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## THE INDEBTEDNESS OF MODERN JURISPRUDENCE TO MEDIEVAL ITALIAN LAW.

How much the world owes to Italian genius and labours! For Italy is "the mother of us all." The lamp of civilization has been handed on from Rome to modern nations by Italian runners. By Italy learning was re-established and the fine arts revived; Italy is truly called "the mother of universities and the saviour of learning." European commerce was originally revived by Italy, after the flood of barbarian invasions of Europe had spent itself. By Italians Roman law was recovered from antiquity, adapted for use in later times, and forever implanted as a living force in our modern civilization.

These grand achievements were accomplished by a people labouring under perhaps the worst political handicap known to history. For over thirteen centuries prior to 1871 Italy never enjoyed any of the blessings of a political union, and was either a prey to foreign invaders or torn asunder by fratricidal wars. During these many centuries Italy was but "a geographical expression"—to use Metternich's illuminating description. Modern united Italy is very youthful: Italy is not yet fifty years old.<sup>1</sup> The exuberance of Italian patriotism in the recent war with Turkey bears witness to this youthfulness of modern Italy, which so ardently rejoiced in its opportunity to display national power.

The beginnings of Italian law—using the term "Italian" in its modern sense—start with the emergence of Italy as a separate country out of the fifth century ruins of the Roman Empire of the West, finally extinguished in 476. About a century later the Ostrogothic kingdom of Italy was destroyed by the splendid military exploits of Belisarius and Narses, generals of Justinian. Once more Italy and Rome, the ancient imperial capital, were united to the Empire.

<sup>1</sup> She celebrated her 40th birthday in 1911.

To the restored province of Italy, Justinian extended in 529 his code of laws<sup>2</sup>—the *Corpus Juris*, as this monumental sixth century codification of Roman law was later termed. Justinian himself re-established and reformed the law school at Rome<sup>3</sup> in imitation of those at Constantinople and Beirut. For the next 500 years Roman law in its original form retained its hold in Italy.<sup>4</sup> And there is one part of the Italian peninsula where this length of time should be increased to over 1,300 years: the twentieth century law of the tiny Appenine republic of San Marino<sup>5</sup> is Roman law purely and simply.

Although three years after Justinian's death, the revived Roman imperial authority in Italy received a very serious blow in the coming of the Lombards<sup>6</sup>—the fiercest and rudest of all the Teutonic invaders — who settled in Northern Italy and gradually acquired the middle and southern portions of the peninsula, yet the dominion in Italy of the Roman Empire of the East did not entirely cease until nearly the twelfth century.<sup>7</sup>

When Rome fell back under the sway of the Teutonic invaders, the law school at Rome removed to Ravenna, the capital for nearly two centuries of the Eastern imperial exarchy of Ravenna; and it was thereafter known as the law school of Ravenna.<sup>8</sup> This law school of the Eastern Roman Empire kept alive in Italy into the eleventh century the knowledge of

<sup>2</sup> See Savigny, *Geschichte d. rom. Rechts, etc.*, vol. 2, §64, note (b); Ortolan, *Hist. de lég. rom.* The ante-Justinian Roman law had survived under the Ostrogothic monarchy in the Edict of Theodoric (511-515),—Sohm, *Rom. law*, §22; Ortolan, *Hist.*, §§529, 531; Amos, *Civil law*, p. 416-417.

<sup>3</sup> The ancient imperial university of Rome had survived the Ostrogothic occupation of Italy. For the teaching of the older ante-Justinian law was substituted instruction in the Justinianean law books.—See Amos, *Civil law*, p. 102-103; Ortolan, *Hist. de la légis. rom.*, §574; Savigny, *Geschichte d. rom. Rechts*, vol. 1, §134.

<sup>4</sup> See Savigny, *Geschichte*, ch. 12; Ortolan, *Hist.*, §§597-603, 612; Amos, *Civil law*, p. 419.

<sup>5</sup> Not only does it preserve Roman law, but it also preserves Roman time: no clock ever strikes more than six—the day is divided into four quarters of six hours each.

<sup>6</sup> In 568 A. D.

<sup>7</sup> Although Rome was lost forever to Byzantine rule in 726 and the ex-archy of Ravenna in 752, the south coast Italian cities remained under the Eastern Roman Empire until the middle of the eleventh century. Certainly Venice nominally belonged to the Eastern Empire as late as 1081. See Foord, *Byzantine Empire*, pp. 291, 289, 332, 333, 309.

<sup>8</sup> The thirteenth century Italian jurist Odofredus speaks of this law-school of Ravenna as identical with that re-established at Rome by Justinian-Savigny, *Geschichte d. rom. Rechts*, vol. 1 §138; Ortolan, *Hist. de légis rom.*, §509.

Justinian's legal system,<sup>9</sup> so much so that the law books of Justinian survived the power that introduced them and obtained a firm hold on Italian Courts and practitioners.<sup>10</sup>

In the very first year of the ninth century occurred an event of greatest importance increasingly fraught with stupendous influence upon later medieval times throughout Europe as well as Italy. On Christmas Day 800, Charlemagne was crowned Roman Emperor at Rome, and the Empire of the West was restored. Western Europe regarded Charlemagne as the lawful successor of Augustus and Constantine. Notwithstanding the adverse conditions of medieval times the restored Western Roman Empire shewed an astonishing vitality; it lasted for over 1,000 years, until 1806, when Napoleon put an end to it. The restoration of the Western Roman Empire had one very marked consequence: it brought Roman law into still further prominence in Italy and elsewhere. The Germanic Roman Emperors adopted for their new empire Roman imperial methods, and called into requisition Justinian's *Corpus Juris* as the actual law of their dominions. The Florentine manuscript of the Digest—the oldest manuscript of Justinian's Digest, written either in the lifetime of that emperor or certainly in the following century—came from southern Italy,<sup>11</sup> and is proof positive that the Justinian law books were not unknown in Italy from the sixth to the twelfth century.

1. The first phase in the evolution of an Italian jurisprudence appeared in the latter half of the eleventh century when a revival of interest in Roman law began. A new force arose which freed Roman law from the study of it in the Byzantine manner prevalent at Ravenna. Curiously enough it was supplied by a Germanic people in Italy—the Lombards, in whom the legal instinct was highly developed. At the outset the Lombards had the best statute law in all Italy: this they began to study at the royal Court at Pavia in the new manner—by means of explanatory notes (*glossæ*). The new method succeeded well. Later it was applied by the Glossators of Bologna to the study of the texts of Roman law, being developed with

<sup>9</sup> St Damian (988-1072) reports a discussion as to the degrees of relationship which occurred in his time at Ravenna, his native country, which was settled by referring to the Institutes of Justinian.—Ortolan. *Hist. de la légis. rom.*, §612.

<sup>10</sup> It should also not be overlooked that the maritime cities of Italy always maintained commercial relations with Constantinople from the Justinianean reconquest of Italy down to the fall of the Eastern Empire in 1453.

<sup>11</sup> Possibly from Amalfi, near Naples.

great skill, and it contributed during the next 200 years most abundantly to a thorough understanding of the *Corpus Juris*.<sup>12</sup>

Not only did the Glossators elucidate the letter of the law: they also reconciled contradictions and connected mutually related parts; all of which was done by searching for "parallel passages"—passages connected with the text under discussion. The results of this labour were collected and summarized in what was called "summaries" (*summæ*), also in imitation of the Lombard jurists. The provisions of pure Roman law of the Justinian period were re-discovered and brought home to the minds of men.

The consequence of the labours of the Glossators was a revival of Roman law study beginning in the middle of the twelfth century and reaching high tide in the thirteenth century—sometimes called from the place of its origin, the Bologna revival, the influence of which was not confined to Italy, but ultimately spread over all of Western Europe and moulded the jurisprudence of the rising European nations.

The Glossators aimed to re-establish the authority of Roman law as a living law. The first step was taken by inserting in the Code of Justinian excerpts from the laws of the mediæval or Germanic Roman Emperors of the West. But here was the practical difficulty—the law as applied in Italy was not altogether the pure ancient Roman law; the problem was how to adapt Roman law to the altered conditions of mediæval life so as to have it recognized in the law Courts. The solution of this problem was slowly worked out by the successors of the Glossators: the Commentators finally accomplished a permanent amalgamation of Roman law and the law of the Teutonic invaders into an Italian law.

One of the most important results of the Bologna revival of Roman law was the founding of universities throughout Italy.<sup>13</sup> "The university, as organized by these wise generations of the thirteenth century, has come down unchanged to us in the modern time,"<sup>14</sup> The oldest Italian university is Bologna, the mother of all modern universities.<sup>15</sup> At the start Bologna had but one faculty—that of law.<sup>16</sup> Considerably

<sup>12</sup> On the work of the Glossators, see Sohm, *Roman law*, §§24-26; Ortolan, *Hist. de la légis. rom.*, §§613-617, 618; Savigny, *Geschichte d. rom. Rechts*, vol. 3, ch. 22-25, vol. 4, ch. 41.

<sup>13</sup> See Savigny, *Geschichte d. rom. Rechts*, vol. 3, ch. 21.

<sup>14</sup> Walsh, *The Thirteenth—Greatest of centuries*, p. 7 and note 1.

<sup>15</sup> It received a charter from the Emperor Frederick Barbarossa in 1158. There is an ancient tradition that it had a fifth charter granted in 433 by the Roman Emperor Theodosius II.

<sup>16</sup> Colquhoun, *Roman Law*, §136 describes in detail the Bologna law school's organization,—terms, examinations, methods of instruction, etc.

later, however, other faculties—medicine, the liberal arts, and theology—were added.<sup>17</sup>

The faculty of law for the training of lawyers never lost its original importance: one of the principal features of every Italian university was a faculty of law. Many of these law schools became known beyond the borders of Italy, and attracted students from all over the medieval world. Furthermore, the development of institutions of learning of which the faculty of law formed a necessary part, was not limited to Italy: this beneficent movement early in its history passed across the Alps and the Mediterranean to bless other countries of Europe.

The founder of the Bologna school of the medieval Roman glossators was the twelfth century Irnerius. Other renowned glossators were Vacarius, Placentinus, Azo, and Accursius. Irnerius and his disciples renewed completely the study of Roman law, and by them it reigned a second time over the whole world.

Through the labours of the Lombard Vacarius,<sup>18</sup> began the medieval reception of Roman law in England. Coming to England to act as counsel<sup>19</sup> for Theobald, Archbishop of Canterbury, Vacarius brought with him his manuscript of the texts of Justinian, and founded,<sup>20</sup> about 1149, the first English school of law at Oxford with a system of instruction modeled on that of Bologna.<sup>21</sup>

To the Italian Placentinus<sup>22</sup> is due the founding of the first French law school at Montpellier, in southern France. Thus was introduced into France the study of law and the system of the Glossators.

Perhaps the most distinguished of all the law professors of Bologna was Azo<sup>23</sup>. The thirteenth century English Chief Justiciar of Henry III., Bracton—the father of the English common law—in his own immortal treatise<sup>24</sup> used freely, and often copied word for word, Azo's *summa*.<sup>25</sup> Once more was English law indebted to Roman jurisprudence.

<sup>17</sup> Savigny records how the schools of medicine and arts were still under the control of the rector of the law school as late as 1295. The theological school was established by Pope Innocent IV. in the second half of the fourteenth century.—*Geschichte d. rom. Rechts*, vol. 3, §67.

<sup>18</sup> 1120-1200?

<sup>19</sup> "Causidius."

<sup>20</sup> Bryce, *Studies*, p. 861.

<sup>21</sup> Ortolan, *Hist. de la legis. rom.* §615.

<sup>22</sup> 1120-1192.

<sup>23</sup> 1150-1230.

<sup>24</sup> *De legibus et consuetudinibus Anglie*, published about 1256.—Güterbock, *Bracton*, etc. p. 27-28.

<sup>25</sup> Amos, *Civil law*, p. 446; Güterbock, *Bracton*, p. 51-54.

Among Azo's pupils was Accursius,<sup>26</sup> later his colleague at Bologna. Accursius' gloss—usually called the "Great Gloss"—marks the summit of the labours of the Glossators. The fact that his eldest son<sup>27</sup> gave lectures on law at Oxford University in 1275-1276, during the reign of Edward I., sheds an interesting sidelight on the continuing influence of the medieval reception of Roman law in England.

Roman law was also revived in the medieval commercial compilations of maritime law which originated in Italy. Three celebrated codes of commercial law were formulated in Europe between the latter half of the eleventh and fourteenth centuries: the *Consolato del Mare*, the *Laws of Oleron* and the *Laws of Wisby*. The oldest of these three—the *Consolato del Mare*—is a regulation of the sea confessedly based on Roman civil law. The eleventh century *Consolato del Mare* was subsequently adopted by many cities on the Mediterranean littoral, and from the fourteenth century exercised enormous influence over all southern Europe. It became the law of Venice and Genoa, the rival maritime powers of medieval Italy. The rules of the *Consolato del Mare* on maritime subjects are very liberal and equitable. These are concerned with the ownership of vessels, the rights and duties of masters and captains, of seamen and freight, salvage, general average and contribution, the rights of neutrals in time of war—in short, with all admiralty matters. Its principles have been universally adopted by nations. It is one of the earliest sources of modern international law as to international trade relations.<sup>28</sup>

The Church also attempted to harmonize Roman law with the requirements of the age through its Canon law. From the twelfth century onward the Roman Church had become almost the supreme mistress of the western world. Originally confined to ecclesiastical matters, the Canon law sought to reform the secular law as a whole—private, criminal, adjudicative—on lines approved by the Church. The jurisprudence of this papal law was substantially Roman law, modified, however, in accordance with medieval ideas. But here was the limitation of the Canon law: it was not recognized in secular Courts—its recognition being confined solely to ecclesiastical tribu-

<sup>26</sup> Francisco Accorso, 1182-1260.

<sup>27</sup> Also named Francisco Accorso (1225-1293). See Colquhoun, *Roman law*, §150; Savigny, *Geschichte d. rom. Rechts*, vol. 4, ch. 42: 1 *Encycl. Brittan.*, 11th ed., p. 134.

<sup>28</sup> The text of the *Consolato del Mare* is given by Pardessus in his *Lois Maritimes*, vol. 2, p. 1-360.

nals. The Church was not finally strong enough to effect full recognition of its law in secular Courts.

II: The second phase in the evolution of Italian jurisprudence began in the middle of the thirteenth century when the school of the Glossators was succeeded by the school of the Commentators, which endured for the next two hundred years. These are often called the "Post-Glossators," or "Bartolists."<sup>29</sup>

The Commentators derived their name from their method of writing lengthy commentaries replete with scholastic distinctions. The method of the Commentators was different from that of the Glossators. The Glossators had written short explanatory notes on the text of the *Corpus Juris*; the Commentators wrote exhaustive discussions of legal doctrines not having much inner connection with the passage of the *Corpus Juris* to which they are connected. The Commentators worked differently because their task was unlike that of their predecessors. The Commentators did not address themselves to explaining the *Corpus Juris*—that task seemed finished to them; but they began the new task of trying to construct a Roman law to fit the actual life of their age.

In the fourteenth century the time had come for amalgamating the Lombardic and Roman population into an Italian people. While Dante, Petrarch, and Boccaccio created a national literature, Cino, Bartolus, and Baldus created a national law out of Roman law and Lombardic customs. The law of practical life had consisted of three parts—Roman law, statute law of Italian cities, and Canon law. Roman law, theoretically of universal authority, was combined with the German law actually in force, and with the ecclesiastical law of the Church: the result was that the Commentators Italianized Roman law, making it in its combined and composite shape a living common law of Italy. By their development of a scientific system of law applicable in actual life the Commentators first shewed the late medieval and the rising modern world *how to make a national jurisprudence out of Roman law and existing Teutonic customary law by fusing the two*—the Roman law becoming the predominant element.

This new "Common law," as events proved, was not to be confined to Italy, but was strong enough to exercise a dominant impulse throughout the western world. So successful were the labours of the Commentators that their new amalgamated

<sup>29</sup> See Girard, *Manuel de droit romain*, 5th ed., p. 85.

juridical produce was borrowed all over Europe. Posterity owes an incalculable debt of gratitude to the Italian Commentators for their wonderful success in accomplishing the task to which they addressed themselves.

The development of a *national jurisprudence* was brought about by the Commentators in this way: they introduced scholastic tenets into legal science. Scholasticism consisted in the predominance of abstract conceptions—its essence lay in the predominance of the deductive method. The scholastic position is that science is nothing but what can be deduced from most general conceptions. It is the method of Aristotle applied to law. The Commentators endeavoured by analysis of each rule to trace back the rules of law to general conceptions. Now the Roman jurists never did this: they dealt with definite legal conceptions. But *the principal concern of the mediæval Commentators was with the making of definitions and distinctions*. Not yet has the influence of scholastic methods entirely passed away: it is still to be seen in modern jurisprudence.

The Commentators, in transforming Roman law into mediæval law, made a sort of philosophical jurisprudence out of law. Reviving the spirit of antiquity, they revived and preached the Greek and Roman doctrine of the *Law of Nature* as permeating all law whatsoever. The Law of Nature was that there is an eternal immutable Natural Law, valid at all times and at all places, which can be deduced by a purely intellectual process from the very nature of things. It took the mediæval world by storm, and has continued down into modern times, surviving the advent of the nineteenth century historical school of Savigny. Where scholasticism erred was to suppose that logical inferences can take the place of observations.

The most famous of many renowned Commentators were Cino, Bartolus and Baldus, all of whom lived in the fourteenth century. Cino<sup>30</sup> was an eminent jurist and law professor. He was associated with the greatest men of his century: Dante was his friend,<sup>31</sup> and Petrarch<sup>32</sup> and Boccaccio are said to have been his pupils. To another pupil, Bartolus, Cino gave the impulse for his wonderful labours in the field of law.

Bartolus<sup>33</sup> is the greatest of the Commentators. His creative legal genius was of a very high order. Here are two in-

<sup>30</sup> Cino da Pistoia (1270-1336).

<sup>31</sup> See Colquhoun, *Roman law*, §168.

<sup>32</sup> Id. Petrarch wrote a famous sonnet on Cino's death.

<sup>33</sup> 1314-1357.



stances: (1) Bartolus discussed the subject of the conflict of laws, and "was the first to point out" that, in determining how far a state should enforce a foreign law, regard must be particularly paid to the question whether the rule of law is real (*circa rem*), personal (*circa personam*), or mixed (*sallemnilis actus*). This distinction of Bartolus is retained to-day in modern private international law. (2) Bartolus discussed the power of a corporation to make binding rules, and "was the first to point out" that there is a distinction between a rule to regulate a political community and a rule to internally regulate a corporation; that while a corporation can make rules of the latter sort, rules of the former sort can be made only by somebody having political authority. Thus Bartolus expressed for the first time the distinctive character of the State's political authority.<sup>34</sup> The great reputation of Bartolus rests on his revival of the exegetical system of teaching law. His best work is his "Commentaries"<sup>35</sup> on Roman law, which became renowned for their excellence all over Europe.<sup>36</sup> These actually received at one time statutory authority in Spain and Portugal.<sup>37</sup> In France the opinions of Bartolus were so influential in Courts of justice that their weight gave rise to the proverbial expressions, "*plus résolu que Bartole*" and "*résolu comme un Bartole*." The influence of Bartolus was international. He was the central figure of the Middle Ages in legal history. Not only did he create a common law for Italy, but he is to be regarded as "the creator of the common law of Germany which sprang from the reception" of Roman law into the German states.<sup>38</sup>

Next in rank to Bartolus is his pupil Baldus.<sup>39</sup> The reputation of Baldus was great in Italy, but he was not so distinguished internationally as Bartolus. When Roman law as embodied in the commentaries of Bartolus was received into Germany, those of Baldus were also received in a secondary degree.<sup>40</sup>

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<sup>34</sup> See Sohm, *Roman Law*, §27.

<sup>35</sup> For their description, see Colquhoun, *Roman law*, §155; Ortolan, *Hist. de lég. rom.*, §629.

<sup>36</sup> Other valuable works were his treatises *On Procedure* and *On Evidence*.

<sup>37</sup> Sohm, *Roman law*, §28.

<sup>38</sup> Sohm, *Roman law*, §28.

<sup>39</sup> Baldeschi (1327-1406).

<sup>40</sup> See Sohm, *Roman law*, §28.