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Early modern European legal history

A TEXTBOOK

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INTRODUCTION

Contemporary European legal cultures trace their roots back to shared traditions, and as such it is possible to sketch out a "European" legal history. This moreover does not disregard local specificities, but rather in fact enhances them.

Along a path of continuity with the medieval period, legal traditions in the early modern age, both in continental Europe and on the common law islands, were characterised by certain fundamental features. Although the passage of time has blurred the details of developments that took place over several centuries, some common aspects are apparent from the sources. These include multilingualism, a plurality of sources of law, the way in which judicial authority was exercised and judicial protection for rights.

Over the course of three centuries, from the late 15th century until the end of the 18th century, linguistic and legal aspects intersected with one another within the patchwork of applicable laws, moulding the legal cultures of early modern Europe. Considered from a long-term perspective, the technical lexicon and language, the powers of the sovereign, the voices of subjects and justice appear as the founding moments of a civilisation, above all if considered in relation to 18th century reforms and their outcomes.

The horizon of legal modernity embraces the pragmatic interests of consulting lawyers, as well as the calls made by philological and literary humanists. Princes and sovereigns administered justice within the courts of the Renaissance and Baroque eras.

After the Reformation had sundered a previously unified western European Christendom, reciprocal relations between temporal and religious powers changed, whilst a secular conception of society started to emerge. Horizons expanded with the geographical discoveries and engagement with non-European cultures and traditions. Doctrines of natural law were asserted, following secular and rational theories, as precursors for the 18th century Enlightenment.

The 18th century was a century of transition: the family order, the right to punish, judicial procedures and trials were harshly criticised, and ultimately the long-standing bases for relations of force between the government and the governed were overturned in the name of a new approach to the major questions of civil cohabitation and peace, and protection for the fundamental rights of citizens.

As far as the law was concerned, the transition from the early modern age to the contemporary era passed through the English, American and French Revolutions, as well as the promulgation of constitutions and declarations of the rights of man and the citizen. At the start of the 19th century, the advent of legal codification on the continent gave rise to a legal order that was different from the past, grounded on the principles of freedom and equality, albeit not without its own compromises and unresolved inconsistencies.

The following pages aim to offer some outline information and a basis for reflection on Europe's legal systems during the early modern age as well as their shared characteristics. The discussion will focus in particular on the role of the languages of law, the ways of doing justice (especially criminal justice) and the Copernican shift brought about by the proponents of legal Enlightenment. The general issues are contextualised within a specific reference framework, the Duchy of Milan in the 16th and 17th centuries.

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Part I

LANGUAGES OF THE LAW IN EUROPE

Chapter 1
LAW AND MULTILINGUALISM

SUMMARY: 1. Introduction. – 2. Medieval Latin and vulgar languages. – 3. Between orality and writing: Germanic legislation. – 4. The Lombard legal language. – 5. Notaries and translations. – 6. The language of proceedings.

1. Introduction

The respective histories of Europe's legal systems share common roots and broadly similar horizons, as well as strong elements of continuity among the various legal traditions. However, each system naturally has its own specific characteristics. This has also been reflected down through the centuries within legal language.

One major distinguishing feature of European history has been multilingualism. During both the medieval period and the early modern age, legal language has been closely linked to the development of the law and its sources within the continent's various legal systems.

In particular, early modern multilingualism is a relic of a past that, over many centuries, saw the progressive emergence of national languages as legal languages, against the backdrop of the language that was regarded – and widely used – in many systems as the language of law *par excellence*, i.e. Latin.

However, the Latin language, which established a dominant position throughout the law during the medieval period, was faced soon and practically everywhere with a competitor: vulgar language (vernacular). Nonetheless, although vulgar language (the first documented appearance of which within legal language dates back to the 9th-10th centuries) was in fact used during the medieval period, Latin always remained dominant, above all in doctrinal writings and documents issued by the authorities charged with the administration of justice.

Subsequently, throughout the 16th century, with the dawn of the new Renaissance era, some European sovereigns and princes chose vulgar language as the official language for their laws. As such, vulgar languages started to establish themselves as a valid (and often mandatory) alternative, albeit at widely differing rates in the various legal systems, depending upon geographic and political circumstances, and also as a direct result of governments' specific needs.

This means first and foremost that both Latin and the vulgar language cohabited within individual legal systems (although not necessarily with

equal prestige). In some systems, above all in Italy, this type of legal multilingualism (or bilingualism) within each state continued until into the 18th century.

An initial glance at the overall framework of languages of law during first the medieval and later the early modern period thus establishes from the outset its complex nature, in addition to the wide variety of sources for the law itself.

The vulgar languages of the various European legal traditions (which later gave rise to the early modern national languages), made initially faltering but later ever more decisive steps into the legal domain. At the same time, medieval Latin was an important and ongoing presence in all legal systems as a learned language.

The story is a complex one, involving the intersection of legal, linguistic, institutional and socio-economic history, as well as cultural and intellectual history and even the history of literature. Valuable guidance is offered by the broad-sweeping and nuanced studies on the history of the relationship between language and the law; from the writings of German jurist Friedrich Carl von Savigny (1779-1861) through to more recent studies published by philosophers, linguists, jurists, legal historians, reflections on this issue are still highly relevant to the present day.

2. Medieval Latin and vulgar languages

In its 'medieval' manifestation, Latin was for centuries the *lingua franca* of Europe: a language of culture that was both a written and a spoken language. It was not learned at home from the family, but rather at schools from teachers.

Medieval Latin had a long history, and could claim continuity with classical Latin: under the influence of late Latin authors, it had also been decisively influenced by ecclesiastical Latin, as well also as vulgar Latin.

Medieval Latin itself still had a long and geographically broad development ahead of it, not least in the field of the law.

Medieval Latin was a living language incorporating ancient words (which in some cases had taken on new meanings) whilst at the same time enriching itself with new expressions and vocabulary along the way.

Moreover, the scholastic character of medieval Latin facilitated the development of a rare penchant for formal perfection and technical precision as a virtue.

Latin had been the language of Rome and its civilisation. In particular, in the Roman world Latin had been the language of the law. Even during

the dying days of the Roman Empire, the Latin language had remained substantially homogeneous within the Empire's vast borders, in spite of the differences between the official literary language and the spoken language (vulgar Latin or *sermo vulgaris*).

Linguists in fact draw a distinction between literary Latin and vulgar Latin during the Late Antiquity in the Roman Empire (4th-6th centuries), i.e. on the one hand the learned language and on the other hand the spoken language.

Vulgar Latin (*sermo vulgaris*) may be regarded as the spoken language of Rome, which was later carried throughout Europe by tenant farmers and legionaries. The form of Latin that lived on within the vulgar languages was specifically this vulgar Latin, which differed the literary language, and especially from classical Latin.

Subsequently, with the shift in the west from the post-classical to the high medieval period during the 5th and 6th centuries, with the barbarian invasions and the fall of the Roman Empire, official Latin started to lose its formal elegance as well as its grammatical and syntactical rigour. As a result, no written documents from that period are at all comparable with those from the imperial period, which had only recently ended.

On the other hand, the territorial fragmentation underway in the former territories of the Western Roman Empire proceeded in parallel with linguistic fragmentation in terms of the respective spoken languages.

The vulgar language started to develop along new lines, starting from the various areas of everyday life where new words were adopted, in particular in the field of agriculture and especially in relation to cereals and consumer goods, such as bread and meat.

More in general, the history of the spoken vulgar Latin can also be viewed as a history first of unification, coinciding first with Romanisation and later with breakdown, with the decline of the Western Roman Empire and its linguistic fragmentation.

A leading role was played within the history of medieval Latin (learned language) and the vernacular languages (which replaced Latin as a spoken language) by the sovereigns from the Carolingian dynasty, whose significance within European history is beyond doubt.

In fact, during the 8th century, Pepin the Short and his son Charlemagne promoted a return to the purity of the official Latin language, drawing on the writings of English (Alcuin of York, died 804) and Italian (Paul the Deacon, died 799) scholars.

The first official documents not written in Latin, but rather in the only languages that were now spoken and understood by common people, i.e. the early Romance and Germanic languages, started to appear at approxi-

mately the same time as the Carolingian reforms, with Latin now having become confined to the Church and the learned.

Accordingly, the Synod of Tours of 813 referred to the *rustica romana lingua* (vulgar Roman language) into which French bishops were to translate their sermons to make them understandable for the people: as such, the Church itself acknowledged the fact that the spoken language differed from the written and liturgical Latin language. Scholars of linguistics specifically identify the emergence of the Romance languages during this period.

Another very famous example of early usage of vernacular within public documents is provided by the Oaths of Strasbourg (*Serment de Strasbourg*) from 842. The oaths sworn by the respective armies – by Louis the German and Charles the Bald, sons of Louis the Pious and grandsons of Charlemagne – featured both Romance and Germanic aspects.

As such, from the 8th and 9th centuries onwards the vulgar language started to be used, albeit hesitantly, also within public documents; at the same time however, a form of Latin referred to by linguists as "medieval Latin" definitively established itself as the learned official language, against a backdrop of an extremely lively and vibrant Latin literary and rhetorical tradition.

In the end, it was the scholastic medieval Latin that brought Latin (and Christian) culture and civilisation to the confines of Europe and beyond, becoming the language of law for lawyers right through to the early modern age.

It was an educated, technical Latin, which was capable of expressing abstract ideas and complicated concepts. However, it did not take on the same form everywhere, and as it continued to be used, the sources show divergences in the ways in which particular words were understood. In addition, there was also very frequent contamination by the legal vulgar language, as well as reciprocal influence between the two.

The histories of Latin and the vulgar language as alternative or competing legal languages were not always linear. Over the centuries they at times departed from each other, developing specific differences, whilst at other times featured strong continuities.

These developments continued through the medieval period, the Renaissance and into the early modern era until the 18th century, carrying forward their inherited complexity right until the eve of the 19th century codifications across the continent.

From the legal history viewpoint, some aspects of the relationship between language and the law within the centuries of linguistic and legal development in Europe deserve particular attention.

3. Between orality and writing: Germanic legislation

From the end of the 4th century onwards, peoples originating from the east overran the borders of the Roman Empire and spread throughout Europe. Germanic populations also reached as far as southern England (Angles, Saxons and Jutes). These peoples established kingdoms in the conquered territories (5th and 6th centuries).

As their culture shifted from an oral one to a written one, rulers in continental Europe immediately chose Latin as a language for written laws, whereas in England they chose to use the Germanic language (see below).

The written laws of the so-called "barbarian" peoples played a decisive role in the birth of a new law after the year 1000. Legal language played a highly singular role within this process, which involved vast areas of Europe.

The law of the Germanic peoples was based on oral custom handed down from generation to generation from one family group (clan) to another. Barbarians identified with their laws, which were originally personal in scope and followed them wherever they went: in fact, the laws of the Germanic peoples applied to people as members of a specific population, and not as inhabitants of a particular territory. Anyone who was not a member of the tribe could not use that particular law.

The first to commit their laws to writing, as early as the 5th century, were the Visigoths who had settled in southern France (Kingdom of Toulouse, 5th-6th centuries) and subsequently moved to Spain (Kingdom of Toledo, 6th-7th centuries). As they did not have a written language of their own, they used the language of the Romans when writing their documents. This was the language of the vanquished, the people they had defeated in battle, and yet it was a people that they had admired right since they first settled within Roman territory.

It was a successful choice, which was soon made by other peoples too (Burgundians, Alemanni, Franks, Lombards), who committed their respective customary rules to writing in Latin.

This was a corrupt, early-medieval Latin: linguists have identified lax compliance with the rules of grammar and syntax of official post-classical Latin during this period, as part of a process that started before the Carolingian rebirth, and which ultimately resulted in the emergence of the scholarly medieval Latin.

When committing customary rules to writing, a decisive role was played by notaries and men of the Church (clerics) in assisting kings and tribal alders (the *antiqui homines*), who were experts in the legal traditions of their peoples. It was in fact essentially the Christian Church that passed on the Latin language and culture during these centuries in Europe.

In a nutshell, the original language of the law used by the Germanic peoples was a purely oral language. In the archaic Germanic world, within the confines of collective memory and the sacred dimension, it was the ability to master the spoken word that counted. Oral recitation was an instrument for conveying knowledge, within both legal disputes and political assemblies. It was after they had settled in Romanised areas that these peoples started to write down the law and to use written Latin.

During this distant early medieval period, the choices made by barbarian lawmakers were still conditioned by the allure of Roman culture: when confronted with the pragmatic and tangible need to identify an appropriate written language for the law, they chose Latin with its technical and terminological baggage and its way of formulating concepts. As an instrument it was suited to any manifestation of the law and political life in those lands throughout which Latin had spread in previous centuries.

4. The Lombard legal language

Latin was often used by barbarian rulers in order to write down laws different from Roman law. It was in fact used to document barbarian law which, albeit within Latin translation, nonetheless maintained its specific substantive identity. Moreover, a number of peculiar expressions have been conserved, also within legal language, in the latinised version of the barbarian peoples' legislation.

The Lombards, who arrived in Italy in the year 568, are emblematic of this tendency. Although the Edict of Rothari of 643 is certainly not one of the oldest written collection of barbarian laws, it was the first to gather together the old and solemn rules governing the lives of the *gens Langobardorum* in order to assert the people's identity and to conserve its customs after setting vast areas of the Italian peninsula.

For the Lombards too, the choice to use Latin in order to document the laws of their unwritten society (as the pre-Italian Lombard society has been defined) entailed a series of not insignificant corollaries.

First of all, thanks to the use of Latin, Lombard laws became accessible also to those from outside the tribe's limited circle of legal experts, and could circulate more broadly, thus opening itself up to external influence.

Moreover, one consequence of the decision to write in Latin gave what we could refer to as a certain "form" to the law. For example, the original prologue to the Edict of Rothari is reminiscent of a typical proem to a Roman edict: the framers had modelled the text precisely on the imperial general laws (Justinian's "Novels", *Novellae*).

By contrast, the contents of the individual chapters are largely drawn

from Lombard traditions and customs, the *cawarfidae* (one of the many latinised Lombard words), which were translated – not without difficulty – into the only language of the law conceivable at that time, and hence committed to writing so as not to be lost. We can only imagine how difficult it was for King Rothari's scribes to draft, and also translate, this material.

At the time Edict was drawn up, laws were conceived of in the Lombard language, using the poetic, alliterative language typical of oral transmission. Rules were subsequently transmitted into Latin by Romans (scribes, clerics and notaries), who sought to use the formulations and locutions that they found in Roman legal texts or that they had accumulated into their cultural patrimony. However, they often did so inappropriately.

In some cases, untranslatable terms are simply left in the Lombard language, albeit alongside an explanation in Latin, either illustrating the concept or case expressed by the original custom within the latinised written version, or at least identifying some kind of equivalent.

Some examples from this 7th century Lombard Edict are provided below. One particularly important concept is that of the vendetta, a custom followed by barbarian peoples in order to avenge – at family level – a wrong, typically an injury suffered by a member of the family (clan).

Rothari sought to eliminate this form of private reprisal against the offender and his family and replace it with a system of pecuniary settlements to provide redress for the harm suffered, according to a precise scale.

The Edict in fact states "*faida, hoc est inimicitia*" (Roth. 45: i.e. vendettas cause enmity). The Latin equivalent chosen to define the old law of retribution – an eye for an eye, a tooth for a tooth – to which the Lombard term '*faida*' refers, is a term that means 'enmity' or 'hostility'.

Later on it states "*de wegworin, id est horbitariam*" (Roth. 26). The Lombard term *wegvorin* is comprised of two elements, *weg* (i.e. 'way') and *worin*, 'blockage, impediment', referring to a blocked path. This consisted specifically in the criminal offence where one person blocked the way for a free woman or harassed her, and as a result was forced to pay a pecuniary settlement.

The Lombard term *wegvorin* is simply transliterated in the Edict and is not translated or supplemented with any Latin equivalent by way of explanation of *horbitariam*. Latinists tell us that the term *horbitariam* referred to a road that could be travelled by cart, and hence is not fully equivalent.

Another of the many terms encountered is the controversial *thinx*, which is translated roughly into Latin as *donatio* (donation) within the Edict of Rothari (Roth. 172, "*De thinx, quod est donatio*"). One of the meanings of *thinx* was that of an 'item' or 'object', as is suggested by the cognate *thing* in English and *Ding* in German.

In the 643 Edict that word referred to a type of free transfer of goods, although not a donation in a Roman law technical sense. In actual fact, the *thinx* (or *gairethinx*/*garethinx*) amounted to a form of voluntary succession *mortis causa*: it was a formal act involving a typical procedure, which was only available if there were no legitimate sons. The fact that it is expressed in Latin must not mislead us: the rule to which the term refers is typical of Lombard law.

On other occasions, when customs were being documented in writing, the framers resolved particularly tricky issues by adding Latin endings to Lombard words. One example of this is the term *mundius*, which was declined in the same manner as any Latin noun (the *mundius* was the power of the father or husband over his daughter or wife, which was an important institute of Lombard law).

The Kingdom of the Lombards was conquered by Charlemagne in the 8th century. However, its laws, including many other edicts adopted after the Edict of Rothari, remained applicable until the dawn of the early modern era (in central and southern Italy – in the Dutchies of Spoleto and Benevento – as well as in Bergamo).

Moreover, there are still clear traces of the Lombard language (which was not used in order to write down the law) within place names throughout Italy: consider for example the terms *fara* (family group including all persons descended from a common ancestor, or the land allocated to a *fara*, and hence also any settlement established on that land) and *sala* (building with one single large room, or manor house).

5. Notaries and translations

Throughout the medieval period, Latin was the language of culture and also the language of the law. The notaries were figures of primary importance, as officials vested with public powers and the guardians of technical and legal knowledge, with the know-how required to write since the times of the Germanic kings.

It was the notaries who, along with churchmen (clerics and monks) had maintained a certain familiarity with the language of the law throughout the medieval dark ages, and Latin had always been their written language.

Significant traces remain of the specific ability of notaries and their practical legal culture during the Lombard and Frankish eras (7th-9th centuries) in Italy and France not only from surviving notarial documents but also from the formularies used by notaries as templates for documents.

Early medieval documents are characterised by closely intertwined con-

tinuity and innovation in the sense that, when using schemata and formularies derived from the late imperial Roman period, notaries incorporated various practices and principles into their documents, thereby handing down both Roman and Germanic legal models to later generations. Moreover, the language typically used by notaries is immediately apparent within the formularies, which are written in Latin.

Following the rediscovery of Justinian's legal texts in Bologna during the 11th and 12th centuries (which would mark a fundamental turning point in the legal history of continental Europe), the formularies drew on the new legal science resulting from the study of the *Corpus iuris*, including its substantive content (and hence also terminology).

From that moment onwards, the formularies thus reflected a revived knowledge of substantive law, including in particular of Roman texts, amongst the notaries.

Again in Bologna, an important notarial school was established in the 13th century, resulting in the production of numerous works, both theoretical and practical.

One very famous book is the *Summa artis notariae* written by *magister* Rolandino de' Passeggeri, known as the *Rolandina*. This work provided a model, which was widely used over the following centuries. Later, following the introduction of printing, around thirty editions of it were published until the 17th century.

Moreover, once again the notaries played a leading role in the practical dissemination of Roman law, which was received throughout Europe according to the academic interpretation adopted in the universities by medieval Italian jurists, from the Iberian Peninsula to Scandinavia, passing through France, Flanders and the German area.

As Piero Fiorelli has written, turns of phrase are extremely important within legal language, which is not limited solely to special terminology (as is the case for other technical languages), although its special terminology is its most apparent aspect. As such, even the phraseology of notarial clauses (such as those used in court chanceries or in business practice) can be a key feature in studying the historical development of the law within individual systems.

From a linguistic point of view, during the medieval period notaries had to be bilingual: their clients spoke in vulgar language, whilst it fell to them to document the desires and consent of the parties in writing – in Latin – in an appropriate manner using well-formed language.

Conversely, he had to switch from Latin back to vulgar language in order to clarify and explain the contents of the notarial documents, which had been drawn up in accordance with standard accepted canons.

Notaries were thus continuously translating between one language and the other. They also developed some rules of thumb amongst themselves to be followed during these everyday practices in order to avoid difficulties and misunderstandings with clients, who were often illiterate, or *rustici* as they were called at that time.

On some occasions in fact, a normal literal translation (form the Latin of the formularies into the spoken vulgar language) could give rise to misinterpretations. As such, terms from the vulgar language had to be chosen with care, paying attention above all to verb tenses.

Wherever Latin used the perfect tense (e.g. *dedit et vendidit*), were the notary to translate literally (i.e. gave and sold), the illiterate client would object, and might even feel cheated, as the contract of sale had not yet been concluded. The *rusticus* did not in fact understand why the past tense was being used, as was standard in the Latin language of notarial documents (*instrumenta*, or instruments).

One of the most authoritative reference texts for notarial activities was the work written by the notary Rolandino, mentioned above. The *Rolandina*, written in Latin in the second half of the 13th century, which includes both formularies and a doctrinal commentary, remained influential also during the early modern era when relations between Latin and vulgar language started to tilt in favour of the latter.

In around 1580, the *Rolandina* was translated into vulgar language in Piedmont after Duke Emanuele Filiberto introduced a requirement in 1561 to use the vulgar language when drawing up notarial and procedural instruments. In actual fact, more than a faithful translation it was rather an adaptation for 16th century Piedmontese lawyers, who regarded the *Summa Rolandina volgare* as a sound source of technical support and a font of indispensable theoretical knowledge.

The vulgar language then continued its legal journey during the 17th and 18th centuries. For example, it achieved some degree of success over Latin both in the Republic of Venice, in particular in the hinterland *Domini di Terraferma*, as well as in the Genoese Republic, within the field of practical and didactic notarial writings, within formularies and also within documentation. In fact, notaries started to abandon Latin when drawing up instruments.

In an entirely similar manner, although at a significantly earlier stage compared to individual legal systems in the Italian peninsula, as early as the 16th century German and French had replaced the traditional Latin used in notarial documents in Germany and France respectively.

In particular, a fundamental development in the Kingdom of France came with the adoption of the *Ordonnance* of Villers-Cotterêt on justice

and policing in 1539, by which Francis I mandated the use of French within all documentation relating to public and private transactions. The *Ordonnance* was particularly important also for the reform of civil and criminal procedure in France. In fact, Francis I ordered that all judicial acts of all types were to be drawn up in French ("en langaige maternel françois et non autrement").

Moreover, again in the Kingdom of France, in the mid-16th century the vast project of writing down customary law (in French) was completed, and it was precisely at this time that the notion of a nationally valid *droit français* (French law) started to emerge, under the impetus of humanist doctrine and the case law above all of the supreme court, the *Parlement* of Paris.

6. The language of proceedings

During the late medieval and early modern period, notaries also performed functions related to the administration of justice. Amongst other things, during trials notaries (who were known as *actuarii*, i.e. actuaries, or notaries *ad acta*) drew up reports and documented witness testimony in writing.

During the medieval period, proceedings were conducted and judgments were issued in Latin. However, witnesses, being common people, spoke in vernacular (both when answering questions and when swearing the oath), thus once again requiring bilingualism within individual judicial proceedings.

Consider for example the formula for swearing an oath in vulgar language contained in one of the parchemin trial records known as the Placiti Cassinesi, the *Carta capuana* of 960 – "Sao ko kelle terre, per kelle fini que ki contene, trenta anni le possette parte Sancti Benedicti" – in which each word has a specific value and is intended to furnish precise information to the judge for the purpose of resolving the dispute.

Within the Germanic procedure followed in the Placiti, in the ruling issued the judge subjected one of the parties to the burden of proving the allegations in dispute through sworn testimony, and then took account of the oath sworn in his judgment. Thus, the wording of the oath contained in the Placiti Cassinesi was relevant for the purpose of decision making, and not only as evidence.

"Sao" thus constitutes certain knowledge – and the witness is swearing that this is the case – that for a particular period of time provided for by law, thirty years, an entity that was a party to the proceedings ("parte Sancti Benedicti", i.e. the Benedictine monastery of Monte Cassino) had exercised a *de facto* power, possession, over specifically identified land, the boundaries of which are indicated by the witness.

The rest of the document is written in Latin: the distinction between vulgar language and Latin is indicative of an intentional choice, and marked the start of a technical usage of vulgar language within legal reasoning, as a language with expressive rigour in the same manner as Latin.

Nevertheless, judges would still be using Latin for many centuries to come, and Latin provided a vehicle for transforming procedures from the oral, accusatorial and Germanic forms of the early medieval Placiti into the written, inquisitorial canons of the Roman-Canonical trial developed by medieval legal science and papal decrees from the 13th century onwards.

Vulgar language only became the language used throughout the entire trial in 1539 in France by the Ordinance of Villers-Cotterêt, mentioned above. Elsewhere on the other hand, Latin remained in use until the 18th century, at least for trials conducted before the highest courts. However, during the early modern era, witness depositions were taken by notaries in vulgar language (*a fortiori*) in those states in which Latin was maintained as the official language for proceedings.

There is a wide variety of case law. For a specific example of the procedural bilingualism that was still typical of Italian systems well into the early modern era, we may consider a famous 1598 criminal trial involving the Cenci family which was held in Rome, the city of popes and of Latin *par excellence*, who were accused of having killed the violent and abusive Count Francesco.

The task of defending his children and widow, who were accused of murder, was taken on by the famous jurist Prospero Farinacci (1544-1618). However, although parading his own eloquence, he certainly did not make much effort to save the accused from execution. These included in particular Beatrice Cenci, who had also turned to Farinacci in desperation, searching for help.

Turning now to the question of language, according to the long-standing custom within legal science, Farinacci used Latin only to present his legal arguments and to plead in favour of the defence, including when referring to the various testimony collected during the course of the proceedings. On some occasions, rather than summarising the content in Latin, he simply transcribed the depositions directly in vulgar language, as they had been recorded in the case file (P. Farinacci, *Responsorum criminalium liber secundus*, Lugduni 1616, consilium CLXXXV).

During the early 19th century, the English poet Percy Bysshe Shelley (1792-1822) and the French writer Marie-Henri Beyle, alias Stendhal (1783-1842), amongst others, recounted the sorry tale of Beatrice and the Cenci trial, elevating the story to the rank of literature: Shelley's tragedy in verse, *The Cenci*, was written in 1819, whilst the *Chroniques italiennes* of Stendhal, including a chapter dedicated to Beatrice, appeared in 1829.

Chapter 2
LAW AND LANGUAGE IN ENGLAND

SUMMARY: 1. Late Anglo-Saxon law. – 2. Norman and Angevin reforms. – 3. Multilingualism of common law. – 4. *Magna Carta*.

1. Late Anglo-Saxon law

In the same way as occurred on the European continent (albeit with some peculiar characteristics), Latin and vulgar language alternated in England, with both contributing to the creation of a legal language, not to speak of the legacy of the old Germanic languages.

In Anglo-Saxon England from the 6th to 9th centuries, collections of customary laws were written in the Germanic language (*Old English*).

A particularly important collection was the text of the laws of King Alfred of Wessex, dating back to the 9th century. King Alfred's law code was known – and cited – as *seo domboc* (*law-book*): it started with biblical passages translated into the vulgar language and brought together rules that had received the sovereign's blessing, which in part also restated and updated those promulgated by his predecessors.

Latin still remained the language of the Church, which had established important links with the ruling classes since the 6th century through its local hierarchies.

In particular, it had been Pope Gregory the Great who had invited Augustine of Canterbury to convert the Anglo-Saxons. Augustine had been granted the right by King Ethelbert of Kent to settle with his followers in Canterbury, where the Pope subsequently appointed him as a bishop. The community established by Augustine gave rise, amongst other things, to the dissemination throughout England of legal knowledge from the Romanist tradition handed down by the Church.

As such, although the laws of the Anglo-Saxon kings were written in vernacular, Latin exercised a lexical influence. It is sufficient to note the term "clerk", which referred to a person who could write, and was derived from the Latin *clericus*.

The term "law", derived from the Norse "*lagu*", also dates back to the era of Anglo-Saxon legislation. The term was used in the laws of King Edgar from the 10th century in relation to the Danelaw.

The term *lagu*/*laga* was subsequently also used in relation to English laws. The Scandinavian peoples hailing from Denmark who invaded Eng-

land in successive waves in the 10th and 11th centuries made their own contribution to the formation of English law, which is apparent specifically within legal terminology.

2. Norman and Angevin reforms

The Battle of Hastings in 1066 and the victory by William the Conqueror paved the way for Norman domination in England. The Normans were also of Norse origin but came from northern France and were related to the descendants of the last Anglo-Saxon and Danish sovereigns.

Due of practical governance reasons, though without disrupting the pre-existing structure of local courts, over the decades following the conquest the Normans launched a process for centralising the administration of justice and established the principle that all of the land in the Kingdom was owned by the King.

In practice, all rights over land or immovable property were considered to have been derived by law from a royal grant according to the rules of feudal law.

It was at the time of the Norman sovereigns, who focused specifically on the administration of justice, that the jurisdiction of the central courts in London was established.

These courts were directly linked to the King, and their powers were aimed at upholding the interests of the Crown and reinforcing its control over the country.

The royal courts in Westminster acted as the driving force behind the English legal system, the system of "common law", which developed according to unitary and centralised lines from the reign of Henry II (1154-1189) onwards, under the Angevin dynasty.

The common law created in the courts in London was the "common" law as opposed to the local laws and pre-existing customary rules – of the ancient Celts, Angles, Saxons and Danes, which had moreover been brought together within the collections of laws of the Anglo-Saxon kings.

As regards the linguistic aspect, a peculiar form of multilingualism involving the parallel presence of, and alternation between, Latin and the vulgar language characterised the historical development of the common law.

From 1066 onwards, the French vulgar language, as the language of the Norman court, became the language of the English gentry.

At the same time, various terms from the Anglo-Saxon and Danish legal lexicon had now been received, and continued to be used. Words derived from early medieval Old English include legal terms in current usage such

as bequeath, goods, guilt, murder, oath, sheriff, swear, theft, thief, witness and writ.

As far as Latin was concerned, in its medieval version it was the learned language and the language of the Church also in England. It was the language used within ecclesiastical schools and courts, where canon law was applied.

In 1143 the Lombard scholar Vacarius moved to Oxford in England, where he put to use within ecclesiastical practice his knowledge of Roman texts acquired in Bologna and became a lecturer of Roman law. Vacarius wrote a summary of Roman law, the *Liber Pauperum* (the book of the poor), which was intended for those who could not afford to purchase a full manuscript of the glossed Justinian texts.

Latin was also used within the King's Chancery. The Lord Chancellor was normally an ecclesiastical figure.

The fact that Latin was the language of the Chancery during the Norman era and the subsequent Angevin era was not without its consequences in linguistic terms for the origins of the common law. In fact, the origins of the common law are rooted in the system of Chancery formularies contained in the so-called "writs".

As such, the Chancery assisted the King in the administration of justice and from the 12th century onwards issued writs – in Latin *brevia*.

These were brief documents written in Latin, bearing the royal seal and containing the order of the King to the feudal lord or the county sheriff, who had local jurisdiction, to take action to uphold particular rights over enfeoffed land that had been invoked by a subject. The writ paved the way for legal protection.

Essentially, if the feudal lord – or the sheriff, for those lands granted directly by the King – refused to grant legal protection to one subject's rights against another subject, the aggrieved person could appeal to the King.

Following an application by a litigant, and upon payment of a sum of money, the King arranged for a writ of chancery to be issued: a *breve de recto* (writ of right) addressed to the feudal lord or the writ *precipe quod reddat* addressed to the sheriff.

Over time, with the grant of new writs, the Chancery introduced other forms of specific action, which subjects could use in order to obtain justice before the King.

These were typical actions in the sense that it was not permitted to take action to seek protection for a right outside those forms that had been admitted and duly invoked. The rules of linguistic drafting of formalised Latin had to be followed scrupulously, and a case could be lost due to a mere lexical error.

This resulted in the birth of the common law, through the granting of typified "*forms of action*". These were drafted strictly in Latin, each using its own terminology and subject to its own procedural rules, which vested competence in the royal courts.

The Chancery was responsible for overseeing the catalogue of forms of action (*Registrum brevium*) that subjects could use, with each being defined by its own individual title.

Throughout the 13th century, the Chancery expanded the list of forms of action by creating new ones with the aim of broadening the scope for legal relief guaranteed by the sovereign.

This resulted not only in an expansion of royal jurisdiction but also the progressive emergence of three separate court branches in Westminster (the Court of Exchequer, the Court of Common Pleas and the King's Bench).

However, with the adoption of the Statute of Westminster in 1285, the barons were able to obtain an assurance from the King that the Chancery would not grant any new writs in addition to those already in use (which could however also be applied by analogy). The barons were jealous of their own judicial prerogatives, which they did not want to relinquish.

3. Multilingualism of common law

The common law emerged in the 12th and 13th centuries out of the judgments of the royal courts. From the end of the 12th century, the decisions of the royal courts started to be written down in Latin, using formal language, in specific parchment registers known as "plea rolls".

Towards the end of the following century (from 1292), also the reports of discussions before the King's courts started to be collected in "Year Books". However, these reports of the trails were not written in Latin, but in the technical language of trials, known as "law French", i.e. Norman legal French, which had been introduced by the Norman Kings.

Law French remained the language of English lawyers until the middle of the 17th century and beyond.

Indeed, since the second half of the 14th century it had not only lost its links with Anglo-Norman (the dialect of Old French spoken in England), but also was probably no longer used for oral discussions before the Westminster courts, except in order to recite *pro forma* pleadings and for certain other formalities. On the other hand, it continued to be used to transcribe legal reports of trials.

During the early modern age, law French appears to have turned into a

kind of legal dialect of English lawyers, and continued to be used as such until 1650, as a formalised technical language, above all in written documents.

The linguistic tension apparent from the written sources of the common law between the law French of the reports and the Latin of the plea rolls was a defining feature of English law at least until the 17th century, and reflected the system's gradual development throughout its history.

Latin and law French were not only the languages of the royal courts but also the languages of English legal literature during the medieval and early modern periods. In particular, Henri of Bratton (Bracton), a churchman and royal judge in Westminster, wrote his masterpiece *De legibus et consuetudinis Angliae* in Latin in the first few decades of the 13th century.

As far as the plea rolls, collecting the judgements of the royal courts were concerned, the usage of Latin and the "court hand" (the writing style commonly used within the courts) were characteristic features of the common law during the medieval and early modern era until they were abolished by Parliament in 1731.

The continuing usage of medieval Latin throughout the 16th and 17th centuries caused a number of problems for the clerks (who were responsible for writing judgments in Latin) in translating terms commonly used in vulgar language, such as for instance "tobacco" or "teapot".

The abandonment of Latin from the 1730s onwards nonetheless caused some upset amongst jurists and practitioners of English law. The abolition of Latin also meant that the writs had to be translated in English and given new names in the vulgar language.

Subsequently, many jurists and legal practitioners in England became largely unable to read medieval Latin.

4. *Magna Carta*

Medieval Latin is an inherent part not only of English legal history but also within the broader western legal and political history: it was in Latin that the *Carta libertatum* was written in 1215 which, on account of its content, subsequently acquired the qualifier 'great' (and hence '*magna*') and in which the term *libertas* must be construed as being synonymous with the term *ius*, i.e. law (see below).

The sixty-three original clauses of the *Magna Carta* contain the roots of English constitutionalism: those rules in fact take us back to the original form of constitutionalism, when the power of the sovereign did not represent as a whole the political community governed by its constitution, and

when the principal of equality did not underpin the guarantee of individual rights.

In this sense, the *Magna Carta* was an expression of a 'constitution' that was capable of striking a balance, in accordance with customary norms agreed upon with the sovereign, among a variety of highly disparate forces – of feudal and corporative origin – with reference to the English political and territorial space.

It set out rules governing the interaction specific to that period among specific bodies of rules and the King's unitary legal order.

However, from that point onwards, a new rule would have to prevail over an older one: the sovereign was no longer able to operate free from any limits, where his action interfered with the exercise of individual rights.

Action taken by the King would have to be approved by anyone who might be harmed by it and the '*locus*' for participation in the exercise of power would become the *magna curia* (the great assembly, or Parliament), as the traditional locus for the administration of justice.