

**The Government of the Russian Federation
National Research University Higher School of Economics
Faculty of Law**

**Course Syllabus
Medieval Law: Theories and Practices**

Master Programme 46.04.01 "History" / "Medieval Studies"

Instructor:

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1 The scope of the course

This is the syllabus of the introductory course on medieval law, its theories and practices in Western Europe, which states the minimum academic requirements for the students, outlines the content of the topics of the lectures and seminars and sets out the criteria to assess students' knowledge at the interim and final examination.

This syllabus is intended for the instructors of this course and for the students of the Master Programme 46.04.01 "History" / "Medieval Studies" who choose this course.

This syllabus is drafted in accordance with the following documents:

- the standard of the National Research University Higher School of Economics for the Master Programme 46.04.01 "History";
- the curriculum of the National Research University Higher School of Economics for the Master Programme 46.04.01 "History" / "Medieval Studies".

2 Outline

Law can surely be regarded as one of the staples of Medieval Civilisation in Europe. It permeated through virtually all aspects of social life in the Middle Ages – from one's relationships with the local lord or his sovereign (the king or the emperor) to one's personal transactions at a marketplace or relations with one's wife and children. Law regulated all that in various ways and through numerous sources, like local and general customs, enactments of the sovereigns, learned common law, court practice. In contrast to modern industrial societies, feudal Europe lacked nation-states and hierarchical legal orders. Medieval social world looked rather chaotic and linked via a plethora of acts, transactions, agreements, and conventions.

Such medieval realities explain the twofold aim of this course, namely, to enrich the vision of the master students of the legal dimension of Latin (Western) Europe and its various sources of law, and to familiarise them with particularities of medieval legal practice. This aim is to be attained through several specific goals. Firstly, to introduce the main sources of medieval law to the master students (starting with the collections of secular laws and church canons in the *Corpus Iuris Civilis* and *Corpus Iuris Canonici*). Secondly, to present major legal doctrines (the learned law) developed by the leading medieval jurists (glossators, commentators, canonists, humanists, late scholastics) from the 12th through the 16th centuries (including the basic concepts, principles, rules, and institutions of legal theory). Thirdly, to look into the influence of the (academic) learned law upon the positive law and its implementation by the secular and clerical courts of various medieval and early modern sovereign entities (the Empire, the Church, kingdoms, city-states). These goals are to be achieved by lecturing.

During seminar classes the master students will be taught to read and understand various fragments of the medieval sources of law and legal practice. They will be instructed as to how to read carefully, analyse, and translate medieval legal texts. A combination of the sources of the learned and positive law is supposed to familiarise the master students with the 'law in books' and 'law in action' and to enable them to perceive this law as the true foundation of the Western European Civilisation.

3 Core competencies to be developed by students of this course

After completing the course students are expected to be able to:

- define basic concepts of medieval learned law and its theories;
- explain how various approaches to legal history can be used to understand theories of medieval law and its legacy for later periods;
- distinguish and identify key features and institutes of medieval law;
- review and summarize recommended academic papers;
- coherently state and reason one's own theses in English regarding the issues of the course.

4 Prerequisites and the place of this course in the curriculum

"Medieval Law: Theories and Practices" is an academic course for the students of the Master Programme 46.04.01 "History" / "Medieval Studies"

The course is targeted at first-year master students who are expected to have successfully completed the bachelor courses on general history.

Students are expected to learn essential legal English vocabulary through study of European legal history, listening to lectures, engaging in disputes, and preparing final written essay.

The instructors propose an interactive mode of giving lectures and organizing seminars. Students are expected to familiarise themselves with the essential readings before attending lectures, they will be asked questions in order to check their comprehension.

From the very beginning of their education students are encouraged to make use of the electronic resources of the Higher School of Economics, as many recommended papers are available at Jstor, Ebrary, Archive.org, and other databases.

The knowledge and skills to be acquired by the students of this course should facilitate their mastery of the following subjects during their further education in accordance with the master programme.

5 Examination type

Types	Forms of assessment	1 year				Description
		1	2	3	4	
Current (weekly)	Quiz			+		Oral questioning on the topics of the course during each seminar.
Final	Examination			+		Written reply to questions related to the course during one hour.

6 Scoring

The overall learning outcome will be assessed on the basis of student's activity during seminars ($O_{seminars}$) and the final written examination (O_{exam}). The examination will refer to all topics of the course and will draw primarily, but not exclusively, on the essential readings.

The assessment formula is as follows:

$$O_{final} = 0.5 \cdot O_{exam} + 0.5 \cdot O_{seminars}$$

7 Curriculum

N.	Topics	Hours	Class hours			Self-study hours
			Lectures	Seminars	Practice	
1	Topic 1. Medieval legal studies and European legal culture.	14	2	2	0	10
2	Topic 2. Beginnings of medieval legal theories.	26	2	4	0	20
3	Topic 3. Legal theories of the mature Roman	28	4	4	0	20

	Canon <i>ius commune</i> .					
4	Topic 4. Influence of Roman-canon <i>ius commune</i> on medieval positive law.	16	2	4	0	10
5	Topic 5. Legal theories of the early modern period.	16	2	4	0	10
6	Topic 6. Influence of the learned law on early modern positive law.	14	2	2	0	10
11	Total:	114	14	20	0	80

7.1 Curriculum (by topics).

Topic 1. Medieval legal studies and European legal culture.

Preliminary remarks. The vitality of law, its theories, and practices in European history ('Western legal tradition').

The profile of this course:

- the purpose to introduce the content medieval legal theories, their origins, methods, approaches to study, and legacy;
- sources and materials: *Corpus Iuris Civilis* and *Corpus Iuris Canonici* with the relevant doctrinal literature (glosses, treaties, commentaries);
- approaches to understand: dogmatical, cultural, sociological studies.
- topics: jurisprudence of the middle ages and early modern period and its legacy.

Legal theory in legal history as an academic discipline. Relation of law and legal studies to logic, sociology, political theory, general history. 'Legal theories (doctrines)' as distinguished from case law and legal philosophy. 'Legal theories' referring to a) legal rules and dogmas, b) legal values, ideas, and methods. Variety of approaches ('pure' normative, cultural, and socio-legal studies).

Development of medieval legal studies since the 19th century. Three waves of actualization of Roman-canonical law in Europe: in the 19th century (Savigny's 'scientific' legal history), after the World War II (revival of the common legal past in the West), after the Cold War (the common legal past of Europe as a building block of its common future). Comparative legal history today and its search for common roots of the European legal culture.

The current framework of medieval legal studies. European legal culture and Western legal tradition:

- major legal areas in Europe: Western (civil law and common law), Nordic, Eastern;
- expansion of Western legal tradition in Europe;
- key features of this culture: personalism, legalism, and intellectualism;
- the jurisprudential character of law on the continent (civil law);
- correlation between jurisprudence and legal practices.

Schematic analysis of European jurisprudence: 1) historical context; 2) formal sources of law (binding texts); 3) the goals of interpretation; 4) the methods of their interpretation and application; 5) the results of such an interpretation (legal theories).

Major jurisprudential schools in medieval Europe: glossators, canonists, commentators (Bartolists), humanists, late scholastics. Their approaches to study and to teach law (from the 14th through the 16th century): *mos italicus*, *mos gallicus*, *mos hispanicus*.

The specificity of medieval legal theories: the learned law based on the scholastic interpretation of authoritative and unchanging Roman laws and Church canons (*ius utrumque*) and intended to be the model for the whole Christendom (*ius commune*). The prominence of the dogmatics of private law over legal procedure and public law.

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Essential Readings:

Vinogradoff P., *Outlines of Historical Jurisprudence*, Oxford: University Press, 1920, vol.1, part 1.

Waelkens L, *Amne adverso*. Roman Legal Heritage in European Culture. Leuven: University press, 2015. § 1.

Zweigert K., Kötz H. *Introduction to Comparative Law*. Oxford: Clarendon Press, 1998, p. 63-72.

Supplementary readings:

Berman H.J., *Law and revolution-I*, Cambridge, Mass.: Belknap, 1983, p. 1-17 (Russian translation: Берман Г. Западная традиция права: эпоха формирования, 2-е изд., М.: Изд-во МГУ, 1998, . С.19-27)

Gordley G., *Comparative law and legal history*, in: *The Oxford handbook of comparative law*. Eds. M. Reimann, R. Zimmermann, Oxford: Oxford University Press, 2008, p. 753-773.

Ibbetson D. *Comparative legal history: A Methodology*, in: *Making legal history: approaches and methodologies*. Eds. A. Musson, Ch. Stebbings. Cambridge: Cambridge University Press, 2012, p. 131-145.

Padoa Schioppa A., *History of Law in Europe: From the Early Middle Ages to the Twentieth Century*. Cambridge: University press, 2017, p. ix-xiii.

Parise A. *The Value of comparative legal history for American Civil Law Jurisdiction*, in: *Ownership Paradigms in American Civil Law Jurisdictions*. Brill, 2017, p. 25-48.

Pihlajamäki H. *Comparative Contexts in Legal History: Are We All Comparatists Now? // The Method and Culture of Comparative Law. Essays in Honour of M. Van Hoecke*. Eds. M. Adams, D. Heirbaut. Oxford: Hart, 2014, p. 121-132.

Senn M., *The methodological debates in German-speaking Europe (1960-1990)*, in: *Making legal history: approaches and methodologies*. Eds. A. Musson, Ch. Stebbings. Cambridge: Cambridge University Press, 2012, p. 108-117.

The Formation and Transmission of Western Legal Culture: 150 Books That Made the Law in the Age of Printing. Eds. S. Dauchy, G. Martyn, A. Musson, H. Pihlajamäki, A. Wijffels. Cham: Springer Verlag, 2017, p. 1-8 [springer.com и hse.library]

Van Hoecke M., *Law as Communication*, Oxford: Hart Publishing, 2002 (chapters 1, 3).

Academic hours – 4.

Self-study hours – 10.

Topic 2. Beginnings of medieval legal theories.

1) The context. Transition from the dark ages to the high middle ages. The 'renaissance' of the 12th century in the Southern Western Europe: changes in economy (revival of trade and cities), politics (rivalry between the Empire and the Papacy), intellectual life (scholasticism). Survival of the pre-medieval legacy: Roman law, Roman Catholic Christianity, Greek philosophy.

Alternatives to Bologna's *studium* in Lombardy, Dauphiné (*Petri exceptiones legum romanorum*), Saxony (*Sachsenspiegel*), England (common law under and after Henry II).

The rise of special law schools (*studium generale*) in Bologna and other cities. The dualism of secular and sacred, hence, the rise of two legal schools – the glossators and the decretists. Contribution of the most notable scholars.

2) The sources of law.

For the glossators

For the decretists

Rediscovery of the laws (*leges*) of Justinian, so-called *Corpus Iuris Civilis: Digesta, discordantium canonum*) by Gratian (ca. 1140) *Codex, Institutiones, Authentica*.

- the issue of establishing the standard text as the object of interpretation.

- the issue of selecting and arranging variegated non legal sources.

3) The goals.

For the glossators:

- to establish the standard edition of *Corpus*

Iuris Civilis;

- to understand *Corpus*;

- to identify and explain contradictions in

Corpus;

- to unveil a coherent legal theory in

Corpus.

For the decretists:

- to collect the 'legal' canons;

- to understand their legal meaning;

- to identify and explain contradictions in

Decretum;

- to unveil a coherent legal theory.

4) The methods.

The common methodology of the early scholasticism: literal (grammatical) interpretation of the Text; finding similar and different fragments in it; making definitions, distinctions, and rules.

Building a theory: choosing the place of a doctrine (*sedes materiae*); reading this text; searching for similar fragments elsewhere; distilling the rules; solving contradictions.

5) The results. Major literature: glossae and summae. Arrangement of legal doctrines.

For the glossators:

Summa Aurea to Codex by Azo

Glossa ordinaria to *Corpus Iuris* by

Accursius

For the decretists:

Glossa to *Decretum* by Johannes

Teutonicus and Bartholomew of Brescia

Summa aurea by Henry of Susa

(Hostiensis)

Ordo iudiciarius by Tancred of Bologna

commentaries to *Libri feudorum* by Accursius

The content of legal theories.

General concepts of law and legal theory:

- law as art (*ius*, D.1.1.1 pr.) and its many divisions (D. 1.1.1.3-4);

- legal rules and definitions (D.50.17.1, 202);

- legal doctrine or theory;

Key concepts and institutes of **private law**:

- the division of private law (Inst. 1.2; *personae, res, actiones*, Inst. 1.2.12);

- persons and family (under canon law);

- possession (*possessio*, D. 41.2.1 pr.);

- property (*dominium*, D. 41.1; *dominium directum* or *utile*, C. 11.62.12);

- obligation, debt, and liability (*iuris vinculum*, Inst. 3.13 pr.; D. 44.7.3 pr.);

- simple and enforceable agreements, four kinds of contracts (*pacta* and *contractus*, D. 2.14);

- private delicts (*ex maleficio*, Inst. 4.1 pr.; D. 47.1.1 pr.);

- actions and interdicts (*ius persecuendi iudicio*, Inst. 4.6 pr.; under canon law, *Decretum, causae* 5 and 22).

Key concepts and institutes of **criminal law**:

- public offenses (*delicta publica, crimina*) as distinguished from private wrongs;

- classification of public delicts (C. 1.17.2.8);

- elements of criminal responsibility;

- punishment (*poena*) and its goals.

Key concepts and institutes of **procedural law**:

- jurisdiction and public adjudication as distinguished from private mediation;

- Roman and theological foundations of procedural law;

- forms of legal procedure (accusatory, denouncing, inquisitorial);

- ordinary (civil) and extraordinary (criminal) procedures;
- stages of the proceedings;
- evidence (*probationes*);
- judgement.

Key concepts and institutes of **feudal law** and their inconsistency with Roman law:

- *feudum* (fief, *Lehn*, manor) vs. Roman *dominium*;
- commendation, homage and *investitura* vs. *traditio* in Roman law;
- other forms of titles to land (*precarium*, *beneficium*, *allodium*, *saisine*) vs. *dominium* and *possessio*.

The merits and demerits of the early Bolognese jurisprudence. Revival or distortion of Roman law? The limits of its academic programme and methods. A scarce interaction between glossators and decretists. Critique and challenge of the French school of Orléans.

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Sources:

Corpus Iuris Civilis (Digesta, Codex, Institutiones, Novellae);
Azo's Summa Aurea to Codex;
Glossa ordinaria by Accursius;
Decretum Gratiani;
Summa aurea by Hostiensis;
Ordo iudiciarius by Tancred of Bologna;
Libri feudorum of Lombardy;
Petri exceptiones legum romanorum;
The Saxon Mirror (Sachsenspiegel);
Bracton's De Legibus et Consuetudinibus Angliae.

Essential Readings

Stein P., Roman law in European history. New York: Cambridge University Press, 1999 (2004), p. 38-69 (chapter 2)

The creation of the *ius commune*: from *casus* to *regula*. Eds. John W. Cairns, Paul J. Du Plessis. Edinburgh, 2010, p. 7-56 (chapter 1). [ebrary.com]

Waelkens L, *Amne adverso*. Roman Legal Heritage in European Culture. Leuven: University press, 2015, p. 100-104.

Supplementary readings:

A History of the university in Europe, vol. 1., eds. Walter Rüegg, H. de Ridder-Symoens, Cambridge: University press, 1992.

Bellomo M. The Common Legal Past of Europe, 1000–1800. Washington D. C., 1995, p. 126-175.

Berman H.J., Law and revolution-I, Cambridge, Mass.: Belknap, 1983, p. 120-164 (Russian translation: Берман Г. Западная традиция права: эпоха формирования, 2-е изд., М.: Изд-во МГУ, 1998. С. 124-164)

Brundage J. A. The medieval origins of the legal profession: canonists, civilians, and courts. Chicago: Univ. of Chicago Press, 2008. (chapter 4)

Gordley J., The jurists: a critical history. Oxford: University press, 2013, p. 28-55.

Kantorowicz H., Buckland W. Studies in the Glossators of the Roman law. Cambridge: University press, 1938. [books.google.com]

Radding Ch.M. Ciaralli A. Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival. Brill Academic Publishers, 2006. [ebrary.com]

Stein P., *Regulae iuris. From juristic rules to legal maxims.* Edinburgh, 1966, p. 124-152 (chapters 7-8).

The Formation and Transmission of Western Legal Culture: 150 Books That Made the Law in the Age of Printing, Cham: Springer, 2017. (see the entries on the sources mentioned above).

Vinogradoff P., *Roman law in mediaeval Europe.* London, NY: Harper&Brothers, 1909, p. 32-58.

Winroth A. *Making of Gratian's Decretum.* Cambridge University Press, 2001. [ebrary.com]

Academic hours – 6.

Self-study hours – 20.

Topic 3. Legal theories of the mature Roman-canon *ius commune*.

1) The context. Growing demand for law amidst diversity of late medieval Western Europe. Major changes in economy (expansion of trade and urbanization), politics (growing number of competing principalities and communes), intellectual life (late scholasticism and expansion of universities). Spread of law faculties within medieval universities. The corporate model of a late medieval university and its impact on the teaching of law. The leading role of the North Italian legal scholarship (*mos italicus*) in the creation and spread of *ius commune*. The schools of commentators of Roman laws in *Corpus Juris* and papal decretal letters (decretalists).

The consolidation of secular and religious legal doctrines into 'both laws' (*ius utrumque*). Contribution of the most notable scholars.

2) The sources of law.

For the commentators of *leges*:

Corpus Iuris Civilis in five volumes

(including *Libri feudorum*).

For the decretalists:

Decretum by Gratian

the collections of papal decretal letters
(*Liber Extra*, *Liber Sextus*, *Clementinae*,
Extravagantes)

3) The goals.

For the commentators of *leges*:

- developing legal theories for practical needs;
- reconciling *Corpus Juris* with local laws

(*iura propria*)

For the decretalists:

- reconciling the old law (*Decretum*) with
the new one (papal decretals)

4) The methods.

Extending the methods of scholastic interpretation between the authority of the law and its reason (*ratio*). Searching for the true meaning of the law (*ratio legis*) through declarative, restrictive, and extensive textual interpretation. Scholastic limitations of such an interpretation.

5) The results. Extensive commentaries to all sources of *ius commune*, first treatise on particular topics or institutes, and collections of legal opinions (*consilia*).

For the commentators of *leges*:

Commentaries by Bartolus

Commentary on Codex by Baldus

Speculum iudiciale by Guillaume Durand and Johannes Andrea

later commentaries to *Libri feudorum*

For the decretalists:

Glossae to the collections of papal
decretals.

Commentaries on the Decretals by Panormitanus

The content of legal theories.

The integration of medieval Roman and canon law into *ius utrumque*: mutual support (X. 5.32.1), exclusive ecclesiastical competence (*causae spirituales*, X. 2.1.13), rare divergence and amendment of laws through canons. Three major branches of legal doctrines: private law, criminal law, procedural law.

Development of legal theories in the commentaries of the late Middle Ages:

- from 'doctrine' to 'legal theory' (*theorica iuris*);
- further subdivisions of law, public and private, common and particular, secular and canon;

In private law:

- origins of subjective rights;

- further 'canonisation' of the law of persons and family;

- possession and property as real rights (*iura in re*) with the primacy of the latter (Bartolus on D. 41.2.17.1);

- protecting possession through interdicts (*unde vi, uti possidetis, redintegranda*) and property – through lawsuits (*rei vindicatio*);

- extending enforceability of agreements (*pacta vestita*, D. 2.14);

- formulating the rules of delictual liability and extending the application of *lex aquilia* (D. 9.2);

In criminal law:

- classification of delicts (C. 1.17.2.8) and crimes: against the public order (political, religious, moral); against persons (murder, injuries); against property (various kinds of theft);

- criminal responsibility in the lack of general theory: culpable willing (D. 48.8.1.3, *dolus, animus vulnerandi*); mitigating circumstances (mental capacity, imputability (Decretum C. 15, q. 1, c. 2 after D. 9.2.5.2.4), age of reason (C. 2.42.3), the weaker sex; justifiable defense (D. 9.2.45.4; X. 5.12.18-19); aggravating circumstances (repeated offense, atrocity of crime, noble rank, regional crime situation);

- punishment for delicts and its goals (private reparation, salvation of soul, crime prevention and deterrence); kinds of punishment (exclusion from society - capital punishment, exile, compulsory labour; mutilation; branding; civil death and *infamia*; civil reparation).

In procedural law:

- due process of law and legality for the uniform administration of justice;

- ordinary (civil) procedure (adversarial, oral, and open to the public, aiming at private reparation); stages of civil procedure (accusation, oath, *litis contestatio*, judgement);

- extraordinary (criminal) procedure (inquisitorial, written, secret, and aiming at protecting public interest); stages of the proceedings (*diffamatio*, charge and detention, investigation and defenses, torture, confession, judgement, appeal).

- legal evidence (*probationes*) and principles of proving: no decision without proofs, the clearest proofs in criminal cases, all doubts in favour of the accused, the burden of proof, *probatio plena* and partial proofs; denunciation of irrational proofs (*juramentum, purgatio, duellum*); kinds of legal proofs (*confessio*, witnesses, advancement of written documents, *consilia* of experts); impartial evaluation of proofs by judge; admissibility of torture to eliminate doubts in grave crimes;

- judicial discretion (*arbitrium iudicis*) and the choice of an appropriate penalty: *lex Hodie* (D. 48.19.13); mitigating or aggravating circumstances (*causa, persona, locus, tempus, qualitas, quantitas, eventus*, after D. 48.19.16.2-8); evaluating crimes according to moral theology and topics (Aquinas' *Summa Theologica*, I-II, qu. 7, art. 3, § 3: *quis, quid, ubi, quibus auxiliis, cur, quomodo, quando*); legal and moral limitations of judicial discretion.

In feudal law:

- the status of the feudal law under *ius commune*: assimilation with emphyteusis (C. 11.62.12.1);

- feudal relationship in the framework of *dominium directum* and *dominium utile*;

- legal concept of *investitura*;
- scholarly debate about the real or personal nature of feudal relationship.

The merits and demerits of the early Bolognese jurisprudence. Creative interpretation or manipulation of the sources? The limits of adaptation of legal theories to practical needs. A path towards the decay of scholastic jurisprudence.

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Sources:

Corpus Iuris Civilis (including Libri feudorum) with Glossa ordinaria by Accursius;
Corpus Iuris Canonici (Decretum, Liber Extra (X.), Liber Sextus (VI.), Clementinae (Clem.), Extravagantes (Extrav. Joh.XXII. and Extrav.comm.) with the relevant standard glosses;
Commentaries on Civil Law by Bartolus de Saxoferrato;
Lectura super Codice
by Baldus de Ubaldis;
Speculum iudiciale by Guillaume Durand;
Aquinas' Summa Theologica.

Essential Readings:

Bellomo M. The Common Legal Past of Europe, 1000–1800. Washington D. C., 1995, p. 175-202.
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Carbasse J.-M. Histoire du droit pénal et de la justice criminelle. Paris: PUF, 2014.
Conte E. Framing the feudal bond: a chapter in the history of the itis commune in Medieval Europe // The Legal History Review. 2012. N.80. P. 481-495.
Pennington K. Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept // Syracuse Journal of International Law. 1994. N.20. P. 205. URL: <https://scholarship.law.edu/scholar/422/>
The creation of the *ius commune*: from *casus* to *regula*. Eds. John W. Cairns, Paul J. Du Plessis. Edinburgh, 2010, p. 7-56, 103-142. [ebrary.com]
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Bar L. von. A history of continental criminal law, translated by Thomas S. Bell, Boston: Little, Brown and co, 1916.

Academic hours – 8.

Self-study hours – 20.

Topic 4. Influence of Roman-canon *ius commune* on late medieval positive law.

The context of reception:

Political struggle and a better governance: competition and cooperation between the Empire and the Papacy, legal reorganization of the Roman Catholic Church; emergence of the self-governing cities; the rise of the monarchs and local princes. Economic revival of the inter-regional trade.

The so-called reception of Roman (and canon?) law in France, Spain, Southern Germany. Establishing law faculties and 'scientification' of local laws. Some examples from Southern France (*Lo Codi*), Northern France (*Coutumes de Beauvaisis*), Spain (*Siete Partidas*) and Germany (*Constitutio Criminalis Carolina*). Transformation or suppression of customary law, with the exception of England, Switzerland, Scandinavia, Eastern Europe.

The state of legal practice before *ius commune*. A patchwork of competing jurisdictions (royal, seigneurial, municipal, ecclesiastical) and legal sources (multiple customs, imperial and royal decrees, case law of the courts). The beginnings of the rationalization of administration and justice. Channels of *ius commune* influence via imitation of the Church administration, recruitment of university graduates, editing of customary and municipal laws, and royal statutes. Efficiency of the institutes and procedures of the learned law, yet various degree of influence (highest to lowest):

Justice within the **Church state**:

- judges and confessors;
- ecclesiastical and secular judges;
- ecclesiastical jurisdiction *ratione personae* and *ratione materiae*;
- the hierarchy of the ecclesiastical courts (the Pope, his Consistory and delegated judges; Rota Romana, episcopal courts, courts of archdeacons);
- the positive law on the basis of *ius commune* (family, inheritance and wills, possession instead of ownership, promises and contracts, delictual liability)
- law of inquisitorial procedure.

Justice under **municipal (urban) law**:

- revival of urban life, establishment of medieval communes, self-governance;
- uneven rate of urbanization and Romanization of self-governance: a) southern European cities and the learned law, b) northern cities with original customs and later reception of *ius commune* (Magdeburg law, Lübeck law);
- the leading example of Italian communes: fragmentary guild laws and the complete *ius commune* as subsidiary law; elected professional municipal judges and their *responsibility* for incompetent or fraudulent judgements against *ius commune*; professional legal procedure; resolving most civil and criminal cases in accordance with the '*communis opinio*' of doctors of law and their authoritative advice (*consilia*).

Royal (sovereign) justice:

- the rise of royal power and justice: a king as sovereign (emperor) in his domain and the source of all justice and the keeper of the peace (with an emphasis on criminal matters);
- the leading example of the *Kingdom of France*:
 - a) *delegated* royal justice:
 - three levels of royal officials and their courts: 1) *prévôts* or *viguiers* for smaller wrongs, 2) *baillis* or *sénéchaux* (or their lieutenants), 3) the *parlement(s)*.
 - professional staff at the courts (king's men: *procureurs* and *avocats*)
 - control over the limitation of the seigneurial justice
 - b) *retained* justice of the king himself as his grace:
 - the king in his royal council with exceptional jurisdiction to review any judgement;
 - royal commissaires during *Grands Jours*;
 - special chambers of justice for exceptional crimes;
 - justice on the basis of *ad hoc* royal letters.
- inquisitorial criminal procedure, case law of the *parlements*, and royal ordonnances;
- adversarial civil procedure on the basis of edited general customs of French regions.
- a particular case of the *Kingdom of England*: centralized Norman monarchy and the rise of common law of the central royal courts in Westminster; writs, forms of actions, and techniques of

pleading; tight professional community of royal judges and advocates; very original legal rules and terminology; no notable influence of *ius commune*.

Feudal justice (for military landowners):

- metamorphosis of feudal hierarchy;
- extreme fragmentation of feudal customs and modest influence of the learned law;
- courts of the peers, by the peers, and for the peers;
- disputes over the power over land (*dominium* and *seisine*);
- disputes over the rights and duties between seigneurs and vassals;
- customary procedure and irrational proofs (*duellum*).

Seigneurial justice (for villains and peasants of fiefs):

- 'no land without a lord' and his justice;
- justice on the basis of the customs of the particular courts;
- shrinking of the seigneurial justice due to the growth of royal and municipal ones.

Merchant law:

- self-elaborated customs of the merchants: land and maritime trade (Rhodes, Amalfi, Barcelona, Oléron, Visby);
- their privileges and merchants' courts of arbitration, their swift and informal procedure guided by material justice;
- novel institutions exclusively for merchants unavailable under *ius commune* (trade associations, insolvency, credit devices, insurance).

The main dynamics of competing jurisdictions: the growth of royal law at the expense of all others.

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Sources:

- *church law:*

Corpus Iuris Canonici (Decretum, Liber Extra (X.), Liber Sextus (VI.), Clementinae (Clem.), Extravagantes (Extrav. Joh.XXII. and Extrav.comm.) with the relevant standard glosses;

Summa aurea by Hostiensis;

Panormitanus, Commentaries on the Books of the Decretals (before 1445);

First Book of Alexander of Imola's Legal Opinions (15th century);

Speculum iudiciale by Guillaume Durand;

- *municipal law:*

Italian municipal statutes (digitized editions at Hathi Trust Digital Library) URL: <https://www.hathitrust.org>

Repertorium in omnia consiliorum volumina Baldi Ubaldi. Venetiis, 1575.

- some collections of *regional law:*

Coutumes de Beauvaisis by Beaumanoir;

Somme rural (c. 1385-1393) by Boutillier.

- *sovereign justice:*

Siete Partidas (Seven-Part Code) of Alfonso X of Castile;

Ordonnance of 1498 by Louis XII of France;

Fortescue's De laudibus legum Angliae (Commendation of the Laws of England, 1471).

- *feudal justice:*

Assises de Jérusalem (12th to 13th centuries);

Libri feudorum with late medieval glosses.

Essential Readings:

Berman H.J., Law and revolution-I, Cambridge, Mass.: Belknap, 1983 (part II).

Caenegem R.C. van. An Historical Introduction to Private Law. Cambridge: University press, 1992 (chapter 3).

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Pennington K. *History of Canon Law overview* URL: <http://legalhistorysources.com/Canon%20Law/HistoryCanonLaw.html>

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Scherner K.O. *Lex mercatoria – Realität, Geschichtsbild oder Vision // Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. 2001. GA. No. 118. P. 148-167.

The Formation and Transmission of Western Legal Culture: 150 Books That Made the Law in the Age of Printing, Cham: Springer, 2017. (see the entries on the sources mentioned above).

Understanding the sources of early modern and modern commercial law : courts, statutes, contracts, and legal scholarship. Heikki Pihlajamäki; Albrecht Cordes; Serge Dauchy; Dave de Ruyscher (eds.). Leiden, Boston: Brill, 2018.

Academic hours – 6.

Self-study hours – 10.

Topic 5. Legal theories of the early modern period.

1) The context. The challenges of the 16th century to the medieval *ius commune* (colonial expansion, the Renaissance, the Reformation and the Counter-Reformation, the rise of nation-state, decline of the ecclesiastical jurisdiction). The co-existing and competing approaches to study law: *mos italicus*, *mos gallicus*, *mos hispanicus*.

The late medieval Italian jurisprudence (*mos italicus*): going beyond the limits of the textual interpretation of *Corpus Juris* for the sake of legal practice. (Menochio, *Commentary on Presumptions, Conjectures, Signs and Indications*; Favre, *Codex Fabrianus*).

The French humanist jurisprudence (*mos gallicus*): bitter critique of *mos italicus* for its scholastic limitations, obscure doctrines and corruption of the learned lawyers, and a new approach of

philological and historical studies of Roman law. Discovery of different epochs of Roman history and admiration for the heritage of the classical lawyers.

The Spanish late scholastic jurisprudence (*mos hispanicus*): an attempt to synthesize *mos italicus* and *mos gallicus* in order to transform legal theory.

Expansion of legal studies beyond Roman laws and Church canons. National law (*ius patriae*), commercial law, international law.

2) The sources of law.

Mos gallicus:

- the classical legacy in the Digest of Justinian;
- all ancient sources to reconstruct this legacy;
- occasionally, French customs.

Mos hispanicus:

- all sources of *ius commune*;
- *ius patriae*;
- divine natural law (in Thomistic interpretation)

3) The goals.

Mos gallicus:

- to reconstruct the classical art of civil law (*ius in artem redigere*), based on clear principles national law according to the Christian virtues of but distorted in *Corpus Juris* and medieval justice and liberality commentaries

Mos hispanicus:

- to explain and rearrange civil, canon, and

4) The methods.

Overcoming the limits of the scholastic interpretation of legal sources on the basis of the Renaissance scholarship and principle-based approach to legal theories.

Mos gallicus:

- historical and philological critique of legal sources;
- topical arrangement of legal theories

Mos hispanicus:

- deducing all legal concepts, institutes, and rules from higher principles of divine natural law (Thomistic moral theology)
- division of all positive law into branches

5) The results.

Mos gallicus:

- Alciato, Four books on the significance of words
- Cujas, Observations and emendations
- Dumoulin, Commentaries on the custom of Paris
- Connan, Commentaria iuris civilis
- Doneau, Commentaries on Civil Law

Mos hispanicus:

- Vitoria, On the Law of War of the Spanish
- Soto, On justice and rights
- Suarez, On laws and God the legislator
- Molina, On justice and rights
- Covarrubias y Leyva, Various solutions

The content of legal theories.

Critique, re-arrangement, and generalization of the medieval legal theories.

Interpretation of key concepts and institutes of private law:

- the new meaning of *ius civile* as private law and its relation to public law;
- conceptualizing subjective rights as fundamental rights of everyone;
- the primacy of rights over the legal means to protect them (*ubi jus ibi remedium*) and a clear separation of material and procedural law;
- towards the single and individual concept of property and possession as an aspect thereof (*ius utendi, fruendi et abutendi*);
- obligations as intangible assets (*res incorporales*), redefining their foundation (*praeceptum*), division, and sources;

- the rise of the general concept of contract as a lawful agreement to establish, modify, or terminate obligations;
- formulating the general rules of delictual liability.

The merits and demerits of jurisprudence of the 16th century.

Mos gallicus: an unfinished or impossible project for intellectuals only? A cause of isolation of university professors in France? The leading role of practicing advocates and judges of the parliaments in the 17th and 18th centuries.

Mos hispanicus: legal theories or moral theology without practical relevance? The link with the secular natural law of the 17th century.

The received legacy of the scholastic jurisprudence in the modern period:

- 'Western legal tradition' (H.J. Berman);
- legal culture of personalism, legalism, intellectualism (F. Wieacker);
- professional pattern of law (U. Mattei).

The rejected scholastic legacy due to the scientific revolution of the modernity:

- the universal reach and infallibility of Roman laws and Church canons;
- Church canons as a major source of law for laymen;
- scholastic jurisprudence as the art of balancing the authoritative texts through reason.

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 Connan F. Ten books of the commentaries on civil law (1553)
 Cujas J. Observations and emendations (1556-1595)
 Doneau U. Commentaries on civil law (1589-1596)
 Dumoulin C. Commentary on the Custom of Paris (1539-1558)
 Favre A. Codex Fabrianus (1606)
 Lessius L. On justice and rights (1605)
 Molina L. On justice and rights (1593-1609)
 Soto D. On justice and rights (1553-1554)

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Gordley J., *The jurists: a critical history*. Oxford: University press, 2013, p. 82-127 (chapters 3, 4).

Stein P., *Roman law in European history*. New York: Cambridge University Press, 1999 (2004), p. 71-103 (chapter 3)

Waelkens L, *Amne adverso*. Roman Legal Heritage in European Culture. Leuven: University press, 2015 (various sections concerning early modern period).

Supplementary readings:

Bellomo M. *The Common Legal Past of Europe, 1000–1800*. Washington D. C., 1995, p. 206-217, 224-234.

Brett A.S. *Liberty, right and nature*. Individual rights in later scholastic thought. Cambridge: University press, 1997. [books.google.com]

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Wieacker F. *A history of private law in Europe with particular reference to Germany*. Translated from German by Tony Weir. Oxford, 1995, p. 61-65.

Wieacker F., *Foundations of European Legal Culture*, in: *The American Journal of Comparative Law*, Vol. 38, No. 1 (Winter, 1990), pp. 1-29. [jstor.org]

Academic hours – 6.

Self-study hours – 10.

Topic 6. Influence of the learned law on early modern positive law.

Major trends of the continental legal culture in the 16th century:

- the rise of national (territorial) law (*ius patriae*) in the centralized monarchies of France and Spain and practical adaptation of *ius commune* to local needs; gradual penetration of *ius commune* into laws of Germany;
- preserving conceptual foundations of *ius commune* and Bartolist jurisprudence in legal practice despite new political, economic, and intellectual background;
- universities preserved monopoly on the legal education in continental Europe;
- fostering absolutism via interpretation of Roman law and diminishing of ecclesiastical jurisdiction;
- changing balance of the sources of national positive law with the nominal superiority of the statutes of the sovereigns and the case law (*usus fori*) of the appellate courts;

Competing jurisdictions in early modern Europe:

- maintaining diversity of courts with the nominal dominance of sovereign courts;
- courts wielding judicial, administrative, and legislative powers with wide discretion and secrecy;
- establishing a hierarchy of royal courts with the appellate courts on top;
- shrinking jurisdictions of ecclesiastical, feudal, and seigneurial courts;
- growing professionalization of court proceedings.

Feudal law: as vassals were losing its military and political power, feudal law became reduced to the law of real estates guaranteed by the sovereign.

Private law:

- sources: written and edited customs with judicial and doctrinal interpretations;
- *family law*: ecclesiastical legacy and church jurisdiction persisted; patriarchal family as nature commands it; mandatory registration of marriage with the church; no divorce but separation in some cases (art. 120 of 'Carolina');
- *property law*: spread of *ius commune* institutions of *possessio* and *dominium* to replace customary ones; stronger protection of proprietors' interests by the public authorities;
- *law of successions*: reception of testaments from *ius commune* with some limitations of disposal over decedent's estate;
- *contract law*: expansion of freedom of contract and their binding effect (*pacta sunt servanda*); elimination of redundant formalities;
- *law of delicts*: generalizing *lex Aquilia* to repair most kinds of unlawful (private or public) damages.

Criminal law:

- sources: customary and doctrinal foundations, lack of statutory law (with notable exception of German 'Carolina' of 1532 and Spanish 'Nueva Recopilación' of 1567);
- deterrence through various brutal punishments and public execution;
- emergence of prisons and compulsory labour;
- sorcery (articles 44, 109 of 'Carolina') and hunt after witches and sorcerers.

Law of procedure:

- sources: *ius commune* and growing national statutes (e.g. Ordonnance Villers-Cotterêts of 1539 by François I, Constitutio Criminalis Carolina of 1532 by Charles V)

a) civil procedure without major changes;

b) criminal inquisitorial procedure with wide judicial discretion, tortures, and witch hunt.

Merchant law: first doctrinal writings on the topic, yet few intersections with *ius commune*.

The influence of *ius commune* on the positive law overestimated or misunderstood? Reception of the learned law as borrowing of legal rules or as formation of professional legal mentality and culture?

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- *statutory law*:

Laws of Toro (1505) and Nueva Recopilación (1567)

Constitutio Criminalis Carolina by Charles V (1532)

Ordonnance Villers-Cotterêts by François I (1539)

- *practical jurisprudence*:

— Italian:

Maranta R. Tractatus de ordine judiciorum... (Procedural Order Treatise called the Golden Mirror..., 1540)

Menochio J. A Commentary on Presumptions, Conjectures, Signs and Indications (1590)

Stracca B. Tractatus de mercatura seu mercatore (1553)

— Spanish:

Covarrubias D. Variarum resolutionum ex iure pontificio regio et caesareo (Various Solutions on Pontifical, Royal and Imperial Law, 1552)

Gómez A. Comments on the Laws of Toro (1552)

López G. Siete Partidas of Wise King Alfonso IX and its Gloss (1555)

— Spanish Netherlands:

Damhouder J. Praxis rerum criminalium (Practical Handbook on Criminal Matters, 1554)

Everardus N. Topicorum seu de locis legalibus liber (A Book on Topics, or Legal Commonplaces, 1516)

— French:

Dumoulin C. Commentary on the Custom of Paris (1539-1558)

Loisel A. Customary Institutions (1607)

Papon J. Recueil d'arrests notables (Collection of Important Cases, 1556)

— German:

Zasius U. Analyses of Several Passages of Civil Law (1526)

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Caenegem R.C. van. An Historical Introduction to Private Law. Cambridge: University press, 1992 (chapter 3).

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Dawson J.P. Oracles of the Law. Ann Arbor: University of Michigan Law School, 1968 (chapters 3-4).

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Academic hours – 4.

Self-study hours – 10.

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8.1 Recommended textbooks

1. Bellomo M. The Common Legal Past of Europe, 1000–1800. Washington D. C., 1995,
2. Waelkens L, *Amne adverso*. Roman Legal Heritage in European Culture. Leuven: University press, 2015.

8.2 Essential readings

1. Gordley J., The jurists: a critical history. Oxford: University press, 2013.
2. Stein P., Roman law in European history. New York: Cambridge University Press, 1999 (2004).
3. The creation of the *ius commune*: from *casus* to *regula*. Eds. John W. Cairns, Paul J. Du Plessis. Edinburgh, 2010. [ebrary.com]
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The Oxford handbook of comparative law. Eds M. Reimann, R. Zimmermann. Oxford university press, 2006.

8.4 Required software and on-line databases

- Microsoft Office (Word, Excel, PowerPoint, OneNote, Outlook, Access, Project, Visio);
- e-mail;
- learning management system (LMS, eFront);

8.5 On-line support

On-line support for the course is provided via learning management system (LMS, eFront).