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The Role of Legal Education in Defining Modern Legal Professions*

David S. Clark**

In the United States, Americans tend to view the legal profession as a single entity, a unified bar. Most Americans believe it is normal for a lawyer to switch positions without special training, perhaps from government work to a corporate counsel's office, to a law firm, or maybe to the judiciary. However, in civil law jurisdictions, young law graduates think of several legal professions, reflecting a Balkanization of various occupations calcified by their own career image. A civil law lawyer must be ready at an early age to select his career either in the private sector as an advocate, notary, or with a corporation, or in the public sector as a judge, prosecutor, or government attorney. Subsequent lateral mobility is minimal.¹ If our inquiry into legal professions is broadened to encompass socialist or Eastern law systems, we further complicate the issue of defining a useful comparative concept for the legal profession. For instance, the practicing bar in socialist nations is generally small and unlike that in capitalist countries.²

Section I of this article presents various views and defini-

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1. J. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 109-10 (1969).

2. For example, there were only about 10,000 lawyers in the People's Republic of China in 1980. J. BARTON, J. GIBBS, JR., V. LI & J. MERRYMAN, *LAW IN RADICALLY DIFFERENT CULTURES* 102 (1983); cf. Clark, *The Legal Profession in Comparative Perspective: Growth and Specialization*, 30 AM. J. COMP. L. 163-75 (Supp. 1982) (division of legal professions in Western nations).

tions of the modern legal profession, discussing their usefulness in different national contexts. Section II considers the role of systematic legal education in providing a usable definition for cross-national research on the legal professions. Section III reviews the origins of modern legal education at the University of Bologna, pointing out the benefits that the Holy Roman Empire found in promoting the study of Roman law and the advantages that the Church of Rome saw in the scholarly development of canon law. Section IV describes the increasing demand for learned lawyers beginning in the twelfth century, and section V concludes by narrating the subsequent proliferation of universities in Europe and throughout the world. It is this common university socialization that presently distinguishes lawyers from their historical pre-professional antecedents.

I. SOME DEFINITIONS OF THE LEGAL PROFESSION

Roscoe Pound, former dean of the Harvard Law School, said there are three ideas involved with the legal profession: organization, learning, and a spirit of public service. This third element, in particular, distinguishes a profession from a trade, which primarily aims at earning a livelihood.³ Pound's formulation probably would find few adherents today, at least to the extent that it attempts to describe reality. For instance, only about half the lawyers in the United States are effectively organized, and the level of public spirited service is not unusually high.⁴

Magali Larson, a sociologist, says that one might define the legal profession as an occupation related to law with special power and prestige. This power and prestige is justified because lawyers have special competence in an esoteric body of knowledge that society needs (to achieve order and justice), and lawyers are motivated to serve the public by more than material incentives.⁵

Larson lists three dimensions she believes captures the essence of the modern idea of a profession. First, there is a cogni-

3. R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 6, 9-10 (1953). To Pound's three elements, one might add that a legal professional has special skills and that he is self-disciplined by appropriate ethics. Wright, *What is a "Profession"?*, 29 *CAN. B. REV.* 748-57 (1951).

4. V. COUNTRYMAN, T. FINMAN & T. SCHNEIDER, *THE LAWYER IN MODERN SOCIETY* 373 (2d ed. 1976).

5. M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* x (1977).

tive dimension. This dimension focuses on the education necessary to master specialized legal materials and skills as well as on the techniques of argument or persuasion utilized by legal professionals. Second, there is a normative dimension that centers on a professional's service orientation, guided by distinctive ethics, justifying the privilege of self-regulation. Finally, there is an evaluative dimension that implicitly ranks the legal profession higher than other occupations, emphasizing its characteristics of prestige and autonomy.⁶

Many writers have used a functional model to examine the legal profession, finding it to be a homogeneous, consensual, and an altruistic group, acting to stabilize society.⁷ Under this model, the profession responds to social needs and cognitive complexity, thereby fostering social benefits.

Larson's approach, on the contrary, argues that the modern legal profession has actively advanced needs only it could satisfy, creating a monopolistic situation in pursuit of its narrowly defined self-interest.⁸ Under this perspective, a profession is an occupation that secures control over the supply of its producers of services. This should include control over the training of its members and the qualifications for entry into the profession. By this definition, English lawyers became a profession around 1850. A legal profession arrived in the United States by 1900, but not in many Third World countries until after World War II.⁹ Moreover, under this perspective, there would be no legal profession in historic bureaucratic law or in modern socialist law regimes.¹⁰ A similar definition, looking at the demand side of a

6. *Id.*

7. Campbell, *Lawyers and Their Public*, 1976 JURID. REV. 20, 21-22; Parsons, *Professions*, in 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 536, 545-46 (D. Sills ed. 1968).

8. See M. LARSON, *supra* note 5, at 9-18; Abel, Book Review, 6 BRIT. J.L. & SOC'Y 82, 85 (1979) (reviewing M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977)).

9. Abel, *The Underdevelopment of Legal Professions: A Review Article on Third World Lawyers*, 1982 AM. B. FOUND. RES. J. 871, 872, 885.

10. Bureaucratic law consists of explicit prescriptions, prohibitions, and permissions addressed to more or less general categories of persons or acts, established and enforced by an identifiable government. This type of law becomes the province of centralized rulers and their specialized staffs; it is an adjunct to the rise of the state. Bureaucratic law is deliberately imposed by government rather than spontaneously generated within society. It attempts to define the powers different groups may exercise over one another, but in revolutionary socialist systems it is supposed to be a uniform law that is uniformly implemented for every group and every individual. R. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 50-51 (1976).

market equation, confines the legal profession to producers who dictate both the needs of consumers and how those needs should be met. Under this definition, neither government nor in-house corporate attorneys would be part of the profession because they are generally unconcerned with stimulating demand for legal services.¹¹

Larson contends that the modern legal profession is essentially different from its pre-industrial progenitors; seeming continuities are more apparent than real. The great transformation, which altered the structure of European societies, was dominated by a reorganization of the economy and society around markets. Professionalization then became a process whereby producers of special services sought to constitute and control a market for their expertise. First successful in the nineteenth century, professionalization inaugurated a new form of structured inequality that was distinct from the earlier European model of aristocratic patronage.¹²

Another approach, suggested by the legal historian Harold Berman, would take us back to the eleventh and twelfth centuries to find the origin of the Western legal tradition. Berman contends that the church became an independent European government with its own bureaucracy and legal system. Church and state were thereafter seen more clearly as distinct entities. Secular rulers paid less attention to spiritual matters and concentrated on administering justice through royal courts and maintaining order with peace statutes in their own kingdoms. Canon law, which absorbed many ideas from Roman law, was particularly significant in shaping Western law. The competition between church and state, the tensions within each hierarchy, and the development of corporative associations such as universities all had a beneficial effect of imposing limits on European rulers and encouraging incipient constitutional forms of government.¹³

Other theorists use a category similar to bureaucratic law as part of their larger typology of legal systems. *E.g.*, R. DAHRENDORF, *Market and Plan: Two Types of Rationality*, in *ESSAYS IN THE THEORY OF SOCIETY* 213, 218-19, 222-24 (1968) (plan rationality); M. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 80-88 (1986) (activist state); P. NONET & P. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 29-52 (1978) (repressive law).

11. Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 *INT'L J. SOC. L.* 331, 332-33 (1979); *see generally* T. JOHNSON, *PROFESSIONS AND POWER* (1972).

12. M. LARSON, *supra* note 5, at xvi-xvii, 8.

13. H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRA-*

Under this view, one could argue that professionalism first emerged with the rise of universities and their law faculties in the medieval period. The legal profession then became a vocation emphasizing an intellectual technique, acquired by prolonged formal training, applicable to an important sphere of everyday life.¹⁴

Larson's modern legal profession, which she dates from the nineteenth century, emphasizes attributes associated with the development of reactive or liberal law.¹⁵ Two distinctive legal roles found in societies where reactive law predominates are judges independent from the political branches of government and lawyers—specially trained, with their own interests, organizations, ethics, and reasoning—who provide a check on the bureaucracy's dominance of government. Larson recognizes that development of a "modern" profession was less spontaneous where strong centralized governments existed outside England and the United States. Furthermore, even in the Anglo-American world, the predominant law job is no longer that of a free practitioner in a market of services but that of a salaried specialist in a large organization.¹⁶

No pure reactive law polity or bureaucratic or socialist law nation exists. Rather, all countries have incorporated into their legal systems important elements of customary law and have usually been affected by pluralistic influences from religious or other competing types of law, which partially determine the

DITION 485-88 (1983); see B. TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150-1650*, at 8-12 (1982) [hereinafter B. TIERNEY, *RELIGION, LAW*].

14. 12 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 476-78 (E. Seligman & A. Johnson eds. 1934).

15. M. LARSON, *supra* note 5, at 5-8. In a state where liberal or reactive law dominates, there is an autonomous corpus of legal norms, specialized legal institutions, a secular tradition of legal doctrine, and a strong private legal profession with its own interests and ideals. These characteristics display four levels of autonomy significant to liberal law. Substantively, the rules explicitly formulated and enforced by government do not codify a particular political or religious dogma. Rather, they aim for generality, addressing broadly defined categories of individuals and acts to avoid favoritism. Institutionally, rules are applied by specialized entities whose main task is adjudication. The state, thus, subjects itself to the doctrine of separation of powers. Methodologically, legal reasoning develops a style of justification that contrasts itself from scientific explanation and from moral and political discourse. Occupationally, a private autonomous legal profession, with special training, captures the supply of non-governmental legal services and staffs public legal institutions. R. UNGER, *supra* note 10, at 52-54.

Other theorists use a category similar to Unger's liberal law. *E.g.*, R. DAHRENDORF, *supra* note 10, at 217-19 (market rationality); M. DAMAŠKA, *supra* note 10, at 73-80 (reactive state); P. NONET & P. SELZNICK, *supra* note 10, at 53-72 (autonomous law).

16. M. LARSON, *supra* note 5, at xvii-xviii, 6.

structure of their legal professions.¹⁷ For example, in India where bar associations do not have the degree of autonomy evidenced in some Western nations, government service for a young lawyer provides the aura of prestige that the Anglo-American culture attributes to an attorney in private practice.¹⁸

Dietrich Rueschemeyer, another sociologist, emphasizes three core characteristics of an attorney: (1) specialized knowledge of legal rules, (2) partisan advice to non-kin clients, and (3) representation of these clients before legal authorities or against other parties. The emergence of lawyers with these characteristics tends to occur under bureaucratic rule where there is growth of commercial trade. Trade requires a counsel's partisan loyalty to private clients. As economies become less dependent upon agriculture for the production of wealth, industrialization leads to a marked differentiation in social structure, for which customary law and other informal social control are inadequate.¹⁹

Bureaucratization in modern and medieval societies, as in the ancient bureaucratic empires, absorbs lawyers into service of the state.²⁰ Private attorneys, alternatively, flourish in modern market economies where an indirect regulative role is pursued by government. The rise of private bureaucracies, such as multinational corporations and trade associations, has particularly affected the structure of private practice, with its growth of law firms. For instance, an important difference between Prussia and the United States in the nineteenth century—which affected the mix of government and private lawyers—was that modernization was pushed by government bureaucrats in Prussia but driven by private entrepreneurs in America. These different roads to mo-

17. Leopold Pospíšil, an anthropologist, postulates that human societies do not "possess a single consistent legal system, but as many [legal] systems as there are functioning subgroups." L. POSPIŠIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 98 (1974). This idea may be applied to a modern nation and its legal profession by investigating the functional equivalents for lawyers and judges associated with geographic, ethnic, or religious communities distinct from a nation's official legal system. See K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* 28, 53 (1941); J. MERRYMAN & D. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 355-90 (1978); R. STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 120-57 (1975).

18. Morrison, *Clerks and Clients: Paraprofessional Roles and Cultural Identities in Indian Litigation*, 9 *LAW & SOC'Y REV.* 39, 40 (1974).

19. D. RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES* 1, 6-7 (1973).

20. The distinguishing feature of twelfth to fourteenth century Florentine lawyers, for example, was that their legal skills were put to the service of the state. L. MARTINES, *LAWYERS AND STATECRAFT IN RENAISSANCE FLORENCE* 4, 6 (1968).

dernity established structural patterns and value orientations for the legal profession that are only now in the process of major alteration.²¹

The American view of a modern legal profession is usually associated with the profession's experience in liberal democracies, where it develops with some autonomy from the political arm of the state. This view of "modern," however, has to be modified to take account of the twentieth century socialist revolutions that have been hostile to legal professions independently trained and autonomously partisan. The capitalist view of a profession is one where autonomy from external control, protection from lay competition, substantial remuneration, trust, and high status are granted in exchange for a promise of private collective self-regulation designed to promote the interests of both clients and society in general. In-house regulators promise a substantial level of technical competence and "professional" ethics.²²

An alternative model, socialist in nature, would provide legal services through government agencies or private bureaucracies regulated by the state. Comprehensive legal insurance plans might satisfy this professional model. These organizations would be controlled by state policies aimed toward some conception of the public good and would be independent of the profession as well as its clients.²³

II. THE ROLE OF LEGAL EDUCATION

Each of the preceding approaches to the question of what is the legal profession has merit for a particular purpose. Pound's highly idealized view might goad attorneys to greater public service in developing legal aid for the indigent. Larson's model fits closely with the historical experience in England and the United States. Rueschemeyer's perspective assists one in understanding developments in Germany.

However, to have a definition broad enough to permit comparative analysis of the legal professions in capitalist and socialist nations, Third World and developed countries, and under civil law, common law, and religious law traditions, one must focus primarily on the cognitive dimension of law. Consequently, I would define the legal profession as an occupation, with special

21. D. RUESCHEMEYER, *supra* note 19, at 8-9.

22. *Id.* at 12-14.

23. *Id.* at 14.

power and prestige, consisting of members who use knowledge and skills, acquired by prolonged formal training, associated with law and legal argument. This definition excludes most customary law roles in ancient and medieval societies, and probably first fits the large-scale education of law students at the University of Bologna in the twelfth century.

Applied to modern nations, this definition would include any person, having spent significant time in legal education, who holds a position utilizing law and legal argument. It encompasses advocates, counselors, notaries, corporate lawyers, government attorneys, judges, legislators, and law professors. This view would greatly expand the perceived size of the legal profession in countries such as Japan and the Soviet Union, compared to definitions which focus on the practicing bar in Europe or the United States.

One might contend that police should be included among the legal professions. Police certainly help to determine both the quantity and style of law in modern societies. They exercise more or less social control from one setting to another, defining or responding to conduct as deviant within the framework of law and government. In addition to a penal style, reacting to violators of the criminal law with force or the threat of force, police also use a conciliatory style, restoring social harmony between people who have an ongoing relationship, as in the same family or neighborhood. Occasionally, police employ a compensatory style of social control, asking an individual to pay damages to a victim after a cursory review of the facts. These conciliatory and compensatory styles approximate the role of mediator in many societies, utilizing common norms of custom to resolve disputes.²⁴ Police, however, are not encompassed by my definition of a legal profession because they normally receive only a cursory education in legal argument and study only penal law. This contrasts with government attorneys, who may defend their client with legal argument or make significant policy decisions based on the same legalistic considerations.

An attempt to operationalize this definition of the legal profession, to investigate its size and structure by looking at statistics on university law graduates or registered lawyers, involves problems of over- and underestimation. To illustrate, in some

24. D. BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 2-3 (1980). For examples of police involvement in dispute resolution, see *id.* at 109-116.

Latin American countries many persons holding law degrees do not actually practice law. This pattern exists where legal studies serve as the conventional training for elites, and the university system does not offer adequate coursework in business or public administration. But it also appears to be the situation in Germany (for other reasons), where lawyers employed by corporations and the government carry out duties only marginally related to the law. On the other side, in many nations people without formal legal training perform jobs closely connected with law, including insurance, tax, property titles, and banking. *Munshis* (clerks) in India act as intermediaries between a lawyer and his client, and carry out many court procedures. In Japan, university law departments train proportionately about as many students as United States law schools, yet those that work as legal advisers are not traditionally counted as lawyers.²⁵

By focusing on the cognitive aspect of legal professions, in particular on the role university law faculties play in educating jurists, one discovers an unbroken history during which modern legal professions have emerged. The study of law in continental Europe has been associated for centuries with instruction at the university. To a significant extent this defines the salient characteristic of the civil law tradition.²⁶ The genesis of European university legal education occurred around 1100, when two universities distinguished themselves in developing and transmitting knowledge to such a degree that they attracted students from throughout Europe. The University of Bologna became famous for its instruction in Roman law and canon law, while the University of Paris, renown for its schools of theology and liberal arts, was influential for its organizational structure.²⁷

In England and the United States, by contrast, it was not until well into the twentieth century that law school education replaced apprenticeship as the dominant avenue to legal ca-

25. Morrison, *supra* note 18, at 43-48; Rueschemeyer, *The Legal Profession in Comparative Perspective*, in *SOCIAL SYSTEM AND LEGAL PROCESS* 97, 104-06 (H. Johnson ed. 1978).

26. See J. MERRYMAN, *supra* note 1, at 59-64, 115-17. The systematic, scholarly examination of the whole of Roman law was the first academic discipline in Europe's history. W. ULLMANN, *LAW AND POLITICS IN THE MIDDLE AGES: AN INTRODUCTION TO THE SOURCES OF MEDIEVAL POLITICAL IDEAS* 79 (1975) [hereinafter W. ULLMANN, *LAW AND POLITICS*].

27. See Clark, *The Medieval Origins of Modern Legal Education: Between Church and State* 35 *AM. J. COMP. L.* 653 (1987).

reers.²⁸ Nevertheless, American university law schools by the end of the nineteenth century already adopted important elements related to the goals, method, structure, and ceremony of European—and especially German—legal education. Modern American legal education, therefore, can be better understood as part of a long and rich university tradition now more than nine centuries old.²⁹

III. THE ORIGINS OF MODERN LEGAL EDUCATION

A. *The Holy Roman Empire and Roman Law*

The great revival of legal studies occurred in Bologna around 1076, when Pepo began lecturing on Justinian's *Codex* and *Institutiones*.³⁰ Emperor Justinian's sixth century compilation of Roman law, executed by Tribonian who led various commissions of government officials, lawyers, and law professors, consisted of three parts: (1) the *Codex* (published in two parts, in 529 and 534), collecting 4,600 imperial constitutions; (2) the *Digesta* or *Pandectae* (533), representing the opinions of 40 jurists from the classical and postclassical periods; and (3) the *Institutiones* (533), heavily based on Gaius and intended to serve as a summary for the education of jurists. To this compilation Justinian added his own reform legislation—dealing primarily with administrative, church, family, and inheritance matters—known as the *Novellae leges* (translated into Latin in 535).³¹

28. B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965*, at 349-75 (1967); R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 24, 209 (1983).

29. Clark, *Tracing the Roots of American Legal Education—A Nineteenth Century German Connection*, 51 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 1, 1-21 (1987).

30. See 1 H. RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* 111-13, 120-21 (F. Powicke & A. Emden eds. 1936); Kuttner, *The Revival of Jurisprudence*, in *RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY* 299, 301-02 (R. Benson & G. Constable eds. 1982); Vergottini, *Lo studio di Bologna, l'impero, il papato*, in 1 *STUDI E MEMORIE PER LA STORIA DELL'UNIVERSITÀ DI BOLOGNA* 19, 20-23 (nuova serie 1956); see also Hyde, *Commune, University, and Society in Early Medieval Bologna*, in *UNIVERSITIES IN POLITICS: CASE STUDIES FROM THE LATE MIDDLE AGES AND EARLY MODERN PERIOD* 17 (J. Baldwin & R. Goldthwaite eds. 1972). See generally J. A. SMITH, *MEDIEVAL LAW TEACHERS AND WRITERS: CIVILIAN AND CANONIST* (1975) (brief description of many Roman and canon law professors).

31. G. DULCKEIT, F. SCHWARZ & W. WALDSTEIN, *RÖMISCHE RECHTSGESCHICHTE: EIN STUDIENBUCH* 277-82 (7th ed. 1981). The first edition actually called *Corpus iuris civilis*, combining the *Digesta*, *Codex*, and *Institutiones* was edited by Dionysius Gothofredus

Although teachers were reported to have taught Roman law at Orléans, Parma, Pavia, Pisa, Ravenna, Rome, and Verona in the eleventh century, Bologna is usually viewed as the first great university since its teachers attracted students from throughout Europe. Bologna was also later known for its schools of liberal arts and medicine.³²

Other teachers joined Pepo at Bologna, and between 1085 and 1090 the rebirth was definitely established through the lectures of Irnerius. Irnerius, a layman, interpreted Justinian's *Corpus juris*, including its rediscovered *Digesta*, in a direction similar to the tradition at the school in Ravenna to favor the supremacy of imperial over ecclesiastical power.³³ The monar-chic descending theme of government and law found in Justinian's *Codex* and *Novellae* proved too attractive for German emperors to resist. They supported the new lecturing and writing, which helped to establish Bologna as the center for Roman law studies and to draw thousands of students from most parts of Europe.³⁴

in 1583. *Id.* at 280-81.

A modern English translation of the *Corpus juris* consists of 4,503 pages, divided as follows: Digest (2,734); Code (1,034); Institutes (173); and Novels (562). See 2-17 THE CIVIL LAW (S. Scott ed. 1932). For an improved translation of the Digest, see THE DIGEST OF JUSTINIAN (T. Mommsen, P. Krueger & A. Watson eds. 1985).

32. 1 H. RASHDALL, *supra* note 30, at 104-07, 233-39. Stephen Kuttner considers Pavia the only center at which serious scholarly reflection on legal texts occurred prior to Bologna. Kuttner, *supra* note 30, at 302. Cf. S. STELLING-MICHAUD, L'UNIVERSITÉ DE BOLOGNE ET LA PÉNÉTRATION DES DROITS ROMAIN ET CANONIQUE EN SUISSE AUX XIII^e ET XIV^e SIÈCLES 16-17 (1955); P. VACCARI, STORIA DELLA UNIVERSITÀ DI PAVIA 3-13 (2d ed. 1957).

33. 1 H. RASHDALL, *supra* note 30, at 107, 110, 113-20, 123-24, 131, 258-59; S. Stelling-Michaud, *supra* note 32 at 18-20; W. ULLMANN, PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES 228 (1961); P. VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE 54-56 (2d ed. 1929); Vergottini, *supra* note 30, at 23, 29, 31; see 2 F. SAVIGNY, GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER 224-37 (1816); 4 F. SAVIGNY, *supra* at 1-8, 24-39 (1826). The University of Bologna will celebrate its 900th anniversary in 1988.

Irnerius's Teutonic name was occasionally spelled Wernerius, leading some to conclude that he was perhaps German. 1 K. KROESCHELL, DEUTSCHE RECHTSGESCHICHTE (BIS 1250) 233 (6th ed. 1983); W. ULLMANN, LAW AND POLITICS, *supra* note 26, at 84; see 4 F. SAVIGNY, *supra* at 13-17. Rashdall maintained that he was a Bolognese citizen by birth. 1 H. RASHDALL, *supra*, at 117. After 1116 Irnerius also worked as a judge and counselor in the imperial service for Emperor Henry V. *Id.*; W. ULLMANN, LAW AND POLITICS, *supra*, at 84-85. In 1118 he took part in the election of an antipope in Rome. 1 H. RASHDALL, *supra*, at 119.

Peter Crassus, a teacher at Ravenna, had used Roman law to defend secular power in his 1084 tract, *Defensio Heinrici IV regis*. Benson, *Political Renovatio: Two Models from Roman Antiquity*, in RENAISSANCE AND RENEWAL IN THE TWELFTH CENTURY 339, 360 (R. Benson & G. Constable eds. 1982).

34. Coing, *Die juristische Fakultät und ihr Lehrprogramm*, in 1 HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE: MITTE-

B. *The Church and Canon Law*

The advantage the Germanic Roman empire derived from a venerable and continuous system of Roman law, in which an emperor was seen as the source of authority, suggested to partisans of the papacy the idea of establishing an opposing ecclesiastical legal system, in which the pope should take an analogous place. Canon law became a system distinct from both theology and Roman law.³⁵ The Bolognese monk Gratian, who may have been a pupil of Irnerius and later a teacher at Bologna, helped to meet the Roman secular law challenge. He systematically applied the theologian Abélard's method of solving contradictions to canon law, publishing his textbook and compilation *Concordia discordantium canonum* in 1140.³⁶ The *Concordia* stimulated papal pretensions and rendered previous collections of canon law obsolete—such as the *Tripertitum*, *Liber decretorum*, and pioneering *Panormia* of Ivo, Bishop of Chartres (1040-1115).³⁷

The church did what it could to halt Roman law developments making religion a servant of the state. Since Roman law studies were popular with clerics who pursued their education at Bologna, Popes Alexander III (1159-1181), Clement III (1187-1191), and Innocent III (1198-1216) attempted to control the emerging university by dealing with student organizations. Pope Honorius III authorized the Bologna cathedral archdeacon in 1219 to confer the *licentia docendi* on students, thereby trying to undercut the power of Bolognese professors to grant teaching licenses.³⁸ After the university was closed between 1286 and 1289 because of discord with the papacy, Pope Nicholas IV issued a bull in 1291 that explicitly recognized the authority to grant a *licentia docendi* in either civil (i.e., Roman, non-religious) or canon law. This teaching license carried the right to teach anywhere in Europe (*jus ubique docendi*). Further disagreement

LALTER (1100-1500), DIE GELEHRTEN RECHTE UND DIE GESETZGEBUNG 39, 81-83 (H. Coing ed. 1973) [hereinafter Coing, *Die juristische Fakultät*]; Vergottini, *supra* note 30, at 30-37, 40-41; see W. ULLMANN, LAW AND POLITICS, *supra* note 26, at 61-66.

35. 1 H. RASHDALL, *supra* note 30 at 134-36.

36. *Id.* at 126-30, 132-34; W. ULLMANN, LAW AND POLITICS, *supra* note 26, at 165-66, 177; Benson, *supra* note 33, at 359-61; Vergottini, *supra* note 30, at 37-39.

37. 1 H. RASHDALL, *supra* note 30, at 129-34, 137-38; Kuttner, *supra* note 30, at 303, 311; see H. BERMAN, *supra* note 13, at 143-44.

38. S. STELLING-MICHAUD, *supra* note 32, at 20-21, 128; Vergottini, *supra* note 30, at 84-91.

with the papacy closed the university between 1306 and 1309, after which it reopened with a papal bull from Clement IV.³⁹

Gratian's *Concordia*—later referred to as *Decretum Gratiani*—provided canon law with an authoritative and learned sourcebook, analogous to Justinian's *Corpus juris*. This made it an appropriate subject to study at the university. The *Decretum* went a long way toward clarifying the writings of church fathers, apostolic and conciliar canons, and papal decretals and decrees, as well as demarcating the boundary between ecclesiastical and civil courts, and between church and state in general. It systematized approximately 3,800 canonical texts on the nature and sources of law, ecclesiastical offices and behavior, church dogma, ritual, religious orders, and other issues of administration and organization. It contributed to rational procedure in episcopal and papal courts, and effectively preempted the fields of family and inheritance law.⁴⁰ Popes from the twelfth to fifteenth century authorized supplements to the *Decretum*, much of which was published together in the sixteenth century as the *Corpus juris canonici*.⁴¹

The medieval church after Gratian assumed more and more the character of a legal corporation. Canon law became clearly differentiated from theology. The cry "freedom of the church" (*libertas ecclesiae*) involved a battle to emancipate the clergy from its former subservience to temporal government, which was

39. 2 J. BOWEN, A HISTORY OF WESTERN EDUCATION: CIVILIZATION OF EUROPE, SIXTH TO SIXTEENTH CENTURY 131-32 (1975); P. KIBRE, SCHOLARLY PRIVILEGES IN THE MIDDLE AGES: THE RIGHTS, PRIVILEGES, AND IMMUNITIES OF SCHOLARS AND UNIVERSITIES AT BOLOGNA, PADUA, PARIS, AND OXFORD 31-34 (1962).

40. M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION 23-26 (1967); W. ULLMANN, LAW AND POLITICS, *supra* note 26, at 166; F. WIEACKER, PRIVATRECHTSGESCHICHTE DER NEUZEIT: UNTER BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG 72-76 (2d ed. 1967); Nörr, *Die Entwicklung des Corpus iuris canonici*, in 1 HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE: MITTELALTER (1100-1500), DIE GELEHRTEN RECHTE UND DIE GESETZGEBUNG 835, 836-38 (H. Coing ed. 1973); [hereinafter Nörr, *Corpus iuris canonici*]; see Kuttner, *The Father of the Science of Canon Law*, 1 JURIST 2, 15 (1941) (the plural *Decreta* was commonly used to refer to Gratian's opus).

41. A. NORTON, READINGS IN THE HISTORY OF EDUCATION: MEDIAEVAL UNIVERSITIES 56 (1909); Nörr, *Corpus iuris canonici*, *supra* note 40, at 845. See generally 1 S. KUTTNER, REPERTORIUM DER KANONISTIK (1140-1234): PRODROMUS CORPORIS GLOSSARUM (1937, reprinted 1973) (growth of canonistic writing in the century following Gratian).

A modern English translation of Gratian's *Decretum* covers over 1400 pages. See 1 *Corpus Iuris Canonici* (E. Friedberg ed. 1879, reprinted 1959).

now considered a betrayal of the church's divine mission. Educated canonists were the generals in this war.⁴²

IV. THE INCREASING DEMAND FOR ACADEMIC LAWYERS

Bologna became in the twelfth century the principal European center for Roman law and canon law. The university, as the seat for both laws, served to varying degrees and in different ways the interests of both state and church.⁴³ This was true even though both Roman law and canon law could be interpreted to embrace a strict monarchic system of government supported by unitary descending themes of law creation and administration.⁴⁴

On the secular side, a proliferating class of lawyers—trained at Bologna and other law faculties—promoting rationalism and secularization, labored to reduce the role of the church in government and to expand the authority of other political entities.⁴⁵ For example, a thirteenth century staff of educated notaries, attorneys, judges, and accountants worked at the imperial chancery to process the flow of petitions directed to German Hohenstaufen emperors.⁴⁶ Other graduates worked as legal advisers, notaries, or judges to cities, kings, princes, and lords of manors.⁴⁷

42. H. MITTEIS, *THE STATE IN THE MIDDLE AGES: A COMPARATIVE CONSTITUTIONAL HISTORY OF FEUDAL EUROPE* 180-81 (H. Orton trans. 1975).

43. See generally C. CALCATERRA, *ALMA MATER STUDIORUM: L'UNIVERSITÀ DI BOLOGNA NELLA STORIA DELLA CULTURA E DELLA CIVILTÀ* (1948); A. SORBELLI, *STORIA DELLA UNIVERSITÀ DI BOLOGNA: IL MEDIOEVO* (1944).

44. W. ULLMANN, *LAW AND POLITICS*, *supra* note 26, at 83-84. Many decretals supporting papal governmental theory found their way into the *Liber extra* (i.e., a "supplementary book" to the *Decretum*). Pope Innocent III, for instance, explained how the allegory of soul and body applied to the *Rex Romanorum* (a preliminary royal status evolving into the Roman emperorship) in a way that required future emperors to seek papal approval. *Id.* at 142, 144-45.

Nevertheless, medieval canonists were aware of competing tensions. Early Christian texts, filled with a sense of community, survived in Gratian's *Decretum*. Decretists, while recognizing a pope's sovereignty, explored implications that the universal church would be strengthened by acquiescence from general councils. B. TIERNEY, *RELIGION, LAW*, *supra* note 13, at 13-18.

45. See 1 H. RASHDALL, *supra* note 30, at 258-60; W. ULLMANN, *LAW AND POLITICS*, *supra* note 26, at 213.

46. H. COING, 1 *EUROPÄISCHES PRIVATRECHT: ÄLTERES GEMEINES RECHT* (1500 BIS 1800) 12 (1985) [hereinafter H. COING, *EUROPÄISCHES PRIVATRECHT*]. See generally *THE HISTORY OF FEUDALISM* 217 (D. Herlihy ed. 1970). For documentary fragments describing the handling of petitions, see *id.* at 272-75; translated from *Acta imperii inedita seculi XIII: Urkunden und Briefe zur Geschichte des Kaiserreichs und des Königreichs Sicilien in den Jahren 1198 bis 1273*, at 733-39 (E. Winkelmann ed. 1880).

47. H. BERMAN, *supra* note 13, at 120, 162. By 1200 both Bologna and Florence had a guild of legal professionals who attained a high status along with the nobility and merchants. Nörr, *Institutional Foundations of the New Jurisprudence*, in *RENAISSANCE*

On the religious side, many of the major medieval popes after the time of Gratian were canonists rather than theologians.⁴⁸ Pope Alexander III (1159-1181) brought the papal chancery into close contact with Bolognese canon law. Legal training facilitated the tasks of legislating for Christian society and administering a complex hierarchical organization.⁴⁹ Alexander III, for instance, ended from a legal standpoint the Investiture Controversy by issuing decretals inspired by Gratian's juristic theory.⁵⁰

The papal curia, and especially its evolving chancery (*Rota romana*) that handled an increasing flow of disputes sent to Rome, required a large cadre of legally trained assistants, whom Bologna and other newly formed universities educated. These learned jurists brought with them Roman law and their law professors' scholastic techniques, which influenced both procedural and substantive canon law. Episcopal chanceries, furthermore, sought canonistic students for archdeacons' offices and for numerous judicial positions (especially the position of *officialis*

AND RENEWAL IN THE TWELFTH CENTURY 324, 328 (R. Benson & G. Constable eds. 1982) [hereinafter Nörr, *New Jurisprudence*]. Over 200 jurists worked in Modena as judges, advisors, or teachers in the 50 year period after 1270. Coing, *Die juristische Fakultät*, *supra* note 34, at 88.

The English King Edward I, on his return trip from the holy land, took a renowned Roman law professor from Bologna, Franciscus Accursius, along as an advisor. H. COING, *EUROPÄISCHES PRIVATRECHT*, *supra* note 46, at 11-12.

48. H. COING, *EUROPÄISCHES PRIVATRECHT*, *supra* note 46, at 11; Le-Bras, *Bologne monarchie médiévale des droits savants*, in 1 STUDI E MEMORIE PER LA STORIA DELL'UNIVERSITÀ DI BOLOGNA 1, 10 (nuova serie 1956).

49. See W. ULLMANN, *LAW AND POLITICS*, *supra* note 26, at 140, 168; W. ULLMANN, *THE GROWTH OF PAPAL GOVERNMENT IN THE MIDDLE AGES: A STUDY IN THE IDEOLOGICAL RELATION OF CLERICAL TO LAY POWER* 373 (2d ed. 1962). Alexander III, the former Rolandus Bandinelli, may have taught theology at Bologna. However, he was not the Bolognese canon law master who wrote *Stroma* and *Sentences*. Noonan, Jr., *Who Was Rolandus?*, in *LAW, CHURCH AND SOCIETY: ESSAYS IN HONOR OF STEPHAN KUTTNER* 21, 43-44 (K. Pennington & R. Somerville eds. 1977); Nörr, *New Jurisprudence*, *supra* note 47, at 330-31; Weigand, *Magister Rolandus und Papst Alexander III*, 149 *ARCHIV FÜR KATHOLISCHES KIRCHENRECHT* 3-44 (1980).

Popes after Alexander III, including Innocent III and IV, Gregory IX, and Boniface VIII, until the fourteenth century were usually highly qualified jurists. They frequently intervened personally in the vast litigation that flowed into the curia. Most secular rulers, in contrast, were barely able to write a Latin sentence. H. COING, *EUROPÄISCHES PRIVATRECHT*, *supra* note 46, at 11; R. SOUTHERN, *WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES* 131-32 (1970); see W. ULLMANN, *LAW AND POLITICS*, *supra* note 26, at 140.

50. W. ULLMANN, *LAW AND POLITICS*, *supra* note 26, at 167. Gratian helped to defuse the proprietary church system by postulating that a lay church owner should be dispossessed and converted into a patron with specific duties toward the church. Patronage issues, moreover, were exclusively under ecclesiastical jurisdiction. *Id.*

generalis), which proliferated after 1150.⁵¹ Ecclesiastical court jurisdiction was extensive by the late Middle Ages, encompassing—in addition to strictly religious matters or cases involving clerics—family and inheritance law issues as well as many questions concerning contracts and corporations. The church, in fact, was the first important entity to absorb large numbers of learned jurists, and by so doing became the first home for the new legal profession.⁵² Hastings Rashdall described the situation:

It was not so much the specific doctrines taught by the *Corpus Juris Canonici* that favoured papal usurpations and ecclesiastical abuses of all kinds as the habit of mind which its study created. In all ages the lawyers, invaluable as a conservative force, have been as a body greater enemies of reform than the priests. The worst corruption of the Middle Age lay in the transformation of the sacerdotal hierarchy into a hierarchy of lawyers.⁵³

In the twelfth century, both imperial and papal authorities became well equipped with lawyers to help with their controversies. Emperors now had Roman jurists to provide ideological support for their German armies; popes had a newly ordered canon law with a growing international bureaucracy to apply it.⁵⁴

V. A PROLIFERATION OF UNIVERSITIES

Success generated imitation. Universities—forty-six of them

51. H. COING, *EPOCHEN DER RECHTSGESCHICHTE IN DEUTSCHLAND* 49 (4th ed. 1981) [hereinafter H. COING, *EPOCHEN*]; W. ULLMANN, *LAW AND POLITICS*, *supra* note 26, at 170-71; NÖRR, *New Jurisprudence*, *supra* note 47, at 332-34.

More than 100 academic canonists became bishops. W. ULLMANN, *LAW AND POLITICS*, *supra*, at 173. Canonists became the technicians who in actual fact worked the mechanism of the *societas christiana*. See 1 H. RASHDALL, *supra* note 30, at 261-62.

52. H. COING, *EPOCHEN*, *supra* note 51, at 49-50; Dolezalek & Nörr, *Die Rechtsprechungssammlungen der mittelalterlichen Rota*, in 1 *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE: MITTELALTER* (1100-1500), *DIE GELEHRTEN RECHTE UND DIE GESETZGEBUNG* 849, 849-50 (H. Coing 1973); S. Kuttner, *The Scientific Investigation of Mediaeval Canon Law: The Need and the Opportunity*, in *GRATIAN AND THE SCHOOLS OF LAW, 1140-1234*, at 493, 493-94 (1983); Trusen, *Die gelehrte Gerichtsbarkeit der Kirche*, in 1 *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN PRIVATRECHTSGESCHICHTE: MITTELALTER* (1100-1500), *DIE GELEHRTEN RECHTE UND DIE GESETZGEBUNG* 467, 467-87 (H. Coing ed. 1973).

53. 1 RASHDALL, *supra* note 30, at 139-40.

54. B. TIERNEY, *THE CRISIS OF CHURCH & STATE 1050-1300*, at 98 (1964). The major political issue dividing the emperor and pope in the twelfth century concerned the emperor's claim to sovereignty over Rome and over Italy in general. *Id.* at 98-101.

by the year 1400—modeled on either the example at Bologna or Paris, began when masters and students migrated to a new town—as at Padua or Orléans—or when founded by secular rulers or by ecclesiastical authority.⁵⁵

Many princes and city leaders established universities because they believed it would be advantageous to have a center where lawyers could be trained to assist in the political development and administration of their regimes. At first, lawyers worked as general counselors, diplomats, judges, or notaries. At distinct tempos in various European polities, centralizing administrative systems—orchestrated by civil servants at the center and implemented by officials at the local level—gradually replaced feudalism. These evolving administrative and judicial bodies stimulated great demand for academically educated jurists, who took places formerly occupied by noblemen. The medieval theory of pluralistic sources of law, moreover, facilitated acceptance by judges or administrators of a Roman legal norm over a territory's or city's statutes and customs. Roman law, as *ratio scripta*, further accentuated demand for university trained lawyers.⁵⁶

European universities generally in the fourteenth century became more closely involved with aristocratic elements. Already by the end of the twelfth century many doctors of law demanded to be called lords (*domini*), rather than masters or doctors. Learning and knighthood were no longer seen as inconsistent forces but as complementary pillars of society. The idea of an aristocracy of merit had particular importance for law professors and jurists who, because of their power and in recognition of their expertise, were granted titles such as *militia legem* or *chevalier ès lois* to parallel the knightly *militia armata* or *chevalier en armes*. Bartolus de Saxoferrato (1313-1357), for

55. G. COMPAYRÉ, *ABELARD AND THE ORIGIN AND EARLY HISTORY OF UNIVERSITIES* 61-69 (1893, reprinted 1969); H. DENIFLE, *DIE ENTSTEHUNG DER UNIVERSITÄTEN DES MITTELALTERS BIS 1400*, at 219-21, 752-53 (1885).

56. H. COING, *EPOCHEN*, *supra* note 51, at 49-52. The prevalent theory of sources of law, as developed by university law professors, considered Roman law to be *ratio scripta*. Thus, although a judge should apply a local statute or custom when it was clearly appropriate to the case at hand, if a custom could not be proved or a statute was not directly on point, he could refer to Roman law to fill the gap in local law. In addition, a judge was entitled to construe local law within the framework of Roman legal science. H. COING, *EUROPÄISCHES PRIVATRECHT*, *supra* note 46, at 12-13, 39-40.

instance, received an accolade from Emperor Charles IV with the right to bear the arms of Bohemia.⁵⁷

By 1400 educated jurists could be found in most parts of Europe. The pattern of university legal education—with its distinctive goals, method, structure, and ceremony—has since spread to virtually every nation, including common law countries. Third World nations, formerly colonies of European powers, have embraced university legal education as a symbol of modernization. Today's legal professions, defined by men and women who have experienced a common socialization, possess significant similarities, including characteristic modes of thought and discourse. It is in these commonalities that the potential for international communication and mutual understanding exists.

57. A. COBBAN, *THE MEDIEVAL UNIVERSITIES: THEIR DEVELOPMENT AND ORGANIZATION* 231-32 (1975); C. WOOLF, *BARTOLUS OF SASSOFERRATO: HIS POSITION IN THE HISTORY OF MEDIEVAL POLITICAL THOUGHT* 3 (1913); Kantorowicz, *Kingship under the Impact of Scientific Jurisprudence*, in *TWELFTH-CENTURY EUROPE AND THE FOUNDATIONS OF MODERN SOCIETY* 92-99 (E. Clagett, G. Post & R. Reynolds eds. 1966, reprinted 1980).