Rome and the Barbarians : The Privilege of Law

Soazick Kerneis

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Abstract: The inheritance of Roman law is complex. On the same background created by Rome, specific legal forms grew up which resulted of the process of acculturation. In the Late Empire, there were many barbarians in the Roman army and military judges had to accommodate Roman rules with tribal norms The so-called barbarian laws are to be found in this military context. They were issued as a privilege, so that the bond of peoples to their own customs was strenghtened and proto-national legal aggregates settled into shape.

Résumé : Le legs du droit romain est beaucoup plus complexe qu'il n'y paraît. Sur le même terreau façonné par Rome s'épanouirent des formes juridiques différentes, produits de processus d'acculturation variables. Aux IV^e^ et V^e^ siècles, la présence barbare dans l'armée romaine était très forte et les juges militaires eurent à concilier les normes romaines aux traditions des unités tribales. C'est dans ce contexte militaire qu'il faut considérer l'origine des lois dites barbares, des lois que les soldats barbares avaient reçues en privilèges. De la sorte se renforça le lien des peuples à ces « lois coutumières » et prirent forme des ensembles juridiques « proto-nationaux ».

Keywords: Barbarian laws – Military laws – Theodosian code – Customs – Privilege

Mots clés : Lois barbares – Droit militaire – Code théodosien – Coutumes – Privilège

1. The terms used to refer to the sources of law are still marked by the fundamental influence of Rome: *lex* and *consuetudo*. However, even if this semantic legacy is certain, it is much more difficult to know what those terms referred to in the Roman period. It would assuredly be quite risky to transpose our modern categories and to consider laws as impersonal and general rules issued from sovereign powers and customs as spontaneously formed uses that have been accepted by the concerned social groups.

2. There is much to say about the very concept of law in Roman Antiquity but this is not the place to do so[1]. We will rather focus towards the topic of customs because the matter is linked to the problem of the so-called barbarian laws. In Classical Rome, rhetors were the first to be interested in customs[2]. Cicero

1 The literature dedicated to this subject is very vast. Against a widespread opinion considering *leges* were scarce in the Roman Republic, D. Mantovani, "*Legum multitudo* e diritto privato. Revisione critica della tesi di Giovanni Rotondi", in *Leges publicae. La legge nell'esperienza giuridica romana*, J.-L. Ferrary (dir.), Pavia, 2012, p. 707-767, who, against a widespread opinion which considers that legislation was scarce in the Roman Republic, emphasises that even in the field of private law, the number of *leges publicae* was considerably larger than usually assumed, and constituted a key component of the Roman jurists' writings and thought. J.-L. Ferrary, *Recherches sur les lois comitiales et sur le droit public romain*, Pavia, 2012, sums up the recent developments in research concerning Roman public law, and particularly deals with the history of historiography and the representations researchers could have about the sources of Republican law. Concerning the imperial period, J.-P. Coriat, *Le prince législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du Principat*, [Paris], 1997 (Bibliothèque des Écoles françaises d'Athènes et de Rome, 294). A. J. B. Sirks, *The Theodosian Code. A Study*, Friedrichsdorf, 2007.

2 Among a huge bibliography, J. Gaudemet, "La coutume au Bas-Empire. Rôle pratique et notion théorique", *Labeo*, 2, 1956, p. 65-80 and *Études de droit romain*, Napoli, 1979, t. 1 ; C. Humfress, "Law and Custom under Rome", in *Law,*

thought that they were sources of law and that their authority was based on their ancientness and on popular will. But his discourse was quite general[3]. In Late Antiquity, the problem of the relationship between laws and customs grew up since the generalisation of the Roman citizenship in 212. They could be considered *praeter legem, secundum legem* or even *contra legem* depending on the specificity of the context and the solutions applied just to the cases they concerned. Different criteria were brought up to characterise customs as such, like ancientness, users' support or rationality. But, as it has already been noticed, it is impossible to find an explicit and general theory of custom in Late Antiquity. Moreover, in the first book of the Theodosian code, there is no mention of customs among the sources of law. Custom as a general concept seems to be a medieval, rather than an ancient, invention[4]. Yet the influence played by Late Antiquity in the very representation of the idea of customs is nonetheless fundamental.

3. If Roman jurisconsultes did not cope with the theoretical question of the custom, the problem of the relationship between laws and customs did occur in the practice of law. Everywhere in the provinces, local rules went alongside Roman law and the judges had to manage the discrepancies by the way of arrangements[5]. Of course, it is impossible to grasp the realities of native laws: when texts mentioned the *consuetudines* of some cities, those customs were only considered in the perspective of their interactions with Roman law. Legal anthropology has underlined that the very existence of custom does not deal with popular will but is linked to a legal order anxious to choose between local traditions which ones he will consecrate as customs. In the Late Empire, customs are mainly to be shown in administrative matters and it should be that these administrative customs are part of the very legacy of Rome. Indeed, they helped to shape particular identities.

4. The numerous occurrences of the word *consuetudo* in administrative matters have often been noted[6]. The word was particularly mentioned in fiscal matters, customs being invoked either as a justification for taxes or as a way to denounce their excesses. In the Late Empire, numerous fiscal systems were implemented, and a constitution issued by Honorius suggests the existence of a list of every diocese in the provinces mentioning, for each of them, their fiscal customs and the possible exemptions they could have been granted[7].

Custom, and Justice in Late Antiquity and the Early Middle Ages, A. Rio (ed.), London, 2011, p. 23-49.

3 The normative value of customs in classical Roman law is a *vexata quaestio*. A. A. Shiller, J. A. C. Thomas, B. Schmiedel consider they did not have a normative functions, whereas J. Gaudemet, J. Mélèze-Modrzejewski think that classical jurists considered them as sources of law. Summary of the question, J. Mélèze-Modrzejewski, "Loi et coutume dans l'Égypte grecque et romaine. Les facteurs de formation du droit en Égypte d'Alexandre le Grand à la conquête arabe", *Journal of Juristic Papyrology*, 21, 2014, p. 358-359.

4 About the medieval creation of the concept out of diverse elements in Roman law, J.-M. Carbasse, "Coutume, temps, interpretation", *Droits*, 30, 2000, p. 15-28. On the part played by judges in the creation of customs, J. Krynen, "Entre science juridique et dirigisme: le glas médiéval de la coutume", *Cahiers de recherches médiévales* [Online], 7 | 2000, put online on 03 january 2007, read on 09 december 2013. URL : http://crm.revues.org/892 ; DOI : 10.4000/crm.892. R. Jacob, "La coutume, les mœurs et le rite. Regards croisés sur les catégories occidentales de la norme écrite", *Extrême-Orient, Extrême-Occident*, 23, 2001. La coutume et la norme en Chine et au Japon, p. 150 : "la naissance d'un droit coutumier dans l'Europe médiévale fut une innovation".

5 In Egypt, exceptional documents preserved on papyrus provide a glimpse on the practice of law, the interactions between laws and customs. But what about the process of acculturation in the Western part of the Empire? Mélèze-Modrzejewski, "Loi et coutume dans l'Égypte grecque et romaine", *art. cit.*, p. 26 says: "dans les provinces occidentales, déjà fortement latinisées, la romanisation aura été assez rapide et assez profonde: les Gaulois ou les Espagnols étaient culturellement prêts à adhérer au droit romain. En Orient, dans des pays de vieilles traditions culturelles et juridiques, la résistance paraît au contraire avoir été plus forte que l'adhésion". I believe that new epigraphical sources emphasize that there were also many ways to do with Roman law in the Western part of the Empire and that we have to analyse those practices in terms of acculturation rather than resistance. S. Kerneis, "Gauloiserie matrimoniale. Les tuiles de Châteaubleau et le droit romain", *Carmina iuris. Mélanges Michel Humbert*, E. Chevreau, A. Laquerrière-Lacroix & D. Kremer (dir.), Paris, 2012, p. 331-345.

6 J. Gaudemet, *La formation, op. cit.*, p. 108-109. J. Mélèze-Modrzejewski, "Loi et coutume dans l'Égypte grecque et romaine", *art. cit.*, p. 360-361.

7 CTh 11.17.3: *Impp. arcadius et honorius aa. praefectis praetorio et comiti sacrarum largitionum. equos canonicos militares dioeceseos africanae secundum subiectam notitiam singularum provinciarum ex praesenti duodecima indictione iussimus adaerari, in tribuendis viris clarissimis comitibus stabuli sportulis in binis solidis pro singulis equis servari consuetudinem decernentes. quam formam quodannis observari praecipimus, ut secundum postulationem gaudenti viri clarissimi comitis africae devotissimo militi septeni solidi pro equis singulis tribuantur. dat. xii kal. april. mediolano vincentio et fravito conss*. (401 mart. 21). quoted in A. Laquerrière-Lacroix, "La coutume dans l'Empire romain tardif", *La Revue-La coutume*, 2,

5. The relationship between those administrative customs characterised by their diversity and the supposedly unified law in the late Empire emphasized in two fundamental texts – the edict of Caracalla and the constitution that promulgated the Theodosian code. The text by which Marcus Aurelius Antoninus gave Roman citizenship to all free men in the Empire in 212 allowed some limits. The bibliography is huge, but to sum up, the edict was devoted to the preservation of the fiscal systems of the provinces, whereas the *dediticii* in the Empire were maintained in their statute. For a long time, it has been thought that *dediticii* were former slaves that had been fred. I do think they were rather former prisoners of war established in the Empire as barbarian communities linked to the Roman army[8].

6. Two hundred years later, the same limits are to be seen in one of the greatest texts of the Late Empire, the constitution that promulgated the Theodosian code. Since the 15th February 438, the code was the sole law in force but the rule was not so absolute as it was said that "the constitutions decided in the past that [were] not reported in the code [should] be brushed aside as false constitutions, except those reported in the military headquarters, those concerning public orders of payment, or those, concerning other affairs, that [were] reported in the registers of diverse offices"[9]. That meant the code did not cancel the fiscal and administrative rules that were recorded in the registers of several offices, or those kept in the archives of the higher military commands, held by the *magistri militiae*. Hence, imperial law allowed the preservation of particular systems in two important domains, fiscal and military ones. How to qualify them? The text did not explicitly mention customs but we can draw an useful parallel with another constitution issued in 469 which used the word and confirmed that the ancient customs (*sic*) of offices, *curiae*, cities, headquarters, or colleges had to be preserved and to have force of law[10].

7. In the Late Empire, particular systems were numerous in fiscal matters, also in the military ones. For a long time, soldiers had been devoted to military discipline. In the IIIrd century, a *ius militare* began to grow up in the name of *utilitas publica* and those laws were recorded in books[11]. At that time, soldiers were mainly issued from barbarian tribes, most of them coming from the groups of *dediticii* established within the Empire. In the same way, "Roman" soldiers had got a *ius militare*, barbarian soldiers were given their own laws. These laws were very helpful as they restricted the judicial powers of the hierarchy. Whether they were laws or customs... that is the question.

8. The constitution issued in 469 stated customs had force of law and in the VIth century, the terms were interchangeable and expression as *consuetudo legis* occurred sometimes[12]. As far as books about barbarian soldiers are concerned, the couple of terms sounds quite right. However, one should be cautious considering those first barbarian laws because even if some of them were imperial laws from a formal point

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2013, p. 24 [Online]http://droit.uclermont1.fr/uploads/sfCmsContent/html/1094/CMH%20LA%20REVUE_2_LA%20COUTUME.pdf.

8 Cf the annotated edition of the text in P. F. Girard & F. Senn, *Les lois des Romains*, [Napoli], 1977, C. VIII/21, p. 478-490 (J. Mélèze-Modrzejewski). See also J. Mélèze-Modrzejewski, "Loi et coutume dans l'Égypte grecque et romaine", *art. cit.*, p. 339-344 et p. 366 (On the maintenance of the specific fiscal status). On the fiscal nature of the reservation clause, J.-P. Coriat, *Le Prince législateur*, *op. cit.*

9 Nov. Th. 1.5-6 (438): 5. *His adicimus nullam constitutionem in posterum velut latam in partibus Occidentis aliove in loco ab invictissimo principe filio nostrae clementiae, perpetuo Augusto Valentinianus posse proferri vel vim legis aliquam obtinere, nisi hoc idem divina pragmatica nostris mentibus intimetur*. 6. *Quod observari necesse est in his etiam, quae per Orientem nobis auctoribus promulgantur; falsitatis nota damnandis, quae ex tempore definito Theodosiano non referentur in codice, exceptis his quae habentur apud militum sancta principia, vel de titulis publicis expensarum aliarumque rerum gratia quae in regestis diversorum officiorum relata sunt*. The word "*his*" refers to the word "constitutions" mentioned before. This mention has been noticed by V. Giuffré, '*Iura*' e '*Arma*'. *Intorno al VII Libro del Codice Teodosiano*, Napoli, 1983, p. 19; D. Liebs, "Roman Law", in *The Cambridge Ancient History XIV Late Antiquity: Empire and Successors A. D. 425-600*, Cambridge, 2000, p. 245.

10 CJ.8.52.3 (469): *Imperatores Leo, Anthemius: Leges quoque ipsas antiquitus probata et servata tenaciter consuetudo imitatur et retinet: et quod officiis curiis civitatibus principiis vel collegiis praestitum fuisse cognoscitur, perpetuae legis vicem obtinere statuimus*. Quoted in C. Humfress, "Law and Custom under Rome", in *Law, Custom, and Justice in Late Antiquity and the Early Middle Ages*, A. Rio (ed.), London, Hellenic Studies Institute, 2011 p. 32.

11 Ulpian D. 29.1.11: *Ex militari delicto capite damnatis testamentum facere licet super bonis dumtaxat castrensibus: sed utrum iure militari an iure communi, quaeritur...*

12 *Law, Custom, and Justice*, *op. cit.*, p. 7-8, giving the *Formulae Bituricenses* no 7 as an example.

of view, they were not part of Roman law in the strictest meaning of the term[13]. In order to understand the context of their enactment, we have first to study the people they concerned, namely the barbarians living within the Empire who as military populations were ruled by military hierarchy and not by civil law (I – Nations on the fringe). In the late Empire, barbarians became powerful and their legal marginalisation was problematic, so that they were progressively integrated into the Roman legal system (II – The integration of barbarians into the Roman legal order). The laws issued for barbarian tribes depended on the context of their establishment in the Empire, how long the peoples had been living in the Empire, and whether they were part of a federation or *dediticii*. The scope of our study will be limited to two of them, that of the Franks, and that of the Bretons of Armorica, which were perhaps the first to appear in the Empire. I will begin by studying the process and the context of the creation of those laws and check what they tell us about barbarian "customs" (III – The first national laws).

I. Nations on the fringe

9. The *Constitutio Antoniniana* granting Roman citizenship to all free men in the Empire is well known. However, the text still raises problems, notably concerning the exclusion of the *dediticii*[14]. It is highly improbable that the exception concerned the few freedmen ruled by the *Lex Aelia Sentia*. It more likely concerned the numerous barbarian *dediticii* who lived near the borders and who had to remain *gentes*, as well people ruled by the military *imperium* and not by the *ius civile*.

10. In the middle of the II[nd] century, Gaius, writing about the freedmen ruled by the *Lex Aelia Sentia*, compared them to the *peregrini dediticii*: "Those who, in former times, took up arms against the Roman people and, being conquered, surrendered themselves, are called *peregrini dediticii*"[15]. Later on, he precisely defined the legal exclusion of the *dediticii* who had no rights but a *pessima libertas*, the least freedom[16]. The parallel Gaius drew between the freedmen of the *Lex Aelia Sentia* and the *dediticii* and the very fact that the latter were taken as the reference in comparison with which the condition of the former was to be defined emphasizes that, at the time of Gaius, the *dediticii* were numerous enough to form a category able to influence Gaius' legal taxonomy[17].

11. By the way, as soon as the middle of the II[nd] century, at the very moment borders began to be fixed, more and more barbarians were to be settled in the Empire. Prisoners caught in one part of the Empire were deported to another part so as to serve as military workforce. Epigraphical sources show those

13 The literature on this subject is so vast that it is impossible to give a detailed account of it. See the historiographical survey conducted in J.-M. Martin, "Droit romain, droit romain vulgaire, droit barbare", *Rechtshistorisches Journal*, 15, 1996, p. 337-348. On the different sources and on the legal atmosphere of that period, D. Liebs, "Roman Law", in *Late Antiquity*, *op. cit.*, p. 260-270; Id., D. Liebs, *Römische Jurisprudenz in Gallien (2. bis 8. Jahrhundert)*, Berlin, 2002; P. Barnwell, "Emperors, jurists and kings; law and custom in the late Roman and early medieval West", *Past and Present*, 168, 2000, p. 6-29, insists upon the integration of vulgar provincial practices (compositions, oaths, and pacts) into the barbarian laws.

14 Vast literature, A. Mastino, "Antonino Magno, la cittadinanza e l'impero universale", in *La nozione di "Romano" tra cittadinanza e universalità*, Napoli, 1984, p. 559-563; F. Jacques, J. Scheid, *Rome et l'intégration de l'Empire 44 av. J.-C-260 ap. J.-C.*, Paris, 1990, p. 282-289; J. Mélèze-Modrzejewski, "Ménandre de Laodicée et l'Édit de Caracalla", in *Droit impérial et traditions locales dans l'Égypte romaine*, London, 1990, p. 478-490, gives a nuanced account of the preservation of ancient laws as customs. M. Humbert, *Institutions politiques et sociales de l'Antiquité*, Paris, 1999, p. 399-400. One of the problems raised by the constitution revolves around the exclusion of the *dediticii*. It is often thought they were few of them, whether they were vanquished peoples or freedmen granted with just a *pessima libertas* The precision in the imperial edict, however, made sense only if there were many *dediticii*, which explains the interrogations concerning that exception.

15 Gai, *Inst*. 1.14: *Vocantur autem peregrini dediticii hi qui quondam aduersus populum romanum armis susceptis pugnauerunt, deinde victi se dediderunt*.

16 Gai, *Inst* 1.26: *Pessima itaque libertas eorum est, qui dediticiorum numero sunt; nec vlla lege aut senatus consulto aut constitutione principali aditus illis ad ciuitatem Romanam datur*.

17 Ch. Sasse, *Die Constitutio Antoniniana. Eine Vntersuchung über den Vmfang der Bürgerrechtsuerleihung auf Grund ds Papyrus Giss. 40*, Wiesbaden, 1958, p. 120 suggested that those *dediticii* were not freedmen but the *peregrini dediticii* mentioned by Gaius.

nationes were legally considered as *dediticii*. Depending on the context, semantics vary. When the barbarians themselves, the military staff, or the Roman and Germanic officers wanted to identify the different tribes, they used the words *nationes* or *gentiles*, and sometimes added a substantive to precise their ethnic origin. When they wanted to insist on their legal status, the word *dediticii* was used.

12. No matter which terms were used, imperial officials had understood that it was useful to keep the *dediticii* in their legal exclusion and maintain their cultural marginalisation. In the II[nd] and III[rd] century, tribal *dediticii* were not part of the regular units of the Roman Army. They served in irregular units, the *numeri*. Hence, they were not granted Roman citizenship when their years of service – difficult ones spent in building and renovating the infrastructures at the borders – ended[18]. This was confirmed by Caracalla when he excepted the *dediticii*[19].

13. On 13[th] August 232, an inscription was engraved at Walldürn, between Rhine and Danube, in the *Agri Decumates*:

> *Deae Fortunae / Sanctae balineu(m)* (for "balneum"*) / vetustate conlap / sum expl(oratorum) S(veborum) Tu(ronum ?) / et Brit(tonum) gentiles / officiales Brit(onum) / deditic(iorum) Alexan /drianorum de suo restituer(vnt), cu / ra(m) agente T(ito) Fl(auio) Ro/mano, c(enturione) Leg(ionis) XXII P(rimigeniae) P(iae) F(idelis) / id. Aug. Lupo et Max(imo) / cos.*

Thus translated:

> To Fortune, the holy Goddess. The baths of the Suevi scouts from (Wall)-dürn and of the Britons, which had collapsed due to their bad state of repair, have been repaired at their own expense by the tribal employees of the office for the Briton *dediticii* of Alexander, under the supervision of Titus Flavius Romanus, centurion of the *primigenia*, pious and faithful XXII Legion, at the ides of August when Lupus and Maximus were consuls[20].

The text is quite interesting. Twenty years after the *Constitutio Antoniana*, *dediticii* belonging to foreign peoples in the Empire, hence barbarians, were still mentioned. Those Briton *dediticii* were called *Alexandriani* because they had been recently levied or reformed by Alexander Severus on the borders of *Britannia*, so after 222, or perhaps only after his military campaign in Persia, in this very year 232.

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18 S. Kerneis, "Les '*numeri*' ethniques de l'armée romaine aux II[e] et III[e] siècles", *Rivista Storica dell'Antichità*, 26, 1996, p. 69-94.

19 Contra R. Mathisen, "*Peregrini*, *Barbari* and *Cives Romani*: Concepts of Citizenship and the Legal Identity of Barbarians in the Later Roman Empire", *American Historical Review*, 111/4, 2006, p. 1026, describing the barbarians living in the Empire as Roman citizens and related to the Roman law. This argument is based on the expression used by a panegyrist in 297: *Francus receptus in leges* (Pan. Lat. 4.21.1), which, according to Mathisen would prove that Franks came under the authority of Roman law. However, the word "*lex*" do have several meanings in Roman law. See Cicero, *Paradoxa* 36: "*leges imponere alicui*" (to impose one's laws to someone, to rule someone as one wishes) and *Academica* 2.23: "*sibi graves leges imponere*" or Cornelius Nepos, Timotheus 2: "*pacem iis legibus constituerunt*" (they made peace on those conditions). In a military context, one has to think to the *leges datae*. For instance, the Salians, when Julian was emperor, requested that peace be made "under this law" (*pacem sub haec lege praetendens*), stating that they would live in peace on what they considered as their territory and that, as a counterpart, noone was to attack nor assault them. The accepted "*lex*" was not the *foedus aequuus* but the *deditio*: "*dedentes se cum opibus liberisque suscepit*" (Amm. 17.8.3). S. Kerneis, "*Francus ciuis*, *miles Romanus*: les barbares de l'Empire dans le Code Théodosien", in *Droit, Religion et Société dans le Code Théodosien*, J.-J. Aubert & Ph. Blanchard (eds), Genève, 2009, p. 377-399.

20 *CIL*, 13, 6592. M. Lemosse, "L'inscription de Walldürn et le problème des déditices", *Ktema*, 6, 1981, p. 349-358 and S. Kerneis, "Les *numeri* ethniques de l'armée romaine", *art. cit.*, p. 73-76.

14. The borders were ruled by the military hierarchy, *duces* and their subordinates[21]. Who lived along the frontier? The population was specific, as well as its administration. The fate of prisoners of war formerly varied: they could be sold as slaves, sent to the circus, or integrated into the *auxilia*. From the IInd century on, many of them were deported to serve in other provinces as *dediticii*. The multiplication of *dediticii* communities may explain why Gaius was interested in this question. His *Institutes* date from the 160's. The policies concerning the imperial borders were then clearly implemented and many barbarians had become *dediticii*. Gaius took care to evoke their situation. When Caracalla issued his edict, he also gave precisions about the *dediticii*, who had been living near the borders for nearly eighty years in his time. Excluding them from the grant of the citizenship meant keep them in a low condition, as devoted servants. The policy bore its results in the late Empire.

15. In a way, Caracalla was ahead of his time. His edict announced the barbarisation of the Empire by facilitating it. There are numerous sources that highlight the role played by barbarians, whether they were soldiers supplanting Roman citizens in the military service, farmers cultivating the *agri deserti,* or even participants in the transfer of the *annona* into the granaries[22]. This public mission explains why they were sometimes called *rusticani corporati*, and why the verb *ministrare* was used to qualify their function[23].

16. In the late Empire, the barbarisation of the Roman Empire was achieved. The separation of the military careers from civil ones allowed the luckiest barbarians to reach higher ranks in the hierarchy. But the growing importance of tribal communities was far from being unproblematic. The *corpora publica*, whatever their missions, were part of the military order ruling the *tractus*, the regions currently under the authority of the military. That separation meant that they were legally isolated and therefore submitted to the imperial power. How long did it last?

II. The integration of barbarians into the Roman legal order

17. When Maximian's panegyrist wrote in 297 that the Frank had been "*receptus in leges*", he did not mean that the barbarians shared the same condition as the totality of the Roman citizens[24]. As a consequence of the legal marginalisation of the *dediticii*, foreign nations constituted customary entities within the Empire. As for the day-to-day life, there were many ways to do with law but as those practices evolved within the communities, we do not know anything from them. The very knowledge we have of the law among the barbarian tribes deals with cases which have been devoted to the hierarchy due to the difficulty of the question or because they dealt with the public order. *De minimis non curat praetor*, in minor cases, the elders' council, made of "veterans", was in charge of the resolution of conflicts and applied local rules, provided that they did not contradict the Roman public order.

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21 On the use of the word "*tractus*" and its proximity with the verb *distrahere*, based on a text by Paulus (D. 21.2.11), see S. Kerneis, "La Bretagne rhénane. Note sur les établissements bretons dans les Champs Décumates", *Latomus*, 58/2, 1999, p. 361: Lucius Titius had bought properties in *Germania*, on the other side of the Rhine, and had only paid part of the price. His heir was later on asked to pay what was left. He answered that he had lost the properties, which, on the Prince's order, had been, for a part, assigned as a reward for the veterans, and, for the other part, "distracted", put aside (*possessiones ex praecepto principali partim distractas, partim veteranis in praemia adsignatas*). The word *tractus* could therefore have referred to properties that had been distracted, substracted, in compliance with the right to withdraw, so as to be ruled by special administrations due to their military uses. This term was finally broadly used in the Late Empire when entire regions were ruled by the military.

22 A. Barbero, *Barbares. Immigrés, réfugiés et déportés dans l'Empire romain*, trad. fr., Paris, 2011.

23 Ambrose, *De officiis*, III, 7, 45-52 (M. Testard ed., Paris, 1984), p. 102-105. This passage has been often commented upon.

24 Pan. Lat. 4.21.1 : (...) *sicut postea tuo, Maximiane Auguste, nutu Neruiorum et Treuirorum arua iacentia laetus postliminio restitutus et receptus in leges Francus excoluit* (...). Cf. supra, note 19. There are many works dedicated to this passage, in which the *laeti*, a category which is by the way the object of many studies, are mentioned for the first time in history. See also A. Chauvot, *Opinions romaines face aux barbares au IVe siècle*, Paris, 1998, p. 48-50.

18. From time to time, some interference occurred with the Roman legal order. Sources able to give a glimpse of the ways of accommodation between Roman and tribal rules are scarce. I will give an illustration with a *defixio* – a curse tablet used as a judicial prayer – found in one of the imperial capitals, Trier. It is part of a much great stock, which was published in the *CIL* a long time ago, but which has to be considered again as it provides precious documents illustrating the judicial way to conduct cases beside the Roman law[25]. The tablet we are dealing with, dating presumably from the late IV th century, mentions the word "cauldron" in Latin and in Irish, in the context of a trial opposing a civilian to a tribal soldier from Ireland. It shows how cauldron, being divination tool for the ancient Celts, was integrated into the late Roman procedure. In opposition to the traditional view of ordeal as something properly Germanic and medieval, I believe that the very first forms of *judicium Dei* can be traced back to the late Empire and that the ordeal of the cauldron was "invented" in the context of a military justice dealing with mixed process between a civilian and a barbarian soldier.

19. In the late Empire, the Roman procedure was devoted to the expression of the truth often by the way of the torture. In this judicial context, the Celtic cauldron began to be used as a demanding test acting on the patient's body, a kind of torture similar to the regular one the civilians had sometimes to endure in case of trial. So that it becomes part of the normative order, first step of the Roman procedure serving as the control of accusation. By that means, the ritual has changed. The cauldron was no more a divination tool. It became actually a physical test able, thanks to the God, to reveal the truth. *Res judicata pro veritate tenetur*: in a mixed trial, two voices mingled to express the truth, that of the emperor and that of the Celtic god. That was how things from the past got a new life and this transformation process may be part of the important legacy of Rome[26].

20. In the middle of the V th century, tribal communities had become so important, both numerically and socially, that they could no longer be legally marginalised. Besides, the period was one of codification[27]. On 26th March, 429, a commission of jurists was charged to sum up the classical jurisprudence. That project, far too ambitious, turned out to be a failure. Yet, part of the work was not done in vain – as the idea that compilations of laws able to help the judges in their tasks was achieved.

21. On 15th, February 438, Theodosius promulgated his code by a constitution addressed to his Praetorian prefect. Henceforth, the code was the sole law in force: [...] *falsitatis nota damnandis, quae ex tempore definito Theodosiano non referentur in codice*. Howeuer, the emperor listed some exceptions: *exceptis his quae habentur apud militum sancta principia vel de titulis publicis expensarum aliarumque rerum gratia quae in regestis diuersorum officiorum relata sunt* [...][28]. The code did not cancel the fiscal and administrative rules that were recorded in the registers of several offices, or those kept in the archives of the higher military commands, held by the *magistri militiae*, which is quite relevant in the case we are discussing.

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25 *CIL*, XIII, 11340, III. *AE*, 1911, 148-152. For an edition and a commentary upon this tablet, S. Kerneis, "Les ongles et le chaudron. Pratiques judiciaires et mentalités magiques en Gaule romaine", *Revue historique de droit français et étranger*, 83, 2005, p. 155-181. For another interpretation of the tablet, see L. Schwinden, "Aberglaube und Magie im römischen Trier", *La religion romaine en milieu provincial, Bulletin des Antiquités Luxembourgeoises*, C.-M. Ternes (dir.), 15, 1984, p. 63-73 in which the word "*ququma*" is understood as referring to a person or an occupation. This argument may well be thought irrelevant as the word "QUOIR", which means in Old Irish cauldron (*coiri*), occurs at the beginning of the text. The bilingual inscription mentions the cauldron twice and presents it as an alternative to the nails, the Roman torture. On the cauldron ordeal practised by the Ancient Irish (fir *coiri*), F. Kelly, *A Guide to early Irish Law, Early Irish Law Series III*, Dublin, 1998, p. 210.

26 [26] S. Kerneis, "Marcher au chaudron. Genèse de l'ordalie dans l'Empire romain (II[e]-IV[e] siècles)", in *Puissances de la Nature – Justices de l'Invisible: du maléfice à l'ordalie, de la magie à sa sanction*, Colloque pluridisciplinaire Université Paris-Ouest, 2 décembre 2010, R. Verdier, N. Kalnoky et S. Kerneis (dir.), Paris, 2013, p. 255-268.

27 C. E. Brand, *Roman Military Law*, Austin (Texas)-London, 1968; J. B. Campbell, *The Emperor and the Roman Army, 31 BC-AD 235*, Oxford, 1984; V. Giuffrè, *Il diritto militare dei Romani*, Bologne, 1980; J. Vendrand-Voyer, *Normes civiques et métier militaire à Rome sous le Principat*, Clermont-Ferrand, 1983; S. Kerneis, "Guerre et droit à Rome. De la discipline des camps au droit pénal militaire", *Droit et Cultures*, 45, 2003, p. 141-158.

28 NTh. 1.6 (438), cf supra. n. 9.

22. Parts of the corpus of military law that had developed in the Empire are in the Theodosian Code in book VII, *de re militari*, yet this book mostly deals with general principles and with the relationships between the State and its soldiers[29]. Military penal law is not very important in the Code. Does that mean it was left at the discretion of commanders in camps? Would it be that the work around the great Theodosian codification inspire other compilations in the Army?

23. Let us consider the context of the first half of the Vth century. Many regions of the Western Empire had been militarised and military commanders had to deal with more and more lawsuits. As many cases were to be judged by military judges who were not well-read in law, their jurisdictions had to be monitored. A military penal code, the *leges militares*, attributed to Ruffus, might have been written at that time. That handbook for military judges is preserved in manuscripts attached to the Byzantine *Ecloga* from the VIIIth century[30].

24. But Roman soldiers were not the only ones to serve in the imperial Army. Jean-Pierre Poly has shown that a pact has been concluded around 350 between the military staff of the usurper Magnentius and the Salian Franks – the Frankish *dediticii* contingents from *Belgica Secunda* – so as to bring an end to the arbitrary decisions of generals. That pact proposed a compromise between Frankish customs and the Roman legal system. This constituted a basis for the *Pactus legis salicae*, which became a written law at the end of the IVth century[31].

25. In a same movement, laws were conceded to the Bretons of Armorica after Aetius had suppressed a local rebellion[32]. One of the scribes who copied the text mentioned *Excerpta de libris Romanorum et Francorum*. This title suggests the existence of an hybrid collection: the Roman book could have been the Theodosian code, in use for the provincials, whereas the Frankish book would be the *Pactus legis salicae*, in addition with a book of the Bretons. Later on, a Breton copyist put aside the first two texts: the appendix concerning the Bretons had become ethnic law, the Ancient Law of the Bretons of Armorica (ALBA). As a consequence, the military authorities presiding over soldiers' trials could use a tripartite collection that compiled the laws that should be applied to soldiers depending on their ethnic origins. This was a first step in the creation of national laws[33].

26. To sum up, the origins of the so-called barbarian laws date back to the late Roman Empire, and we have to consider the military context of the birth of the first ones: the *Pactus legis salicae* – in its written form – was adopted in 398, whereas the ALBA was promulgated in 437. We shall see now that those laws found their origins in jurisprudential practices anterior to the Theodosian codification.

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29 D.1.3.16: *Ius singulare est, quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est*. D. 49.16.6: *Omne delictum est militis quod aliter quam disciplina communis exigit committitur*. The literature dedicated to these texts is immense.

30 On this text, see V. Giuffrè, "Tracce di una raccolta di 'iura' in materia militare", in *Festschrift für Werner Flume zum 70. Geburstag*, Köln, O. Schmidt, 1978, p. 25-42; Id., '*Iura*' e '*Arma*', *op. cit.*, p. 184-203.

31 J.-P. Poly, "La corde au cou. Les Francs, la France et la loi salique", in *Genèse de l'État moderne en Méditerranée. Approches historique et anthropologique des pratiques et des représentations*, Rome, 1993, p. 287-320; Id., "Le premier roi des Francs. La loi salique et le pouvoir royal à la fin de l'Empire", in *Auctoritas. Mélanges offerts au professeur Olivier Guillot*, G. Constable, M. Rouche (eds), Paris, 2006, p. 97-128.

32 S. Kerneis, "L'ancienne loi des Bretons d'Armorique. Contribution à l'étude du droit vulgaire", *Revue historique de droit français et étranger*, 73, 1995, p. 175-199; Id., "La paix, l'empereur et l'évêque. La réconciliation dans l'Antiquité tardive", in *Mélanges Gwenaël Le Duc*, B. Merdrignac et *alii* (ed.), Rennes, 2008, p. 221-240. In 445, Merobaudius pronounced an encomium of Aetius in which he glorified the fact that peace had been restored: "*Caesareoque diu manus obluctata labori sustinet acceptas nostro sub consule leges*" (Pan. II., *MGH*, A.A. XIV, v. 12-13, p. 11).

33 S. Kerneis, "Codification et droit pénal militaire romain. Les premières lois barbares", in *Compilations et codifications juridiques*, *Passé et présent du droit*, 4, 2007, D. Deroussin et F. Garnier (eds), p. 121-152.

III. The first national laws

27. At first sight, the *Pactus legis salicae* (PLS) and the Ancient Law of the Bretons of Armorica (ALBA), on which our analysis focuses, seem quite different. The Salic Law, with its Malbergic glosses, looks close to customs, whereas the ALBA is clearly influenced by Roman Law. Yet, these two texts have to be compared as to understand how those first "barbarian laws" emerged.

28. The *Pactus legis salicae* is characterised by its unity. It is a catalogue of strictly-defined compositions, presented in an "if ... then" structure, the sanction being often introduced by the verb "*iudicetur*". The Malbergic glosses clearly show that the roots of *Pactus legis salicae* are to be found in the custom[34]. The short preamble, however legendary it might be, highlights the popular origin of the pact: *Placuit et convenit inter Francos et eorum proceribus*[35]. The very meaning of the *Pactus legis salicae* was to give legislative value to the customary fines.

29. The laws of the Bretons of Armorica were instituted in a different context. One of the striking features of this text is the heterogeneity of its structure. Whereas the Salic Law just mentions pecuniary penalties, the sanctions listed in the ALBA are very diverse: the fines were to be paid in slaves, sometimes in money, or in animals.

30. The diversity of the fines is due to the fact that ALBA is a collection of various fragments and this is a very difference with the Salic Law[36]. Yet, like the law of the Franks, it should have established ancient compensations. However, it is clearly inspired by the terminology used in the imperial constitutions. Out of the 59 dispositions of the text, 14 use the expressions *iubemus*, *praecipimus*, *sancximus*, *permittimus,* or *iubetur*. The verb *praecipimus*, which occurred ten times, is known to be massively used in imperial constitutions. However, the author is rather a *magister militum* than the emperor and we have to consider the *Excerpta de libris Romanorum et Francorum* as a compilation of judiciary decisions concerning difficult cases[37].

31. As for the structure of the text, it is roughly divided into four parts. The first one concerns murder, the second assaults, the third theft, and the fourth randomly deals with questions about the communities. Some of these dispositions reveal the process of the establishment of the text.

32. The part devoted to assaults is made of eight articles. Six of them are inspired by Salic Law and give precise details about wounds, just like the Frankish laws[38]. But such borrowings from Frankish customary fines were sometimes problematic. Article 8 in the ALBA says: "If in a brawl, someone maims the hand, the eye, or the foot of another person, let him know that he shall give a male or a female slave in return". It can be compared to the article 29,1 of the *Pactus legis salicae*: "If someone took off the hand of someone else, or his eye, or his foot... then he shall be found guilty and pay 100 sous". In the fourth paragraph of the same article, the Frankish law states that the fine shall only amount to 50 sous if it is only the thumb of the

34 R. Schmidt-Wiegand, "*Sali*. Die malbergischen Glossen der Lex salica und die Ausbreitung der Franken", *Rheinische Vierteljahrsblätter*, 32, 1968.

35 J.-P. Poly, "Le premier roi des Francs. La loi salique et le pouvoir royal à la fin de l'Empire", in *Auctoritas. op. cit.*, p. 97-128.

36 For an edition of the text, see L. Bieler, *The Irish Penitentials*, Dublin, 1963, p. 136-159.

37 The Praetorian Prefect could issue edicts in which he interpreted the laws. On this point, see A. H. M. Jones, *The later Roman Empire 284-602*, Baltimore, 1986, p. 473. C.J. 1,16, 2: *formam a praefecto praetorio datam, et si generalis sit, minime legibus uel constitutionibus contrariam, si nihil postea ex auctoritate mea innovatum est, seruari aequum est*. I. Wood, "The code in Merovingian Gaul", in *The Theodosian Code. Studies in the Imperial Law of Late Antiquity*, J. Harries, I. Wood (eds), Duckworth, 1993, p. 175-176. Many royal edicts or decrees have been integrated into the barbarian laws, notably in the *lex ripuaria* and in the Burgundian laws. In other cases, barbarians laws directly borrowed from Roman law. Gundobad, king of the Burgudians and *magister militum* used an imperative language and the word "*praecipimus*" is often used in the laws he issued. I. Wood, "The legislation of *Magistri Militum*: the laws of Gundobad and Sigismund", in this volume.

38 The correspondances with the Salic Law were first noted by L. Bieler, "Towards an interpretation of the so-called 'Canones Wallici' ", in *Medieval Studies presented to Audrey Gwynn*, J. A. Watt & *alii* (eds), Dublin, 1961, p. 387-392

hand or the foot that is taken off. The amputation of the thumb is also mentioned in the ALBA, but the text shows that the case was not without any problem: "If someone cuts off the thumb of another's hand, we prescribe that half of the damages shall be paid"[39]. What can be inferred from this? The comparison of the dispositions suggests that the tribal peoples in Armorica had no proper laws for a period of time – the *Pactus legis salicae* was applied to them. However, the transposition of Frankish customs to Celtic peoples was sometimes problematic: maiming the hand of someone costed one slave among the Bretons of Armorica, yet was the same fine to be enforced if only the thumb was affected or was it to be reduced by half as the Franks did? Which, obviously, raised the problem of what half a slave could be... The case was to be submitted to the military judge, and the sentence prescribed that half the damages should be paid, slaves being considered as a count unit. Later on, when the laws were written, the sentence was added after article 8.

33. On principle, the *Pactus legis salicae* was a guide for all trials which involved tribal communities. But sometimes the application of Frankish customs was difficult due to the gap between Frankish and Celtic praxis and the *Magister militum* was asked to judge the case. Sentences were recorded in the archives of the *principia* and progressively were collected in a book, according to a general practice making their consultation easier. From the standpoint of the military hierarchy, these books were just tools for the judge, but in the context of the codification of law, the emperor decided to sustain their validity and gave them a legislative value. So that the military judge was able to judge with three books, the Theodosian code for Roman law, the *Pactus legis salicae* and the law of the Bretons as a collection of previous sentences. Do we have to think to a *stare decisis* and were these *decreta* judicial precedents? Of course, sources are lacking to give a definitive answer but as Justinian ordered "judgments should be rendered not according to precedents (*exempla*) but in conformity with the laws" (CJ 7.45.13) and we rather have to consider those law books as collections of sentences given as models to follow.

34. Writing the ancient customs and making the first barbarian laws was by no means validating a tribal past. On the opposite, it showed how Roman laws and tribal practices could manage together in the late Empire. Barbarian laws did not consecrate the ancient customs, yet this does not mean that they had nothing to do with them. It is the historian's task to look beyond the sentence to understand the case that raised the difficulty. Very often, amidst the intricacies of a complex phraseology, he will see how tribal communities were reluctant to renounce to the glorious way to end up the conflict, the revenge. How to accommodate familial solidarities and the necessities of public order? In the late Empire, it was not easy to keep on the most basic right and sometimes the judge could do no more than frame feudal violence.

35. So that, the so-called barbarian laws can be considered as documents of vulgar Roman law, the result of an acculturation process trying to combine different normative cultures. Joseph Mélèze-Modrzejewski, in his study concerning the reception of Roman law in Egypt, considers that the very effect of the generalisation of Roman citizenship was that the *peregrini* local customs became Roman provincial customs, so that they were part of the Roman normative system as long as they respected the principles and the values of the "*Reichsrecht*"[40]. In Egypt, customs were usually acknowledged not in a theoretical perspective, but from a pragmatic point of view, so as to solve the local conflicts brought before judges. The same observation can be made concerning the barbarians in the Western part of the Empire. Barbarian customs were accepted as parts of the Roman normative system, considered as laws – after a few modifications – if they did not contradict public order.

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39 PLS 29.1: *Si quis alterum manum <uel> pedem aut oculum eiecerit uel nasum amputaverit… IVM denarios qui faciunt solidos C culpabilis iudicetur. ALBA 8: Si quis in rixa manum uel oculum pedemue hominis maculauerit, ancellam siue seruum rediturum cognoscat. PLS 29.4: Si quis policem de manum uel (de) pedem excusserit… MM denarios qui faciunt solidos L culpabilis iudicetur. ALBA 9: Si quis pollicem manus exciderit, medium dampni (in)poni praecipimus.*

40 J. Mélèze-Modrzejewski, "Loi et coutume dans l'Égypte grecque et romaine", *art. cit.*, p. 370: "le 'Reichsrecht' joue le rôle d'étalon de mesure à l'aide duquel sont rectifiées les solutions propres aux coutumes provinciales qui lui sont subordonnées". The generalisation of Roman citizenship resulted in a more rigorous application of the principles of Roman law when the new citizens were concerned. In opposition to the idea of local legal systems that were either completely accepted or globally rejected, the author believes that these legal systems were kept as provincial customs as long as they were in accordance with the higher principles of Roman law.

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36. Finally, what about the idea of customs deeply rooted in Late Antiquity? Notwithstanding the theoretical legacy of the Empire, the inheritance is solid if one considers the legal systems and the microcosms that went on through time. In the Early Middle Ages, the word "customs" referred to fiscal matters and the relative continuity of taxes in the so-called barbarian kingdoms after the collapse of Rome has often been noticed. As for national laws, their fate until the Carolingian period is well known.

37. Academic publications are often preoccupied by periodising that supposedly obscure period, stressing its links to the Roman period and the permanency of State institutions. It might be better, as Chris Wickham and Emanuele Conte suggest for instance, to prefer a pragmatical analysis focussing on events rather than theoretical considerations[41]. In this perspective, one cannot but notice the influence of Roman legislative customs, both in fiscal and legislative matters.

38. Why did they last for such a long time? Probably because they were privileges, in the etymological sense of the word. Customs were specific laws which a particular group of people was allowed to keep in. One of the main devices used by the imperial administration was the petition, as the direct relationship between the emperor and its subjects was based on it. The emperor undoubtedly liked to accede to the requests of individuals or communities in fiscal matters. This probably explains why the beneficiaries were so attached to their customs. In the fiscal meaning of the term, customs were the basis of solidarity in groups. In a technical perspective, they were the basis of mutual obligations concerning taxes, but, beyond this, they also correlatively played a part in the feeling of belonging to communities. This feeling grew stronger when other public structures disappeared. When Rome was nothing but a memory, this idea of a specific tax system granted by the Prince stayed on.

39. Customary laws were helpful in the creation of identities. It was not religion but law that finally gave the dispersed tribes living in the Empire that sense of community that allowed them to claim that they belonged to the same nation. Laws – customary laws –, being privileges, were the basis for the Frankish nation, and, since the barbarians living in the Empire were mostly soldiers, it was in the Army that the first national identities were created. Soldiers were gathered under the same banner, thanks to the same laws, the same customs. Romans probably did not write any theory on customs, yet they were involuntary actors in their history.

40. Cultures of the past still have something to tell us, as "the root for man is man". The reconstruction of legal systems that prevailed almost everywhere in the XIXth century undoubtedly modified the legal scene in Europe in a decisive way. Yet it is quite difficult to make a clean sweep of the past. Legal systems are built in strata and the legal behaviours that are the result of past norms probably still influence the "spirit" of current, or even future, laws. In this perspective, the ancient and yet very strong influence the imperial army had in the creation of the first legal traditions in Western Europe is no doubt of importance. One has to think of the way norms are represented or of the feeling of obedience experienced by subjects. To quote William Faulkner, *"the past is never dead, it's not even past".*

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41 C. Wickham, *Framing the Early Middle Ages. Europe and the Mediterranean, 400-800*, Oxford-New York, 2005; E. Conte, "Les formes étatiques en Occident avant l'an mil, un bilan", in *Formes et doctrines de l'État. Actes du colloque international Dialogue entre histoire du droit et théorie du droit (14-15 janvier 2013)*, à paraître.