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XXVIII.12 On local customs ; transformation of the laws of barbarian peoples and of Roman law

- The Spirit of Law - Book XXVIII. On the origin and transformations of the civil laws among the French -
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We see from several documents that there were already local customs in the first and second dynasties. We read there about *local custom*, [1] *former practice*, [2] *custom*, [3] *laws*, [4] and *customs*. Some writers have thought that what they referred to as customs was the laws of the barbarian peoples, and that what they were calling law was Roman law. I am proving that that cannot be. King Pépin ordered that wherever there was no law, custom would be followed, but that custom would not be preferred to law. [5] Now to say that Roman law had the preference over the law codes of the barbarians is to upend all the ancient documents, and above all those law codes of the barbarians which are forever saying the opposite.

Far from the laws of barbarian peoples being these customs, it was these very laws which as personal laws introduced them. The Salic law, for example, was a personal law ; but in places generally or almost generally inhabited by Salian Franks, the Salic law, personal as it was, became with respect to those Salian Franks a territorial law, and it was personal only for Franks who lived elsewhere. Now if, in a place where the Salic law was territorial, it had happened that a number of Burgundians, Germans, or even Romans had often had contentions, they would have been decided by the laws of those peoples, and a large number of judgments consistent with some of those laws should have introduced new practices into the country. And that well explains the constitution of Pépin. It was natural that those practices should affect the Franks themselves who lived there in cases which were not decided by the Salic law, but it was not natural that they be able to prevail over the Salic law.

Thus there was in each place a dominant law and accepted practices which served to supplement the dominant law when they did not clash with it.

They could even sometimes serve as supplement to a law that was not territorial ; and to follow the same example, if in a place where the Salic law was territorial, a Burgundian was judged by the law of the Burgundians, and the case was not found in the text of that law, there is no doubt that the judgment would be made in accordance with local custom.

In the time of king Pépin, the customs that had grown up had less force than the laws, but soon the customs destroyed the laws ; and as new statutes are always remedies that are signs of a present malady, we can believe that in Pépin's time customs were already beginning to be favored over laws.

What I have said explains how from the earliest times Roman law began becoming a territorial law, as we see in the Edict of Pistres ; and how the Gothic law continued still in use, as appears from the Synod of Troyes which I have mentioned. [6] Roman law had become the general personal law, and Gothic law the particular personal law ; and consequently Roman law was the territorial law. But how did ignorance make the personal laws of barbarian peoples fall everywhere, whereas Roman law subsisted as territorial law in the Visigoth and Burgundian provinces ? My answer is that Roman law itself had more or less the fate of other personal laws ; otherwise we would still have the Theodosian code in the provinces where Roman law was the territorial law, whereas instead we have the laws of Justinian. Almost all that remained in these provinces was the name land of Roman law or written law, the love that different peoples have for their law, especially when they regard it as a privilege, and some provisions of Roman law retained for the time in men's memory ; but that was enough to produce the effect that when Justinian's compilation appeared, it was received in the provinces of the domain of the Goths and the Burgundians as written law, whereas in the old domain of the Franks it was received only as written reason.

[1] Preface of the formulas of Marculfus.

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[2] *Leges Langobardorum*, book II, tit. 58, §3.

[3] *Leges Langobardorum*, book II, tit. 41, §6.

[4] *Life of St. Léger*.

[5] *Leges Langobardorum*, book II, tit. 41, §6.

[6] See above, ch. v.