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CENTRALITY OF DEBT IN WESTERN MEDIEVAL SACRED AND SECULAR LEGAL SYSTEMS (*)

Among ancient writers, Tacitus was one of the few who addressed comparative law, admittedly in order to praise Britons and Germans at the expense of fellow Romans (1). In the medieval era, Marco Polo (1254-1324) exhibited that curiosity of mind required of modern scholars of comparative law: the urge to travel, mentally and physically, to learn from outsiders, and to narrate similarities and differences. Marco Polo had a fascination for comparative customary laws, from Venice to China and Japan, telling every sort of story about wonderful rules and observances. One such reminds us of how central, indeed primeval, the concept and the action of debt has been to both sacred and secular systems of law.

When he sailed west from Ceylon to the southeastern coast of India *circa* 1292, he recorded the law for debt collection there as follows:

(*) This is a condensed version of my much larger examination of the legal history of debt and sin, which continues. I remain indebted to D. Trevor Anderson (Manitoba), Alan Watson (Georgia), and Olivia Robinson (Glasgow) for critical readings of an early draft, but only I am obligated for errors. This text is slightly altered from the one that I personally presented to the XIVth International Congress of Comparative Law, Athens, 31 July 6 August 1994, which is also published as part of the collection of Canadian papers in Athens, edited by Professor H. Patrick Glenn (Cowansville, Québec: Les Éditions Yvon Blais, 1995). I have retained the same title, here as there. In Athens, Professors Giovanni Pugliese (Rome) and Ernest Caparros (Ottawa) honoured my presentation of this paper as presiding scholars in the session.

(1) G. CORNELIUS TACITUS, *The Agricola, and the Germania*, trans. by H. Mattingly, rev. by S.A. Handford (Harmondsworth: Penguin, 1970). *The Agricola* gives testimony to the Britons' military skills and submission to « obligations imposed by government, provided that there is no abuse » (p. 63); while *The Germania* admiringly reports a wide range of orderly customary laws (pp. 107-20).

> If a debtor after many demands from his creditor for repayment of a debt continues day after day to put him off with promises, and if the creditor can get at him in such a way as to draw a circle round him, the debtor must not move out of the circle without first satisfying the creditor or giving firm and adequate security for full repayment on the same day. Otherwise, if he should venture to leave the circle without payment or surety given, he would incur the penalty of death....

Marco Polo then reported witnessing the local king, on horseback, caught in just such « a circle round him, horse and all, [drawn] on the earth », by a foreign merchant creditor. The crowd outside the circle exclaimed: « "See how the king has obeyed the rule of justice!" And the king replied: « "Shall I, who have established this rule, break it merely because it tells against me? Surely it is incumbent on me before all others to observe it" » (2). That debtor's circle graphically illustrated the centrality of debt within the universal ideal for the rule of law. Even more so, the debtor's circle created the visual fact of captivity at the hands of the creditor.

It also suggested that the reason why one paid one's debts existed outside political authority, outside economic power and social status, even outside the law-maker. For a medieval Latin Christian who, at the end of the Crusader era, saw nothing positive in Muslim laws, Marco Polo openly admired the humane spirituality of Hindu and Buddhist teachings. He left little doubt in his *Travels* that these vivacious worlds of « idolaters », far beyond the pale of Christianity, governed themselves effectively through a combination of community customs, moral imperatives and punitive magistrates.

If we travel half-way around the world to England in 1292, we see the English common law enforcing its own version of the debtor's circle. Imprisonment for debt, first noted in royal records by FitzNigel's *Dialogus de Scaccario* (*circa* 1179), applied then to crown debtors but would become commonly available in 1352 (3).

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(2) *The Travels of Marco Polo*, trans. by Ronald Latham (London: Penguin Books, 1958), pp. 266-7.

(3) *Dialogus de Scaccario: The Course of the Exchequer by Richard, Fitz Nigel and Constitutio Domus Regis...*, ed. and trans. by Charles Johnson (Oxford: Clarendon Press, 1983), pp. 105-23. See « Research Note: Theory and Practice

Edward I (1272-1307) had debt very much on his mind when creating royal remedies for private creditors by statutes in 1283 and 1285 (4). But in direct contrast to the Indian king in that debtor's circle, Edward I added a less edifying version of the rule of common law. In the year 1290, he expelled the entire Jewish merchant community from Christian England, thereby cancelling their credits as claims against him (5). Expulsion on such a grand scale of a whole peoples in a sense reversed the individuated process of English outlawry for debt, because here the royal debtor was outlawing his creditors. Such outlawry was normally the creditor's procedural alternative to imprisonment of the defaulting debtor. Judgment given against a debtor could be pressed through procedural stages until the debtor was proclaimed to be outside the law's protection, and thus denied access to law for use against others (6). Imprisonment and outlawry, then, were the creditor's choices in medieval England as the ultimate lawful instruments for enforcing payment of debts.

By 1292 canon law and its elaborate system of church courts, episcopal and visitational, also reserved its most serious penalty for the defaulting debtor: excommunication (7). Rather than make one

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within the Medieval English Prison », RICHARD W. IRELAND, *The American Journal of Legal History*, XXXI (1987), pp. 56-67, for an excellent survey of evidence and argument regarding imprisonment for debt.

(4) *Statutes of the Realm* (London: Record Commission, 1810), I, pp. 53-4 (Statute of Merchants at Acton Burnell, 1283, offering common law court enrollments when creating debts, as record for future enforcement, except for Jews) and pp. 98-100 (Statute of Merchants, 1285), substantially revising the 1283 scheme and defining elaborate procedures for creditor recoveries; and the Statute of Westminster II, c. 18, in 1285 creating a writ of *elegit* giving creditors « choice » for recovery by seizure of all chattels, plus one-half of a debtor's lands, if necessary). See T.F.T. PLUCKNETT, *Legislation of Edward I* (Oxford: Clarendon Press, 1949), pp. 137-54.

(5) MICHAEL PRESTWICH, *Edward I* (Berkeley: University of California Press, 1988), pp. 62, 125, 343-6; and *War, Politics and Finance under Edward I* (London: Faber and Faber Ltd., 1972), pp. 200-2. For the influence of medieval Jewish law of debtor-creditor relations, see JUDITH A. SHAPIRO, « The Shetar's Effect on English Law », *The Georgetown Law Journal*, LXXI (1983), 1179-1200.

(6) PLUCKNETT, *Legislation*, pp. 148-154.

(7) Sir FREDERICK POLLOCK and FREDERIC WILLIAM MAITLAND, *The History of English Law Before the Time of Edward I* (Cambridge: at the University Press, 1968, 2nd ed.), II, pp. 200-2; RICHARD H. HELMHOLZ, « Excommunication as a Legal Sanction: The Attitudes of the Medieval Canonists », in *Canon Law and the Law of England* (London: The Hambledon Press, 1987), pp. 101-17.

captive, within the circle or prison, this spiritual outlawry placed one outside the church's route to individual salvation and eternal paradise. The canonist Joannes Andreae (1270-1348), citing the *Summa* of Hostiensis (*c.* 1200-1270), defined requirements and remissions concerning debtor payments, *de solutionibus* (concerning payments) (8). In 1285 the Church in England had its jurisdiction over debt litigation defined in the common law, with the writ of *circumspecte agatis* (9). This kept the sacred-secular judicial division intact, as first prescribed by William the Conqueror's Ordinance of 1070-76, which had reserved to Church courts those cases *quae mere sunt spiritualia* (which are purely spiritual) (10). Generally speaking, the sources for secular law were external, as command and rights, but for sacred law they were internal, as morality and duties.

This division made basic legal sense because the English common law of debt was simply a recuperatory action, while the Church rooted its canon law of debt as a matter of faith and morals. The secular emphasised a right, the sacred a duty. In England's common law one paid one's debt because one's right to retain material possession had expired. The time was literally up for some prior unilateral grant of money or fungible, so the creditor either made recovery or imprisoned or outlawed the defaulting debtor until such recovery occurred (11). In the sacred law operating in England, alongside common law, as well as throughout western Europe, one paid one's debt because to not do so was a sin. To violate a pledge of one's honour and word, to break one's faith (*fidei laesio*), jeopardised one's prospect for immortal happiness. The defaulting debtor effectively excommunicated one's self, so a breach of faith meant a breach of communion, regardless of the amount owed. And if the original promise or debt included an oath to that effect, this

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(8) JOANNIS ANDREAE, *In Quinque Decretalium Libros: Novella Commentaria*, ed. by Stephan Kuttner from 1581 ed. (Torino: Bottega d'Erasmo, 1963), III, p. 96: « Debitor qui non est solvendo, excommunicatur ».

(9) POLLOCK and MAITLAND, II, 200-1; WILLIAM STUBBS, *Select Charters*, rev. by H.W.C. Davis, 9th ed. (Oxford: Clarendon Press, 1913), pp. 469-70.

(10) STUBBS, *Select Charters*, p. 469. The phrase is from the writ of *Circumspecte agatis* (1285). The « Ordinance of William I, Separating the Spiritual and Temporal Courts, 1070-6 », *ibid.*, pp. 99-100.

(11) IRELAND, « Medieval English Prison », p. 59; and generally, C.H.S. FIFOOT, *History and Sources of the Common Law: Tort and Contract* (London: Stevens & Sons Ltd., 1949), ch. 10: « Debt », pp. 217-33.

made the defaulter's sin all the more deadly. The spiritual, much more than the material, was what defined debtor-creditor relations in the sacred law (12).

No connection *circa* 1292 appeared to exist in the complementary, often competing, actions of debt available to creditors in the two systems. As Pollock and Maitland tangibly put it for English common law: « The claimant of a debt asks for what is his own » (13). The issue was a simple one of fact, to be proved by written instrument (i.e., covenant, as a sealed specialty) or by sworn witnesses (i.e., compurgation, as oath-helpers to the debtor's sworn denial), or both. Such issues were thereby resolvable in secular jurisdictions, both common and customary. In a sense Thomas à Becket would owe his death (1170) to debt. When Henry II tried to take debt litigation back, in his Constitutions of Clarendon (1166), from what William I had allowed, both Becket and Alexander III, the papacy's first canon lawyer, condemned the royal declaration. Henry's definition for actions of debt in his common law made the element of faith, good or bad, irrelevant. A debt was a debt, with or without one's faith (14). The Church, as definer and defender of faith (*fides*), tied repayment to its control over the spiritual element in the debt, which the secular law declared immaterial. The secular law focused on the externally tangible and factual in the debt. Therefore, prove that the amount or the thing had moved out from you, as if on a giant elastic, and the secular law empowered you to snap it back. The sacred law focused on the faith, as *bona fides*, internal to any promise, as if that giant elastic itself mattered far more than the material amount or thing at the other end. In the medieval order of things, that distribution worked, as the respective court records of each amply exemplified (15). People sued and were

(12) HELMHOLZ, « Assumpsit and *Fidei Laesio* », in *Canon Law*, pp. 263-89.

(13) POLLOCK and MAITLAND, II, p. 205; JAMES BARR AMES, « The History of Parol Contracts Prior to Assumpsit », in *Select Essays in Anglo-American Legal History* (Boston: Little, Brown, and Company, 1909), III, pp. 313-19.

(14) « Cap. XV. Placita de debitis quae fide interposita debentur, vel absque interpositione fidei, sint in justitia regis » (Pleas of debt which are owed under pledge of faith, or are without the interposition of faith, belong within the king's justice): Stubbs, *Select Charters*, p. 167 for Latin text.

(15) DELLOYD J. GUTH, « The Age of Debt, the Reformation and English Law », in *Tudor Rule and Revolution: Essays for G.R. Elton from his American Friends*, ed. by DeLloyd J. Guth and John W. McKenna (Cambridge: Cambridge University Press, 1982), pp. 77-80.

sued routinely for debt in sacred and secular courts, sometimes simultaneously in both for what amounted to a double jeopardy.

Such comparative legal realities in Marco Polo's time begged historical explanation. They particularly suggested that England's common law of debt did not owe its institutional origins, as one version of western secular law, to the ecclesiastical law. That was no cause for alarm, if only because in law, as in life, debt remained a generic term, synonymous with any sense of obligation (16). The concept of debt was central to law itself, to all law, and thus it transcended the creation of any instrumental action of debt. As such, the concept of debt existed outside any particular religion or church.

What Marco Polo found in India could be found in the earliest surviving records of law, in third millennium B.C. Egypt, in Hammu-rabi's Laws of the mid-eighteenth century B.C.E., in ancient royal and customary Chinese laws. At these dawnings of legal historical time, law's purpose was to sanction self-help in enforcing rights and obligations. Hammu-rabi's Laws offered far more than earlier Egyptian legal maxims, because they routinely assessed the monetary prices to be paid in compensation for a wide variety of civil and criminal wrongs. In so doing the legal system defined all wrongs as torts, converting them to fixed, compensatory moneyed debts. The magistrate's judgment would empower the plaintiff, whether for physical assault or breach of contract, to become a self-collecting creditor against the defendant (17). Chinese pre-imperial law during the Western Chou dynasty (c. 1122-771 B.C.E.), combined punitive and performance orders for remedying breached obligations generally, much like we see in medieval western secular and sacred actions of debt (18). Similar parallels and patterns

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(16) *Ibid.*, pp. 80-1; Fifoot, pp. 217-20; Pollock and Maitland, II, pp. 184 *ff.*

(17) *The Babylonian Laws*, ed. and trans. by G.R. Driver and John C. Miles (Oxford: Clarendon Press, 1952), I, pp. 144-5, 208-21; and II, Sections 113-119, pp. 47-8, for original texts regarding « debt and distress ». Similarly and earlier than Hammurabi, see the textual fragments and explication by REUVEN YARON, *The Laws of Eshnunna* (Jerusalem: The Magnes Press, Hebrew University, 1969), pp. 146 *ff.*

(18) HERRLEE GLESSNER CREEL, « Legal Institutions and Procedures during the Chou Dynasty », in *Essays on China's Legal Tradition*, ed. by Jerome A. Cohen, R. Randle Edwards, and Fu-mei Chang Chen (Princeton, N.J.: Princeton University Press, 1980), pp. 29-30.

were found in the ancient laws of Gortyn (Crete) (19) and of Athens (20), as well as in the so-called Laws of Manu from ancient India (21). Each system made the debtor-creditor relationship, as concept and often as instrumental action, central to the rule of law. Indeed, the very heart of Solon's reforms as archon of Athens (594 B.C.E.) was abolition of slavery and imprisonment for debt, through creation of tight limits on debtor-creditor relations and on interest rates (22).

Contemporaneous to the arrival of Athenian democracy were the two great eastern philosophers of law and conduct, Confucius (c. 551-478 B.C.E.) and Siddartha Gautama Buddha (c. 563-483 B.C.E.). Marco Polo routinely noted, eighteen centuries later, their deep jurisprudential impacts on Chinese and Indian cultures. Both emphasised duty, meaning a moral imperative, as the reason why one paid one's debts (23). This served to internalise obligation in the debtor, at the same time that scriptural recorders of the first five books of the Hebrew peoples externalised it. Their recording of divine commandments, that debtors must pay debts and creditors must generously release them, dated from the Torah's final redaction around the time of the Babylonian Exile of 587/6 B.C.E. People of the Covenant were to pay their debts because God, from the heavens above, commanded them to do so (24).

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(19) *The Law Code of Gortyn*, ed. by Ronald F. Willetts (Berlin: Walter de Gruyter & Co., 1967), pp. 14 (creditor's bondage of freeman for his debt), 30 (adopted son inherits debts), 33-34 (oath procedures), 40 (debts arising out of torts, such as rape), 47 (debt on sureties), 49 (adoption of heir), 56-7 (procedures against debtors), and 73-8 (on obligations and gifts).

(20) DOUGLAS M. MACDOWELL, *The Law in Classical Athens* (Ithaca: Cornell University Press, 1978), pp. 142-54, 164-7.

(21) *The Laws of Manu*, ed. and trans. by G. Buhler (Oxford: Clarendon Press, 1886), ch. VIII, nos. 47-52, 140-3, 152-6, 163-8, 222-3; on the centrality of *dharma* = duty, see ROBERT LINGAT, *The Classical Law of India*, trans. by J. Duncan M. Derrett (Berkeley: University of California Press, 1973).

(22) PLUTARCH, *The Rise and Fall of Athens: Nine Greek Lives*, trans. by Ian Scott-Kilvert (Harmondsworth: Penguin, 1960), pp. 43-76: « Solon », esp. Section 13, p. 54, and Section 15, p. 57.

(23) LINGAT, *The Classical Law of India*; DERK BODDE and CLARENCE MORRIS, *Law in Imperial China* (Philadelphia: University of Pennsylvania Press, 1967), and WANG WEIGUO, « Some Main Characteristics of the Traditional Legal Culture of China », *Juridisk Tidskrift*, nr 5 (1989-90), pp. 588-600.

(24) Exodus, XX-XXIII: *New American Standard Bible* (Canada 1988), pp. 56-9; also, Leviticus, XVIII.

Such ancient legal history reminds us that the institutionalisation of debt must be pre-historical, that is, in all cultures prior to their extant evidence, prior to our present ability to know. By institution is meant an established orderly practise, a regular (*i.e.*, rule-based) process, such as that leading to imprisonment or excommunication for defaulters. An action of debt, with a prescribed formula for repayment or recovery, existed in all systems as an instrument, a procedure available to creditors.

Ancient legal history also reminds us that, even if we wish, it is exceedingly difficult to sort the secular from the sacred in any legal system. Debt, in its generic sense, best illustrates this intersecting in law of fact and faith, of property and morality.

The word itself contained a strong moral imperative, the self-justifying « must » or « ought », at the same time as it identified an object, the amount or thing that was owed. The verb « to owe » and its auxiliary « to ought » established in any language both the external command and internal duty as locations for why repayment was compelled. Any discussion of the concept of debt was about repayment of a fixed sum of money, return of a thing loaned, performance of an unperformed promise, service on a bond, maintenance of personal credibility and character. Debt meant duty created by law, secular or sacred. It could also be a thing by itself, as a legally recoverable object. For comparative law and legal history, debt expressed the universal element that derived from all enforceable obligations, common to all legal systems and vocabularies. In every language there was a word or phrase to express the concept of debt, of « owing » and of « oughting ». Insofar as all law was relational, creating definitive norms for relationships between person and person and between person and thing, debt was quintessentially legal (25). It simplified and identified the law's recognition of a proprietary priority, of creditor's ownership against debtor's possession, in all ancient, classical cultures.

The emergence of Christianity, and its profound influences over the later medieval secular law, represented yet another jurisprudential synthesis that placed debt at its centre. By adopting debt as its metaphor for salvation, by making debt a synonym for sin and the redemption of sinners its *raison d'être*, the Church added the

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(25) GUTH, pp. 80-1; LEO WIENER, *Commentary to the Germanic Laws and Mediaeval Documents* (Cambridge: Harvard University Press, 1915), pp. 47-51.

element of faith, specifically « good faith », to the requisite formalism of the Roman law of obligation in the Empire that first suppressed it and eventually succumbed to it.

People of the Covenant, inspired by their living Sinai Compact which Moses had bequeathed them, had certainly held that they had a reciprocal obligation with God, as the core of their divinely revealed religion. But that unique obligation, made directly between God and the Israelites, was not identified as a debtor-creditor relationship. The Hebrew Bible did not deem the Chosen People to be in debt or ransomed to God or Satan (26).

But the very language of the New Testament, particularly in the Epistles, was saturated with debt, by analogy to sin, by metaphor of debtor's bondage to some creditor, and by the theology of individual redemption. James, John, Jude, Paul and Peter introduced themselves separately, repeatedly in their Epistles as « bond-servant » or « bond-slave » of God or of Christ (27). The bond (*nexum*) in Roman law probably pre-existed the Law of the XII Tables (*c.* 451 B.C.E.), as an action by which a creditor bound a free person to work off the debt, or at least held the debtor in service until repayment (28). The Christian epistle-writers, living and working for Christ within that Roman law system throughout the Mediterranean lands, surely knew how to identify themselves routinely through the verb *debere* that literally captured their relationship to their God. Luke's Gospel equated debt and sin (29). John's « Revelations » resonated with the

(26) Leviticus XXVI, 14: « But if you do not obey Me and do not carry out all these commandments, ... and so break My covenant, I, in turn, will do this to you: I will appoint over you a sudden terror, consumption and fever ... then I will punish you seven times more for your sins » with numerous other plagues, destructions, and wastes.

(27) *New American Standard Bible*: p. 864 (James 1), p. 876 (John, Revelation 1), p. 875 (Jude 1), p. 854 (Paul, Titus 1.1, 2.9), p. 845 (Paul, Colossians 2.14: Christ « having cancelled out the certificate of debt » for us), p. 835 (Paul, Galatians 3.13: « Christ redeemed us from the curse of the Law »), p. 807 (Paul, Romans 1.1), p. 841 (Paul, Philippians 1.1), p. 868 (1 Peter 2.16), and p. 870 (2 Peter 1.1).

(28) ALAN WATSON, *Rome of the XII Tables: Persons and Property* (Princeton, N.J.: Princeton University Press, 1975), pp. 111-24. I am indebted to Dr. Olivia Robinson for pointing out to me that *nexum* as such had been obsolete perhaps as early as 300 B.C., although Gaius (*c.* 165 A.D.) still shows its influence regarding the discharge of obligations.

(29) Luke VI, 34-5: VII, 41-3; VII, 48; see « debitor » and « debitum » in *Vulgatae Editionis Bibliorum Sacrorum Concordantiae*, ed. by F.P. Dutripon (Paris: Bloud et Barral, 1880), p. 312.

courtroom metaphor of judgment against the debtor (30). Paul described Christ as « having cancelled out the certificate of debt consisting of decrees against us » and as having « redeemed us from the curse of the Law » (31). The Lord's Prayer itself, in both the original Greek and Latin Vulgate versions, had Christ urging followers to pray to « Forgive us our debts as we also forgive our debtors » (32). *Debere* in Latin, and in its Greek equivalent, meant « to owe » in the sense of « that which must or ought to be done ».

Making debt and redemption the twin metaphors for sin and salvation, respectively, was a purely early Christian creation, embedded in the New Testament itself and pregnant with long-term jurisprudential implications. Paul's context was of an old-law, concerning the « flesh, sold into bondage to sin », versus the new-law, for the soul and its « spiritual » redemption (33). The concept and the action of debt was always individuated in law, between person and person. The individuality of the incarnate divine Son's redemptive act required that the New Testament God redeemed individuals, not a covenanted chosen community. The Christian Church as such did not go to heaven. Only those individuals, mainly Greeks in the early days, who accepted Christ's redemptive act would be saved through baptism and the Church's mediation, between God and the Christian, by forgiveness of sin « as we also forgive our debtors ». The patristic literature, Greek and Latin, repeatedly picked up this analogical theme of debt and sin to shape the early Church's theology.

The key question for the Church Fathers became: to whom was the debt of sin owed? Put another way, who was the creditor in the redemptive process? Paul repeatedly pushed the legal-juridical metaphors, concluding logically that « all the truth about us will be brought out in the law court of Christ and each of us will get what he deserves for the things he did in the body, good or bad » (34). But before getting to that court, each had to pay the price (*pretium*). And it was on this precise point that patristic writers asserted the

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(30) The book, the seals, the witnesses, the throne of judgment, the individual accountability for all one's actions and inactions, the punitive anger, and always God's bond-servants are central to John's exhortations and vision.

(31) Paul to Colossians II, 14; Paul to Galatians III, 13.

(32) Matthew VI, 12; Luke XI, 4.

(33) Paul to Romans VII, 14.

(34) Paul to II Corinthians V, 9-10.

debitum solvere diaboli (the debt to be paid to the devil). Irenaeus, Origen, Basil, Gregory of Nyssa, and Anastasius of Antioch represented the eastern Fathers' view that Christ paid the fixed price to Satan by His crucifixion, and that Satan as Prince of Sin held continually the creditor's bond over each sinner ([35]). Jerome, Ambrose, and Augustine certainly agreed but appeared to be conscious that such language was metaphorical ([36]). In some later Church Fathers, like Peter Chrysologus, Valerian, and Salvian, the debt was owed directly to God, *debitum solvere Deo* ([37]). Regardless of whether God or Satan was the sinner's creditor, the centrality of debt remained firm in early and medieval Christian thought. In the end it was mainly Anselm of Bec (1033-1109) who extricated the Church from the *debitum solvere diaboli*, banishing Satan as creditor while reinforcing arguments for the *debitum solvere Deo* (the debt to be paid to God) ([38]). But Satan's « dominion » still survived within the modern Roman Catholic Church's baptismal liturgy, and in its annual renewal of vows, as a power that must be vocally rejected!

One needed to place this theology in the context of early Christianity's host legal system, specifically within the imperial

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([35]) G.M. LUKKEN, *Original Sin in the Roman Library: Research into the Theology of Original Sin in the Roman Sacramentaria and the Early Baptismal Liturgy* (Leiden: E.J. Brill, 1973), pp. 167-81. Satan's role and power vis-a-vis Christ was directly recorded in Matthew IV, 8-10 and Luke IV, 6-8.

([36]) *Ibid.*, pp. 172-4; also, *Saint Caesarius of Arles, Sermons II*, trans. by MARY MAGDELEINE MUELLER, in *The Fathers of the Church* (Washington: Catholic University of America Press, XLVII, 1964), p. 314; and, *Paulus Orosius: The Seven Books of History Against the Pagans*, trans. by Roy J. Deferrari, in *The Fathers of the Church* (Washington: Catholic University of America Press, L, 1964), pp. 275-6, narrating how « the debts of sin should be remitted under Caesar in » Rome.

([37]) *Saint Peter Chrysologus, Selected Sermons, and Saint Valerian, Homilies*, trans. by George E. Ganss in *The Fathers of the Church*, XVII (Washington: Catholic University of America Press, 1953), pp. 117-18, 122, on debts in « The Lord's Prayer »: and « Unkept Vows », pp. 321-8. Also, *The Writings of Salvian, The Presbyter*, trans. by Jeremiah F. O'Sullivan (Washington: Catholic University of America Press, 1962), pp. 277-80, 288-91, 293-7, 308-13.

([38]) *Cur Deus Homo by St. Anselm* (Edinburgh: John Grant, 1909), chapters XI-XIV, XIX-XXIV; with the Latin text in *Anselme de Cantorbéry: Pourquoi Dieu S'Est Fait Homme* trad. de René Roques (Paris: Les Èditions du Cerf, 1963), pp. 262-77, 310-33. For Anselm's meaning and use of « debere », see DESMOND PAUL HENRY, *The Logic of Saint Anselm* (Oxford: Clarendon Press, 1967), pp. 191-6; and on the « devil-ransom theory », see JASPER HOPKINS, *The Companion to the Study of St. Anselm* (Minneapolis: University of Minnesota Press, 1972), pp. 188-98.

Roman law of obligation. The clash between Roman formalism (39) and Christian moralism, certainly during and after Gaius's *Institutes* (*c.* 165 A.D.), would force debt and sin to grow closer, symbolically and symbiotically. By the thirteenth century the clash had produced what we have already seen: a concept of debt, with its accompanying action *fidei laesio*, bathed in the language of good faith, where even the *nudum pactum* was to be enforced, regardless of formalities or ceremonials, because *pacta sunt servanda* (obligations must be served) (40). In this sense the Church would not serve Roman law and its sophisticatedly simple formalism, as first defined for us by Gaius. His *Institutes* offered a careful categorizing of obligations capable of creating debtor-creditor relationships from *mutuum* (money debts) to *mandatum* (service debts) (41). These were enforceable because and if they fitted within a framework established for each obligation. The clarity of that secular focus on the external form or objective content of the original agreement would increasingly be clouded by internal moral considerations of the debtor, deriving from duty and « ought ». Secular Roman law commanded repayment so long as the proper form (real, verbal, literal, or consensual) for the debt had been followed, while sacred Church law increasingly tied repayment of an ordinary debt to the debtor's declared « faith » that had created it. In the Christian

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(39) By Roman formalism I mean that prerequisite for validity in all four « classes » (*genera*) of obligations as articulated by Gaius, that one must speak the correct words in the correct order (*stipulatio*) or follow the prescribed forms and vocabulary for at least notional transfers of control over the real object (*conductio*). Again, I gratefully acknowledge the aid of Dr. Olivia Robinson on this point, specifically for emphasis on the binding role of « good faith » (*bona fides*) throughout the Roman jurisprudence on obligation. But this did not mean that proof of good faith replaced the compelling Roman formularies.

(40) POLLOCK and MAITLAND, II, pp. 193-203; and, JOHN WILLIAM SALMOND, « The History of Contract », in *Select Essays in Anglo-American Legal History*, III (Boston: Little, Brown, and Company, 1909), pp. 320-35.

(41) *The Institutes of Gaius*, trans. by W.M. Gordon and O.F. Robinson, with the Latin text of Seckel and Kuebler (Ithaca: Cornell University Press, 1988), Book III, Sections 88-181, pp. 313-72; also, Alan Watson, *The Law of Obligations in the Later Roman Republic* (Oxford: Clarendon Press, 1965), pp.10-17; and, JOHN P. DAWSON, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980), pp. 7-13.

Justinian's Institutes (533 A.D.), trans. by Peter Birks and Grant McLeod (London: Duckworth, 1987), beginning at Book III, Title 13: « Obligations », pp. 105 *ff.*

sense, this may have improved debt-collecting by creditors, who now might invoke God as on their side of eternal hell.

The impact of Christianity on Roman law appeared in The Theodosian Code (438 A.D.) in at least two major ways: secular recognition of a distinctly sacred jurisdictional system exclusively for the « Catholic Church », and a retreat into greater formalism regarding the law of obligation (42). Of at least thirty separate provisions concerning debt, virtually all pertained exclusively to public debts, meaning moneys owed to the imperial treasury (*fisc*). The focus was also almost entirely on debts created by a written instrument. The Code restricted appeals, rights of sanctuary, and interest rates, while relaxing procedures on expropriation of delinquent taxpayers' properties and the selective use of torture. The word *debita* throughout the Code had become by 385 A.D. the regular term for payments owing to the state (43). By 452, the *Novellae* (new laws) of Valentian, made a last-ditch attempt to confine debt recovery actions to secular courts, offering default judgments for plaintiffs and imposing security payments on defendants (44). By the time of Justinian's Code (533 A.D.), and despite its clear restatement of the law of obligations from Gaius, the Christian sun commanded a moral height that cast final shadows on whatever remained of a strictly Roman law of obligation, operating alongside of or more often by absorption into western regional customary legal systems. Laws of the Visigoths, Burgundians, Lombards, Ripuarian and Salian Franks, formulated in pre-Christian times, often syncretised Roman form with customary substance in matters of debt and much else (45).

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(42) *The Theodosian Code and Novels and the Sirmondian Constitutions*, trans. by Clyde Pharr (New York: Greenwood Press, 1969, repr. of Princeton University Press, 1952), Book XVI, pp. 440-76; and, DAVID HUNT, « Christianising the Roman Empire: the Evidence of the Code », in *The Theodosian Code: Studies in the Imperial Law of Late Antiquity*, ed. by Jill Harries and Ian Wood (London: Duckworth, 1993), pp. 143-60.

(43) *The Theodosian Code*, Book VI, Title 30.10, p. 148, note 24; and the thirty and more entries found by way of Pharr's index under « debt ».

(44) *Ibid.*, Novels of Valentian, Title 35.1.15, pp. 547, 549.

(45) For example, *The Lombard Laws*, trans. by Katherine Fischer Drew (Philadelphia: University of Pennsylvania Press, 1973), pp. 101-3 (Rothair's Edict, chapters 245-52, and p. 124, chapters 365-6), and pp. 150-1 (Laws of King Liutprand, chapters 15-16, and p. 109, chapters 108-9: dated 720-9 A.D.): « Foreword », pp. xiii-xxii, and « Introduction », pp. 21-37. Also, *The Burgundian*

The era of the *leges barbarorum* was by then well developed in the west, with the Church asserting claims of heirship to Roman universality, empty as these often were and would equally be for the Holy Roman Empire of Charlemagne and successors, after 800 A.D. The long era of western decentralized, decolonized, deformalized law had arrived. Six centuries of the « laws of the barbarians » (more accurately, of the bearded ones!) produced widely variant degrees to which the old Roman law's formalism had been left, within more customary laws regarding debt, or any other actions based on legal obligation. At this point, we do not know how faithful the early medieval Roman Church itself tried to be to Roman legal formalism. It certainly made no attempt, in its otherwise laudable monastic manuscript mission, to preserve the secular law's texts and formularies. We also have no evidence of any trace of Roman law's remains in England, despite nearly four centuries of cross-Channel occupation beginning with Julius Caesar (*c.* 55 B.C.E.), at least not until Bracton's utterly unconvincing attempt (*circa* 1235) to impose Roman conceptualisation on the common law's stubbornly home-grown forms of action (46).

Of all the so-called « laws of the barbarians », those of the Anglo-Saxons and Danes in England came closest to the tradition identified much earlier with that of Hammu-rabi. The first collection in England, the Laws of Aethelberht (603 A.D.), translated a myriad of wrongful acts into compensation-scheduled torts that created self-helping creditors. All such acts, from chopping off a nose to committing adultery, had a fixed price (47). In the return to centralization, dramatically imposed by the Normans after 1066, the origins for the common law's action of debt remain virtually unknown. We are still where Maitland left us on this subject at the turn of our century. The action emerged as recuperatory and medieval creditors showed no faith in their borrowers'

Code, trans. by Katherine Fischer Drew (Philadelphia: University of Pennsylvania Press, 1949), pp. 3-14; P.D. King, *Law and Society in the Visigothic Kingdom* (Cambridge: Cambridge University Press, 1972); and, ROSAMOND MCKITTERICK, « Some Carolingian Law-Books and Their Function », in *Authority and Power: Studies ... Presented to Walter Ullmann*, ed. by Brian Tierney and Peter Linehan (Cambridge: Cambridge University Press, 1980), pp. 13-27.

(46) POLLOCK and MAITLAND, II, p. 207; FIFOOT, pp. 218-20, 236-38.

(47) *The Laws of the Earliest English Kings*, ed. and trans. by F.L. Attenborough (Cambridge: Cambridge University Press, 1922), pp. 5-17.

word or inner sense of duty: most secured « a judgment or recognizance before the loan was made ». Sale was only binding after the thing was delivered or when partial payment or earnest money had been given. In all instances, the action of debt only applied where the sum of money was made certain in advance (48).

And so we return to the western European world of 1292, where royal, central law and local, customary law (of landlords and municipalities) competed jurisdictionally with ecclesiastical law (synodal and papal) for debt litigation. That configuration of courts — royal, customary, canon — each with its formalised action of debt existed as vivaciously in medieval England as across western continental Europe, be it alongside French regional *coutumes* or German *Gewohnheitsrecht* (49). My focus for secular law in Marco Polo's time has been limited to the medieval English model, specifically to the common law because it created the major comparative base with the revitalised Roman civil law of continental European countries in the modern era. The important subject of medieval customary law, and its relation to common and canon laws, remains to be studied.

This brief and sweeping survey illustrated how much richer the tripartite jurisdictional systems in the medieval era were when juxtaposed to our modern era of singularly secular, national systems. There was simply so much more to compare during the medieval era, within a given time and place as well as from country to country. Marco Polo, I am confident, would agree and would not mind being an inspiration for all participants in this XIVth International Congress of Comparative Law. To acknowledge a debt to him and to the centrality of debt in all legal systems, reveals how vital the comparative historical method can be for a better understanding of law itself.

Debt clearly did not originate, institutionally or conceptually, in ecclesiastical law. If anything the opposite was true, in the grip that the metaphor of debt had on the earliest Christians. The post-im-

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(48) POLLOCK and MAITLAND, II, pp. 203, 207-10; and it is clear that the « barbarians » insisted on contractual formalism, not merely the « good faith » requirement that Roman law and then canon law emphasized.

(49) ANDRÉ GOURON et ODILE TERRIN, *Bibliographie des Coutumes de France: Èditions antérieures a la Révolution* (Genéve: Librairie Droz, 1975), and HEINRICH BRUNNER, *Grundzüge der deutschen Rechtsgeschichte* (Leipzig: Verlag von Duncfer & Humblot, 1901).

perial millenium of ascendancy for the Roman church saw it develop its own spiritual criterion for debt repayment, faithful duty, and its own spiritual punishment for debt default, excommunication. The post-medieval, post-Reformation common and civilian systems of law shared a growth toward contractual formalism that produced, for the modern era, the triumph of the secular over the sacred, the material over the spiritual ([50]). As our own world staggers under mounting public debts and private bankruptcies, both sanctioned by law, perhaps the time may soon come for a reversal of that triumph, by re-learning why we ought to pay what we owe.

([50]) GUTH, pp. 69-86, cited note 15 above.