still inherently flexible or open to modification but because the thought that lay behind them and gave rise to them was vital and fluid. It was also much richer, more variegated, and more complex than it would seem from the dead and fragmentary remaining documentation.

The manuscripts of both the libri legales (the Corpus iuris civilis) and the great church "codifications" frequently show significant traces of these cultural and didactic processes; we can analyze internal evidence of their use to reconstruct a basic line of legal thought in late thirteenth- and fourteenth-century Europe.[141]

By that date the text of the civil and canon law was accompanied by a standard, or "ordinary," apparatus. Thousands of additions (additiones) to these two sets of writings were collected and disseminated, incorporating and in part documenting ongoing juristic thought in continual transformation. Furthermore, the fact that professors in the schools read the texts of Justinian and the ordinary apparatus that completed them opened up the way for even more annotations and comparisons, which enriched legal science but eventually invited revision of both problematics and methodology.

This was how the lecturae per viam additionum came into being. These were lecturae of varying length and importance whose reconstruction always raises problems because only rarely were they redactae by the professor who read the books of law and their accompanying ordinary apparatus. They are a rich source of information, however, since they often record and summarize quaestiones and consilia -- that is, everyday cases debated in the classroom or the courts. On occasion they note repetitiones in full or in summary. The transcription of quaestiones and repetitiones in a lectura per viam additionum may not reflect the original shape and oral character of the lectura itself: this happened when someone who owned a codex (a book) was moved (and had enough blank space in the volume) to embellish the document with a lectura containing quaestiones and repetitiones extraneous to the original lesson.

11. From Lecturae to Commentaria

It was out of this context that the Lecturae of Cino da Pistoia sprang, as well as the Commentaria of Johannes Andreae, Bartolus of Saxoferrato, Bartolomeo da Saliceto, and a very few other jurists of the fourteenth and the early fifteenth

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Parallelo 38, 1974-), vol. 1, Le "quaestiones disputatae": Saggi di Manlio Bellomo, 55, n.87.

141 A research team at the Istituto Storico Germanico di Roma working under my direction and with the sponsorship of the Gerda Henkel Stiftung of Düsseldorf is in the process of investigating this topic. See also Manlio Bellomo, "Scuole giuridiche e università studentesche in Italia," in Luoghi e metodi di insegnamento nell'Italia medioevale (secoli XII-XIV), ed. Luciano Grargan and Oronzo Limone, Atti del Convegno di Lecce-Otranto, 6-8 October 1986 (Galatina: Congedo, 1989), 121-40.

centuries (Paulus de Castro, for example, among the civilians, and Nicolaus de Tudeschis [Panormitanus] among the canonists).

Commentaria have at least two characteristics that distinguish them from the other works of the time. From the point of view of their form they were the product of a personal and meditated reelaboration of a range of heterogeneous materials that had accumulated, layer after layer *per viam additionum*, during the course of *lecturae* on Justinian's laws and on the *Glossa Ordinaria* of Accursius. Thus they were works in a particular "form" that the author had chosen deliberately for a definitive expression of his thought. From the point of view of their substance they were works of homogeneous content covering one complete part of the *libri legales*, the *Code*, for example, or the *Digestum vetus*.

Because the *commentarium* was a new literary genre and, above all, because of the fame and the authority of the *Commentaria* of Bartolus of Saxoferrato, historiography calls all fourteenth-century jurists "commentators," a term that is decidedly inappropriate or inadequate for a good many of these men.

The differences between the *commentum* and the *lectura*, in its various documented forms and even in its written fragments, had a number of consequences. First, only the *commentum* was made up of a definite text and that circulated in the written form conceived by its author. For this reason, we find it in the same form in a variety of manuscripts.

Second, both the *lectura per viam additionum* and the *lectura per viam quaestionum* showed variations in their documentation because even one course of lessons could appear in different formal guises that reflected the talents or the interests of the person who captured in one of more written phrases thoughts that the professor had exposed orally. When this happened, the circulation of that thought was not linked to the stability or the unity of one written "form" precisely because the original means of expression was oral. Hence only rarely is there any literal correspondence among manuscripts, even when they document the same thought and the same lesson.

Third, a partial reelaboration of this varied documentation led to reworking the material (that is, the *additiones*) that had accumulated on the margins of the *libri legales* and Accursius's *Glossa*. At times it was the professor himself who selected *additiones* written or rewritten by himself or by others and who arranged them in a stable order; at other times this task was done by someone else who made use of the texts -- a student, another professor, or a practicing jurist or judge sensitive to the use of the *Ius commune*. These two procedures alternate in the *Supleciones* of Guido of Suzzara and the *Casus* of Riccardo da Saliceto.

7
The System of the Ius commune

Summary: 1. Ius commune and Ius proprium as Positive Law: Hierarchy of the Sources; 2. The Ius commune Without Hierarchy; 3. Ius commune and Ius proprium as One System: The Problem of Legality; 4. Ius commune and Ius proprium as One System Sovereignty; 5. Major Figures: Irnerius; 6. Gratian; 7. The New Science of Law; 8. Great Jurists of the New Age; 9. Accursius and Odofredus; 10. The Magna glossa: Authoritative Text and Sure Guide; 11. An Alternative Line of Thought in the Thirteenth Century; 12. The Great Canonists; 13. Late Thirteenth-Century Civilization in Europe; 14. The System of the Ius commune and the Corpus iuris civilis: Dialectic; 15. The System of the Ius commune and the Corpus iuris civilis: The Ius proprium; 16. Cinus of Pistoia; 17. Bartolus of Saxoferrato; 18. Scientia iuris; The Role of the Jurist in the Fourteenth Century

1. Ius commune and Ius proprium as Positive Law: Hierarchy in the Sources

In the long age that began in the twelfth century and continued until the eighteenth century, the many local legal systems regulated the norms of a city, a feudal territory, or a kingdom; that covered the entire population or special groups, social levels, corporations, or confraternities within the population -- drew sustenance from developing intellectual currents that gradually came to be clarified, delimited, and consolidated.

All of Europe was honeycombed with a thick network of thriving particular laws. They give a first impression of confusion, uncertainty, and precariousness. Anyone who traveled a long distance and went from one country to another might easily change status within the day; he might be of age in one place in the morning and that evening find himself accounted a minor in another place.[142] At least this was the case until the fourteenth century, when radical corrections were introduced into the Ius commune to define and give concrete form to personal status and basic, stable personal rights.

Historiography has responded to this panorama in a variety of ways that can barely be touched on here. Some scholars have seen the "ethnic" origins of certain social phenomena as all-important and have supposed that they were perpetuated at the start of the second millennium out of a nostalgia for a remote past. Thus "Roman" or "Germanic" descent has been praised from opposed and conflicting points of view. Or else particular events or figures have been picked out and charged with symbolizing an epoch or a land as the historian follows the thread of conflict between classes or interests engaged in a headlong rush toward

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[142] This observation is borrowed from Emile Chénon, Histoire générale de droit français public et privé des origines à 1815, 2 vols (Paris: Société anonyme du Recueil Sirey, 1926), 1:488ff.

open and bloody revolt or reach a resolution in a social compact or concordia. Another approach has been to concentrate on life's more mundane moments and the rhythms of everyday living in an attempt to reconstruct a global microhistory.[143]

In all cases diversity has either been exploited, moving from a basic conviction that has attempted to document its own past by stressing it difference, or else has been ignored in favor of a contemplation of the isolated datum or out of an indifference toward comparison that denies it all feasibility or usefulness.

In the circumscribed world of microhistory, an insistent analysis of all the data present in one particular set of historical circumstances led that historiographical school into dealing with problems, concepts, ideologies, languages, and styles of reasoning that it has been unable to comprehend because it isolated the phenomena on which its investigation focused from the broader context out of which they arose and by which they were shaped.

This is what happened concerning the problem of the relationship between particular law, the ius proprium, and the common law, the utrumque ius or Ius commune. We have in fact seen little or nothing of the Ius commune in historiography because it has either been considered completely extraneous to the ius proprium or we have been shown only that portion of the Ius commune that particular law has allowed us to see and appreciate, which means that we have had only a reduced and distorted image of it, or else its various aspects have been reconstructed according to the viewpoint of those who acted within the order of particular law. Obviously, this angle of vision is not only partial but is marked by the political interests of the social and political order in question or by the disinterest and sense of irritation of dreamers unable to see beyond their own small provincial world who imagined that it provided answers to all the demands of their own daily lives in the realm of the law and in that of values and principles.

The favorite terrain for this sort of reductive historiography is the set of notions that make up the so-called "hierarchy of the sources."

We have seen how -- in the Regnum Siciliae by means of Puritatem, in a number of municipal normative systems by means of statutes, and elsewhere by royal order -- legal sources in Europe came to be organized in order of precedence as a way to provide judges with guidance and a basis for their decisions. We usually find the highest priority given to the law that was the most direct expression of the organs of government: the royal law in various European

[143] See Bruno Paradisi, "Gli studi di storia del diritto italiano nell'ultimo cinquantennio" (1946-47) and "Indirizzi e problemi della più recente storiografia giuridica," both of which are now available in Paradisi, Apologia della storia giuridica (Bologna: Il Mulino, 1973). For a more recent and better organized summary, see Ennio Cortese, "Storia del diritto italiano," in Cinquanta anni di esperienza giuridica in Italia, Proceedings of the Congresso nazionale organized by the Università di Messina and Casa editrice Giuffrè, Messina-Taormina 3-8 November 1981 (Milan: Giuffrè, 1982), 787-858.

kingdoms, the statute in the municipal communes, or the feudal law in territories ruled as counties, duchies, and principalities. Customary law had a lower priority: the judge could apply it when he failed to find a disposition that fit his case in the law of the first level of priority. Failing these, the judge was invited either to adjudicate according to justice -- that is, according to an equity that he was to determine in the specific case before him -- or he was permitted to search for an appropriate norm in the corpus of civil and canon laws of the Ius commune.

One episode has on occasion been taken as emblematic of this search for a norm. Andrea Bonello da Barletta (d. 1291) relates that a prominent lawyer (he may have been speaking of himself) was attempting to argue a case for a client in Puglia, within the Regnum Siciliae (Kingdom of Sicily), on the basis of the laws of Justinian. The lawyer for the opposing side, whom Andrea scornfully describes as an advocatellus quidam (a certain little lawyer), knew nothing of Roman law, but he had a copy of a summary of Lombard law that he kept carefully hidden under his robe, producing it in a surprise move to win his case. The judge decided in favor of the "little lawyer" because Lombard law was taken to be of a higher rank of positive law that took precedence over Roman law.[144]

In both the general problem of "hierarchies" and in this example taken as a model and a basis for historiographic evaluation, there are recurrent terms and concepts that we have already encountered: ius regium, statutum, consuetudo, ius commune. These terms are all placed on the same plane in the sense that they are always understood within the context of "positive law" and with the meaning they have in that context.[145] "Hierarchy" is only conceivable by doing so; because otherwise there would be no lowest common denominator that could make an operation of the sort feasible or useful for such purposes.

2. The Ius commune Without Hierarchy

The problem is that a modest reconstruction of a portion of historical reality of that sort neglects at least two fundamental aspects of reality. First, the ius proprium was not merely a "positive law" that exhausted its reasons for being by offering precepts to judges and opportunities for arriving at judicial solutions in

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[144] This episode is noted in Francesco Calasso, Medio Evo del diritto (Milan: Giuffrè, 1954), vol. 1, Le fonti, 553.

[145] For this line of historiographic interpretation, see esp. Ugo Niccolini, "Diritto romano e diritti particulari in Italia nell'età comunale," Rivista di storia del diritto italiano 59 (1986): 13-172. For a clear example of an erroneous historiography completely indifferent to the problematics of the system of the Ius commune, see Carlo Guido Mor, "Considerazioni su qualche costituzione di Federico II," Archivio storico pugliese 26 (1973): 423-34, now also available in Il "Liber Augustalis" di Federico II di Svevia nella storiografia, ed. Anna L. Trombetti (Bologna: Il Mulino, 1987). Mor even claims that every "reading" of the ius proprium "must" necessarily and methodically avoid noting any possible relation between ius proprium and Ius commune.

a situation of conflict of interest. Second, even less was the Ius commune merely a "positive law" deprived of all connection with ideas and all ideal roots or stripped of all theoretical, practical, and operational capacities.

We need to seek to understand what the ius proprium contained that the Ius commune did not, and vice versa, and how they differed. We also need to grasp why neither of these complex normative systems can be reduced to or understood uniquely as positive laws.

Anyone redacting a norm as a way to fix a fluid customary law in writing or to flesh out the will of a citizen assembly or a prince used the Latin language and, within that language, the lexical paraphernalia specific to the Roman jurists. Thus such a person knew, and had to know, Justinian's Corpus iuris civilis because the technical terms of juridical science were set out in that corpus and transmitted by it. If he spoke of dominium (lordship), of obligatio (contract), or of emptio-venditio (purchase-sale), he necessarily did so in reference to the meanings that those terms bore in the laws of Justinian, whether he wanted to use them in that precise sense or move away from that meaning.

The notary was in an analogous position with respect to the wishes of the private persons who expected him to help them make out a will, make an inter vivos (among theliving) transfer of a res (property), or assume a debt or a credit. The notary had to use a prescribed language (Latin) and a specific technical language (that of the common law), hence he too wrote of testamentum (will), of obligatio, of emptio-venditio, and so forth.

In both cases the increasing precision in the technical language perceptible in the sources beginning in the late eleventh century can be explained only if we keep in mind that knowledge of the Ius commune was essential for the redactor of a law or for the notary. Consequently, behind the completed act -- be it a "law" or a notarial act -- there had to have been practical and concrete study of the common law -- study intrinsic to the work at hand, an integral part of it, and that determined its technical value as a job well done -- even when no citations to Ius commune texts appeared and no texts of the Ius commune were applied.

The interpreter of the law, be he a judge who had to hand down a decision or a lawyer who needed to construct a defense, was involved in a similar operation. Even if a norm of ius proprium (royal, communal, or other) or a clause in a contract that needed to be interpreted was an obligatory point of reference, the judge or the lawyer could not ignore the common and accepted meanings of the technical terms that he found in the law or in the notarial act. In other words, he could not be unaware of the Ius commune, which established the significance of those terms and which even designated what Gaius called the variae causarum figurae -- the legal concepts and doctrines that were the inheritance and the wealth of every jurist.

In these mechanisms it was not important whether or not the "content" of the norms or of the clauses being negotiated agreed or disagreed with the precepts of the Ius commune. Thus it was totally irrelevant whether the Ius commune, as positive law to be applied, was first or last in the hierarchies of sources of law.

What mattered were simply the concepts and doctrines that were the stuff of the *Ius commune*, the principles that inspired it, and the values that it expressed.

Furthermore, as we shall see, reference to concepts and rules and knowledge of them was accompanied by a faith that they were eternal and unchanging because they gave concrete form to a system of values and of superior and absolute principles. They offered a standard of evaluation, a model of representation, and a tool for understanding that surpassed the fortuitous and contingent nature of the *ius proprium*. Thus the *Ius commune*, in its objective and metahistorical consistency, also became functional, in and of itself, for safeguarding the interests of the jurists and of their class, whether the jurists were aware of this function or not, and whether they appealed to and stressed the universality of the *Ius commune* out of a deep-rooted and reasoned conviction or only out of an ingenuous and unreflecting trust.

If we look at the question in these terms we cannot (and we should not) be surprised that practice reflected just the opposite of what is thought by those who restrict their vision to the norms of the *ius proprium* and who establish a fixed hierarchy of laws and assign the last place to the *Ius commune*. It should not seem astonishing that in every important practical act the *Ius commune* was the basis of every decision, thanks to a rational mechanism broadly attested in the extant records of court cases, official and ancillary, and in *allegationes* and *consilia*. Not only did the *Ius commune* serve to provide concepts and technical language; its norms also served a purpose, even if they were not applied and even if they differed from or even contradicted those of the *ius proprium*. It was the grafting of Aristotelian dialectic onto jurisprudence that made it feasible to utilize the *Ius commune* in court cases or arbitration. When the "practical" jurist found an adequate *modus arguendi* in the available logical paraphernalia, he used a disposition included in the *Corpus iuris civilis* or in the universal laws of the church as the linchpin of his argument. Then, reasoning by similarity, *a contrario*, *ex silentio*, or *ab auctoritate* (according to the *modus arguendi* that he chose from among the many available), he used that base to construct an *argumentum* that led to a juridical resolution of a problem not present in the civil or canon laws, but adequate to resolve a problem arising from interpreting a provision of the *ius proprium* or even a contractual clause that lay behind an actual or eventual law suit or extra-judicial quarrel.

One can see at a glance that when the jurists of this middle period were involved in a practical activity (writing *consilia*, for example), they always argued from the norms of the *Ius commune*. It occasionally happened that they chose to (or were obliged to) argue only *ex justitia* rather than *ex lege*, but they never argued from texts other than those of the *Ius commune*, and certainly never on the basis of norms from the *ius proprium*. It is thus misleading to think that the *consilia* can be understood historically only as an excellent mirror of practice; the *consilia* provide just as good a reflection of the theoretical potential, used in a concrete situation, of the *Ius commune*. Moreover, the jurists of the thirteenth and fourteenth centuries had behind them a long apprenticeship. As we have seen,

they learned their craft in the schools when a quaestio ex facto emergens or a quaestio statutorum was being debated, and they knew perfectly well that arguments on the basis of any text from ius proprium or of any sort other than the Ius commune were inadmissible.[146]

3. Ius commune and Ius proprium as One System: The Problem of Legality

It soon began to be clear that the Ius commune and the ius proprium shared a system of relations and values that far exceeded the notion of hierarchical sources of law, and at the same time new cultural movements arose that, as we shall see, had little or nothing to do with that hierarchy of precedence. It came to be even less true that the Ius commune, as a subsidiary law in that hierarchy, was a phenomenon of little practical importance, to be considered at best a model and a product of the abstract theorization of pedantic absent-minded professors.[147]

I might also note one constant, recurrent fact: the contemporaneity of the ius proprium in the extraordinary variety of local situations. The various terms for the particular and contemporaneous local legal systems known in Spain as usatges, in France as coutumes, in Italy as statuta or consuetudines often reveal their origins and the reasons for their formation. Thus the statuta reflected a desire for free and autonomous municipalities and a need to consolidate the internal processes for the institutionalization of autonomous power; consuetudines reflected the traditions of a people; the usatges and laudamenta curiae showed legal procedures; royal laws and ordonnances expressed the will of a king, count, or duke; concordiae and Landfriede arose out of compromises or agreements reached between a lord and a community.

Everywhere in Europe there was a shift from a regime of oral norms (customary law, Carolingian capitularies) to a regime of written law, and everywhere, with varying degrees of awareness, people saw the terms of a new law in the written law. At the risk of schematic simplification, we might say that until the eleventh century people believed that conflicts within the society in which they lived could be resolved either per pugnam or per iustitiam, even if here and there the hope was expressed of resolving them per iustitiam alone; from the twelfth century on, however, it was thought that all conflicts of interest must be prevented, avoided, or resolved and settled per legem, even if the sizable problem of iustitia was never lost from sight.

In other words, a new value arose, and without separating off from the old faith or from a confident trust in iustitia, it manifested itself and crystallized in the notion of legality. I should stress that this new value surfaced and took shape both in exegesis of the Ius commune and in a concrete affirmation and spread of

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[146] See above, chap. 6, sections 8 and 10.

[147] See the bibliographical references in Manlio Bellomo, Società e istituzioni in Italia dal medioevo agli inizi dell'età moderna, 5th ed. (Catania and Rome: Giannotta, 1991), 451-53.

the ius proprium. The ruler, like any other legislator, had to be not only a just ruler but also a princeps legalis, a lord who respected his own law. To act according to justice signified acting secundum ius.[148]

Two currents coexisted: on the one hand there was the constant practice of the particular normative system -- a phenomenon uniform in its methods and its animating ideas even in the immense variety of its concrete manifestations. On the other hand, reflecting that practice but also driving it forward, there was the thought of the great jurists of the intermediate period, men who expressed original and highly significant ideas on equity, human justice, and legality.

This was the thread that bound the ius proprium and the Ius commune together in one quintessential relationship, a relationship that was implicit, unexpressed, but nonetheless evident and sure. Without the Ius commune, the ius proprium would never have had so much vitality and so much of an impact on people's consciousness; conversely, without the notable differences and the variety of the ius proprium, the Ius commune would have lacked roots and had no field of operations in which its functions could be made explicit.

4. Ius commune and Ius proprium as One System: Sovereignty

Another thread connected the ius proprium and the Ius commune. We can discern it by examining society -- each particular society -- to analyze institutional trends within it, seeking to understand how these trends were hardened and perpetuated by having the stable forms of a legal structure -- an adequate network of laws -- shaped to them and applied to them. Thus, if a distinction emerges between what was typical of a society per se, considered as an entity, and what was the part of the private subjects who made up that society, we can distinguish between imperium and dominium, between public power and individual property, between the voluntas principis (will of the prince) that gave society its law and the will of the private individual forging his own laws by juridical negotiation.

It is undeniable that in the extraordinary multiplicity of particular social orders such problems, which are central to all forms of social cohabitation, led to equally different solutions. The fact remains, however, that those problems arose everywhere, and while they gave stimulation and nourishment to legal thought they drew from it a paradigm for their own organization.

In the legal thought of those centuries the chief paradigm and the supreme model was dual: both the Holy Roman Empire and the church were universal orders with enormous power inherent in their heads, the emperor and the pope. As is known, earlier (in the twelfth century) emperors and popes needed to know and jurists wanted to establish the nature and limits of the jura reservata principi (rights reserved to the prince), or regaliae, and whether the emperor's or the pope's dominium over the things of this world was property ownership (dominium

[148] Francesco Calasso, Gli ordinamenti giuridici del rinascimento medievale, 2d ed. (Milan: Giuffrè, 1953), 267-70.

quo ad proprietatem; lordship over property) or governing power (dominium quo ad iurisdictionem et protectionem; lordship over jurisdiction and protection). It is clear that the way these complex problems were approached reflected the difficulties that feudal circles experienced in understanding them: they found it difficult to grasp the meaning of the term dominium,[149] and they had good reason to balk at conceiving of a public dimension of power and to try to bend public powers to fit the grid of private law. It is just as clear, however, that there were pressing reasons on the side of those who were intent on "uprooting the concept of state from feudal terrain."[150] When the latter convictions prevailed, and when the components of the superior model were set (for instance, by lists of the regaliae pertaining to the secular or ecclesiastical ruler), an integral and profound change took place in political structures. Even if seigniory (feudal, territorial, or landowning) continued to be the rule in large areas in Europe, it nevertheless had to compete with free cities and great institutionalized aggregations (counties, duchies, principalities, kingdoms -- regna) that were beginning to lose their original feudal characteristics and to take on the new attributes of sovereignty. From this point of view, the history of the Kingdom of Sicily is exemplary. It was a fief of the church, but it was also an independent and sovereign kingdom.[151]

Thus the characteristics of the imperial powers were reproduced in innumerable smaller entities. More and more, the jurists quoted the lapidary formula, "Rex in regno suo est imperator" (A king is emperor in his own kingdom); they embellished it with the added attributes of exclusivity and independence: "Rex superiorem non recognoscens in regno suo est imperator" (A king recognizing no superior is emperor in his own kingdom);[152] and they applied this notion to the powers of government of particular political orders. These in turn were revitalized by use of this same notion, clarified by theory, with the result that any head or lord of an institutionalized community had public powers modeled on those of the supreme head, the emperor, and differing from the emperor's only in their more limited scope.[153]

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[149] Ibid., 254-55, 232-34.

[150] Francesco Calasso, "Jurisdictio nel diritto comune classico," in Studi in onore di Vincenzo Arangio-Ruiz nel XLV anno del suo insegnamento, 4 vols (Naples: Jovene, 1953), 421-43, quote 425, now available in Annali di Storia del Diritto 9 (1965), quote 93.

[151] Francesco Calasso, I glossatori e la teoria della sovranità, 3d ed. (Milan: Giuffrè, 1957).

[152] Ibid; Ennio Cortese, Il problema della sovranità nel pensiero giuridico medievale (Rome: Bulzoni, 1966).

[153] See Bellomo, Società e istituzioni in Italia, 377-80. On the problem of normative power and its theoretical justification, see Federico Martino, Dottrine di giuristi e realtà cittadine nell'Italia del Trecento: Ranieri Arsendi a Pisa e a Padova (Catania: Tringale, 1984), 102-18.

In short, the jurists competed with one another to define a political and institutional reality and bring it to the attention of their contemporaries, to the point that the same theory of power was taken over by feudalism and became the theoretical basis of seigniorial power as expressed, particularly in France and southern Italy, in the formula, "Baro in sua baronia est imperator" (A baron is emperor in his barony). This motto inverted the basic principles of feudal civilization, twisting them by transplanting the political and ideal dimension of the emperor's public power to a feudal terrain that never could have invented it, let along accepted and practiced it. This opened the way for the formation or the strengthening of the great institutionalized political concentrations, which gave rise, in the fifteenth to the eighteenth centuries, to such regional and multiregional states as the principalities of Italy and elsewhere and to national states such as France and Spain.

None of all this would be comprehensible or could have occurred if the destinies of the ius proprium had not become interwoven with those of the Ius commune and if the latter had not offered a model, a propitious terrain, and the raw materials to construct an overall vision of the law. This vision was realized on the level of the ius proprium in the multiplicity of the European political orders, which varied according to place and time and according to local traditions and original contributions and to the presence and the inventiveness of single individuals and entire peoples.

Thus the Ius commune contributed to creating a single juridical civilization in Europe, a civilization that was not feudal but fundamentally urban and solidly built on a number of firm and staunchly defended ideas: imperium (which was public) and dominium (which was private); the liberty of the prince ("Quod principi placuit legis habet vigorem"; What pleases the prince has the force of law), and the need to observe the precepts to which that liberty led, as a way to guarantee stability to power and to defend the life of the individual. In a word, the new value of sovereignty.

5. Major Figures: Irnerius

Two figures stood out in this movement, dominating the scene, Irnerius and Gratian.

We know these two men. We have encountered them at work constructing the bases of their thought, Irnerius by reorganizing, restoring, and redistributing the texts of Justinian's laws; Gratian by endowing the church with a programmatically homogeneous, abundant, and flexible normative text. We need to look now at the theoretical works of these two men and seek their translation into contemporary terms of a problem considered perennial in a human heart forever torn between yearning for justice and being blinded by private interests.

Historiography credits Irnerius with separating the law from ethics and from logic.[154] This is an operation that might not be considered precisely to his "credit" if it did not mean -- as indeed it does -- that Irnerius viewed justice as an autonomous phenomenon and theorized on it in those terms, although he never rejected the necessary relationship in the substance of what he was distinguishing. Thus a norm qualified as juridical, hence represented as autonomous, could also be considered for its ethical content and in its verbal formulation, including all the associated problems touching on man's inner life and his intellectual and expressive capacities. Indeed, this was so much the case that not only Irnerius but whole generations of jurists after him posed as a vital problem the question of the relationship between a norm that was discerned as juridical -- hence complete in itself, rational, and authoritative -- and a norm that could clearly be discerned as ethical, hence was necessary intrinsically.

Equity, Irnerius stated, meditating on a fragment of the Digestum vetus, although a part of justice, differs from it: it can be perceived in things and in human relations, but it only becomes "justice" (a juridically defined and juridically relevant phenomenon) when there exists the will to give it a "form" -- a verbal garb and a cogent value. Only the emperor, "lex animata in terris," (living law on earth) had the power to transform equity into justice, because the Roman people had delegated its own original power to the emperor once and for all. Thus all the Roman laws determined by Emperor Justinian constituted "justice": justice was indeed distinct from equity, but it had emerged out of equity and was still and would forever be connected with equity.[155]

A concrete illustration may help to clarify Irnerius's argument. In the exchange of a thing for the payment of a price, for instance, it was in the nature of things (in rebus) that no one deprives himself of something without some compensation (in a sale or a transfer) or without a reason (in a donation). Hence it was just and equitable that the person who receives a res pays a price, provided that the compensation reflects the will of the giver or seller (a determining factor and a specific stage in the transaction). All this was equitable and a concrete, specific exemplification of aequitas. But it remained on the level of a rudis aequitas -- that is, on the level of moral evaluations -- until such time as there was a norm that stipulated an obligation to pay a price for a res received or to give over a res for a price received. The glossators held that the transaction still remained outside the province of the law if this process of discerning the equity in the concrete relationship was conducted by a private subject, because in that case one would have either a ius strictum (strict right) -- not yet scriptum -- if that discernment was reasonable and responded to the bonum generale (general good), or an aequitas bursalis (personal equity; the equity of one's purse) if it responded to personal or particular interests as a convenient "rule" that anyone might bring

[154] Calasso, Medio Evo del diritto, 1:503ff, 557.

[155] Ibid., 477.

forth, at his will and pleasure, from his own bursa (purse). According to Irnerius, in order to transform the aequitas into iustitia the emperor had to lend his authority to the entire logical operation, a move that would also serve to guarantee absolute certainty to the outcome (as opposed to the tendency of the particular case toward justice). In other words, the norm had to become cogent, the ius scriptum had to correspond to the ius strictum.

The expressions used by Irnerius and the jurists of the generations of glossators and commentators who followed him are often vivid and picturesque. Aequitas, wrote Rogerius in the twelfth century, does not become justice if it is not "in praeceptionem redacta et iuris laqueis innodata"[156] -- if it is not set down in lega norms and by that means well knotted into the web of the law. Jacques de Révigny, writing in the thirteenth century, explained that aequitas was like a raw material out of which a manufactured product could be made; it was like silver, which exists in nature, is extracted from mines, and can be transformed into a vase, but only becomes a vase thanks to the craftsman's skill. Aequitas was a genus; iustitia was a species, and as such equity had its own specific characteristics while retaining those of the genus.[157] Similarly, the law was indeed autonomous and distinct from morality, but it retained and actuated moral precepts.

In this conception, aequitas had a vast meaning because it was the source of justice (fons iustitiae) and the source from which all positive law flowed. There was a different meaning of the term, however, that brought it down to more limited dimensions: aequitas could be understood as a way to temper the rigor iuris (rigor of the law), as benignitas (mercy), but always within a specific order of relations and subject to clearly defined logical operations. This occurred when the first step in the process -- the emergence of justice out of equity -- came to an end and a cogent norm came into existence. At that point what was needed was only to interpret and apply the norm, which could be done in the most human and merciful way.[158]

6. Gratian

Gratian achieved a similar result of affirming and heightening the new value of legality and of the role assigned to the "law" in assuring order in society -- to a "law" not to be conceived as detached or isolated from justice and divine precepts

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[156] Rogerius, Enodationes quaestionum super Codice (no. 2), in Studies in the Glossators of the Roman Law, ed. Hermann Kantorowicz with William Warwick Buckland (Cambridge: Cambridge University Press, 1938), reprint ed. with additions by Peter Weimar (Aalen: Scientia-Verlag, 1969), 282.

[157] See Calasso, Medio Evo del diritto, 478-79.

[158] Ennio Cortese, La norma giuridica: Spunti theorici nel diritto comune classico, 2 vols (Milan: Giuffrè, 1962-64), 1:68; 2:347ff.

yet that had to be distinct from them in its form and function in order to establish and broadcast its own autonomous value.

Gratian deserves our admiration for the audacity of his innovative positions identifying a canon law autonomous of theology. This was a burning problem, difficult to resolve in any clear-cut manner, and in fact Gratian treated it with great prudence and expressed a variety of reservations.[159]

Every human action and every human thought could lead the human soul to perdition or salvation; it could be a sign of virtue or vice, of heavenly destination or condemnation to hell. The repentant Christian was expected to tell his sins, in deed and in thought, to his or her confessor because God sees everything and judges everyone. But what of the earthly judge? How was he to judge thoughts not transmuted into deeds, accomplished or initiated? How were thoughts to be proven? And why should they be proven if unexpressed thoughts had harmed no one, damaged nothing, and not disturbed civil cohabitation, but had only offended an order that God had imprinted into the human conscience?

Gratian's position had a revolutionary impact. It assigned to the jurist (and thus to human law) only the task of evaluating and judging acts, not hidden thoughts. This position had several important consequences. It removed from the clergy, as clergy, the power to control the entire range of human activities in view of practical ends, because it was not the task of the clergy to restore a violated social order. The church was recognized to have and to retain control over actions, and even over thoughts, insofar as they concerned the dictates of Christian doctrine and related to the goal of the soul's salvation. The earthly judge (who might on occasion wear ecclesiastical vestments) was entrusted with judgment of earthly acts relevant to the social context, as expressed in the new ordo of Roman and canon trial procedure of the last decades of the twelfth century.

Although in Dante's eyes Gratian had earned his place in paradise for having separated "l'uno e l'altro foro," the inner "forum" of conscience and the outer one of acts (Paradiso, X, 104-105), for many people of his time Gratian must have seemed a nettlesome personage who was working hard to take power and social functions away from the church hierarchy. Quite the opposite was true: following in the footsteps of a long line of reformers in the pregregorian reforms, the Gregorian reforms, and the reforms of monastic culture instituted by the Camaldolese order, he was using the law to regenerate the church as a universal order.

7. The New Science of Law

A scientia, and indeed a new scientia, was emerging from a vague sapentia. This new "science" was a system of relationships within the "laws" of the Ius

[159] See Calasso, Medio Evo del diritto, 394-96.

commune; it involved identification of the general principles of its own existence and development: "Habet quaelibet scientia principia et radices, super quibus regulariter constituitur fundamentum" (Every science has principles and roots on which the foundations of the science are regularly established).[160] It cast its light on the ius proprium, became incorporated into the ius proprium, and soon proved a stiletto-sharp weapon in the hands of practitioners -- judges, arbitrators, lawyers, legal advisors, and notaries.

This new scientia, once it had been clearly defined and was completely elaborated in all its complexity, constituted one "form" of the broader culture from the twelfth to the sixteenth centuries. From the twelfth century on, people's overall vision began to include a fundamental relationship between esse (being) and existentia (existence) -- between what is perfect and external and realizes the idea of God and what is imperfect, transient, and consumed in this world in the human life-span.[161] The imperfect tended toward the perfect: it could not reach its goal short of the celestial beatitude of Heaven, which only the few would deserve. The only other choice for imperfection was to rebel against perfection and be lost to the torments of Hell. All of human life was beset by error, injustice, and imperfection, but it was also illuminated by an aspiration toward perfection and toward symmetry in forms, order in thoughts, justice, and the good. Thus all the sciences, each discipline in its own way, were imbued with a profound religious tension: geometry was the earthly projection of the divine symmetry of forms and spaces, arithmetic a projection of divine calculation, music of harmony, astrology of immense but finite distances, ethics of the eternal good to be realized on earth, logic of the immutable order of thought, rhetoric and grammar of the perfection of the expressive forms and the properties of language. Last but not least, human law was the projection of divine justice in its new, hard-won and avidly defended autonomy.

In the field of the law as elsewhere, there reigned an aspiration toward order, symmetry, and coherence in thought and a yearning for absolute justice. All that humankind constructed must correspond, within the limits of human capacities, to the eternal and transcendent models. This was imperative when the legislator established a legal system, and it was just as necessary when the interpreter modeled the concepts and doctrines of the law or the judge resolved a drama in civil litigation or in a criminal case.

Because it was the outcome of a human operation, all terrestrial acts were condemned to imperfection. Nonetheless, what the emperor had decided was the best one could do and the nearest one could come to God's designs, because the

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[160] Azo of Bologna, Summa Institutionum, Proëmium, no. 1 (Venetiis, 1584), col. 1043.

[161] For bibliographic information on this question and for a view of the problem as it matured in fourteenth-century doctrine, see Manlio Bellomo, "Per un profilo della personalità scientifica di Riccardo da Saliceto," in Studi in onore di Edoardo Volterra, 6 vols (Milan: Giuffrè, 1971), 251-84, esp. 266 n. 34.

emperor was conceived as a *divina sacrata maiestas* (divine, consecrated majesty) who had descended to earth among humankind. In the Byzantine world, the emperor was conceived as himself a divinity living out his earthly career, but the Roman Christian tradition saw him as God's representative on earth. The emperor shared this privilege with the pope, hence Roman and canon law served as the linchpin for all reflection on human law, almost as if it were a providential mediation between a severe and immutable divine justice and an unreasoning human will that groped for justice, often with personal and particular cases as a point of departure, and that on occasion lost its way out of earthly blindness and fell into a squalid and degrading *aequitas bursalis*.

In this perspective, the jurist's first responsibility -- a responsibility that was felt with full religious impact but that was also bent, within only a few decades, to serve the interests of the consortium, the corporation, or a social class -- was to study Justinian Roman law and canon law, to consider them as the most direct reflection of the *veritas divina* (divine truth), hence as law common to all Christians, and to think that only on the basis of these two laws were the practice of the law and a didactic, technical, and professional apprenticeship in the law possible. Only these two bodies of law offered a legitimate basis for the formation of a juridical mentality, a juridical methodology, and a specifically legal culture.

Imperial and pontifical law needed to be studied analytically, in minute detail, and with care if their unity and order was to be discovered. Above all, jurists needed to grasp the splendor of God's unity and of divine order, which were present with the greatest intensity in Roman and canon law. For this reason the *Ius commune* began to be thought of as a *corpus*. The first great work of the new times, Gratian's *Decretum*, was born of a declared intent to bring discordant canons into harmony. The intellectual efforts of entire generations were singlemindedly and profoundly committed to pointing out concordances, identifying antinomies, and interpreting the meanings of discordant passages. Jurists put all their intellectual energies into eliminating disagreement.

Step by step, Roman and canon law were consolidated into one *corpus* by both intent jurists who cared little for the interests of their kin and their corporations and cold jurists lucidly and astutely pursuing their political calculations and the accumulation of immense wealth. It continued to be thought of as a *corpus* for centuries to come.

Within a narrower scope, the movement toward coordination was led by glossators and commentators persuaded that it was possible to describe some juridical concepts theoretically and to conceive of each of them as an entity. They held that with the help of Justinian's laws and an ongoing, evolving canon law, one could distinguish a *natura* in part extraneous to the laws and that preceded the laws and existed independent of them, even though nature lived again in the laws because it was part and parcel of them and found a terrestrial and comprehensible *forma* in them.

The author of the Summa Trecensis warned his readers that the treatment of a concept (in this instance the donatio propter nuptias) must be carried on in such a way that the essential natura of the concept could be contemplated, but also in such a way that the same essential natura, now reconstructed and understood, could serve as a base to which whatever novelties the imperial laws may have established could be added.[162] Other jurists followed the same line of thought to decide on the validity of specific agreements according to whether or not they conformed to the "nature" of an institution (the dowry, for instance).[163] In this view, it was the duty of the legislator to translate the theoretical natura of legal institutions into workable practical terms, while it was the interpreter's task to reconstruct the reasoning processes of the legislator and compose the resulting materials in a unified framework. In perfect coherence with the culture of the age, "essential" lines were distinguished from "accidental" ones within this framework, following a division between the proprium (inherent) and the accidens (non-essential) that paralleled the basic discrimination between esse and existentia.

8. Great Jurists of the New Age

After Irnerius and Gratian new actors appeared on the juridical scene. The next generation was dominated by the "Four Doctors," Martinus, Bulgarus, Jacobus, and Hugo. Although legend states that the dying Irnerius chose Jacobus as his heir, the men who most truly continued the work of the great master were Martinus Gosia (d. before 1166) and Bulgarus (d. 1166). Martinus and his followers (called gosiani), and Bulgarus and his followers pursued distinct and at times conflicting approaches. Martinus and his school were more interested in testing the equitable possibilities of the Ius commune; Bulgarus and his pupils sought a more rigorous method for analysis of the formal logic of Justinian law.

During the course of the twelfth century other jurists were prominent teachers. One of these was Rogerius, who flourished in the mid-twelfth century (around 1162); another was Placentinus, who was active in his native Italy but also in the south of France, where he died in Montpellier in 1192; still another was Pillius Medicinensis (d. after 1207), who was prominent for a number of reasons in the last decades of the twelfth century. Pillius was the first of the Bolognese professors to leave that city (he went to Modena some time after 1180 to open a school of law); he was also the most important jurist of his time to give close consideration to feudal law and compiled an apparatus to the Consuetudines feudorum (or Libri feudorum). Toward the end of the century Johannes Bassianus (d. 1197), a man with an extremely acute intelligence but who lived a disorderly

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[162] Summa Trecensis, C.5.3, De donationibus inter sponsum et sponsam, no. 2, in Summa Codicis des Irnerius, ed. Hermann Fitting (Berlin: J. Guttentag, 1894), 138-39.

[163] Martinus, De iure dotium, 21, Studies in the Glossators of the Roman Law, ed. Kantorowicz, 261: "Pactum inutile est, quod contra dotis naturam sit."

life, taught in Bologna. Famous and much appreciated in his own right, Bassianus was the master of one of the most talented jurists of the age, Azo of Bologna (d. 1220, perhaps after 1230).[164]

Azo gave a new theoretical dimension to jurisprudence in Europe of the Middle Ages when he parted ways with an earlier doctrinal tendency to emphasize everyday happenings, use them as exemplary, or reinterpret them for the purposes of legal discussion. Azo instead took great care not to trespass beyond the limits of the Justinian compilation; rather than muddle his discourse with references to events from his own time, he decanted to their maximum purity the legal concepts embodied in and handed on by the laws of Justinian. This aspect of his method and his thought is particularly clear in the various apparatuses that he composed on passages from the Justinian texts, the Code in particular.[165] In his famous Summa Codicis Azo utilized schemes of classification borrowed from Ciceronian philosophy, which gave the materials he elaborated in his exegesis of the Corpus iuris civilis a firm and consistent architectonic structure.[166] Azo's Summa Codicis was a basic work, not only for studying the theory of the Ius commune but also for its practical use. The enormous importance of the Summa for legal practice is clear in the somewhat disrespectful goliardic motto that circulated in scholastic and juridical circles: "Chi non ha Azzo non vada in palazzo" (if you don't have Azo, don't go to court).[167]

Like Azo, his contemporary Hugolinus de Presbyteris (d. after 1233) was a pupil of Johannes Bassianus. Also like Azo, Hugolinus composed profuse extensive apparatus apparatuses to the Corpus iuris civilis, to the Code in particular. He went his own way, however, which meant that the two jurists' apparatus were in competition with one another as the two men contended for supremacy. Their rivalry developed into differing schools of thought, a question to which I shall return. Legend soon intervened concerning the life and personal behavior of these two heads of schools. Odofredus, a pupil and follower of Hugolinus, later stated with undisguised hostility that Azo was so busy teaching

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[164] The date of Azo's death is uncertain: on this question, see Piero Fiorelli, "Azzone," in Dizionario Biografico degli Italiani (Rome: Istituto della Enciclopedia Italiana, 1960-), 4:775; Johannes Fried, Die Entstehung des Juristenstandes im 12. Jahrhundert (Cologne: Böhlau, 1974), 72 n. 22 and 98 n. 71.

[165] See Manlio Bellomo, "La scienza del diritto al tempo di Federico II," in Frédéric II et les savoirs, Atti del II Seminario Internazionale su Federico II, Erice 16-23 September 1990 (Palermo, 1991).

[166] Bellomo, Società e istituzioni in Italia, 458 and n. 44.

[167] See Thomas Diplovatatius, Liber de claris iuris consultis, ed. Fritz Schulz, Hermann Kantorowicz, Giuseppe Rabotti, Studi Gratiana, 10 (Bologna: Institutum Gratianum, 1968), 68.

that he took sick only on holidays, which made it inevitable that he would die on a day when he was on vacation.[168]

Their rivalry and intellectual dissent led to fantastic tales: Hugolinus and Azo quarreled regularly with one another on their way to court in the palace of the podestà, and one fine day, "instigante diabolo" (at the instigation of the devil), Azo was said to have killed Hugolinus when they met on the stairway.[169] Another legendary anecdote states that Hugolinus was detested by Azo's most prominent and most loyal student, Accursius, because Accursius had discovered that his wife had had an affair with Hugolinus, and in a move to sent his rival packing, Accursius pulled political strings to have Hugolinus banished from Bologna.[170]

Legend aside, there are some elements in the situation that can be documented. It is certain that Accursius, who followed Azo's approach but was not above picking out the best features of Hugolinus's teaching, completed the more challenging work, an apparatus so vast that it was commonly called the Magna glossa. Throughout the Middle Ages Accursius's Magna glossa surpassed all other apparatus in importance, authority, and diffusion.

9. Accursius and Odofredus

Accursius was a jurist endowed with extraordinary capacities of analysis and synthesis. Between the second and the third decades of the thirteenth century, when he was no longer a very young man, he left the territory of Florence to attend the law schools of Bologna.[171] He is reported to have responded curtly to companions who teased him about his age that since he had arrived after them he would finish before them. In 1229 he was already a doctor iuris, but we do

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[168] See Friedrich Carl Savigny, Geschichte des römischen Rechts im Mittelalter, 2d ed., 7 vols. (Heidelberg: J. C. B. Mohr, 1834-51; reprint Bad Homburg, 1961), vol. 5 (1850), 9 n. g, which quotes Odofredus: "Et audivi . . . quod non infirmabatur nisi in diebus vacationis, et ita tempore vacationis mortuus est."

[169] Diplovatatius, Liber de claris iuris consultis, ed. Rabotti, 71: "Azo fuit de principalioribus illuminatoribus iuris et ipse Ugolinus glossator; et regulariter in palatio discordabant in tantum, quod tandem instigante diabolo semel Azo Ugolinum dum descenderent de palatio potestatis interfecit." See also Savigny, Geschichte des römischen Rechts, 5: 9.

[170] Diplovatatius, Liber de claris iuris consultis, ed. Rabotti, 93: "Item dicebat dominus Bartolus, quod ita Accursius glossator reprehendit in glossis sepe Ugolinum, quod eius inimicus erat, immo, quia eius uxorem supponebat; scivit tantum tractare, quod fecit eum bannire de Bononia." See also Savigny, Geschichte des römischen Rechts, 5: 50.

[171] On Accursius's place of birth, see Giuseppe Speciale, "'Accursius fuit de Certaldo . . .'," Rivista internazionale di diritto comune 1 (1990): 111-20 and the literature cited therein.

not know how many years earlier he received his doctorate.[172] He died in 1263.[173]

We know from the sure evidence of some annotations in manuscripts that have come down to us -- a few scattered observations among the glosses he was studying -- that Accursius first concentrated on an attentive and impassioned study of the apparatuses of Azo, his master, and Hugolinus.[174] At first Accursius was keenly attuned to contemporary happenings and to episodes that could be used to illustrate or clarify the laws of Justinian. This was already a custom that had given rise, in some of the schools (that of Jacobus Balduini for instance), to a current of thought and a methodological option that developed further in the following decades in both the official lessons (the lecturae) and the afternoon "exercises" (the quaestiones disputatae, quaestiones de facto emergentes, quaestiones statutorum, and so forth). Around 1230, however, Accursius started to devote full time to the work that was to guarantee him immense fame throughout the centuries.

Once again legend masks the truth and mixes fact and fantasy. The idea of composing a text so complete and so polished that it could serve as an automatic exegetic accompaniment to the texts of Justinian's laws and merit a place beside them is supposed to have occurred, simultaneously, to Odofredus de Denariis and Accursius. Legend tells us that Accursius let it be known that he was sick, and he retired to a villa that he owned near Bologna, thus fooling Odofredus into thinking that he himself had a great deal of time to finish his own project. Accursius beat him to it, however, suddenly returning to Bologna with a completed work in the form of an apparatus.[175]

As is always the case, there is a kernel of truth behind the legend. Odofredus was indeed writing a major work, but he followed a different methodology from Accursius's, and he became the leading exponent of a current of thought that not only resisted the overwhelming success of Accursius's apparatus for decades but also was supported and carried on by great jurists up to the early years of the fourteenth century. Hence from roughly 1230 on, there were two principal but divergent currents of thought: the first and dominant

[172] The documentation has been published recently in Paolo Colliva, "Documenti per la biografia di Accursio," in Atti del Convegno internazionale di studi accursiani, Bologna 21-26 October 1963, ed. Guido Rossi, 3 vols. (Milan: 1968), 2: 403.

[173] For discussion of Accursius's date of death, see ibid., 395-402.

[174] Such annotations are well documented in MS Prague, Knihovna Národního Musea, XVII.A.10, on which, see Manlio Bellomo, "Consulenze professionali e dottrine di professori: Un inedito 'consilium domini Accursii'," Quaderni Catanesi 7 (1982): 199-219, esp. 200-202.

[175] The episode is told by Benvenuto Rambaldi da Imola in a passage of commentary on Dante; see Savigny, Geschichte des römischen Rechts, 5: 275-76.

current was that of Accursius (and before him, Azo); the other, a persistent alternative, that of Odofredus (derived from Hugolinus).[176]

Odofredus's work , known under the title of Lectura, was a vast commentary on the laws of Justinian. It was an expository work made up of lengthy passages elaborated and written by Odofredus, to which brief glosses supplementing them in one way or another were added.

The work that Accursius composed was more traditional in its approach because it was modeled on the apparatus of Azo (and, in part, of Hugolinus); it differed little either in its expository techniques or in its interpretive methodology from the models that it imitated. It was an outstanding and valuable work, however, full of valuable materials. Unlike Odofredus's work -- and unlike the work of Accursius himself in the first phase of his study of the apparatus of Azo and Hugolinus -- all reference to actual events disappeared from it, even major events in living memory. The dross of the occasional and the contingent was perfectly eliminated; what remained were the concepts and doctrines in all their purity, principles and legal problems, unadorned and thought through anew in their full abstraction but, at the same time, with full capacity and potential for serving the practical jurist and being replicated infinite numbers of times in his practical activities when he needed to define a legal case submitted to him for decision or a legal problem entrusted to his tutelage and defense.

Accursius finished this magnificent work because of his extraordinary command of the entire Corpus iuris civilis and thanks to the respect he showed to his models and his fidelity to them. He was in fact so faithful to Azo that his work has been criticized for lacking originality. In reality, however, it was not the novelty of their content that distinguished Accursius's glossae and his apparatus; it was his formidable achievement in selecting and integrating his materials. The work was made up, for the most part, of glosses extrapolated from the apparatus of Azo and Hugolinus, which Accursius often reproduced in their entirety, including the siglum at the foot of the comment that identified its author, or which on occasion he edited slightly by making cuts or additions. Into this basic outline Accursius inserted other glosses taken from various other jurists' manuscripts, notably Johannes Bassianus (Azo's master), Pillius, Placentinus, and, going further back in time, Rogerius, Martinus, Bulgarus, and Irnerius. Selecting from among tens of thousands of annotations, Accursius found a place in his apparatus for more than ninety thousand glosses. They touch on all parts of the Corpus iuris civilis: the Digest (Digesta vetus, Infortiatum, and Digesta novum), the Code, the Institutes, the Tres libri, and the Novels. The enormous size of

[176] On this "alternative line of thought," see Bellomo, "Consulenze professionali," 189-201; Bellomo "Intorno a Roffredo Beneventano: Professore a Roma?" in Scuole diritto e società nel Mezzogiorno medievale d'Italia, ed. Manlio Bellomo, Studi e ricerche dei "Quaderni Catanesi," 7; 2 vols. (Catania: Tringale, 1985-87), 1: 135-81, esp. 147-48; Federico Martino, "Testimonianze sull'insegnamento del diritto a Napoli nei secoli XIII-XIV: Il manoscritto ambrosiano E.29.inf.," in Scuole diritto e società, 2:25-38, esp. 32-33.

Accursius's work gave it the title by which it has been known ever since: Magna glossa.

The Magna glossa contains all the principle themes of the jurisprudence of the age -- problems of equity, of worldly justice, and of the interpretation for which the jurist is responsible (within and without the limits of the given law). It by and large neglects the problem of the ius proprium and its relationship, by its very existence and in its administration, to the Ius commune. When used from this point of view, the Magna glossa offers excellent evidence of the most pressing topics of its time. As we have seen, however, the principal attraction of this work lay on the theoretical plane, where its analysis of legal doctrine and principles were of constant use to practice. The Magna glossa brought together a theoretical patrimony of truly inestimable value. For centuries it has offered that treasure to any jurist who might want to look beyond blind practice for ways to orient and improve the quality of his everyday activities and sharpen his technical skills.

10. The Magna glossa: Authoritative Text and Sure Guide

Toward the mid-thirteenth century, the Magna glossa was universally accepted as an essential and standard accompaniment to the texts of Justinian.

Some manuscripts that contained only the laws of Justinian (and had sufficiently empty margins) were used to copy the glosses of Accursius's apparatuses next to the laws to which they pertained. On occasion apparatuses of Azo or Hugolinus or anonymous grids of glosses were erased by the usual technique of scraping the margins of the parchment leaf and the freed space was used to transcribe portions of the Magna glossa instead (which is why such reworked manuscripts are called palimpsests, from the Greek for "rescraped"). When new codices were made, Justinian's laws were always accompanied by the Magna glossa, often copied in the same hand. In this manner the laws lent some of their sacrality to the apparatus, and in their reflected glory Accursius's Glossa became as untouchable as the laws themselves.

The libri legales and the Magna glossa were surrounded by something like a sea of orality that highlighted and increased the permanence and the sacred aura of the legal writings. We would have no knowledge of this vast amount of thought expressed verbally if it were not for the few traces -- some more fully elaborated and better thought out than others -- that it has left in writing.[177]

From the mid-thirteenth century on, the diffusion of the Magna glossa in Europe reached impressive proportions. It became such a common custom of the schools to accompany the libri legales with Accursius's Magna glossa that it came to be called Glossa ordinaria.

We can find copies of Accursius's Glossa ordinaria in all regions of Christian Europe -- on the Iberian Peninsula, where one of Accursius's sons,

[177] See above, chap. 6.

Guglielmo (Guillelmus Accursii), went to teach civil law,[178] in France, especially in the pays de droit écrit, where we find the same Guillelmus Accursii,[179] in Germany in monasteries and the libraries of cathedral chapters and collegial churches, in the lands of what is now Switzerland,[180] and in many other European lands.[181]

On occasion the statutes of Italian cities (Padua, for one)[182] required the judges to own a copy of the libri legales. They also prohibited -- if this were still necessary -- forensic use of the common law above and beyond its place in the sequence of normative systems to be applied.[183]

11. An Alternative Line of Thought in the Thirteen Century

The current that provided an alternative to the Glossa ordinaria continued for several decades, lasting at least into the early fourteenth century. It is attested in the use, well after Accursius's lifetime, of the apparatuses of Hugolinus, continued and supplemented by Jacobus Balduini, Benedetto da Isernia, and Roffredus Beneventanus. It also persisted in several Bolognese schools in the tradition of Odofredus, in Naples, where Odofredus was studied with particular intensity,[184] and in such smaller cities as Reggio Emilia.[185]

In other instances it was the work of Azo that survived, not because a current of thought different and distinct from that of Accursius developed from it but rather because the apparatuses of Azo remained, buried and forgotten, in a few ecclesiastical libraries, where they had been put during the early thirteenth century by a monk or a canon who had studied jurisprudence in Bologna, had

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[178] See Frank Soetermeer, "Un professeur de l'Université de Salamanque au XIIIe siècle, Guillaume d'Accurse," Anuario de Historia del Derecho Español 55 (1985): 753-65.

[179] Henri Gilles, "Accurse et les Universités du Midi de la France," in Atti del Convegno internazionale di studi accursiani, 3: 1042-43.

[180] See Sven Stelling-Michaud, L'Université de Bologne et la pénétration des droits romain et canonique en Suisse aux XIIIe et XIVe siècles (Geneva: E. Droz, 1955).

[181] For a useful overview, see the papers in vol. 3 of Atti del Convegno internazionale di studi accursiani.

[182] On this point, see Federico Martino, "Giuristi di scuola e 'pratici' del diritto a Reggio e a Padova: Il ms. Olomouc C.O.40," Quaderni Catanesi 16 (1986): 443 and n. 134. The Padua statute is dated 1265.

[183] Martino, "Giuristi di scuola e 'pratici' del diritto," 423-45.

[184] Martino, "Testimonianze sull'insegnamento del diritto."

[185] For example, MS St Gall, 746 (a Codex).

commissioned the local stationarii to copy some works in a fine hand, and had later brought them back with him when he returned to his homeland.

Thus Hugolinus's apparatus were in use and continued to be studied with lively interest. The legal thought that derived from them had its own unique characteristics reflecting the intellectual personality of Odofredus -- a personality that should be seen in the context of a thought that had developed even before Odofredus began to teach and that continued in his day.

The annotations that came from this current of thought included frequent references to everyday events. Although these may have detracted from the limpidity of the juridical discourse, they gave it such concreteness and anchored it so firmly in the real world that the theoretical potential of the many legal concepts was enhanced -- concepts that juridical doctrine controlled and used with masterful skill.

Among the scholars in this second line of thought one man soon stood out: Roffredus Beneventanus, who was active during the first half of the thirteenth century and came from the prominent Epifani family. Although the documents are still in part lost or have not been studied adequately, we can see that Roffredus's thought bore the stamp of Odofredus, particularly in his examples and the tone of "festiveness" that made his writing particularly attractive. They also reveal interests unusual in a civilian of those years, however, because Roffredus made frequent, cultivated and relevant use of canon law.[186]

Roffredus also showed a tendency (which became explicit in some sectors of jurisprudence in the latter half of the thirteenth century) to take account of the needs of practice and offer practical remarks in which the theory of the Ius commune was translated into concrete institutional applications, particularly in regard to court procedures. Roffredus left two works on Libelli, one on civil law and the other on canon law, containing examples of legal documents useful as models for

[186] On Roffredus, see Bellomo, "Intorno a Roffredo Beneventano"; Stephen Kuttner, "Canonisti nel Mezzogiorno: Alcuni profili e riflessioni," in Scuole diritto e società, ed. Bellomo, 16-19.

practical jurists.

12. The Great Canonists

The thirteenth century in Italy was a time of extraordinary creativity. If we also consider the jurists who read and interpreted canon law, the panorama becomes crowded with great figures.

The canonists' exegetic activities were fully as intense and their results just as polished as those of the civilians. The canonists concentrated on the great legal collections of the church, the Decretum, the Liber Extra, and in the fourteenth century, the Liber Sextus, and the Clementinae, but they also worked on such texts as the Quinque compilationes antiquae. Just as Accursius had selected and crowded into the Glossa ordinaria a complete apparatus of glosses to supplement all the laws of Justinian, so a number of canonists composed thick apparatus on the laws of the church.

Summae on Gratian's Decretum began to appear beginning around the mid-twelfth century there were Summae by Rolandus, Rufinus, Johannes Faventinus, all twelfth-century jurists, and by Stephen of Tournai and Huguccio, who lived into the early thirteenth century.

Aside from the summae, grids of glossae formed around the laws of the church, in particular around the texts officially promulgated the popes. These glosses were similar to those of the civilians, but in canon law the phenomenon seemed to have arrived later, in part for reasons we have already seen such as the nature of Gratian's Decretum as a private work. They became more the rule after the church's promulgation of its own first official body of laws in 1209-1210 with the Compilatio of Innocent III (the third of the so-called Quinque compilationes antiquae).

The term "summa" and the methodology for exposition connected with it remained in the canonistic tradition, and weighty summae were composed in the thirteenth century on the Liber Extra (Decretales) of Gregory IX. The most important of these were the summae of Goffredus of Trano (d. 1245), Sinibaldo dei Fieschi (Pope Innocent IV, d. 1254), and Henricus de Segusio, called Hostiensis (d. 1271). For its concision, its completeness, and its "golden" eloquence the Summa of Hostiensis became commonly known as the Summa aurea in the late fifteenth century.

One jurist from German lands, Johannes Teutonicus (d. 1245) brought together glossae to the Decretum, added his own comments, and wrote a comprehensive apparatus (ca. 1217). Another jurist, Bartolomaeus of Brescia (d. ca. 1258) lightly revised Johannes Teutonicus's apparatus example. This work became a Glossa ordinaria to the Decretum.

Intense exegetical activity also centered on the Liber Extra. A Emilian jurist, Bernardus Parmensis from Parma (d. 1266) was the author of an apparatus of glosses that was accepted as the Glossa ordinaria for that work.

Apparatus were compiled for the Liber Sextus of Boniface VIII of 1298 as well. Johannes Andreae (d. 1348) composed a Glossa ordinaria for the Liber Sextus out of excerpts and exegetical passages from various works to which he added his own annotations and, in his later years, a series of additiones. He wrote other works in a similar format on the Clementinae, both in the form of grids -- apostillae -- or as an ordinary apparatus (the Glossa ordinaria on the Clementinae).

Following the tradition begun in the twelfth century with the oldest summae and developed in the thirteenth-century summae, Johannes Andreae also wrote lengthy Commentaria on the Decretales (Liber Extra) of Gregory IX and on the Liber Sextus of Boniface VIII. These Commentaria also appeared in manuscripts under the titles Novella in Decretales and Novella in Sextum. According to legend, these titles recall the name of one of Johannes Andreae's daughters, Novella, whom the same legend claimed was such an expert jurist that she was capable of replacing her father in the lecture hall.[187]

The commentaria of other fourteenth- and fifteenth-century canonists followed. By far the most important of them, for both the wealth of doctrine it offered and for its reputation, was the Commentaria of another great jurist, Nicolaus de Tudeschis (d. 1453). A native of Catania but active in a number of cities of northern Italy, Siena in particular, Nicolaus de Tudeschis played a prominent role in the famous Council of Basel (1431-48), where he worked to define his own position on the various theses proposed and debated at the council for limiting the absolute powers of the papacy.[188] Nicolaus de Tudeschis has passed into history as "Abbas Panormitanus" or simply "Panormitanus" because he spent the last years of his life as abbot of Maniace (near Bronte, on the northwest slopes of Mount Etna, in the province of Catania) and as cardinal archbishop of Palermo.

13. Late Thirteenth-Century Civilization in Europe

The latter half of the thirteenth century was a crucial period in European legal history, as it was in many other domains of civilization on the continent of Europe. The Empire put down roots in German lands with the establishment of the long-lasting Habsburg dynasty by Rudolf I, king of Germany from 1273 to 1291. The French monarchy was put on a more solid footing by Louis IX (d.

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[187] See Guido Rossi, "Contributo alla biografia del canonista Giovanni d'Andrea: L'insegnamento di Novella e Bettina, sue figlie, ed i presunti responsa di Milancia, sua moglie," Rivista trimestrale di diritto e procedura civile 11 (1957): 1451-1502.

[188] See Knut Wolfgang Nörr, Kirche und Konzil bei Nicolaus de Tudeschis (Panormitanus) (Cologne: Böhlau Verlag, 1964. See also Charles Lefebvre, "Panormitain," in Dictionnaire de Droit Canonique, 7 vols. (Paris: Letouzey et Ané, 1935-65), vol. 6, cols. 1195-1215; Stephen Kuttner, "Canonisti nel Mezzogiorno," 22-23.

1270) and Philip the Fair (d. 1314), while on the Iberian Peninsula the aristocracy grew in power in the great kingdoms of Castile and Aragon.

In the cities of north-central Italy the arti -- the Italian word for guilds -- celebrated their triumph in the formation of the Comune del Popolo after bloody struggles with the nobles in the mid-century. In southern Italy the unity of the Kingdom of Sicily was shattered in 1282, when the Sicilian Vespers detached Tinacria (the island of Sicily) from the continent and from Naples.

In 1265 Thomas Aquinas began writing his Summa Theologica. During those same decades acquaintance with the major works of Aristotle, in particular, the Metaphysics (known as "Aristotle major"), was spreading throughout Europe. Aristotle's works, which arrived in Europe through the Arabs in Spain and the Greeks in Sicily, were translated into Latin beginning around 1230 and soon were introduced into high culture throughout the continent. Dante Alighieri was born in Florence in 1265. In 1270 Cino Sighibuldi -- a poet, but principally a jurist of genius, known as Cinus of Pistoia -- was born in Pistoia.

The works that provided the bulwarks of European culture were the Gospels, the libri legales of civil and canon law, Aristotle's Metaphysics, the Summa Theologica of Thomas Aquinas, and, somewhat later, Dante's Divine Comedy. It was a truly and intensely European culture, a culture that overrode frontiers, knew no linguistic barriers, and had no other difficulties linked to the idea of the "nation" that was just beginning to surface. New languages -- national languages -- were indeed becoming defined, but although they were in current use in everyday life they were no substitute for Latin, which was and continued to be the linguistic vehicle for the circulation of ideas throughout Europe. Almost all the books of the Ius commune were written surveys. Latin too was a living language: it gave the romance languages their base and it even reached lands of national languages from a different source (Germanic or Slav).

The parallel between the vicissitudes of the Latin language and those of the law is striking. As the Latin language offered a unified basis for national languages and provided them with useful theoretical and practical notions, so did the Ius commune, civil and canon. As the national or regional languages were many, so were local laws and iura propria. And as the national languages not only recognized the Latin language but accepted it and intermingled with it, so the various iura propria intertwined with the Ius commune, from which they might also diverge profoundly, however, just as the romance languages split off from Latin.

Thus an understanding of the unity of legal life in Europe requires a grasp of the necessarily dialectical relationship that existed between the unity of a Ius commune and the plurality of the iura propria. The latter could not have existed without the one Ius commune, and today we cannot relive their history without taking that dialectical relationship into account.

14. The System of the Ius commune and the Corpus iuris civilis: Dialectic

Around the 1270s legal theory began to show signs of change, diverging in two main directions. Thus the overall problem of the Ius commune in Europe can be looked at in two ways, distinct yet not separate, like the two faces of a coin.

The long-standing tradition that considered the laws of Justinian and those of the church as a corpus, hence as unified and as sacred and authoritative not only persisted but strengthened. From this point of view the Ius commune was a "system," a system of laws that obligatorily corresponded to a system of law and that was conceived in programmatic terms as exhaustive.

The second current was more sensitive to the problem of increasingly vast sectors of the law that were emerging everywhere (as we have seen in chapter 4) but that did not correspond to the corpora of the civil law and the canon law so remained closed as sectors of the ius proprium. Some jurists discovered that the norms in the Ius commune's "system of the laws" lacked full potential to provide for all the acts of everyday life, which meant that the "system of the laws" did not coincide with the "system of the law."

We need to follow each of these two evolving lines of thought separately. The first was older and can be documented at least as far back as two passages in Accursius's Glossa, one of which referred even farther back to the thought of Jacobus, to whom Accursius attributed the idea of a common law as corporis universitas.[189] The other reiterated the widely shared conviction that "omnia in corpore iuris inveniuntur" (all things are found in the body of law).[190] This last phrase, read in its entirety, not only expresses the idea that the civil law must be separate from theology, from morality, and from what was by that time considered extraneous to the scientia iuris but also expresses faith in the idea that a discipline for human actions is always and in every instance found in positive norms, taken as a whole, and in the idea of positive law as a sistema legum (system of laws).

Jurists in the twelfth century and the first decades of the thirteenth plunged with interest and passion into problems inherent in this vision, and they wondered increasingly frequently whether it was not perhaps the jurist's task to investigate the correspondence between the sistema legum and a substantive sistema iuris (system of rights). This led them ineluctably to a search for the "justice" intrinsic to every law that found its best expression in debate and reflection on aequitas rudis and aequitas constituta -- in short, in the court cases through which equity was transformed into justice and the ius (ius strictum) into law (ius scriptum). In the fourteenth century, when the issue had crystallized, one great southern Italian jurist, Lucas of Penna (ca. 1345-ca. 1382), put it succinctly: "Manifestum autem est, quod, cum voluntas principis ab aequitate, iustitia aut ratione deviet, non est

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[189] Accursius, the iuri communi to Dig.1.1.6, De iustitia et iure, 1., ius civile: "Responditur secundum Iac[obum], non detrahitur iuri communi in sua corporis universitate."

[190] Accursius, the notitia to Dig.1.1.10, De iustitia et iure. 1. ius civile: "Sed nunquid . . . oportet, quod quicumque vult iuris prudens vel iurisconsultus esse debet theologiam legere? Responde: non, iam omnia in corpore iuris inveniuntur."

lex" (It is clear that when the will of the prince deviates from equity, justice, or reason, it is not law).[191] Thus he drew a distinction between the prince's law, which corresponded to equity, justice, and reason, and the prince's will, which, even when it reached out toward the law, in reality did not become law because it "deviated from equity, from justice, and from reason."

The only way to create and elaborate a sistema legum was to discern the internal connections between one precept and another in the Justinian compilation or the laws of the church, and then to bind these connections together so that the entire mass could be thought of as one unified corpus.

The jurists of the twelfth and the thirteenth centuries at first worked toward this goal with techniques and logical methods of modest scope. For example, they worked to construct their system using the scheme of sic et non -- whatever is not prohibited is permitted -- or they linked one norm to another by assuming a juridical problem centering on a given question and posed increasingly specific alternatives (aut . . .aut) in a branching "tree" that brought together in one visual field legal precepts scattered throughout the various books and titles of the Code or the Digest. To take representation as an example of such problems: if a servant acquired a sick animal, he either was aware that the animal was unhealthy or not; if he was aware of the state of the animal's health, one must ask whether he acquired the animal for himself, out of his own peculium, or for his master; in the latter case one must distinguish whether or not the master knew of the acquisition or not, and if not, whether or not he could have known about it. And so forth, following up each alternative until the original alternatives had multiplied and ramified to become an analytical outline of all foreseeable cases, and at each step in the process citing an appropriate provision in the corpus of the Ius commune.[192]

As time went by the logical process became more refined. The rediscovery of the major works of Aristotle and the study of dialectic helped to consolidate logical experimentation in the aim of constructing a systematic vision of the Ius commune. Especially after the mid-thirteenth century, the Italian schools produced brief repertories, organized by cumulative strata of contributions, of the essence of the principal modi arguendi in iure (modes of arguing in law) and loci loicales per leges probati (location of laws for legal proofs).[193] The technical modes of argumentation that were classified in this manner had in part already

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[191] Luca da Penne, In Tres Libros Comm., Cod.10.26.3.

[192] This example is drawn from a distinctio constructed, with some differences in form, by Jacobus ("Cum servus emit animal . . .") and by Martinus ("Scientia vel ignorantia servi . . ."). See Manlio Bellomo, "A proposito della rappresentanza: Due inedite 'distinctiones' di Iacopo e Martino," Annali di storia del diritto 7 (1963): 115-24.

[193] On this question, see Manlio Bellomo, "'Loci loicales' e forme del pensiero giuridico in alcuni testi inediti dei secoli XIII e XIV," Rivista di storia del diritto italiano 47 (1974): 5-18 and the bibliography therein.

been incorporated into the texts of the Digest because they had been used by Roman jurists of the Republic or the Empire, but now they were rediscovered and retempered for the purposes of Aristotelian dialectic. Such techniques served to argue in iure to reinforce a dubious interpretation or lend it certainty. There were tens of these techniques: one could argue a maiori (from the greater reason), a minori (from the lesser reason), a toto (from the whole), a diffinitione (from a definition), a nominis interpretatione (focusing on the meaning of a term), a genere (referring to generic characteristics), a similitudine (by analogy), a contrario (by opposition), ex silentio (holding an activity licit if not expressly prohibited), and so forth.

The use of dialectic could lead to excess, especially in the schools of philosophy. A famous anecdote that circulated concerning the school of Anselm of Laon was often repeated to note and warn of the perils of abstract logical exercises. It begins with a simple and incontestable opposition, "Quod ego sum, tu non es" (What I am you are not). It then adds, "I am a man," in the circumstances equally incontestible, and concludes, with impeccable logic but against the facts, "Therefore you are not a man."[194]

The study of dialectic was particularly intently pursued in France, where dialectic continued to be used and refined in the field of jurisprudence. During the final decades of the thirteenth century two major jurists, Jacques de Révigny (Jacobus de Ravanis) and Pierre de Belleperche (Petrus de Bellapertica), were particularly active in this area. The intellectual personality of these two men is typified by a search for all the possible normative solutions implicit in Justinian's laws. In fact, as Justinian's laws were increasingly defined as a corpus, and as dialectic was applied to the law to greater and greater effect, that corpus gave the impression of having no lacunae simply because it was thought there could be none.

We may need to examine at least one example if we want to understand the sort of reasoning that led these jurists to "create" a norm if one was not explicitly given in the corpus but was thought implicit in it so could be extracted from it by dialectical argumentation.

There was no explicit rule in the laws of Justinian that covered the husband's obligation to maintain and provide for his wife if he had received no dowry or if the dowry was deemed insufficient. Jurists called on a range of data to circumscribe this marital obligation. Hugolinus de Presbyteris combined two texts to argue that the wife had a right to maintenance, to foodstuffs, and to medicines because she was in the service of her husband, in support of which he cited a fragment of the Infortiatum, Dig.38.1.48, on the labor of freedmen. Another argument used an ecclesiastical example: if an obligation bound a

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[194] This anecdote from the school of Anselm of Laon (eleventh - twelfth centuries) is reported in Odon Lottin, "Nouveaux fragments théologiques de l'école d'Anselme de Laon: Quelques autres manuscrits allemands," Recherches théologiques anciennes et médiévales 13 (1946): 267.

person's conscience, one could argue that the person deserved excommunication for nonfulfillment of this duty.[195]

Jacques de Révigny "constructed" the missing norm with a typical and rigorous argumentum a fortiori (for a still stronger reason): "Let us put the case," he states, "that there is no dowry and that the wife dies. The law states that the husband must bury her (at his own expense). It is obvious that alive he owes her something more than dead, thus if the husband must bury her at his expense when she dies, for even stronger reason must he feed her at his expense when she is alive."[196] Thus by taking an existent disposition and using it as an indisputable base on which to construct a dialectical argument, the jurist expanded the normative capacities of Justinian's laws.

Extending Roman law in this fashion granted power to those capable of bringing off the operation -- that is, the interpreters -- who inevitably took an active role in the process. It also involved handsome earnings, as the professors pointed out to their students: there were subtle theoretical problems of no immediate use that did nothing to swell one's money purse,[197] but there were also pressing, current, and lucrative problems in search of a solution that met the needs of a broad variety of clients.

The great initial formative phase of the system of the Ius commune can be said to have ended with the thirteenth century. Examination and experimentation had been pursued, decade after decade, for nearly two centuries. The Ius commune was a reality, not only as a system of positive law but also as a system of legal thought. That was where it revealed its greatest potential. For one thing, it served as a model for the ius proprium when and to the extent that particular social and political communities of Europe wanted to reflect or reproduce its dictates (with modifications or additions). For another, it provided the principles, the concepts, the terminology, and the modi arguendi that the jurist could not do without when he turned to practical affairs and needed to write up the articles of a city statute or a sovereign's laws. Finally, it provided an orientation (thus, once again, it served as a model) in the complex practical operation that led to the determination of every norm of ius proprium if those provisions were to be as just and rational as those of the Ius commune.

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[195] On this problem, see Manlio Bellomo, Ricerche sui rapporti patrimoniali tra coniugi: Contributo alla storia della famiglia medievale (Milan: Giuffrè, 1961), 152-55.

[196] Attributed to Pietro Bellapertica (Pierre de Belleperche) but actually Jacobus de Ravanis (Jacques de Révigny), Lectura super C.5.12.20, De iura dotium. 1. pro oneribus (Parisiis 1519), fol. 229vb.

[197] See, for example, Johannes Andreae, add. De peculio to Guillielmus Durantis, Speculum iudiciale, IV.3, De peculio clericorum, no. 2 (Augustae Taurinorum 1578), fol. 158b: "Ioan[nes] de Bla[nosco], licet parum, instet in hac materia, dicens quod ipsa nunquam fecit suam bursam hydropicam."

15. The System of the Ius commune and the Corpus iuris civilis: The Ius proprium

During the final decades of the thirteenth century the second main current of legal thought reached clearer definition. It stressed the notion that although the "system of the laws" translated and encompassed a large part of the "system of the law," it failed to cover the entire field of the law, which meant that entire sectors of the normative materials in the ius proprium were totally irreconcilable with the discipline and the theoretical concepts of the Ius commune.

In their attempt to resolve this formidable problem the leading theorists of juridical doctrine in Italy and southern France (the pays de droit écrit) drew up the main outlines of an overall vision of the law that was destined to last for centuries (though in the sixteenth century that vision was challenged and even combatted in some countries and certain circles in Europe).

The principal protagonists in this drama were two Italian jurists, Cinus of Pistoia and Bartolus of Saxoferrato. It would be a grave error in historical perspective, however, to isolate these two men from their historical context, the tradition in which they operated, or their generation and those of their students and successors.

Concerning their tradition, it is enough to recall Cinus's master, Dinus of Mugello, and some of the jurists active during the latter half of the thirteenth century, including at least Franciscus Accursius, Albertus Odofredi, Guido of Suzzara, and Lambertinus de Ramponibus.

Above all we need to look at a didactic practice that the doctores moderni, as the sources call them,[198] reinstated and reinvigorated around 1270 by defining (with the aid of their students and the student statutes) the procedures and the structure of the public disputation of quaestiones selected for that purpose.[199]

Because the quaestio could not be based on a casus legis (that is, on a case provided for and regulated by the Ius commune, civil or canon), and because it could be based on an actual event or act that might be covered by communal statutes (quaestiones statutorum) or feudal customary law (quaestiones feudorum), disputation provided an ideal terrain for testing out possible theoretical links between the Ius commune and the ius proprium and between the world of the "certain" and that of the "probable."

The moment in which that connection was made was in forging the arguments that were needed, as we have seen, to resolve the juridical problem

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[198] This expression can be found in MS Vatican, Chigi lat.E.VIII.245, fol. 91rb: "Infrascripte questiones disputate sunt per doctores modernos sub anno domini M°.CC°.sept.secundo . . . ." At the same date of 1272 there is an analogous notation in MS Vatican, Arch.S.Pietro A.29, fol. 137va.

[199] For the reconstruction of a specific statutory rubric before 1274, see Manlio Bellomo, "Legere, repetere, disputare: Introduzione ad una ricerca sulle 'quaestiones' civilistiche," in Aspetti dell'insegnamento giuridico nelle università medievali (Reggio Calabria: Parallelo 38, 1974), vol. 1, Le 'quaestiones disputatae': Saggi di Manlio Bellomo, 55-56 and n. 88.

(quid iuris) inherent in the event stated as the topic (id quod accidit). At every step, each argument had to be linked to legislation in the Ius commune, by use of a modus arguendi, before it could be used as a reasonable and plausible base for the next move.[200]

Norms taken from the Ius commune -- at times only from brief and incidental phrases in the texts or from cases of a totally different nature -- thus offered fragments, hints, and principles that could be transplanted into the particular law, the ius proprium, to support or deny a normative solution that may have been given in the ius proprium but, since its provisions were "probable" rather than "certain," that required confirmation (or refutation) from another solution.

In actual practice, disputation served in the great majority of cases not to confirm or deny the validity of a particular law, statute, or custom in the ius proprium but to fill in normative gaps when a statute or a customary law was assumed but no specific provision was given. To borrow a phrase from Bartolus of Saxoferrato,[201] the Ius commune dominated the ius proprium because it projected its doctrines and norms into the areas in which the ius proprium reigned.

Clearly this was theoretical activity of the highest level. That the constant presence of infuences of the Ius commune owed nothing whatever to the daily practice of the ius proprium is equally clear.[202] Nonetheless, it was precisely the theoretical context and the methodological tools of the Ius commune that the practical jurist used to shape his professional mentality. Here was where he learned to consider contingent events by imagining a theoretical model to which they must correspond, and where he learned to take responsibility for shaping a rule for the case under examination when he gave his solution. The jurist, both theoretical and practical, enhanced his own function and the Ius commune, which was the legacy of his methodological training and a body of laws containing well-honed instruments for use in theory and practice alike.

This was the context in which Cinus of Pistoia and Bartolus of Saxoferrato wrote and worked.

16. Cinus of Pistoia

Cinus of Pistoia was a contemporary of Dante Alighieri. He was born around 1270 and died in 1336. His thought was fertile, rich in fantasy and wisdom, and he was capable of extremely clear and incisive expression. His soul was imbued with a strong religious tension, expressed as a yearning for an absolute justice that

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[200] See above, chap. 6, section 8.

[201] Bartolus of Saxoferrato, Tractatus de procuratoribus, quaestio VIII, An in causis criminalibus admittatur procurator, no. 7 (Venetiis 1585), fol. 205rb.

[202] Some historians disagree on this point; see above, n. 4.

God had impressed in the human heart and that humankind could rediscover and try to realize in everyday activities if men could only keep from falling into vanity and injustice.

Cinus made use of all the most vital experiences of the culture of his twelfth- and thirteenth-century predecessors. He had the soul of a poet and his poetry had met with some success, but he soon devoted himself entirely to the study of jurisprudence, beginning with a critical review of the *Corpus iuris civilis* and the *Magna glossa* that supplemented it. Under the guidance of an excellent master, Dinus of Mugello, and at his suggestion, Cinus decided to test the limits of this heritage. The Roman laws were admittedly a corpus, and Justinian's authority was indisputable and Accursius's merits uncontestable, but legislators and interpreters were human, like all humans their memories were fallible and they might make mistakes or contradict themselves. Even Accursius, who could not be expected to remember everything, had written glosses that contradicted one another. Cinus expressed these thoughts in a brief preface to a short compilation that he wrote as a school exercise during the very first years of his scholastic training, but because his remarks were extracted from the laws of Justinian they applied not only to the interpreters (Accursius in this instance) but to the legislators as well.[203]

Thanks to Dinus of Mugello and Lambertinus de Ramponibus (another of his masters), Cinus knew statutory and customary law and knew how to exploit them. In his mature works he continuously records the many *quaestiones* that he heard disputed, that he himself had disputed, or that he had read in the written versions in circulation. He thus had a fund of practical experience in the systematic connections between the *ius proprium* and the *Ius commune* that were part of the techniques of argumentation of the *quaestio disputata*.

Cinus had thoroughly absorbed the lessons of two French scholars, Jacques de Révigny and Pierre de Belleperche, whom he had very probably heard in France and seen again in Bologna. Thus it is sure that he had contacts with French circles that may have helped him learn how to apply syllogisms and *modi arguendi* to extract a norm from the *corpus* with simplicity and clarity.

Cinus's major work was his *Lectura super Codice*, written between 1312 and 1314. He also wrote valuable though lesser and unfortunately fragmentary *lecturae* on the *Digestum vetus*, at least two of which were written some years later.[204]

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[203] Cinus of Pistoia, *Glossae contrariae*, Proëmium. This work has been identified and in part published in Manlio Bellomo, "'Glossae contrariae' di Cino da Pistoia," *Tijdschrift voor Rechtsgeschiedenis* 38 (1970): 433-47, Proëmium p. 443.

[204] An unknown *divina lectura* of Cinus on the *Digestum vetus* has been identified by Domenico Maffei, *La "Lectura super Digesto Veteri" di Cino da Pistoia: Studio sui mss. Savigny 22 e Urb.lat.172* (Milan: Giuffrè, 1963).

Several tendencies are visible in the many topics that Cinus treated in his works. He used dialectic, but he was aware that every via brocardica was dubious and dangerous because it might have consequences contrary to good sense, truth, and justice. For that reason Cinus shrewdly avoided letting himself be swayed or misled by the iron grip of an abstract logic or by the canonized forms of expression that logic often implied. Thus at times his argumentation seems quite free, as when he dared to dispute a quaestio without the usual opposition of arguments pro and con, or when he suggested somewhat brusquely that his listener use his own head ("Tu cogitabis"). These liberties attracted the criticism of a young and pedantic professor, Jacopus Bottrigarius Junior, who cared more for the proper respect of hallowed techniques and forms of argumentation than for using his own head.[205]

In Cino's thought, dialectic was simply one instrument that the human mind could make use of but that must not be allowed to condition, much less dominate, men's minds. The central problem for which dialectic was a means and an instrument was the discovery of truth and justice, which could be accomplished by following a tradition of thought continuously consolidated and enriched over two centuries. In every human relationship a jurist may discover and evaluate the worldly dimension of an absolute but unknowable divine justice. Even when a principle of equity had been identified, however, aequitas (equity) was not a praeceptum ("Potest dici quod equitas non est preceptum"; It can be said that equity is not a norm); it required the intervention of someone with the power to formulate and promulgate a cogent norm: "Ius vero est preceptum ab his qui auctoritatem precipiendi habent" (A law is a norm when it is promulgated by those who have the authority of establishing it). Errors might be committed during that intervention out of negligence, ignorance, or interest, and when they were the ius would not correspond to aequitas: "Legislators at times ordain what is iniquitous, because as men they err and will continue to err."[206]

What was new in Cinus was the breadth of his discourse, which no longer kept strictly to the norms of Roman law, as with the glossators, but considered all legal norms, those of the highest imperial and pontifical authorities and those of the governing forces of kingdoms, communes, and seigniories. As an interpreter of norms and rules (praecepta) Cinus granted himself great liberty and independence, as if he could and must judge whether or not each norm conformed to aequitas. In this process of judgment he made use of all the argumentative possibilities offered by the extremely rich range of weapons in dialectic's kit -- but he simply made use of them and did not allow himself to be submerged by them.

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[205] Manlio Bellomo, "Un'opera ritrovata: La 'quaestiones' di Iacopo Bottrigari jr.," in Aspetti dell'insegnamento giuridico, 86-87.

[206] Cinus of Pistoia, Lectura in Cod.1.14.1, quoted in Calasso, Medio Evo del diritto, 1:479 and n. 32.

Cinus was sincerely sensitive to motivation, which he viewed in its full religious dimension, and he frequently accused statutory dispositions of being iniquitous and tyrannical. He thought the field of local law was the most fertile for this sort of abuse, thanks to the variety of its decisions and the fact that many of them regulated personal and particular interests. "A man," he stated, "a Lucchese, Captain of the People in Pistoia, stood in the middle of the City Hall and sold himself like a prostitute in the middle of a brothel." This politician was not the object of public scorn, however, but "was reputed sapiens [wise] in Lucca, as a skillful thief might be in a band of thieves."[207] Cinus's opinions had a clear and consistent moral set of values, especially those concerning the ius proprium. Questions concerning statutes occupy much of the discussion in the Lectura and are constantly present in the fifth point of his program.

Cinus's vision of the relationship between Ius commune and ius proprium was marked by this particular aversion to the ius proprium, which he saw as normally iniquitous and the product of thieves and sharpers. The decisive factor in this relationship was how well each set of norms reflected equity, and here the Ius commune always proved superior. In all his discussion of their relationship, the ius proprium always came second for Cinus. Following a logical scheme current at the time, the ius proprium was an accidental, occasional, hence very changeable law, whereas the Ius commune was the law par excellence; it was stable to the point of seeming eternal, and it was just. The ius proprium was only an "accessory" law; the Ius commune was the "principal" law. But the justice intrinsic to that same Ius commune was just as relative and problematical as it was in every human action and every human work in comparison to the supernatural, to the values of the faith, and to divine Will.

17. Bartolus of Saxoferrato

Bartolus of Saxoferrato was a person of mythical proportions in a golden age. He was born between November 1313 and November 1314 in Venatura, a hamlet in the Marches in the territory of the town of Sassoferrato. He began his legal studies at a very young age and had an extremely short life, since he died in Perugia in 1357 when he was barely forty-three.

Bartolus was a feverishly active man: he was a professor, a lawyer, and a legal advisor; he was involved in public life (as a member of the city council -- an assessore -- in Todi and perhaps in Cagli); he played an active role in religious confraternities. He allowed himself no rest, and during one brief summer

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[207] The episode is recounted in Cinus of Pistoia, Lectura in Cod.2.6.5, De postulando, 1. si qui (Francofurti ad Moenum 1578), reprint (Turin: 1964), fol. 71rb. It is studied in Mario Sbriccoli, L'interpretazione dello statuto: Contributo allo studio della funzione dei giuristi nell'età comunale (Milan: Giuffrè, 1969), 409. It is also discussed, with a different view of the problems involved, in Francesco Migliorino, Fama e infamia: Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII (Catania: Giannotta, 1985), 9.

vacation, while seated on the banks of a river watching its placid waters, he quickly drew up a summary of all the hypotheses in the legal questions connected with riparian rights and wrote a treatise on the subject.[208] He truly lived for the law.

Bartolus's works were vast and numerous. They included Commentaria on the three parts of the Digest (Digesta vetus, Infortiatum, Digesta novum), on the Code, and on the Novels; a long list of treatises on particular topics (tyranny, reprisals, city ordinances, riparian rights, and more); quaestiones disputatae; and several hundred consilia. His knowledge of Roman law, canon law, and statutory and feudal questions was endless and extremely solid. His dialectical formation was rigorous and perfectly fitted to the study of the law.

These were Bartolus's more obvious merits, but they fail to give a sense of the man's personality, nor do they show the goals of his vision of the law, a vision that embodied thoughts so complex it is difficult to put it into focus and to grasp its most significant traits. Indeed, historiography has often picked out either the most generic and obvious facets of this great jurist or has concentrated on highly secondary and irrelevant characteristics.

In the fullest scholarly evaluation Bartolus has been presented as Cinus's successor in the task of subjecting the law to dialectical rationalization. Bartolus attended Cinus's lessons in Perugia for only a short time, but he acknowledged that his mind had been "modeled" by Cinus. He was a pupil who surpassed his master not only in "refinement of the technique of the commentary," for his "dialectical force," and for his "exceptional skills in excavating the depths of the littera legis (letter of the law) to extract its most hidden mens (mind) and ratio," but also because by shattering the littera of the law and by a dialectical recomposition of the contents of the law he succeeded in bringing to the old fabric of the Ius commune "the first signs of life of the new societas iuris (society of law)."[209]

This portrait is undoubtedly true to life, and it gives some notion of Bartolus and his works, but it is little more than a sketch. It notes some similarities between Bartolus and Cinus but it fails to clarify with what new terms Bartolus dealt and with the vitally important fourteenth-century problem of the Ius commune and its relationship with the ius proprium.

These problems were hardly new. They were felt on the theoretical plane since, as we have seen, they had been posed for some time regarding both the relationship of norms within the Corpus iuris civilis and the relationship between that entire corpus and the many norms of the ius proprium.

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[208] Bartolus de Saxoferrato, Tractatus Tyberiadis, or De fluminibus (Venetiis 1635), fols. 132v-137r; reprint of Bononiae 1576 with a preface by Guido Astuti (Turin: Bottega d'Erasmo, 1964).

[209] Francesco Calasso, "Bartolo da Sassoferrato," in Dizionario biografico degli Italiani, 6:640-69. The same article appears in Annali di storia del diritto 9 (1965), quotes 516.

These problems had also been experienced in practice by those who wrote the laws of the kingdoms, the statutes of the communes or the corporations, or the customary laws of the cities; by notaries drawing up acts and by judges in need of concepts, principles, and methods from the Ius commune in order to decide cases -- in short, by people who needed to distinguish between the use, the formal or substantial reproduction (local legislators), and the application (judges) of the Ius commune.

In Bartolus the two lines of the system of the Ius commune acquired a particular clarity. Theoretical recognition of the ius proprium had been definitively achieved, something to which Bartolus himself had made a decisive contribution with his theoretical construct of iurisdictio, in which he stated that every ordinance contains, on a reduced scale and in reduced measure, the same powers that the emperor had in the Empire -- powers that thus become a "model."

Bartolus deepened and modified Cinus's vision. If I may be permitted the image, Cinus's view of the "system" of the Ius commune, unified by the central problem of aequitas, was like the Ptolemaic system in which the earth lay immobile at the center of a horizontal plane while the sun in its heavens moved around it every day, illuminating and warming it. So the question of aequitas could be configured as a complex of norms as varied as the various parts of the planetary system, some parts of which were principle, others accessory, but all of which gathered together to make a whole that was integrated but had no life without the light and the warmth of equity, their vitalizing sun.

Bartolus's vision was different. Common law and iura propria were not located on the same plane, and if they must be distinguished from one another the concepts of "principal" and "accessory" were inadequate. They moved instead as if within an immense spherical space in which -- to return to the planetary image -- the sun was the Ius commune and the iura propria were planets.

Equity lost the definition and the fullness that Cinus had ascribed to it, but it reacquired a full function, since it was the spirit that moved this legal universe. It resembled the divinity, which has no corporeal substance: just as the divine circulated within the human being, aequitas was the vital fluid that circulated in both the Ius commune and the ius proprium.

Furthermore, just as the sun had no life but was the prime origin of all possible life, so the Ius commune was lifeless in the terrestrial sense of the word but was the origin of all possible (legal) life for the iura propria. That was where there was tumultuous action, order and disorder, violence and peace; in short, that was the province of man, with all his problems. The Ius commune, with its concepts and its principia (norms), descended to the level of human acts, inspiring them and giving support to their legal organization. The inverse was impossible, however: "The truth of the civil law must not be obscured by the images of the statutory law," Bartolus wrote in one of his treatises.[210] The Ius commune was

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[210] Bartolus of Saxoferrato, Tractatus de procuratoribus, q.VIII.7 (Venetiis 1585), fol. 205rb: "Veritas iuris civilis per imaginem iuris statutorum obumbrari non debet."

central: "All interpretations of the statutes must be made with the authority of the Roman laws."[211]

Legal images came to be formed in the ius proprium, and they too had a legitimacy that derived from their orderly placement in the system, just as the earth had its position in respect to the sun and man in respect to God. But the statutory images could no more transcend the limits of their specific legitimacy -- limits set by the fact that they were inscribed in the system -- than the earth could seek a life of its own outside its habitual orbit and outside its constant relationship with the sun, or than men could renounce God, because only in their relationship with God did their soul have existence.

No one explained the master's thoughts better than Baldus de Ubaldis, Bartolus's most prominent pupil. Baldus did so first in general terms: "One might say that the Ius commune inspires the statutes and invests them but is neither inspired nor invested by them: and this is because of the force of attraction (vis attractiva) that the Ius commune has toward the law of the communes. But the contrary does not occur."[212] Baldus continued in even more specific terms and with a clear example: "I wonder whether the statutes are to be interpreted by means of the Ius commune. Bartolus maintains that the statutes undergo a passive interpretation from the Ius commune: thus if the statute says that Bartolus is a citizen, all the norms of the Ius commune relative to citizenship acquire relevance for him," and for that reason become applicable to his person.[213]

This example illustrates the principle that no norm on any level of the ius proprium (royal, city, corporative, or other) could be applied without taking the accepted doctrines of the Ius commune into account -- not even an extremely simple norm whose content seemed evident, such as the imposition of taxes on the citizens of a given city. A statute of the ius proprium permitted the taxation of a subject who lived in a city insofar as that subject was qualified as a "citizen," but for all their clarity and precision, the city statutes said nothing about how one became a citizen. Thus one had to turn to the Ius commune for the concept and doctrine of citizenship and for the provisions pertaining to it, and make use of them to render the statutory norm applicable. Here the distinction between the "use" and the "application" of a norm are clear: the judge (or the interpreter in a theoretical context) "used" the Ius commune to "apply" the ius proprium.

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[211] Bartolus of Saxoferrato, Comm. in Dig.1.1.9, De iustitia et iure. 1. omnes populi, no. 65 (Venetiis 1615), fol. 14ra: "Omnes dictae interpretationes fiunt authoritate legis." I might also recall a dictum that circulated widely: "Statutum interpretatur secundum ius communem."

[212] Baldus de Ubaldis, Super Decretalibus,X 1.2.9, De constitutionibus, c. Canonum, no. 15 (Lugduni 1551), fol. 11va.

[213] See Sbriccoli, L'interpretazione dello statuto, 440-41.

In this context, the use of the Ius commune was no longer and not only the practice of the judge who only as a last resort looked to the Ius commune to seek a norm to fit the case before him. As is clear, the situation was quite different. Use of the Ius commune responded to a need to provide the concepts and doctrines that were indispensable if a precept of the ius proprium was to have legal force. It also avoided the problem -- or the expectation -- of finding in the Ius commune a precept identical or analogous to one in the ius proprium; it even suggested that any contradiction between the specific normative contents of the ius proprium and the Ius commune would be totally irrelevant.

Legality came to be defined as polarized, with the Ius commune and its energizing wealth of concepts, general principles, and legal doctrines to one side, and, to the other, the ius proprium -- real, effective, and human. Like a body without warmth, a man without a soul, the soul without God, the one was meaningless and lifeless without the other.

Religious motivation and love for human life were organically merged in this vision. The divine and the human were fully experienced with neither aristocratic detachment nor desiccating rejection. Scholars have quite rightly stressed Bartolus's profound humanity, comparing him to Dante "not only for chronological reasons."[214] Bartolus has also been presented as the leading figure in a culture working to redeem "the very figure of the jurist, who in the common opinion is only a man of law" because people have often forgotten "that those laws all arose hominum causa (because of human beings), and that their study is first of all the study of humankind."[215] This culture was working to construct a true humanism that in no way resembled Jakob Burckhardt's definition and that was "the only [humanism] that the jurist can and must feel: not just discovery and exaltation of humankind but defense of them in thought and in action."[216]

This undeniably describes genuine facets of Bartolus's thought and ones that were sincerely felt and experienced. The fact remains, however, that the "system" that Bartolus constructed with a rigor and that remained paradigmatic could function in the interest of the jurists' consortia and corporations. It was precisely because the jurists were necessary interpreters of the needs of humankind, because they were the depositaries and creators of a legal science composed of principles and categories, because they were trained in the arts of proper reasoning and the skillful application of abstract concepts to concrete human acts that they could concentrate (and defend) in their person, their family, their corporation, and their class a power and a political weight proportional to the role that they played in society. Even more: thanks to their discourses on the

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[214] Francesco Calasso, "L'eredità di Bartolo" (1959), now in Calasso, Storicità del diritto, ed. Piero Fiorelli (Milan: Giuffrè, 1966), 325.

[215] Ibid., 322.

[216] Ibid., 336.

human soul and on divine and terrestrial justice, to the casual observer in the great popular masses (and on occasion in the eyes of their own students) these jurists were intellectuals much like, if not identical to, the moralists and preachers. The jurists found still greater power in being identified with such figures; they assimilated their roles, and their new cultural attributes consolidated their prestige and increased their ascendancy.

18. Scientia iuris; The Role of the Jurist in the Fourteenth Century

The jurist was anchored to the width, breadth, and characteristics of his scientia; when jurisprudence reigned supreme over the other disciplines, the jurists who had dominion over it and who stepped forward as leaders achieved a social rank that translated into and was manifested in prestige, power, and wealth. This occurred in two closely related ways.

The vulgus (a common person), who looked at the professional figure of the jurist from the outside, were struck by the social prestige and the wealth of the man of law. For that reason jurisprudence itself seemed a science of power and a lucrative discipline.

"Jurists," Nigellus Wireker wrote in the twelfth century, "are everywhere where there is money and power, at the king's court and in the dwelling of the pope, in civil society, and in the monasteries."[217] They assumed an aspect and a function: "They advance stiff as a ramrod, and they cling to kings."[218] Nigellus is repeating here one of the century's favorite themes and one that other writers -- St. Bernard, Maurice de Saint-Victor, and others -- treated with burning accusations. Fables and goliardic poetry also treated the theme of a rich and powerful jurisprudence. In spite of his "sensus hebes et cervix praedura" (obtuse and stiff-necked [character]), the ass Brunellus fully understood that the law was a road to the summits of power.[219]

This was how the common people viewed legal science. Some scholars agreed: Placentinus gave a lively personification of legalis scientia, contrasting it to ignorantia. Jurisprudence was a rapacious woman: she strikes fear in all who behold her; she has black hair streaked with white that glistens like coal and dark, sunken eyes; she is thin and pale with wrinkles running over her face; her

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[217] Nigellus Wireker, Contra curiales, in The Anglo-Latin Satirical Poets and Epigrammatists of the Twelfth Century, ed. Thomas Wright, 2 vols (London: H.M.S.O. / Longman, 1872), 1: 187, also available in reprint (Wiesbaden: Kraus Reprint, 1964).

[218] Nigellus Wireker, Contra curiales, in ibid., 1:164.

[219] Nigellus Wireker, Speculum stultorum, in ibid., 1:53.

only luminous aspect is gleaming sharp teeth set in a dry and bloodless face ("Facies, colore arida, sanguine desolata").[220]

Others, however, knew that the law had inherent values and positive features. Sensing its unity as parallel to the unity of the Empire ("Unum est ius cum unum sit Imperium"; The law is one as the empire is one)[221] was a way of transferring to the law the sacrality and the authority of the Empire. Devoting one's efforts to studying justice in order to measure the extent to which a law was or was not congruent to justice implied concentrating on the same acts and the same behaviors that concerned the theologian and the churchman, and the parallel between their activities reflected divine authority onto the figure of the jurist. It was true that the legal field remained clearly distinct from those of ethics and theology, but that distinction by no means signified a total separation, among other reasons, because intuition or observation showed them to have a common goal. Thus Placentinus displayed no embarrassment (perhaps a bit of irony) when he taught that jurisprudence was "most true philosophy," reiterated that it was a "most holy thing," and announced that it "chases away vices, supports good mores, and most admirably detests bad ones," or that it taught everyone, young scholars in particular, the three cardinal qualities of character, which were generosity, strength of soul, and (even) chastity.[222] Placentinus explained all this in the cathedral of Bologna because this discourse was part of his Sermo de legibus, read to inaugurate the academic year, and because the school year was always begun in the house of God with the professors normally speaking right along with (although after) the ecclesiastics who carried out the religious part of such functions. This was a setting that inevitably evoked the idea, current at the time, that the law contributed in its own distinct way to the melioratio ad statum perfectum (betterment to a perfect state) of humankind that was the focus of all medieval culture.

This perspective lends significance to the internal coordinates of legal culture and the very nature of the law: the jurists' insistence on justice and equity; their basic conviction that the Ius commune was a universal law, one as the Holy Roman Empire was one and as the church that brought all the fideles Christi into one fold was one; All roads led to unity -- to "oneness": the arduous

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[220] On Placentinus, Sermo de legibus, and its publishing career, see Hermann Kantorowicz, "The Poetical Sermon of a Mediaeval Jurist: Placentinus and his 'Sermo de legibus'," Journal of the Warburg Institute 2 (1938): 22-41, now available in Kantorowicz, Rechtshistorische Schriften, ed. Helmut Coing and Gerhard Immel (Karlsruhe: C. F. Müller, 1970), 111-35; esp. 127-35.

[221] Questiones de iuris subtilitatibus, rub. II, De iure naturali, gentium et civili, ed. Ginevra Zanetti (Florence: La Nuova Italia, 1958), 16, lines 176-79: "Horum igitur alterum concedi necesse est: aut unum esse ius, cum unum sit imperium, aut si multa diversaque iura sunt, multa superesse regna."

[222] Placentinus, Sermo de legibus (Kantorowicz ed., lines 77-78, 150-55, 166-67, 165-66, 176-213.

construction of a "system" to bind together the texts of the Justinian compilation and make them so homogeneous that they could be perceived as one corpus ("Omnia in corpore iuris inveniuntur"; All things may be found in the body of law); twelfth-century efforts to reduce to unity and concord the discordant normative passages in church law (Gratian's Concordia discordantium canonum or Decretum) and to promulgate the great "codifications" of the universal church of the thirteenth century (the Liber Extra of Gregory IX and the Liber Sextus of Boniface VIII) and of the early fourteenth century (the Clementinae of Clement V and John XXII); finally, the slow definition of another meaning of "system" as a link between the Ius commune and the ius proprium.

Our next problem is, first, to understand why jurists who took up the topics of the universality and the sacrality of the law and the unity of a Ius commune, conceived as a corpus, took such pains to prove their points; and second, to understand why, at the same time and with a related involvement, jurists attempted to discern real-life connections between Ius commune and ius proprium and to theorize on those connections, proposing a different picture of systematic relationships and a different meaning to the "system" of the Ius commune.

Personal motivations have little importance in the search for such reasons. Principles and values may indeed have passed "from ideals to myths, and from myths to useful instruments in the hands of those whose goal was action."[223] That might have been the case among lawyers, judges, or office-holders in public administration, even among notaries, because all these men had reason to mask the true face of their operational choices behind solemn proclamations of ideals and mythical principles. It is difficult to establish, case by case, whether it actually occurred.

It is certain, on the other hand, that there were connections between the Ius commune and the ius proprium, and the theoretical position describing and depicting such connections is equally clear. These are real data that always have the same features; in and of themselves they produced effects that were independent of the will or the awareness of the person or persons involved in the acts, whether such a person made conscious use of the Ius commune when he was setting down a norm of ius proprium in writing, or he was constructing a systematic vision of the law according to the two currents of thought that I have sought to describe. Whether a jurist, practical or theoretical, became aware of the possibilities inherent in the "system" or whether, out of distraction, ignorance, or innocence, he neglected to consider the features and constructs implicit in the real workings of a "system," the result was the same: because everyone -- the pettifogging lawyer, the judge with few scruples and little intellectual inclination, the inexperienced, ingenuous professor enamored of the logical creations of his own imagination -- everyone and in every instance, for his own part and by his own efforts, even when he knew nothing, hence had no desire to do so, everyone

[223] Guido Morselli, Un dramma borghese (Milan: Bompiani, 1978), 244.

participated actively in this historical process. I might note, incidentally, that something analogous is occurring in our own century and our own times in the field of the economic order of the capitalist "system," where the farmer, the worker, and the retail merchant, even if they know nothing about the capitalistic "system," nonetheless live in the daily reality of that "system" and, no matter how unaware they may be, contribute to constructing and maintaining it.

The universality of the Roman and canon law and of the "system" of the Ius commune conceived of in the dual perspectives of coordination within the Ius commune and coordination between the Ius commune and the ius proprium had consequences that radiated out in all directions and that it was objectively impossible for those who cultivated juridical science not to be aware of. Certainly some jurists engaged in seeking out such real connections and theorizing about them were quite lucidly aware of the effects of their theoretical position and realized how much it contributed to the consolidation, prestige, and power of their class.

First, the jurists were in a stronger position vis-a-vis heads of government but also in relation to the craftsmen and merchants who furthered production and commerce. They also reinforced their ties to the ecclesiastical world because the two groups displayed common intentions in their insistence on comprehending the things of this world and interpreting them sub specie aeternitatis (as a quality of eternity) as an imperfect reflection of divine perfection and of the supernatural and eternal sphere. Furthermore, the jurist exploited these ties, whether he made a show of them, hid them, or was totally unaware of them.

Second, a Ius commune and a universal "science" permitted, postulated, and by their very nature comported an extremely open communication among those who undertook legal studies because jurists could easily recognize one another, not only when they came from the same city or the same region but throughout Christendom. Differences in local customs, vernacular languages, customary laws and city statutes, and regional or royal laws put no obstacle in the way of their relations and their integration. In short, we have the phenomenon that the sociologists call a "horizontal integration of the elites" -- in this case, among the jurists of the various cities of Europe. This is why I believe that the problems heretofore studied and reported only under the inaccurate labels of the "pre-reception" and the "reception" of the Roman law in German lands and elsewhere need to be reconsidered in a new and more profitable perspective. It will not come as a great surprise to find that in Germany as in the Iberian Peninsula or in France, legal culture of the Bolognese type was present as early as the twelfth century and constituted a solid base for establishing robust relations within all of Europe. It should hardly be necessary to emphasize that this formidable process of horizontal integration multiplied its own powers of expansion in direct proportion to the multiplication of centers specialized in the academic formation of jurists, hence in direct proportion to the spread of universities throughout Europe.

Thanks to a universal science and a universal law, a vertical integration was also realized among those city elites, the pope and the emperor, who reigned at the summits of the two universal organizations, and the sovereigns of the various countries of Europe at the summits of the great monarchical organizations. There were in fact thousands of opinions given, letters written, and instances of technical assistance to the pope, the emperor, or the kings on the part of jurist-doctors, who always made use of the Ius commune, civil and canon.

One episode among the many that might be cited is truly paradigmatic of the dual process of the horizontal and vertical integration of the power of European jurists. In 1328 Riccardo Malombra, a famous professor of law in Padua and a consultant for the Venetian republic who, two years earlier, had been suspected of heresy for having had commerce with certain people in Alexandria, was called to Bologna on the order of the pope, John XXII, to be "examined" by the cardinal legate. Certain elements in this story seem to have had a decisive effect. The jurist presented himself, at the place and the hour in which the examination of the solidity of his faith was to take place, accompanied by the entire College of the Jurist-Doctors of Bologna, an organization of which he was not a member, since he taught in Padua, but whose full solidarity he evidently enjoyed. The cardinal legate expressed his astonishment that so many illustrious persons would "dare to take the defense of an impious [person] and a heretic." He spoke "sharp words of reproach" against Riccardo, not so much for his as yet unproven heresy as for his imprudent behavior, but he went no further than delivering a generic injunction enjoining Riccardo to remain in Bologna for an unspecified period of time.[224] Riccardo remained in Bologna for several years, still awaiting a judgment that never came either to sentence him or exonerate him. He seems to have suffered no harm from the experience because we know that his intimate knowledge of the Ius commune earned him well-remunerated consilia, to the point that some relevant theoretical points of one of his opinions merited inclusion in the Commentaria of Bartolus of Saxoferrato.[225]

This episode illustrates the chief components of legal reality in the fourteenth century: the unity of the law (Ius commune and ius proprium), the universality of legal science, the solidarity of jurists as a group, which the unity and the universality of the Ius commune helped them to achieve, but which was also aided by their close relations with the local and central political powers. Jurists were guaranteed ample elbow room for at least the entire century.

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[224] On this episode, see Enrico Besta, Riccardo Malombra, professore nello studio di Padova: Consultore di Stato in Venezia: Ricerche (Venice: Visentini, 1894), 29.

[225] Bartolus of Saxoferrato, Comm. in Auth. sacramentum post Cod.5.35.2, Quando mulier tutele officio. 1. matres, no. 2 (Venetiis 1585), fols 172rb-172va. See also Manlio Bellomo, "Giuristi cremonesi e scuole padovane: Ricerche su Nicola da Cremona," in Studi in onore di Ugo Gualazzini, 3 vols (Milan: Giuffrè, 1981-86), 1:91-92.

The political class has always had to deal with jurists, even on the political terrain of power struggles between the jurists' corporations and the constituted governmental powers. The law was repeatedly suggested as a means for setting limits for the actions of the lord or the prince.

Once again, Bartolus gave a clear statement of the question: the lord was not a tyrant if he acted "secundum ius" (according to the law); a lord was a tyrant "qui in communi re publica non iure principatur" (who did not rule his principality legally).[226] Thus the jurist reserved to his own domain an area of specific pertinence that excluded lords and princes: "Quia hodie Ytalia est plena tyrannis, ideo de tyranno aliqua ad iuristas spectancia videamus" (Because today Italy is full of tyrants, we may look to jurists in matters touching tyranny).[227] I cite from a fourteenth-century manuscript in the Vatican Library (Vat.lat. 2289, fol. 73ra) because the interpolation does not appear in the humanistic edition of the works of Bartolus.[228] I do not believe the omission to have been due either to chance or a printer's error because it is precisely the final phrase (". . .ideo de tyranno aliqua ad iuristas spectancia . . .") that refers explicitly and openly to the jurist's power to deliberate on the acts of the lord and render judgment on them. The fourteenth-century "lord" accepted the idea of listening to and even submitting to the jurist's judgment, but the "prince" of the new times was no longer willing to expose himself to that judgment or to respect the confines of an exclusive legal domain.

In the fifteenth century, when relations between the Ius commune and the ius proprium began to change in Europe, it was precisely in this area that they changed. And when the value assigned to legal science shifted in the great currents of humanism, the "Secunda Scholastica," and the Usus modernus Pandectarum, the role of the jurist changed along with it. So did the social and political power of jurists as a class when the corporations of both theoretical and practical jurists were attracted, swallowed up, caged, enmeshed, and at times desiccated as they were caught in the institutional trammels of the new principalities, the absolutist monarchies, and the national states.

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[226] Bartolus of Saxoferrato, Tractatus de tyranno, II, in Politica e diritto nel Trecento italiano: Il 'De Tyranno' di Bartolo da Sassoferrato (1314-1357), ed. Diego Quaglioni (Florence: L. S. Olschki, 1983), 177.

[227] Bartolus of Saxoferrato, Tractatus de regimine civitatis (in fine), in Politica e diritto nel Trecento italiano, ed. Quaglioni, 170.

[228] For other manuscripts of Bartolus's work, see Quaglioni, ed., Politica e diritto nel Trecento italiano, 148. For the historiographical reasons expressed here, I do not agree with the proposal to eliminate the final interpolation from the text as extraneous to the original. This suggestion (ibid., 170) is shared by Paolo Mari, "Problemi di critica bartoliana: Su una recente edizione dei trattati politici di Bartolo," Studi medievali, ser. 3, 26, pt. 2 (1985): 907-40, esp 924-25, n. 45.