of reform: among these was the centrality and supremacy of the pontificate with reference both to normative powers and to the widely employed instrument of the appeal to Rome, the autonomy of the Church from secular authority, the breaking of the bonds of servitude of the feudal and vassal systems, and finally ecclesiastical celibacy. The legal and institutional tradition of the Catholic Church would be directly influenced until the twentieth century.

No less important were the consequences of the reforms on the historical development of secular law. If it is an overstatement to say that the evolution of Western legal tradition is fundamentally attributable to what has been referred to as the 'Papal Revolution' of the eleventh century [Berman 1983], there is no doubt that the events that formed the modern European states and their legal systems are directly or indirectly connected and in part depend on the institutional structures adopted by the Church during the decisive decades of the reform.

PART II

The Age of the Classical *Ius Commune* (Twelfth–Fifteenth Centuries)

After the end of the ancient world and the beginning of the new era, many centuries later to be named the Middle Ages, a pivotal sign of discontinuity occurred in the decades of transition between the eleventh and the twelfth centuries, when society, intellectual life and institutions underwent a radical transformation and acquired new and original features. An astounding series of innovations were to take place almost simultaneously: reforms within the Church and the monastic orders, demographic development, the increase of land under cultivation and the concomitant introduction of new agricultural methods, the revival of trade and craftsmanship, the rebirth of cities, the rise of urban and rural communes, the transformation of feudal relationships, the establishment of monarchic sovereignties in southern Italy, France and England, and last of all (but certainly not least) the emergence of a legal science, through the founding of an institution, the university, devoted specifically to the training of lawyers.

The phase of early medieval customs had ended: the new European society demanded different rules and methods to successfully manage public and private legal relationships. Only appropriate legal education could insure such rules and methods: for this reason, the role of the professional jurist was to acquire fundamental importance both in civil society and in the Church. On the continent professional jurists were trained in the universities, whereas in England training took place within the new legal system of *Common Law* introduced by the Normans. From this time on, no European legal order has been able to function without trained jurists.

This is a momentous phase in European history, the driving force of which came to a large extent from Italy. Indeed for almost five centuries, Italy held a leading role in the economic, intellectual and artistic history of Europe and the Mediterranean, and it is not unfair to say that until the sixteenth century the history of Italy made its mark on the history of the whole of Europe.

The new legal science, which we will shortly be examining, was first developed in a single centre of studies, founded in Bologna and subsequently

adopted in numerous other Italian and European universities. From the thirteenth century onwards they were to adopt its methods, and these were to constitute the template for a body of norms and doctrines, which were to acquire the name of '*ius commune*'. On one hand, there was the law governing the secular sphere, on the other, the law of the Church; these were to form the two vast normative systems of civil and canon law, respectively, at one time universal and common being constituted by rules and norms which were general and which superseded the multitude of particular or special laws of single localities, jurisdictions or social classes into which society was subdivided. Neither one nor the other of these two legal regimes derived its authority from the state: law, at its highest legislative level, had in these centuries a stateless character, which is confirmed by the enduring importance attributed to custom and to the central role of doctrine as a source of law.

The character of the legal regime of the late Middle Ages cannot be understood if not in a European context. A comparison with art is natural: in the same way that the basic features of Romanesque and Gothic architecture from Catalonia to Bavaria, from England to Sicily were able to translate the spirituality of those centuries into harmonic spatial lines without relinquishing the infinite variety of motifs which render the Romanesque and Gothic art of each region and each sacred building unique, so the *ius commune* was a phenomenon which developed through the incessant circulation of persons, writings and models. Bound within a single framework, according to location it manifests original and different features.

Although over time the evolution of rules and methods was never ending, from its first inception in the twelfth century, the *ius commune* was to adopt and never put aside as its fundamental normative basis, Justinian's compilation and with it the great heritage of classical and post-classical Roman law. Well beyond the chronological confines of the Middle Ages and until the end of the eighteenth century, Roman norms retained their role of a common law, superseding particular laws of cities and kingdoms.

From the point of view of the sources of law, therefore, in continental Europe the 700-year span between the twelfth and the eighteenth centuries constitutes a single unified period which may be defined as that of the *ius commune*. The four centuries of the medieval period within this cycle, from the twelfth to the fifteenth centuries, are referred to as the classical age of the *ius commune* as this was the time during which, in both civil and canon law, a new direction in methodology developed and a succession of great jurists flourished, whose influence was to remain unabated until the modern age of codification.

7

The Glossators and the New Legal Science

7.1 Origins of the New Legal Culture

The new phase of medieval law becomes perceptible quite suddenly and almost simultaneously on various fronts. In the final decades of the eleventh century Church reform and the first manifestation of the renewed legal culture described previously were concurrent with early changes in the written documentation of agreements and judicial acts.

There are deeds of sale, exchange agreements, acts of donation and endowment, in which new formulas attest to more sophisticated legal skills of the notary drafting the act. For example, the notary Pietro di Arezzo gives evidence of his acquaintance with Justinian's *Institutions* and the *Codex* as he is eager to insert snippets of text from these into his acts [Nicolaj 1991] and qualifies himself as '*legis amator*'. In a trial that took place in 1076 in Marturi near Poggibonsi (Siena), a monastery contesting an individual over his rights to a portion of land succeeded in winning the case – despite the adversary's claim of a forty-year prescription in his favour – arguing from a Roman text which granted the interruption of prescription in case the litigant, through no fault of his own, was unable to find a judge.[1] The case is well known because the document contains the first quotation from the *Digest* after centuries of oblivion. The broader and more complex part of the Justinian *Corpus iuris*, with its wealth of classical Roman law jurisprudence, thus became a fundamental source of law and would remain so for seven centuries.[2]

In the following years other private and judicial documents – although rare in comparison to the multitude of documents still drafted in the

[1] *I placiti del Regnum Italiae*, ed. C. Manaresi, Rome 1955–1960, vol. III, n. 437, p. 333. The case is well known: the judges ruled in favour of the monastery quoting word for word the text of *Dig.* 4. 6. 26. 4; the quote was a decisive factor, though some doubt remains concerning the claim that in forty years the monastery was not able to approach the judges of the Canossa dominions in order to defend the right to the lands contested by his rival Sigizo.

[2] See the contributions collected in the volume *Interpretare il Digesto*, Pavia 2015.

traditional format – confirm the existence of judges, advocates and notaries familiar with Justinian's texts. A case in point was the 1098 dispute in Garfagnolo near Reggio Emilia, in which the skilled legal argument of the judges went hand in hand with the procedure for a duel, the case concluding with general fisticuffs.[3] Another case transcribes a subtle exchange of textual arguments between the lawyers representing the two parties in a document from the year 1107 in Rome.[4] Yet another was in Teramo, in a trial that took place the following year.[5]

It is in this very early documentary evidence that a fundamental aspect of the new legal culture may be perceived. Quotation of legal texts and the use of erudite argument are not mere exhibition of learning; on the contrary these deeds are strictly functional to the purpose of guaranteeing transactions and ensuring a stronger position in judicial disputes. It is clear that the litigant able to make use of such legal instruments often had a decisive advantage over his adversary. For the debate to be on an even footing, it was necessary for the adversary to be able to retort with equally effective arguments based on Roman texts. This gave rise to a chain reaction and rapid spread of the new legal technique founded on Justinian texts.

Nonetheless there was a preliminary condition to be met: in trials and every other legal transaction the texts of the Justinian compilation needed to be accepted as enforceable law. This could not at all be taken for granted, for though Roman law never completely disappeared from legal practice in Lombard-Frankish Italy, as we have seen, it was quite another matter to exhume an entire normative body which was 500 years old and which in its time had only marginally impressed itself on the Western world in comparison with the Theodosian tradition. But in fact, following paths which may never be entirely deciphered, this is precisely what happened: beginning in the eleventh century (the precedent of the

[3] *I placiti*, vol. III, n. 478, p. 432. The two designated 'champions' of the parties in the case – on one side the monastery of San Prospero, on the other a group of men residing on a plot of land in the Apennines belonging to the monastery – were intent on battling when a group of men from the monastery wanted to 'help out' their champion. The judges – who were basing themselves on texts from the Justinian Code to frame the question in a different way, though bound to the ordalic procedure by the *pugna* by direct order of the duchess of Canossa of whom they were delegates – refused to support the result of the duel.

[4] J. Ficker, *Forschungen zur Reichs- und Rechtsgeschichte Italiens im Mittelalter*, Innsbruck 1868–1874, vol. IV, pp. 136–138. On this and other cases of the time mentioned, Padoa-Schioppa, 1980.

[5] *Il cartulario della Chiesa teramana*, ed. F. Savini, Rome 1910, pp. 16–19.

Pavia jurists becomes very significant in this sense), it became accepted that to link an agreement or a legal argument to Justinian's text made it legally binding and founded. The four parts of the Justinian compilation – an immense collection of complicated texts – became unquestionably positive law without a new law having had to impose it.

The reasons why this might have happened may be understood intuitively. The great demographic development, the rebirth of cities and the spread of commerce, the rise of the first communes through a veritable revolution in autonomies, had all put a great strain on the system based on custom which had developed during the long centuries of the early Middle Ages. The Pavia jurists had tested the exegesis of the Lombard edicts and capitularies, but the normative foundation on which they operated could not adequately respond to the needs of a society going through such extraordinary change. The demand for a more satisfactory normative framework than that of medieval laws of Germanic origin was being felt with growing urgency. The revival of Justinian's compilation was the answer to this demand. Its many-faceted nature was to be a determining factor, as it supplied – not unlike a vast arsenal – normative instruments, rules and arguments applicable in the broadest spectrum of needs and institutions. It is significant that soon, already in the course of the twelfth century, not only powerful families, great churches and wealthy monasteries turned to the revived Roman law and the new legal techniques in settling their disputes, but craftsmen, the minor clergy, county communities and peasants from small villages[6] also did so, if they were able to pay for the services of a professional jurist. It was therefore the necessity for a legislative framework adequately responding to new demands that led to the revival and adoption of Justinian's *Corpus iuris* as a body of universal law. Moreover, its authority derived from the Empire, which was the highest authority on earth regulating civil relations: in fact, medieval emperors considered themselves successors to the Emperors of antiquity.

However, the use of the *Corpus Iuris* in transactions and judicial procedure would have been impossible in historical conditions so distant from those of classical and post-classical antiquity, in the absence of adequate analytical and interpretative instruments allowing access to an otherwise hermetical and useless body of texts which had been forgotten

[6] A typical example, among many, is that of the peasants from Piuro (Valtellina) who, in a 1155 dispute they initiated with the nearby town of Chiavenna, were evidently assisted by a professional jurist, given that a feature in their argumentation was the *exceptio rei iudicatae* (Manaresi, *Gli Atti del Comune di Milano fino all'anno 1216*, Milano 1919, n. 30, p. 48).

for centuries. For this purpose, the requisite total command of a body of notions and especially of a new legal method could only be acquired over many years of study. Therefore there was a demand for the support of professional jurists, trained on these texts and able to make adequate use of them. There was also a need for teachers able to provide this technical training.

The tough challenge of rendering Justinian's *Corpus iuris* intelligible and usable was best met by jurists working in Bologna, founders of the school of law known as that of the Glossators, although others in the same decades were also working on it – in Pavia, in Rome and perhaps elsewhere. In the first years of the twelfth century, the first university in Europe was thus founded: a small group of students and Irnerius, who 'studying began to teach'[7] (*studendo cepit docere*). From then on the essential meaning of university rests on the binomial 'research' and 'teaching'.

From this time on, the more complex functions of those working in the legal world in continental Europe – such as the judicial role and that of a defence lawyer – have been entrusted to men trained at university, though in very different historical and normative contexts; neither public institutions nor the private sector have been able to do without the work of professional jurists.

7.2 The Teachers from Bologna: From Irnerius to Accursius

The origins of the school of Bologna are obscure. What we do know is that towards the end of the eleventh century a man named Pepo – perhaps the same Pepo '*legis doctor*' mentioned in the Marturi placitum (1076) – had begun to teach law, but left almost no trace in Italy, although he was occasionally quoted in France and in England in the twelfth century.[8]

[7] '*Dominus Yrnerius, dum doceret in artibus in civitate ista [Bologna] cum fuerunt deportati libri legales, coepit per se studere in libri nostris, et studendo coepit docere in legibus, et ipse fuit maximi nominis et fuit primus illuminator scientiae nostrae; et quia primus fuit qui fecit glossas in libris nostris, vocamus eum lucerna iuris*' (Odofredus, *Lectura super Digesto veteri, Dig.* 1. 1. 6, *de iustitia et iure*, l. *Ius civile*, nr. 1, Lugduni 1550 = Bologna 1967, f. 7rb).

[8] L. Schmugge, *Codicis Iustiniani et Institutionum baiulus. Eine neue Quelle zu Magister Pepo*, in: '*Ius commune*', 6 (1977), pp. 1–9. It is particularly significant that the first evidence of the 'Bolognese' approach to Roman sources should entail the relationship between natural, Roman and Langobardic law: according to the testimony of the English theologian Ralph Niger, Pepo contested the applicability of the Langobardic fine in the case of a man accused of murdering a servant, arguing that the *ius naturale* demands punishment by retaliation with no distinction between freeman and servant. It is worth noting that Pepo's reference to *ius naturale* 'involves on the one hand the application of capital punishment in accordance with Roman law and on the other parity between servant and freeman, which is in contrast to Roman law. There is no better example of the polyhedric nature of the concept of *ius naturale*.'

The founder of the school was another jurist, whom documents attest to as having been active between 1112 and 1125: Irnerius (or Wernerius, or Guarnerius). Little is known about him,[9] but it is certain that he worked as a legal advisor and judge, that he taught the liberal arts and that in 1119 he was excommunicated for having supported the nomination of an antipope. Recent findings suggest that he was probably of Germanic origin and perhaps in youth a cleric, therefore coming from the ecclesiastical order [Mazzanti 2000; Spagnesi 2013]. His fame is, however, tied to his work as interpreter of Justinian's compilation.

The original texts of the *Digest*, the *Codex*, the *Institutions* and *Novels* were studied and analysed with extraordinary critical acumen – considering that Irnerius had at his disposal no existing interpretative apparatus, other than his own intellect – adding thousands of commentaries '*glossae*'[10] on the margins of the parchment Codes of the transcribed Roman text. In the glosses, brief statements clarified the meaning of the text, made reference to other, parallel passages, and occasionally discussed the applicability to similar but not identical cases, to the literal meaning of the norm. These three exercises constituted the critical nub of the method created by the Glossators.

Living in Bologna in the first half of the twelfth century were four pupils of Irnerius known as the 'four doctors': Bulgarus, Martinus, Iacobus and Hugo. The fact that in 1158 Emperor Fredrick I asked them to confirm his jurisdictional rights over the cities, to which question he was given a positive answer on the basis of Roman texts [De Vergottini 1977], clearly shows the authority that the school had acquired even at an early date. Bulgarus (post 1115–1166 ca., Loschiavo DBGI, I, 357–359) was the one who left the most lasting mark. Among other things, he wrote a brief treatise on procedure[11] and produced a set

[9] On the life and work of Irnerius, see the critical essay in Spagnesi 2013 (Cortese, 2002; Id., DBGI, I, 1109–1113). On Irnerius' knowledge of the Justinian *Corpus iuris*, Conte 2009, pp. 67–73; on *Authenticum*, Loschiavo et al., 2011.

[10] A collection of *glossae* to the *Digestum vetus* was edited by E. Besta, *L'opera di Irnerio*, Turin 1896; for *glossae* to the *Institutiones*, Torelli, 1959; other *glossae* by Irnerio and indication of manuscripts with unpublished glossae – in the writings of various authors, in the first place Savigny, Pescatore, Torelli, Kantorowicz and Dolezalek.

[11] Bulgarus, *De iudiciis*, ed. A. Wunderlich, *Anecdota quae processum civilem spectant*, Gottingae 1941, pp. 1–26; ed. L. Wahrmund, *Quellen zur Geschichte*, IV.1.

of legal questions originally discussed in his class:[12] both these activities were to produce literary forms destined for great success, the *ordines iudiciorum* and the *quaestiones disputatae*. A contrasting approach was that of Martinus Gosia (1100 ca.–ante 1166; Loschiavo, DBGI, II, 1294–96), a 'spiritual man' inclined to give greater weight to equity (*aequitas*) than to the rigour of the law, but equally skilled and in command of the Justinian texts[13]; he is author of brief treaties and of whole sets of glosses, still largely unpublished.

Bulgarus was to have many students, among whom the most notable are Rogerius (author of one of the earliest *Summae* to the *Codex*, written in Provence[14] and of the first apparatus to the *Infortiatum*; Chiodi, 1997), Willelmus de Cabriano (author of an important work, the *Casus Codicis*, recently discovered and published[15]) and Johannes Bassianus from Cremona (Cortese DBGI, I, 191–193): a jurist who was particularly sensitive to the new legal reality of his time, which was often distant from the discipline of the *Corpus iuris*. Thus Bassianus acknowledged what he called 'modern customs' (*consuetudines modernorum*) in reference to the autonomy of communes and to their new institutions; in a particular case he was to question how, in the presence of a well-established custom, 'can the whole world be mistaken?'[16]

Pillius de Medicina (1269–1213 ca.; Cortese in DBGI, II, 1587–1590) and Placentinus (d. 1181 ca.; Cortese, DBGI, II, 1568–1571) were his contemporaries in the final decades of the twelfth century. The first of these was an innovative writer of works on trials and teaching, but also of an important collection of *quaestiones*,[17] as well as the first doctrinal

[12] See the series of questions collected in the cd. *Stemma Bulgaricum*, which undoubtedly lists questions discussed in Bulgaro's classes: ed. F. Patetta, *Questiones in schola Bulgari disputatae*, in BIMAe, II, pp. 195–209.

[13] '*in legum pagina nulli secundus*', as a source of the time asserts (Acher, 1910, p. 516).

[14] Rogerius, *Summa Codicis*, ed. G.B. Palmieri, in BIMAe, I2, pp. 47–223. Rogerius, a student of Bulgarus, was his winning adversary in an 1162 case between the Counts of Barcellona and of Baux in Provence; and in Provence – where he taught between 1152 and 1162, perhaps in Arles – where he wrote the unfinished *Summa* to the *Codex* (Gouron, 1992).

[15] T. Wallinga, *The Casus Codicis of Wilhelmus de Cabriano*, Frankfurt am Main 2005. The work was rediscovered by G. Dolezalek; cf. Wallinga, DBGI, I, 1087–1088.

[16] '*Numquid totus mundus errat?*' The question concerns the legal qualification of an arbitration entrusted to a judge, already frequent at the time; Johannes held that this was possible, referring the case to the sphere of transaction (Accursian gl. *conventum*, to *Nov.* 86. 2 = *Auth.* IX. 11, *ut differentes*).

[17] Pillius, *Questiones sabbatinae*, Rome 1560 = Turin 1967.

analysis of feudal customs.[18] In 1182 he founded the *Studium* of Modena, to which he transferred together with some students from Bologna. Among his works was the *Libellus disputatorius*[19], which was aimed at a new way of training future jurists, and in which he summarised the essence of Roman norms into a few principles, with broad reference to specific passages of the *Corpus iuris*: but the attempt was not a success (evidently law could not be learned, even in those days, without long years of study). Placentinus was the author of an elegant *Summa* on the *Codex*[20] and of many other works, mostly to do with the trial. He too was a renowned professor not only in Bologna, but also in France, at Montpellier, where he spent at least two long periods and where Rogerius had already taught some years before.

The new legal science had in fact taken hold very early on in southern France; from 1127 in the Dauphiné there is evidence of jurists trained in the Bologna teaching practice. Around the middle of the century several legal writings were to come to the fore in the Midi (at Arles, Valence, Die and Montpellier) – in particular some important and original *Summae* of the *Institutions* and *Codex*, among which the oldest *Summa Institutionum*[21] and *Summa Codicis*,[22] which were directly inspired by the methods of the Glossators, but having characteristics of their own. The researches of André Gouron[23] have enabled many hidden aspects of the origin of a whole series of writings from twelfth-century France to come to light. Some of these works such as the *Codi*, written in the Provençal language and then translated into Latin,[24] attest to great attention being paid to the demands of contemporary practice. Others testify to the influence of original concepts and theories taken from canon law, for example inviting the judge to refuse applying an unjust custom[25] or

[18] A. Rota, *L'apparato di Pillio alle Consuetudines feudorum*, in '*Studi e memorie per la storia dell'Università di Bologna*' 14 (1938), pp. 1–170.

[19] Still unpublished, the whole work is preserved in manuscript form in Vienna, *Oesterreichische Nationalbibliothek*, lat. 2157.

[20] Placentinus, *Summa Codicis*, Moguntiae 1536 = Turin 1962; *Summa Institutionum*, Moguntiae 1535.

[21] P. Legendre, *La Summa Institutionum 'Iustiniani in hoc opere'*, Frankfurt am Main 1973.

[22] *Summa Codicis Trecensis*, published and erroneously attributed to Irnerius: H. Fitting, *Die Summa Codicis des Irnerius*, Berlin 1894 = Frankfurt am Main 1971.

[23] See research studies collected in: A. Gouron, 1984; Id., 1987; Id., 1993; Id., 2000.

[24] *Lo Codi in der lateinischen Übersetzung des Ricardus Pisanus*, Halle 1906, hrsg. von H. Fitting; on which Gouron (1984), VIII.

[25] *Libro di Tubinga*, 123, ed. C. G. Mor, *Scritti giuridici preirneriani*, Milan 1935–1938, vol. I, p. 221: '*cum de iustitia et consuetudine contenditur inter idiotas legisque peritos, consuetudo iuris nescia, errore nata, recedat, iusticia vero in omnibus iudiciis vigorem habeat*'.

affirming that norms which are contrary to the law or reason can be quite simply 'stepped on'.[26]

By this time students were descending on Bologna not only from northern Italy, but from the south of the country, from Germany, France, Spain and other regions of Europe, proving the extraordinary success of the new teaching practice. A little later, beginning in the first decades of the thirteenth century, other university centres (*Studia*) were founded on the same model such as Padua (1222) and Naples (1224) and over time many other centres: Rome, Vercelli, Piacenza, Reggio Emilia, Arezzo, Modena, Mantua, Vicenza, Padua and Pisa. Moreover, apart from general universities (*Studia generalia*) and in addition to cities in southern France, once Bologna had begun, many places in Europe became sites of teaching where work on the Justinian sources was carried out: Paris, Reims, in Normandy and England (where the Lombard scholar Vacarius was at Oxford, perhaps as early as 1149), in Ireland, Catalonia and Germany.

Of the fourth generation of Bologna teachers, the figure who stands out is the Glossator Azo, who lived between the end of the twelfth century and the beginning of the thirteenth (d. ante 1233; Conte–Loschiavo, DBGI, I, 137–139) and had been a pupil of Bassianus. He was a great jurist, an indefatigable professor (the story is told that he became ill only during vacation time) and enjoyed such success that on occasion he was forced to lecture in the town square as the students could not fit in the classroom (this would suggest that by this time there were many hundreds of law students in Bologna). Azo was the author of a work that was soon to become a classic, the *Summa Codicis*,[27] written with exemplary thoroughness and clarity. It remained without equal of its kind, so much so that no one was to attempt to write another. The *Summa* explained the entire *Corpus iuris* in summary form, following the structure of Justinian's *Codex* in such a way that, for example, under the title of sales or agency or witnesses, it mentioned not only the rules established in the *Codex*, but also those in the *Digest*, the *Institutions* and the *Novels* on those topics. For no less than five centuries Azo's *Summa*, first in manuscript form, then in print, was read and consulted.

[26] *Petri Exceptiones*, Foreword, ed. Mor, *Scritti giuridici preirneriani*, vol. II, p. 47. This topic will be discussed in Chapter 15.1 concerning the relation between equity and strict law.

[27] Azo, *Summa super Codicem, Instituta, Extraordinaria*, Papiae 1506 = Augustae Taurinorum 1966; another edition: Id., *Summa aurea*, Lugduni 1557 = Frankfurt/Main 1968; cf. Mausen in DGOJ, p. 24.

There were some jurists who were acquainted with the new science of law and not teaching in the law schools also outside Bologna and Provence. Among them was the judge Rolandus Guarmignani of Lucca (1195–1234); he was the author of a *Summa Trium Libroum* (Code's books 10–12), recently edited and analysed, the unusual focus of which is on public law, particularly on fiscal law.[28]

The first generation of Glossators had begun – also in preparing its classes – to annotate its manuscript copy of the Roman text with a thorough series of glosses, often covering the entire manuscript. The work of earlier teachers was used by their successors, who often appropriated someone else's glosses, but also made additions and often amended their conclusions. In time the manuscripts became filled with layer upon layer of *glossae* (a single page could contain as many as 100) and the necessity for producing a more legible version, assembling and ordering the older annotations, became pressing. After the apparatus of Azo and of other Glossators, in the first half of the thirteenth century, a professor from Bologna, Accursius (1180–ca. 1262; Sarti in Enc. It. App. VIII/Diritto, p. 47), was to devote all his energies to this very task. For several decades he worked to assemble a gigantic collection of glosses (around 100,000) to the Justinian compilation. In this work he was able to incorporate the interpretations of as many as four generations of Glossators, basing himself first on the more recent ones such as those of his own teacher, Azo.

The thoroughness and accuracy and subsequent usefulness of Accursius' text were such that soon, from the second half of the thirteenth century, it was to surpass all others. With the title *Glossa ordinaria*, the work of Accursius was to be transcribed in thousands of manuscripts and later, from the second half of the fifteenth century, published in innumerable editions.[29] Until the end of the eighteenth century every jurist in Europe consulting the *Corpus iuris* in his day-to-day work as a lawyer or as a judge was invariably working with the help of Accursius' great work.

7.3 Teaching Method and Literary Genres

To grasp the full significance of the Glossators' work, it is first of all necessary to remember how fundamental was the role played by the text

[28] E. Conte and S. Menzinger, *La Summa Trium Librorum*, 2012: edition (pp. 1–526) and conceptions about public law and fiscal law (pp. 65–242).

[29] Quotations will be from the 1592 Venice edition.

of written laws. For the teachers of the Bologna school, the four parts of Justinian's Compilation, in the form of manuscripts written on parchment and divided into five hefty tomes – *Codex, Digestum vetus, Infortatium, Digestum novum, Volumen*[30] – was, in the fullest sense, actual and enforceable law. Not only was each part and every statement considered valid and applicable law, but also every real or hypothetical case could find a solution within what would from this time on be called the *Corpus iuris civilis* (a title consistent with the idea of a single text that includes civil law in its entirety). The task of the interpreter was to clarify its significance by means of the conceptual instruments possessed by the jurist. This unshakeable conviction may only be compared – and also be a clue of its origin – to the attitude held by the Fathers of the Church and the scholars of late antiquity and the Middle Ages to the text of the Bible: just as, God himself being its source, for them every part of the Scripture was true, so the entire Compilation was valid for the Glossators, above and beyond apparent contradictions.

It was necessary to 'explain' the text, literally to lay open every small delicate fold and make every nuance clear. The work of the teachers from Bologna in fact begins first clarifying their own understanding of the text and then communicating or 'explaining' it to students eager to learn. Thus the Glossators' work of scientific investigation, teaching and literary activity all began simultaneously. This close connection between the teaching of law and legal science becomes clearer if we examine the different steps in which the explanation of the text was given in the lecture hall. These steps are illustrated by professors such as Bassianus at the end of the twelfth century[31] or the canonist Henricus de Susa a half

[30] The *Codex* included only the first nine books of Justinian's Code, the *Digestum vetus* books I to XXIV.2 of the *Digest*, the *Infortiatum books* XXIV.3 to XXXVIII, the *Digestum novum* books XXXIX to L. The fifth volume (*Volumen*) included the *Institutions*, the Justinian *Novels* in *Authenticum* edition, subdivided into nine sections, books X–XII of the *Codex* (known as the *Tres Libri*), and later also the *Libri Feudorum*, as well as the text of the Peace of Constance of 1183 and some imperial constitutions of the twelfth and thirteenth centuries.

[31] '*Modus in legendo quem observare consuevimus, quadripartito progressu, quasi quibusdam quatuor metis et terminis distinguitur: primo casum simpliciter et nude ponimus; secundo contraria assignamus et solutiones adhibemus; tertio argumenta ad causas de facto adnotamus, quae loci generales vel generalia vel vulgariter brocarda appellantur; ad ultimum quaestiones movere et discutere consulimus, vel statim in lectione vel in vesperis praesertim difficultatem prolixiori disputationi reservando*': [Johannes Bassianus], *Materia Pandectarum*, pr. [ed. In the Appendix of many editions of *Summae* of the *Codex* and the *Institutions* of Azo: Azonis *Summa aurea*, Lugduni 1557 = Frankfurt/Main 1968, f. 293ra.

century later[32] (the method, in fact, remained unaltered for the university degrees in both civil and canon law).

The steps may be described as follows:

1–2. A single fragment of the text was read out by the teacher: the term *lectio* (lecture) which still today characterises teaching by antonomasia, comes from this primary work of analysis, of the 'reading' of the text.

Next came a summary clarification of the meaning of the fragment, through what was (and still is) the most effective instrument for the purpose, that is, by way of a concrete example, which encapsulated the legal principle expressed in the norm, the *casus*.

The exegesis followed, consisting of a veritable explanation of every single word and proposition in the fragment of text just read.[33]

3. At this point the problem arose of the connection between the fragment under examination and parallel passages in other parts of the Compilation. In fact, more often than not, the same topic would have been treated under titles and in fragments of the *Digest*, as well as the *Codex*, the *Institutions* and often also the *Novels*.[34] It very often happened that at first glance the rules seemed discordant between the norm in the parallel passages and the passage being examined. It therefore became necessary to solve the disparity between sources (*solutio contrariorum*): a crucial phase in the work of the interpreter, which very often resulted in a pronouncement in the form of a distinction (*distinctio*), so as to corroborate both norms, as we shall see further on.
4. The fragment could include summary statements of a general nature, lending themselves for use in legal argumentation of a case (*notabilia, argumenta ad causas, generalia*). The teacher highlighted[35] the statement

[32] Henricus de Susa (Hostiensis), *Summa aurea*, a X 5. 5 *de magistris*, n. 6, ed. Venetiis 1584 = Turin 1963, col. 1513.

[33] Curiously the description by Joh. Bassianus (mentioned in note 31) does not mention this phase, although there is no doubt that the Glossators practised it consistently; perhaps he considered it implicit. It is explicitly mentioned, on the other hand by, Henricus de Susa (see note 32), in second place after the *casus*: '*secundo legendo literam et exponendo et etiam construendo, si difficilis appareat.*'

[34] Many of the manuscripts of the first generations of the school have on their margins references to parallel passages: simple references, with no further notes on the part of the Glossator. This work of identifying parallel passages in itself required long and patient analysis, carried out by several generations of jurists.

[35] Sometimes simply drawing a hand or a finger on the parchment next to a noteworthy passage.

and underlined its value in argumentation; he might also formulate other general statements – sometimes expressed directly in Roman sources, sometimes formulated by the Glossator himself – which synthesised the scope of a number of parallel sources; or he proposed pairs of opposing principles (*brocarda*), each of which could be referred back to expressly quoted sources.

5. Finally, the fragment under scrutiny was taken as the starting point for proposing one or more hypothetical or real questions: questions to which the text gave no direct and certain answer:[36] these were the *quaestiones de facto*. The answer to these questions of fact usually required reference to other sources and the recourse to techniques of legal interpretation (e.g. to analogy); it also sometimes involved the choice between two contrasting arguments, as in cases debated before a judge when two parties present contrasting legal arguments. In class the teacher therefore proposed the *quaestio*, illustrated the various alternatives and then offered the *solutio*. Beginning at the end of the twelfth century there was the additional teaching practice of assigning the examination of the questions proposed by the professor, which might be solved in different ways, to the students themselves. At set times, in the afternoon or on Saturdays (*quaestiones sabbatinae*), having divided themselves into two groups and having prepared their arguments, the students would debate the questions in the presence of the teacher, who ended the session with the approval of one or the other of the solutions, or by pronouncing a different solution of his own.

Simply listing the various steps is enough to suggest what an arduous task it was to acquire such a profound knowledge of the *Corpus iuris*. Although the operations described earlier were not always exercised for each of the many thousands of the *Corpus iuris* fragments, it nevertheless took years of study to become expert navigators of such a vast maelstrom. The teaching method was undoubtedly very advanced even in comparison to modern-day legal training. The exegesis familiarised students with the texts and their interpretation. The *solutio contrariorum* acquainted students with the technique of combining different legal texts. The use of questions and the practice of debating them trained

[36] E.g. should a norm in the *Digest* regulating the autonomous contractual capacity of the son without the necessity of the father's intervention extend also to the daughter? Did it include the capacity to make a will? Could it extend to the capacity of going to trial and obtaining satisfaction of the contractual obligation through a judge?

students to devise solutions through an effective combination of exegesis, knowledge of the system taxonomy and awareness of the case, as well as with their active participation. The reason for the European success of the method used in Bologna may largely be ascribed to the seriousness and proficiency of the teaching method.

If we look at the written works of the Glossators, it becomes clear that the various literary types which they developed almost invariably originated directly or indirectly with the intellectual activities undertaken in the school. That doesn't mean that the works themselves were simply transcriptions of what the teacher explained in class: if a few texts were generated, so to speak, in the classroom,[37] most of them were written and 'published' directly by the professors. But as a rule, even these constitute nothing more than the development of the intellectual exercises that flourished in the university classroom, and subsequently honed into a careful and coherent literary form. All the literary genres of the Bologna school similarly originated in the conceptual exercises of which we have spoken, and many among them were destined primarily to legal practice, that is to supply lawyers with tools of argument to employ before the judges in actual cases.

The tie between the teaching method mentioned previously and the Glossators' writings as distinct from the interlinear *glossae* or ones on page margins is actually very close. The collections of *distinctiones* [Seckel 1911] list the more important distinctions, generated by the analysis of parallel passages and the effort of consistently devising a *solutio contrariorum*. The *brocarda* (Azo produced a collection of these[38]) put forward pairs of contrasting principles, which quoting pertinent sources could be used to support one's thesis before the judge. The collections of *quaestiones* (sometimes edited by pupils, as in the collection of Bulgarus, sometimes edited by the jurist who had formulated them himself, as in the ones by Pillius and Azo[39]) gathered questions arising from cases (hypothetical or real) related to the text, which had been illustrated in class by the teacher. The same goes with the *quare*, which discussed the *ratio* of a legal rule contained in the texts.

[37] E.g. Bulgarus' lessons were in part 'reported' by Willelmus de Cabriano in his *Casus Codicis*, those of Johannes Bassianus were transcribed by his student Nicolaus Furiosus, those of Azo on the *Codex* from his student Alesxander of Sant'Egidio (Saint-Gilles).

[38] Azo reworked Otto from Pavia's *Brocarda*: Azo, *Brocardica aurea*, Naples 1568 = Augustae Taurinorum 1967.

[39] E. Landsberg, *Die Quaestiones des Azo*, Freiburg i. Br. 1888; Belloni, *Le questioni civilistiche*, pp. 31–37; 89–96.

The *dissensiones dominorum*[40] originated in a similar way, collecting legal points on which the professors themselves were in disagreement (dissent among professors is as old as legal science). The literary genre of the *Ordo iudiciorum*, whose eminently practical purpose was to train judges, advocates and notaries in judicial procedure, had a formidable development, but did not result from teaching, although it was Bulgarus who initiated it.[41] But the *Summae* – which present the contents of the entire compilation by adopting the systematic structure borrowed from one of its parts (mostly the *Codex* or the *Institutions*[42]) – correspond to an expanded version of the *summulae*, the short introductions used in class to present the exposition of single titles.[43]

The close association between teaching and legal science is significant for various reasons. Firstly, it illustrates the character of the university, which has remained unchanged since the twelfth century, consisting in a close connection between teaching and research. Those given the task of transmitting higher intellectual learning and training the new generation in the practice of the higher professions – the legal professions themselves being in first place – are scholars recognised as having the capability of undertaking personal innovative scientific research in their field.

Secondly, this correlation produces substantial effects on the evolution of the law's conceptual structure. The theories, the systematic categorisation, the distinctions, the rules introduced by the new legal science in the Western tradition were to prevail because they answered the needs of professional practice, in which individuals were inevitably engaged in transactions, disputes and wrongdoing. However, many of these instruments which were soon to be used in trials and allegations would not have emerged had it not been for the great incentive for reflection and theorising associated with the taxing process of intellectual training characteristic of the university. In the same way as for theology [De Ghellinck, 1948], for law too the demand for academic learning at the university level was an essential element in the new legal science that emerged in the twelfth century.

[40] *Dissensiones dominorum* ed. Haenel, Leipzig 1834 = Aalen 1964.

[41] A vast collection of *ordines* are in Wahrmund, *Geschichte der Quellen*, 5 volumes, Innsbruck 1905–1917. On the *ordines*, Fowler, 1984 and 1994.

[42] Among which first of all the *Summa Trecensis* (see note 20 of this chapter), *Lo Codi* (note 24) and those of Rogerius (note 14), of Placentinus (note 20), of Azo (note 27). But Rolandus de Lucca, Bassianus, Pillius and other Glossators also wrote *summae* or sections of them.

[43] A list in Weimar, HB Coing I, 1973, pp. 193–198.

7.4 The Scientific Method

A close analysis of the methods the Glossators followed will allow a better understanding of their sources and their criteria in setting out juridical questions. An attempt shall therefore be made to enter into the laboratory of the jurist trained in Bologna, so as to identify the tools at his disposal and how they were used.

It is necessary first of all, to draw attention to the intellectual tools of which the new legal science could avail itself. In fact the Glossators were not working on the Roman texts equipped with nothing but enthusiasm and a desire to understand. Their minds were fully equipped in reasoning because they had thoroughly assimilated disciplines offered by a particular intellectual background: the liberal arts culture which included the study of rhetoric and dialectics. The primary source of these two branches of knowledge included that part of Aristotle's *Logic*[44] which had been transmitted to Western Europe in the early Middle Ages.

Dialectical commonplaces – general principles to which one made recourse in solving problems for which a specific norm did not exist – were listed and illustrated by Cicero in his *Topics* and by Boethius in his *De differentiis topicis* along the lines of Aristotle and Themistius. The Glossators often relied on these. Some examples among many are the following: Martinus uses the *argumentum a contrario* to admit the recusation of the judge at the beginning of the trial, before the *litis contestatio*[45]; Placentinus uses the *argumentum a simili* to extend by analogy[46] the regime of dowry in order to protect the purchaser who is victim of great damage[47]; the *argumentuma genere in speciem* ('what is valid in general is also valid in the single instance') allows the Accursian Gloss to argue that a fraudulent pact cannot be protected by a judge, though not expressly prevented, because fraud belongs to the broader *genus* of crime, and malicious pacts are forbidden by law.[48] The recourse to rhetorical models and methods of argumentation

[44] Currently known as *Logica vetus* (included in the two treatises by Aristotle *Categories* and *De interpretatione* and in the *Isagogé* by Porphyry, through the translation and the three commentaries by Boethius, *De divisione, De differentiis topicis, De syllogismis*; as well as Cicero's *De inventione* and *Topica*), to distinguish it from the *Logica nova* (included in Aristotle's *Sophistical refutations*, in the *Analytics* and in the *Topics*), already in part known in the twelfth century, but only thoroughly known in the West in the thirteenth century.

[45] Because the law ruled out the judge's recusal after the *litis contestatio* (see *Cod.* 3. 13. 4), it was argued *a contrario* that it must be considered licit before that phase: see Martinus, in *Dissensiones dominorum* of Ugolino, § 114, ed. Haenel, Leipzig 1834 = Aalen 1964, p. 344.

[46] On analogy see Bobbio (1938), ed. 2006.

[47] Placentinus, *Summa Codicis*, 4. 44, p. 176.

[48] '*Dolus est genus, et inest fraus ei ut species generi [. . .], et erit bona argumentatio de toto ad partem*': *gl.'sed si fraudandi'* ad *Dig.* 2. 14. 7. 10.

(*modi arguendi*) [Caprioli, 2006] would remain in the forefront also in subsequent times to that of the Commentators.

The most significant aspect of the method adopted by the Glossators nonetheless does not reside in the recourse to rhetorical and dialectical forms, but rather in the techniques and the results to do with interpretation and the combination of Roman sources. We would like to underline the importance of three operations which sources testify as having been used very frequently in the school: the law's text being examined might receive an extensive interpretation, or a restrictive interpretation, or even a misconstrued one with respect to its original meaning. Each of these options naturally entailed important consequences as to the significance the jurist assigned to the particular norm being analysed.

The last of the three options mentioned should not come as a surprise. That a Glossator may have misunderstood a text from Justinian's Compilation is natural enough, considering, on one hand, the difficulty of arriving at a historically correct interpretation of ancient norms in the absence of adequate philological and historiographical instruments; on the other, as the Glossator would inevitably have 'read' the norm from antiquity from a point of view focused on the reality of his own time, this might naturally lead to misinterpretation.[49] Often the mistaken exegesis was corrected at a later date, by another scholar; in other cases the error was to be perpetuated until Accursius' time or even later.

One example concerns a principle enunciated for the first time by Placentinus, by virtue of which 'he who possesses is presumed to be owner' [Kiefner, 1962]: this important presumption – which we find in some modern codes – was generated by the mistaken (if felicitous) interpretation of the term *dominus*, interpolated in an imperial rescript in the post-classical age.[50] Placentinus' thesis was criticised by Bassianus, but would later be taken up by the great jurist of the fourteenth century Bartolus of Sassoferrato and for a long time repeated, even becoming law in some of the modern codes.[51]

[49] An example among many: a constitution of Anastasius of AD 507 (*Cod.* 3. 13. 7) mentions imperial officials in charge of overseeing the corporations of the late Empire; whereas the Glossa and then the Commentators intended the text to mean that the officials-judges were the elected heads of the corporations: in this they were influenced by the different world of the guilds of the communal age, based on autonomy.

[50] *Cod.* 4. 19. 2.

[51] See, e.g., the Napoleonic Civil Code, art. 2279; the Austrian Civil Code (ABGB), § 323; the German Civil Code (BGB), § 1006.

Another example regards the problem of appealing judicial decisions on disputes to do with possession. A constitution of Valentinian incorporated in the *Codex* established that such decisions, though subject to appeal, with regard to their execution, could not be suspended while waiting for the decision on the appeal,[52] as opposed to the general rule regarding appeals. But the school, from Bulgarus to Azo and Accursius, was in general agreement that appeals against sentences on possession should be totally excluded.[53] Only later was the Glossator Jacobus Baldovini the first to become aware of the consequences of such a ruling, which denied an appeal even in cases in which the decision *de possessione* was to remain definitive, when not followed by a subsequent decision *de proprietate*; and so he argued in favour of the appeal.[54]

One of the important features of the Commentators, beginning with the teachers from Orléans in the second half of the thirteenth century, was precisely that of rethinking and correcting many traditional exegeses of the *glossae* with a critical sense. This occurred again, but using an entirely different methodology, with the work of legal humanists in the fifteenth century and most of all with the *Culti* in the sixteenth century. It is clear that interpretations based on questionable or incorrect exegesis were intrinsically vulnerable, given that they were destined to fail – even after some centuries – the very moment the error had demonstrably been pronounced and agreed on.

As to cases of extensive interpretation of a norm, which were frequent in the *glossae*, we shall limit ourselves to a single example, which concerns criminal appeals. The Justinian *Codex* declared that sentences for five heinous crimes (homicide, adultery, poisoning, casting of spells and manifest violence) could not be appealed when the decision was

[52] *Cod.* 7. 69. 1: '*Cum de possessione et eius momento causa dicatur, etsi appellatio interposita fuerit, tamen lata sententia sortiatur effectum. Ita tamen possessionis reformationem fieri oportet, ut, integra omnis proprietatis causa servetur.*'

[53] Already in Bulgarus in his *De iudiciis*: '*Aliquando causa non est eius momenti, ut appellatio admitti debeat, ut de possessione momentaria*' (ed. Wahrmund, *Quellen*, IV, 1, p. 8). Other texts are examined in Padoa-Schioppa, *Ricerche* [1167], II, pp. 68–72.

[54] Actually the controversy over possession was not necessarily followed by one over ownership – as the preceding Glossators had asserted, in this way justifying the (supposed) ban on appeals – for one who had legitimate possession (and therefore could promote the case for possession, possibly losing it) might not be able to produce title of ownership. Baldovini, who was the first to point out this possible *iniquitas* (the term is his), did not go so far as to contradict the traditional interpretation, but argued in support of the appeal in the *ita-oportet* period of the text quoted earlier, '*sumpto argumento a contrario sensu, quod est fortissimum*' (the argument is cited by Jacobus' pupil Odofredo, *Lectura* a *Cod.* 7. 69. 1. *si de moment. poss.*, l. *cum*, nr. 2).

pronounced by the lower judge on the basis of certain proofs ('*luce clariores*'), further corroborated by a confession.[55] Beginning with Azo, the theory that this limitation should extend to all crimes began to take hold:[56] this was based on two fundamental principles of the Glossators, the principle of equity ('*pari equitate* ... ', discussed later) and the principle by which if the rational basis for the norm is the same, the legal rule should be the same ('*ubi eadem ratio, ibi idem ius*'). The inclination to deny criminal appeals is manifest, perhaps explained by the context of the historical period of the Italian communes, where sentencing for a crime was not subject to appeal.

The third way mentioned previously, consisting of the restrictive interpretation of a norm, is also very frequent and of great importance. The result was obtained by espousing a distinction (*distinctio*) applied to the text, thus allowing the norm to stand for a specific category of cases, but not allowing its application to one or more other categories, that were ruled by a parallel but (at least apparently) dissenting text of the *Corpus iuris*. It deserves a closer analysis.

7.5 The Distinctions

This key aspect of the activity of the Glossators – the one that perhaps was to generate the most original and lasting results – is in fact tied to the reconciliation between contradictory texts (*solutio contrarium*), previously mentioned with regard to teaching methods. In this instance, the logical procedure of the *distinctio* had a primary role.

The presence of aporemes and contradictions in the *Corpus iuris* is easily understandable, if we consider the co-existence, within the Justinian codification, of both the regime of classical Roman law, principally in the *Digest*, and that of the post-classical and Justinian law, present in the *Codex* and the *Novels*. For the modern scholar of Roman law, these unquestionable 'contradictions' are the starting point and the basic tool for reconstructing the evolution of Roman law.

For the Glossators, on the contrary, as a consequence of their attitude of unconditional acceptance of the *Corpus iuris* as a whole, almost as if it were a single giant monolith, contradictions were inadmissible. With the sole significant exception of the reforms introduced by the *Novels* – which,

[55] *Cod.* 7. 65. 2.

[56] Azzone, *Summa Codicis*, 7. 65 *quorum appell.*, nr. 4; Id., *Lectura Codicis*, a *Cod.* 7. 65. 2, l. *observare*: '*si enim sunt convicti per testes aut per confessionem, ad quid provocabunt? Et dicit generale, "ubi eadem ratio, ibi idem ius"*'.

ideally being set in the Justinian age, were generally considered by the Glossators to nullify previous norms (for them, the time of the *Novels* was equivalent to 'today': *hodie*) – the *Glossa* almost always refused to justify contradictions by placing them in a historical perspective. In the presence of a contradiction in the sources, the usual reaction was to demonstrate that the contradiction was only apparent. It was up to the interpreter, armed with juridical logic, to find a way to solve the problem. The coherence of the Justinian sources was an unshakeable belief and an indisputable assumption in the work of the Glossators.

A single example should suffice. Let us consider the hypothesis – one which was quite frequent in the age of communes and canon law, as it had been in antiquity – of delegated jurisdiction, which came into play when the competent judge legally handed over jurisdictional powers to others. The sentence passed by the delegate was naturally subject to appeal in the same way as that which would have been pronounced by the judge who had delegated his powers; the question was to whom the appeal should be lodged. A text by Ulpian included in the *Digest* indicated that the appeal should be addressed to the superior judge and not the judge who would have received the case in the first instance, had he not delegated his powers,[57] whereas a post-classical constitution in the *Codex* ruled that the appeal should be addressed to the latter.[58] Leaving aside a series of further opinions, an innovative thesis of Albericus, a third-generation Glossator, made the distinction between delegating powers in a single case as opposed to delegating jurisdiction as a whole, and argued that Ulpian's position was valid in the second instance and that of the *Codex* in the first instance.[59] A little later Johannes Bassianus, though accepting the distinction, inverted the conclusion; it was to be this position, also embraced by Azo, which was to affirm itself in the school up until Accursius' *Glossa* and beyond. Both authors overcame the contradiction between the *Digest* and the *Codex* through a distinction: each of the two norms was valid because applicable to different cases. And so the contradiction would simply be overcome. In the Accursian *Glossa* we find thousands of such *solutiones contrariorum*.

[57] *Dig.* 49. 3. 1. 1 '*is erit provocandus ab eo cui mandata est iurisdictio, qui provocaretur ab eo qui mandavit iurisdictionem.*'

[58] *Cod.* 7. 62. 32. 3, del 440: '*eorum enim sententiis appellatione suspensis, qui ex delegatione cognoscunt, necesse est eos aestimare, iuste nec ne fuerit appellatum, qui causas delegaverint iudicandas*'.

[59] gl. *iuris dictionem* a *Dig.* 49. 3. 1. 1, MS Paris, Bibliothèque Nationale, lat. 4455, f. 151va.

There were also many and important institutes for which the task of the interpreter was even harder: the relevant sources would be more than two, scattered in distant locations and apparently contradictory. It was then necessary to interpret them in a way that each made sense, all together constituting a coherent whole.

An example is the following and regards the frequent occurrence of contumacy in a trial and its consequences. This topic had undergone considerable evolution in Roman law: whereas in the classical age the presence at the trial was required of both parties and the case was automatically lost by the party who failed to appear,[60] in the post-classical age several imperial interventions made the position of the absentee party less drastic, and by the age of Justinian the judge could take into consideration the arguments of both parties and possibly even make a decision in favour of the party who had failed to be present in court. It was Irnerius himself who first brought this question up. As a preliminary thing he made a distinction between the failure to appear before or after the *litis contestatio* had taken place; for this second eventuality he made a further distinction between the absence of the plaintiff or (as occurred more frequently) of the defendant. In this latter case he made a distinction between three different kinds of absence: by necessity, negligence or contumacy. For each of the three there were different consequences, depending on the outcome of the controversy and on the possibility for the contumacious loser to appeal against it.[61] The later generations of Glossators, from Piacentinus to Azo and Hugolinus, were to return to this theme over and over again. The result which was ultimately reached, after many doctrinal oscillations, was the one drafted in Accursius' *Glossa*: it made a distinction between 'true' contumacy and 'presumptive'[62] contumacy, limiting the drastic and general limitation of the right of appeal on the part of the party absent by contumacy – dictated by the sources[63] – to the first of the two hypothetical cases.

The mechanism of distinction (*distinctio*) therefore allowed the Glossators to place scattered sources into a rational order. By assigning

[60] '*Contumacia eorum qui ius dicenti non obtemperant, litis damno coercetur*' (*Dig.* 42. 1. 53 pr.): a consequence that does not apply to an absence due to illness or reasons of *force majeure* (*Dig.* 42. 1. 53. 2).

[61] '*Lite contestata contingit reum abesse quandoque contumacia quandoque necessitate quandoque sola negligentia vel voluntate*' (gl. ad *Cod.* 7. 43. 10, ed. Pescatore, Die Glossen des Irnerius, repr. Frankfurt am Main, 1968, p. 73).

[62] According to the Accursian *Glossa* (gl. *appellare*, ad *Dig.* 4. 1. 8).

[63] '*Eius, qui per contumaciam absens [. . .] condemnatus est [. . .], appellatio recipi non* potest' (*Cod.* 7. 65. 1).

a role and a specific meaning to each of them, contradictions were overcome and resolved. But in addition to this, the passages under consideration were assigned a place within a systematic framework in accordance with a pattern of categories and concepts and this work was often directly and personally attributable to the Glossator, not to the Roman sources. For example, Irnerius' tripartite division – absence by necessity, by negligence and by contumacy – did not appear in the sources; nor did Accursius' classification regarding the five possible causes of absence from judgement[64]; nor the further distinction between true and presumed contumacy. Thus an embryonic system within the juridical institutions was generated: this was a 'micro-systematisation' resulting from the effort to understand and coordinate the texts, but destined to become the basic skeleton of the different juridical institutes.

The Glossator began with the letter but ended far beyond the letter of the text: be it in the interpretation, in the work of systematisation or the solution of controversial questions. The procedure by which this work was done was in using *the whole text* of the *Corpus iuris* while *analysing any single fragment* contained within it. Every snippet of text was read and interpreted while keeping in mind the existence and implication of parallel texts: each one assuming its true significance only in its relationship to all the others; every statement was understood in the global context of the entire compilation. What is more, the Glossators were convinced that every case could be analysed and solved through the texts of the compilation: 'everything can be found in the *Corpus iuris*', declared Accursius in one of his *glossa*.[65]

Law is encompassed in a single book, the book does not have any contradictions and therefore forms a coherent mosaic, and every possible case can be traced back to the text by virtue of a befitting work of conceptual analysis: this was the Glossators' firm conviction.

The interpretative technique that derived from this approach is clearly infinitely more complex and articulated than the simple reading of single passages might suggest. Two aspects should be underlined: first, its resemblance to the method applied by the Fathers of the Church and

[64] The Accursian *Glossa appellare* a *Dig.* 4. 1. 8 (quoted earlier in n. 62) makes the following distinctions: 1) absence '*probabilis et necessaria, ut militia*'; 2) '*probabilis tantum, ut studiorum*'; 3) '*necessaria tantum, ut relegatio*'; 4) '*voluntaria sine contumacia, ut mercator*'; 5) '*per contumaciam*'. Each of them produces specific consequences concerning restitution and appeal, with references to various sources.

[65] '*Omnia in corpore iuris inveniuntur*': Accursius, *Glossa magna*, Venetiis 1592, gl. *notitia* to Dig. 1. 1. 10.

other ancient and medieval authors such as Gregory the Great to the texts of the Old and New Testament; and secondly, its affinity with the modern techniques of interpretation of law. It was the Glossators working in the *ius civile* who brought this technique – marginal in antiquity, both in Greece and in Rome – into the world of law, probably deriving it from theological culture. It has been applied since then, even after the transition to modern codifications.

8

Canon Law

During the age in which the new legal science originated, canon law was also to undergo radical transformation. Although certain fundamental choices had been made in the decades of the Gregorian reform, their integral translation into written law took place in the course of the twelfth and thirteenth centuries, together with a further evolution which has led historians to name this historical phase the 'classical' age of canon law.

8.1 Gratian's *Decretum*

First and foremost was the composition around 1140 of a collection of canon texts which was very different from any that had come before. In Bologna a monk named Gratian[1] gathered into a single compilation about 4,000 texts covering the entire spectrum of juridical relationships within the Church: sources of law, nominations and powers of the regular and secular clergy, procedural norms in ecclesiastical cases, crimes and sanctions of a religious nature, juridical rules of the sacraments, including marriage, which from the early Middle Ages until the modern age was, as a sacrament, thought to be within the competences of the Church. Gratian's work consisted of a succession of layers the first phases of which, according to a part of recent historiography,[2] included different authors, whereas others believe it was Gratian himself who in a second phase inserted a series of passages taken from Justinian's Compilation. With further additions this would become the definitive version which was to be adopted for centuries by the schools.[3]

[1] On Gratian's life and work, see Condorelli in DBGI, I, 1058–1061; Landau in Hartmann and Pennington, 2008, pp. 22–54; Roumy, DGOJ, 2008, pp. 212–216.

[2] The two positions are represented in particular by Winroth, 2000; and by Larrainzar, in De Leon et al. (eds.), *La cultura giuridico-canonica*, 2003, pp. 45–48; a full recent bibliography on the affirmation of the *Decretum* is given and summarised by Condorelli in *Graziano*, in DBGI, I, 1058–1061.

[3] *Decretum Gratiani*, in *Corpus Iuris Canonici*, ed. Aem. Friedberg, Leipzig 1879, repr. Graz 1959, vol. I.