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.

Together with canons from Church councils and synods, Gratian's *Decretum* included many texts of a pontifical origin, in particular of Gregory the Great; in addition, hundreds of passages taken from pastoral writings of the great Fathers of the Latin Church, Saint Augustine in particular; lastly also texts of secular law, particularly Roman law. As mentioned previously, these Roman law additions, mainly those to do with procedure, were inserted in the second expanded draft of the *Decretum* appearing not long after the first, and in the following years were to multiply by jurists involved with the collection, in the end reaching about 200 in number. Not surprisingly the work came into being in Bologna, in the very years during which Irnerius' students had already established the new method of study on Roman law sources.

Roman law had been adopted by the early medieval Church ('*ecclesia vivit iure Romano*') and was to be fundamental in canon law tradition, despite the profound differences and the innovations based on scriptural precepts and the elaborations of councils and great pope judges as well as legislators.[4]

The presence of hundreds of passages by the great Fathers of the Church – texts often endowed with religious significance and rich with admonitions, advice, ethical judgements, although not strictly legal in nature – gives Gratian's *Decretum* a particular quality. Law and theology, legal rules and moral-religious rules sit side by side in the *Decretum*, although it was Gratian himself who provided the premise for a distinction between the two spheres, one which was to be theorised and applied in the doctrines of the great canonists of the classical age. This combined presence of the two elements constitutes one of the reasons for both the appeal and the success of the *Decretum*.

In his *Decretum* Gratian based himself on some earlier collections, first of all those of Anselm of Lucca and of Yves of Chartres. But for this work he used a very different method: he accompanied the texts with a series of short explanatory comments (*dicta*), conceived for the purpose of reconciling the many contradictions present in the canonical sources, encompassing a millennium of Christian rules and institutions. Understandably, the title of the work was *Concordia discordantium canonum.*

[4] Just one example: canon law was to adopt the Roman law rule whereby responsibility was excluded in the case of a minor's illicit act if it resulted from negligence or culpability, but was instead recognised if the act was carried out deliberately ('*ex animo*'): on this and related questions to do with infants on which canonists were to thoroughly deliberate, making a distinction between 'delict' and 'sin', also in consideration of their religious and legal consequences, see Lefebvre-Teillard, 2008, pp. 131–148.

On occasion it is Gratian himself who added other texts, mostly biblical, raising questions of coherence: for example, confronted with the canonical rule banning lay interference in ecclesiastical legal affairs, he underlined the anomaly of Daniel's intervention when unfair judges sought to condemn the innocent Susanne.[5] The questions are sometimes solved on a whim, such as in the case (mentioned earlier) in which he simply declares that in antiquity conduct was allowed which no longer was admitted[6]; he calls into play therefore the logical principle whereby 'The cause ceasing, so does the effect cease'.[7]

But it is mostly the criterion of the distinction which Gratian uses in his work [Meyer, 2000, p. 264], much as Peter Abelard had done in theology two decades before, in his pioneering work *Sic et non.*[8] By identifying an appropriate distinction, as we have seen, it is possible to show that two or more rules which seem to contradict one another actually concern different cases: the contradiction thus being overcome. Among the innumerable examples Gratian offers is the distinction between the *necessity* and the mere *opportunity* for the Church of effecting a promotion or a nomination against the will of the chosen candidate, a point on which the sources were divergent:[9] also the distinction between necessary sacraments (such as baptism) and sacraments which bestowed dignity (such as an order) as a separate criteria that should determine the validity or the invalidity (the sources were divergent also on this matter) of the sacrament administered by a simoniacal priest or bishop[10]; another distinction regarded the possibility for an infidel recently converted to Christianity to remarry – here too the texts held divergent views – the distinction being whether it had been the wife or the husband who had interrupted their cohabitation after the conversion.[11]

[5] Daniel 13.

[6] At the time of the Old Testament 'multa concedebantur que nunc penitus prohibentur' (Gratian, *dictum* a C.2 q.7 c.41, §7).

[7] Concerning the prohibition – repeatedly expressed in the canons – of electing a simple layman to the bishopric, Graziano recalls the case of Ambrose, who was elected without having been baptised and resolves the question by limiting himself to declaring that 'prohibitiones proprias habent causas, quibus cessantibus cessant et effectus' (Gratian, *dictum* a D.61 c.8).

[8] Abelard, *Sic et non*, ed. B. B. Boyer and R. Mc Keon, Chicago-London 1976. Abelard was, however, unable, in a famous dispute which took place in Paris, to convince the jurists that his method of interpretation and argumentation was more efficacious than theirs: 'unde derisus fuit' (Giuliani, 1964).

[9] Gratian, *dictum* ad D.74 c.6.

[10] Gratian, *dictum* ad C.1 q.1 c.39.

[11] Gratian, *dictum* ad C.28 q.2 c.2: if it was a non-Christian wife who had departed, the husband could remarry, according to Gratian, whereas if it was the converted husband who had interrupted the cohabitation, he could not remarry.

Gratian made efforts to apply these and other criteria, beginning with the fundamental one of the *distinctio*, so as to make use of the entire Western canonical tradition, without having to sacrifice part of it in the name of coherence.

8.2 The Decretists

The *Decretum* was not officially recognised by the Church, so the juridical validity of the texts included in the collection remained that of each original source, all very different from each other, as we have seen. But the influence of this work was *de facto* enormous, both in the practice of canon law and at a doctrinal level, as the new method of study and analysis introduced by the Bolognese Glossators was extensively adopted. After Gratian, beginning in the middle of the twelfth century and with rapidly increasing intensity, a great many doctrinal texts of canon law came to light. An evolution in canon law was therefore to take place akin to that which had occurred a little earlier with the civil law Glossators and here too scientific activity and teaching were strictly tied.

From the beginning, the centres of study and research in which the Decretists[12] (this was the name given to the authors working on Gratian's *Decretum*) worked were also to be found outside Italy. Other than Bologna – where the earliest *Summae* of the *Decretum* had been produced by Paucapalea[13]; Rufinus, a Frenchman who taught in Bologna; and the mysterious Roland; also in Paris (where the *Summa Parisiensis* and the *Summa* of Etienne de Tournai were written),[14] in Cologne (*Summa Coloniensis*),[15] in Normandy, in the Low Countries, in England and elsewhere, during the second half of the twelfth century and the beginning of the thirteenth century, there was a veritable flowering of glosses, commentaries, *summae*, apparatuses and treatises on canon law and procedure, all of them based on the *Decretum*. At the end of the century the great *Summa* by Uguccio

[12] Weigand in Hartmann and Pennington, 2008, pp. 55–96.

[13] Paucapalea, *Summa*, ed. J. F. von Schulte, Giessen 1891, repr. Aalen 1965; *Die Summa decretorum des magister Rufinus*, ed. H. Singer, Paderborn, 1902, repr. Rufinus von Bologna, *Summa decretorum*, Aalen 1962; *Summa Magistri Rolandi*, ed. F. Thaner, Innsbruck 1874, repr. Aalen 1962.

[14] *The Summa Parisiensis to the Decretum Gratiani*, ed. T. P. McLaughlin, Toronto 1952; *Die Summa des Stephanus Tornacensis*, ed. J. F. von Schulte, Giessen 1891, repr. Aalen 1965.

[15] *Summa Elegantius in iure divino seu Coloniensis*, I–IV, ed. G. Fransen and S. Kuttner, New York 1969 – Vatican City 1978–1990.

from Pisa (d. 1210),[16] professor in Bologna and later bishop of Ferrara, a work particularly rich in references to Roman law completing (especially for the procedure) the canon norms, continued (but did not close) the season of the Decretists. In the first years of the thirteenth century this tradition produced some important works of analytical commentary on Gratian's *Decretum* outside of Italy: as in France the Summa *Ecce vicit 2009* and the Apparatus *Animal est substantia*[17].

In the first decades of the thirteenth century in Bologna, Johannes Teutonicus (clearly of German origin) wrote what would become the Ordinary Glossa on the *Decretum*, later revised by Bartolus of Brescia in the definitive version, present in hundreds of manuscripts and in all the old editions of the *Decretum*. A science of canon law had thus been engendered, a very distinctive one both in purpose and method, despite the many points of contact with theology and with the *ius civile*.

8.3 The Decretals and the *Ius Novum*

In the same last decades of the twelfth century another stream of canon law was developing. The accession to the pontificate of popes who had received a thorough legal education was one of the reasons for the huge increase of canon law coming from the Roman Curia.

The centralisation of the Church, beginning with the Gregorian reforms, had in fact enormously increased the number of judicial decisions from the single dioceses to Rome. Canon law admitted the right to appeal to the Pope not only after a definitive sentence, but also against the interlocutory decisions by bishops who acted as ordinary judges in the single dioceses. It admitted appeals to Rome against decisions made in local seats, for example to do with ecclesiastical benefits. It allowed appealing directly (*omisso medio*) to the Pope, without having to apply first to the bishop of the dioceses competent in the given territory. Furthermore, it was often the bishops themselves who asked Rome for a legal opinion in difficult cases. There was therefore a continuous stream of appeals to the apostolic seat, which some members of the Church criticised for taking the Pope away from his pastoral duties; among these was Bernardus de Clairvaux, who addressed a written request to his

[16] The *Summa* is unpublished, but is preserved in various manuscripts, among which the Vat. lat. 2280 of the Vatican Library.

[17] Both written in Paris; it has been persuasively argued that the author of the first of these (*Ecce vicit leo*) was the Parisian Petrus Brito (Lefebvre-Teillard, 2009).

former disciple Pope Eugene III, exhorting him not to be weighed down by the plethora of controversies addressed to the Roman Curia.[18]

The judicial load became overwhelming, particularly with the pontificate of a great jurist from Siena, Rolandus Bandinelli, Pope by the name of Alexander III from 1159 to 1181, who held that 'opening your ears to claimants' and 'to judge fairly' were the primary duties of a Pope.[19] Alexander III himself and his successors were intent on limiting the increase in appeals, frequently inserting in their decisions a clause forbidding the appeal to Rome against the judgement made by the papal delegate. But the number of appeals to Rome remained very high. At the end of the thirteenth century a single case could still result in as many as sixteen appeals to the Pope.[20]

The procedure most frequently used by the Roman Curia consisted in composing a brief – a decretal letter, *littera decretalis*[21] – in which either a bishop or another prelate, for the most part resident of the territory from which the appeal to the Pope had come, was delegated by the Pope to decide on the case – on condition that the factual premises ascertained by the delegated judge corresponded to those represented in the appeal – on the basis of a rule of law explicitly outlined in the decretal itself.

The analogy with the rescript procedure at the time of Imperial Rome is self-evident; and also the decretals answering the bishop's questions are comparable to the procedure of *consultatio* of the late Imperial age. In the same way that the Roman rescripts eventually acquired normative status, the pontifical decretals – each of which addressed a specific case and was therefore originally binding solely in that case – in practice soon acquired an authoritative role in analogous cases. The decretal goes from being a judicial decision to becoming a general norm: as Montesquieu was to say in another context, as it went along (*en roulant*), jurisdiction was transmuted into law. A large part of classical canon law came into being in this way. Furthermore, already with the great Pope Innocent III (1198–1218), himself a trained jurist, and with his successors, pontifical interventions of a strictly legislative nature became more and more frequent.

[18] Bernardus, *De consideratione* (1149–1152), III. 2: 'appellatur de toto mundo ad te [. . .] et utinam tam fructuose quam necessarie' (PL 182, col. 761).

[19] See, respectively, *Collectio Wigorniensis*, ed. Lohmann (ZSS, KA, 22, 1933, p. 134); and Petrus Cantor, *Verbum abbreviatum*, 65 (PL 205, col. 199).

[20] As in a case of 1292 in Milan concerning a vacant benefice: *Gli Atti dell'arcivescovo e della Curia arcivescovile di Milano nel secolo XIII, Ottone Visconti (1262–1295)*, edited by M. F. Baroni, Milan 2000, n. 362, p. 334.

[21] Pennington in Hartmann and Pennington, 2008, pp. 293–317.

Beginning in the last decades of the twelfth century decretals were to be privately transcribed into a number of collections [Fransen, 1972] which would soon be arranged systematically so as to make them easier to consult. In 1190 a collection appeared named *Compilatio prima*, edited by the canonist bishop Bernard of Pavia (d. 1213), who arranged the material by dividing it into five parts, which has since become the classical format for canon law. To Bernard we also owe the first *Summa decretalium*, which sets out the contents of the collection.[22] Four more compilations were added in succeeding years, which as a cumulative work together with the first compilation, were known as *Compilationes antiquae* (1210–1226).[23] The Third Compilation (1210), ordered by Pope Innocent III and sent by him to Bologna, was promptly commented on in a gloss by Johannes Teutonicus, who also glossed the Fourth Compilation (1216), whereas the Fifth (1226), which collected the decretals of Honorius III, was edited, by order of the Pope himself, by Tancredus, professor in Bologna and author of the well-known *Ordo iudiciarius*.[24]

A few years later Gregory IX (Pope between 1227 and 1241) entrusted the Spanish Dominican canonist Raimundus de Peñafort to bring together the five collections into a single work. Thus came into being in 1234 the *Liber Extra*,[25] a vast collection of pontifical law, systematically ordered in the same way as the preceding ones beginning with *Compilatio I*. Book I dealt with the sources and ecclesiastical offices, Book II with canon law procedure, Book III with the clergy and ecclesiastical property and benefices, Book IV with marriage, Book V with criminal law. Every book is divided under headings, each of which is dedicated to a specific subject with the inclusion in chronological order of the decretals and other pertinent canonist texts.

It is important to underline that the decretals having come into being as pronouncements on single cases, once having been included within this set framework, were inevitably to change in nature and scope. This was not only because the rules contained within them became the general law of the Church, but also because their joint presence in an organically

[22] Bernardi Papiensis Faventini episcopi, *Summa decretalium*, ed. E. A. Th. Laspeyres, Regensburg 1860, repr. Graz 1956.

[23] *Quinque Compilationes Antiquae nec non Collectio canonum Lipsiensis*, ed. Aem. Friedberg, Leipzig 1882, repr. Graz 1956.

[24] Pillii Tancredi Gratiae *Libri de iudiciorum ordine*, ed. F. Bergmann, Göttingen 1842, repr. Aalen 1965.

[25] *Decretales Gregorii IX*, ed. Friedberg, *Corpus iuris canonici*, Leipzig 1879, repr. Graz 1959, vol. II, col. 1–928. The name comes from the *Liber Extravagantium* (decretals 'straying outside', as they were not originally collected in organised texts).

conceived compilation made it imperative that the way the single texts were interpreted would assure their compatibility and clarify their relationship, in the same way as with the Roman texts and with those of Gratian's *Decretum*. Every decretal thus acquired a significance and scope deriving from its relationship with the other decretals and with other canon law sources.

The procedure for appeals to the Pope and the decretals and constitutions which it was to generate were the fundamental instrument in promoting the development of canon law in the twelfth and thirteenth centuries, and for rendering it uniform within the entire Latin Church.

Side by side with Gratian's *Decretum*, the *Liber Extra* – together with the succeeding minor but nevertheless important collections: the *Liber Sextus* ordered by Pope Boniface VIII in 1298, the *Clementine* by Pope Clement V in 1313, the *Extravagantes* of Pope John XXII in 1323[26] – constituted the *Corpus iuris canonici.*

This was destined to regulate Church law, even with important additions such as that of the Council of Trent in the sixteenth century, until the code of canon law of 1917.

8.4 The Decretalists

The collections of pontifical decretals were also the subject from very early on of an intensive doctrinal work of interpretation and conceptual refinement, beginning at the end of the twelfth century.[27] The *ius novum* made up of the decretals was harmonised with the ancient tradition of canon law enshrined in Gratian's Decree. Many authoritative canonists worked on this, and not only Italian: some of the names of those working in Italy suggest a foreign provenance, such as Vincentius Hispanus, Laurentius Hispanus, Alanus Anglicus and Ricardus Anglicus, but also Petrus de Sampsona from Provençe, Damasus from Bohemia and many others. Johannes Teutonicus, the author of the Ordinary Glossa to the Decree, commented on the rules established by Innocent III in the fourth Lateran Synod of 1215[28] and transfused the canons to *Compilatio IV* of 1216.

The 'Decretalists' carried out an interpretative and creative activity in no way inferior, in either quality or quantity, from that of the legists. They

[26] *Corpus iuris canonici*, ed. Frieberg, vol. II, col. 929–1312.
[27] Pennington in Hartmann and Pennington, 2008, pp. 211–245.
[28] *Constitutiones Concilii quarti Lateranensis*, ed. A. García y García una cum commentariis Glossatorum, Vatican City 1981.

were careful to combine canon law with the Roman law elaborated by the legists of their time, since the Church had for centuries adopted Roman law within its normative legacy. Procedural rules in particular were organised in such a way as to integrate the two legal systems, giving life to what would be referred to as 'Roman-canonical procedure'. The Ordinary Gloss apparatus to the *Liber Extra* was the work of Bernard of Botone, who edited as many as four successive versions between 1241 and 1266; no less praiseworthy are the unpublished versions of Vincentius Hispanus, a student of Azo in Bologna, and by Laurentius Hispanus, teacher of Bernard de Botone [Kuttner, 1980, IV].

Among the Decretalists of the mid-thirteenth century, at least three figures of indisputable authority must be mentioned: Goffredus de Trano (Tranensis) from Puglia, Henricus of Susa (Hostiensis) from Piedmont and Sinibaldus Fieschi from Genoa. The first of these, professor of canon law in Bologna and perhaps Naples, elevated to cardinal in 1244, was author of a well-known *Summa* of the Gregorian *Decretales*[29] and, in the forties of that century, of a gloss apparatus to the *Liber Extra* which is still unpublished [Bertram, 1971]. Henry of Susa, later to be elevated to Cardinal of Ostia and therefore known as Hostiensis [Pennington in DBGI, I, 795–798], wrote a *Summa Decretalium*[30] which soon imposed itself (more than 100 medieval manuscripts survive) and prevailed for centuries because of its precision and clarity, playing a similar role in canon law as Azo's *Summa* in civil law, in addition to which he produced a more analytical commentary (*Lectura*) on the decretals.[31]

Sinibaldus Fieschi was Pope between 1243 and 1254 with the name Innocent IV, during the overwrought period of the clashes with Emperor Federico II, but the fame he enjoyed as a jurist was not inferior to that of his role at the summit of the Church.[32] The *Lectura* to the decretals written in the form of *glossae* and annotations to the single decretals of the *Liber Extra* (but handed down as a free-standing work, without the addition of the text of the decretals) was written in the years of his pontificate and widely circulated immediately. It contains interpretations and ideas that would be quoted for centuries by civil and canon law

[29] Goffredus de Trani, *Summa [...] in titulos Decretalium*, Venetiis 1586.
[30] Henricus de Susa (Hostiensis), *Summa aurea*, Venetiis 1584 = Turin 1963.
[31] Henricus de Susa (Hostiensis), *Lectura [...] in primum <-sextum> decretalium [...] commentaria*, Venetiis 1581, repr. Turin 1965.
[32] V. Piergiovanni in *Gli inizi del diritto pubblico*, 2008, pp. 195–222; Melloni in DBGI II, 1872–1874.

scholars of the *ius commune*. Sinibaldus' analysis touches on all the institutions of canon law, and sometimes also of civil law. To mention just a few examples, he admitted two sources of authority, local and universal, legitimising the office of notary, as he maintained that notaries who had been nominated by the Emperor or the Pope could practise anywhere, whereas notaries who had been nominated by the citizenry had the authority to operate only within the bounds of their own communes; he also expressly acknowledged the value of custom in this matter.[33] He held, against the belief of other canonists, the principle of the distinction between the ecclesiastical and the secular courts, denying the legitimacy of the appeal to the bishop against the decision of a lay judge.[34] His concise theory of an interconnected plurality of things or individuals (*universitas*) as fictitious persons (*persona ficta*) provided a conceptual basis for the concept of this fundamental figure in law, the 'legal person', with ramifications that have come down to the modern age.[35]

Among the many authoritative canonists of successive generations Guidus de Baysio (d. in 1313; Liotta in DBGI I, 1092) should be remembered. A native of Reggio Emilia, he was a student of Guidus of Suzzara, and eventually a professor in Bologna. Born into a family of modest economic means, he was helped by his teacher to graduate without having to incur any fees, and was later nominated archdeacon and chancellor of the University of Bologna, a title (*Archidiaconus*) for which he is best known. He carried out some delicate missions for the Popes in Avignon. He was the author of a commentary on the *Liber Sextus* but above all of a well-known commentary on Gratian's *Decretum*,[36] with the title *Rosarium*, in which he makes extensive use of some doctrinal sources that had been ignored in the Ordinary Glossa of the *Decretum*, in particular the work of Laurentius Hispanus.

Johannes d'Andrea (1271–1348; Bartocci, in DBGI, I, 1008–1012) was a student of the archdeacon in Bologna; as a professor there, he wrote a gloss to the *Liber Sextus* (1303), a commentary on the Clementine (1326), a commentary on the *Liber Extra* and another on the *Novella in*

[33] As in Innocent IV, *Apparatus in V Libros Decretalium*, Francofurti ad Moenum 1570, repr. Frankfurt am Main 1968, a *Liber Extra*, X 2. 22. 15 *cum P.*

[34] Innocent IV, *Apparatus* a *Liber Extra*, X 1. 29. 38 *significantibus*; a X 1. 33. 6 *solitaebenignitatis*, a X 2. 2.7 verum.

[35] Innocent IV, *Apparatus* a *Liber Extra*, X 2. 20. 57 *praesentium (tibi authoritatem).*

[36] Guidus da Baysio (Archidiaconus), *Super Decreto*, Lugduni 1558; Id., *Super Sexto Decretalium*, Lugduni 1547.

Sextum (1336–1339),[37] so named after his daughter Novella, a learned young woman, who on occasion he would have as a substitute teacher in his course.[38] These works, which were to make him famous, are characterised by a meticulous appraisal of legal writings in the past, of which Johannes gives an accurate and balanced account, tackling the new themes in the recent papal norms.

Among the canonists of the fifteenth century the first to remember is Nicolaus de Tudeschis (1386–1445), also known as Panormitanus as he was archbishop of Palermo in the last decade of his life. He was born in Sicily into a family of German origin. Having entered the Benedictine order, he was sent to Bologna to study law, where he became the student of the well-known canonist Antonius de Butrio, later becoming teacher of canon law, a position which he held for twenty years in various universities in central Italy. He was to have an important role – in consonance with the position of the king of Sicily Alfonso V and the antipope Felix V, which did not coincide with those of Pope Eugenius IV – in the controversies of the fourth decade of the fifteenth century, and during the Council of Basel, concerning the crucial question of the relationship of the Pope with the Council [Nörr, 1964]. Among other things, he believed that the Council could decide on the Pope's orthodoxy and even depose him on account of his faith; but he did not agree with the extremes of Conciliarism expressed by thinkers such as Marsilius of Padua and William of Occam, who placed the Council, conceived as the entity representative of the Church as a whole, to have powers superior to those of the Pope. The commentaries to the decretals and the Clementines, the *Consilia* and the other juridical writings of Panormitanus had great authority and were consulted for centuries.[39]

Another author of commentaries on the decretals of great repute[40] was Felinus Sandeus (d. 1503), from Parma, auditor of the Rota and promotor of the pontifical thesis against the king of Sicily. During his last two years, he was bishop of Lucca, where his rich library of legal manuscripts is still preserved.

[37] Johannes d'Andrea, *In quinque Decretalium libros novella commentaria*, Venice 1581, repr. Turin 1963; Id., *Novella in Sextum*, Venice 1499, repr. Graz 1963.

[38] It is said that Novella would cover her face so as not to distract the students with her beauty.

[39] Abbas Panormitanus, *In Decretalium libros*, Lugduni 1547, ed., 9 volumes.

[40] Felinus Sandeus, *In quinque libros Decretalium Commentaria*, Lugduni 1549, 4 volumes.

8.5 Canon Law Principles

Classical canon law presents some characteristic features, which considered all together appear to constitute a specific legal tradition, distinct from any other legal experience of the past [Padoa-Schioppa 2017, pp. 251–295].[41]

As we have seen, unlike the Roman law tradition developed by legislators based on the *Corpus iuris*, canon law contains a conspicuous legislative component of 'new law' (*ius novum*) which is mainly of a jurisdictional origin, integrating the legacy of ancient canon collections up to and including Gratian. There is a plurality of normative orders, a hierarchy of sources, the insurmountable summit of which is the revelation consigned to the Scriptures in the Old and New Testaments; the different levels of ecumenical councils, pontifical decrees, local synods and doctrinal sources show a gradation within sources that secular regimes would only introduce with modern constitutions. On the other hand the separation that distinguishes the science of canons from that of theology remains clear, it too blossoming into forms close to that of law beginning in the twelfth century, with the great theologian and philosopher Abelard [Chenu, 1957; De Ghellinck, 1948]. In canon law there is a symbiotic combination of strictly legal sources and of authoritative sources of a pastoral origin, the latter largely deriving from the writings of the Church Fathers; this osmosis lends canon law a particular quality, in that it stresses the presence of an underlying ethical-religious stratum vivifying the formal rules of law [Gordley, 1991]. There is on the other hand the combination of rigid rules on one side – for example where Christ's actions and precepts as witnessed in the Holy Scripture have induced intransigence in their adoption, as in the rules on the sacraments[42] – and flexibility on the other, allowing otherwise insurmountable obstacles to be overcome, for example in dealing with the effects of the irregular ordination of priests.[43] The ultimate objective of eternal salvation (*salus animarum*) undoubtedly suggested bold solutions to the Fathers of the Church in these cases.

[41] See the collected studies by Landau 2013; and Helmholz, 1996.

[42] Neither the wine nor the wheat are replaceable in the Eucharist. The sacrament of the order cannot be revoked. The bond of marriage, if validly contracted, is indissoluble.

[43] E.g. Gratian's Decree (D. 4 c. 39, § 1 *de consecratione*) accepts Augustine's thesis (*In Evangelium Iohannis*, V, 1. 18, in PL 35, col. 1424), according to which baptism is valid even though administered by an unfit or illegally ordained priest, because in such a case the priest which is baptising without canon authority is replaced by Christ himself ('quos enim baptizavit Johannes, baptizavit Johannes; quos autem Iudas baptizavit, Christus baptizavit').

This flexibility is found in the concept of canonical equity (*aequitas canonica*), discussed later, the key to less formal solutions than those permitted by secular law. To illustrate the meaning of a principle or of a rule of behaviour imposed on the faithful, canon law often resorts to the strong, persuasive power of metaphors, as is clearly shown in the sacred texts (the evangelical parables being an obvious example) and in the patristic texts, as in Augustine likening a sacrament administered by an unworthy priest to water which has flowed through contaminated banks irrigating a field.[44]

Canon law and its rules have had a normative role not only for the Church and for the faithful. The deep roots of the Latin Church in Western Europe have ensured that the influence of its legal system should go far beyond mere ecclesiastical institutions. Secular powers and institutions in many fields and epochs have adopted rules and juridical instruments originating in canon law.

The most intensive period in Church history with regard to the production of new norms and the definition of its institutional characteristics was during the twelfth and thirteenth centuries, as we have seen, and is often referred to as the classical age of Western canon law. The Latin Church differs profoundly from the Eastern Church in the greater importance it gives to institutions and to legal rules: a characteristic underlined by several historians and theologians, who have on occasion suggested that this aspect may have weakened the spiritual tension of the Church itself. Without downplaying the great importance of the legal norms of the Latin Church, nor the different posture of religiousness in the Greek Church, it must nevertheless be observed that canon law itself did not thwart the expression of fundamental Christian values. It is not the form inherent to the law which conceals these values, but rather the content of single rules or decisions. Furthermore, the doctrinal interpretation and the judicial enforcement of canon rules admit great latitude, allowing the 'letter' not to be slavishly followed, should it contradict the 'spirit'. Thus Saint Paul's admonition – 'the letter kills, the spirit brings to life'[45] – coincides exactly to the statement by the Roman jurist Celso 'to know the laws doesn't mean to know the text of the law, but understanding its force and power'.[46]

[44] Augustine, *In Evangelium Iohannis*, V 1. 115 (PL 35, col. 1422), quoted by Gratian, dictum post C. 1 q. 1 c. 39.

[45] '*Littera enim occidit, spiritus autem vivificat*': Paul, Letter to the Corinthians 3.6.

[46] '*Scire leges non hoc est verba earum tenere, sed vim ac potestatem*': Celsus, Dig. 1. 3. 17.

In the evolution of canon law there are norms tied to the ideas and the power structure of the time during which they came to light, such as those concerning the relationship between secular and ecclesiastical power. We need only remember the decretal of Pope Lucius III on the necessary handing over of heretics to the secular branch[47] or Innocent III's blistering penalties against heretics, whose sin is seen as equivalent to lèse-majesté[48] and from whom it was ruled that all property assigned to them should be confiscated, assigning them to the prince to whom they were subject, while the secular authorities that failed to take action against heretics were delegitimised to the point that their subjects were released from their oath of allegiance.[49] The communes and the states adopted these dispositions, incorporating them in their laws. Another direct influence on secular law, leading to the preference for proof by means of testimony and documents, was a canon of the Fourth Lateran Council of 1215 which limited trials by ordeal.[50]

Many canon norms have a different nature, ruling the institutes of the Church in a new way, with norms destined to last. The following are a few examples, some of which have been taken from a large recent collection in four volumes,[51] which has shown how varied the fields of private, criminal and procedural law are in which the influence of classic canon law has been a determining factor in the secular law. Among these is the notion of 'office' (*officium*) as distinct from the person who temporarily holds the post and is tied to a function and a role destined to continue in time;[52] the hierarchical power structure and the connection between jurisdiction and the control over lower-level authorities through the mechanism of the appeal;[53] the rules in the marriage contract (consent, requirements, nature of impediments, cases of annulment); the unavailability and imprescribability of state actions;[54] the prerequisites of *dolus* in the discipline of civil liability and the powers of the judge;[55] the

[47] *Liber Extra* 5. 7. 9, *de haereticis, c. ad abolendum* (1181–1185) (on which see Helmholz, 1996, p. 361).
[48] *Liber Extra* 5. 7. 10, *de haereticis, c. vergentis* (1199); Hageneder 2000, pp. 131–163.
[49] As in *Sinodo Lateranense IV* of 1215, c. 3; also in *Liber Extra* 5. 7. 13, *de haereticis, c. excommunicamus.*
[50] *Sinodo Lateranense IV*, c. 18: *de iudicio sanguinis et duelli clericis interdicto.* Cf. *Liber Extra* 3. 50. 9 *ne clerici vel monachi, c. sententiam.* See Cavina 2003, pp. 23–57; Id., 2005, pp 19–25.
[51] *Der Einfluss des kanonischen Rechts* (M. Schmoeckel, O. Condorelli, F. Roumy, Y. Mausen edd.), 4 volumes, 2009–2014.
[52] H. Wolter, in Padoa-Schioppa, 1997.
[53] Padoa-Schioppa, 1997.
[54] Demoulin-Auzary, 2004, pp. 87–130.
[55] Descamps, 2005, pp. 55, 130.

foundation of tax law;[56] the presumption of paternity; the penal system; the abuse of power; confession; summary judgements; the burden of proof; the appeal' the *ex audito*;[57] testimony and others.

Other new canon law rules included the very important doctrine of the validity of the nude pact, that is of the simple promise, which Roman tradition denied,[58] whereas the Decretists, beginning with Uguccio, citing the principle by which all pacts should be honoured ('*pacta sunt servanda*': about which see Landau, 2003), held that, as a promise before God was binding independently from the form that it took, it should be rendered binding also before the judges.[59] The concept of the 'legal person', as distinct from the physical persons that make it up, which is endowed with its own subjectivity in virtue of a 'legal fiction', was outlined, as we have seen, by Sinibaldus Fieschi. Again, canon law formulated the idea of direct representation as distinguished from the indirect,[60] in contrast with the principle of Roman law whereby 'no one can stipulate in the name of someone else'.[61]

No less important was the contribution made by canon doctrine to the principle of the majority in a court decision.[62] Pope Leo I in the fifth century and the Benedictine rule in the sixth had already established this premise as the Church from its inception had had to bridge between a choice based on quality and merit or one which mediated between

[56] Condorelli, 2011, pp. 361–396.
[57] Bassani, 2012.
[58] Dig. 2. 14. 8. 4: '*nuda pactio obligationem non parit, sed parit exceptionem*' (Ulpian).
[59] Uguccio, in a glossa of a passage of the Council of Toledo of 633, held this view in demanding respect for promises made to the Church (Gratian *Decretum*, C. 2 q. 12 c. 66, c. *quicumque suffragio*: cf. DDC, voce Pacte, vol. VI, col. 396); the Ordinary Glossa by Johannes Teutonicus to this canon also confirmed this position, stating that '*aliquis obligatur nudis verbis, licet non intercessit stipulatio [. . .] et potest dici quod competit actio ex nuda promissione, scilicet conditio ex canone illo*'. The same, referring to this glossa, was the Ordinary Glossa to the *Liber Extra* 1. 35. 1. Other canonists thought the bond of the nude pact in canon law did not operate by virtue of an *actio* or of a *condictio ex lege*, but rather '*ex offico iudicis*', that is for the compulsory power inherent in the judicial function.
[60] To this end, canonists used the procedure whereby a representative of a church or monastery could make an oath in a trial on behalf of a priest or monk for whom it was forbidden: but the threat of eternal condemnation for perjury weighed on the conscience of the one being represented, not the one taking the oath (Gratian's *Decretum*, D. 63 c. 33); as well as a passage of Gregory the Great that authorised the taking of an oath of orthodoxy of a priest who represented the Pope (*Decretum*, C. 1 q. 7 c. 9). Later two *regulae* added to the *Liber Sextus* (VI, 5. 13. 68 e 82) were interpreted by a part of the doctrine as a normative basis to confirm the principle of direct representation (Padoa-Schioppa, 1976).
[61] '*Alteri stipulari nemo potest*' (*Dig.* 45. 1. 38. 17).
[62] Galgano, 2007; Glomb, 2008; Padoa-Schioppa, 2011.

divisions among electors and did not allow for a unanimous solution; however, the Benedictine formula, which entrusted the decision to the *maior et senior pars* of the electors, was to create difficulties in cases in which the requisites did not coincide, that is when on one side there was the 'majority' and on the other the 'superior'. This explains why classic canon law was over time to give space to the principle of majority, at first recognising it with the two thirds, as a condition in the election of the Roman Pope (1179),[63] later by admitting it to resolve other types of election (1274).[64] In the meantime, the requisite of at least half of the electorate had affirmed itself as the condition for validating the election (1222).[65] Although the criterion of the *senior pars* underwent a progressive decline, in part due to the difficulty of applying it in practice, the fundamental contribution of Church legislation in the shaping of the basic rules of the modern majority principle in secular orders, in both the public and the private law spheres, is undeniable.

Lastly, the contribution made by some canon schools of thought to the formulation of principles destined many centuries later to constitute the basis of modern theories of political power should not be underestimated. In his 1324 *Defensor pacis*, Marsilius from Padova (ca. 1284–ca. 1343), educated in the Parisian school of theology, held that the fundamental structure of order among men – the premise for peace, therefore – is human law,[66] which in turn must not be handed out by superior ecclesiastical or secular authorities, but first of all stem from a legislature made up of the 'people', constituting the *universitas civium* despite the variety of its many types of *status*.

As to the Church's organisation, Marsilius in his *Defensores* and, a century later, Nicoló Cusano (*De concordantia catholica*, 1433) were already of the opinion that the Church itself derived (or rather, should derive) its authority from the council assembly, not the authority of the Roman Pope. In the decades following the period in Avignon and when the papacy returned to Rome there were heated controversies regarding the election of the Pope, and the Council of Pisa (1409), the Council of

[63] Lateran Synod III (1179), c. 1; then in the *Liber Extra*, X 1. 6. 6, § 3.

[64] Council of Lyon (1274), c. 8; then in the *Liber Sextus*, 1. 6. 9, *de electione*, c. Si quando.

[65] *Liber Extra* 1. 6. 48 *de electione*, c. *Ecclesia vestra* (Onorius III, 1222). Those who supported the candidate who had the majority of suffrage, '*licet maiorem partem facerent partium comparatione minorum, non tamen ad maiorem partem capituli pervenerunt*'; for this reason the Pope refused to validate the nomination in the decretals. This decision was included in the *Liber Extra* and thus became a general rule.

[66] Costa, DBGI, II, pp. 1287–1289.

Constance (1414–1417), the Council of Basle (1431–1438), the Councils of Ferrara and Florence (1438) were conducted by adopting very different models of deliberation as to the power of the vote. In each instance this was attributed only to the superior echelon of the clergy, which included cardinals, bishops and abbots, or to the inferior clergy or again with the active participation of doctors in theology or law and even representatives of cities or principalities.[67] It was only in the early sixteenth century with Julius II that the principle too hold by which only the assent of the Bishop of Rome could authorise council deliberations.

8.6 Natural Law

Of particular importance is the early canonistic development of the concept of natural law as the basis of the fundamental rights of all persons. It implied that some behaviour or status expected or exercised by individuals – such as personal freedom, ownership or self-defence – were the manifestation of legitimate powers, constituting fundamental natural rights, which neither the legislator nor the judges could abrogate.

It should be remembered that the idea of natural law was not new. It went back to classical Greece and had found expression not only in philosophy, but also in poetry. In a famous scene of a tragedy by Sophocles, the protagonist consciously faces death for having buried a rebel, which violated a law that made her punishable by death. Antigone buries her brother and proclaims before the king that beside human laws there are also 'unwritten laws' which are fairer and more sacred, such as burying the dead; these must be respected in any case, even at the price of one's life.[68] For this she is killed.

Along the lines of Greek thinking, there is a clear representation of the concept of natural rights in Cicero, when he declares that 'law is the supreme reason, inherent in nature, which regulates what must be done and what on the contrary is forbidden', that 'reason is common to God and man'; and that it is true that 'between those who have reason in common, the right reason is also common, identified in the law'; and so 'between those who have law in common the rights are also in common'[69]. Further references to natural rights also appear in the work

[67] Schmoeckel, 2005, pp. 224–226.

[68] Sophocles, *Antigone*, vv. 450–459.

[69] Cicero, *De legibus*, I. 6–7: '*lex est ratio summa, insita in natura, quae iubet ea quae facienda sunt prohibetque contraria*'; '*[ratio] est et in homine et in Deo [...], inter quos autem ratio inter eosdem etiam recta ratio communis est; [...] inter quos porro est communio legis, inter eos communio iuris est*'.

of Roman jurists, sometimes from a different perspective, as where Ulpian argues that *ius naturale* is the law that nature has given to all living creatures, so not only to men, but also to animals, being common to all, whereas the *ius gentium* is common only to all men.[70]

In the ancient world natural law was conceived as a body of rules dictated by the natural order, which man must obey, signifying a superior and objective law.

The medieval canonists paid great attention to the meaning of *ius naturale*, and Gratian devoted to it the first texts included in his *Decretum*. In the flowering of early opinions which modern historiography has brought to light [Weigand, 1967], what clearly emerges with Rufinus and a little later with Uguccio is that the canonists distinguished between several meanings of *ius naturale*, one of which referred to the rights of a subject, such as that of possession [Tierney, 2002]. This did not contradict the original notion of property as a right which was held in common in accordance with an 'objective' natural law. It was thought that if one held the uncontested possession of a good, causing no harmful interference to others, or if a needy person attained a livelihood, either consensually or by the bishop's order, using goods belonging to the wealthy, such possession would be considered not only legitimate, but also 'natural' [Couvreur, 1961].

The position of the *ius naturale* as superior to positive law had been recognised because it was likened to divine law, through the precepts which God himself had dictated to men through the text of the revelation: '*natura, id est Deus*',[71] was a classic adage of canon law. Nature and natural laws therefore originated from God. But two distinct trends had clearly surfaced. Thomas Aquinas held reason to be inherent to natural law,[72] inasmuch as God himself was at the source of both reason and nature, in this sense taking up the classical notion of natural law as objective law. Franciscans had taken a different position, with the intent of defending that particular rule of Saint Francis which strictly forbade monks from owning property. Popes had acknowledged this peculiarity of the Franciscan order, and Saint Bonaventura had theorised that the relationship with material property could simply qualify as 'factual use' (*usus facti*) [Grossi, 1972], but later a constitution of Pope John XXII had

[70] '*Ius naturale est quod natura omnia animalia docuit*': in this way the union between male and female '*quam nos matrimonium appellamur*'; in this way the procreation of children and their education. Instead '*ius gentium est quo gentes humanae utuntur* [...]', which '*solis hominibus inter se commune est*' (Digest 1. 1. 1. 3–4).

[71] On this see Cortese, 1962–1964, I, p. 45.

[72] *Summa theologiae*, II. II, 57.1.

denied it, declaring the refusal of the ownership of usable goods as being contradictory.[73]

William of Occam in the first half of the fourteenth century elaborated a thesis whereby the use of goods was allowed when necessary for survival, but denied the right to legally enforce that use, making a distinction between natural right (*ius poli*) and positive right (*ius fori*), the first valid in principle, but not concretely obtainable through legal action, the second susceptible to enforcement: according to Ockham, only the first of these pertained to the monks of the Franciscan order [Villey, 1975]. Therefore, in dealing with the practical question of the monastic rules of the Franciscan order – like many new ideas and institutions in legal history, this theory also resulted from a concrete and specific situation – Occam did not refute John XXII's pronouncement, but at the same time he confirmed the traditional Franciscan position, once again making use of the flexible instrument of distinction.[74] Thus he attributed to the notion of 'natural right' – in the same way as Marsilius of Padova and later Jean Gerson at the beginning of the fifteenth century – an objective value which, as we shall see, would be developed in the modern age.

These are just a few among the many cases of institutes and concepts that with time and through diverse channels were shaped within canon law and later (often over centuries) migrated into the vast world of secular law.

[73] John XXII, *Extravagantes*, 14.3 *Ad conditorem*; the decretal modifies the *Exiit* Bull pf 1279 of Pope Nicholas III (in *Liber Sextus* 5. 7. 3, which sanctioned the simple *usus facti* for goods used by the monks). From a legal standpoint, the Pope was not wrong: if it was accepted that consumable goods (e.g. food) did not belong to the person consuming it but to others, a problem might arise. Franciscan logic was evidently different.

[74] Krieschbaum, 1996, pp. 24–39; Tierney, 2002.

9

Law and Institutions

9.1 Medieval Communes and Empire

The characteristics of the new legal science and its evolution in time are in many ways connected to – in the double sense of influencing them and of being influenced by them – the public institutions of the late Middle Ages in Italy and Europe. We shall limit ourselves to a few references, necessary for an understanding of the relationship between the sources of law and the society of the time.

The development of the Italian communes in the twelfth century constituted a radical departure from the legal system of the early Middle Ages. When at the end of the eleventh century some cities began to elect their own consuls and when, a little later, these consuls were entrusted with typically public duties such as collecting taxes and administering civil and criminal justice, duplicating or ignoring the legally instituted powers of counts, bishops and imperial judges, this revolution was to adopt legal forms that in large measure drew on Roman law and sources. The limited duration of a consulship, the collegial nature of city magistracy, the very word 'consulate' all derive from antiquity, in the same way as do some fiscal and tax rules and rules controlling publicly elected authorities, the responsibility of judges and many more.

Yet, what we have is not a mere imitation of models from antiquity, neither Roman nor Greek: classical Greek cities were profoundly different and their constitution in any case unfathomed in medieval times. The Roman models from antiquity are material used for constructing an entirely new structure, founded on autonomy rather than on traditional powers. The analogy with architecture is appropriate: Romanesque churches were the expression of the religious and cultural identity of these centuries, yet often built using the same stones employed in late antiquity to construct forums and other civilian monuments.

Law plays a fundamental role in this process. In the beginning, the consuls operated more like arbiters than public judges. Even when the

legal strength and enforceability of their pronouncements became clear – this happened in several cities from the fourth decade of the twelfth century – sentences were to be underwritten by judges nominated by the Emperor ('*iudices domini imperatoris*') in order to attribute proper legitimacy to the consul's decisions. This happens, for example, in Milan with the judge (and consul) Obertus de Orto, a jurist with a profound knowledge of Roman and Lombard law, but also of feudal law, of which he was considered the foremost expert.[1]

Only half a century later, at the end of the protracted and violent battle with Barbarossa, the Peace of Constance of 1183[2] acknowledged full jurisdictional powers to the communes as well as the right to live according to custom: but not yet the legislative power, though this was already being fully exercised in the cities by many sectors of public and private law [Calasso, 1953].

Even when the Emperors granted the communes full autonomies – jurisdictional, legislative, monetary and fiscal powers, war and peace treaties: unquestionably the typical attributes of sovereignty – the principle of subordination to the Empire still survived, as the Emperor's supremacy in the temporal realm was deeply rooted in medieval political and legal ideology. This supremacy was to be theorised in its most compelling way when it had already faded from European political reality. It was formulated with great lucidity by Dante Alighieri in his *De Monarchia*, where he theorised the need for a secular power overriding that of cities and kingdoms, capable of settling controversies without having to resort to war. What he conceived of was the Emperor's political jurisdiction of last resort, accompanied by legislative power which was subsidiary to that of cities and principates, but distinct and fully autonomous from the spiritual and legislative power of the Church.[3]

Secular autonomy, universality and the subsidiarity of imperial power: these are the three core principles Dante Alighieri expressed in 1311, in the hope, soon to be revealed as vain, that the descent of Ludovicus the Bavarian into Italy might restore the Empire and pacify the country. Of these three principles only one, the separation between secular and religious authorities and powers, would be pursued in Europe in the

[1] *Gli Atti del Comune di Milano sino all'anno 1216*, ed. C. Manaresi, Milan 1919, n. 3 of 1130.

[2] *Peace of Constance*, ed. Weiland, in MGH, *Constitutiones*, vol. I, n. 293. Cf. Dolezalek in *Gli inizi del diritto pubblico*, pp. 277–307, on the commentaries on the Peace of Constance.

[3] Dante Alighieri, *De monarchia*, I. 10, 11, 14; '*Ubicumque potest esse litigium, ibi debet esse iudicium [. . .] est igitur monarchia necessaria mundo*' (in the same way as chap I. 10).

centuries that followed, whereas the other two would remain unattained until the modern age.

A large part of the legal rules that regulate civilian life were developed through collective decisions which determined the procedures [Keller, 2014, p. 165 ss., 263 ss.], the prerogatives and the operative limits of public offices and their powers. The model of ecclesiastical institutions interacts with this process, for example in the modes of decision-making and the definition of the principle of majority [Ruffini, 1977]. But the essential elements come to light in the life itself of these communities, with the pinpointing of rules that merge co-optation and election by drawing lots, multi-level elections and norms of exclusion. Among the many rules worth mentioning, a very significant one regarded judicial responsibility. Judges were liable for misdemeanours committed during their office, through a procedure initiated against them 'by syndicate' by the aggrieved citizen at the end of their term in office [Engelman, 1938]. A judicial body elected for this purpose (Syndicators) was responsible for examining complaints and making provision for the sanctions in case of sentencing.

The medieval urban constitution,[4] which evolved under the impulse of formidable tensions, is also reflected in the evolution of its legal institutions. Within the commune, the divisions (also of a social nature, as between magnates and commoners which emerged forcefully in the thirteenth century) are of such violence as to transform the cities – so seemingly harmonious from an architectural and urban point of view – into an ironclad network of families belonging to one or another faction and perpetually at war with each other.[5] In the first part of the thirteenth century this resulted in abandonment of the consulate and recourse to a *podestà*, an elected foreign mayor (i.e. coming from another city) in the attempt of ensuring impartiality in the management of public affairs.

The ferocious hatred between families was placated through the drafting of private peace accords, stipulated before a magistrate or drawn up by the will of the parties before a notary [Padoa-Schioppa, 2003, ch. 4]. Here too, norms from antiquity carry out a legitimising role, with the reference to Roman texts on settlements in criminal cases.[6] The 'breaking

[4] See the summary by G. Dilcher, in Bader-Dilcher, 1999.

[5] *Collectio chartarum pacis privatae medii aevi ad regionem Tusciae* pertinentium, ed. G. Masi, Milan 1943: a lively picture of the thick web of allegiances and enmities emerges from these documents from the Tuscan town of San Gimignano in the thirteenth century.

[6] *Cod.* 2. 4. 18 of 293. On the earliest *Tractatus criminum* of the twelfth century see Minnucci, 1997; on the so-called *libri terribiles* of the *Digest* (*Dig.* 47–48) concerning criminal law, see Massetto, 2015.

of the peace' was punished with the same sanctions as for major crimes: banishment (authorising citizens to be the arbiter of the very life of the 'bandit' if found within the city limits) or the penalty of death, introduced by many statutes in the third decade of the thirteenth century as a substitute to the public banishment.[7]

The countryside had strong political and economic ties to the cities, variously balanced between subordination and limited autonomy. Peasant communities experimented with a juridical status of collective and objective responsibility – for example, for unpaid debts to creditors or city landlords – which strengthened relationships within the rural communities.

This is a feature present also in the cities and kingdoms, typical of the Middle Ages, but persisting to the modern age. Taxes were mostly charged collectively to single categories and local communities, private collectors and ultimately the community itself left with the task of apportioning them until a consensual or authoritative agreement was reached as to each individual share. This leads to a system of reciprocal controls, separate from a direct relationship between the individual and the state.

The model of the Italian commune was transmitted to other regions in Europe such as southern France or the Low Countries, along commercial routes. But it was not the only one. Another form was the one taken in Germany with the 'sworn community' (*Eidgenossensschaft*): here too the aim was to create a less conflictual cohabitation in a context of such degraded anarchy in a small centre such as Worms, in which, according to Bishop Burcardus, around 1025 there might be as many as thirty savage homicides (*more canino*) a year for revenge or in fights.[8] In the territories between the Rivers Mosa and Rhine, cities were often administered by *scabini* (*échevins, Schöffen*), sometimes nominated from among the citizens of the city by the local lord, otherwise elected or co-opted [Ennen, 1978].

The fundamental requisite for belonging to the city was the free status of its citizens. Even servants coming from the countryside became freemen once they had become resident within the city walls: 'the air of the city makes one free,' it was said: this was a formidable incentive to urbanisation and accepted by the citizens themselves for economic

[7] As, e.g., in Bergamo: *Statuti del secolo XIII*, ed. Finazzi, in MHP, XVI/2, *Augustae Taurinorum* 1876, rubr. IX. 6, 10, 11, 13.

[8] *Lex familiae Wormatiensis ecclesiae*, pr.; 12 (MGH *Constitutiones*, I, n. 438, pp. 640, 643).

reasons first of all. But clearly it is the principle in itself that is valuable, best conveyed by a word which at the beginning of the communal age still only indicated the belonging to an urban territory and to a class free from feudal ties, but that with time was to acquire a profounder civil significance: the word *citizen, citoyen, cittadino*, as in the German territories, and later elsewhere the word *Bürger, bourgeois*.

In the kingdoms in which an effective monarchic power was to establish itself, cities obtained a very inferior, though differentiated, degree of autonomy.[9] Privileges, exemptions, economic and fiscal guarantees are to be found in the France of Philip Augustus in the twelfth century, in the Sicily of the Normans and Swabians and in Norman England: but kings wanted control over urban communities, often choosing those responsible for order within the city himself. A caustic observer of the exemptions granted to the city of London in the year 1191 by King John Lackland expressed the diffidence towards citizen autonomy, describing them as 'tumor of the rabble, fear of the Kingdom, weakness of the priesthood'.[10]

The economic structure of the city's economy is equally innovative and dynamic. The guilds that unite artisans, merchants and professionals – including judges, lawyers and notaries – only apparently look akin to the corporations of the late Empire. The monopoly on the practice of a craft or a profession and the legislative and jurisdictional power attributed to the members of the corporation were regulated in line with a new and original legal outlook. Although with some modifications, this configuration was to be retained in Europe until the end of the eighteenth century. In the course of the thirteenth century in many Italian communes social tensions were such that they led to a splitting of the magistracy, with the nomination of a captain of people (*capitano del popolo*) alongside the *podestà*, whereas in other cities it was the guilds themselves (*Arti*) that directly took over the government of the city.

Rural communities were regulated in a variety of legal forms. In the age of the commune Italian cities were able to bring the rural district (*contado*) – which from a religious point of view was included in the diocese and therefore belonged to the ecclesiastical district of the bishop – under their direct control: sometimes by force, sometimes with agreements between the commune and the local feudal lord, or with citizens

[9] See the work of Rigaudière (*Penser et construire l'Etat [. . .] (XIII^e–XV^e siècle)*, Paris 2003) on the different strategies of royal power and on fiscal matters.

[10] *'Tumor plebis, timor regni, tepor sacerdoti'* (Ennen, 1978, p. 123).

who had freed themselves from the feudal tie. A different level of autonomy corresponded to each of these circumstances. But generally cities kept the jurisdictional powers in their own hands, for major crimes committed in the district and in controversies involving a citizen, also to guard against what a document, clearly of urban origin, called the '*malitia colonorum*'.[11]

Though at different times, the principle of autonomy was nevertheless to assert itself also in rural areas which early on were to imitate cities in establishing rural communes. The normative authority of custom was to maintain a decisive role in rural areas: texts reporting rural customs in the thirteenth century testify to this, for example the *Sachsenspiegel* written by Eike von Repgow and the *Coutumes* of the Beauvaisis written by Philippe de Beaumanoir, of which more later.

The Italian communal regime went into irreversible decay during the fourteenth century, when it was forced to give way to the establishment of the *Signorie*: in place of temporary and elective offices there was the lifelong nomination of a local individual from a powerful family as lord. The members of the city councils were in fact chosen by the prince himself, who in any case ensured his right to legislate by his own authority, even modifying the city statutes.

The phase of the medieval system of city autonomy thus came to an end, though it was destined not to disappear altogether in the modern age and many institutes of the communal age, though transformed, were maintained until the end of the eighteenth century. Although it was not from this main root that modern democracies would directly stem, the legal models which the communes had created [Nicolini, 1955] were to constitute a laboratory of forms of modern governments and democracies [Sbriccoli, 1969] which would be preserved and used over and over again.

9.2 Kingdoms

During the same centuries some European states were to develop an institutional framework destined to last until the modern age. Of the Norman kingdom in England we shall be speaking further ahead. In southern Italy and in Sicily another group of Norman warriors conquered the vast territory belonging to Byzantium and (in the case of

[11] The statute of Milan of 1170, in *Atti del Comune di Milano fino all'anno* MCCXVI, ed. C. Manaresi, Milan 1919, n. 75, p. 111.

Sicily) Islam, ingeniously creating a compact structure which became a kingdom in 1130. Although the Normans had introduced feudal institutions in the south, control over jurisdiction and taxes remained firmly in the hands of the king [Caravale, 1998]. In an early law of 1140 the power of the king is qualified as full (*plena potestas*), making use of the same terminology as Justinian's text to define imperial power.[12] Frederik II (king of Sicily and Emperor from 1215 to 1250) further stressed the absolute character of the sovereign dominion, furthermore in 1231 passing a code of laws which would remain of fundamental importance.

In Spain the state and the powers of the king were to take on different configurations in the different kingdoms. In the kingdom of Castile, which had permanently incorporated that of Leon in 1230, King Alfonse X in the middle of the century tried to establish a uniform legislation which would prevail over the local *Fueros*, discussed later. But in 1274 the resistance from cities and the aristocracy forced him to back down from the proposal of directly nominating the city magistracies.

The Capetian monarchy in France in the years of the kingdom of Philip Augustus (1180–1223) greatly expanded its dominions by annexing Normandy, Maine, Anjou and Auvergne and fighting a victorious battle against England begun over a question of feudal rights, because of the unwillingness of King John to recognise the supremacy of the king of France, despite being his vassal. In the same years the principle took hold whereby the king could legitimately promulgate ordinances valid throughout the kingdom even without the assent of every major vassal of his own territory [Lemarignier, 1970]. But the ordinance was required (according to Philippe de Beaumanoir) to be reasonable and motivated by the common good as well as approved by the majority of the kingdom's nobility.[13]

A new target was reached around a century later. The adage whereby the 'king who recognises no superior is emperor in his own kingdom'[14] originated in Italy, but was also used in France to give voice to the case for making the king independent from the authority, albeit theoretical, of the Empire. In the middle of the thirteenth century the Paris Parliament was to come into being as a court of last resort, the sentences of which could not be appealed even to the king. The king began to nominate people of his choice in the territory – the bailiffs (*baillis*) and the *sénéchaux* – who

[12] *Le Assise di Ariano*, ed. O. Zecchino, Cava dei Tirreni 1994. See the Assisa 17, deriving from *Cod.* 9. 29. 3, which qualifies discussion of the king's decisions as 'sacrilegious'.
[13] *Coutume de Beauvaisis*, ed. Salmon, Paris 1899–1900, II, c. 49, § 1515.
[14] '*Rex superiorem non recognoscens in regno suo est imperator*'.

were given the authority to decide in his name in matters to do with administration, procedure and internal order, reserving some cases to royal justice: the 'royal cases' and others, among which controversies to do with possession.[15]

In the years of Philip IV the king was to intervene with his judges in heresy cases and in trials by inquisition (the condemnation of the Templar order was carried out with ferocious determination by the king's men and judges). In the fourteenth century the Cour des Comptes was established for the purpose of controlling the state's accounts, whereas fiscal litigation was assigned to two distinct magistracies, the Chambre du Trésor and the Cour des Aides. Later, in the fifteenth century, it was ruled that the Parlement de Paris was legitimately authorised to receive a claim also against an ecclesiastical sentence (*l'appel comme d'abus*), so that the decision could be suspended and sent back to the Church judges.

It was a broad set of competencies that were assigned to the king and his officials, which had been obtained over time largely through the law. Besides the Roman model – with recourse to the adage from the *Digest* constantly quoted, 'what the prince likes has the force of law':[16] it is no accident that the ordinances refer to the 'pleasure' (*plaisir*) of the sovereign as fundamental to his law – also the canonical model of hierarchical organisation of justice as a means to centralisation, and the feudal law itself, are some of the instruments used, together with war and alliances through marriage, as the basic tools for the building of a state. In a historical cycle lasting centuries, from the small territory of the Ile de France, the Capetian dynasty succeeded in expanding the state so as to attain the modern frontier line of France.

In the process of building the state, the French monarchy availed itself of instruments of government, historical models and legal techniques. Among them we might include institutional competitiveness, hierarchy and specialisation [Padoa-Schioppa 2003, ch. X].

Competition: this word defines the practice of placing at the side of traditional powers (seigneurial justices, vassal supremacies, ecclesiastical authorities and others) royal officials who performed public functions and had privileged means of intervention: for example, in cases on possession with the procedure of inquiry (*enquête*) reserved for the royal judges, or directly through the feudal tie (*ligesse*) between vassal

[15] Beaumanoir, *Coutume de Beauvaisis*, I, c. VI, § 214.
[16] '*Quod principi placuit legis habet vigorem*': *Dig.* 1. 4. 1.

and king, prior to the link between the vassal and his feudal lord. A network of local agents instituted by sovereign power to adopt and adapt the Norman model of bailiffs and *sénéchaux*, thus affirming their role without ousting traditional powers, though they survived, little by little lost ground against the new competing powers.

The principle of *hierarchy* operated with the technical instruments of *justice retenue* (the royal prerogative of centrally exercised judicial power) and most of all through the appeal. Through the first of these the king and his magistrates might intervene in the more complex or delicate cases. The second allowed the appeal to bailiffs against decisions of seigneurial courts, and to the Parlement de Paris against decisions of royal judges and even ecclesiastical judges. Thus the way opened for subjects to request the review of decisions seen as unjust, but at the same time assured the central power's control over local decisions.

The organisation of the Church, which had practised both forms of centrally exercised power and hierarchical appeal to the apostolic seat for centuries, undoubtedly offered a model to the French monarchy; however, France followed an innovative route in instituting several courts of last resort and setting out appropriate procedures for their intervention. Doing so, some regions of the kingdom – from Brittany to Normandy, from Bourgogne to Languedoc – acquired a considerable degree of autonomy with the creation, from the fifteenth century on, of regional parliaments, subject solely to the control of legitimacy of the Conseil du roi.

The increase of royal competences determined a progressive *specialisation* of the judicial, administrative, fiscal and military activities sectors. This process was manifest both locally and centrally: in time the functions of the bailiffs were split up between different officials; the Paris Parliament was divided into sections and chambers; in the course of the fourteenth century, a number of central financial magistracies came into being, each one endowed with distinct jurisdiction.

At the heart of these early manifestations of state-building are the instruments sovereigns implemented to affirm their control over the territory. Jurisdiction was one of them: through the royal nomination of magistracies, although in very different form and by no means uniform way in the different kingdoms, sovereigns were able to control the powers and relationships between various 'bodies' into which civil society, cities, classes and guilds, as well as churches and monasteries, were divided. For this reason historiography has used the formula of 'jurisdictional state' [Fioravanti, 2002] to describe a reality in which the public power, which may qualify as 'state', is exercised through a plurality of competing jurisdictions and not

by the king's direct administrative action. And it is no accident that the term *iurisdictio* came to have a very broad meaning among medieval jurists, including not only jurisdiction in the strict sense, but also legislation and administration [Costa, 1969].

The growing complexity of the functions and the new judicial competencies required a body of administrative personnel equipped with specific technical knowledge. In time – beginning at least in the second half of the twelfth century, but particularly from the fourteenth century – a formal legal education became indispensable for many public functions and not only for judges appointed to strictly judicial functions [Favier, 1989]. In France, as in all the public European political structures of the late Middle Ages, professional jurists became instruments of government. The king sought his jurists wherever he could find them, also in the Church and often ignoring the requisite status of nobility and class: legal education thus became an effective means of social advancement, a privileged channel for access to the governing élite.

The reason for the success of jurists, as individuals and as a class, is to be found in the compelling instruments of their craft. In order to strengthen its political and institutional role, the monarchy needed not only governmental policies and territorial control, but also a conceptual framework sustaining its claims, some of which have already been mentioned. Without an appropriate theoretical framework, neither the feudal supremacy of the king of France, nor the centralisation of power, nor independence from the Empire and the papacy, could have been a long-lasting conquest.

A different kind of political structure was adopted in 1291 by the populations of some alpine valleys of Germanic descent. These decided to free themselves from Hapsburg domination by entering into a mutual alliance by sworn pact, which promoted cooperation for internal and external defence, autonomy in the selection of judges from the valleys and active cooperation for the repression of the gravest crimes.[17] So it was that between the rural communities of Uri, Schweiz and Unterwalden the first nucleus of the future Swiss Confederation came into being.

[17] *Quellenwerk zur Entstehung der Schweizerischen Eidgenossenschaft*, I, Urkunden, 1, Aarau 1933.

10

University: Students and Teachers

10.1 The University of Bologna: Origins and Organisation

Beginning in the twelfth century, the development of a specific class of professional jurists in every sector of society – from that time on present and active in cities and kingdoms, in the Church and civil society: a phenomenon of central importance in the legal history of Europe – is connected with the coming into being of the institution of universities. In all of continental Europe, the most influential jurists are educated in universities following methods and procedures common in all of Europe, inherited from the great teaching model of Bologna.

By the time of the second generation of teachers – the time of Bulgarus and Martinus, in the mid-twelfth century – a group of students gathered around a teacher which constituted his *schola*, and listened to his lectures in a classroom which was sometimes in the teacher's own home. Together professor and students formed a cohesive unit, referred to in some sources as a *comitiva* (group).

Soon, however, the growing number of students coming from regions far from Italy and Bologna encouraged them to form groups from specific places: so the *nationes* came into being, of students from Campania, Sicily, Lombardy, Germany, France and Helvetia to name a few, each one with its own set of regulations in addition to ones common to all [Colliva, 1975]. The juridical structure of the student organisations was that of an association of people, the *universitas*, to use terminology from Roman sources [Bellomo, 1992]. The technical term *universitas* was in the Middle Ages used for all juridical persons – from the trade corporation to the urban or rural commune, from the single kingdom to the Empire, from the chapter of a cathedral to the Church as a whole – and only much later did its linguistic meaning become restricted to centres for higher education.

In Bologna in the thirteenth century the student *nationes* joined in two distinct *universitates*, that of the *citramontani* (on this side of the Alps) which included all students from Italy and the *ultramontani* (beyond the

Alps) with students from countries outside of Italy. Each elected a rector, picked from among the students themselves and endowed with functions and powers that were to expand with time: the students in fact were duty bound to obey, having taken an oath at the moment of *matriculation* (another medieval term, at the time concerning all corporations but surviving to this day only in the context of universities).

The authority of the rectors was justified by the necessity of ensuring order within the student communities, which were ever more numerous as well as often turbulent. The community itself asked for and was granted a large measure of autonomy, which needed to be managed in an orderly manner. This caused difficulties in the relationship between the cities and the institutions of the commune, who could not ignore the importance of the university schools (also economically profitable for the towns). From the middle of the twelfth century the position of the students within the cities was safeguarded by Emperor Frederic I: for Bologna he emanated a special constitution[1] which was to constitute the legal basis of a series of privileges and powers, later to be variously configured in city and university statutes, ruling that in cases brought against a student the jurisdictional power would be given to the professors or to the bishop, thus removing the student from the city judges. In 1217–1220, again for Bologna, Pope Honorius III intervened to support student autonomy.

In particular, the principle was to be affirmed – in line with the university structure constituting a legal person – of special jurisdictional autonomy, managed by the student-rectors themselves for civil or criminal cases involving a student as defendant: the 'student forum'. In addition to this, the *universitates* were themselves to establish their own rules by issuing special statutes concerning university life in its organisational and teaching aspects.

The commune could not but take an interest in all of this. The presence of hundreds of young men from every country in Europe (in Bologna the number reached more than 1,000 at the beginning of the thirteenth century) posed problems of public order on one hand, but on the other constituted a sizeable flow of resources and revenue, deriving from the need to house, feed and supply the students with books and other resources. The interventions of communal regulations began for this reason, some concerning the control over the student populations, some providing incentives for accommodating the students during their years of study in the cities.

[1] Cost. *Habita*, MGH, *Diplomata Friderici* I, vol. II, n. 241, p. 34.

At the same time the widespread success of university study on the *Corpus iuris* and the growing demand for juridical texts for legal practice (*Juristische Buchproduktion*, 2002) had created an incentive for a veritable book industry, which in Bologna was organised through special operators, the *stationarii*, in charge of the transcriptions of manuscripts of texts which were subdivided into established parts, each of which was written separately on sheets of standard-sized parchment, the *pecie*, so as to allow a number of scribes to work independently and collate the sections according to techniques which have been clarified by historiographers [Soetermeer, 1997, 2002].

10.2 The Law Curriculum

The relationship between students and professors reflected this composite reality. In the beginning the relationship between students and teachers was an entirely private one, with students agreeing on a time schedule of the lessons with the professor and paying him the agreed fee known as the *collecta*. Later, in universities other than Bologna, it was the commune which paid a salary to the professor, whereas in the *alma mater* the *collecta* system survived until the fourteenth century, despite the introduction along the way of salaried teaching positions paid by the commune. But even so students retained their right to agree with the professors which subjects and how they would be taught, as well as verifying whether the agreement had been carried out: all this was established in the Bologna statutes of 1252 (the oldest on record) and of 1317 [Maffei, 1995, pp. 23–52]. And if the professors kept the costly legal books belonging to the students as security to ensure receipt of the *collectae*, the students (and the commune itself) ensured the timely fulfilment of the professors' academic duties by holding back a quota of their salaries until the end of the year.

As a rule teaching began at the beginning of October and ended in mid-August, the heavy schedule requiring attendance both morning and afternoon. The core teaching on the Justinian texts – which, as we know, were divided into five volumes – was centred on two courses called 'ordinary', addressed respectively to the first nine books of the Code (*Codex*) and the first twenty-four books of the *Digest* (*Digestum vetus*). The professors with the greatest reputations and largest salaries held these two chairs: the programme for one year generally included half of both the *Codex* and the *Digestum Vetus* (respectively, Books I–IV or V–IX of the *Codex* and Books I–XII or XIII–XXIV of the *Digest*), so the

course would be completed in two years. The 'extraordinary' chairs were dedicated to the other two parts of the *Digest* (*Infortiatum* and *Novum*), as well as to the *Institutions*, the *Novels* and the *Libri Feudorum* (all included in the fifth *Volumen*). Later, in the fifteenth century, we find places like Padua, where the ordinary chairs were appointed to two scholars who scheduled their lectures at the same hour, so as to encourage competition and their best performance [Belloni, 1986]: this element was what attracted students to one university rather than another. The concern with finishing the entire programme in the time allotted for each course, with no delays or omissions, led to a precise and cogent list of specific texts which had to be discussed in class by the professors – these were called *puncta* – as well as a set number of hours and days of lessons to be dedicated to each *punctum*.

For a long time there was no fixed length for legal studies, but they usually lasted several years. Later, from the fourteenth century onwards, it was established that the entire course up to the final exam should last seven to eight years for civil law and six years for canon law. Undoubtedly a student aiming to assimilate the difficult texts of the *Corpus iuris* (in the same way as those working on the sources of canon law) could not possibly limit himself to listening to a single course on the same part of the Compilation: it would have been necessary to return and listen to the explanation two or three times in successive years, in this way slowly acquiring greater and greater understanding. Only at the end of this could he feel fully trained. We have seen how very complex the progression of the course was – including the casus, the exegesis, the examination of parallel passages, the questions – which the professors followed for every single passage of the Compilation.

Legal training consisted therefore in the students repeatedly listening to lectures and little by little beginning to actively participate in the responses to questions formulated by the professors. Many students abandoned their studies after a year or more, content with a training which was incomplete but in any case considered useful in obtaining minor offices, while those who persevered were in the later years entrusted with assistance in the teaching, which provided the experience necessary not only to face the final examinations, but also to eventually become a professor. The senior students were then invited to give a *lectura* on a single title, to carry out a *repetitio* and to debate a *quaestio* [Bellomo, 1992], being then qualified as '*baccalarius in actu legens*'.

The exam season would only begin at the end of this long cycle. A student presented himself to a professor of his choice to be

authorised to take the final exams. The professor, having ascertained the expertise and natural ability of the student in a private meeting, made a decision whether to authorise him. In case he did, the student considered himself '*ad privatam admissus*', that is, admitted to the closed-door examination before the College of Jurists (*Collegio dei dottori giuristi*), an institution which, having begun in the thirteenth century, in time was to assume the role of a law school (*Consiglio di Facoltà*), often with additional consulting and jurisdictional duties, in Bologna under the presidency of the archdeacon of the dioceses of Bologna, to whom Pope Honorius III had entrusted the role in 1219. Known as the '*tremendum et rigorosum examen*', it took place before the entire College and involved the student presenting a lengthy discussion on a specific text from the Compilation (*punctum*) picked at random a few hours before. Passing the exam required the assent of the majority of the professors of the College: if successful, the candidate was then proclaimed '*licentiatus in iure*' [Bellomo, 1992].

One more obstacle needed to be overcome before finally concluding the course of study: a last examination in public (*conventus*), which normally took place in the cathedral; it was easier than the exam the student had already passed, but on the other hand rather costly: the candidate was expected to pay considerable sums equivalent to an entire year of study in buying prestigious items of clothing as gifts for the professors, dinners, processions with horses and more. There followed the festive proclamation of the title of '*doctor iuris*', endowing the neo-doctor with the '*venia legendi*' permitting him to teach in any university.

The long and arduous training described constituted therefore the way to obtain not only the title, but also the professional qualifications required to practise a legal profession of a high standard. This might explain why the control over university legal training, both regarding the creation of new doctors and the requisites for teaching, which was in the hands of the College of Jurists, was the object of careful regulation as well as fierce contrasts between secular and religious authorities. The results were not uniform. From 1219 Bologna was to see a growing cooperation between the doctors and the archdeacon in the concession of the *venia legendi*. But admission to the College of Jurists was strictly limited and requisites became more and more stringent as time went on: not only was citizenship required (which implied having lived for many years in the city), but later also a further limitation was often introduced of needing family ties for admission to the College.

Elsewhere, as in Padua, both Paduans and the Venetians were excluded from the College, as this was reserved to a restricted number of foreign university professors [Brambilla, 2005, p. 105].

Access to teaching for foreign professors was also differentiated: in Bologna they could only accede to secondary chairs, whereas in Padua at the end of the fifteenth century the system was introduced of having one Paduan and one foreigner in the primary chairs (that of the *Codex* and the *Digestum Vetus*), for the purpose of encouraging competition and better-quality teaching, necessary in attracting students from outside the country [Belloni, 1986].

This educational system was to last for centuries in Europe, as to the method of study and exams, and to some extent still exists, for example in Germany. It was an international and uniform scientific teaching method. Beginning in Bologna, the university model was transmitted to new places of learning, some of which have been mentioned, and many more that were to emerge during the thirteenth and fourteenth centuries in Italy and in Europe. Modena, Montpellier, Padua, Naples, Orléans, Siena, Pisa, Perugia, Florence, Pavia, Heidelberg, Prague, Vienna and Coimbra are only a few of the cities where universities of law were then created. Despite teaching characteristics peculiar to each place, bearing the stamp of the single professor, the object and the method of legal studies was similar: the *Corpus iuris* remained the only testing ground for civil law training and the texts of Gratian and the decretals for canon law; the length of the course was uniform, as was the use of Latin. All this made for the migration of students from one place to another easier, as well as resulting in a wide circulation of teachers and their works.

We might therefore consider the model of university science and teaching in the civil and canonical *ius commune* as the basic element of what we would call a large 'republic of legal culture' which extended throughout the greater part of continental Europe from the twelfth century to the eighteenth.

Who were the jurists emerging from the universities? If we look at the names and their provenance, we see that the social background of students varies a great deal: besides the majority coming from middle-class, urban families, we also find descendants of the nobility from all over Europe, but young men of humble origins were not rare. This was also true of professors.

One of the most significant aspects of the university as the training ground for jurists consisted in having constituted a privileged channel for social mobility: through the mastery of legal instruments, acquired in the

university lecture hall, a gifted young man could, even if not of high social extraction, make his way as a lawyer, or as a judge, or as an expert in legal problems in the service of the city or a prince. Legal studies constituted a direct means of emerging, giving those who completed them wealth and power. This helps to explain the great success of the university schools of law.

11

Legal Professions

11.1 Notaries

If we look at the private documents of central and southern Italy beginning from the mid-twelfth century, we notice a profound change in their probative value. This no longer rested on the testimony of witnesses, nor on the testimony of the notary who had drafted it, as in the law of late antiquity,[1] but exclusively on a set of appropriate formalities and on the signature of the notary, which gave the document (*instrumentum*) full probative value. The notarial act in itself therefore had probative value, without calling in witnesses or the notary himself.

This evolution, which came about in the twelfth century, was once again a creative product of custom. Law, at both a legislative and a doctrinal level, was to intervene only later. At the end of the thirteenth century a decretal of Pope Alexander III registered this evolution as a *fait accompli*,[2] and it became a point of reference for the doctrine. Learned jurists later declared with no uncertainty that the notarial act provided full proof of what the parties had agreed and declared before the notary himself, and that only the appeal against the act as being false could question its authenticity.[3] What results is the official trust (*publica fides*)

[1] *Nov.* 73. 7. 1: in the absence of proof of the act in the *gesta*, even the act drawn up by a notary ('*instrumentum publice confectum*': *Cod.* 8. 17 (18). 11) did not constitute definitive proof before the judge, but rather transformed the notary into a privileged witness.

[2] *Liber Extra* 2. 22. 2: '*Scripta vero authentica, si testes inscripti decesserint, nisi per manum publicam facta fuerint* [i.e., by the hand of the notary] [...] *aut authenticum sigillum habeant* [i.e., the seal of an episcopal or public chancellery], *non videntur nobis alicuius firmitatis robur habere*'. The argument deduced *a contrario* was that a notarial contract maintained its value as evidence independently from the consultation of the witnesses mentioned in the act.

[3] Azo expresses it as follows: '*Soli autem publico instrumento habetur fides per se, idest sine aliquo adminiculo, eo quod sine vituperatione appareat [that is without defect: reference to Nov. 73. 7 pr.]; nisi is contra quem profertur probet falsum*' (*Summa Codicis*, 4. 21 *de fide instrumentorum*, n. 1).

in the notarial act, understood to be a public act,[4] insofar as it was produced by a notary, himself a public officer.

The consequences of notarial acts being structured in this way had a great impact on legal practice. The legal certainty of transactions rested on documents: inasmuch as they were drawn up and undersigned by a notary, they were untouched by the passage of time and the vagaries of testimony given by witnesses or the notary himself. In addition to which early on (in Genoa already in the twelfth century) a notarial act could be presented directly to the judge by one of the parties to obtain the immediate enforcement of the terms contained in the agreement[5]: for example, a confession of a debt agreed on before a notary had the same effect as a sentence pronounced at the end of a regular court trial. The direct executive value attributed to certain categories of notarial acts made them extraordinarily efficient and, for those who could take advantage of them, avoided the lengthy procedures of a normal trial.

There is proof that in Genoa – but also elsewhere, as in Pavia [Barbieri, 1990, p. 88], Lucca and Florence [A. Meyer, 2000, p. 138] – around the middle of the twelfth century, notaries were in the habit of noting every agreement in chronological order on the numbered pages of a register, later to draft a final copy on parchment (*mundum*) for clients who had requested it. The register in which all the acts were listed in abbreviated form noting all the essential facts of the act acquired the name '*imbreviatura*. The practical use of such registers – which soon spread to other cities in Italy – is obvious: they allowed the checking at any time, even much later, of the actual existence of a single act (contract, will) in the complete list of the acts of any given notary, as the *imbreviature* were ordered in chronological sequence. This also allowed new authenticated copies of acts to be produced for which the original documentation had been lost.

The practice then evolved whereby the breviary itself provided sufficient evidence: in many cases it was not necessary for the parties to obtain a copy of the document on parchment, for example with loans: it was enough to have recourse to the breviary in case of dispute [Meyer, 2004, p. 147]. In fact, the risk of falsification inherent in the parchment document did not exist with the breviary register, which contained hundreds

[4] For all these, see the clear summary by Henricus de Susa, written in the middle of the thirteenth century: '*dicitur autem publicum instrumentum quando confectum est per manum tabellionis [...] de his que videbit et audiet pro utraque parte*' (Hostiensis, *Summa* a *Liber Extra* 2. 22 *de fide instrumentorum*, n. 2, ed. cit. [n. 91], col. 643).

[5] Examples in Costamagna, 1970, pp. 65–67.

of acts drafted and signed by the same notary. Where the registers still exist, the wealth of data that they provide on the various aspects of society is much greater than where only the parchment has survived, mostly in churches or monasteries. Sample documents from Lucca between 1220 and 1280 have allowed us to arrive at the conclusion that more than 90 per cent of all notarial acts was lost and only the parchments survived, without the corresponding notarial registers [Meyer, 2004].

In the mid-twelfth century the political and legal power of the communes was asserting itself also on this front. Some Italian cities had begun to create notaries independently from imperial authorisation or assignment: in Genoa beginning in the year 1157. Legal doctrine refined the idea of a double source of legitimisation, and asserted that notaries nominated by the Emperor or the Pope were free to work anywhere, whereas those nominated by the consul of the commune were allowed to operate only within that commune: also on this front the value of custom was expressly recognised.[6] But in the fourteenth century the authority of Bartolus led to the acceptance of the idea that the act drafted by a notary, even created by a commune, should be valid everywhere, including outside that commune.[7] It was in fact the communes that nominated their own notaries, who soon organised themselves into corporations: thus imperial legitimisation, should there have been one whether direct or indirect, constituted by then only an element – not an irrelevant one, but one of limited importance – in a process of nomination and control over the profession which hinged on the commune and the guild of notaries.

11.2 The *Artes Notariae*

We know very little of the training of notaries in the age of transition between the *charta* and the *instrumentum*, but it is very likely that the craft was essentially acquired by working for several years for a notary, as it had for centuries (and even today in the post-graduate phase). Here we need to focus briefly on an aspect linked to this, which concerns the *formularia* in which set models for notarial acts were collected and of which the notary could avail himself in his daily practice.

[6] Innocent IV, *Apparatus in V Libros*, Francofurti ad Moenum 1570 = Frankfurt am Main 1968, a *Liber Extra* 2. 22. 15 *de fide instrumentorum*, c.cum P. (p. 280ra).

[7] Bartolus of Sassoferrato, *Commentaria in Primam Codicis partem*, Lugduni 1550, a *Cod.* 1. 1. 1, l. *cunctos populos*, nr. 36: the *instrumenta* of the notary whose nomination is based on the city statute '*ubicumque faciunt fidem*'.

The first formulary to come down to us is from Bologna and dates back to 1205,[8] as the formulary written by Irnerius himself, almost 100 years earlier, was lost. Ten years later a notary from Perugia, Rainerius, published a formulary of notarial acts in Bologna, which shows remarkable legal learning and an innovative approach.[9] The structure of the work gives an insight into his doctrinal background (Rainerius may have been a pupil of Azo), in that the various *formulae* are carefully outlined, as where the fundamental distinction is made between *dominium directum* and *dominium utile*, introduced by the Glossators.

But notarial formularies were to be seen other than in Bologna in the thirteenth century. In Arezzo, Florence, Belluno, Verona and elsewhere there were notaries who wrote formularia. In 1232 Martinus del Cassero, belonging to a patrician family from Fano, wrote a formulary which clearly shows how notaries were skilled enough to coordinate, in their day-to-day work, rules of Roman law, local customs, canon law and feudal law, of course not overlooking the rules established by the city statutes.[10]

Rainerius – who was later to revise his work – had a leading role in Bologna.[11] The institution of the register (*matricola*) of notaries in Bologna was due to him, began in 1219 and was thereafter regularly updated.[12] By this time in Bologna the *ars notaria* was taught separately from the university teaching of law. In addition to Rainerius and others, two prominent notaries taught in the notarial school during the thirteenth century: Salatiele and Rolandinus dei Passeggeri. The first produced an *Ars notaria*[13] in which the whole of the notarial craft was illustrated not only with formulas, but also with an apparatus of glosses which analytically clarified their legal implications. Rolandinus was author of a work that was to have long-lasting authority: the *Summa totius artis notariae*,[14] written in 1255 and later accompanied by a commentary composed in part by

[8] Edited by G. B. Palmieri with the title *Wernerii Formularium tabellionum*, in BIMAe, vol. I, Bononiae 1914, pp. 9–45.

[9] Edited by A. Gaudenzi in BIMAe, vol. II, pp. 25–67: the original title of the work is *Liber formularius*.

[10] L. Wahrmund, *Das* Formularium *des Martinus de Fano*, in *Quellen zur Geschichte des römisch-kanonisches Processes im Mittelalter*, I. 8, Innsbruck 1905.

[11] Edited under the title *Die Ars notaria des Rainerius Perusinus* da L. Wahrmund, *Quellen*, vol. III/2, Innsbruck 1917.

[12] *Liber sive matricula notariorum comunis Bononiae (1219–1299)*, ed. R. Ferrara e V. Valentini, Rome 1980.

[13] Salatiele, *Ars Notaria*, ed. G. Orlandelli, Milan 1961, 2 vols., with the two drafts and the *glossae*.

[14] The work of Rolandinus includes the *Summa Aurora*, divided into ten chapters; two minor treatises (*Tractatus notularum; Tractatus de officio tabellionatus in villis vel castris*:

Rolandinus himself and in part by Petrus de Anzola and Petrus Boattieri. The work was immediately accepted as an authoritative text of reference – both in the schools of *Ars notaria* and for the practising notary; because of the clarity, the simple structure, the thoroughness of the formulas and the accompanying commentary, it provided an answer to any possible query that might arise in the drafting of any type of notarial act. This work constituted – not unlike the *Summae* of Azo and the *Glossa Magna* by Accursius – the classical model of a new literary genre: the notarial formulary, which in fact has never ceased to flourish since then.

11.3 Notaries, Society and Powers

Notaries played a fundamental role in the commune. A recent collection of papers has demonstrated their widespread presence in Europe, from Italy to France, from Germany to Eastern Europe, from Scandinavia to England and even in the New World.[15] They guaranteed private powers through the *instrumentum*, of which we have seen the relevance. Furthermore, they conceived of and then introduced into legal practice a number of new legal instruments, interacting with merchants, the real protagonists in the economy and whose success owes much to the work of the notaries' *ars notaria*. Among many examples, one may recall the important innovation concerning the effects of an act drawn up before a notary (*guarentigiato*), which automatically 'warranted' the parties agreeing to it the legal power of an enforceable title.

In the judicial activities of the commune the role of the notary soon became equally indispensable, as only sentences authenticated by a notary's signature had the value of full proof, which exempted the parties from the burden of proving its existence by means of witnesses. Furthermore, during the thirteenth century the number of judicial acts to be drawn up in writing grew exponentially. Written by notaries were not only the sentences, but also the *libellus* which contained the plaintiff's complaint, the determination of time limits for the parties, the appointment of the delegates of the judge, the interlocutory judgements, the loading of appeals and the enforcement of court decisions [Keller-Behrmann, 1995].

All of this explains the ubiquity of the notary in the society of the commune. It is not surprising, therefore, to meet with such numbers as

of 1256 and 1268); the Comment on the first three chapters of the *Summa* (1273). See the collected research papers *Rolandino e l'Ars notaria*, 2002.

[15] See Schmoeckel and Schubert, 2009.

would appear extraordinary: in Bologna, to the 270 notaries admitted to matriculation in the first year of 1219, later as many as 100 new notaries a year were added for many years; in 1283 there is evidence of 1,059 notaries, almost a tenth of whom worked in various offices of the commune.

Through Italian influence the presence of notaries with functions similar to those exercised in the Italian commune was to spread outside the country. Early on (from the end of the twelfth century) in certain cities along the trade routes in southern France such as Marseilles, Lyon and Grenoble, city autonomy in the form of the commune of the consuls had established itself, as well as in some regions of southern Spain. But in France, the notaries soon had to contend with monarchic power, which could not consent to such a vitally important public function to be carried out by persons legitimised exclusively by the Emperor or the Church. At the beginning of the fourteenth century this resulted in the intervention of King Philip IV, who reserved for the king the right to nominate the notaries of the realm and to regulate how documents were to be drafted and registered [Hilaire, 2003].

The presence of a strong monarchy was to condition the position of notaries also in other European states. This happened in Sicily, where the *Liber Augustalis* of Frederick II put limits on the number and the efficacy of notarial signatures, while requiring the presence of a judge as a condition for qualifying a document as a public act;[16] but later the role of the notary in southern Italy became very close to that of the notaries in the Italy of the communes.

In England, beginning in the second half of the thirteenth century, we find many ecclesiastical notaries, active in the dioceses of Canterbury and elsewhere; Johannes of Bononia wrote a book on *ars notaria* with the purpose of encouraging the activity of notaries in England.[17] Later, in 1320, King Edward II banned notaries, and, although we find ecclesiastical notaries during the entire fourteenth century, the fact that the royal *common law* courts did not recognise the public character of notarial acts was one of the reasons for its decline in England. Here and in other courts or regions of Europe the monarchies imposed the exclusive use of a royal official to attribute to a document the character of a public act, with a royal seal and the payment of a tax.

[16] *Liber Augustalis*, I. 79; I. 82, ed. Huillard-Bréholles, *Historia diplomatica Friderici Secundi*, Paris 1854 – Turin 1963, vol. IV. 1, pp. 54, 58.

[17] Johannes de Bononia, *Summa notarie*, ed. L. Rockinger, *Briefsteller und Formelbücher*, München 1864 = New York 1961, vol. II, pp. 593–712.

So in countries ruled by a monarchy, in general, the notarial function had therefore less prestige and authority. There were alternative forms for drafting public acts. Sometimes it was a privilege granted to other professional bodies, or was entrusted to a royal judge equipped with a royal seal. Sometimes a ban prevented the formation of a professional body of notaries, with its own statute and the prerogative of keeping its own records. In spite of all of this, the specific legal force of public documents as opposed to royal or official diplomas, which had been introduced by the notarial profession, was widely recognised throughout Europe.

11.4 The Colleges of Judges and Advocates

Many crafts and trades, including intellectual ones, tended to be organised as professional associations (*arti*, guilds). Legal professions[18] also had a corporate structure, and these were generally present in every city from the late Middle Ages to the end of the eighteenth century. The College of judges was such an association and existed in the more important Italian communes from the thirteenth century; it included jurists formally accredited to provide legal services within the city. Admission of candidates to the College followed rules specified in the statute and aimed at assessing skills considered indispensable in the exercise of the legal professions. Evidence of the legal practice of the time suggests that in many cities the members of the College were indeed legal experts (*iurisperiti*), though often they did not receive university-based legal training. In Milan, for example, at the end of the thirteenth century only a small number of the 120 legal experts had a degree, and still in the fourteenth century, instruction in civil and canon law was provided by non-university schools,[19] where the majority of *iurisperiti* was trained.

In time, city statutes were to impose the requirement of attending a university as a condition for admission to the College, the number of years requested varying over time between three and seven in different Italian cities, though the requirement did not necessarily include having attained a licence or a degree [Meyer-Holz, 1989]. However, beginning early on, citizenship was a necessary requisite for admission to the College: this became more and more stringent from the fourteenth

[18] On this see above all the seminal work by Brundage, 2008, dealing with Roman law and canon law proctors and lawyers, courts and schools.

[19] Milan, *Statuta iurisdictionum*, 1351–1396, r. 92 (in MHP, XVI.2, col. 1016).

until the sixteenth century, even demanding that the candidate's progenitors on both the mothers' and the fathers' side should come from the city, in addition to a statement attesting that forebears had not exercised the baser trades (*arti vili*), such as commerce or the lesser-qualified crafts [Brambilla, 2005]. The resistance towards foreigners and the progressive restrictions allowing access only to the city patricians were mainly due to the lucrative fees commanded by the members of the College of judges, particularly to those acting as consultants, as we shall see. In cities with a university (such as Bologna, Pavia, Padua) the presence of two colleges, one of university doctors and the other of judges, because of the requisites already mentioned, meant that they often did not coincide, not including the same members: in particular the College of judges normally excluded foreigners. The colleges of doctors, which governed the granting of academic titles, whether they were made up of citizens or foreigners, were generally selected among the university professors.

At the time, the broad spectrum of public and private documents on civil and judicial matters which were entrusted to the notaries implied that their number far exceeded that of lawyers, consultants or judges.[20]

On lawyers' professional conduct and legal ethics,[21] the remarks made by authors in numerous works on procedure could sometimes be caustic: professional secrecy was recommended, warning was given of the impossibility of defending on appeal the litigant who had been the opposing party in the judgement of the first degree; that a lawyer could find out what arguments were going to be used by the lawyer of the opposing party was admitted, but only 'as long as it does not contravene correctness'; and unflattering remarks were made concerning the greed of many professionals.[22]

A fundamental characteristic of the legal profession at a superior level (*defensores*) – other figures of lower rank such as legal agents who represented the parties (*procuratores*) and variously assisted the defence (*sollicitatores, causidici*), usually belonged to separate colleges – must be underlined. The role of defence belonging to the lawyer was not separate from his judicial function, as they were both expressions of the same professional community: in several cities we find a single *Collegium*

[20] For Milan, the credible testimony of Bonvesin della Riva shows that at the end of the thirteenth century there were 120 jurists and as many as 1,500 notaries.

[21] On legal ethics and the lawyer's duty not to accept defending *causae iniustae*, see Bianchi Riva 2012.

[22] Many passages from civil and canon jurists of the thirteenth and fourteenth centuries are included and commented on in Brundage, 2003.

judicum et advocatorum. When, by the mid-thirteenth century, the city magistrates in the Italian communes promoted the practice of entrusting the instruction of the case and handing down a sentence to a legal expert in the form of a legal opinion (*consilium sapientis iudiciale*), the basic judicial task was in fact transferred to one or more jurists who belonged to the College: and these were the same individuals who worked as lawyers on a day-to-day basis in the city, even if, of course, not on the same cases or which they were asked to act as *consiliatores*.

In order to defend the crown's interest in judgements, as early as in the thirteenth century the kings of France instituted the Procureurs du Roi, 'King's Solicitors', who acted as representatives in the same way as the solicitors who had been nominated by the parties in legal proceedings between private parties; another figure was soon added, the Avocat du Roi, who defended the crown's interest. The distinguishing characteristic between these two roles is the principle whereby the Procureur had to adapt to the king's instructions in his written memorandum, whereas the Avocat was free to express his own opinion on the case in question[23]; of course, the task of deciding was up to the magistrates. These two categories of 'officials' constituted the two branches of what would later become the 'public ministry': the 'stand-up' magistracy (*debout*) as opposed the 'seated' (*assise*) one made up of the magistrate judges. The modern distinction between the public ministry (the public prosecutor's office) and the state bar, where the respective functions are in any case more sharply distinguished, originated in this way.

11.5 The Romano-Canonical Trial Procedure

In the European regions in which the *ius commune* was to intervene integrating the pre-existing normative and customary sources, a particular form of judicial procedure established itself and became a fundamental component of the legal regime: the trial was regulated by a complex set of rules derived from the Justinian texts, canon law and the decretals, from the nascent civil and canon doctrine originating in the universities, from works directed to those in practice such as the formularies and the *ordines iudiciorum* and, lastly, from local normative sources, either statutory as in the cities, or royal as in the kingdoms. The essential traits of the procedure derive from the common elaboration

[23] See the characteristic adage 'the pen is servant; the word is free' ('*la plume est serve, la parole est libre*').

of the Roman and canonical sources. Hence the formula 'Romano-canonical' process used to describe this procedure.[24]

The trial began with the presentation of a written brief known as *libellus* in which the plaintiff named the opposing party, the object (*petitum*) and the ground of the case (*causa pretendi*) with or without (depending on local laws) the indication of a specific action (*actio*) at the basis of the summons. The judge fixed the time both parties should appear, and on that day the 'dispute of the case' (*litis contestatio*) took place in which both parties expressed their willingness to defend their respective arguments before the judge. The parties then swore the oath *de calumnia*, solemnly confirming their good faith in facing the trial [Sarti, 1995]. In many cases they also swore to accept the courts' verdict.

A written statement followed with questions which each side – active part in the trial through the work of its solicitor, whose function was different from that of the defence council and often different in person, as said earlier – addressed to its adversary by means of the *positiones*, a practice typical of the *ius commune*. The written records included the counterclaims and formal objections of the defendant. It also included witness declarations, which were presented to the court in written form and mostly collected by designated notaries or officials. Having heard the defence's submissions – as well as in some cases the opinion of experts testifying on behalf of one or other or both parties, that is, the *consilia* (discussed later) – the court delivered the judgement. When in the middle of the thirteenth century in Italy the custom spread of having the *consilium sapientis* commissioned by the same judge, he would limit himself to requesting the opinion of the *sapiens* to simply incorporate it in the sentence, normally (though not everywhere) without the motives [Mancuso, 1999]. In civil law the judgement was generally subject to appeal. Once it became definitive, either in the first degree or on appeal, the losing party was expected to comply. In case of non-compliance, the judgement was enforced, through the assessment and forced sale of assets for the value of the sum in the decision.

If the defendant failed to appear – which was often the case – the judge issued a decree introducing the confiscation of the contended property or a sum equivalent to the value of the debt, a decree which was revoked if

[24] The role of canon law was essential, also for the input of the *ius novum* created by the great jurist popes, mentioned previously. Three examples, among many, of historical research are those on the powers of the judge (Ch. Lefebvre, 1938), on appeals (Padoa-Schioppa, 1967–1970) and on the trial role of women (Minnucci, 1990–1994). For a historical synthesis on Roman-canonical procedure, see Nörr 2012.

the defendant made an appearance in court within a year. Once the term of a year had passed, a second confiscation decree was issued rendering the plaintiff's possession inviolable, and marking the beginning of the term of usucaption, which was interrupted only if before the end of the prescribed term for acquisition -which went from ten to thirty years depending on the location and the assets – the defendant could bring the evidence of his property right before the court.

From the beginning of the thirteenth century a more straightforward procedure, the summary proceeding,[25] which was less hampered by formalities and writs to be instructed '*summarie, de plano, sine figura iudicii, sola veritate facti inspecta*', was to establish itself also outside Italy.

In criminal law the initial phase of procedure was defined by the accusatory model. The victim of a crime and his relations – or a third party for certain crimes – presented their accusation before the judge. They were then expected to prove their claim, mostly through witnesses. If proof was not provided, the accuser risked the same penalty as the party who had committed the crime. Also for this reason the instrument of the denouncement (*denuntiatio*) based on canon principles was soon added, which authorised the judge to set in motion the gathering of evidence and presented less serious consequences for the accuser. Between the late thirteenth century and the early fourteenth century in Italy and elsewhere in Europe, city statutes adopted the *inquisitorial principle* [Vallerani, 2005], which also derived from canon sources.[26] For the more serious criminal offences, the initiative of investigating and gathering evidence was entrusted to the judge on the basis of any information of illicit activity. The accusatory principle then gradually gave way to the inquisitorial principle, which became the rule for some serious crimes such as assault, political crimes and heresy. Criminal sentences in the *ius commune* – also on the basis of a debatable interpretation of Roman law – were generally not subject to appeal.[27]

[25] *Il processo breve*, 2012.

[26] On *purgatio canonica, fama, infamia* and the relationships with the inquisitorial procedure, see Fiori 2013, pp. 415–460.

[27] The new inquisitorial procedure presented tricky problems when it was connected with dispositions of collective responsibility: this is clearly demonstrated in a recently edited and analysed *consilium* by Bartolus of Sassoferrato (Lepsius, 2008, pp. 37–69), in which in answer to the Bishop of Nocera's request for the great professor's opinion on the requisites for ascertaining culpable omission on the part of local magistracies in case of homicide, he replied with a concerted argument indicating the conditions proving public responsibility.

From the twelfth to the fourteenth century, the system of punishment in the Italian communes was to undergo a profound change. In the earliest statutes the penalty sanctioned even for the most serious crimes such as murder was the ban – by which the culprit was expelled from the city and anyone who encountered him within the city limits was authorised to proceed against him by taking his life – and the confiscation of property: in this a trace of the Germanic rule of the pecuniary amends is clearly discernible, contrasting with the blood punishments of Roman law. But by the early thirteenth century, statutes began to punish homicide by inflicting the death penalty. At the same time, there were modifications in private peace agreements: originally the penalty was revoked or in any case substantially reduced if the offended party came to an agreement (*concordia*) with the offender or his relatives, also in cases of homicide. When city legislation introduced capital punishment, the role of such agreements diminished with regard to those who had committed murder, though it remained effective for minor crimes [Padoa-Schioppa, 2003, pp. 227–250]. Albertus de Gandino tellingly expressed the spirit of the new regime when he asserted that the person who commits such a crime offends not only the victim and his family, but the entire community.[28] The modern notion of the public nature of crimes and of criminal law was thus under way.

The Romano-canonical procedure, briefly outlined previously, developed by the doctrine of the *ius commune* by means of an imposing amount of doctrinal analysis and synthesis.[29] Each one of the aspects mentioned, as well as many others, gave rise to a series of specific problems. Every single point, every phase of the trial, every means of proof have been discussed by hundreds of authors spanning the time between the twelfth century and the advent of the modern codifications.

This work implied an evolution, even if the trial procedure of the medieval cities basically remained unchanged in the historical developments of the modern era, before the demise of the *ius commune*: some characteristics of the Romano-canonical trial have persisted, though transformed over time and with innumerable variations depending on local legislation. The trial is upheld on the basis of a plurality of normative sources, hierarchically ordered with precedence given to local legislation (statutes, ordinances), to which is added the significant integration

[28] '*omnis delinquens offendit rem publicam civitatis*': Albertus de Gandino, *De maleficiis, r. de transactione*, n. 10 (Kantorowicz, 1907).

[29] For an account of the law of proof, see Lévy, 1995, pp. 47–114.

of the normative bodies of the *ius commune*. The process is mostly written and based on an analytical discipline of proofs, concerning the number of witnesses and the distinct phases of the procedure. The role played by the parties and by the defence is considerable, both for the trial strategy and for the legal arguments on which the judge (or his consultant) would deliver judgement. Some examples given later will try to show the spirit of the procedures followed by the judges in this long span of centuries.

11.6 The *Consilium Sapientis*

Among the elected magistrates of the communal age, alongside the *podestà* with his assessors and alongside the captain of the people (*capitano del popolo*), where such a role had been instituted in the course of the thirteenth century, were also the consuls of justice, inherited from the early communes. Later, these were often required to have specific legal competence, a requisite *curriculum* of study being indicated though not necessarily to be undertaken at a university, nor necessarily to end in a degree, as we have previously seen in regard to the requirements for admission to the College of judges.[30]

Beginning in the middle of the thirteenth century, it had become customary in Italy for local judges to entrust one or more professional jurists – for the most part enrolled in the College of judges of the town, as we have seen – with the task of preparing a legal opinion for the case currently being debated before their court. The opinion thus having been commissioned by the court (*consilium sapientis iudiciale*) was subsumed in the judge's decision in settling the case. This practice became commonplace also in canon law, persisting despite papal attempts at curtailment.[31]

Though only subsequently made explicit and formalised, the practice was already customary in the early communal age. If the original motive for requesting an opinion was a lack of legal competence on the part of

[30] E.g. a 1279 statute in Perugia requested a period of study of five years as the requirement for election among the six consuls of justice, in S. Caprioli (ed.), *Statute of the Commune of Perugia 1279* (Perouse, 1996), ch. 86, Vol. 1, pp. 104–107.

[31] A 1199 decretal by Innocent III (*Liber Extra* 1. 4. 3, c. *ad nostram*) condemned ecclesiastical judges who routinely commissioned *consilia* which they then incorporated in their decisions. In the late thirteenth century Guglielmo Durante criticised the *consilia*, but in the fourteenth century Johannes d'Andrea came to their defence, on which see Ascheri's contribution in *Legal Consulting*, 1999, pp. 25–41.

the consuls, by the thirteenth century recourse to a *consilium* on the part of the *podestà*, assessors or consuls of justice, all of whom were expert in law, was for different reasons.[32] In Tuscany we frequently find instances of professional judges requesting a *consilium* from professors or jurists from other cities, most likely for the purpose of avoiding the risk of a *syndacatus*, a trial to which officials could be subjected at the end of their mandate. For the most part, the author of the opinion limited himself to a concise statement, without supporting textual citations, only in some cases relying on Roman law, statutes or at times authoritative doctrinal opinions, such as, for example, that of Azo.[33] By the thirteenth century many statutes were already regulating the *consilium sapientis* and the *Artes notariae* were illustrating them [Rossi, 1958].

Beginning in the second half of the thirteenth century in some cities, this practice assumed the nature of a general rule, for example in Milan [Padoa-Schioppa 1996] there was not a civil trial in which the judge – be he *podestà*, his assessor, the captain of the people or the consul of justice – did not entrust one or more legal experts with the task not only of drafting the *consilium*, but also of questioning the parties, gathering evidence, evaluating the allegations, and in effect instructing the trial and conducting it to its conclusion. The judge would do nothing more than literally translate the *consilium* into a decision – which in Milan was pronounced without any reference to either sources or doctrine – thus ensuring that it be executed with the coercive instruments of public power.

If one considers that the consultant legal experts were generally chosen from within the College of judges and advocates of the town, in places where such a college existed, one cannot but underline the particular relevance of this evolution in the jurisdiction of the communes during the second half of the communal age. The elected judges had in fact already relinquished the exercise of jurisdiction, handing it over to members of the corporation of jurists, who were in those cases *de facto* judges, while being lawyers and defendants in other cases in which they did not perform the function of a magistrate's consultant. So jurisdiction was entirely in the hands of local professional jurists, who were appointed members of the local College of judges and advocates. The power of the elected magistrate, though nominally a judge, was limited in each case to

[32] On *consilia* see the contributions published in *Legal Consulting*, 1999.

[33] On the *consilia* from San Gimignano between the late thirteenth century and the early fourteenth century, see M. Chiantini, *Il consilium sapientis nel processo del secolo XIII. San Gimignano 1246–1312* (Siena, 1997).

selecting the legal expert to be entrusted with the drafting the *consilium sapientis iudiciale* and of ensuring the execution of the court decision.

Only with the emergence of the *signorie* beginning in the fourteenth century was the jurisdiction of the commune in this way partially transformed, to be supplemented and later dominated by seigneurial justice, exercised through judges chosen by the local lord who often created (as in Milan by the Visconti and elsewhere) a supreme appellate court: these were the courts that were to evolve into the sovereign courts of the modern age.

There was also another form of counsel, originating in the age of the Glossators, but becoming commonplace only beginning in the fourteenth century: it was the *consilium* requested not by the judge, but by a litigant whose choice was to have, in addition to the normal defence of a lawyer, the opinion of a legal luminary whose fame and erudition was hoped to persuade the court. Naturally to redress the balance, the other litigant – if he could afford it, as the *consilia* of great professors were very costly – hurried to seek the opinion of another famous jurist in support of his case. These *consilia* were separate from the advocate's allegations, as in underwriting them the jurist declared that, should he be the judge, this would be his decision: these are at the basis of the *pro veritate* opinions still frequent today in important legal cases. In giving his opinion, the jurist invested, so to speak, his personal and scholarly reputation in a different way from the advocate, whose task was to defend his client to the best of his ability, without a moral obligation to be coherent with arguments he may have sustained in other cases. These were also very different from the *consilia* requested directly by the judge; as we have seen, the legal motivation was in fact unnecessary for the decision and was therefore rare in the *consilium judiciale*, whereas it was essential for the *consilia* requested by the litigant, as the legal argument by an authoritative expert served to persuade the judge.

The very authority of the authors of the *consilia* requested by litigants determined their success: almost all the major commentators of the fourteenth and fifteenth centuries either personally or through their successors, collected and diffused their *consilia*, which were later to be published alongside their theoretical and practical works. *Consilia* therefore became part of the patrimony of doctrine and were used and quoted for centuries.[34]

[34] It might happen that the author of a commentary or a treatise, in a *consilium*, took a different position from one held in his own writings. *Ius commune* doctrine discussed

11.7 Justice

To understand the consequences of the new legal science and of the advent of professional jurists in the administration of justice would require a separate analysis for each city and each reign, as the institutional and normative development was unremitting in every city and region of Europe. We shall limit ourselves to a few highlights and some examples, without pretending to generalise such diverse situations.

On observing judgements passed in the initial phase of the new juridical regime, between the end of the eleventh century and the beginning of the twelfth, one becomes aware of how the recourse to erudite sources and techniques of argument based on them provided a formidable instrument in support of the legal position of the party who could avail itself of a jurist trained to effortlessly navigate among the Justinian texts. The Marturi *placitum* from 1076,[35] recalled earlier, was a case in point. Further evidence confirms this, such as the 1146 trial that took place in Verona on the rights of the locality of Cerea [Padoa-Schioppa, 1980], in which Roman texts, feudal rules and customary norms converged, in the skilled hands of a jurist expert in all these fields, the city *consul* and judge Obertus de Orto.

The power of the judge seems to have been very great in the first part of the communal age. It is no wonder that citizens of the county, or even localities further afield, would turn to the city councillors (*consules, iurisperiti, sapientes*) to seek and obtain justice. Also in their decision-making the councillors were relatively unencumbered. In particular, in decisions to do with proof on which the outcome of the trial was based, attributing the burden of proof to one or the other of the two litigants seems to have been largely at their discretion: for example, they were free to decide if a witness was admissible and could reject one held to be unreliable;[36] that is true also in the decision on which of the two parties the interrogation under oath should be imposed, which if taken would determine the outcome of the trial. These elements are evidence of the continuity with medieval Lombard law, as the oath is generally required

the question (Lombardi, 1967): some authors held that a doctrinal work had greater authority than the *consilium*; others maliciously argued that the *consilium*, as it was commissioned and generously paid, might have engaged the jurist's attention to a greater degree and was therefore to be considered more trustworthy.

[35] Manaresi, *I placiti* [note 1], n. 437, vol. III, p. 333.

[36] '*de hoc [actores] protulerunt testes, cui non est data fides*': according to Milan's consuls in 1150 (*Atti del Comune di Milano fino all'anno MCCXVI* a cura di C. Manaresi, Milan 1919, n. 19, p. 30).

not only in the absence of proof, but also in addition to proof which alone would guarantee success in judgement.

Only rarely is it possible to evaluate the legal arguments on which a judgement is based, as these were not mentioned in the decision; but in exceptional cases in which we have memorandums from one of the parties from the twelfth and thirteenth centuries at our disposal, the legal path adopted behind the citations and arguments reveals itself in all its complexity. The first examples date back to the end of the eleventh century and are of some trials we have already mentioned (Marturi, Garfagnolo, Rome). The *consilia* on behalf of one of the parties – of which an early example is that already quoted of the 1146[37] trial in Verona – became very frequent in the fourteenth century. Through them we can follow the strategy of legal arguments which the judge approved or dismissed, by so doing determining the outcome of the trial. The interweaving of local law and that of the *ius commune* was a constant feature and was managed with care by the lawyers, by the authors of *consilia* and by the judges, in line with a course we shall address when dealing with the sources of law.

If we consider the substantive law of the new trial, we see that through the discretionary power mentioned earlier, the judges of the age of the *ius commune* had effective decision-making power. Effective in the timing, as documents show that city cases were generally decided on within weeks or months (canon law procedures were different, as they were characterised by continuous appeals to the Roman curia and pontifical law, also with appeals against interlocutory decisions). Effective as to the substance of the decision, also due to the fact the consuls (*consoli*) acted, especially at the beginning of the communal age, in accordance to criteria closer to arbitration than to ordinary justice: this happened, for example, when the rights over the use of pasture land and woods were in question, where the contrasting interests of the parties were often resolved with equitable solutions on the part of the judge, far from the normal path of deciding who is right and who is wrong between the two litigants.[38]

[37] Two noteworthy legal *consilia*, respectively from Milan and from Brescia, are in Ughellli, *Italia sacra*, vol. V, col. 788 (on which Padoa-Schioppa, 1980).

[38] A clear example concerns the request on the part of some neighbours of the small rural commune of Velate near Varese, who in 1162 asked the counsellors of Seprio for permission to divide among themselves a wooded lot of which they had become common proprietors following negotiations with the local lords; the parish of Velate opposed this proposition on the grounds that it feared a division of the wooded lot would lead to the trees being felled and the land being cultivated and therefore to the risk of the Church losing the rights to the timber to which it had traditionally had a right. The consuls

The jurisprudence of the consuls and of the *podestà* was not a source of law: the fact that the city magistracy's decisions did not circulate, and that they were never collected, attests to this. However these decisions certainly had their weight: for example, a telling passage in the 1216 *Consuetudines* from Milan affirms that a certain question remains uncertain because 'it hasn't yet been resolved judicially'.[39]

Law was to undergo a notable changes during the late Middle Ages in Italy, some similar and some different in the various regions and *signorie*. Often the two authorities of the *podestà* and of the *capitano del popolo* both obtained the right to judge, and in private law cases the affirmation of the *consilium sapientis* was analogous in both forums, as happened in Milan in the late thirteenth century [Padoa-Schioppa, 1996]. With the seigniorial regime of the Visconti and then the Sforza, again in Milan during the fourteenth and fifteenth centuries the *Consglio di giustizia*, made up of men chosen by the *signorie*, was instituted as the court of last instance for the most important cases. In the criminal law field, the general affirmation of the inquisitorial procedure in some cities was accompanied by a notable increase in accusatory procedures, therefore countering the inquisitorial regime. At the same time, the not-gowned component increased, even without legal training, but in closer touch with local conditions than the *pro tempore* foreign rectors of the thirteenth and fourteenth centuries, which had not altogether disappeared (as, e.g., in fifteenth-century Florence; see Zorzi, 1988).

Within kingdoms the kings' justice and that of their officials worked very differently from that of the city-states. It was active both in the peripheral territories (through royal judicial officers: bailiffs, *justiciarii, sénéchaux* and others) and centrally, where beginning in the twelfth and thirteenth centuries supreme courts were also instituted – in Sicily, England, France, Castile and elsewhere – which supported the centralising function of the monarchy, controlled the inferior jurisdictions and established innovative rules and procedures to be applied throughout the kingdom.

Late medieval, seigniorial and feudal justice persisted (and was to persist for a long time). So too did ordalic law. The trial described in

recognised the Church's argument and ordered the neighbours not to proceed with the division, but authorised them to divide the rights of use of the wooded lot (*Le Carte della Chiesa di Santa Maria del Monte di Velate, vol. I, 922–1170*, a cura di P. Merati, Varese 2005, n. 145, p. 250; the Milanese consuls had made an analogous decision in a similar case of 1153, see ibid., n. 137, p. 237).

[39] '*licet quaestio ista nondum in contradictorio iudicio sit sopita*' (*Liber ConsuetudinumMediolani*, 22. 17, ed. Besta and Barni, Milan 1949, p. 118).

highly poetic language in the *Chanson de Roland* is well known; it recounts and reflects[40] – despite being written at the beginning of the twelfth century and therefore of significance for the law of that period – a far more ancient legal framework: Ganilon is accused with felony towards his sovereign, Charlemagne, for having murdered Roland and is in the first instance absolved by his equals (v. 3805), but condemned in a later trial fought between two champions; after the duel won by the accuser, Thierry, who had fought against Pinabel (a relative of the accused), Ganilon was killed with all thirty of the relatives who had guaranteed for him (v. 3958): an astounding testimony to the persistence of collective parental responsibility.[41]

If we examine the judicial activity of the Paris Parliament in its earliest phase [Hilaire, 2011], documented in its thirteenth-century registers (the *Olim*), we notice that it is not unusual for recourse sought by private parties or religious entities against an act or conduct of a royal officials to be accepted by the central court of the king[42]; and it is possible to perceive how the central royal justice could impose itself on local seigneury,[43] making a judgement in favour of their tenant farmers and ordering the royal officer (the *bailli* on site) to execute the court sentence.[44]

It should be remembered that, particularly in the early thirteenth century, the king was still able to intervene in judicial decisions in person, directly carrying out the judicial function which was so essential to the very idea of royalty in the medieval world.

In the first years in which the new procedure 'by inquest' (*enquête*) was being promoted by the French monarchy, a trial shows what contrasts the exercise of royal justice could kindle in real life, and how important this change was to be. A literary text in verse from 1260 tells of a case against Enguerrand, lord of Coucy near Laon, who in a fit of anger had had three local youths hung for poaching on his land. The relatives and a local

[40] *Chanson de Roland*, ed. Bédier, Paris 1955, CCLXXI–CCXCI.

[41] Carbasse, 2014, pp. 138, 343; a reconstruction in Sacco, 2007, pp. 113–121.

[42] *Les Olim ou Régistre des arrêts rendus par la Cour du roi*(1254–1318), ed. Beugnot, Paris 1839–1848, 4 volumes: see, e.g., how in 1264 a *bailli* was obligated by the crown court to respect the mortmain exemption granted as a privilege by the king to the husband of a bourgeois woman (*burgensis*), the bailiff contesting the exemption because the woman had been absent from the *villa* for a year and a day (vol. I, p. 599).

[43] Descamps et al., *Le Parlement en sa Court*, 2012.

[44] E.g. a man (Mauricius de Bella Villa) was ordered by the Paris Parliament in 1270 to return the sum of 1,500 lire to the men at his dependency. The dominus de Castro Brienci had previously been ordered to pay this sum as a penalty for damages to those self-same men, but the sum had been kept by Mauricius (*Les Olim*, vol. I, p. 856).

abbot appealed to the king for justice. Enguerrand then demanded that he be tried by his equals on the basis of the judicial duel, in accordance with feudal law (*curia parium*); he was supported by other local lords. At this point it was Louis IX himself who established, against the custom, that the case was to be judged directly by the king, so abandoning the traditional procedure which was too favourable to the lord, and so a royal inquest proceeded to condemn Enguerrand to a severe pecuniary penalty.[45]

By the fourteenth century the jurisdiction of the Paris Parliament had been consolidated. An examination of its sentences reveals that the reference to Roman law is often absent (although some of the judges had been trained in the *ius commune*),[46] whereas there are explicit references to royal ordinances, for example concerning the oscillating value of coins.[47] The judge's powers over fact-finding were enhanced by the 'inquest' (*enquête*), but the course of justice could also be very slow, as in the case of a quarrel to do with a dowry, which was concluded sixty-seven years after the wedding celebration.[48]

The study of legal procedure in canon law has in large part still to be carried out, particularly for Italy. But a masterly study of marriage procedure in the fourteenth and fifteenth centuries in some Episcopal courts in England and France (York, Ely, Cambria, Paris, Brussels) has shown – for example, regarding the role of women in legal contentions on the marriage tie and judges' evaluation with respect to the efficacy of the marriage vow *de presenti* and *de future* – remarkable differences between the courts in York and Paris, and between these ecclesiastical courts and the Venice court.[49] And this occurred despite the common normative discipline on marriage in the different ecclesiastical European provinces, each following the same canon law rules of the *Decretum* and the decretals.

[45] The incident is reconstructed by E. Faral, *Le procès d'Enguerrand IV de Coucy*, in RHDFE, IV/26 (1948), pp. 213–258.
[46] The role of the Roman law is discussed in Timbal, I, 1973–1977, p. 357.
[47] Ibid., p. 357. [48] The case is published in ibid., pp. 491–496.
[49] Donahue, 2007, pp. 622–629; for Venice, Cristellon, 2005.

12

The Commentators

12.1 The Post-Accursians

In the first half of the thirteenth century, while Accursius was composing his fundamental work, other jurists were following different lines of endeavour. In particular Jacobus Balduinus [Sarti, 1990] was the author of acute interpretations and important theories, such as the one of making a distinction between 'ordinating' norms and 'decisionary' ones, for the first time clearly separating procedural rules from substantive rules of law, with important practical and theoretical consequences. His theses were in part transmitted by his pupil Odofredus, also a professor in Bologna in the middle of the century and in turn author of lectures which include a lively account of the early years of the university and other important historical events of the early school of Glossators, described for the benefit of the students. But after five generations of scholars, the historical function of the *Glossa*, following the ultimate achievement of Accursius' thorough apparatus, had run its course. It is significant that jurists of unquestionable standing such as Guidus de Suzzara and Dynus de Mugello expressed many of their often original theories in the form of *addenda* to the Accursian *Glossa*.

In the meantime, the model introduced by the Glossators – that is, a higher-level legal education attained exclusively on the texts of the *Corpus iuris*, using the method described previously – was expanding in Italy and Europe, through the founding of new general universities (*Studia generalia*): after Modena in 1175, new universities were founded in Padova in 1222, Naples in 1224 (this was the first state university, founded by will of Emperor Fredrick II, king of Sicily), later also in several other cities inside and outside of Italy. In the fourteenth century universities were founded in Coimbra, Heidelberg, Prague, Pavia and elsewhere, creating university centres for legal studies which would become famous in successive centuries. It should be underlined that in many places the beginning of the advanced study of law in accordance