A Treatise of Legal Philosophy and General Jurisprudence

Volume 7

The Jurists' Philosophy of Law from Rome to the Seventeenth Century

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The Jurists' Philosophy of Law from Rome to the Seventeenth Century

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Springer

A C.I.P. Catalogue record for this book is available from the Library of Congress.

7 Volume Set:
ISBN-10 1-4020-4950-1 (HB)
ISBN-10 1-4020-4951-X (e-book)
ISBN-13 978-1-4020-4950-7 (HB)
ISBN-13 978-1-4020-4951-4 (e-book)

Published by Springer,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

Printed on acid-free paper

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PREFACE

There is no body of legal norms, however produced, that is not in some way predetermined by a vision of the world and of human society. From the beginnings of civilization, human beings have given law the function of ensuring a peaceful coexistence and tranquillity within their communities. The notion of order carries within it the concept of proportion. In the words of Dante Alighieri, "law is the proportion between man and man in relation to things and people [*realis et personalis hominis ad hominem proportio*], and this proportion, if kept in balance, will keep human society healthy, and if spoiled will spoil the well-being of society [*servata hominum servat societatem et corrupta corrumpit*]." This means that relationships among people, or among people and things, must share the values specific to their time and place. Any set of values that prevail in the collective consciousness (whether these values are religious, or ethical in a broad sense, or economic) will receive wider protection than other values that are considered to be less important. The distinction between individual goods and collective goods will produce a hierarchical order capable of guiding decisions when conflicting interests are at play.

Even though ethics and law constitute two distinct spheres of human knowledge and activity—at least they do so in Western civilization—they have appeared for millennia to be bound up by a necessary relationship. Ethics served as a guidepost, showing the way for law and pointing out the ends to be sought. We have historical evidence that this was going on even before the Greeks framed the organically structured discipline that would take the name of "ethics." Even in the most ancient civilizations, and in those that followed—some of them incapable of working out complex theoretical systems, as was the case in Europe during the early Middle Ages—precise moral dictates were set forth (often drawing inspiration from religious precept) that informed norms more properly describable as legal. Even here, law cannot be said to have escaped the reach of philosophy. Indeed, for humans, to exist is to philosophize, even though philosophizing does not always mean doing philosophy. For us to philosophize is to face our destiny with eyes open, and clearly setting out the problems arising out of our relationship with ourselves, with other people, and with the world. It is not so much a matter of developing concepts or theoretical systems as it is a matter of making choices and committing ourselves by living a true, genuine, and reasoned life. If, as Plato would have it, we cannot live as humans without living as philosophers, then philosophy accompanies us from the beginning, when we first get the light of consciousness. Certainly, in this necessary "philosophizing" that we do, we are helped out a great deal by the professional philosophers, by the technical

work they do—we can rely on centuries of tradition, experience, and myth. The doctrines developed over the centuries have provided the indispensable tools with which to understand ourselves and the world around us, enabling us to come to a clearer perception of the tasks we must accomplish, both as individuals and as members of a social organism. If we look at the recent efforts made to deny the guiding force that ethics exerts on law, we will find that, whatever the reason for such a denial, there is always a theoretical argument—and hence a philosophical basis—offered in justification. Nor could it be otherwise, considering that in thought lies the specific nature of humans.

If, then, every legal system, every set of values, written or unwritten, is modelled on a certain set of ideal norms that precede it, the same can be said to be true in the science of law. Certain lawgivers like Justinian have wished that their work be forever free of interpretation and commentary (Tanta, 21: "nemo [...] audeat commentarios isdem legibus adnectere"), but their wishes have proved ineffective and fallacious. Any text that others must understand will necessarily have to be interpreted. Hermeneutics is the inescapable light in which human knowledge is bathed. Thus, jurists have had to explain every collection of legal norms. They must determine their applicability to the matter at hand—to the facts presented by life, facts themselves requiring interpretation in their own turn. Indeed, when events happen that are relevant to law, the jurist must extract a meaning from them—the meaning attributed to them by the social environment—and then must bring that to the legal case in point. This interpretation which the jurist is entrusted with does not confine itself to figuring out the meaning the norm initially had in the historical and social context where it was conceived. The jurist must also find out whether the norm took on a further social meaning (even if unintentionally). Can it, for example, be applied to other conflicts or situations beyond those the norm was initially designed to settle. This kind of interpretation—evolutional interpretation—has always characterized Western law and continues to do so. In the age of *ius commune*, from the 14th to the 16th century, the jurists' activity became even freer and more creative. For it became the practice to interpret concrete facts by turning to Justinian's *Corpus Iuris* on the one hand and canon law on the other. Sometimes the two would converge in their interpretation. Sometimes they would go their separate ways. Justinian's compilation, authoritative and venerable, was nonetheless the mature fruit of a bygone society, individualistic and still pagan (despite the touchups made by Justinian); canon law was the new legal system introduced by Christianity—it brought along the spirit of a world bristling with lively new social aggregations and unforeseen economic forms. The law of the Church could certainly not do away with the law of ancient Rome. It continued, rather, to shape and influence the law because of its unquestionable technical sophistication, as well as for its comprehensiveness. Justinian's *Corpus Iuris* treated a vast number of legal problems and regulated many legal institutions, from marriage to contracts

("omnia inveniuntur in corpore iuris"). Many institutions, such as matrimony, contracts, trials, and inheritance, regulated matters in which the moral teachings of the Church had to be taken into consideration. In these cases the popes and the jurists introduced norms different from those found in Justinian's *Corpus Iuris*. It was precisely on these points that the jurists focused their effort, ready to "freeze" Roman law and usher in canon law, deemed more equitable, modern, and flexible. The dialectic internal to the *utrumque ius* system—in which there coexist two universal systems of law in force—can be likened to that which operated under the Roman praetorship or the Court of Chancery: the one tempered *ius civile* with *ius praetorium* and the other common law with equity. But unlike the praetor and the chancellor, the continental jurist in medieval and protomodern Europe was not invested with any public function. Rather, the continental jurists created a new law. They did so on the basis of the scientific knowledge they were credited with having, and without in principle striving for any office, magistracy, or official position. They attempted instead to achieve an *opinio communis*, a convergence, the widest that could be had, with the opinions of other jurists, whether prominent or not. They generally showed a great sense of responsibility in their interpretation of the law, because they realized that there was no such thing in Europe as a single, supreme lawmaking body capable of filling the gaps and fixing the problems of interpretation and fact in the *ius commune*. They took pride in their work, knowing as they did that they belonged to a group that was honoured and heeded by emperors, kings and princes.

These reflections on the *ius commune* are sketchy, but they constitute an indispensable premise without which we would not be able to understand the relationship that took shape between jurisprudence and philosophy. The jurists of the day found they had made themselves into philosophers: They had to guarantee that the freedom they exercised in formulating the law rested on a critical reflection on the methods of argumentation and on the values to be affirmed in deciding cases one way or another. Judges had to distinguish the honest (*honesta*) from the useful (*utilia*) and could not bypass the jurists' interpretation and its philosophical backing; they couldn't choose not to rely on it, said the humanist Leon Battista Alberti († 1472): "ea re fit ut philosophum esse iudicem oporteat" (De iure, 2). Even those interpreters who seemed less interested in theory and who staunchly defended the strictest conformity to the law showed (at least in deed, by the outcome of their activity) that they adhered to a specific view of their task as jurists and of the ends entrusted to law. Iohannes Bassianus is the glossator who in the latter half of the twelfth century caused the science of law in Bologna and Europe to do an about-face; he did so condemning his predecessors for their metaphysical flourishes, and propounding a self-referential knowledge: "legistis [...] non licet allegare nisi Iustiniani leges" (the jurists are not allowed to allege anything but the laws of Justinian); and yet neither he nor his followers, Azo and Accursius above all,

could help proclaiming that jurisprudence is itself philosophy. In fact they did more than that: They proclaimed, taking their cue from Dig. 1.1.1, Inst. 1.1, and Dig. 1.1.10.2, that jurisprudence is true philosophy, the science of right and wrong. That being the case—jurisprudence is "philosophy," it is "science"—it will have to show it can proceed by the soundest methodology. It is little wonder, then, that Bassianus himself, as the sources reveal, was well versed in the arts of the trivium (comprising grammar, rhetoric, and dialectic) and used these disciplines in the service of law ("extremus in artibus").

Certainly, the Roman jurists had begun to organize their juristic opinions using logical and conceptual instruments at least as early as Quintus Mucius Scaevola (ca. 140 to 82 B.C.). The method of formulating definitions and then rules, and grouping legal phenomena under different types, seemed to satisfy the Ciceronian ideal of taking the *ius Quiritium*, the ancient law of the farmers and shepherds who had settled along the Tiber's riverbanks, and imparting an order to this venerable repository (*in artem reducere*), a prescientific law that had grown up as an incoherent assemblage.

With the Bolognese rebirth of the early twelfth century, the dialectic method made its way ever more profusely and penetratingly into the work of the jurists. As the new logic was revived, the Platonic method of division gave way to the Aristotelian syllogism, a methodology that was capable of much greater coherence and insight. In the second half of the 13th century and throughout the 14th century, the Aristotelian epistemology expounded in the *Posterior Analytics* forced every science, including jurisprudence, to address the preliminary question of its *principia propria*, the principles proper to it and from which would issue all further knowledge. The jurists committed themselves to the task of putting a definition on every legal concept and ascertaining the *ratio* and *sensus* of each *regula*, its grounding principle beyond the letter of Justinian's text. They tried to build a strictly deductive knowledge and sought to emulate the certainty of the physical and mathematical sciences. This became the stuff on which Italian jurisprudence would focus until the late 17th century, and Andrea Errera provides a detailed, perspicuous analysis of the endeavour. Meanwhile, in the rest of Europe, and especially in France and Germany, there began a lively debate of a different sort, but a debate that has no mention here. While some interpreters, such as Sebastian Derrer and Johann Nicolaus Frey, seemed in large part to follow in the footsteps of the commentators, others polemicized against them and their intransigent Aristotelism. They took up Italian humanism and the writings of Pierre De la Ramée, a method more adherent to the ordinary processes of knowledge, to philology and historiography, in rejection of all abstract, formalistic forms of knowledge.

It is not by any accident that we have omitted to treat those scholars here, who formed what would come to be known as the rational school of natural law. True, this school must be credited with affording the best innovation that

juristic reflection would see in seventeenth-century Europe. But then an enquiry into the doctrines of the natural-law theorists would take us too far from our main focus, which is the jurists' philosophy of law. Now, it is well known that not only the jurists contributed to bringing out the new natural law, but also philosopher-jurists and philosophers tout court. Exemplary in this regard is Hugo Grotius. He was not a philosopher and had no philosophical interests properly so called, yet he grounded the validity of his thought on a whole series of speculative questions that cannot be ignored. In short, given any problem, such as defining "just war," the solution for it had to be forged on philosophical grounds, and only then would it find confirmation or validation through the authority of the *ius commune*. This procedure was common to the entire modern school of natural law. In fact, as Norberto Bobbio has keenly observed, the exponents of this scientific movement forsook all interpretive activity (no longer deemed useful) devoting themselves instead to the effort of "discovering" a new law, a law capable of sustaining each nation, and the family of nations, in its future course. The natural-law theorists found that the source of law no longer lay in the *Corpus Iuris Civilis* or the *Corpus Iuris Canonici*, but rather lay in the "nature of things," the only standard, certain and constant, by which to assess human behaviour. Thus, we no longer see in their treatises any mention of the methods of textual interpretation—no *argumenta* or *loci* devoted to that subject—which for three centuries had been the focus of the commentators and their exegesis. And not just anciently, either: most of the modern European jurists who practised law continued to be faithful to the canons of that long tradition.

The need for setting jurisprudence on a scientific foundation had occupied the jurists from the outset, with Jacques de Révigny († 1286) and Pierre de Belleperche († 1308) in France and Cino da Pistoia († 1336) in Italy. But it wasn't long before their work would meet opposition: A few decades thence, in the course of the memorable "dispute of the arts," medical doctors and some humanists entered the fray. If the laws, they objected, have their foundation in the will and their end in utility, how, then, can our knowledge of them be argued to be in any strict sense scientific? Indeed, for Aristotle, science seeks to know that which is eternal and necessary, rather than changeable, contingent, and particular—which is what human facts are. Until that time, the jurists had striven to attain rigour in law by using and by refining the rules of logic. The certainty of their conclusions had to be attained purely propositionally and linguistically, and hence formally. This approach was clearly inspired by the contemporary masters of logic and speculative grammar who had been increasingly ignoring the question of homogeneity or of the correspondence between knowledge and being. Against this background, when the question of the truth of legal knowledge arose, this knowledge found its way back into the internal structure of reality. If the truth of a proposition is given by a correspondence (*adaequatio*) between discourse and the object of discourse,

then the highest form of certainty, in any discipline, can no longer be made to consist exclusively in the correctness or rigour of logical argumentation.

From this premise proceeded the example of the Perugian jurist Baldus De Ubaldis († 1400), who did more than anyone else to impart to the science of law an organization based on the methodology that was typical of Scholastic philosophy. Firmly opposed to the whole notion of Ockhamist nominalism (which, contrary to what is widely thought to be the case, cannot be detected in any form in the thought of the late medieval and early modern thinkers), Baldus shared with the earliest glossators a concern to base jurisprudence on sound metaphysical premises. But whereas Baldus stayed true to the Thomist teaching, the glossators who came before him based their philosophy on Saint Augustine and John Scotus (Eriugena). But beyond these cultural affiliations, the basic concern remained the same: The effort was to ensure the soundness of the premises by grounding them in the Absolute Being, in God. In Him, or rather in his Son, in the eternal Logos, lie the immutable, true ideas of every institution and concept of law and of all possible relations among humans and between humans and things. Here, in the Word, reality exists with a fullness superior to that of anything that can be experienced through the senses. Now, the first condition of science is precisely that its object exist: But to speak of existence is to invoke "substance" and "truth." When founded on the essence of things, juridical logic can return to us an even more strictly demonstrative truth, a truth homologous to the order and structure of being. By recovering a long and well-established tradition that endowed the institutions of law with a substantive weight, Baldus legitimated, in the midst of opposition, the scientific nature of juridical thought.

According to a teaching reiterated throughout the Middle Ages—the teaching of Isidore of Seville—philosophy divides into three branches: metaphysics, logic, and ethics. For the jurists of the middle period, to deal in ethics is by and large to deal in politics. The nexus between the two disciplines had already been observed by Aristotle in the *Nicomachean Ethics* (1.9), to be sure, but it then found its own development independently of Aristotle: at least it did so in the first two centuries of the Bologna School. Not until the second half of the 14th century, with Giovanni da Legnano († 1383) and his disciples, did the jurists cite Aristotle more frequently and use him more accurately. But even then, the masters of the civil law continued to interlard their doctrines with citations drawn for the most part from Justinian's *Corpus Iuris*: From the very start of the legal renaissance that got underway in the twelfth century, then, this great repository of Roman juridical knowledge supplied the choice material for the political projects undertaken in the Middle Ages. The *Corpus Iuris Civilis* served the glossators, who used it to legitimize the imperial ideology of Frederick Barbarossa, and afterwards it served the commentators, who used it to sustain, with ever-increasing boldness, the claims advanced in the effort to gain autonomy from the Holy Roman Empire—so we

have here yet more evidence of the intellectual freedom with which the jurists of the early Middle Ages proved they could bend their sources to respond to the new historical circumstances that were coming up.

The canonists were different: They were not as attached to the juridical legacy of imperial Rome. They could draw extensively on the pronouncements of the popes who were engaged in a power struggle with the Germanic emperors. They also could utilize material drawn from pro-papal polemical writers. Valuable in this regard is Kenneth Pennington's contribution to this volume, which shows up the decisive role that medieval canon law and commentary played in giving shape to political doctrines destined to achieve widespread and lasting currency. Many of the questions to which the early interpreters of canon law devoted themselves would later engage the jurists of civil law, too, forcing them to confront the new, unforeseen problems that had emerged.

At the beginning of the thirteenth century the jurists developed an entirely new way of looking at the law. Until then, jurists focused on the content of law when they decided whether a law was just or not. They presumed that law must be moral, ethical, equitable, and, most importantly, reasonable. As new theories of legislation emerged from *ius commune*, the jurists began to look at the sources of human law and the institutions that produced positive law. They discovered the will of the prince. In particular, Laurentius Hispanus († 1248) asserted that reason was not the only standard by which law should be judged. He argued that the will of the prince must be supreme. Following his footsteps, Cardinalis Hostiensis (Henry of Susa, † 1271) blazed a further path for the jurisprudence of sovereignty. With his *potestas ordinata* the pope had the authority to exercise jurisdiction over positive law. *Potestas ordinata*, on the other side, enabled the pope to exercise extraordinary authority and jurisdiction. Later jurists defined the prince's power with these terms and sometimes concluded that the prince could take the rights of subjects away when he exercised his absolute power. Of course these assumptions touched off a wide and deep debate in the jurisprudence of the day, and in that which followed, a debate on the limits of sovereign power in relation to the sovereign's subjects and the inviolable dictates of natural law.

Another question which the canonists brought into focus was the fundamental principles sustaining corporate law and the nature of legal persons (*universitates*). They defined the relationship of the head of the corporation to the members. As the jurists explored and developed a jurisprudence that governed the *universitas*, they created norms that regulated the political life of medieval and early modern society. Perhaps, the most significant norm that they established was "What touches all, ought to be approved by all" (*Quod omnes tangit, ab omnibus approbari debet*).

The few examples so far produced, in very broad strokes, lead to a concluding consideration. There emerges clearly enough from the foregoing pages

the image of a science of law which, at every step of the way—from Roman to early modern times—presents itself as unattached from the other forms of thought. To speak of a philosophy of jurists is precisely to clarify the relationship that jurisprudence clinched with the different endeavours of the mind. As a form of thought bent on action, juristic reflection is led to respond to the stimuli and suggestions coming from different fields of enquiry, however specialized, and to take up their methods. To chart a course for itself, and seize from up close the object against which it is constantly measuring itself, jurisprudence will eagerly welcome any light coming from fields of research close or far removed from it. And the converse is true as well, with movement flowing in the opposite direction. Consider, for example, the legal notions that philosophers from Ockham onward took up to convince themselves of them, notions such as that of ordered and absolute *potestas*, of legal personality, and of principles of majority rule. Consider, too, Jean Bodin's doctrines, how well they resonated with political philosophers. All these things are widely known. Less known—although it is beginning to be discussed in the scholarly literature—is the response that the techniques of reasoning in wide use among jurists is receiving from logicians tout court, or again that the metaphysics of the masters of law stimulated interest among medieval theologians and philosophers.

Of course there is still much work to do in this direction, just as there still remains much to say about the questions treated in this volume, which does not pretend to any exhaustiveness. But the fundamental proposition of this volume should hold up: the assumption that there was a necessary and constant rapport between the science of law and philosophy. This assumption might also be expressed as the essential and irreplaceable historical dimension of law and of the science devoted to it.

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ABBREVIATIONS

Alexander de Hales

HalesGl	Magistri Alexandri de Hales *Glossa in quatuor libros Sententiarum Petri Lombardi*
HalesSTh	*Doctoris irrefragabilis* Alexandri de Hales *ordinis minorum Summa Theologica*

Augustine of Hippo

DCD	S. Aurelii Augustini Hipponensis episcopi *De civitate Dei*
DDQ	S. Aurelii Augustini Hipponensis episcopi *De diversis quaestionibus LXXXIII liber unus*
ENPS	S. Aurelii Augustini Hipponensis episcopi *Enarratio in Psalmum 109*

Baldus de Ubaldis

QBS	*Quaestio Baldi de schismate*
TP	Baldi Ubaldi Perusini *Tractatus de pactis*, *cum adnotationibus Benedicti a Vadis Forosemproniensis i.u.d.*

Bartolus of Sassoferrato

TT	Bartolus a Saxoferrato, *Tractatus testimoniorum*
BA	*Tracta. De alveo do. Bar.*
BSDB	*Sermo do. Bartoli in doctoratu Do. Bonaccursii fratris sui*

Bernard of Clairvaux

TID	S. Bernardi Abbatis Primi Clarae-Vallensis *Tractatus de interiori domo seu de conscientia aedificanda*

Boethius

BCA	An. Manl. Sev. Boetii *In Categorias Aristotelis libri quatuor*
BoeTrin	An. Manl. Sev. Boetii *De Trinitate*
BP	An. Manl. Sev. Boetii *in Porphyrium dialogi a Victorino translati*

St. Bonaventura

BonHe	*Seraphici Doctoris* S. Bonaventurae *Collationes in Hexaëmeron, sive illuminationes Ecclesiae*

BonSCh *Seraphici Doctoris* S. Bonaventurae *Quaestiones disputatae de scientia Christi, de mysterio SS. Trinitatis, de perfectione evangelica*

BonSent *Doctoris seraphici* S. Bonaventurae *Commentaria in quatuor libros Sententiarum Magistri Petri Lombardi, II*

Lactantius

LDI Lucii Caecilii Firmiani Lactantii *Divinarum institutionum liber secundus de origine erroris*

Pseudo-Augustinus

SA Ps. Augustini *De spiritu et anima liber unus*

Thomas Aquinas

CG Sancti Thomae de Aquino *Summa contra Gentiles*

ThB Sancti Thomae de Aquino *super Boetium De Trinitate*

ThC Sancti Thomae Aquinatis *super Librum de causis expositio*

ThMet Sancti Thomae Aquinatis *in duodecim libros Metaphysicorum Aristotelis expositio*

ThQP Sancti Thomae de Aquino *Quaestio disputata de potentia*

ThQV Sancti Thomae de Aquino *Quaestio disputata de veritate*

ThSeI Sancti Thomae de Aquino *super Evangelium Iohannis reportatio*

ThSent Sancti Thomae de Aquino *in libros Sententiarum*

STh Sancti Thomae de Aquino *Summa Theologiae*

EE Sancti Thomae de Aquino *De ente et essentia*

ThSS Sancti Thomae Aquinatis *de substantiis separatis ad fratrem Reginaldum socium suum*

Zabarella, Jacopo

ZTP Iacobi Zabarellae Patavini *Liber de tribus praecognitis*

Chapter 1

THE ROMAN JURISTS' CONCEPTION OF LAW

by Peter G. Stein[*]

1.1. Introduction

The Roman jurists were the first professional legal specialists. They appeared in the second half of the Roman Republic and they were required because of the technicality of the Roman legal process.

The recorded history of Rome begins around the year 500 B.C., when Rome was a small settlement on the left bank of the river Tiber. It was originally governed by kings, who were expelled and replaced by a republic dominated by an aristocracy of well-born families. Government was in the hands of the Senate, a body consisting of the heads of the chief families and former office-holders. The main office-holders were the two consuls, elected annually, who took the place of the expelled kings.

Law for the Romans begins as a set of unwritten customs, passed on orally from one generation to the next, which were regarded as part of their heritage as Romans. These customs applied only to those who were Roman citizens; *ius civile*, civil law, means law for *cives*, citizens. Wherever there was doubt as to the application of these customs, the matter was referred to the college of pontiffs, a body of aristocrats responsible for the maintenance of the state religious cults and the repository of traditional learning in general.

The citizens as a body were divided between the patricians, a relatively small group of wealthy families of noble birth, and the plebeians, numerically larger but disadvantaged in various ways. The pontiffs responsible for interpreting the unwritten law were exclusively patrician and the plebeians naturally suspected that their pronouncements, which did not give reasons for their decisions, were not disinterested. The plebeians wanted the law written down in advance of cases arising, since that would curb the powers of interpretation of the pontiffs. As a result of plebeian agitation a commission was appointed which produced a collection of written legal pronouncements

[*] All English translations are by the author unless otherwise indicated. Sections 1.7, 1.10–1.11, 1.13–1.14, reproduce and reframe revised versions of excerpts taken, respectively, from the following essays by P.G. Stein: Equitable Principles in Roman Law, in *Equity in the World's Legal Systems*, ed. R.A. Newman, Brussels, Etablissements Emile Bruylant, 1973; Elegance in Law, *Law Quarterly Review* 77 (1961): 242–56; The Digest Title, *De diversis regulis iuris antiqui*, and the General Principles of Law, in *Essays in Jurisprudence in Honor of Roscoe Pound*, ed. R.A. Newman, Indianapolis, Bobs-Merrill, 1962. There are instances where we have been unable to trace or contact the copyright holder. If notified, the publisher will be pleased to rectify any errors or omissions at the earliest opportunity.

which became known as the Twelve Tables. It was formally proposed to the assembly of all citizens and accepted by them as law. In giving their approval the assembly did not feel that it was making new law in place of old law; rather it was expressing more precisely what had always been, in general terms, the law (*ius*). Now, as the public and authoritative statement of what was *ius*, it became *lex* (from *legere*, to read out) (Stein 1966; Wieacker 1988, 277ff.).

The original text of the Twelve Tables has not survived but its contents have been substantially reconstructed from quotations. They ranged over the whole field of law and included both public law and sacral law as well as private law, with a special emphasis on procedure.

The interpretation of the law, whether it be unwritten *ius* or written *lex*, remained in the hands of the pontiffs (Stein 1995a). They could "interpret" the law in a progressive way, even to produce a new institution unknown to the previous law. An example is the emancipation of children from their father's power. Under traditional customary law the power of a family head over his descendants in his power lasted for life and there was no legal means whereby he could voluntarily sever the relationship. He could exploit his sons by selling them into forced labour and the Twelve Tables contained a provision, apparently aimed at curbing abuse of this power, to the effect that if the father sold the son three times into forced labour, the son was to be free of his father's power. As a result of pontifical interpretation, a father could make three successive "sales" of the son to a friend, who each time released him. After the third sale he was free by virtue of the Twelve Tables rule (Gaius, *Institutes* 1.132).

So far interpretation has used that rule for a purpose different from that originally intended. Formalistic pontifical interpretation, however, went further. The Twelve Tables referred only to sons; doubtless the family head was originally quite unrestricted in his treatment of daughters and grandchildren. Once the rule was understood to refer to voluntary emancipation, it was held to mean that three sales were needed to free sons, but one sale was sufficient for daughters and grandchildren. Legal conservatives would be comforted by the thought that emancipation could be seen as something at least implicit, if not expressed, in the Twelve Tables and therefore not really an innovation (Jolowicz and Nicholas 1972, 88).

1.2. Legal Procedure

In the early republic there were few state officials and in many situations, recognized in the Twelve Tables, the aggrieved citizen was left to pursue his case by self-help. In cases which the parties were unable to settle for themselves, they had to appear before a magistrate. Initially this meeting was to inquire whether the dispute raised an issue which was recognized by the civil law and if so, how it should be decided. Normally the issue was referred to a private citizen, or sometimes a group of citizens, chosen by the parties and magistrate.

This private citizen, known as the *iudex*, presided over the second stage of the action, hearing evidence of the facts, listening to the arguments of the parties, and finally delivering a judgment condemning or absolving the defendant.

While the second stage of the action before the *iudex*, the time-consuming stage, was informal from the beginning, the first stage before the magistrate was originally highly technical; it required the plaintiff to recite a set form of words, and could only be brought on set days. A plaintiff who did not follow the precise wording might lose his claim. Once again it was the pontiffs, as the custodians of the Roman traditions, who were familiar with the details of the wording of these *legis actiones* and the calendar of court days. They were not published until about 300 B.C., when membership of the college of pontiffs was opened to plebeians.

At first the magisterial function fell, like all government business, to the two consuls, but in 367 B.C. a special magistrate, the *praetor*, was established to deal specifically with the administration of justice. About 242 B.C. a second *praetor*, known as the *praetor peregrinus*, was introduced to deal with cases involving *peregrini*, non-citizens, to whom the *ius civile* did not apply. Neither *praetor* had any prior legal training. The *praetor*'s task was to supervise the first stage of a legal action. The task was facilitated by an important change in procedure.

The parties who appeared before the *praetor* were now allowed to express their claims and defences informally in their own words instead of in set forms. Then the *praetor*, having learned from the parties what the issue was, set it out in hypothetical terms in a written document, called a formula. This instructed the *iudex* to condemn the defendant, if he found certain allegations of fact to be proved, and to absolve him, if he did not. The *iudex* derived all his authority from the formula and could only act within its terms.

The *praetor* could grant a formula whenever he felt that the claimant ought to have a remedy. At the beginning of his year of office, the *praetor* published an edict in which he stated the various circumstances in which he was prepared to grant a remedy and appended the appropriate *formulae*. Prospective litigants would consult the edict and could demand as of right any formula promised in it. A defendant who disputed the plaintiff's allegations would not be prejudiced so long as the *iudex* did not believe them to be true.

In the early republic the parties spoke on their own behalf, but now there was a tendency to be represented by advocates. The Roman advocate was not a jurist (Crook 1995). He was professionally trained, to be sure, but in rhetoric, in the art of presenting a case in the most effective way. In both civil and criminal trials, it is not the law but the facts which are most in dispute and trained advocates were much in demand. Only occasionally would an advocate need assistance from a specialist in legal technicalities. He might be asked to explain the legal implications of a formula or advise on which formula was best adapted to the plaintiff's needs.

1.3. The Rise of the Jurists

The secular jurists who took on this advisory role came to prominence in the second century B.C. Their work replaced that of the pontiffs. Unlike the latter, they took personal responsibility for their opinions; they were not paid but hoped to gain prestige, which would help them when they stood for election to public offices. Their main concern was private law and they did not deal with public law or sacral law, or even to any significant extent with criminal law. They came to see themselves as the guardians of the principles and rules on which private property was built. This civil law was conceived as a set of "enduring principles, institutions and rules that remain valid despite personal influence and power. The jurists are the custodians of this law, and to undermine their authority is to weaken law itself" (Frier 1985, 119).

The jurists showed a remarkable ability to isolate private secular law from other types of law. There was a good deal of sacral law in ancient Rome and in the Twelve Tables it is intermingled with secular law. Even at the end of the Republic there were specialist practitioners of sacral law, who paid little attention to secular law, but their writing has not survived. The anonymous pontiffs did not publish their opinions (Schulz 1946, 6ff.), but the new secular jurists, who followed them in giving opinions on the application of the customary or statutory law in individual cases, published them, at first in the form of collections of answers to specific inquiries, including the names of the parties involved. Cicero observes that in the works of two of the earliest secular jurists, Cato and Brutus, a legal opinion was generally accompanied by the parties' names, so that the reader gained the impression that the reason for the dispute was to be found in the character of the parties rather than in the objective circumstances. Thus, since the parties to disputes are innumerable, we are discouraged from learning the law (Cicero, *De Oratore*, 2.142).

Very little juristic writing has survived directly and our main source is the Digest, part of the codification of Roman law carried out under the orders of the Byzantine emperor Justinian in the sixth century A.D. The Digest is an anthology of extracts from juristic writing from republican times until the third century A.D., but with the emphasis on the great synthesizing jurists of the early third century, Paul and Ulpian. It is about one and a half times the size of the Bible, but represents, according to Justinian, only one twentieth of the material with which its compilers began (Mommsen, Krueger, and Watson 1985). Their work took three years to complete, but not only did they have to abbreviate many arguments, but they were instructed to avoid repetitions and eliminate all contradictions. As a result much evidence of disagreement among the jurists has been cut out and the jurists have been made to seem more of the same mind with each other than they were in fact. Apart from the Digest, a second century A.D. students' manual, the *Institutes* of Gaius (Gordon and Robinson 1988) has survived and is an invaluable source.

By the end of the second century B.C. much of private law was covered by juristic opinions, delivered piecemeal, usually in actual cases, but occasionally in hypothetical cases. The next step was to generalize the opinions, and although the material remained Roman, the methods by which it was organized were Greek (Stein 1966, 36). The key step in passing from the accumulation of particular cases to universals is induction (*epagōgē*). This process produces certain propositions, of which the most basic are so-called definitions (*horoi*).

The earliest work to make an attempt at such a process was the *liber horōn* of Quintus Mucius Scaevola, who was consul in 95 B.C. and died in 82. Mucius included in his book both explanations of terms and simple propositions of law. He was fixing the precise limits (*horoi*, *fines*) of legal institutions, which in a more general way had long been familiar. His choice of a Greek word for the title of his work shows that he recognized it as something new and unprecedented in Roman legal literature. It has been attacked as not genuine but there are no real grounds for that idea.

Apart from making definitions, the other Greek dialectical technique used by Mucius was *divisio in genera*, classifying into different types, and he is said by Pomponius (Dig. 1.2.2.41) to be the first to arrange the law in that way, in a work of eighteen books. He identified five *genera* of tutorship. Having divided the civil law into classes, he had to put them into some sort of order. He began with wills, legacies and intestate succession, which together formed about a quarter of the whole work. Succession on death was the key institution of the family, ensuring the transfer of family property from one generation to the next, and was the area of private law in which the bulk of disputes arose. The remaining topics of private law are arranged approximately in the order in which they appear in the Twelve Tables.

Despite Mucius's achievements in defining and classifying the civil law, he did not make it sufficiently scientific to satisfy Cicero. In *De Oratore* 1.190, the latter observed that geometry, astronomy and grammar had all, like law, once consisted of disparate elements, but they had been classified systematically and so could claim to be organized sciences. Cicero seemed to assume that law too was a coherent body of finite rules that were waiting to be identified by a jurist equipped with the requisite training in Greek dialectic. According to Aulus Gellius (*Attic Nights*, 1.22.7), Cicero himself drafted a "civil law reduced to a science" (*ius civile in artem redactum*), but it seems to have made no lasting impact since no trace of it has survived.

1.4. The Arrival of Legal Theory

The earliest theorising about the nature of Roman law was probably inspired by contemporary studies of the character of language (Stein 1971). Some grammarians argued that language derives from convention (*thesis*) and that it was an orderly product, whose elements could be set out systematically.

Nouns and verbs could be classified into declensions and conjugations on the basis of similarities of form, which were known as *analogiae*, and the grammarians who alleged them were called analogists. The opposing school of grammarians, supported by the Stoics, argued that language derives not from convention but from nature and pointed to the large number of exceptions to the regularities identified by the analogists. They denied that language was governed by general principles and asserted the dominance of anomaly. These anomalists asserted the individuality of each word in its flexion.

The Roman antiquarian Varro, in his treatise on the Latin language, discussing the basis of Latinitas, the observance of correct speech in Latin, identifies four basic elements: nature, analogy, custom, and authority (Funaioli 1969, I.289). The republican jurists conceived of law as something given, waiting to be discovered and declared. Mucius's definitions included not only the meaning of terms but also propositions of law, which had been reached by a process of induction. When they began to think about the nature of law and its rules, the jurists frequently used Varro's elements of language, although not always in exactly the same sense as Varro. Custom, *consuetudo*, was an obvious basis of any legal institution which had existed for a long time and could not be traced to a *lex*. Even the remedies set out in the *praetor*'s edict were often said to be based on custom. When there was, exceptionally, a more specific source, such as a statute, the rule would be attributed to authority.

As long as the function of jurisprudence was to describe the existing law, there was no place for analogy. It was only when the jurists became conscious of the fact that law is not outside human control, when they regarded it as capable of being guided in a certain direction, that the method of induction, generalising from a number of similar cases, was seen to be inadequate. The propositions are now intended to persuade rather than merely to demonstrate. It is at this point that legal analogy makes its appearance in juristic reasoning.

It seems likely that it was the jurist Labeo, at the time of the emperor Augustus, who introduced analogy into legal discourse, along with other innovations (*plurima innovare instituit*; Pomponius, Dig. 1.2.2.47). Labeo was known to be an expert grammarian and he tended to be an analogist in matters of language. Aulus Gellius, 13.10.1, tells us that he was well-versed in the origins and principles (*rationes*) of Latin words and used that knowledge to solve knotty points of law. It was the mark of the analogist to seek the *ratio* which lay behind similar word forms and then apply that *ratio* to cases of doubtful language, and Labeo followed that technique in law.

There are several examples of reasoning by analogy in Labeo's work, and such reasoning is not found in the writings of his predecessors. They asserted what they understood to be the law, whereas Labeo was prepared to argue in favour of a particular conclusion. One of his principal works was entitled *Pithana*, which means Conjectures or Probabilities.

Another of Labeo's innovations was the use of the term *regula* in place of *definitio*. *Regula* (and its Greek equivalent *kanōn*) had superseded *analogia* in grammatical discourse to describe the rules of inflection. There was a subtle difference between *regula* and *definitio*. A *definitio iuris*, as understood by Mucius, was essentially descriptive. A *regula iuris* went further; it was a normative proposition which governed all the situations which fell under its *ratio* or underlying principle. It looked to the future as much as to the past.

There are traces of a later controversy over the nature of legal rules, based on the distinction between *definitio* and *regula* (Stein 1966, 67ff.). This question is expanded upon in Sections 1.13 and 1.14 of this chapter.

1.5. Jurist-law

Jurist-law, the law developed by legal experts, became established in the last century of the Republic. Its characteristics may be summarised as follows: first, there was a continuous succession of individuals, all dedicated to the civil law, in the sense of private law, and all building on the work of their predecessors; secondly, they were intimately concerned with the day to day practice of the law; thirdly, they enjoyed freedom to express their opinions; and fourthly, they alone had a comprehensive knowledge of the civil law (Schiller 1958 and 1968). The *praetor* held office for one year only; the *iudex* was concerned only with the case in which he had been chosen to preside; the advocates tended to despise a concentration on legal niceties. Specialist legal knowledge was the exclusive preserve of the jurists.

The jurists expressed their views in *responsa*, answers to specific legal problems which had been submitted to them, and collections of their *responsa* were the main early form of legal literature. They had neither the opportunity nor, it seems, the inclination to speculate about the nature of law and its relation to society. Legal philosophy was something that in general they left to the Greeks. "There is no attempt to elaborate a philosophy of law and the Roman Jurists owe their fame to their success in solving practical problems. Though they might not be able to define the concepts with which jurisprudence must work, those concepts were present to their minds in sufficient numbers and with sufficient clarity for their practical purposes" (Jolowicz and Nicholas 1972, 374–5).

1.6. The *Ius gentium*

It has been noted that a separate *praetor* was introduced to exercise jurisdiction over non-citizens, to whom the civil law did not apply. After Rome acquired provinces, whose residents did not become Roman citizens, the number of non-citizens increased and the problems of dealing with their legal disputes became acute. The peregrine *praetor* issued edicts, as did also provin-

cial governors in respect of their provinces, in which they promised remedies to non-citzens, which tended to be based on the civil law, stripped of its technicalities.

The rules that grew up to deal with the problems of non-citizens came to be seen as applying to all nations (Jolowicz and Nicholas 1972, 102ff.). Law common to all mankind must be part of Roman law and so Roman law was now seen as made up of two elements, the *ius civile*, which applied exclusively to citizens and the *ius gentium*, which applied both to citizens and to non-citizens. This is *ius gentium* in the "practical" sense, and several established institutions of civil law were now recognized by the jurists to be part of the *ius gentium*. For example, all specific contracts which were informally created, whether by the delivery of a thing or by consent of the parties alone, were now classified as belonging to the *ius gentium*.

There was at this stage a tendency to merge this practical sense of *ius gentium* with a theoretical sense, derived from Greek philosophy. In the *Nicomachean Ethics* (5.7.1), Aristotle distinguished between law which was natural, which was the same everywhere and was universally valid, and law which was man-made, which applied only to a particular state and dealt with matters on which Nature was indifferent (Cicero, *De Officiis*, 3.69; Gaius, *Institutes*, 1.1).

The jurists generally adopted the identification of *ius gentium* with natural law and used the two terms indiscriminately. There was one case, however, in which the two ideas could not be seen as the same and that was slavery. Slavery was universally recognized in antiquity and, being common to all peoples, was clearly part of the *ius gentium*, but many thinkers, other than Aristotle, considered that by nature man was free and therefore slavery could not be part of the law of nature (Justinian, *Institutes*, 1.2.2).

Although the majority of jurists held to the dichotomy between *ius gentium* (equated with *ius naturale*) and *ius civile*, there is one influential text, attributed to the early third century jurist Ulpian, which states that the law of nature is what the natural instincts of men and animals lay down (Dig. 1.1.1.2,3 = Inst. 1.1.4), and therefore distinguishable from the dictates of man's natural reason.

1.7. Equity from *Ius honorarium* to the Postclassical Age

It was through the jurisdiction of the *praetor peregrinus* that the ideas of the *ius gentium* were first introduced into Roman Law. The process was facilitated when, towards the end of the second century B.C., the flexible formulary procedure, which was devised for the peregrine *praetor*'s court, was made available also in cases in which both parties were citizens. Such cases came within the jurisdiction of his colleague, the urban *praetor*, and had previously been dealt with by a rigid procedure—that of the *legis actio*—in which the role of the magistrate was severely limited by custom and the only initiative

open to him was to deny an action to an unmeritorious suitor by refusing to co-operate in carrying out the procedural forms (*denegatio actionis*).

The formulary procedure, on the other hand, conferred a wide discretion on the *praetor* to grant remedies when he thought it appropriate to do so, and he thus became the instrument for the introduction of equitable notions.[1] As in the *legis actio* procedure, every action was divided into two stages, the first *in iure*, at which the issue was settled in the presence of the *praetor*, and the second *apud iudicem*, at which proof was made before a private citizen chosen by the parties for the purpose and the issue decided by him. In the formulary procedure, once the parties had settled precisely what was the issue between them, it was set out by the *praetor* in a written document, the *formula*, addressed to the *iudex*. The *formula* was always expressed in hypothetical terms: If it appears to you ..., condemn, if it does not appear, absolve. The *praetor* could grant such a formula even though there was no precedent or specific legal authority for giving a remedy in the particular circumstances. He usually exercised this power on the advice of jurists, because he himself normally was not a lawyer and might only be associated with the administration of justice for his one year of office. Thus, though the constitutional agent of legal development was the *praetor*, his activities were in practice controlled and inspired by the professional lawyers. The *praetor* stated what remedies he was prepared to give in an edict, published when he took up office, and normally he would take over most of the remedies promised in his predecessor's edict. The law which came into being as a result of the remedies promised in the praetorian edict was known as *ius honorarium* in contrast to the civil law to be found in custom and statute.

The function of the *ius honorarium*, said the jurist Papinian, was to aid, supplement, or correct the civil law (Dig. 1.1.7.1; cf. Jolowicz 1952, 98). It aided by offering more convenient remedies to persons who already held rights of action at civil law, such as the interdict by which an heir at civil law could obtain possession of the deceased's goods. It supplemented by granting remedies to persons who did not have rights of action at civil law. For example the law of succession did not recognize any claim in the widow of a man who died intestate, leaving no children or other blood relations (since she was strictly not in his family). The *praetor* allowed her to claim the deceased's property, although she was not and could not be called his heir. Again, the statute dealing with damage to property (the *lex Aquilia*) gave an action for damages to the owner. The *praetor* gave an action in similar circumstances to one who was not owner, but who had an interest in the safety of the thing, such as a *bona fide possessor* or pledge-creditor. Finally the *ius honorarium* corrected the civil law by giving a person a remedy, where someone else was entitled at civil

[1] For comparison between the Roman *praetor* and the English chancellor, cf. Buckland 1939.

law, because the praetor considered his grantee more worthy of protection. An example was the person nominated heir in a will which failed to satisfy the formalities required by the civil law but which was recognised by the *praetor*.

The remedies promised by the praetor included not only actions, but also defences, *exceptiones*, to actions brought by others and orders of *restitutio in integrum*. The latter had the effect of annulling the result of some transaction which the *praetor* considered inequitable by restoring the party prejudiced by the transaction to his original position, notwithstanding that the transaction in question had complied with the law. If the *praetor* had used this power of ordering *restitutio in integrum* too enthusiastically, he would have undermined public confidence in the law and its forms. It is a testimony to his restraint that the power was only exercised in certain classes of cases and then only after the praetor himself had investigated the circumstances and satisfied himself of the truth of the complainant's allegations (*causa cognita*).

The formulary procedure applied throughout the classical period of Roman law (roughly the first two centuries A.D.) so that apart from such exceptional cases, the magistrate under classical law did not hear evidence or argument on the facts but confined himself to settling the terms of the formula by which the *iudex* was authorised to adjudicate. In the postclassical period, however, this procedure was superseded by the *cognitio* procedure, in which a judge, who was a salaried imperial official, conducted the whole case both deciding the legal issues and hearing the evidence. Whereas most of the equitable principles in Roman law were introduced through the praetorian edict, some applications of equity can be traced to resolutions of the senate during the principate or to imperial constitutions. The rulings found in the sixth century *Corpus Iuris* of Justinian thus date from various stages in the development of the law.

Although the postclassical legal texts are replete with references to equity, they have little to do with the equitable principles, mentioned earlier, which gave form and structure to the classical law. Such appeals to equity were usually aimed at ensuring that the rules of classical law should not be applied if the results would be unpleasant, despite the cost of the uncertainty thereby generated. The strength of the classical law was, in part at least, due to the jurists' recognition of the limitations of law, and of the fact that, although the scope of rules can be extended or narrowed, all possible cases cannot be foreseen in advance and that the need for legal certainty may occasionally produce hard cases. The classical jurists recognised the equitable principles which have been mentioned, and they incorporated equitable standards in the formulation of certain rules, thus taking advantage of the practical experience of the world enjoyed by the *iudices* who applied them. By the beginning of the third century A.D., when Roman law was set forth in the great synthesising works of Paul and Ulpian, the jurists probably realised that there was little more that they could do by way of introducing fresh equitable principles or standards

into Roman law. They knew when to call a halt; and that is one of the reasons why we call their law classical.

1.8. The Proculians and the Sabinians

At the beginning of the Principate there were two opposing schools among the Roman jurists, the Proculians, who were founded by Labeo but took their name from their second leader Proculus, and the Sabinians, founded by Capito who took their name from Capito's successor Sabinus. There is little consensus among scholars as to the basis of their disagreements, but recently there has been a tendency to see it as a difference of method (Stein 1972; Liebs 1976; Falchi 1981). In the present writer's view, the Proculians pressed for more rationalism in law, for a coherent set of rules and greater use of logic in the application of those rules, and for remedies with precisely defined limits. The Sabinians, on the other hand, rejected too much precision and logic and concentrated on achieving satisfactory solutions in individual cases.

For example, there was a famous school dispute over whether in a contract of sale, the price had to be in money, or whether barter, the exchange of one thing for another, could be treated as a form of sale (Gaius, *Institutes*, III.141; Dig. 18.1.1.1). Sabinus held that barter and sale were the same contract, basing his view on ancient custom and authorities such as Homer who had used the Greek word for sale to describe what was clearly a barter. Sabinus' argument seems to have been that if, in daily life, ordinary people had traditionally treated barter and sale as one transaction, the law would be unnecessarily artificial if it treated them differently. Proculus argued that the two transactions were distinct. The law imposed certain duties on the seller and other duties on the buyer and these duties were enforced by separate actions with distinct *formulae*. In barter it was usually impossible to distinguish between seller and buyer, since both parties fulfilled both roles at the same time. Therefore neither the seller's action nor the buyer's action applied to barter and the *praetor* had to grant special actions with *formulae* setting out the facts.

In cases involving a written text, whether it was the text of a statute, a procedural formula, a private contract or a testamentary document, the Proculians consistently advocated a strict objective interpretation of the words of the text, whatever may have been the intention of its author, and whatever the consequences. The same words should be understood in the same way in whatever context they occur. By contrast, the Sabinians favoured a less rigid approach to textual interpretation, more in line with what was intended by the author.

When asked to interpret the terms of a legacy in a will, Sabinus did not look for the objective meaning of the words used by the testator but rather at what the testator intended. Thus, for Sabinus, the same expression could

mean one thing in one will and something different in another will. A term was understood by one testator as a broad category and by another as a limited one. What mattered was not consistency but finding a reasonable solution to a particular problem. The law of delicts provides a useful area to see the attitudes of the two schools in action (Stein 1982).

Theft (*furtum*) was part of the traditional customary law and, although it was regulated by the Twelve Tables, there was no statutory definition of it. During the Republic the notion of theft was gradually expanded to the extent that the jurists were recommending the grant of the victim's remedy, the *actio furti*, for any dishonest interference with another's property, even if the thing "stolen" was not moved. Indeed it has been well said, "with the single word *furtum* to interpret, the lawyers had a free hand and there is probably no other institution in which the shaping hand of the jurist, untrammeled by legislation, is so evident as it is here" (Buckland 1931, 327).

Labeo was critical of some of the wide extensions of the notion of theft urged by the republican jurists. In his view criteria had to be established to define the limits of the *actio furti*, and to distinguish between theft, fraud, and damage to property. If a man waves a red rag at an animal to make it run away, is that theft? Labeo held that, if he did it in order that the beast should be taken by thieves, then the *actio furti* should be given against the rag-waver. If, however, the act, although deliberate, was part of a silly game (*ludus perniciosus*), then it was not theft, and the praetor should grant an action in *factum*, based on the specific facts. In Labeo's view, for theft it must be shown that the thief intended the thing to be taken by someone other than the owner, whether the original thief or a third party (Dig. 47.2.50.4).

Sabinus was reluctant to limit the broad scope of theft laid down by the republican jurists. Most jurists thought that theft was confined to moveables, Sabinus held that a tenant farmer who sold the land that he was renting, committed theft against the land-owner (Aulus Gellius, *Attic Nights*, 11.18.13). Indeed, unlike Labeo, Sabinus did not even seem to require actual subjective dishonesty on the part of the thief, since he asserted that "anyone commits theft who has handled another's thing, when he ought to know that he does so against the owner's will" (Aulus Gellius, *Attic Nights*, 11.18.20).

Damage to property was governed by a statute of the third century B.C., the *lex Aquilia*, and in interpreting it the jurists were limited by the words of the statutory text. The first chapter gave an action to the owner of a slave or larger animal against anyone who had killed it without justification, allowing a claim for the highest value in the previous year. The word for kill was *occidere* (from *caedere*, to cut). Labeo, as has already been noted, was an expert on etymology and held that *occidere* covered only killing by violence and with a weapon. So, where a midwife gave a slave woman a drug which the slave took, consumed and then died, Labeo argued that the action under the statute did not lie and that the praetor should grant an *actio in factum*, specifying the

facts which the plaintiff had to prove (Dig. 9.2.9 pr.). The *actio in factum* was not subject to certain procedural limitations of the statutory action and offered the defendant more scope to deny liability.

Sabinus took a more relaxed view of statutory interpretation than did Labeo. The third chapter of the *lex Aquilia*, which dealt with damage to a thing, imposed a penalty based on its value in the nearest month. Sabinus argued that, since Chapter 1 referred to the "highest," Chapter 3 should be understood as if it too contained that word, even though it did not. His explanation was rather lame, viz., that the legislator must have considered it sufficient to use the word in regard to the penalty in Chapter 1 (Gaius, *Institutes*, 3.218) and took no account of the possibility that the legislator intended a different assessment of value in the two chapters.

1.9. Unwritten Law

In cases which did not involve the interpretation of a fixed text, the Proculians tended to assume that the law was based on certain basic principles, which they sought to apply even when the cases could be distinguished on the facts. Most lawyers probably distinguished between theft and damage to property on the ground that one was derived from ancient custom and the other from a statute. Labeo noted that they were both civil wrongs and that liability should be governed by similar principles in both cases. Where damage to property was caused by a child under seven years of age, who did not understand what he was doing, Labeo held that there was no liability. Where, however, the damage was caused by a child over seven, an *impubes*, there was liability, because, says Labeo, an *impubes* was liable for theft (Dig. 9.2.5.2). It would be irrational to have different principles of liability for the two delicts of theft and damage to property and the law must be rational.

The Proculians applied the criterion of rationality even between different fields of law. They observed that there was no essential difference between the duty of an heir to deliver to a legatee what had been bequeathed to the legatee in a will and the duty of a promisor under the formal contract of stipulation to deliver what he had promised. Where the testator had made the legacy subject to an impossible condition, the Sabinians held that the heir was bound to deliver it as if it had been given unconditionally. The Proculians, on the other hand, noted that a promise by stipulation which was subject to an impossible condition was regarded as void and that there was no justifiable reason to treat legacy differently from stipulation. Gaius, *Institutes*, III.98, who reports the dispute, was himself a Sabinian but had to admit that there was no rational basis for making a distinction between the two cases.

On occasion the Proculians were able to rely on rationality to reach a more liberal decision than that favoured by their opponents. Roman wills were only valid if they instituted an heir to the testator's estate and normally therefore

the institution was the first clause in the will. It was generally agreed that the grant of a legacy or the manumission of a slave, which was written before the institution of the heir, was void. The Sabinians argued that the same rule must also be applied to the nomination of a guardian for the testator's children, which preceded the institution. The Proculians responded by asking what was the reason for making void a legacy or manumission which preceded the institution and found that they both reduced the amount of the residuary estate that went to the heir. Thus it was logical that they should appear in the will after the institution of the heir. But this reason did not apply to the nomination of a guardian and so, in the Proculian view, such a nomination was valid even when it preceded the institution (Gaius, *Institutes*, 2.231).

In situations in which the Proculians applied the criterion of reason, the Sabinians preferred to rely on past practice and authoritative precedents. Sabinus is said to have continually approved the opinions of the republican jurists (Dig. 12.5.6) and Aulus Gellius (*Attic Nights*, 5.19.3) notes that he was concerned that the antiquity of the law should be maintained. The Sabinians were prepared to tolerate with equanimity a certain level of irrationality in the law. As Javolenus, a Sabinian, put it, "Labeo's opinion has reason in its favour but the rule that we follow is this" (Dig. 40.7.39.4).

The dispute over the age of puberty exemplifies the two contrasting approaches. An adolescent acquired legal capacity when he attained puberty, but, as the Sabinians observed, physical development varies from one adolescent to another. In their view, legal capacity must also vary, and in the case of an impotent person, the normal age will be applied. The Proculians replied that the need for certainty in the law required that there be one age for legal capacity for everyone and that for a young man it should be fourteen years, irrespective of his physical development. The Proculian view prevailed.

Where there was no previous practice to rely on, the Sabinians referred to "the nature of things," by which they implied that the decision they favoured should be obvious to everyone and therefore need no specific justification. The texts suggest that it was Sabinus who introduced the term "natural reason" (*naturalis ratio*) into legal discourse with the meaning of common sense (Stein 1974). The term occurs in non-legal texts to counter supernatural explanations suggested for unusual events and assert that they occur rather "in a natural way." In law it was intended to be a counterweight to what Sabinus regarded as the over-legalistic type of reasoning, characteristic of the Proculians, and known as *civilis ratio*. As with the English phrase "it stands to reason," there was the clear indication that the conclusion was self-evident and that no specific argument was required to justify the conclusion.

The dispute over specification, where *A* makes a new thing out of material belonging to *B*, is an example (Gaius, *Institutes*, 2.79; Dig. 41.1.7.7). The Proculians held that the new thing belonged to *A*, the maker; the Sabinians that it belonged to *B*, the owner of the material (Wieacker 1954). The differ-

ence of opinion has sometimes been attributed to a difference in philosophical approach. Aristotelians would have said that the maker of the thing gave it its form, whereas the Stoics, emphasizing its nature, would have said that its substance was the material of which it was made. Probably the Proculians' decision was the result of their insistence that the plaintiff in the *vindicatio* action, by which one claimed ownership of a thing, had to give a precise description of what he was claiming. If the description had changed, the owner of the material, *B*, could no longer claim it by its former description; the new thing never belonged to *B*. So it must belong to its maker, *A*. The Sabinians held that "natural reason" dictated that the owner of the material be owner of the thing made from it. A thing is a thing, even when its form is changed and purely legal reasoning cannot alter nature.

Similar arguments were deployed in a dispute over the ownership of a large rock, embedded in the ground, partly on *A*'s land and partly on *B*'s land. As long as it is in the ground, it is part of the ground, and *A* and *B* each own the part of the rock which lies on their side of the boundary. But what is the position when the rock is removed from the ground? The case is reported in two texts, both from the jurist Paul (Dig. 10.3.19 pr. and Dig. 17.2.83), which show signs of abbreviation. The latter text states that natural reason indicates that *A* and *B* each retain the same part of the rock after its removal from the ground as they had before; it is common sense that ownership cannot be affected merely by removing it from the ground. However, the decision in both texts, as they stand, is that once the rock is out of the ground, it is owned by *A* and *B* in common in undivided shares, which bear the same relation to each other as their former separate portions, a practical solution to the problem.

The Proculians consistently championed rationality, and the Sabinians countered with a variety of arguments, precedents, natural reason and later "general convenience" (*utilitas communis*). Neratius and Celsus were both leaders of the Proculian school in the late first and early second century. Neratius was a traditionalist who required the law to be precise and certain, *ius finitum* (Dig. 22.6.2), whereas Celsus was more pragmatic and more inclined to take into account ethical considerations (Scarano Ussani 1989). At the beginning of the second century A.D, Salvius Julianus remarked that "in innumerable cases it can be proved that rulings have been accepted by the civil law contrary to logic for general convenience" (Dig. 9.2.51.2). As an example, he cited the case where several persons, intending to steal, carry off a timber beam, belonging to another, which (was so heavy that) none of them could have carried it off by himself. They are all liable for theft, although by subtle reasoning (*subtili ratione*) it could be argued that none of them is liable, because no one person actually removed the beam.

The contrasting attitudes of the schools grew less marked in the second half of the second century and then disappeared. The leading jurists of the early third century seem to combine in their work elements of the thought of

both schools. Indeed part of the attraction of later classical law may be traced to the combination of rational thought with traditional attitudes which characterize many of its main exponents.

Almost without exception and whatever their sympathies in the Proculian-Sabinian debate, the jurists lay great stress on authority, in that they rely on the *auctoritas* of a previous writer as an argument for its correctness. Cicero ridiculed the cult of authority but recognized its force. The jurists were not obliged to follow each other's views; but to a degree they were absolved from providing reasoned arguments when they could quote an eminent name on their side, and certain emperors attempted to improve consistency in the giving of legal opinions by laying down that where the opinions of earlier writers were agreed on a particular line, a *iudex* had a duty to follow that line.

1.10. Elegance in Language and Law

A particular feature of classical writing is a predilection for elegance (Stein 1961). The notion of elegance for many people today has degenerated into an advertiser's catchphrase, intended to connote that gracious living to which civilised people should aspire. In the context of the law elegance is a more precise idea, but even in this limited field it is susceptible of a number of meanings.

Etymologically, elegance is connected with *eligere*, to choose, and essentially it suggests choice, a discriminating choice, choice governed by a nicety of feeling. The attribution of elegance is thus to some extent bound to be a relative matter, partly dependent on trends in fashion and on individual taste.

Elegance in legal contexts is treated most frequently in discussions of Roman and Civil law and so we will begin with the Roman notion of *elegantia*. Sir Henry Maine, in a well-known passage in *Ancient Law*, described the Roman jurisconsults as surrendering themselves to their "sense of simplicity and harmony—of what they significantly termed 'elegance'" (Maine 1935, chap. 4, 65). As a result of Maine's dictum, elegance is generally accounted a characteristic mark of the classical jurists. They were certainly familiar with the notion themselves. Although they never use the word *elegantia*, the adverb *eleganter* appears in the Digest forty-six times.[2] But it may be questioned whether the jurists' own idea of elegance is best described as simplicity and harmony.

The jurists did not invent the idea of *elegantia*. It was already current in the schools of rhetoric (cf. Ernesti 1797, s.v. "Elegantia," 143), where it was considered to be one of the characteristics of a good style. (It was connected with the Greek *eklogē onomatōn*, choice of words.) The *Auctor ad Herrenium* (4.12) explains that *elegantia* is the expression of each topic *pure et aperte*,

[2] The passages are collected together in Radin 1930.

and it has two aspects, first, *Latinitas*, the correct use of language, and secondly, *explanatio*. *Explanatio* is what makes the language plain and intelligible, *quae reddat apertam et dilucidam orationem*. This clarity and intelligibility is achieved by the use of *usitata verba* and *propria verba*, *usitata verba* being terms current in everyday speech, *propria verba*, terms peculiar to the subject-matter of the discourse, used in their technical meaning. Thus the rhetorician thought of *elegantia* as clarity and correct choice of words with avoidance of mere emotional appeal. It was language directed at the mind rather than at the heart.

Rhetoric was the main training of the orators who did the actual pleading in Roman courts. So the elegant advocate at Rome was advised to avoid the exotic and ornamental in his choice of expressions, and rather seek to project his own personality through ordinary words properly used.

This precise and accurate use of ordinary language was not enough in itself to win cases. Where there is no emotional language to attract the jury, more attention has to be paid to the argument. For success in advocacy, therefore, elegance of language must be supplemented by elegance of reasoning. Cicero recognised that, as well as the *elegantia* of style, there was a kind of *elegantia* which consisted in *subtiliter disputare* (*Brutus*, c. 22–3; *Pro Plancio*, c. 58). He associated this subtle reasoning especially with the legal way of thinking at its best. When he wanted to compliment the jurist Servius Sulpicius, he spoke of his *subtilitas et elegantia* (*Epistolae ad diversos*, IV, 4).

The jurists themselves learned both these ideas of *elegantia* as schoolboys, but in their own writings they gave the notion a particular twist. In view of the connection between the rhetoricians' notion of *elegantia* and everyday language, it is significant that in the earliest recorded reference to *elegans* by a jurist (Dig. 45.1.137.7, Venuleius lib. i stipulationum; Sciascia 1948, 376), *elegans* is coupled with *usitatus*—this being in fact the only occasion when it, or *eleganter*, is found with another epithet in legal writings. The jurist in question was Labeo, who says that if we stipulate for something to be done, it is both more usual and more elegant to add a penalty in case the promise is not fulfilled. Labeo then quotes the various formulation of the penalty, "if it shall not be done so," "if it shall be done contrary to this," and so on. Although, as Labeo notes, it had become the practice to add a penalty clause of this kind, it was not necessary for the efficacy of the stipulation. But the addition of such a clause reinforced the obligation, saved the promisee the trouble of proving his interest, and allowed him to bring the *condictio certi* in place of the *actio ex stipulatu*. Such a penalty clause involved only the addition of a few everyday words to the stipulation; and it was functional in that it enabled the obligation to be enforced more efficiently. Thus it was elegant in substance.

In the majority of cases, elegance to the jurists was not a matter of words but of ideas. An opinion was elegant if it combined simplicity of application with an awareness of the realities of the situation. For example, where a

debtor who owed money to his creditor on several accounts made a payment, could the creditor appropriate it to any of the debts? Julian (Dig. 46.3.103; Sciascia 1948, 383; cf. Dig. 46.3.8) considered that the payment could be credited against any debt which the debtor could have been compelled to pay at the time when he made the payment. This sensible solution appeared to Marcian to be very elegant.

To a certain extent what was elegant to a Roman jurist was a matter of individual judgment. A jurist who was particularly fond of using the term *eleganter* was Ulpian. No less than forty of the forty-six texts in which it appears are his. In a few of these cases, admittedly, he means little more than that he approves of the ruling which he dubs elegant. Thus, in discussing legacies, he raises the question whether the bequest of a library (*biblioteca*) covers merely the shelves and fittings or includes the books as well (Dig. 32.52.7). Nerva said that it depends on the intention of the testator, a somewhat trite remark which Ulpian rather surprisingly qualifies as elegant. In this instance, Ulpian can have meant little more than good. It is worth noting that Ulpian is also responsible for eleven out of the fifteen texts in which *belle* or *bellissime* describes a juristic opinion.

Even a cursory examination of the texts, however, shows that in most cases Ulpian meant something rather more precise by the word *eleganter*.

Sometimes he used it in the standard rhetorical sense to describe a felicitous expression. Provincial governors were not obliged to refuse all gifts which were offered to them, but they were not to accept an excessive amount. The notion was relatively simple, but it was not easy to find the formula which would adequately express it. An imperial rescript (Dig. 1.16.6.3) of Severus and Caracalla put it this way: "There is an old Greek proverb: 'not everything, nor everyday, nor from everybody.' It is quite uncivil (*inhumanum*) to accept gifts from no-one, but equally it is most sordid to be greedy for everything." Ulpian says this opinion was given *elegantissime*. His reason was not merely that it emanated from the imperial chancellery but that it struck exactly the right note. By its reference to a familiar proverb it conveyed more aptly than an elaborate formula would have done that the true test was reasonableness. Its form thus made it an elegant opinion.

More frequently, Ulpian uses *eleganter* to characterise acuteness of thought as shown by the ability to transcend traditional categories. The jurist Pedius (Dig. 2.14.1.3) observed that despite the various ways in which a contract could be made, there was no contract which did not have in itself a *conventio*, an agreement. Ulpian called the statement elegant. Here the elegance consisted in discerning the constant element which marked all the divers Roman contracts (Philonenko 1956, 516). This is elegance of reasoning, but reasoning leading to synthesis, to system.

1.11. The Aesthetics of Juristic Reasoning

The most characteristic form of Roman juristic elegance was displayed in the discussion of cases. When a husband and wife had been divorced, the ex-wife sometimes had to sue the ex-husband for the recovery of her dowry. In such an action the ex-husband was entitled to the *beneficium competentiae*, i.e., judgment could be given against him only up to an amount that he was able to pay. Suppose, says Pomponius (Dig. 24.3.14.1), that the husband had previously agreed that he should be able to be condemned in full—to waive the *beneficium*—would such an agreement have any effect? Pomponius thinks not, because it is surely *contra bonos mores* in that it conflicts with the respect which a wife ought to show her husband. A most proper decision, but the interesting point is that what Ulpian finds elegant in this case is not Pomponius' decision but the question itself. By putting that case, the jurist gave his readers a new insight into the scope and purpose of the rule.

A question or a distinction is elegant when it pinpoints in a dramatic or subtle way the exact limits of a rule, or when it shows by a nicely chosen example that a rule is not as tidy as it seems.

A jurist whom Ulpian held in special regard as his work was marked by an off-beat elegance touched occasionally with mischief, was Celsus (see Roby 1884, CLXff.). My remaining examples of juristic elegance will be his.

If the parties to a dispute agree to submit it to an arbitrator, they are bound under penalty to attend the arbitration (Dig. 4.8.21.11; Sciascia 1948, 384). If the parties themselves have not indicated the place of the arbitration, the arbitrator has power to summon them to a convenient place. But if he orders them to convene in a low spot such as a tavern or brothel, Vivianus holds that he can be disobeyed with impunity. Celsus now enters the debate. Suppose, he says, the place designated by the arbitrator is one at which one of the parties could appear without loss of face, but not the other. The party who could have come without disgracing himself fails to turn up, while the other, steeling himself to withstand the ignominious circumstances, does appear. Can the latter then collect the penalty on the ground of the first party's non-appearance? Celsus says, no. It would be absurd that the order should be good when applied to one of the parties and not to the other. The particular case thus neatly indicates the basis and scope of the rule, and so Ulpian describes Celsus' contribution to the debate as elegant. There Celsus' elegance was constructive. It was not always so.

In *negotiorum gestio* (unauthorised act of administration on behalf of another), the rule enunciated by Labeo (Dig. 3.5.9(10).1; Sciascia 1948, 384, note 19) is that the *gestor* can claim his expenses if he has acted *utiliter*, beneficially, even though ultimately his act produced no lasting result. So if he has repaired a house which was in danger of falling down, he was acting *utiliter*, and the fact that the house is later destroyed by fire will not deprive him of his

action for expenses. Proculus qualifies Labeo's statement as being too wide. There may, he says, be cases where a man has acted *utiliter* but does not have the action. For example, if the *gestor* has repaired a house which the owner had already abandoned, to allow the *gestor* an action would lay an unfair burden on the owner. This opinion is then "elegantly" ridiculed by Celsus, who shows that in Proculus' example the requirement of *utilitas* was lacking. To repair a house which the owner has already abandoned is to do something that is not beneficial even at the time when it is done. Thus Labeo's principle can be upheld without modification.

Even in Ulpian's plain account, some of Celsus' delight in tripping up the great Proculus comes through. Celsus hated anything that suggested loose or sloppy thinking. He once remarked[3] of a certain problem that it depended on *bonum et aequum*—a category, he said, in which as a rule disastrous mistakes are made in the name of jurisprudence.

It was Celsus who was responsible for the most famous of all elegant remarks in Roman law—the definition with which Justinian begins the Digest (Dig. 1.1.1 pr.): *Ius est ars boni et aequi*. Fritz Schulz (1946, 136) dismissed this as "an empty rhetorical phrase." But in view of the Roman jurists' well-known reluctance to coin definitions and the fact that this is the only definition of law they have left us, it is worth looking at it more closely. It is not really as vague as it at first appears to modern ears.

In the first place, *bonum et aequum* does not refer merely to a nebulous notion of justice. The peregrine praetor by the use of such notions as *bona fides* gradually built up a body of rules based on *aequitas*. *Aequitas* here connotes a social ethic derived from the common recurring experience of human life and from common moral feeling. *Bonum et aequum* is thus the material out of which law, *ius*, is made. The relationship between the two may be used either because the law is defective—too narrow in its formulation—or because social circumstances have changed and the law has not changed with them.

Secondly, *ars* should not be translated "art," but rather "craft" or "systematic technique"—it is the Greek *tekhnē*. In his definition, Celsus showed that he saw the jurist as a craftsman, whose function was to integrate the law and keep it in line with social conditions. By its crisp, epigrammatic formulation, the definition is elegant in the rhetorical sense. It has that *elegans et absoluta brevitas* which Caecilius (Aulus Gellius, *Attic Nights*, 20.1.4; Marouzeau 1959, 435) admired in the Twelve Tables. But its substance must also have given Celsus' contemporaries cause for speculation as to their role in society. It presented their vocation in a new light, and it was as much a product of Celsus' acute appreciation of realities as his most subtle legal rulings.

[3] Dig. 45.1.91.3, *Paulus*, *lib. xvii ad Plautium*, where Celsus is described as *adulescens* when he gave the opinion.

Elegance for the Roman jurist meant the technical mastery of the substance of the law, manifested without any apparent effort or ostentation and directed towards improving the working of the law. Such an effortless demonstration of professional expertise produces an aesthetic satisfaction in those who know enough about the subject to appreciate its quality.

The Roman jurists experienced this aesthetic pleasure. It was stronger in some, like Ulpian, than in others; but it was general. Radin (1930, 323) is puzzled because we never find Paul using the word *eleganter* in spite of the large number of excerpts from his works in the Digest. He overlooked the fact that Paul three times (Dig. 35.1.81; 46.3.8; 50.16.25.1.) qualifies an opinion by *non ineleganter*. Paul was less calm and detached and also more subtle than Ulpian. He himself excelled in just those ingenious points which Ulpian found so elegant, and he was, perhaps, less impressed by that quality in others. But he was nonetheless aware of it.

The elegance of the jurists is not the only form of elegance associated with Roman law. There is also the elegance of the legislator (Philonenko 1956, 522ff.). Gaius (Inst. I. 84–85), discussing the legal position of children born of parents of differing status, says that by the rule of the *ius gentium* the child follows the status of the mother, but that in particular cases that rule has been altered by legislation. Thus by the S.C. Claudianum, if a free Roman woman cohabited with somebody else's slave with the owner's consent, she herself remained free, but her children were slaves. The Emperor Hadrian, moved, says Gaius, by the inelegance of the law, *inelegantia iuris motus*, restored the rule of the *ius gentium* (Hoetink 1959, 153). Again, where the anomalous result of legislative interference with the *ius gentium* was that the children of a certain type of union were free if they were boys, but slaves if they were girls, Vespasian was similarly said to be *inelegantia iuris motus*. He therefore restored the rule of the *ius gentium*, so that the children were thereafter slaves in every case.

The Emperor's reaction to this form of *elegantia* was also an aesthetic experience, but it was an experience produced not so much by subtlety of reasoning as by the orderly arrangement of legal rules in a harmonious system. The cases mentioned by Gaius were anomalies which disfigured the logical symmetry of the legal structure and therefore demanded direct intervention to remove the anomaly. The elegance of the legislator is thus elegance of form and is akin to the architectural elegance of a Greek temple. It is this notion of elegance—or a combination of this notion and the rhetoricians' elegance of expression—which I think Maine had in mind when he spoke of elegance as "simplicity and harmony." But it is something quite different from the elegance of the jurists.

1.12. The Institutional Scheme

One of the most influential features of Roman jurisprudence has been the institutional scheme, which first appeared in the middle of the second century in the work of Gaius, a law teacher who seems to have been rather obscure in his own time (Stein 1983). The arrangement of his students' manual, the Institutes, is based on a classification of all private law into three parts, relating respectively to persons, things, and actions. The first category is concerned with different kinds of personal status, regarded from three points of view, namely freedom (is the individual a freeman or a slave?), citizenship (is he a citizen or a peregrine?) and family position (is he a *paterfamilias* himself or is he in the power of an ancestor?).

The second category, things, bore the main brunt of the classification. It included everything to which a money value could be attributed. Originally it was confined to physical things, both moveables and immoveables, but Gaius extended it to include incorporeal things (Bretone 1996). Under this head Gaius put collectivities of things, which pass en bloc (*per universitatem*) from one person to another, such as an inheritance which passes as a whole from the testator to his heirs. Such collectivities may include corporeal things but they are themselves incorporeal. The other main component of incorporeal things was obligations. The notion of obligation had long been recognized to include the various ways in which one person could become indebted to another and looked at the relationship from the point of view of the debtor who was bound because he had entered into a formal promise to pay another money, or because he had received something by way of loan from another, which he had to return. In certain cases the praetor treated parties as obligated to each other merely on the strength of an agreement between them. The main example of this group of "consensual contracts" was sale. As soon as the parties committed themselves to the contract of sale, in that the seller agreed to deliver the thing sold and the buyer to pay the price, they were held to be obligated to each other in law.

Jurists before Gaius had seen that obligations could be created in various ways, in many cases requiring something more than mere agreement, but that there was a common thread uniting them, namely a prior informal arrangement between the parties indicating what they intended. It was this prior arrangement that created the category of contracts. They were all voluntary assumptions of a burden by a debtor. Gaius now viewed obligations in a new way, not as burdens on the debtor but as assets in the hands of the creditor. By treating the latter's right to sue the debtor as an asset, Gaius was able to expand the notion of obligation to include not only contracts, but also civil wrongs, delicts, as sources of obligations.

The third part of the law was concerned with civil actions, not so much the procedure for suing in court but rather different kinds of action, such as those

that can be brought against anyone, for example an owner's action to claim his property, and those that can be brought only against particular persons, for example, a creditor's action to enforce an obligation.

Gaius' institutional scheme thus contained several novel features. He included actions at law among the phenomena to be classified, alongside persons and things; he recognised incorporeal things as things alongside physical things. He classified inheritances and obligations as incorporeal things and he recognized both contracts and delicts as sources of obligation. All these innovations were destined to have enormous influence on the form of the law in the future, although they made little impact on Gaius's practice-oriented contemporaries.

Gaius's scheme gained in popularity in the late Empire and Justinian included a modified version of it in his codification (Birks and McLeod 1989).

In another elementary institutional work, Ulpian, around 200 A.D., drew for the first time a clear distinction between private law and public law. Hitherto the term "public law" had been used in a variety of senses, frequently to indicate those civil law rules which could not be altered by private agreement between the parties, by contrast with those that could be so altered. Ulpian now applied the term to a distinct body of rules of public concern, such as the powers of magistrates and the state religion, by contrast with the law that concerned the interests of private individuals. His purpose can only be conjectured, but it may have been connected with the recent enactment of the *constitutio Antoniniana*, which, although probably promulgated for fiscal reasons, had the effect of turning most of the residents of the empire into Roman citizens, and as such subject to the civil law. Ulpian probably wanted to reassure the new citizens that the civil law was private law, quite distinct from public law and therefore less likely to be modified by imperial intervention.

In the same institutional work, Ulpian derived the word *ius* from *iustitia*, justice, and quoted the famous definition of Celsus (again called "elegant") that law was the art of goodness and fairness. This definition has been dismissed as a mere rhetorical flourish but recently there has been a tendency to take it more seriously (Cerami 1985; Gallo 1987; Scarano Ussani 1989). The law has an ethical purpose; it is concerned with what ordinary people regard as good, as opposed to bad, and fair in the sense of equal. The law must treat like cases alike. Law is not, however, a vague, imprecise expression of what people approve of, but the product of a specific technique. It is a human creation (*artificialis*), by contrast with a natural phenomenon; the recognised methods convert what is equitable into law. The values of justice may not be capable of being realised in every case through law, because of the necessary limitations to which as an *ars* it is subject. These limitations are based on other values, such as certainty, regularity and predictability. Law cannot be just a set of individual cases. It was Celsus who said that laws are not established in matters which occur only in one case (Dig. 1.3.4); so law is a compromise between the claims of morality and those of science.

Similar issues were raised by the jurists when they discussed the relations between custom and law (Stein 1994). Already in the Republic it was seen that many institutions of private law were of customary origin, in the sense that they had existed from time immemorial and enjoyed popular approval. What made them law, however, was not their ancient origin but their specific recognition as law by one of the standard sources, viz., *lex*, magisterial edict, imperial rescript, the consistent opinions of jurists. Before it was filtred through one of these recognized sources of law, a custom remained for the jurists merely a practice.

A custom could have limited legal effects, if it was of purely of local ambit. Gaius says that where land has been sold, the seller must give the buyer security against eviction from the land "according to the custom of the region in which the transaction was concluded" (Dig. 21.1.6). The general rule was that it was for the parties to agree the conditions of the sale, but where there was a local custom on the matter it could be assumed that the parties were contracting with that custom in mind. The custom could be viewed as supplementing, but not contradicting, the general law.

When they speculated on the basis of the authority of such local custom, the jurists concluded that it must derive its authority from the same source as a statute, namely, the will of the people. The second century jurist Julian holds that in matters in which we do not have written laws, the rule should be followed which was established by usage and custom, and if that rule is incomplete, it should be extended by analogy (Dig. 1.3.32). Custom and statutes are both based on popular judgment, which may be expressed either formally by legislation; or informally by practice. For what difference does it make whether the people declares its will expressly in writing or silently by its conduct? The text ends with the logical conclusion that even written laws may be repealed not only by vote of the legislator but also by the silent agreement of all, through desuetude, that is, a general practice which counters the legal rule.

After the passing of the *constitutio Antoniniana*, the newly enfranchised citizens throughout the empire were expected to conform to the forms of the civil law; but in practice they continued to follow their own local laws and the imperial authorities were forced to accept the practice. The result was that Roman law now began to appear in different versions in different provinces and a general rule was required to control the recognition of local custom. In 319 A.D., the emperor Constantine laid down that the authority of custom and long usage was not insignificant (*non vilis*), but was valid only to the extent that it did not override reason or the text of a general law (Cod. 8.52.2).

1.13. The Digest Title, *De diversis regulis iuris antiqui*, and the General Principles of Law

Justinian ended his Digest with two titles which he clearly intended to round off the work in a suitably general manner: 50.16, *De verborum significatione*, in which are collected 246 juristic opinions on the meanings to be ascribed to particular words and phrases, and 50.17, *De diversis regulis iuris antiqui*, which consists of 211 short fragments from juristic writings, ranging in length from a three-word sentence to a couple of paragraphs, and each containing one or more *regulae*. The comprehensive character of the latter collection and its prominent position at the end of the most important part of the *Corpus Iuris Civilis* ensured that the special attention of lawyers would be lavished on it through the centuries that followed the revival of Roman law studies in the eleventh century. It provided them with a manageable and easily memorised, if rather ill-arranged, set of principles to which they could turn when the richness of detail in other parts of the Digest became too indigestible for them (Dekkers 1958).

The influence of title 50.17 was two-fold. First, the very inclusion of a rule in the title *De regulis*, as it came to be known, suggested that Justinian regarded it as specially important and so conferred on it a distinctive cachet, as being in some way superior to other rules. Secondly, the title provided an opportunity for the discussion of the very notion of general principles and of the relation of such principles to the rest of the legal system.

In this section it is proposed to consider first the contents of the title and the nature of its composition, and then trace in outline its treatment at the hands of the jurists of later ages.

In the opening fragment of the title (fr. 1) the jurist Paul explains the nature of a *regula*: "A *regula* briefly sets out the matter in hand. The law is not derived from the *regula*, but the *regula* is made from the existing law. So by means of a *regula* a brief statement of the matter is passed on, and, in Sabinus' words, constitutes a kind of summary of the matter which loses its force if it is vitiated in any particular." The difficulty of formulating a rule to which there are no exceptions and which is applicable in every case is taken up again by the jurist Javolenus in another fragment (fr. 202), "Every maxim (*definitio*) in the civil law is dangerous; for it is rare that it cannot be overturned."

Despite the note of caution sounded by these opinions, however, Justinian's compilers produced an impressive array of *regulae*. Most of them are broad principles applying to legal transactions generally. Some deal, for example, with matters of status. We learn that although, according to natural law, all human beings are equal, yet at civil law slaves have no standing at all (fr. 32). Again, an insane person has no will (fr. 40) and so cannot perform legal transactions. An infant who is not yet able to speak lacks understanding as much as does an insane person, but their position in law differs in that the infant can perform transactions *tutore auctore* (fr. 5).

The basic rule that what is ours cannot be transferred to another without our act is laid down in fragment 11. An act must be voluntary, but consent may be nullified by force or fear or error (fr. 116). The extent to which an act done under superior orders is voluntary is the subject of fragment 4 and fragment 169. The nature of legal obligation is further expounded by rules such as that no obligation to do what is impossible is binding (fr. 185).

Several fragments deal with the interpretation of wills and documents. Some give general advice, e.g., where there is obscurity, the course to be followed is that which is least obscure (fr. 9), or that which is the most likely or the most usually done (fr. 114), or that which is better adapted to the circumstances of the case (fr. 67). In everything fairness (*aequitas*) should be the prime consideration (fr. 90). The aim of interpretation is to discover the intention of the parties responsible for the ambiguous language (fr. 96). In contracts, the test is what was decided, *quod actum est*, and if that is not clear, the custom of the region is to be followed. lf there is no such custom, then whatever interpretation puts the obligation at its minimum should be adopted (fr. 34).

The title also contains certain general canons of interpretation derived from rhetoric, such as that the greater includes the less (fr. 110, cf. fr. 21); that the whole includes the parts (fr. 113), and that special cases are covered by general (fr. 147). In one text (fr. 178) it is said that when the principal does not exist, the accessories have no place. But the statement loses its normative force by adding the word "generally" (*plerumque*).

Other texts deal with more specific points of interpretation. Whenever the time for the performance of an obligation is not expressed, it is deemed to be due now (fr. 14). Where "two months" are prescribed, the sixty-first day is considered to be within the period (fr. 101).

Many of the *regulae* are applicable to particular branches of the law, e.g., no one can die partly testate and partly intestate (fr. 7); a marriage is formed not by cohabitation but by consent (fr. 30); a sale is not fictitious when the price is agreed (fr. 16). Some rules are concerned with procedure rather than with substantive law, e.g., a person sued on a voluntary obligation is entitled to be condemned only up to an amount which he can afford to pay (fr. 28).

All the fragments in the title are short, but some are formulated so crisply and succinctly that they are in fact maxims or brocards. Since they have been particularly influential in the history of legal thought, some of the more famous will be quoted:

No one can transfer to another a better right than he has himself (fr. 54).
No one can lose what is not his (fr. 83).
No one commits fraud who exercises his own right (fr. 55, cp. fr. 151).
No benefit is conferred on one who is unwilling (fr. 69).
In an equal cause the possessor must be considered the stronger (fr. 128 pr.).
It is less to have an action than the thing (fr. 204).

Lack of skill is equivalent to fault (fr. 132).

He who suffers loss from his own fault is not considered to suffer loss (fr. 203).

1.14. The Historical Formation of *Regulae iuris*

In a few cases the text found in the title has provided the materials for a more succinct maxim. Thus fragment 206 reads *Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*. The maxim which expresses the same idea is usually rendered: *Nemo locupletior esse debet alterius detrimento* ("No one ought to be enriched to the detriment of another").

Where did the compilers of the Digest get these *regulae* from? The majority derived from two jurists of the first part of the third century A.D., extracts from whose works comprise half the whole Digest, Paul (69 fragments) and Ulpian (62 fragments). Next in order come two jurists of the second century A.D., who were exceptional in that they were especially interested in the teaching rather than the practice of law, Gaius and Pomponius (17 fragments each). This interest in legal education naturally encouraged them to favour the formulation of succinct rules in an easily memorised form.

The remainder of the fragments in the title come from the works of various Roman jurists, ranging in time from the early part of the first century B.C. to the fourth century A.D. The earliest author to be quoted is Quintus Mucius Scaevola, the most distinguished of the *veteres*, as the Republican jurists were called. He is represented by a single fragment which appears to be a conflation of a number of rules taken from his book *Horōn*. Quintus Mucius represents the earliest attempt in the development of Roman law to generalise particular decisions and so formulate the law in an abstract way.[4] He was, Pomponius (Dig. 1.2.2.41) tells us, the first to arrange the civil law under heads (*generatim*). The techniques he used were those of Greek dialectic which at that time permeated Roman intellectual life. An example of Quintus Mucius' generalisation is, "No one can appoint a tutor to anybody except one who was his *suus heres* when he died or who would have been if he had lived" (fr. 73.1).

The latest jurist to be quoted is Hermogenian, who is represented by a pair of fragments from his *Epitome*. This work, like that of Quintus Mucius, is also characteristic of its time. The fourth and fifth centuries A.D., the postclassical period, saw a decline in legal science, in which the jurists strove to preserve a few basic ideas from the unsystematic mass of classical decisions.

Most of the *regulae* in the title date from the classical period and did not originally have the broad application which their position in the title confers

[4] P. Jörs (1888, vol. 1, 283ff.) named this movement *Die Regularjurisprudenz*; cf. Schulz 1936, 49ff. and Schulz 1946, 66ff.

on them. The classical jurists did not share the propensity towards generalisation which characterised the Republican jurists. They thought in narrow categories and were content to give a series of decisions which harmonised into a system of law, while in general avoiding abstract formulations (cf. Stein 1960, 488). For them a *regula* was still not an independent principle of law, but rather, as Paul's description in fragment 1 of our title shows, a short statement summing up the effect of a series of decisions, and not necessarily intended to have normative force.

The Byzantine jurists of the post-classical period on the other hand, loved maxims (Pringsheim 1927, 248ff.). The notion of ending the Digest with a title consisting of general principles was part of the original plan for the work, and the compilers were instructed to look out for statements which could be lifted from their context and become general rules. In some cases the *regulae* of the title *De regulis* appear also in their original context in other titles. In fact there are thirty-three examples of these *leges geminatae* in *De regulis*. Even where we do not have the rule reproduced in its original setting, we can often deduce what that setting was from the inscription of each fragment, which not only gives the name of the jurist and the title of the work, but even the number of the *liber* from which the fragment is taken; this allows comparison with other fragments taken from the same *liber* and thus indicates the subject under discussion when the rule was laid down. Thus the famous maxim, "A judicial decision must be taken as the truth" (fr. 207), was originally stated in connection with the question whether a particular individual was of free or of servile birth. Once a court had adjudicated on this question, it could not thereafter be challenged. This appears from the context in which the statement is made in Dig. 1.5.25.

The isolation of a rule from its context in this way may merely deprive it of its point rather than increase its scope. It is difficult to see the application of "No one ought to be expelled from his own home" (fr. 103), until it is realised that the statement was originally made in connection with the *in ius vocatio*, or summons beginning a legal action, which in classical law had to be undertaken by the plaintiff himself calling on the defendant to accompany him into court (Dig. 2.4.21). Again, the rule in isolation may be too cryptic, as in the case of "In doubtful matters the more benevolent solution should always be preferred" (fr. 56), which at once raises the question, more benevolent to whom? When it is seen that this maxim is derived from a discussion of legacies, it becomes clear that it meant more favourable to the legatee (Berger 1951, 36ff.).

A cursory survey of the title shows that in general cases maxims occurring in one part of the title are paralleled by other maxims, expressing the same thought in somewhat different words, occurring in another part (ibid., 44ff.). Thus, the maxim last quoted (fr. 56), which is from Gaius, is paralleled by a similar rule from Marcellus (fr. 192.1 = Dig. 28.4.3 pr.). This duplication and the lack of any intelligible order for the fragments are due to the method by

which the Digest was compiled. The compilers appointed by Justinian were divided into three sub-committees, each of which was entrusted with a group or "mass" of classical writings. As they worked through their "mass," the members of the sub-committee would pick out general statements which they considered suitable for insertion in the last title. This title they then created by simply sticking together the three lists without any rearrangement of the fragments. In fact it was the peculiar order of the fragments in the title *De regulis* which provided the German scholar, Bluhme (1820, 257), with the clue which enabled him to work out the theory of masses which is now generally accepted.

The compilers, doubtless due to the extreme haste in which they worked, did not always choose the most suitable *regulae*. As we have seen, some which they picked out lost their point in isolation. Others were overlooked. For example, in Dig. 22.6.9 pr., Paul says that ignorance of the law harms everyone, but ignorance of fact does not, and actually prefaces the remark with the words *Regula est*. Yet the compilers, if indeed they did not themselves interpolate it in Paul's text, failed to copy it for the title *De regulis*, for which it seems ideal.

1.15. Conclusion

Roman civil law reached its most sophisticated state in the so-called classical period, approximately from the first century A.D. to the third or from the reign of Augustus to that of Diocletian. This period was the hey-day of the jurists, whose work reached its zenith in the commentaries of Paul and Ulpian in the early third century.

The Roman jurists had a high opinion of their calling. In a passage which Justinian placed at the opening of his Digest, Ulpian says that the jurists were rightly called priests of the science of goodness and fairness; for they not only distinguish between what is lawful and what is unlawful, but they aim to make men good by fear of penalties and by promise of rewards (Dig. 1.1.1.1).

Ulpian also refers to the jurists having a genuine rather than a sham philosophy. By this phrase he seems to refer to certain ethical values enshrined in Roman private law. Among the most prominent of these values was good faith (*bona fides*). *Fides*, in the sense of "keeping one's word," was generally pervasive in many aspects of Roman life, such as its international relations, but its application in private law as *bona fides* depended to a large extent on the lay element in Roman legal procedure (Lombardi 1961). Good faith is a standard, which involved a moral judgement on the parties' behaviour; it was applied by a *bonus vir*, the Roman equivalent of the "reasonable man" of the common law. Since it is not formulated absolutely but is relative to time and place and circumstances, it is specially suited to be applied by laymen rather than by professionals. When the praetor made the main commercial contracts, such as

sale, hire and partnership, enforceable, the content of the duties which they imposed on the parties was determined by the standard of good faith. In a dispute arising out of such a contract, the formula instructed the lay *iudex*, who was advised by a *consilium* of other laymen, to condemn the defendant in whatever sum he ought "in good faith" to pay the plaintiff. This deceptively simple phrase was never precisely defined, so that its value was not diminished. Public opinion, expressed in the decisions of successive generations of laymen acting as *iudices*, required increasingly higher standards of conduct from Roman business men.

Some formulae instructed the *iudices* to award whatever seemed *bonum et aequum* to them (Watson 1974, 175). The *praetor* issued an edict on *iniuria* which gave this flexible measure of damages in place of the fixed penalties provided by the Twelve Tables. The procedure thus allowed laymen to give effect to their moral ideas of fairness.

Although they were very conscious of the ethical dimensions of the civil law, the jurists studiously ignored all extra-legal matters, such as the economic context of a legal institution. The usual example is the position of the lessee. "The lessor could, during the life of the contract and in contravention of the same, deprive him of the use of the thing leased [...] The classical jurists simply state the legal rule: The lessee is not the possessor of the thing, and therefore cannot insist on its enjoyment in the face of prohibition by the lessor. But why is the lessee not possessor while the pledgee, the tenant at will (*precario*) and the sequester are *possessores*? This question is not put at all" (Schulz 1936, 24–5).

This separation of the law from what was not strictly legal remained a feature of the civil law. The jurists, having established what was the civil law, wanted to preserve and re-state it rather than reform it. When the empire became Christian in the fourth century, very little change in the civil law was needed to accommodate the new orthodoxy.

Chapter 2

THE METAPHYSICAL THOUGHT OF LATE MEDIEVAL JURISPRUDENCE

by Andrea Padovani[*]

2.1. Foreword

Whereas the Roman jurists of Antiquity, in line with the pragmatism of their law, were not inclined to address complex questions of natural philosophy, the glossators and commentators of late medieval jurisprudence displayed a radically different attitude. In doing so, they implemented a change of greatest importance in the history of juridical thought. What follows is an attempt to identify some of the metaphysical queries faced by the medieval jurists. I am aware that, for the moment, the intricacy and novelty of the argument, as well as the massive number of juridical works produced between the twelfth and sixteenth centuries, do not allow me to offer definitive conclusions. For each of the themes and questions to be discussed in the present essay, I have therefore consulted only a limited number of sources. In my mind, the selected documentation is particularly apt to illustrate the principal issues. Still, there is much that remains to be done. My interpretations do not preclude further investigation, nor do they cover many of the different approaches.

2.1.1. Why Metaphysics?

Irnerius and his followers took as their starting point the basic observation that the events of nature unfold with constant regularity. From the human perspective, the universe seems to be moving, continuously and uniformly. In the skies, the stars move through their orbit which is always the same; on earth, the seasons change from year to year with identical rhythm, thereby determining the life cycles of plants and animals. Every living species, moreover, reproduces individual beings of the same type, the same family, without exception. The repetitiveness of nature leads to an inquiry that does not spare

[*] Quotations in English from the Bible are taken from the Authorised King James Version (1960). English quotations from the Digest are taken from Alan Watson's translation (1985). All other translations are by the author unless otherwise indicated. This chapter is gratefully dedicated to Michael P. Ambrosio. Since the inception of Seton Hall's Summer Programs at the University of Parma, Professor Ambrosio has invited me, in a series of unforgettable lectures, to examine the relationship between philosophy and medieval law. The author also wishes to thank Professor Wolfgang P. Müller of Fordham University for the accurate translation into English, and Catherine M. A. McCauliff of Seton Hall University School of Law for her enjoyable discussion of several ideas developed in this chapter.

anyone who is capable of wondering and, for the love of wisdom, detests numb indifference: "Which is the principle, the cause of such movement, always in pursuit of the same direction and always uniform (*uni-verse/universum*)?" This far-reaching question had pushed the Greeks since the sixth century B.C. toward the philosophical investigation of the highest principle (*arkhē*), responsible for the state of things and the modes of their actual existence. Since then, everyone who has tried to penetrate, through the use of rational means, the causes determining the structure of the universe has turned himself into a philosopher: literally, a lover of knowledge, a student of reality. Once the medieval jurists, guided by a long and authoritative tradition, began to explain the harmonious regularity of the world, they themselves became philosophers of sorts. They did not launch an unwarranted invasion into the field, a bizarre attempt to go beyond their specific competence, as it might appear to us today, who are used to respect the compartmentalization of academic discourse. At least in the twelfth century, the clear distinction of different intellectual disciplines, so familiar to us, was still unknown. It will be sufficient to cite as proof protagonists like Irnerius,[1] Peter Abelard, Thierry of Chartres, and John of Salisbury. But there were additional queries, too. The force which moves things in orderly fashion affects inanimate beings as well as animated ones, including, among the latter, man himself. That impulse operates within nature as the inescapable principle. The observation was immediately evident, confirmed not only by day-to-day experience, but also by the authoritative voice of Ulpian:

> Natural law is that which nature has taught all animals; for it is not a law specific to mankind but it is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law.[2] (Dig. 1.1.1.3; Inst. 1.2 pr.)

The Stoic philosophy inspiring this fragment (Fassò 1966, 151) did not pose an obstacle to further elaboration of a different kind. If man is composed of soul and body, it is easy to concede that he possesses an instinctive capacity also shared by the other animals. People, Azo (†1230) once remarked, are right when they say that "the most elementary motions are beyond our manipulation," due to the fact that they are directed "by natural instinct (*per instinctum nature*)" (Azo 1596, 1050 ad Inst. 1.2). The attraction between the genders, the desire to procreate, the raising of offspring are tendencies

[1] A theological treatise has recently been attributed to him, Mazzanti 1999.

[2] "Ius naturale est, quod natura omnia animalia docuit: Nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: Videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri."

within us, forming part of our physical self to the same degree as they determine the behavior of every other animal in possession of a sensitive soul. Many voluntary acts, the same jurist adds, are not anything but the instruments through which the law of nature manifests itself. Contrary to the other animals, however, man reveals longings of his own. Some of them are more elevated, as, for example, the love of God, of relatives, and of the region of birth; others are tied to his existence so profoundly immersed in this world: the formation of political communities, the freeing of slaves, the right of legitimate defense and war, property, the mutual exchange of goods and services (Dig. 1.1.2–5; Inst. 1.2). The impulse sustaining these and other forms of behavior is guided by reason, common to all human beings. The medieval interpretation turns that which the ancient Roman jurists had called the law of the people (*ius gentium*) into rational natural law, a law recommended by natural reason.

The simple observation that all things, animate and inanimate, are kept in motion by an innermost driving force which directs them toward various activities, does not satisfy the mind of the thinker who wishes to find out what causes various events. What, in fact, provokes the impulse and what accounts for its regularity? Nature cannot completely explain nature: One needs to surpass the confines of natural science to uncover what is truly the primary cause. Above and beyond the laws of physics, there is a level of knowing that is more extensive, deeper, and in a certain way, more definitive, that of metaphysics. Already Aristotle, who in a first instance had identified science (*sophia*) with physics, later reformulated his philosophical agenda upon observing that the primary causes of reality extend, so to speak, beyond nature and are located outside of it. To comprehend the things in existence and their mode of being, one must look at the totality of what is reality, which simultaneously contains them and places them in this world. Insofar as the query approaches the divine, it was defined by the Stagirite as the science of theology; insofar as it was directed toward the first being and the multitude of beings deriving from the first, it was called metaphysics (or, in modern times, ontology).

For the late medieval jurists, transcending the concrete world toward metaphysics did not mean that they indulged in dilettantism. If all things existing in this world appear as regular and harmonious, and if there is order inherent in them, it is mandatory either to search for their cause or to conclude that the order is the result of an accident. In order to exclude the latter hypothesis, it was sufficient to rely on Platonic and Aristotelian philosophy, patristic tradition and Revelation, all of which agreed on directing their thought toward God, the primary cause and highest form of reason. In addition to these justifications of a philosophical or religious nature (certainly influential), medieval legal interpreters found in the text of the Institutes (1.2.11) an explicit reference: "Now," it stated, "natural laws which are fol-

lowed by all nations alike, *deriving from divine providence*, remain always constant and immutable."[3]

The identification of a force that operates within things animate and inanimate, the rational inclination toward what is good, and sociability, all turn the attention toward God. Stable and unchangeable, the said tendencies share the same characteristics of eternity and immutability which belong, first and foremost, to the primary and eternal being (Dig. 1.1.11). He who truly tries to understand the nature of man—for whom alone legal institutions are in existence—must consider the whole of which he is part and which is firmly rooted in God. To explain the reciprocal connection tying the various beings of the universe together, to account for the harmonious coexistence of things and for the capacity of the human mind to associate, unify, and deduct, one must presume a mind which, from the beginning, has arranged every particle of reality according to a plan by no means accidental. The world, regulated by permanent principles, seems orderly to us: Yet the order is generated by the mind. "Order is the mode of being of everything that is," Baldus de Ubaldis remarked at the end of the fourteenth century (Baldus 1586a, *Proemium*, 2rb, n. 4), adding that "nature is a certain capacity with which the divine intellect has endowed everything [...] , or nature is a certain divine predisposition determining the order and state of things," animate and inanimate.[4] The divine providence invoked by the Institutes is in fact a mind that orders and directs toward a specific purpose the countless number of beings, as they find themselves interrelated in time on earth and in the celestial space. Such rationality inherent in each being explains the capacity of the human mind to comprehend, foresee, and dissect many single occurrences. There is nothing more surprising than this realization. Our rational capacity is congenial to the world, traversing it in each direction. Our mental activity does not encounter any resistance to efforts of measuring, structuring, and clarifying. Being is based on the mind: Being that is mind, and mind that is being.[5] In this way, the mind proceeds on its path from tangible phenomena to the origin of everything, uncovering at last the principle, *arkhē*, which is the foundation of all

[3] "Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta semper firma atque immutabilia permanent."

[4] Baldus 1586a, 7va, n. 16: "Ordo […] est modus entium"; "Natura rerum dicitur quaedam proprietas inserta rebus ab intellectu divino in rebus animatis secundum intellectum, vel a sideribus in plantis et brutis: Vel natura est divina quaedam dispositio et ordo rerumque status"; Baldus 1586f, 62rb, n. 7 ad Cod. 4.21.16: "Ordo facti significat ordinem intellectus." On the concept of *ordo*, which reflects divine justice, see *STh*, I, q. 21, a. 1 ad 3m; I, q. 47, a. 3, resp.; I, q. 103, a. 2 ad 3m; II.II, q. 154, a. 12 ad 1m: "Sicut ordo rationis rectae est ab homine, ita ordo naturae est ab ipso Deo"; *CG*, II, c. 39, 2, 5; III, c. 97. Cf. also Ermini 1923, 84–5.

[5] Since we cannot perceive being as such apart from those beings known to us, we cannot perceive it as something other than intelligible. Moreover, if intelligibility exists only as a function of the intellect, then being as such will also be intelligent. One could add: An absolute cause, self-sufficient and intelligent, is not something, it is Someone.

recognizable reality. To that extent, at least, Plato, Aristotle, and Christian philosophy prove to be compatible. In fact, none of them could exist without the activity of a mind that foresees, distinguishes, and directs toward an end. Given that there is an order to things, it is necessary to associate order with a determining reason: divine reason, supreme and beyond measure, it is true, but not entirely inaccessible to man. The reality we experience is in fact analogous to the first being, the primary truth, and the supreme good of which it is part. Again, the level of physics must be transcended through the adoption of a more elevated point of view (*meta-phusis*).

To this consideration of a generic kind, another one can be added. Without a doubt, the law is an existing reality: The legal institutions and norms shaping it are in fact something, and not just nothing (Olgiati 1944, 54; cf. Aristotle, *Metaphysics*, 1005a19–b2). They are entities which are related and subordinate to that "general grammar of being," applicable in its principles to the prime substance (of God) as well as to all of the other, inferior substances (Aristotle, *Metaphysics*, 1003b19–22; 1004a2–9).

The object of metaphysics is therefore unique—being as being—yet at the same time it is bipolar, given the dual path on which reason proceeds toward the recognition of principles. In terms of mental intentions, the itinerary leads toward the contemplation of the common being and its properties (substance, matter, form, essence); in terms of the efficient cause, it leads to God. Departing from differing perspectives, one arrives at the same goal.

As a result, the first part of this study will discuss the nature of the objects treated by jurisprudence; the second part, forming a necessary extension of the preceding one, will explore the ultimate, theological foundations.

The order of treatment will become clear on the basis of distinguishing between these levels. The point of departure is indeed established by the obvious statement that "something exists" in the world around us. Once the existence of this "something" is determined, the inquiry becomes a question of understanding how we are necessarily drawn beyond the "something" itself, being forced to recognize that if "something" exists, this "something" comes from God. Reason attaches properly to God because He thinks, and because of the impossibility that existing things should make themselves understood by themselves. For this very reason Aristotle assumed that the science of being culminates in theology (*Metaphysics*, 1026a19). On the other hand, our mental representations undeniably exist and among these (the more important for us) are juridical concepts (see Padovani 2003).

Their foundation, though distinct from that of material and tangible things, reveals itself to be subordinate to the laws of being. Moreover, in thinking, man reveals his similarity to God in the highest degree. Indeed, human ideas presuppose divine ideas. While divine ideas, however, are the cause of the universe, human ideas, conceived by man, are merely their effect, because they reflect the innermost structure of things. Considered then under

this aspect also, philosophy leads to a theology. The analysis of reality, of any reality, concrete or not, arrives at a like result.

Therefore, if the jurist wanted to remain faithful to truth (or to being, which is the same thing), he could not succeed without opening himself, as the philosopher had done, to theology. After Aristotle, theology was understood as the summit and end point of metaphysics. But the moment the medieval jurist attempted to insert the natural tendency of man toward the good, that is, toward truth and justice, the moment he endeavored to explain the universal harmony which the positive law also had to obey, his theology sought other points of reference. The jurist sought out not only Plato and Aristotle but also the full Revelation of Jesus Christ as the Fathers of the Church had transmitted that Revelation.

The second part of this study will be devoted to this complex and fascinating vision, which places the metaphysics of the Greeks alongside a Christian tradition nourished by faith.

2.2. The Objects of Jurisprudence

2.2.1. Being and Essence. The Concept of Substance

What is being? The philosopher can try to answer this question by beginning to observe the things he encounters in day-to-day experience, in the hope that they will carry him progressively toward uncovering the primary realities (*EE*, *prooemium*, 2).[6] On a daily basis, we enter into contact with entities, concrete things of which we try to identify the constitutive principles turning them into what they are. We are thus confronted with things that exist: But they exist in widely different fashion. Some exist by themselves, being called primary substances, such as this man and this book. Others instead appear always somehow tied to a substance, for example, a certain color or a specific dimension. These are known as accidents. As the latter exist as part of something else and never by themselves, it follows that being as such pertains first and foremost to the substance and merely in a subordinate sense to those terms related to it. Without their substrate, the accidents would disappear. The same observations renders evident the multiplicity of meanings attached to being. "Being" does not imply a single notion, but comprises numerous concepts that figure under a single denomination (Aristotle, *Metaphysics*, 998b22–27; cf. De Rijk 1972, 18–9).

The essential priority of the substance is apparent from the use of language: "The subject—the primary substance—is that which predicates other things while not being predicated by anything else" (Aristotle, *Metaphysics*, 1029b1, my translation). As a subject, the substance can acquire a great

[6] Already prior to Aristotle, this had been Plato's approach to the problem.

number of attributes that qualify it according to various aspects: color, quantity, length. There is, however, a predicating relationship which admits only those characteristics that a certain substance must necessarily possess in order to be what it is. If I ask Socrates "What are you?," and he responds to me "A philosopher," his answer does not express that which he is by himself, necessarily and permanently, namely, in his substance. Indeed, he might just as well not be a philosopher or, upon having become one, he might cease to be one. By saying instead that he is "a rational animal," he expresses that which he cannot avoid being and is necessarily by being human. He consequently refers to his essence and defines himself in terms of what he is by necessity. There is no methodological difference between the jurists and the natural philosophers. The question we find repeated for centuries in the works of the leading jurists ("*Quid sit ius*," "*hereditas*," "*actio*," "*usufructus*": "What is law, inheritance, an action, usufruct.") pursues the goal of capturing the essence, the "*quidditas*" or nature of the realities—or rather, the substances—treated by jurisprudence.[7] *Quidditas*, insofar as the expression answers to the query of "*quid est?*": "Which is the reality I have before my eyes?" (*EE*, 1.2). Simultaneously, essence can also refer to form, due to the fact that in Aristotelian usage, form is the determining element of the thing, that because of which a thing is what it is, distinct from anything else. Matter, on the other hand, is the undifferentiated element, common and potential.

As intelligence finds its measure in being as such, what thing appears primarily to intelligence must also be of primary importance from the perspective of being as such.[8] Thus, when we say that the essence of the human being is "the rational animal," we indicate, firstly, the genus, and then the difference. The genus refers to multiple things distinct from one another; in terms of species, the difference is what characterizes the various species of each genus.[9] Whereas things subject to the senses are individual, genus and species

[7] Cynus 1578, II, 520va, n. 3 ad Cod. 8.52(53).2: "In diffinitione debent comprehendi essentialia rei deffinitae"; Bartolus 1570c, 89vb, n. 2 ad Dig. 28.1.1: "Definitio […] debet ponere substantialia rei definitae"; 1570e, 80va, n. 6 ad Dig. 41.2.1: "Discamus a Physicis, qui dicunt homo est animal rationale, etc., […] et predicti in diffinitione ponunt […] quid est in substantia"; Albericus de Rosate 1585a, 9va, n. 1 ad Dig. 1.1.1: "Cum diffinitio dicat essentiam rei." Cf. *ThSent*, II, d. 35, q. 1, a. 2 ad 1m: "Quia ens per prius de substantia dicitur, quae perfecte rationem entis habet, ideo nil perfecte definitur nisi substantia: Accidentia autem, sicut incompletam rationem entis participant, ita et definitionem absolutam non habent."

[8] Baldus 1586e, 229vb, n. 2 ad Cod. 3.34.7: "Sicut se habet in ordine rei, ita videtur se habere in ordine intellectus." Cf. *QBS*, 118va, n. 16: "Apud intellectum nostrum prius est esse quam operari"; cf. 120rb, n. 13. This echoes a principle widely disseminated by the Thomistic teachers ("Illud quod intellectus concipit quasi notissimum et in quo omnes conceptiones resolvit est ens"; *ThQV*, I.9. Cf. *ThQP*, IX, 7 ad 15).

[9] Bartolus 1570e, 80vb, n. 7 ad Dig. 41.2.1: "Differentia in substantia […] facit diversam speciem. Nam hoc, quod est rationale, facit nos differre a brutis: Et hoc, quod est mortale, facit differre ab angelis."

are universal and intelligible realities. To denote them, Aristotle uses the ambiguous expression of "secondary substances" (*Metaphysics*, 1017b1, 13, 20–5; *Topics*, I, 5, 102b3; *Categories*, V, 2a, 11–9). Along with the primary substances, they can appear as subjects in a given statement (e.g., "the animal is an organized body"); simultaneously, they participate in the essence of individual entities and lack an autonomous existence. The genus "animal" does not exist. There are only single animals to which the genus "animal" conveys the properties it encompasses as a subject.

This again reveals the complexity of meanings attributed to the term "being." Aristotle is entirely convinced that only the individual is or exists; at the same time and the more his thought reaches maturity, he becomes aware that the individual can only become intelligible through the essence: the universal as explained in the definition above (genus and difference). No entity without identity. If, as I have noted, that which appears as primary and fundamental to the intelligence must be the same also from the perspective of being as such, then essence must precede existence. In turn, essence constitutes substance, "secondary" only with regard to factual existence. This is the vindication of Plato and the fundamental ambiguity Aristotelian thought proves unable to overcome: to the point of triggering the medieval debate on the universals, as is well known (Gilson 1962, 59–60).

I have already mentioned that, in the primary substance, essence is form: "I understand the form as essence"—Baldus remarks (*TP*, 2va, nn. 27–8)[10]—"because the form confers being to the thing and maintains it. As it maintains, the form is identical with the essence." Or, to put it differently: The form, insofar as it is essence, provides the things with the cause or reason for being, that because of which a thing is what it is.[11] All of the particular entities we notice are identifiable insofar as they consist of matter and a form. Within this composite, which is that of the primary and individual substances, the form nevertheless provides the principle prevailing over the rest. There is indeed

[10] "Accipio formam pro essentia, quia forma est, quae dat esse rei et rem conservat et in quantum conservat est idem forma, quod essentia"; Baldus 1586c, 92ra, n. 6 ad Dig. 28.6.15: "Certum est, quod identitas formae arguit identitatem essentiae." And Azo: "Fit enim secundum formam actionis, idest secundum eius essentiam" (Otte 1971, 51); Errera 1995, 175. Cf. *EE*, I.2: "[Essentia] dicitur etiam forma, secundum quod per formam significatur perfectio seu certitudo uniuscuiusque rei […] sed essentia dicitur secundum quod per eam et in ea res habet esse."

[11] Caprioli 1961–1962, 282–3, n. 264: "Interdum ratio, i(dest) causa quia quid dicatur," "Causam, si placeat, appellamus rationem que habetur de rebus." Probably for the same reasons, Bulgarus did not hesitate to identify *res* with *causae*: The thing seems to fuse with what conveys being to it (ibid., 341). Also interesting is a passage to be found in *QBS*, 120rb, n. 13: "Nec est aliud verbum ita substantificum in mundo sicut verbum sum, es, est […] substantiam rei perfectissime includens." This means, for example, that in the sentence "Socrates is a human being," the humanity in Socrates appears as the form, as the necessary and substantial essence. Cf. Bellomo 1969, 276, 58; 273, 60.

no doubt that, whenever we ask about an object we face: "What is it?," the response ("a horse, a tree") depends primarily on the outward appearance (*eidos*) presented to us. On the form, that is to say.[12]

If the form allows us to distinguish entities of the same genus from one another, matter permits the distinction between entities of the same species (e.g., a golden statue from one made of wood). In this way, matter and form are pre-requisites for the experience of multiplicity and change. Matter in fact expresses that which is potentially, that which can assume different forms. The form, on the other hand, is to be identified with the realization of a specific possibility. The form endows things with being. It changes things from something indistinct into something distinct, while maintaining the stability of their existence: that is the meaning of the passage from Baldus cited above.

To summarize: For Aristotle, the examination of being as such requires the study of substance. Everything relates to this primary term "that stands or subsists by itself."[13] It applies to the cosmic order centering upon substance;[14] it also applies to the spoken language, in which the meaningful use of the words hinges upon the permanence of definitions. The substances in their various appearances likewise furnish the objects for each of the single sciences. To discuss being as such and to identify principles is equivalent to looking for the principles of the substance. And since being, vested as substance, pertains to every single thing, investigations into the principles of the substance imply a search for the principles of all things, as well as the one presupposition common to all of the sciences, law included.[15]

To become the mark of Western Scholasticism this theoretical approach to the problem of being as such did not require the rediscovery and diffusion of the Aristotelian *Corpus*. The writings of the Stagirite, once they were available in their entirety, certainly contributed to the deepening of metaphysical reflection. Still, previous research had been fairly successful in drawing significant inspiration from translations, from commentaries on Aristotle and on Porphyry, and from the various *Opuscula theologica* composed by Severinus Boe-

[12] Baldus 1586e, 74vb, n. 5 ad Cod. 1.18.10: "Illa est forma substantialis, per quam datur deffinitio. Unde dicit Aristo(teles) et Boetius quod diffinitio claudit essentiam."

[13] Baldus 1580a, 228rb, n. 37 ad X 2.20.37: "Dicitur autem substantia, quasi per se stans, seu subsistens […] apud iuristas vero substantia incorporea est contractus, obligatio, actio, dominium et omne intellectuale, puta testamentum […]. Substantia autem corporea patet sensu: ut ager, fundus, mancipium." Cf. De Rijk 1956, 331.

[14] *QBS*, 118rb, n. 7: "Ordo est figura substantiae cuiuscumque rei et nihil constat sine ordinis dispositione."

[15] Cagnolus 1586, 33rb, n. 1 ad Dig. 1.1: "Quemadmodum Physicorum primo ultramondanus scribit Aristoteles, tunc unumquodque cognoscere arbitramur quum causas cognoscimus primas et principia prima usque ad elementa, ex quo manifeste ostendit in scientiis esse processum ordinatum, prout proceditur a primis causis ad proximas causas, quae sunt elementa constituentia essentiam rei." This approach is common to jurists and *naturales philosophi* (n. 4).

thius. In any case, the juristic glossators and, even more so, the commentators were in a position to adopt for themselves the concept of substance as an interpretive tool of fundamental importance.

This approach of the medieval jurists to the techniques and to the lexicon in use among the contemporary schools of philosophy is a fact which turns out to be confirmed more and more by recent studies. To be sure, the propensity of the medieval masters of law to avail themsleves of the fruits of Scholasticism had been pointed out long ago, beginning with Friedrich Carl von Savigny, but only in a one-sided way, with a generally negative tone. Indeed, legal historians had completely disregarded the medieval establishment of juridical problems on a metaphysical foundation. If this was noticed at all, it concerned for the most part, the influence of dialectic on the medieval jurists. In the wake of the cutting criticisms of the humanists, this influence was often felt to be ill-fated because of its excess subtlety, which was treated as an encumbrance, and because in practice it was completely unproductive. Although it was difficult, these historiographical postures have now been vanquished by the need to reconstruct the entire intellectual horizon of those medieval lawyers. "True understanding, itself also a unity, cannot occur without an understanding of the whole," said Hugh of St. Victor (Baron 1955, 113), a sentiment to which many medieval jurists would have undoubtedly subscribed.

2.2.2. The Concept of Substance in Jurisprudence. Acts of Ethical Relevance

In an attempt to capture the gist of the problems discussed by the medieval jurists, let us begin with some observations related to the use of language. It is possible to say: "This is an action," "This is usufruct," or: "An action is the right to pursue in court that which is owed to us," "Usufruct is the right to use and take advantage of things belonging to someone else, while leaving them intact in their substance" (Inst. 4.6.1; 2.4.1) In the first two phrases, "action" and "usufruct" are predicates of *x*; in the following two phrases, the same terms are the subjects of a predicative relationship. From a logical viewpoint, coupled statements are identical with those frequently proposed by the philosophers: "Socrates is a human being," in one case, and "The human being is a rational animal," in the other. "Socrates" is, to employ Aristotelian terminology, primary substance and "man," the name of the species which, in the first example, serves as a predicate. In the second, it rather provides the subject or secondary substance, by which "animal" is predicated. In addition, we already know that—contrary to the primary substances—the secondary substances are capable of being used as subjects as well as predicates. This having been said, it becomes necessary to find out what is understood by *x* in sentences such as the ones mentioned earlier: "*x* is an action," "*x* is a usufruct," and so on and so forth. I can in fact assert that the open parchment before me on the table is a testament, or that, in formally identical terms, that

it is testament a certain fact which has really occurred: On his death-bed, my friend Peter summoned the notary and a certain number of witnesses to dictate loudly and clearly this last will, subsequently rendered in a document. Obviously, the ontological nature of *x* in the two cases is entirely different. On the one hand, I refer to the material substance (the written parchment), on the other to various human acts serving a pre-established end and distributed over a certain period of time (the summoning of the notary and the witnesses, the dictating of the dispositions). Language provides room for both types of assumptions. If the judge asked me to show the testament, I would certainly produce the parchment in my possession; if the adversary claimed that Peter's testament was invalid due to the lack of substantial requirements, the objection would relate to the appropriateness of the acts leading to the drafting of the given document. The claim of invalidity in fact cannot refer to the parchment in its material consistency, but rather challenges its content or the form in which the content appears. To repeat the words of Francesco Mantica (1534–1614): "It is the form which confers being to the testament. The form embraces the testament in its totality so as to give it perfection and precision; the form of the testament is a certain indivisible transaction [*actus individuus*], which is completed with the last period and the final letter of the text" (Mantica 1580, 16vb, n. 2).

The passage by Mantica contains reflections that are fairly important. Following a scientific tradition reaching back to the beginnings of the Bolognese school of law, he reaffirms that it is the form which confers being on a juridical act.[16] The influence of Aristotelian metaphysics is manifest: The tangible substances come about through the fusion (*sunolon*) of matter and form. In the present instance, however, the object to which the jurist refers is certainly different from a natural entity (a tree, an animal), or from an artificial one (a book, a statue). These entities have a corporeal existence that is, so to speak, specific and permanent, as long as the aggregation of matter and form lasts: Barring unforeseeable events, I will see this tree and that statue again tomorrow or in a year. In the case of the testament, we are confronted with an act that, as Mantica observes, consists in chronological terms of different actions (*actus*) directed toward a single goal. Once they have been performed, human activities of this kind will forever remain inaccessible to direct observation. Their memory will be consigned to the witnesses and the parchment, which can be called a testament only in equivocal fashion. In spite of this, a consistent scientific tradition treated the single juridical act (or rather: each

[16] The gl. acc. *forma* ad Dig. 41.1.7.5, repeating an earlier remark by Martinus, comments on "desiit esse, amissa propria forma": "Id est esse rei"; Bellomo 1969, 273, 60; 276, 58: "Res dicitur esse illud cuius formam habet et illud non esse vel desinere cuius interempta est forma." Cf. ms. Barb. lat. 1400, 20v: "Nulla res est nisi per formam in materia subiacente." Conversely, by changing the form "debet mutari esse rei": Romano 1977, CXLII, 304–7; CXLIV, 350.

transaction concretely concluded between identifiable subjects) as substances that could be assimilated, by their innermost structure, to natural ones.

The problem we therefore have to tackle is the following: Under which conditions and in which ways is it possible to maintain, from a metaphysical standpoint, that a human act represents a substance? The question was debated by the theologians, particularly with regard to the sacraments of the Church and to sin: two topics certainly of interest to the canonists and, as far as sin was concerned, to the interpreters of Roman law as well (due to its structural affinity with matters of crime). The parallel between things and human acts of ethical relevance is stated in various instances by Thomas Aquinas: "One has to speak of the good and evil in acts as much as of the good and evil in things […] As regards things, each of them holds as much of the good as it contains being"[17] (*STh*, I–II, q. 18, a. 1, resp.).

Things as well as acts *are* to the degree to which they are good: *Ens et bonum convertuntur.* "If being and the good did not exist, nothing could be called evil or good" (*STh*, I–II, q. 18, a. 1, resp.; I–II, q. 8, a. 1, resp.). Or, to put it briefly: Every human act, insofar as it is, is good. Hence, sin itself (or, in a juridical context, crime as such) is not purely negative, but a defect of good and being which still retains in its consistency a positive core that cannot be eliminated: "Sin is not sheer privation, but rather an act deprived of its proper order"; "the act of sin is being as well as act. Sin, however, implies an entity and an act with a certain defect" (*STh*, I–II, q. 72, a. 1, resp.)[18]

Let us keep this first conclusion in mind: Human acts *are*. But what kind of being are we dealing with? To respond to this query we can refer to the example of sin (or crime) which, among the human acts, greatly suffers from the reduction of being that is proper to evil. The conclusion reached in this case will be valid to an even greater degree when applied to all the other acts in which the good (or the conformity to the law) is integral. Alexander of Hales, St. Bonaventure, Thomas Aquinas, and Egidius Romanus uniformly concur in their respective commentaries on the second book of Peter Lombard's *Sentences*, when they define sin—as far as act—as essence, entity, nature, and thing, endowed with quidditas or intelligibility of its own: "In being act, [sin] is substance" (*ThSent*, II, d. 37, q. 1, 1 *sed contra*; Cf. *STh*, I–II, q. 10, a. 1,

[17] "De bono et malo in actionibus oportet loqui sicut de bono et malo in rebus […] In rebus autem unumquodque habet de bono quantum habet de esse"; *STh*, I–II, q. 1, a. 3, resp.: "Ea quae sunt composita ex materia et forma constituuntur in suis speciebus per proprias formas. Et hoc etiam considerandum est in motibus propriis"; *STh*, I–II, q. 18, a. 10, resp.: "Sicut species rerum naturalium constituuntur ex naturalibus formis, ita species moralium actuum constituuntur ex formis, prout sunt a ratione conceptae" (with an interesting example drawn from the law); *ThMet*, 775.

[18] "Peccatum non est pura privatio, sed est actus debito ordine privatus"; I–II, q. 79, a. 2, resp.: "Actus peccati et est ens et est actus […]. Sed peccatum nominat ens et actionem cum quodam defectu." Cf. *HalesSth* 1930, 3, q. 1, resp.; Iansen 1926, 352, q. 352.

resp.; *HalesGl* 1952, 357, II.XXXVI; 362–3, II.XXXVII.2; *BonSent* 1885, 877, d. 37, *dubium* 4; Columna 1581, 546a–8b, dist. XXXVII, q. 1, a. 1).

However, the substantive nature of every ethically relevant act must be understood with the necessary specifications in mind. The act, it is true, exists in a reality that is part of the world and recognizable; in the realm of language, too, it can function as a subject within an indicative phrase (e.g., "Peter's marriage is invalid").[19] We can organize the various actions into species and place the latter again under a genus. Similar to the natural substances, acts also encompass accidental elements—the external circumstances—which qualify them and give them precision.[20]

From an analytical point of view, each act, whether good or bad, consists of a formal and a material principle. The latter can be identified with the nature (*naturalis species*) of the act brought into being: words or human behavior. For Thomas Aquinas (*STh*, I–II, q. 72, a. 6, resp.), the matter in a homicide consists of the strangulation (*iugulatio*), the stoning (*lapidatio*), or the hit with a cutting weapon (*perforatio*). The goal toward which all of these operations, so different from one another, are directed remains nevertheless identical: the killing of a human being. The objective qualifies the action, not the mode in which it is performed. Just as the form specifies the entity as it exists in nature, human acts "obtain their proper specificity from their purpose," imposed by reason and pursued by the will (*STh*, I–II, q. 18, a. 2, resp.; I–II, q. 1, a. 3, ad 3m). In the same context, the distinction between matter and form can be clarified through a case scenario frequently invoked by medieval interpreters: "Although the city statute prescribes in general terms that whoever sheds blood on the square be punished with the amputation of his hand, the surgeon who causes bleeding on the square in the course of a phlebotomy will not be punished according to that norm" (Everard 1587, 186, n. 4; cf. *HalesSTh* 1930, 55, inq. I, tract. III, q. I; *STh*, I–II, q. 1, a. 3, ad 3m.).

In this instance, the matter of the two acts is the same: Different is instead the intention of the agent giving form—and thus meaning, specificity and intelligibility—to the event materially taken into consideration. That is why Thomas Aquinas can write: "Matter does not attain form apart from the motion imposed by the agent" (*STh*, I–II, q. 1, a. 2, resp.).[21]

In full coherence with these premises, Baldus affirms that the matter of the law consists of human activities (*facta hominum*). Sheer potentiality, an indis-

[19] Dal Pra 1969, 265–6: "Nam furtum vel homicidium quasi specialia et substantialia nomina sunt factorum et eorum causae circa iudicia et distinctas distributiones habent quod non habent justum vel injustum vel similia quae sunt accidentalia." Cf. *HalesSTh* 1930, 55–6, inq. I, tract. III, q. I; Iansen 1926, 216, q. XCI; Cursus 1678, 90, tr. XIII, disp. VI, dub. II, 18.

[20] In particular, differing circumstances modify the punishment for each crime: cf. *STh*, I–II, q. 18, a. 10, resp.; I–II, q. 18, a. 3 resp., ad 3m.

[21] "Materia non consequitur formam, nisi secundum quod movetur ab agente"; Lottin 1954, 51; 98; 115.

tinct something which, in conformity with the primary matter as defined by Aristotle, "is not yet" relevant for the law.[22]

In other words, and in more detail, in the physical world, matter awaited the impression of a form in order to become knowable. So too the facts which the jurist contemplated and which made up the "matter" of his work awaited a form. These juridical facts had to be qualified within the preconstituted categories of the law. Sometimes a similar event can lend itself to different evaluations, even to all evaluations which are possible in the abstract. When the jurist decides, he cuts (*decido* in Latin = I cut) the knot of uncertainty. The different possible qualifications of the fact under examination reduce themselves to one, which the jurist in fact chooses. The potential becomes act, matter is subjected to a form, the darkness is illumined, the understanding is made clear. The event which has been juridically delineated has the appearance and the consistency of a substance, a compound (*sunolon* in Greek) of matter and form.

2.2.3. The Different Substantiality of Human Acts and Natural Things

While distinguishable, in the abstract, according to its material and formal principles, we have already noted that the human act cannot be viewed as completely identical with any natural substance (*ThSent*, II, d. 37, q. 1, 1, *sed contra*).[23] There is a real difference between Peter and the actions he undertakes. "The being of an action is not superior to that of the substance to which the action pertains,"[24] Alexander of Hales states peremptorily (*HalesGl* 1952, 1, I.1), aware of the fact that the substances are ordered hierarchically and reflect the degree of perfection of each in the order of being. There is no doubt that man, for example, is substance to a lesser degree than an angel or God Himself.[25]

[22] Baldus 1586a, 3va, n. 6 ad *Nomen et Cognomina*: "Hoc ius quod non potest tunc intelligi specifice sed solum in confuso et non est clarum, sed est aptum natum suscipere lumen claritatis per dispositionem legis et dicimus quod forma sicut lumen est susceptivum luminis istius, sit sicut materia et quod istius materiae materia sit factum"; 1580a, 60rb, n. 24: "Actus ex quibus inducitur consuetudo non sunt consuetudo, sed materia consuetudinis. Porro causa efficiens consuetudinis est consensus populi, causa formalis est forma actuum ex quibus surgit, causa materialis sunt ipsa negocia et controversia in quibus imprimit, causa finalis est utilitas." Cf. Ioannes ab Imola 1575, 3va, n. 11, *praefatio*: "Primo modo potest dici unam esse materiam omnium rerum materialium et hanc philosophi dicunt materiam primam, de qua primo Physicorum et haec est ipsa res prout consideratur absque forma: Et hoc modo materia non est hoc aliquid, idest aliqua res per se subsistens, sed per formam fit hoc aliquid, ipsa ergo res prout est in potentia ad suscipiendam formam dicitur materia prima"; Aristotle, *Metaphysics*, 1036a 8; 1037a 27; 1049a 18; *Physics*, 192a 31. Cf. Kriechbaum 2000, 321, but especially Bellomo 2000, 642–4, 655.

[23] "Primo ergo modo accipiendo substantiam [secundum quod significat rationem primi praedicamenti], nullo modo dubium est peccata substantias non esse."

[24] "Non […] nobilius est esse actionis quam substantiae cuius est actio."

[25] Or "magis est substantia species quam genus, quia species est propinquior prime substantie quam genus" (De Rijk 1972, 30).

In spite of being placed at different levels of perfection, the entities we experience display the same structure: "Just as, in the genus of natural things, a specific conglomerate is composed of matter and form (for instance, man, who represents a single natural entity in the unity of body and soul, but is nevertheless made of many parts), the same applies to the human acts" (*STh*, I–II, q. 17, a. 4, resp.).[26]

Let us try to verify this proposition with regard to juridical acts. Their unity consists of parts, actions which are coordinated among themselves for a certain period of time. We have already seen how one accomplishes the drafting of a testament. We might equally consider the complex ritual of celebrating a wedding, of making a sales contract, and so on, by citing an almost infinite number of examples. Still, not all of these operations have the same significance, for theologians and jurists alike. Some of them constitute the matter of the act, others the form. Yet since primacy belongs essentially to the latter, with being depending on it, we can understand the efforts made by jurists and theologians (as far as it was within their respective competence), to distinguish the material element from the formal or accidental one.[27] It is therefore necessary to differentiate between the various formal requirements. Some underline the solemnity of the act, while others are necessary to serve as proof.[28]

[26] "Sicut in genere rerum naturalium aliquod totum componitur ex materia et forma, ut homo ex anima et corpore, qui est unum ens naturale, licet habeat multitudinem partium; ita etiam in actibus humanis."

[27] Otte 1971, 54, wrongly claims that the doctrine of the *substantialia* and *accidentalia contractus* echoes only superficially ontological terminology. When, as the German scholar maintains, certain *substantialia* (*pretium*, *res*, and *consensus*) are lacking in a sales agreement, the contract is void and cannot retain validity in any other form, just as, if in a human being (whose definition is that of being a "rational animal") rationality is absent, we are simply confronted with an animal. In actual fact, Boethius says precisely the opposite: "Homini enim huiusmodi differentia [i.e., *rationalitas*] per se inest, idcirco enim homo est, quia ei rationabilitas adest; quae si discesserit, species hominis non manebit"; "Cum ea quae substantialiter dicuntur pereunt, necesse est ut simul etiam ea interimantur quorum naturam substantiamque formabant […]. Si ab homine rationabilitatem auferamus […] statim perit hominis species" (Boethius, *in Isagogen Porphyrii commenta*, 250, IV.4, 281, IV.17). Reasoning distinguishes humanity from other animate beings. Without that characteristic there would not be any human species within the genus "animale." The same applies implicitly to individuals. An insane person does not cease to be human, nor would a God (deprived, to say the impossible, of his immortality) step down to the level of man. Bartolus de Sassoferrato agrees: The *res animata* indeed possesses a *forma substantialis* that is *anima* "et cum ipsa perdiderit, desinit esse illud et vocatur cadaver"; "Si non haberet [homo] illam formam, diceremus quod non est homo" (*BA*, 145rb, nn. 4, 11, *Stricta ratione*). Cf. Bellomo 1998b, 110.

[28] Baldus 1586e, 74vb–5ra, n. 6 ad Cod. 1.18.10: "Triplex est forma, quaedam quae requiritur ad esse et ad probationem esse, ut in testamento et ista est forma substantialis et probatoria, quaedam requiritur ad esse tantum, ut in stipulatione et ista est forma substantialis, non probatoria, ut l. I, § I, ff., de const. pec. (Dig. 13.5.1.1), quaedam quae requiritur ad solam probationem, non ad essentiam: Et ista est forma probatoria." Cf. Padovani 1993, 184–6; Hopper 1584, 93rb; Mantica 1580, 16rb, II.IV, n. 1–2.

Only those *ad substantiam*, however, confer existence on the transaction in which they inhere (Antonius a Butrio 1578f, 12ra, n. 10 ad X 4.1.26; 1578a, 154va, n. 25 ad X 1.7.2; Panormitanus 1582, 12rb, n. 10 ad X 4.1.26; Baldus 1586e, 74vb, n. 5 ad Cod. 1.18.10; 1586h, 73ra, n. 3 ad Cod. 7.53.5).

"Note"—Antonius a Butrio (†1408) remarks with regard to marriage—"that substance of the act is called that which, once performed, is equivalent to the performance of the whole act; if it is omitted, the act itself is omitted, too. To be sure, only consent confers substantiality" (Antonius a Butrio 1578f, 12ra, n. 11 ad X 4.1.26).[29]

This conclusion was unassailable theoretically, given that in the human acts the will, guided by reason as the structuring faculty, provides form.[30] By using and partly adapting the Aristotelian scheme of the causes that endow the substance with being, Baldus on his part writes: "The formal cause in marriage is the consent, because it conveys being to the thing; the spouses are the material cause, because they are the subject; the words are the formal cause, the offspring and the sacrament supply the final cause" (Baldus 1586a, 7ra, n. 23 ad Dig. 1.1).[31]

"The laws […] imitate nature in producing effects,"[32] Antonius a Butrio clarifies, still referring to the four Aristotelian causes (1578a, 130va, n. 17 ad X 1.6.33). This is an observation of great significance. By underlining the nature of juridical acts, Antonius confirms the analogous (not equal) relationship they maintain with the natural substances. Even to a mind not especially trained in philosophical subtleties, it appears as evident that the matter of ethically or juridically relevant human acts, albeit recognizable by the senses (I see and listen to Peter while he dictates his last will), do not have an extension in three-dimensional space (unlike Peter himself: Suarez 1751, 254, sec. I). Nor does the separation of form and matter (which signals the end of whichever living organism) follow the physiological laws of nature. A decretal by Innocent III states with regard to the same issue: "We observe the following difference between corporeal and spiritual things, namely, that the corporeal ones are more easily destroyed than preserved; the spiritual ones instead are more easily constituted than they are destroyed" (X 1.7.2).[33]

[29] "Dicitur de substantia actus, quo posito actus ponitur, et quo dempto actus deficit. Consensus ergo solus est de substantia." Cf. Antonius a Butrio 1578a, 154va, n. 25 ad X 1.7.2; Lapus 1571, 52va, n. 7, all. 56; Capistranus 1584, 78vb, n. 3.

[30] The debate on the matter and form of marriage (a juridical transaction as well as a sacrament) involved jurists and theologians for centuries, with interesting discrepancies. Cf. Soto 1598, 92–4, dist. 26, q. 2, a. 1.

[31] "Sic in matrimonio consensus est causa formalis, quia dat esse rei; personae sunt causa materialis, quia sunt subiectum; verba sunt causa formalis, proles et sacramentum sunt causa finalis."

[32] "Iura […] imitantur naturam in producendo effectum." In general, Kriechbaum, 2000, 311–3.

[33] "Inter corporalia et spiritualia eam cognoscimus esse differentiam quod corporalia facilius destruuntur quam conserventur: Spiritualia vero facilius construuntur quam destruantur."

2.2.4. The "Iura" Are Incorporeal Things and Secondary Substances

Whatever the state of affairs in that respect (and the argument would deserve to be studied attentively), the chief difference to be found between the substances existing in nature and those forming the object of law consists of the forms to which they are subordinated. It is obvious that the forms depend on the activities of human beings and constitute as such an *artificium*. We will return to this aspect shortly (see below Section 2.2.6). Suffice it to note, for the moment, that whether natural or artificial, the essences of things find their manifestation in a predicating relationship. That is what is confirmed by Accursius in his gloss on the words of Gaius:

> Furthermore, some things [*res*] are corporeal, others incorporeal. Corporeal things are those which can be touched, such as land, a slave, a garment, gold, silver, and, in short, innumerable other things. Incorporeal things are things which cannot be touched, being of the sort which exist only *in contemplation of law*, such as the estate of a deceased person, a usufruct, and obligations however taken on […] The fact is that the right of succession and the right to use and to fruits correlative to the obligation is in each case incorporeal. (Dig. 1.8.1.1; Inst. 2.2)

> *In contemplation of "ius."* That is, subsumed under the term "*ius*," which can be predicated. In defining each incorporeal thing, it is in fact always necessary to supply [the term] "*ius*." For example, "inheritance is the right [*ius*] to succeed […] The usufruct is the right [*ius*] to use […] The obligation is the bond of law [*iuris vinculum*] […] The action is the right [*ius*] to pursue in court."[34]

If the concrete circumstance can only be known through abstraction, it follows that the philosopher and the jurist must transcend the level of immediate experience to grasp the ideal, necessary, and unchangeable consistency of the single phenomenon. The definition of the various institutions is imposed by the necessity to obtain knowledge that is authentically scientific:

> Granted that each definition is risky in law and can easily be refuted (Dig. 50.17.202 (203)), the result seems to be that law is not a science: That conclusion, however, is contradicted by Dig. 1.1.10. (Medici 1584, 283va, n. 1)[35]

[34] "*In iure*. Id est, sub hoc predicabili ius, continetur, nam in definitione cuiuslibet rei incorporalis oportet assumere ius: Ut ecce, hereditas est ius succedendi […] usufructus est ius utendi […] obligatio est iuris vinculum […] actio est ius persequendi." Cf. gl. acc. *in iure* ad Inst. 2.2: "Sub hoc predicabili ius, continetur: In quorum diffinitionibus ponitur hec dictio in praedicato." An analogous solution can be found in Odofredus: "Ius est genus," which subordinates to itself "duas partes principales de aliis praedicantes," the public and private law (Odofredus 1550, 6rb, n. 10 ad Dig. 1.1.1.2). Cf. Bartolus 1570b, 2va, n. 8 ad Dig. 12.1.1: "Volens scire iura particularia, ante omnia debet scire quid sit ius in genere."

[35] "Si definitio omnis in iure periculosa est et facile subverti potest, sequitur quod ius civile non sit scientia, quod est contra, l. iustitia, in fin., ibi, ff. de iust. et iu."

The first and most important function of the definition is that of revealing the essence of the things; the second is that of providing the point of departure for the demonstration of the accidents pertaining to the defined thing. (Medici 1584, 283va, n. 8)[36]

It is hardly surprising that, for centuries, the jurists began their commentaries almost regularly by defining the institutions they wished to treat.[37] Knowing indeed means knowing the causes of whichever phenomenon: yet the first and fundamental cause of the substance, of that which causes it to be and operate in a certain way, is its essence.[38] The jurist, not unlike the natural scientist, relies on empirical, factual data, but always arrives at abstract and universal notions. That is his mandatory assignment, leaving no alternative. Bartolus recognizes it openly:

Science is therefore a speculative habit capable of demonstration that considers the inferior causes with true reason: This is what pertains to the natural sciences. The same science, which treats universals and things that cannot be anything other than what they are, is attributed by Justinian to us jurists, too, […] and quite rightly so, because jurisprudence also considers the inferior causes [in so far as] […] it is concerned with universals. The *iura*, in fact […] also relate to things that are by necessity. (*TT*, 165vb, n. 70)[39]

These affirmations show the close ties in medieval philosophy between metaphysics and logic. I will not focus on the subject any further, considering that another section of the present book deals with the relationship between jurisprudence and dialectics. For the jurist who intends to provide a metaphysical basis for his own intellectual discipline, it is important to define the nature of the concepts used in his theoretical explanations. To elaborate on this point, it is possible to depart from the passage of Gaius mentioned above (Dig. 1.8.1.1;

[36] "Primus enim ac praecipuus usus definitionis est ut demonstret essentiam rei: Alius usus est ipsius, ut sit principium ad demonstranda accidentia rei definitae." Cf. *EE*, 1.2.

[37] A few examples may be sufficient: Baldus 1580b, 2vb, n. 8; 1586a, 7rb–va, nn. 6–7 ad Dig. 1.1.1.1. Cf. Horn 1967, 115.

[38] Aristotle, *Parts of Animals*, 639b14; *Physics*, II.9, 200a35; *Posterior Analytics*, 71b8; 87b28–88a17; 89b36–90a34; Baldus 1580a, 202rb, n. 3 ad X 2.19.5. Cf. Bartolus 1570a, 5vb, n. 1 ad Dig. 1.1.1: "Ad sciendum aliquid non est necesse scire principium ex quo […] sed principium propter quod." Cf. Cortese 1962, 184, n. 2; Bellomo 1998b, 123: "Diffinitio esse rei per substantialia sua significat"; Bellomo 2000, 604.

[39] "Scientia autem est habitus speculativus demonstrativus ratione vera considerans causas inferiores et haec ad scientias naturales spectat. Haec quidem de universalibus et necessariis se habentibus hoc nomine et iuri nostro attribuitur per principem […] et merito: Quia etiam causas inferiores considerat […] De universalibus iudicat. Iura enim […] sunt etiam de necessario se habentibus." Coluccio Salutati, who had a good knowledge of law, expressed himself very similarly: "Concluditur leges, quoniam ipsarum scientia de universalibus rationibus humanorum actuum, potentiarum, habituum et passionum anime considerant, inter speculabilia numerandas" (Garin 1947, 136); "[Legum ministri atque latores] licet aliquando de singularibus agant, semper tamen in bonum commune rationibus universalibus diriguntur" (ibid., 132). He who maintained, therefore, that "legum non esse scientiam" would surely be wrong "cum [leges] diffiniendo dividendoque procedant et cum habeant universalia sua, que non possint aliter se habere" (ibid., 240).

Inst. 2.2), relative to the distinction between things (*res*) that are either corporeal or incorporeal. The medieval jurist is left without a choice, once it has been established, in line with Boethius (*BCA*, I, 185C),[40] that "every thing is either substance or accident and among the substances there are primary and secondary ones. The result is a triple partition, with every thing being either accident, or secondary, or primary substance." Each *ius* is a secondary substance, as is confirmed from the beginnings of the school, by Rogerius (… 1162 …).[41] Two centuries later, Baldus de Ubaldis reiterates the same point of view: "Among the jurists, the incorporeal substance is the contract, the obligation, property, and all that which is of an intellectual nature, as, for instance, the testament […] The corporeal substance, on the other hand, is immediately exposed to our senses. For example, a field, a cottage, a *mancipium*" (cf. above n. 13).

The distinction between corporeal and incorporeal substances was certainly well known among scholastic thinkers, since it had already been formulated by Porphyry and Boethius. But whereas the primary ones are of immediate accessibility thanks to experience which reveals them to us, it is more difficult to arrive at an adequate depiction of the secondary substances. Placentinus had written on the subject:

> Incorporeal are those things that cannot be touched, nor perceived by the other senses of the body, such as the inheritance, the usufruct, the use, the obligation, and the action. But there are also other things which do not have any consistency in the legal sphere: Among the incorporeal things there are the genera, the species, the evil spirits [*cacodaemones*], the human soul, and the soul of the universe […] In similar vein, the rights of landowners, such as the servitude of things. (Placentinus 1535, 27 ad Inst. 2.2)[42]

A few decades later, Azo expresses himself almost in the same terms: In addition to the *iura*, there are incorporeal substances which "do not have any consistency in the legal sphere, such as the genera, the species, the spirits, the hu-

[40] "Cum omnis res aut substantia sit aut accidens et substantiarum aliae sint primae, aliae secundae, fit trina partitio, ita ut omnis res aut accidens sit, aut secunda substantia, aut prima." Cf. also 169D: "Omnis enim res aut substantia est, aut quantitas, aut qualitas […] et haec est maxima divisio." Faithful to the text of Gaius (as well as to Ulpianus, Dig. 50.16.23: "Rei appellatione et causae et iura continentur"), the glossators commonly repeated that the *iura* are *res*. Cf. gl. acc. *rem* ad Dig. 50.17.1 ("Regula est, quae rem quae est, breviter enarrat"): "Idest ius." Further examples in Caprioli 1961–1962, 313, n. 409, 343, 368, 373–4; Otte 1971, 52; Errera 1995, 214, 249.

[41] Palmieri 1914, 57: "Res dicitur ipsum ius incorporale quod vocatur substantia obligationis." Cf. also Otte 1971, 51: "Obligationum […] substantia, id est esse et natura" (Azo); 83, n. 75, 95; Errera 1995, 233, cf. 177 ("Secundum substantiam actionum"), 320 ("Divisio prima fit secundum quod sunt, id est secundum essentiam quod habent. Subdivisio fit secundum accidens").

[42] "Incorporalia sunt quae tangi non possunt, nec aliis corporeis sensibus subiacent, ut haereditas, ususfructus, usus, obligatio, actio. Sed et ea quae in iure non consistunt, ut genera, et species, et cacodaemones et anima hominum et anima mundi […]. Item res incorporales sunt praediorum iura, id est servitutes rerum."

man soul, and the soul of the universe" (Azo 1596, 1072 ad Inst. 2.2). More succinctly, Accursius poses the question: "And what about the good and bad angels and the human soul? Say that they are incorporeal, even though that is not within our competence" (gl. *ius obligationis* ad Dig. 1.8.1.1).[43]

The philosophical sources inspiring the two earliest glossators most likely had their origins in the school of Chartres: the *Philosophia mundi* and the *Dragmaticon philosophiae* of William of Conches (Gratarolus 1567).[44] In both works, we find among the incorporeal substances which exist invisibly God, the soul of the universe, the spirits (*calodaemones* and *cacodaemones*), and the soul of the universe.[45] Compared to the French models, Placentinus and, in his wake, Azo omit God and insert the genera and species instead. An addition that could be explained through Platonic realism, according to which the ideas—as incorporeal forms—have a real existence (in conformity with the other entities simultaneously considered). When Accursius reexamines the whole question, the eclipse of Neo-Platonism and the hostility of the theologians has already led to the elimination of the mention regarding the soul of the universe (Padovani 1997, 199). Parallel to that, the criticism directed against exaggerated realism also recommends, for the sake of avoiding risks of ambiguity, the elimination of the reference to genera and species. As regards the nature of the angels and of the human soul, Aristotelian texts (particularly the *Metaphysics* and *On the Soul*), along with their respective Arabic commentaries, lead to reflections that are different from traditional ones. Notwithstanding the different points of view, which came to the fore among theologians from early on, there is full agreement on one issue: angels and the soul are incorporeal substances not subject to the senses.[46] This was enough to place both entities in the same category as the incorporeal *iura* of Dig. 1.8.1.1 (Inst. 2.2). It could not have been otherwise as long as the fundamental distinction, outlined by Porphyry, opposed the corporeal to the incorporeal substances. To quote the translation by Boethius: "The substance, therefore, is the most general genus. It predicates itself upon all of the other ones, its first two species being corporeal and incorporeal" (*BP*, 103).[47]

[43] "Quid de angelis bonis et malis et anima. Dic incorporalia: Licet de his nihil ad nos." Almost identical is the gl. acc. *vocantur* ad Inst. 2.2, though without the final remark.

[44] I have consulted the Italian translation, Maccagnolo 1980, 213, I.2; 219, I.14–6; 222, I.21; 249–50.

[45] Referring to Azo by name, the *calademones* are invoked again by Odofredus 1550, 24vb, n. 3 ad Dig. 1.8.1.1. On the ties between the Bolognese school and that of Chartres, cf. Padovani 1997.

[46] For St. Bonaventure, the incorporeal nature of the angels does not coincide with the notion of immateriality (*BonSent* 1885, d. 3, pars 1, art. 1, q. 2 ad 3m). Thomas Aquinas is in total disagreement by assuming that "matter" and "body (*corpus*)" are equivalent (*CG*, II.XLIX). The complexity of the problem had led William of Conches to exercise prudence and withhold judgment.

[47] "Substantia igitur generalissimum genus est: Hoc enim de cunctis aliis praedicatur, ac

And yet, when viewed from a different angle, the soul and the angelic nature on the one hand, and the single *iura* on the other, had little in common. The former exist in nature and perpetually, owing to a creative act of God; the latter are the product of human ingenuity and endowed with an existence that is extremely peculiar. Let us briefly consider this aspect. In this very regard, the accomplishment of the medieval jurists is revealed fully. These jurists outlined the ontological consistency of the objects with which they occupied themselves. If these objects are not mere nothingness (which is out of the question), they too must exist. "There is no third way" ("*Tertium non datur*"). The alternative is radical. To decide where and how these objects exist, or what could their origin be, is however a problem which cannot be resolved on the basis of Justinian's texts or juridical techniques. The answer can only come from that science which concerns itself specifically with being, that is, metaphysics.

Recourse to the works of the earlier school of Chartres, and to the writings of Aristotle and his interpreters, then, proves to be completely justified. As soon as the medieval masters of the law decided to investigate the foundations of their knowledge, "first philosophy" became their inseparable companion and master.

2.2.5. The "Iura" Are Products of the Imagination. The Mathematical Paradigm

By attributing substantial essence to each *ius*, Accursius follows the path already traced by metaphysical reflection. In line with every other scholastic thinker, the jurist treats the universals (genus and species) by having recourse to phenomena familiar to his expertise. In the human acts, the universals correspond to the immanent form that gives them existence for the law. Apparently, there is an affinity between the natural substances as considered by the physicist and those contemplated by the jurist, in that they both result from combinations of matter and form. The remaining difference is hardly irrelevant, however. When looking at a pine tree, for example, I perceive its essence immediately by saying: "It is a tree."[48] Participating, conversely, in the

primum huius species duae sunt, corporeum et incorporeum"; cf. ibid., 20. The discrepancy between him and Cicero is evident: "Esse enim dicit ea quorum subiacet corpus […] non autem esse illa intelligi voluit quibus nulla corporalis videtur esse substantia"; ibid., 898–9. Also of interest is the comment by Baldus, ad Inst. 2.2, as in Vatican, Barb. Lat. 1411, 49r: "Ait Porfirius quod substantia est duplex, scilicet corporea et incorporea et de istis duabus substantiis seu rebus trattat iste titulus et dicit quod res corporalis est illa que potest tangi, sed res incorporalis est illa que non potest tangi sed solo intellectu percipitur […]. De incorporalibus vero talis datur regula quod omnis res cuius diffinitione ponitur ius est res incorporalis."

[48] Ms. Barb. lat. 1400, 20v: "Recto quidem modo cognoscimus […] per formam aceptam: A re cognosco lapidem visu." Cf. *ThB*, q. 6, a. 2, resp.

signing of a contract of emphyteusis, I behold a certain number of people involved in various activities and, at last, a written text. To be sure, it all proceeds in orderly fashion, following a specific ritual. The perception of what happens in essence remains nevertheless far from immediate, and certainly so for a person ignorant of the law. Yet it is not even clear to the expert. Prior to understanding, he must reconstruct in his mind all of the phenomena he has observed, so as to reduce them to conceptual unity. In short, the reality before my eyes is artificial in the strict sense of the word: Not only because everything occurs in accordance with specific technical requirements, but even more so because the final result forms an entity existing in the law and for the law, escaping, for the most part, the senses.[49] The statue, once it has left the hands of the sculptor, enters physical reality as a work of art and remains in it. The emphyteusis (to adhere to the example already given) is not the parchment documenting it: It is rather an intellectual reality, a mental configuration known to the interested parties and obliging them to conduct themselves according to pre-established patterns.

"Although, under the term of testament, one commonly understands the written document [*scriptura*]"—Bartolus de Sassoferrato (1314–1357) observes—"it is something pertaining to the intellect [*quid intellectuale*]" (Bartolus 1570c, 90rb, n. 7 ad Dig. 28.6.1). In a yet more general sense, actions and obligations, being as it were artificial realities, exist merely in the imagination.[50] Other interpreters arrived at the same conclusion as well. Late in the period, for example, Francesco Mantica says of the testament that "it is not found outside of the intellect, forming something imagined [*imaginatio*]" (Mantica 1580, 4va, I.IV, 2).[51]

It is necessary to note here that, from Boethius to Thierry of Chartres and Thomas Aquinas, the imagination was viewed as the faculty facilitating mathematical judgments (*BoeTrin*, II.10–9; *ThB*, q. 6, a. 2, resp.; *ThC*, prop. 6; Maccagnolo 1976, 107–8). It is in fact worthwhile considering how the mathematician or the geometer relate to the primary objects of their expertise: bronze circles, straight sticks, surfaces of land. To calculate their length or extension, they disregard the material composition of each, concerning themselves solely with the formal data, with numbers, that is to say. "The mathema-

[49] Lapus 1571, 110va, n. 9, all. 91: "Genera sunt in intellectu, non in sensu, unde tange si potes"; Baldus 1586a, 7vb, n. 5 ad Dig. 1.1.1 pr.: "Tu dic quod ars, idest opus artificis, unde formae huius artis dicuntur formae artificiales, sicut forma stipulationis, sunt quaedam formae fabriles, sicut forma cultelli, et domus"; 7va, n. 17, l.c.: "Ars in suis dispositis accomodat iuri quandam, quam dicimus, artificialem naturam."

[50] Bartolus 1570a, 187ra, n. 1 ad Dig. 8.2.32: "Artificialia […] aut componuntur ex rebus elementatis et non possunt esse perpetua, ut hic, aut non componuntur ex his, ut actiones et obligationes, quae sunt simplices imaginationes, et istae possunt esse perpetuae ad nutum principis."

[51] "Non invenitur extra intellectum, cum sit imaginatio intellectus."

tician, by abstracting, does not consider the thing apart from what it is: He in fact does not claim that a line lack tangible matter, but focuses on the line and its properties without taking tangible matter into account" (*ThB*, q. 5, a. 3, ad 1m).

This characteristic, already pointed out by Plato, Aristotle, and Boethius, reveals that which distinguishes the three branches of theoretical philosophy: Physics examines forms that are inseparable from matter, theology forms that are completely separable from matter and movement (God and the angels), and mathematics forms that are immanent in matter *as if* separate from matter and movement. Moreover, whereas the objects of physics and theology are entities which exist in nature, in mathematics there is a division between the object of science and the reality to which it relates. The former exists only in the mind, the latter in matter (*STh*, I, q. 5, a. 3, ad 4m; *ThMet*, 2162–3; cf. 157–8; 1161).

Still, the mathematician is not only concerned with entities existing in nature. It often occurs that he freely imagines figures or relations without any reference to tangible data: his mind creates, for example, the notion of a point without dimensions, of lines which extend infinitely, or of perfect circles. In that case, the separation from matter as known through experience is most evident. The abstraction involved nevertheless regards tangible, not intellectual, matter, the latter of which does not make its appearance if not in the definition of mathematical entities. Thomas Aquinas states that "mathematical entities are not abstracted from just any matter, but exclusively from that which is subject to the senses," while maintaining the intelligible matter that is mentioned in the same context by the *Metaphysics* of Aristotle (*ThB*, q. 5, a. 3, ad 4m).[52] In the definition of mathematical entities there consequently appears something that is almost matter and something that is almost form. In the definition of the mathematical circle, "the *circle* is a superficial figure, with the *surface* representing matter and the *figure* representing form" (*ThMet*, 1761).[53] Accordingly, intelligible matter retains the potential quality that generally characterizes it when understood in the metaphysical sense. The surface is indeed capable of accommodating any geometrical form.

2.2.6. The Scientific Nature of Jurisprudence

The preceding digression concerning the objects and methods of mathematics is of fundamental importance in order to understand the meaning of a gloss in

[52] Cf. Aristotle, *Metaphysics*, 1036a, 9–12: "Matter is either subject to the senses or intelligible: The one subject to the senses is like bronze or wood, and all matter that is in motion; intelligible matter is that which is part of tangible things, though not subject to the senses by itself, as, for example, the mathematical entities"; Suarez 1751, 9, I, sec. II.

[53] "Aliquid quasi materia et aliquid quasi forma. Sicut in hac definitione circuli matematici: *Circulus est figura superficialis*, superficies est quasi materia et figura quasi forma." Moreover, "forma circuli vel trianguli est in tali materia, quae est continuum vel superficies, vel corpus."

the margins of the Vatican ms. Barberinus latinus 1400, 20v, which echoes indirectly, if not directly, the thought of Baldus:

> Note that certain matters and forms are subject to the senses; others are intellectual and abstract, so that the intellect can construct by itself a form and create a matter. In this way, jurisprudence is similar to mathematics which imagines abstract substances.[54]

The passage from Baldus repeats a conclusion already known to us through different channels. The objects of jurisprudence are constructions of the intellect and exist properly in the sphere of the science conceiving them. "The *iura* are purely incorporeal. In addition, they are conceived and exist only to convey the understanding the law has of them" (Baldus 1580a, 152vb, n. 3 ad X 2.1.3).[55] The *iura* undoubtedly have an existence: not, however, in the physical world, but in the soul and through the activity of the legislator. Iohannes Faber, a French jurist active in the first decades of the fourteenth century, expresses himself on the matter in the clearest of terms:

> You can ask yourself why the incorporeal things are called *iura* or why they have a consistency of their own in the law. You must know that the legislators gave being to the law and called "beings" those *iura* which one can neither see nor touch physically. They nevertheless have a consistency and are considered notions of the mind or the result of an activity exercised by the mind. Therefore, when we read that the incorporeal things can neither be seen nor be touched, but are merely recognized by the mind and have consistency only in the sphere of thought, we understand why they are called *iura.* For good reason, because they have a substance given to them by the law, just as they are created and named by the law. (Faber 1546, 26va, ad Inst. 2.2)[56]

Like points without extension and infinite lines that exist only in the imagination, juridical concepts do not have a place in the tangible world, either. A real right (such as property) cannot be seen by the material eye, but it can be perceived. It can be seen with the eyes of the intellect, surpassing the perception of the senses (*ThB*, q. VI, a. 2, resp.).

[54] "Nota quod quedam sunt materie et forme sensibiles, quedam intellectuales et abstracte et intellectus potest sibi fabricare formam et creare materiam et sic scientia legum deservit metamatice que imaginatur substantias abstractas." With regard to this passage, at least two clarifications are necessary. *Deservit* needs to be interpreted in the sense of "obedience that consists of the assimilation of certain modes, or of the imitation of pre-established processes." *Intellectus* obviously stands for *phantasia*: Chenu 1926; 1946. Cf. Aristotle, *Metaphysics*, 1078a, 21; *On the Soul*, III, and the late (yet most illuminating) observations by Zabarella 1587, I, X, 48va; I, XV, 72rb; I, XXIII, 96rb.

[55] "Iura mere incorporalia, quae solo iuris intellectu percipiuntur et subsistunt."

[56] "Sed quare incorporalia dicuntur iura, seu in iure consistere: Scire debes, quod legislatores nominaverunt et posuerunt esse in iure et esse iura illa, que videri non possunt, nec tangi corporaliter, sed consistunt et habentur pro animi notitia et ex animo […] unde cum hic, incorporalia videri non possunt, nec tangi: Sed in sola cognitione animi sunt et per solam cognitionem consistunt, iura vocantur et merito, quia per ius substantiantur, creantur et nominantur." The first part of the paragraph is repeated almost word for word by Angelus de Gambilionibus (Angelus a Gambilionibus 1574, 71ra, n. 6 ad Inst. 2.2).

To be sure, in mathematics as well as in law, it is possible to choose as the point of departure factual situations and material data. In the field of science, however, it is also possible—and even necessary—to move beyond concrete constellations and accidental characterizations in order to concentrate on elements that are entirely formal. Once physical reality has been left behind, things in mathematics remain imaginable all the same. In law as well, nothing prevents the characteristics of institutions and transactions from being deduced in completely abstract fashion. The intelligible matter to be found in the mathematical entities (surface, unit) can be encountered equally in the definitions of inheritance, obligation, and action. Accursius, as we have seen (cf. above, n. 34) writes about them: "[The incorporeal things exist only *in contemplation of* ius]. That is, subsumed under the term '*ius*,' which can be predicated. In defining each incorporeal thing, it is in fact always necessary to supply [the term] '*ius*.'" Wherever *ius* "serves as an indication of the genus," it must be assumed as if it were matter (Placentinus 1535, 28 ad Inst. 2.4).[57] Matter understood, of course, in the metaphysical sense, as potential (the genus, indeed, is modified by addition of the species). As the surface is potentially a circle or a triangle, *ius* can manifest itself as inheritance, usufruct, obligation, or something else.

Although apparently surprising, the attention paid by the jurist to the operative modes of mathematics has a specific reason. The triple division by Boethius of the speculative sciences (physics, mathematics, theology) is based on their respective processes of reasoning. Still, the interpretive pattern is not understood in rigid fashion. The method of each is not exclusively reserved to the science it is assigned to, but rather proper to it to a particular degree. Nothing prevents other disciplines from adopting it as well. This is the case with law which, in many aspects, can be compared in its procedures and organization to the mathematical *ideal type* (or *prototypus*). The same argument deserves to be explored in greater detail.

For the medieval commentators of *De Trinitate* by Boethius (and especially for Thomas Aquinas), mathematics represents the one science capable of guaranteeing the highest degree of certainty. More than the natural sciences, because it abstracts from matter and movement which always imply a component of instability and contingency; and also more than theology, considering that mathematics offers the advantage of examining realities less removed from the senses and the imagination. The abstraction from sensual impression—characteristic of mathematical analysis and, on the highest level, also of

[57] "Ususfructus est ius, hoc nomen ponitur tamquam genus et ut secernatur a venditione, puta, quae facti est: et quia actio est ius, additur utendi et quia nudus usus est ius utendi, additur utendi fruendi." Cf. Palmieri 1914, 107: "Videndum est quid sit accio, qualiter dividatur secundum substantiale esse, secundum qualitates seu accidentia […] Accio est ius"; *EE*, III.2: "Unde genus sumitur a materia, quamvis non sit materia."

law—permits access to unchanging and yet undeniable realities. Those are in fact the objects with which science in the strict sense is concerned (*ThB*, q. V, a. 1, resp.; a. 2, resp., ad 4m.). The possibility of using the appropriate procedures of definition and proof is based precisely on those premises. Insofar as jurisprudence deals with abstract forms, universal concepts, or secondary substances (genera and species), it is considered, rightfully and in line with Aristotelian standards, a theoretical science, to be placed in the sphere of speculative philosophy. The goal jurisprudence proposes for itself is knowledge of truth, of the nature of the legal institutions, and of the relationships between them. The substantial consistency of each *ius* assures the scientific quality of the logical operations. For Aristotle, the necessity of proof is indeed identical with the necessity of the substance expressed in the definition (*Prior Analytics*, 43b, 21; 7b, 30; *Metaphysics*, 1010b, 28; 1078b, 24; *On the Soul*, 402b, 25). For this reason, Bartolus again emphasizes (cf. above, n. 39) the scientific character of jurisprudence when he repeats the definition of science given by Aristotle in his *Posterior Analytics* I.2, 71b9, word for word: Proven knowledge is obtained when "one finds the cause of an object, that is, one knows why the object cannot be different from what it is" (my translation). In brief: Scientific knowledge can be identified as knowledge of the necessary essence or substance which forms the object of the investigation, be it for the jurist, the mathematician, or the physicist (*Metaphysics*, 1031b5).[58]

2.2.7. Jurisprudence Is a Theoretical as well as a Practical Science. The "Debate of the Arts"

The open acknowledgement of the speculative character of jurisprudence does not by any means eliminate the practical dimension of the discipline. The jurists recognized this by attributing to their activities the characteristics of the arts (*ars*):

> The arts form a habit that is by nature directed toward practice. Consequently, one is confronted with a certain task which through this habit is transformed into external matter: such as a specific work, a house, or a book. […] The same designation [*ars*] is also appropriate for the law, whence the ancient Roman jurist affirms that "the law is the art of the good and equitable" (Dig. 1.1.1.1); and rightly so, given that our juridical norms relate for the most part to external acts. (*TT*, 165vb, n. 72)[59]

[58] The essence is the object of investigation by the physicist insofar as he considers the form and the essential reasons of things in themselves, apart from their motions (although they are always in motion). Only in this respect, his procedures do not differ from those of the mathematician: *ThB*, q. V, a. 2, resp. For Aristotle, moreover, medicine as a science is subordinate to mathematics.

[59] "Ars vero est habitus ratione naturae factivus, unde per talem habitum inspicitur opus faciendum, quod transit in materiam exteriorem, ut aliquod opus, domus, liber […] quod nomen etiam iuri per Iurisconsultum tribuitur dum dicit ius est ars boni et aequi et merito, cum iura nostra, ut plurimum, actum extrinsecum intuentur."

The knowledge of the jurist, in other words, is *ars* when it involves doing (*facere*), an action which introduces into the world new (artificial) realities. "Doing" is to be understood neither casually, nor in a random fashion, but in accordance with the principles of correct reasoning.[60] The conclusion to be drawn from these considerations is that jurisprudence, simultaneously and without contradiction, represents a speculative as well as a practical science. From the age of the commentators onward, statements such as these follow one upon the other: "Ours is a science as speculative as it is practical." "This science of law is not only practical, but in part practical, in part speculative" (Baldus 1586a, 7ra, n. 23 ad Dig. 1.1).[61]

It needs to be remembered that the proud affirmation of the scientific character of jurisprudence gained strength through contact with the Aristotelian sources.[62] It was further consolidated during the "debate of the arts," which erupted between the jurists on one side and humanists and physicians on the other.[63] To a broad front of detractors, anxious to view law as a discipline entirely dedicated to action, the mere result of the legislator's will, mutable, sheer opinion, lacking speculative character, and devoid of veritable proof—the jurists (supported by Coluccio Salutati) presented the image of a doctrine rigorously deduced from necessary and permanent principles. Had it not been Aristotle who taught that each science proceeded from a certain number of basic premises proper to itself? Now, the civilian commentators maintained, the legal discipline possessed such primary principles in the form of the laws: "You know that the jurist finds his science in the written laws.

[60] The same Bartolus adds that the jurist, as a practitioner, shows his *prudentia* (*habitus activus*). In this regard, see Piano Mortari 1976, 158–71, and Coopland 1925–6, 65–88. Several authors, including Paulus Venetus, prefer to use the word *ars* for *habitus activus* as well as *factivus*: Paulus Venetus 14.., 1vb.

[61] Idem in ms. Barb. lat. 1410, 332r: "Apparet igitur quod scientia nostra est vera philosophia, idest amor sapientie quam protoplaustus didicit in pabulo pomi vetiti. Hec enim scientia est scientia proficui et nocivi, practice vero est electiva boni et confutativa mali. O igitur mirabilis scientia"; Ioannes ab Imola 1575, *praefatio*, 4rb, n. 17; Piano Mortari 1976, 160, n. 24; 162, n. 30. Cf. Coras 1584, 64rb: "Iurisprudentia […] et in cognitione et in operatione posita est […] scientiae nomen, Iurisprudentia sibi suo iure vindicat: Quoniam vero certis theorematibus et praeceptibus clauditur: Quorum usus et observantia pro utilitatum praesentium rationibus: Et variis rerum humanarum circumstantiis flecti saepe et mutari solet, ars quoque nec immerito dicitur"; Vulteius 1598, 9–10: "Quemadmodum omnium scientiarum et disciplinarum, ita et iurisprudentiae vis omnis atque studium in duobus illis positum est, in cognitione nimirum, eiusdem usu"; Piano Mortari 1966, 526.

[62] From the second half of the thirteenth century, the question of the scientific character of knowledge is also central to theology: Chenu 1957; Biffi 1992.

[63] I limit myself to referring to the most recent bibliography on the subject: Padovani 1983, 507–12; 1995, 207–9; Cortese 1992a, 92; Rossi 1999, 79–81; Kriechbaum 2000, 323. Contrary to what is commonly maintained, the dispute began in the first decades of the fourteenth century and continued on until the middle of the fifteenth (cf. Nevizzanus 1573, 584, V.74–607.V.85). I hope to return to the argument in a future publication.

[They] are the first principles a science must presuppose as self-evident and true."[64]

A reply and defense in truth rather weak, given that the laws, far from being known by their own virtue, are received in authoritative fashion through the texts of Justinian.[65]

2.2.8. The Knowledge of the Primary Principles and the Hierarchy of the Sciences

Whatever the answer to this particular point, it was clear to the jurists that the law is not solely based on the evidence afforded by disciplinary specificity and scientific autonomy. As a regulator of human activities, the law cannot do without ethical standards of general character which, from a medieval perspective, are decidedly more important than any other consideration. The claim according to which the law "is inferior to ethics [*supponitur ethice*]," repeated at the beginning of the exegetical works since the days of the school of Pavia,[66] acquires, after the rediscovery of Aristotle's *Posterior Analytics*, a different and speculatively more sophisticated meaning (Chenu 1957; *ZTP*, 505–6, 518). Previously, the common phrase referred to the placement of law in one of the three branches into which philosophy was usually subdivided (ethics, logic, physics), "insofar as it treats the habits of human beings" (*quia loquitur de hominum moribus*). Henceforth, it referred to the fact that the law borrowed some of its principles from ethics, relative to which it was a subor-

[64] Andrea Gammaro, cited in Piano Mortari 1956, 11, n. 24: "Sciatis […] iurisconsultum habere scientiam, quoniam leges scriptae sunt […] tamquam prima principia quae in qualibet scientia pro claris et veris ponuntur"; Piano Mortari 1976, 208. The passage was repeated literally by Nevizzanus 1573, 584, V.74, on whom see Brugi 1921b, 21–2. Cf. also Piano Mortari 1978, 283–5, 287, 388, 411.

[65] The challenge had already been addressed, in a substantially similar context (Holy Scripture), by the theologians: Biffi 1992. An interesting idea in that respect can be found in ms. Barb. lat. 1410, 332r (331v: "Compositum per dominum Baldum de Perusio"): "Dixit insipiens in corde suo *ars civilis legum humanarum non est scientia* eo argumento utens quia non est perpetua cum iuris civilis statuta sint mutabilia. Preterea omnis scientia procedit ex principiis per se notis circa que non contingit error, ut patet secundo methaphisice, sed scientia nostra procedit ex voluntate statuentis que voluntas non est per se nota. Sed contra eos est quod scribitur Sapientie X° *dedit illi scientiam sanctorum* (*Song of Sol.* 10.10). Nam, ut ait ille Demostenes summus stoyce sapientie philosophus: *lex est inventio et donum Dei cui omnes homines obedire docet dogma omnium sapientum* et Crisippus philosophus ait *lex est omnium rerum divinarum et humanarum notitia quam oportet preesse bonis et malis et principem et ducem esse*. Item Ar(istoteles) primo ethycorum *quanto comunius, tanto divinius*." More sophisticated is the defense of the discipline by Giovanni da Legnano: Donovan and Keen 1981, 329–33. On the *propositiones per se notae*, *STh*, I–II, q. 94, a. 2, resp. About the problem in general, cf. Otte 1971, 183–5; 219; Wieacker 1967, 59–60.

[66] Crescenzi 1990, 1 ad Inst. 1.1: "Quodam modo ad ethicam hic liber spectat." Cf. Fitting 1965, 95–9; Kuttner 1940; Calasso 1954, 275; Diurni 1976–7, 17; Pace 1992, 222.

dinate science.[67] In general terms, the relationship of subordination is explained as follows by Thomas Aquinas:

> The inferior sciences, which are subordinate to the superior ones, are not derived from principles autonomously known, but presuppose [*supponunt*] conclusions already proven [*probatae*] in the superior sciences. Those principles in reality are not known autonomously, but have been demonstrated in the superior sciences on the basis of their own principles. (*ThSent*, I, prol. a. 3, sol. 2)[68]

This refers to the problem of the "dignity" (*principium*) guiding the operations of practical reason: "The good is that which all things seek" (*STh*, I–II, q. 94, a. 2, resp.).[69] "Our law"—Baldus concludes—"applies to itself the whole of moral philosophy" (Baldus 1586a, 7ra, n. 20 ad Dig. 1.1),[70] due to which "the learned who study the law can choose someone who lectures in moral philosophy, the mother of, and gate to, the laws" (Horn 1967, 108; 1968, 7; Ermini 1923, 82, 151): ulterior proof (if still needed) of the fact that the law owns the principles it adopts from another discipline, namely, ethics. In addition, the law assumes a certain number of "dignities" from ethics, as both belong to the practical sciences. The nature of the latter requires, however, that the same "dignities" be directed toward ulterior ends instead of representing an end in themselves. Thus the law, to the degree to which it is oriented toward practice and to the service of human beings, "is not pursued as an end, but rather leads to an end" (Ullmann 1942, 388): The most sublime end consists in the contemplation of truth.[71] Truth is the goal of the speculative sciences and to an even higher degree of metaphysics. The practical arts hence serve the speculative ones, which, in turn, are subordinate to primary philosophy as they receive from it their guiding principles. As in fact all of the particular sciences focus on distinct aspects of being, only metaphysics studies being insofar as being, uncovering its

[67] The novelty introduced by the commentators is not noted by Horn 1967, 107–8; Kriechbaum 2000, 308–9.

[68] Continuing with these words: "Similar to perspective, which deals with visual lines and is subordinate to geometry." Cf. *ThB*, q. II, a. 2, ad 5m. In general, Biffi 1992.

[69] "Bonum est quod omnia appetunt." But cf. Garin 1947, 44: "Legum principia sunt […] tres certissime, quibusque dissentire nullus valeat, equitates: Ut quod nobis fieri volumus alteri faciamus, quod nobis fieri nolumus nemini faciamus et illud tertium, quod quisque iuris in alium statuerit ipse eodem iure utatur […]. Nec puto […] hec principia posse negari […] quam prima physice vestra [sc. *medicorum*] principia"; ibid., 234.

[70] "Ius nostrum applicat sibi totam moralem philosophiam"; Ullmann 1942, 387; Le Bras 1960, 198.

[71] The passage by Baldus has to be understood in the context of *Metaphysics*, I.1–2. Cf. 982b24–27: "It is therefore clear that we do not seek this knowledge for any ulterior use. Just as we call man free when he exists for himself and not for some other person, we pursue this science as that which is unique in that it serves as an end to itself." The same line of thought is followed by Iulianus Duciensis 1492, 9: "Per quam [legem] causam causantem, idest Deum cognoscere docemur […] ipsum Deum esse legem asseremus." Important considerations in this regard can be found in *CG*, III.25.6.

principles and highest causes (Aristotle, *Metaphysics*, IV.1). For this reason it deserves to be called by the name of wisdom, "which encompasses the intellect and science, and judges the conclusions reached by the sciences and their principles" (*STh*, I–II, q. 57, a. 2, resp.; cf. Aristotle, *Metaphysics*, 981b28–82b9). Since the law deals with things that are, it follows necessarily that law, in studying its objects, must refer to the supremacy of philosophy which examines being in principle and in abstract fashion. All knowledge is structured in an orderly way and consequentially according to fundamental presuppositions: "He who wishes to learn about the effect must first uncover the antecedent. He who wants to detect the essence of a thing must know about its principles" (Baldus 1586a, 7ra, pr. ad Dig. 1.1.1),[72] namely, the substantial and immutable essence: "The order pertaining to the substance of a thing or its form is unchangeable" (Baldus 1586a, 4va, n. 14 ad const. *Omnem*, pr.).[73]

The exercise of jurisprudence thus implies respect for the priorities existing in ontological terms and their reproduction in the cognitive processes (Baldus 1586a, 1rb, nn. 1–3, *Proemium*). In other words: the necessity and the universality of sciences reflect the need and the universality attributed by metaphysics to being as such.[74]

Based on these premises, at least two consequences can be discerned. Theoretically, jurisprudence is subordinate to metaphysics: "Legal science"—Baldus states—"is immediately subjected to theology."[75] The term "theology" is understood in its Aristotelian sense here, first science or metaphysics. The latter stands for the wisdom which, in the words of Bartolus, is "a speculative habit considering the highest causes. The same habit pertains primarily to theology and metaphysics, which consider the first causes and pass judgment on the principles employed by the other sciences" (*TT*, 165vb, n. 70).[76]

[72] "Qui vult scire consequens debet primo scire antecedens. Qui vult scire quid rei debet scire principia rei." Cf. Bellomo 2000, 644, 35 (Azo).

[73] "Ordo tendens ad substantiam rei vel ad formam est immutabilis."

[74] There is an interesting critical comment in Baldus 1586a, 7rb, nn. 6–7 ad Dig. 1.1.1, on gl. acc. *Prius*, l.c. ("Sic econtra decet pro oportet"): "So. Dicit gl. quod exponitur oportet, idest decet, nam in materia probabili oportet, idest congruit: Sed in materia necessaria ponitur praecise: Sed tu dic, quod oportet, stat pro praecisa necessitate, nam scire dicimur, quando res per causas cognoscimus, item ius noscitur ex una causa, praesertim essentiali et intrinseca: Sed iustitia est causa intrinseca iuris."

[75] Following the passage cited above, n. 65: "Item scientia legum immediate subalternatur theologie, de quo scribit Ysaye, LXIIII, penultima, *super sensu hominis ostensa sunt tibi* (*Eccli*. 3.25)." Cf. *BSDB*, 188ra: "Excepta sola sacra theologia, cui hanc scientiam fateor esse suppositam."

[76] "Est enim sapientia habitus speculativus considerans causas altissimas: Et hoc pertinet principaliter ad Theologiam et Metaphysicam, quae Deum et primas causas considerant et de principiis omnium aliarum scientiarum iudicant et etiam de ista ad iuristas, unde merito dicitur *est enim res sanctissima ista civilis sapientia* ut Ulpia(nus) ait; ipsa enim causas altissimas considerat: Quia est divinarum atque humanarum rerum notitia et cognitio, iudicat de principiis aliarum scientiarum."

The habit of wisdom is not completely foreign to the jurist, though it does not pertain to him "primarily": only partly and to a limited extent.

At the same time, the jurist cannot avoid paying attention to those primary, divine realities from which law takes its origin: "Many things become clear to us when we investigate the principles from which law originates. Many things in fact become evident through the principles of that which is explored. Because he who does not know the principles, does not master the art" (Baldus 1586a, 7va, n. 1 ad Dig. 1.1.1, *additio*).[77]

The recognition of the harmonious and immutable order that exists among beings presupposes the justice of the Creator, "which was from eternity, before the world was created." In spite of being pagan, Ulpian "spoke of nature constituted in the heavens, that is, of the order and disposition of animated things." As was also noted: "He spoke thereof as a natural philosopher" (Baldus 1586a, 7rb, n. 3 ad Dig. 1.1),[78] whose supposed metaphysical digression did not rely on Revelation ("the [ancient Roman] jurist did not attempt to make reference to that celestial justice which remained inaccessible to him").

The science of being as such necessarily leads to the science of the supreme being and the separate substances as principles of being in general. With that additional aspect of metaphysical investigation among the glossators and commentators we must deal in the following section.

2.3. Theology and Law

2.3.1. Greek Logos *and Christian* Logos

In the beginning was the Word [*En arkhē ēn ho logos*],
and the Word was with God,
and the Word was God.
The same was in the beginning with God.
All things were made by him;
and without him was not any thing
made that was made. (John, 1.1–3)

The magnificent prologue to the Gospel of John was rightly understood over the centuries as the reply of Christianity to the question posed by Greek

[77] "Multa manifesta fiunt ab origine iuris ab investigatione principiorum. Multa namque manifesta fiunt per principia eorum quae quaeruntur, et quia non perfecte novit artem, qui non novit principia artis."

[78] "Item nota quod ius descendit, idest nascitur a iustitita et sic iustitia fuit prius, quam ius et hoc non est dubium de iustitia Creatoris, qui fuit ab aeterno antequam orbis crearetur, sed iurisconsultus non intellexit de illa iustitia, nec posuit os in caelum, sed sicut naturalis philosophus loquutus est de natura in caelo constituta, idest de ordine et dispositione rerum animatarum." The natural theology "proper to the philosophers which is called physics" is discussed by St. Augustine, *DCD*, VI.5.2.

thought from the very beginning: Which was the initial cause (*arkhē*) of everything real. It was certainly not by sheer coincidence that the fourth Gospel was originally written in Greek, the common language among the learned in the Hellenistic world. The longing of human wisdom finally found reassurance in the unforeseeable revelation God had made of himself, in history, through Jesus Christ. The passage from the Greek *logos* to the Christian one, furthered by the reflections of Justinus and Origenes (Marchesi 1984), found its most mature expression in the philosophical and theological works of St. Augustine. For the bishop of Hippo, the Word/*Logos* makes possible an ultimate understanding of the world, because *logos* created it in the first place and then recreated it through His incarnation and redemption, accomplished in the mystery of Easter. In the son, the world of ideas actually becomes comprehensible. Plato had sensed the latter to be the authentic reality, the full and eternal being, but he had tried in vain to tie it in some way to the tangible world. Having acquired from Revelation the concept of creation and the identity of *logos* and God, St. Augustine was able to turn the realm of the archetypes into the object of a thought, conceived by the Father from all eternity (*ab aeterno*), the model from which all things had subsequently flowed.

"The ideas are fundamental forms or stable and immutable reasons of the things. Being eternal and always identical, they are contained in the divine intelligence. Although they neither are born nor die, everything that can be born and dies is grafted upon their model" (*DDQ*, 29). For St. Augustine, the doctrine of ideas is essential to philosophy and even more so to religion. He who is religious, in fact, claims that all things have been created by God:

> Now, granted all of this, who would dare say that God has created all things irrationally? If that cannot be maintained nor believed, it follows that everything has been created in accordance with reason. But it would be absurd to think that Man was created according to the same reason or idea as a horse. As a result, everything has been created following its own reason or idea. [...] If, moreover, these reasons for all things created or to be created are contained in the divine intelligence, and if there cannot be anything that was not eternal and immutable, and if these fundamental reasons for the things are those which Plato calls ideas, then there are not only ideas, but the ideas are the true reality, because they are eternal and immutable and everything that exists does exist through participation in them, regardless of its mode of being. (*DDQ*, 29)

The passage explains sufficiently the reason why none of the Christian thinkers, prior to the advent of Nominalism, maintained that it was possible to abandon this Platonic residue: not even those who, like Thomas Aquinas, took Aristotle for their guide. In addition, the doctrine seemed to be perfectly adaptable to the holy texts: To begin with *Proverbs*, 8.22–30, where divine wisdom (subsequently identified with *logos* and the Son), talks about itself in these terms:

> I was set up from everlasting, from the beginning, or ever the earth was.
> When there were no depths, I was brought forth; when there were no fountains abounding with water.

Before the mountains were settled, before the hills was I brought forth.
While as yet He had not made the earth, nor the fields, nor the highest part of the dust of the world.
When He prepared the heavens, I was there, when He set a compass upon the face of the depth:
When He established the clouds above: When He strengthened the fountains of the deep:
When He gave to the sea His decree, that the waters should not pass His commandment:
When He appointed the foundations of the earth:
Then I was by Him, as one brought up with Him: And I was daily His delight, rejoicing always before Him.

And again in the words of St. Paul, in his letter to the Colossians (1.15–20):

He [Christ Jesus] is the image of the invisible God, the firstborn of every creature. For by Him were all things created, that are in heaven, and that are in earth, visible and invisible. […] All things were created by Him and for Him. And He is before all things, and by Him all things consist […] for it pleased the Father that in Him should all fullness dwell.

Read in a Neo-platonic light, these texts manifest the priority of divine thought in relation to any created reality. In a certain way, the sublime quality of the divine operations can be understood on the basis of human experience, which carries the imprint of God's similitude (Genesis, 1.26: "Let Us make man in Our image, after Our likeness"). Nothing in fact can be produced by us without one or several ideas, without a project previously conceived by the mind and present therein in greater perfection than in its concrete realization, in what reflects the limits imposed by matter. The truth of every single thing exists first and foremost in the mind: Or, rather, in the divine mind which preserves the perfect model of it. Rightly, therefore, St. John the Evangelist writes that all has been brought forth through the *logos*, the original idea of everything present, past, and in the future. "In the beginning"—that is, in the Son, in eternal thought, or principle—"God created the heaven and the earth" (Genesis, 1.1–2). The Old and New Testaments present themselves in full and suggestive concordance.

2.3.2. Equity and Justice, Names of God. The Influence of St. Augustine

This speculative core element, presuming that God is being and thought, and hence truth, life, wisdom, beauty, order, will, and love to the highest degree, is transferred to the Middle Ages with lasting authority. From the twelfth century onward, perhaps in the wake of Irnerius himself, the work of St. Augustine also becomes part of the reflections by the Bolognese jurists on the themes of justice and equity. I have already treated these arguments in an earlier publication (Padovani 1997, 35–86; 241–8). Here, I will limit myself to a brief summary of the principal conclusions. The point of departure is provided by statements that can be found in the works of the first glossators. For instance, "equity is nothing other than God"; "we call justice the divine will";

"equity is also justice, whenever directed by the will. Everything, in fact, that is equitable, is also just if brought forth by will."[79] The key to harmonizing these glosses with one another, to revealing their unifying inspiration, is given to us by theology. Equity and justice are names that man can attribute to the persons of the Son and the Spirit in the divine Trinity, respectively. The *logos* is the thought of the Father, containing the archetypes of the things created. The archetypal ideas, of course, do not subsist without being interrelated, without an order that encompasses them in unity. The Supreme Maker, in ways not very different from those of an architect, has arranged in a single cosmos, from eternity, the existence of every single being. The harmonious proportion we sense in the world gives a faint reflection of the perfect correspondence, which mutually ties together the archetypes in the divine mind. The project conceived in God's mind, called eternal law or providence by the Fathers of the Church, Irnerius and his pupils was usually invoked as equity. The contemporary philosophers from Chartres instead called it equality (*equalitas*), echoing a term employed by St. Augustine in his *De doctrina christiana*. Just as the terms are corresponding ("*dicitur equitas quia equalitas*"), their significance is identical as both *equitas* and *equalitas* provide denominations (or, technically speaking: appropriations) of the Word/*Logos*. Equity/Equality manifests itself equally in the things and their orderly distribution ("*equitas in rebus ipsis percipitur*"), for it partakes in God the Creator: More precisely, it *is* God in the second person of the Trinity. Representing the supreme law governing animate and inanimate beings alike, the notion of equity further coincides with that of natural law. The former merely underlines the intrinsic equilibrium and harmonious correspondence among the forms of life.

The impact of St. Augustine's *De Trinitate* is similarly manifest in the conception of justice. Justice *is* God as well: no longer, however, perceived as reason, but as will that confers on the world the order conceived by the Son and in the Son. If the Holy Spirit is the will to do good, His name is justice. In human affairs, related by analogy to those divine, is it not that we call someone just when he puts the good perceived in his mind into effect? The dual relationship of identity and distinction between equity and justice, formulated by Irnerius ("justice is called here the good and the equitable. But equity differs from justice. In fact, equity can be grasped within the things themselves and when it flows from will, it becomes, once it assumes form, justice")[80] and again put forward by his pupils, finds its proper explanation in the light of the

[79] "Nihil aliud est equitas quam Deus"; "Divinam voluntatem vocamus iustitiam"; "Equitas […] que et iustitia ita demum, si ex voluntate redacta sit: Quicquid enim equum, ita demum iustum si est voluntarium." Cf. Padovani 1997, 42; 67–9, for references to the sources and parallels in other testimonies.

[80] "Bonum et equum vocat hic iusticiam. Differt autem equitas a iusticia; equitas enim in ipsis rebus percipitur que, cum descendit ex voluntate, forma accepta, fit iusticia."

Trinitarian dogma. Equity and justice are one and the same thing in relation to God; they are different as the Son is a person distinct from the Holy Spirit.

The connection established between the most elevated juridical notions and Trinitarian speculation is not surprising. Whoever is somewhat familiar with the philosophical thought of the twelfth century knows that the study of the divine substance and the precise relations within the Trinity held a place of central importance in the scientific debates of the schools.[81]

2.3.3. From Equity in General to the Juridical Norm. The Influence of Iohannes Eriugena

Apart from Augustinian themes, my previous examination of the philosophy of the Bolognese glossators has also revealed elements of reflection typical of Iohannes Scotus Eriugena, for whom all reality is a manifestation of God, a theophany, like a cascade that flows from a principle mysterious and inaccessible in itself. What appears to our senses is an authentic and divine substance, which after having surged, still shapeless (and hence beyond knowledge), from its original fountain, gradually descends while taking on forms that define it and turn it into an object. This grandiose image inspired the first teachers of the law to construct an orderly hierarchy among the juridical concepts. The words used by Eriugena, alluding to the secret folds in which God is hidden ("*in occultis naturae sinibus*"), are taken up by the glossators to indicate crude equity (*rudis equitas*), which is at the origin of every normative event in the world. Originally lacking all form (in line with Eriugena's God), equity,

[81] *De Trinitate* continued to be cited frequently in the writings of later jurists; the refined treatment of Azo in his *Summa Codicis*, 7, nn. 1–5 ad Cod. 1.1, for example, seems to follow closely V.9. The same work also inspired the distinction of the faculties of the soul into memory, intellect, and will, modeled after the three divine persons, which we encounter again in Henricus de Segusio 1963, 13ra, nn. 1–2 ad X 1.1. In addition to the tripartite scheme of St. Augustine, however, Henricus provides a variation of his own: "Tria reperiuntur in ea [anima], scilicet intellectus, qui praeconcipit, et hoc comparatur Patri, primo operanti, ratio quae discernit et hoc comparatur Filio discernenti, qui est sapientia Patris in caelo et terra, omnia disponens sua virtute et memoria, quae conservat et hoc comparatur Spiritui Sancto, qui omnia bona corroborat." Similar modifications appear in Baldus 1586f, 68ra, n. 2 ad Cod. 4.24.5: "Sunt tres potentiae animae, scilicet intellectus, voluntas, memoria. Intellectus praecedit, deinde sequitur voluntas, quia voluntas est movens motum ab appetibili intellectu: Unde nihil prius est in voluntate, quin sit prius in intellectu, secundum sanctum Thom(am). Memoria habet se ad utrunque, scilicet ad intellectum et voluntatem"; Baldus 1580a, 8rb, n. 9 ad X 1.1.1 (with reference to *TID*, 547, c. XXXVIII: "Et sicut in Deo tres sunt personae, Pater, Filius et Spiritus Sanctus: Sic et tu habes tres vires, scilicet intellectum, memoriam et voluntatem"): "Tria reperiuntur in anima, scilicet intellectus praeconcipiens et ratio discernens et memoria conpraehendens ac retinens, secundum Bernardum"; *QBS*, 120ra, n. 8: "Tria sunt in anima, intellectus, ratio et voluntas. Intellectus namque examinat et illuminat: Ratio determinat et voluntas acceptat." A copy of St. Augustine's *De Trinitate* is extant in the rich library of Giovanni Calderini (Cochetti 1978, 981. IV). In general, cf. Padovani 1997, 74–5.

coming forth from itself, becomes *constituted* and gains precision in a form. "*Manens quod erat, incipit esse quod non erat*": Remaining that which it was (that is, equity), it starts being what it was not, namely, law that is recognizable to human beings. If crude equity is at first, like God, beyond expression ("*nondum quicquam dictum erat*"), it finally becomes manifest and defines itself. It is, according to an appropriate formulation by Rogerius, captured by a string of words ("*Iuris laqueis innodata*"; Padovani 1997, 193) giving expression to the juridical norm. The gush of water, so to speak, freezes and turns into a tangible thing, while remaining the same all along. It continues to be water ("*manens quod erat*"), but it is now locked into something else, rendered rigid, and no longer alive and fluid. It begins to be something new ("*incipit esse quod non erat*"), inferior.

Leaving the suggestive terrain of the metaphor behind, all this means that each positive norm constitutes an expression of lesser potency, weakened in comparison with the mysterious harmony which is in God, or rather, is God Himself. The perfection of the *iura*, the norms contained in the eternal *logos*, is obscured and diminished at the moment when man, living in the vicissitudes of history, takes hold of them and applies them to the world of intersubjective relations. Such is the case, to cite but a few examples, with individual freedom and property, which equity would demand to be extended to all, but which in actual fact remain subject to necessary limitations, be it in the law of the peoples, be it in civil law.

Whether they feel inclined toward metaphysics of an Augustinian stamp, or prefer to dwell on the thought of Eriugena, the first glossators follow the mainstream of Platonic tradition, which characterizes the Western philosophy of the time.

2.3.4. The Abandonment of Meta-Juridical Analysis after Accursius

The rediscovery of the Aristotelian texts, becoming available in translation since the mid-twelfth century, affects only in part the scenario just outlined. As is well known, there were numerous apocryphal writings which added to or supplanted the works of the Stagirite, commentaries, and lectures of the Peripatetic school of the Arabs laced with Neo-platonic elements. They included observations we will see reemerge in the comments of several fourteenth-century jurists and their successors.[82] Nevertheless, remarks on metaphysical questions tend to grow less and more vague from about 1250 until the first decades of the following century. This turn of events seems to reflect

[82] Cf. also Section 3.9. Among the canonists, the references by Iohannes Andreae to the Ciceronian tradition of Plato's *Timaeus* are worth noticing ("Tullius de creatione mundi"), as well as those to Porphyry and to the *Theological Elements* of Proclus ("Arist. Element."). See Ioannes Andreae 1581, 10va, n. 12 ad X 1.1.1.

a trend favoring the methods of the Terminists and Modists, who led medieval logic into new directions. In the footsteps of their colleagues teaching in the schools of the *artes*, the jurists are attracted by the prospect of conferring on their conclusions solidity through a greatly extended use of the dialectical technique. This is not the point to elaborate on the argument, examined in another section of the present book. The recourse to the *modi arguendi in iure* and the diffusion of *quaestiones* (inserted into the narrative of the lectures) are indeed eloquent signs of a change in the scientific orientation. The triumphal advent of logic in the juristic literature was certainly favored by the tendency, reinforced by Iohannes Bassianus and his highly influential school, to indulge in an increasingly technical exegesis of Justinian's text (Padovani 1997, 199). However it might be interpreted in its motivations, this turning point entailed far-reaching consequences. From the early fourteenth to the fifteenth centuries, we are confronted with jurists hardly or not at all interested in metaphysical problems. Others—a minority, indeed—were keen on building their own investigations on the sound premises of speculation, in many aspects merely reiterating themes and considerations already touched by the glossators.

Our attention will now turn to several of these interpreters and identify the points tying them to the venerable tradition of the first Bolognese masters.

2.3.5. The Doctrine of the Ideas of God. A Neo-Platonic Residue Indispensable to Medieval Philosophy

We have just mentioned that the spread of Aristotelian philosophy did not eliminate altogether certain elements characteristic of Platonism. This observation is valid for the philosophers as much as for the theologians of the period. Suffice it to think, in particular, of the doctrine of the ideas. To abandon the doctrine of the ideas would have meant to revert to an element of metaphysical reflection that was incompatible with Christian revelation. Aristotle, on his part, had taken the opposite direction, challenging Plato all along the way: but his resistance was precisely the reason why, according the judgment of St. Bonaventure, the cardinal aspect of his metaphysical thought remained shrouded in obscurity. The God of Aristotle does not know Himself, nor is He in need of knowing a single thing; He is not even required to set things in motion, because He does not act upon them as the efficient cause. Aristotle's God moves them only in His quality of being the final cause, as a necessary ingredient and object of longing and affection. God, to put it differently, does not know particulars. From this suppression of the divine ideas derives, as if from a primordial error, a whole series of other mistakes. First of all, there is the fact that God cannot have foreknowledge nor providence of the things because He does not carry within Himself the ideas that would allow Him to have knowledge. Such an assumption, of course, appeared unacceptable not

only to the Franciscan doctor, but also to Thomas Aquinas, otherwise so quick to profess his adherence to the doctrines of Aristotle.[83]

If the doctrine of the ideas, prior to the crisis brought on by Ockham, forms an indispensable aspect of metaphysics, we must ask ourselves whether and to which degree it is present in the writings of the jurists. In fact, the same concept of equity, interpreted as the harmonious project of creation, implies the presence in the *logos* of archetypes on which all things are modeled. In the first decades of the thirteenth century, William Vasco, canonist and civilian of both Parisian and Bolognese training, formulates his viewpoint, inspired by Plato's *Timaeus*, with admirable conceptual precision:

> God Father, preparing Himself to send into the world His only begotten Son, wished the archetypal world to be contained in the tangible universe in such a way that the latter conformed itself to the former in fraternal likeness with the first model (as Plato affirms in his *Timaeus* at the beginning of the second book). He thus created the tangible world and called into existence the things of the world, subject as they are to inconsistency and perdition, arranging them in perfect order according to the eternal nature of the archetypal world. The permanent structure of the latter in fact informs, with the perpetual law of immutability, the ideas of the things which appear in the world from day to day. The philosophers have called this archetypal world the divine mind, a mind that we identify with the divine Word and the wisdom of the Father. The ancient Roman jurist, inspired by God or perhaps guided by the profundity of his own study, has called it *nature in which all things have been created*, arriving in this way at the apex of truth. Thus, as Plato says in the second book of his *Timaeus*, the highest artisan, contemplating the various ideas of the intelligible world and among them, as if from a higher perspective, the ideas of equity and the difference between the equitable and the unjust, went about to endow with existence their ideal models by laying first the foundation of merit and demerit. Since equity refuses to be associated with a reality lacking reason, however, God, in creating, chose to enhance, of all he intended to create, the rational things by conferring on them greater dignity.

And further on:

> In this fashion man was made, capable of reason, to the effect that his ability to discern led him to seek equity and detest iniquity. God, to be sure, who is true equity, shaped man in such a way as to leave him the freedom to choose by himself at the crossroads of the equitable and the unjust. (Aimone Braida 1983, 33; cf. Padovani 1997, 117–9)

Three hundred and fifty years later and in a completely different scientific context, a jurist like Joachim Hopper (1523–1576) formulated, in typically humanistic terms, a doctrine that was substantially similar:

[83] *BonHe* 1891, 360–1, VI.2–3: "Aliqui negaverunt, in ipsa [causa prima] esse exemplaria rerum; quorum princeps videtur fuisse Aristoteles, qui et in principio Metaphysicae et in fine et in multis locis execratur ideas Platonis. Unde dicit, quod Deus solum novit se et non indiget notitia alicuius alterius rei et movet ut desideratum et amatum. Ex hoc ponunt, quod nihil, vel nullum particulare cognoscat […] Ex isto errore sequitur alius error, scilicet quod Deus non habet praescientiam nec providentiam, ex quo non habet rationes rerum in se, per quas cognoscat […] Et ex hoc sequitur, quod omnia fiant casu, vel necessitate fatali" and that there is no final retribution. Cf. Gilson 1953, 84, 121, 133; *STh.*, I, q. 15, a. 3, *contra*: "Sed omnium quae cognoscit, Deus habet proprias rationes. Ergo omnium quae cognoscit, habet ideam."

Having revealed in us and almost consecrated the image of God the Supreme, who can doubt that we must ascend to the same God, the creator and artisan of all things, to seek to comprehend ourselves and this world? Once we have absorbed Him with all of our mind, we will doubtlessly no longer find shadows and approximations of the things, but the exact forms and species which are called the ideas: Those that, impressed and embedded in our souls, bring forth the recommendations and precepts of nature we usually call premises and common notions. (Hopper 1584, 83vb)[84]

Meanwhile, a single purpose is attributed to the soul and the mind of man: "To raise the eyes toward the divine substance and majesty and admire in it those primary species of the visible things that are known as ideas or forms, removed from any physical contact in the likeness of God Himself" (Hopper 1584, 84rb).[85]

2.3.6. The "Iura" Are Encompassed in the Divine Word

Given that the ideas preexist in God, "highest summit of the things according to His simple being" (*STh*, I, q. 57, a. 1, resp.),[86] it is necessary to ask whether we must understand the archetypes of the single laws elaborated by jurisprudence as being included among them as well. Even from a purely theoretical viewpoint, the response cannot be but in the affirmative. If it were not the case, it would be necessary to admit that God does not know the realities known to man and that He lacks the criteria of just and unjust. The opposite is true. In the Word, the models not only of the tangible realities, but also of the intelligible ones, as for example the ideal forms of the laws and the virtues, are joined. "Indeed, if we are to believe that the ideas of the other things are in God"—we read in a French *Summa*—"this applies even more so to the virtues" (Legendre 1973, 24).[87]

[84] "Nam, cum Dei Optimi Maximi effigiem, dedicatam in nobis, et quasi consecratam, habeamus: Quem quidem si tota mente prehenderimus, inveniemus profecto, non umbras rerum et simulachra, sed ipsas formas et species, quae Ideae nominantur: Quaeque impressae ac consignatae in animis nostris, efficiunt illas perpetuas commendationes ac praescriptiones naturae, quae anticipationes et communes notiones vocari solent."

[85] "Divinam substantiam et maiestatem suspicere admirarique in ea, primas illas rerum adspectabilium species, quae Ideae sive formae dicuntur, quaeque longissime absunt ab omni contagio corporis, quemadmodum est ipse Deus."

[86] Cf. Antonius a Butrio 1578a, 6vb, n. 15 ad X 1.1.1: "Dic quod [Deus] est principium principians, non principiatum. Et quod sit dare unum principium increatum, patet ex eo, quia alias iretur in infinitum. Ubi enim ponis unum creatum aliquid, ponis creatorem: Et ascendendo ires in infinitum, nisi dares unum principium increatum. Item si Deus inceperit, esse oportet, quod exiverit de potestate essendi ad actum. Sed, ut dixi, non potest esse, quod alius eum duxerit, nec quod ipse se ipsum, secundum quod sequeretur, quod ipse praecessisset suum esse, vel seipsum: Quod non est intellegibile. Concluditur ergo, quod non incepit esse." The use of the first approach by Thomas Aquinas, already adopted by Iohannes Andreae, is obvious (Ioannes Andreae 1581, 8ra, n. 18 ad X 1.1.1).

[87] "Nam si aliarum rerum, multomagis virtutum ideas esse in Deo credendum est." The conclusion shows the influence, at least indirect, of Plotinus: "Dico ergo, quod illa lex aeterna

In God, the ideas are the object of an eternal thought that defines the nature and truth of their being much more than the norm of positive law is able to do, the school of Bulgarus (†ca. 1168) maintains: "The broad reach of justice extends to transactions already in existence. It also encompasses those that will come to light in the future. The actual law instead does not even admit within its framework many of the ones already extant."[88] In full agreement with these affirmations, Baldus follows Azo when he writes: "In justice, all of the *iura* are contained along with those it still carries in the womb" (Baldus 1586a, 7vb, n. 4 ad Dig. 1.1.1).[89] And again: "The *iura* come forth due to a divine suggestion. They draw their origin from heaven and are promulgated by the mouth of the princes. The most just laws and the sacred canons proceeded from a single womb or divine source" (*QBS*, 118ra, n. 3).[90]

The Neo-platonic inspiration of these passages is manifest not only due to the metaphor of the source and the use of the verb "to proceed," but also through the invocation of the divine Word, viewed as the fertile matrix (*uterus*) of the experienced realities. A passage by St. Bonaventure comes to mind: "In eternal wisdom, it is the reason of fertility that conceives, nourishes, and gives birth to every universal law. All of the exemplary reasons are in fact conceived from eternity in the womb [*utero*] of eternal wisdom" (*BonHe* 1891, 426, XX.5).[91]

2.3.7. Reasons for the Criticism of Plato

The doctrine of the ideas thus remains a core element of metaphysical and theological speculation, and also whenever jurisprudence becomes involved in investigations regarding the principles on which it is based. Nevertheless, Franciscus Zabarella (1360–1417) and Baldus de Ubaldis reject Platonic thought almost simultaneously by using terms from Aristotle. Let us listen to the teacher from Padova:

Outside of the soul, the universals have no existence, due to which the Philosopher reproaches Plato who places the ideas of the universals outside of the soul. Plato's opinion, however, is sal-

est exemplar omnium […] In illa ergo primo occurrunt animae exemplaria virtutum. Absurdum est, ut dicit Plotinus, quod exemplaria aliarum rerum sint in Deo et non exemplaria virtutum" (*BonHe* 1891, 361, VI.6).

[88] Padovani 1997, 178 ("Iustitia, latius patens, negotia et ea que sunt et que futura sunt comprehendit, ius vero nec omnia ea que sunt, suis laqueis apprehendit"), also citing a parallel passage from Iohannes Eriugena.

[89] "In ea [iustitia] stant omnia iura et omnia iura gestat in utero." Cf. *ENPS*, 16.

[90] "Divino […] nutu iura processerunt […] De coelo enim originem ducunt et per ora Principum promulgantur […] iustissimae leges et sacri canones ex uno utero vel fonte divino processerunt."

[91] In reference to *Eccl*. 26.16: "In sapientia aeterna est ratio fecunditatis ad concipiendum, producendum et pariendum quidquid est de universitate legum. Omnes enim rationes exemplares concipiuntur ab aeterno in vulva aeternae sapientiae seu utero."

vaged by many theologians interpreting it in acceptable fashion. For the moment, we leave the discussion of the issue to them. (Zabarella F. 1517, 46rb, n. 6 ad X 5.3.30)[92]

And Baldus adds:

Note that this is said against Plato, who puts the being of the ideas, insofar as sources of the forms, in heaven or in the clouds in the air. He understands the ideas as the primary causes for all entities endowed with form: He does not say that they are in God, though, but rather that they were created by God, as images and models of the species, including, for example, that of man, of the dog, and of other things, in predicative function. This assumption is rejected by Aristotle in the first book of his Ethics. (Baldus 1580a, 8rb, n. 10 ad X 1.1.1)[93]

Looking closely, neither of the two jurists denies the existence of the ideas and the role played by them in relation to the tangible world. Zabarella limits himself to rejecting the claims of exaggerated realism; Baldus, on his part, criticizes a certain interpretation of Plato, which turns the ideas into just as many creatures (*a Deo creatas*). Granted that the pupil of Socrates never professed such a doctrine (with the Christian concept of creation from nothing, among other things, unavailable to him), one must conclude that Baldus misses the mark on this point. It obviously posed an unresolved problem for some time, as John of Salisbury had written two hundred years earlier:

In the work of the six days, the single things created are recorded minutely, without any mention of the creation of the universals. And there is no attempt to see whether they are essentially united to the single things or whether Plato was right. Besides, I do not recall to have ever read from where the ideas received being or when they began to exist. (John of Salisbury, *Metalogicon*, 95, II.20)[94]

It is likely that the polemic can be traced to John Eriugena, an author who, as we have seen, certainly influenced the first generations of glossators. In any case, for John of Salisbury as well as for Baldus, the ideas, far from being created or from forming an autonomous realm, distinct from God, were to be viewed as consubstantial with the Word: "The universals will disappear entirely, unless they are tied to God" (John of Salisbury, *Metalogicon*, 95, II.20).[95]

[92] "Universalia non sunt quid extra animam, unde reprobat Philosophus Platonem, ponentem ideas universalium extra animam. Tamen opinio Platonis salvatur a multis theologis ad sanum intellectum: Quod pro nunc dimittamus eorum disputationi."

[93] "No(ta) contra Platonem, qui posuit ideas, tanquam principium formarum esse in coelo, vel nubibus aeris. Et ideas intelligit primarias causas entium formalium quas non dicebat esse in Deo sed a Deo creatas: Tanquam imagines et exemplaria specierum, ut hominis, canis et caeterorum, quae suo praedicamento sunt subiecta, quod reprobat Aristo(teles) in primo ethicorum (*Eudaemonian Ethics*, I. 1217b)." Cf. Horn 1967, 121.

[94] "In operibus sex dierum in genere suo bona singula creata memorantur, nec tamen creationis universalium mentio aliqua facta est. Nec oportuit si essentialiter singularibus unita sunt, aut si Platonicum dogma optineat. Alioquin unde esse habeant aut quando coeperint, nusquam memini legisse."

[95] "Dispereant universalia, si ei [i.e., *Deo*] obnoxia non sunt."

2.3.8. The Archetypes of the "Iura" Are in God

The Trinity, Baldus explains, as being "the sole source of the universals," is "the universal cause of all the general forms and cause of the individuals."[96] If the archetypes are in God, they share one and the same essence with Him, according to the principle that what is in God, is God.[97] The error of Plato with regard to our subject does not lie in his having proposed the doctrine of the ideas, but in having endowed them with a reality other than, and distinct from, God.[98] In that respect, Baldus does not depart in any way from a consolidated and uniform strand of thought, which runs from St. Anselm to St. Bonaventure and Thomas Aquinas[99] (to mention only the major representatives) among the theologians, and from Irnerius to the first generations of the glossators among the jurists. St. Thomas, for instance, writes: "Just as in the mind of the Father there are the reasons and ideas of all the creatures God has brought forth, the reasons of the things we must accomplish are also contained in there. Just as the reasons of all things derive from the Father and the Son, who is the wisdom of the Father, the same applies to the reasons of all the acts that will occur" (*ThSeI*, 12.8.1723).[100]

As a result, we find in God the reasons, the eternally true and stable criteria to which human activity is bound in the realm of inter-subjective relationships. "The moral rationalism of Christianity"—Gilson rightly observed (Gilson 1969, 310–1)—"is ultimately integrated into a metaphysical understanding of the divine law." The divine order, innermost structure of the universe, indeed dominates and defines the moral order. In conformity with these premises and in accordance with Bartolus (see above, n. 76), a manuscript from the school of Baldus affirms: "This light (of the intellect) is acquired through the sciences, especially those divine, just as our most sacred law which, while being subordinate only to theology, surpasses all of the other sci-

[96] *QBS*, 118vb, n. 22: "Deus, qui est universalis causa omnium generalium formarum, et causa individuorum."

[97] *CG*, I.45. Cf. Boland 1996, 197. Cf. *STh*, I, q. 15, a. 1 ad 3m: "Idea in Deo non est aliud quam Dei essentia."

[98] Perhaps, the passage already cited from Francesco Zabarella must be understood in this sense: "Tamen opi. Platonis salvatur a multis theologis ad sanum intellectum." Cf. above, n. 92.

[99] For St. Anselm, cf. Vanni Rovighi 1949, 112–3, and in particular his *Monologion*, 9.24, 12–4; 10.24, 24–7; 12.26, 26–31; for St. Bonaventure, cf. Vanni Rovighi 1974, 53–4, and especially *BonHe* 1891, 386, XII.12; *BonSCh* 1891, 8, q. 2, resp.; for Thomas Aquinas, Boland 1996, 206, 209–12, 236, and particularly *STh*, I, q. 15, a. 1, resp.; ad Im; ad IIIm.

[100] "Sicut ergo in mente Patris sunt rationes omnium creaturarum quae a Deo producuntur, quas ideas vocamus, ita et in ea sunt rationes omnium per nos agendorum. Sicut ergo a Patre derivantur in Filium, qui est sapientia Patris, rationes omnium rerum, ita et rationes omnium agendorum." A similar argument can be found in Coluccio Salutati (Garin 1947, 136): "Concluditur leges, quoniam ipsarum scientia de universalibus rationibus humanorum actuum, potentiarum, habituum et passionum anime considerant, inter speculabilia numerandas." Their necessity reflects the absolute necessity that is in God (ibid., 148).

ences." "The laws, in fact, are supreme philosophy or wisdom, regulating and ruling the human souls by sanctifying them. Arranging in this way life in the inferior spheres in order to attain the superior one, (the laws) participate to a high degree in the divine (natures) or separate substances" (ms. Barberinus latinus 1400, 20v).[101]

2.3.9. Perpetuity of the "Iura": The Impact of the Book on Causes

To clarify the meaning of these words, it will be appropriate to analyze several passages from the *Tractatus de successionibus* of 1391, with which Philippus de Cassolis challenged the same Baldus de Ubaldis and his pupil Christopherus de Castiglionibus in a memorable *querelle* (Vaccari 1957, 23; Dillon Bussi 1978, 522). The jurist from Reggio resolutely states that the civil law accompanies (*comitatur*) natural law in both of the accepted meanings: the law of nature *naturata* and of nature *naturans*. Adoption, for example, follows *natura naturata* (the created order) when requiring a difference of at least eighteen years of age between the adopting and the adopted party. Speaking more generally and from a different perspective, it can be said that the creations of civil law (actions, obligations, sentences, stipulations, testaments) provide imitations of the *natura naturans*: that is to say, of divine reason.[102] Now, positive law has invented (*adinvenit*) its own institutions "as incorporeal creatures, after the example of the nature *naturans*, that is, God" (Philippus de Casolis 1584, 108va, n. 11),[103] acquiring, in this fashion, a perpetual existence. "Perpetual" is that which has a beginning and no end, as the soul, the sun, or the moon (Philippus de Casolis 1584, 108va, n. 11).[104] If, for example, obligations and actions were not capable of surviving their holder, it would occur that "corporeal and perpetual entities would come to an end." That would be con-

[101] "Istud lumen acquiritur per scientias maxime divinas sicut sunt sacratissime leges nostre que, soli t[h]eologie ancillantes, omnes alias trascendunt leges. Sunt enim leges suprema phylosophia seu sapientia, ff. de var. et extraor. cognitio, l. prima (Dig. 50.13.1) que regulant et regunt hominum animas, C. de sacro. eccl., sancimus (Cod. 1.2(5).22(19)) et sanctificant eas. Cum enim ita vitam inferiorem ordinent ut ad superiorem usque trascendant, magis participant cum diis sive substantiis separatis." Continuing as follows: "Adeo quod anima separata a corpore remanet recordatio scientie sanctarum legum. Sophismatum autem vel medicine nulla est rememoratio." One notes, on the one hand, the recourse to a classical Platonic theme (*rememoratio*) and, on the other, a polemical attitude with regard to physicians and philosophers.

[102] For the expressions *natura naturans* and *naturata*, cf. Alighieri, *De vulgari eloquentia*, I.VII.4; *Monarchia*, II.II.3; Padovani 1997, 211–2.

[103] "Et has ius civile velut incorporales creaturas ad similitudinem naturae naturantis, idest Dei, adinvenit."

[104] "Tales sunt et dici possunt creaturae iure civili et tamen sunt perpetuae, quia perpetuum est, quod habet initium et non habebit finem, ut est anima, sol et luna." Cf. Bellomo 1993, 453–4; Bellomo 2000, 635–6.

trary to the *natura naturans*, to the providential and highly necessary order of being (*summa necessitas*). In the same order, the incorporeal entities, albeit not included among the four elements (air, earth, fire, and water), retain the mark of perpetuity.

The excerpt just presented would seem to contradict the line of reasoning most common among medieval jurists. If the archetypes of the single *iura* were indeed consubstantial with the Word, they would be eternal and not perpetual. They would exist from all time, just as God has always been and persisted without beginning. In reality, we find ourselves confronted with an elaboration of the doctrine of ideas that is not opposed to the premises from which we departed, but forms a development in line with the fundamental arguments to be found in the *Book on Causes* (*Liber de causis*). This little volume, attributed by the Pseudo-epigraphers to Aristotle and accepted as such throughout the Middle Ages, offers a collage of texts of varying provenance—though consistent in their inspiration: the *Theological Elements* of Proclus, the *Enneads* of Plotinus, and the work of Pseudo-Dionysius. Translated into Latin by Gerardus Cremonensis toward the end of the twelfth century, the *Book on Causes* began to circulate quickly and widely. Cited for the first time, as it appears, by Alanus ab Insulis and, in extracts, by William of Auxerre and Philippus Cancellarius, it was frequently consulted by the major philosophers of the thirteenth century, including St. Bonaventure, Albert the Great, and Thomas Aquinas. In his commentary, St. Thomas tried to blend the fundamentally Neo-platonic outlook of the *Book* with the Aristotelian views so dear to him.

Without entering into the problem of how the jurists became aware of the *Book on Causes*,[105] and without detailing the basic arguments of its 32 propositions, we will focus on those points that are of immediate interest in the present context. The primary cause, preceding all of the causes and their effects, is necessarily beyond definition (even though it can be called the One or

[105] To my knowledge, the text was already known to Hostiensis (Henricus de Segusio 1963, 14rb ad X 1.1.1), who attibutes it, as was usual, to Aristotle: "Et secundum Arist(otelem) prima causa superior est narratione et non deficiunt linguae a narratione eius, nisi propter narrationem causae ipsius, quoniam ipsa est super omnem causam: Et narratur nisi per causas secundas, quae illuminantur a lumine primae causae, quod est, quoniam prima causa non cessat illuminare suum causatum et ipsa illuminatur a lumine suo, quoniam ipsa est lumen et supra quod non est lumen" (cf. Pattin 1966, 57–9). The immediately preceding passage offers a collection of arguments drawn from the same source: "Unde Philosophus, ipsum principium, quod est Deus, non est contentum sub genere, neque sub diffinitione, nec subest demonstrationi, expers est qualitatis, quotitatis, ubi et quando et motus sibi: Nec est aliquid simile nec communicans, nec contrarium." Cf. Baldus 1580a, 228rb, n. 37 ad X 2.20.37: "Ut dicit Ari(stoteles) in liber de causis, ens igitur est praedicamentum praedicamentorum et dividitur in X praedicamenta." In addition to Iohannes Calderinus (Cochetti 1978, 972. XXVI), Girolamo Cagnoli was also fascinated by the work much later on: "Causa prima, ut in libro de Causis Philosophus ait, est omni narratione superior, non cessat illuminare creatum suum et ipsa non illuminatur lumine aliquo, quoniam ipsa est lumen purum, super quo non est lumen aliud" (Cagnolus 1586, 33rb, n. 1 ad Dig. 1.1).

the Good), because it transcends, like the One of Plotinus, being as well as the intelligible. Being merely appears as the first effect, as pure intelligence, encompassing the total of the intelligible forms. Every other intelligence, brought forth by the first and hence hierarchically subordinate to it, is similarly "replete with forms" (*Propositio* 10), forms that endow the inferior causes with existence. All there is depends on the One, which provides the single truly creative cause. Everything derives from the One through a chain of descending intelligences and intelligible forms, which in turn cause effects only due to the causality of the One. As a result, the efficacy of the forms is of an "informing" nature, rather than a creation in the proper sense of the term.[106]

2.3.10. Traces of Averroism?

Although this system was introduced under the false label of Aristotle's supreme authority, it could not be accepted by the Christian thinkers in its integral format. Thomas Aquinas nevertheless took it upon himself to supply an interpretation compatible with the promises of Revelation. To put it briefly, he appeared convinced that the primary Intelligence, the most eminent among the creatures, consisted of being and intelligence. It possessed them, however, as reflections of the primary Cause, namely God, who in essence is nothing but pure being and pure intelligence.[107] Every intelligence that is distinct and hierarchically ordered from high to low, identified by Aquinas with the various groups of angels, provides the basis for forms that mirror the Word and are coessential with it (*CG*, II. 98). In the angels, the forms are created: more precisely, they are created along with the angelic nature. Granted that they cannot exist eternally, but only perpetually, they have a beginning and no end.

With this having been said, the reason why Baldus de Ubaldis and Philippus de Cassolis claim that each *ius* has perpetual consistency becomes clear. Their fountainhead is in God and coincides with the second person of the Trinity. There they are eternal yet intangible, due to their absolute transcendence. They enter into contact with the life of man on a lower level, upon assuming their angelical nature made "in the likeness of the *natura naturans*," i.e., God (cf. *STh*, I, q. 57, a. 1, resp.; I, q. 55, a. 2, resp., ad Im; I, q. 105, a. 3, resp.; *ThSS*, c. 15, 135).[108] The forms, reproduced in the angelical natures, rule the souls and inspire human beings to seek sanctity. Here Baldus seems to adopt an argument of Thomas Aquinas, for whom it is the purpose of the

[106] Although Avicenna understood the activity of the primary substance in terms of a creation: *STh*, I, q. 4, a. 5, resp.; ad Im.

[107] *ThC*, especially in commenting on the *propositiones* 3 and 16; *ThSS*, c. 14, 1, 120: "Dei substantia est ipsum eius esse, non est autem aliud esse, atque aliud intelligere."

[108] The concept reappears in his *Monarchia*, II.2–4; *Purgatorio*, 32, 67; *Paradiso*, 18, 109–11; also in Holland 1917, 90.

separate intelligences to lead the creatures toward their perfection.[109] The doctrine of the divine ideas, which include the archetypes of the laws, is by no means contradicted by references to forms that exist in separate intellects. The two assertions relate to different levels of being: If the jurists sometimes prefer to insist on the intermediate position of the intelligences between God and man, it serves only the purpose of underscoring the providential and redeeming function of the laws in the human sphere (*STh*, I, q. 103, a. 6, resp.; I, q. 104, a. 2, resp.; I, q. 105, a. 5, resp.; I, q. 111, a. 1, resp., ad IIIm; *CG*, III.80; *SS*, c 14, 1, 132). This is a transfer into the realm of juridical realities of a metaphysical vision, which Dante had contributed to disseminate in his works, led by Avicenna and the already mentioned *Book on Causes*. The angelical intelligences, aiming at the "intentional example" in God, "forge with heaven the things here on earth" (*Convivio*, III.VI, 4–6). As intermediaries of the divine cause, they fix and render individual the generic shape perceived by them in the first light, thereby adapting it to the material world (Nardi 1967, 101; 1992, 37–52; Vasoli 1970; Capasso and Tabarroni 1970). Ernst Kantorowicz excessively simplified the thought of the medieval theologians and jurists, when he stated that "the created Intelligences—Spirits without a material body—were the created Ideas or Prototypes of God" (Kantorowicz 1957, 281). In fact, the separate intelligences, in adopting the divine ideas, reduce them from eternal to perpetual ones. This occurs because the angelical nature is the first among all of the creatures, and whatever is part of it also partakes in its ontological structure. It is doubtless erroneous to maintain that the jurists embraced an Averroist "double truth," conceding, on the one hand, as Christians, the impermanence of the realities of this world, and on the other, as Aristotelians, a "quasi infinite continuity" (Kantorowicz 1957, 283, 300–1). It is rather evident that, when Philippus de Cassolis compares actions and obligations to the perpetuity of the soul, the sun, and the moon, he refers to the angelical forces which, according to the medieval vision, move the spheres of the sun and the moon. He does not speak of the stars in the physical sky, for it is said that they will perish (Matthew, 5.18; 24.35). If it were otherwise, we would also have to suspect Pope Honorius III of Averroism, who in his bull, *Super specula*, alludes to the doctors as "destined to remain like stars in perpetual eternity" (X 5.5.5).[110] "The doctrine of the immortality and continuity of *genera* and *species*," accurately pointed out by Kantorowicz (1957, 300),[111]

[109] *SThC*, comment on *propositio* 9.

[110] "Qui velut stellae in perpetua aeternitate mansuri [sunt]." The perpetuity of the soul was, of course, never called into question: "Initium habet, finem non habet" (*SA*, 796, 24). Cf. Baldus 1586a, 15rb, n. 1 ad Dig. 1.1.10: "Anima est immortalis ac perpetua […] nam anima est quid divinum et immortale."

[111] The doctrine is based on an old tradition, dating back to the earliest beginnings of the Bolognese school. Cf. Fransen and Kuttner 1969, 1. 9, 33: "Sicut Bulgarus ait: ius naturale in generibus et speciebus suis immobile, in indiuiduis non sic." As we have seen, Bartolus 1570a,

can only be explained in the light of the doctrine of ideas and their presence in the separate intelligences.[112]

2.3.11. Conclusion

This view of ideas, adopted from the beginnings of the Bolognese school yet sometimes passed over in silence due to the prevalence of other scientific interests, was essentially never forgotten. On the contrary, it was defended against skeptics and the uninformed of any variety:

> The *Decretum* [of Gratian, C. 16, q. 3, c. 17] states that the laws are divinely promulgated. But many ignorant people laugh at this and say: "Or you claim that the laws are made by God without mediation, which is not true for the civil laws; or you say that they are made by God through some mediating agency, which, however, could be said about any other things as well, and not only of the laws." Those speaking similarly do not know what they are talking about, because discerning just from unjust is not given to man if not in obedience to divine indications. (Cynus 1578, 444vb, n. 2 ad Cod. 7.33.12)[113]

In fact, the criterion of the good and the bad is not in the primary possession of man, but resides from eternity to eternity in divine reason. Prior and perfect model of any law, His reason judges the laws by promoting an ever higher form of justice in the societies inspired by Him, "since all of the effects reach their apex of perfection when they attain the highest degree of similitude relative to the cause producing them" (*CG*, II.46.1).

In this vision, the spirit of medieval civilization can be summed up. The medieval, as perhaps no other civilization, attempted to conform nature and history to a supernatural, invisible, but above all perfect, reality because reality was divine. Medieval man, also conscious of his misery and sin, tried in every way to make his own age an image of the eternal, beginning with those laws by which man was called to reign over the world in justice and peace. That ideal, a thousand times sought out and a thousand times defeated, was nevertheless the main characteristic of a millenium in which Western man conceived of himself as *anthropos*, the being who, according to the suggestive

187ra, n. 1 ad Dig. 8.2.32 (cf. above, n. 50), distinguishes the *artificialia*, which by virtue of being composed "ex rebus elementatis" cannot be perpetual, from the realities that are not composed "ut actiones et obligationes, que sunt simplices imaginationes et istae possunt esse perpetuae ad nutum principis."

[112] Moreover, Baldus derides the Averroist doctrine about the unity of intellect: Padovani 1983, 274.

[113] "Et decretum dicit, quod leges sunt divinitus etc., sed de hoc derident nos laici, arguendo sic. Aut dicis, quod leges sunt factae a Deo immediate et hoc est falsum de legibus civilibus: Aut dicis quod mediate et tunc idem est in quibuscumque rebus, non tantum legibus, tamen nesciunt quid loquantur: Quia discernere iustum ab iniusto non competit humanae naturae, nisi quatenus divinus nutus hoc facit." The passage is reproduced almost literally in Albericus de Rosate 1585h, 105vb, n. 1 ad Cod. 7.33.12.

image of Plato and of Philo (later revived by Lactantius[114]) "looks upwards" (in Greek, *anathrein*).

As such, man—"an upward-looking being"—proves himself to be naturally and originally devoted to metaphysics.

[114] *LDI*, II.I, 257B: "Hinc utique *anthropon* Graeci appellarunt quod sursum spectet […] spectare nos caelum Deus voluit."

Chapter 3

THE ROLE OF LOGIC IN THE LEGAL SCIENCE OF THE GLOSSATORS AND COMMENTATORS

Distinction, Dialectical Syllogism, and Apodictic Syllogism: An Investigation into the Epistemological Roots of Legal Science in the Late Middle Ages

by Andrea Errera[*]

3.1. The First Half of the 12th Century: The *Logica vetus* and Recourse to the *Distinctio*

3.1.1. The Logic and School of the Glossators

Between the end of the 11th and the beginning of the 12th century a school of law was created in Bologna dedicated to the study of Justinianian texts, that is to say to the examination of that assemblage of Roman law (collectively known in the Middle Ages as the *Corpus iuris civilis*) that had been compiled in Byzantium in the 6th century on the initiative of the Emperor Justinian. After a long and almost complete absence in the early Middle Ages, apart from some brief summaries, the texts reappeared in the course of the 11th century in northern Italy and from then on gradually began to be recognised and used not only by judges and notaries but also as subject matter in the preparation and training of jurists (Cortese 1993). Various aspects of the more distant past of the Bologna school are still unknown, but the determining impulse for the creation of a *Studium* (i.e., a school) aimed at the teaching of Roman law was probably due to the activity of a legal scholar by the name of Irnerius, who started lecturing on and explaining the Justinianian sources to his pupils in the early years of the 12th century.[1] The teaching carried out in Bologna by Irnerius was undoubtedly innovative and original not only for its content (previously largely neglected), but also for the way chosen to present the teaching, in so far as the exclusive and specialised study of Roman law brought with it a substantial change in the traditional encyclopaedic approach that had

[*] The translation of this essay was done by Philip Biss, who also translated (where not otherwise indicated) the quotations from the authors referred to in the text or in the notes. The translation has been made possible thanks to the support of the Department of Science and Law History of the "Magna Graecia" University of Catanzaro.

[1] New studies have recently tried to throw light on the possible links between Irnerius and theology: cf. Mazzanti 2000; Spagnesi 2001. In general on the connections between legal and theological studies of the glossators cf. Padovani 1997.

been a typical element of scientific study in the past. Until the innovations introduced by Irnerius, the study of law had been seen as just one element in a much wider course of study that was centred on seven different disciplines—the liberal arts—that represented the totality of knowledge. Within this overall framework the teaching of law, deprived of scientific autonomy, was completely regarded as one of those concepts to be acquired through the study of rhetoric which, together with grammar and debate (*artes sermocinales*: i.e., the art of discourse), was one of the arts of the *trivium*.[2]

Irnerius had initially been a teacher of the liberal arts before beginning his specialist teaching of the sources of Roman law, and this explains why, as founder of the Bologna school, he was able to use the methodological tools characteristic of the *artes sermocinales* to draw up some ingenious explanatory glosses to the Justinianian legal compilation.[3] On the other hand, the study of the liberal arts constituted the ineluctable cultural basis needed for access to the higher faculties, so that the pupils and teachers of the Bolognese school of law also needed a general knowledge, even if only at an elementary level, of the set of principles and collection of ideas taught in the *trivium* and *quadrivium* disciplines.[4] The necessary familiarity that the Bolognese glossators had to have acquired with the techniques taught in the liberal art schools also implied, therefore, their close knowledge of the cultural inheritance of logic, which constituted the specific subject matter of the *trivium* art known as *dialectica* (dialectic).[5] Besides all this, a knowledge of dialectic was made absolutely necessary by the fact that this art represented not only a distinct science, but also an arsenal of discursive and hermeneutic techniques that was indispensable to the correct epistemological development of all the other sciences. Logic, as *scientia rationalis* (i.e., the science of reason), showed all the other disciplines the road to follow in the construction of valid arguments and in the avoidance of errors of reasoning.[6]

[2] On the organisation of studies based on the liberal arts and in general on the problem of basic teaching in the Middle Ages cf. Pini 1999, 481–501. As regards logic in particular in the context of the *trivium* disciplines cf. Köhn 1986, 257–65.

[3] For some examples of Irnerius' dominating mastery of the tools of logic see Errera 1995, 127–50. In general on the use of dialectic in the glossators' school refer to Otte 1971.

[4] Concerning the nature of preparatory learning for the liberal arts so as to follow studies at a higher level see Cobban 1975, 9–13 (in particular cf. ibid., 9, where the liberal arts are defined as the "theoretical basis of medieval education"); Corvino 1976, 132–6; Verger 1981, 296; Luscombe 1989, 81, where we read that "the seven liberal arts provided the basis of all the teaching given in the schools during the eleventh and twelfth centuries as they had done in earlier centuries."

[5] About placing dialectic among the arts of the *trivium* and on the synonymous nature of logic and dialectic up to the 13th century, when a rigorous semantic specification of the two terms together with the delimitation of dialectic is imposed in the field of arguments that are merely probable cf. Garin 1969; Michaud-Quantin and Lemoine 1970, 61; Padellaro 1970, 14; Blanché 1973, 152; Scholz 1983, 17–8; Kahn 2000, 491–2.

[6] For medieval logicians, dialectic was "at the same time a science and a tool of science":

As regards content, the dialectic taught at the time of Irnerius consisted of a well defined set of conceptual rules that had been handed down almost unchanged since the 6th century under the name of the *logica vetus* (i.e., ancient logic). The unchanging nature of the principles and methods that characterised the teaching of logic from the 6th to the 12th century depended on a cultural standpoint—typical of the early Middle Ages and of the early years of the late Middle Ages—whereby philosophers were convinced that all the fundamental ideas for a complete and exhaustive knowledge of every subject had already been harmoniously formulated and laid out by the classical authors in a set, defined and unchangeable number of authoritative works handed down from antiquity (Ebbesen 1999, 1).

In particular the sole dialectic texts that were actually known and studied in the context of the *logica vetus* were Porphyry's *Isagoge*, Boethius' translations of the *Categories* and of *De interpretatione* (*On Interpretation*) by Aristotle, and Cicero's *Topica*, plus a few others written by Boethius, Marius Victorinus, Martianus Capella, Cassiodorus, and Isidore of Seville (Prantl 1937, 3–8; Padellaro 1970, 17; Blanché 1973, 160; Grabmann 1980, vol. 2: 84; Ebbesen 1999, 5–9).

The rigidity of the fundamental rules of *dialectica* derived from the unassailable conviction that this set of classical and early medieval texts contained all possible wisdom on the subject of logic and, for that reason, these source materials constituted a collection of writings and doctrine which were not open to expansion or alteration. This made it inevitable that during the entire period in which the *logica vetus* was actively in use, and that was until about the middle of the 12th century, these sources were not subject to any substantial change.[7]

3.1.2. The Dichotomous Technique

The specific list just indicated of works of logic that were known and actually used from the 6th to about the middle of the 12th century formed the exclu-

Blanché 1973, 153. On the standing of *scientia scientiarum* (i.e., science for the development of other sciences) of dialectic cf. Preti 1953, 683–5; Gregory 1992, 23; Jacobi 1994. The importance of logic in medieval thought "extends itself universally to every part and to all parts of knowledge: to those with secular knowledge no less than to those with religious knowledge": Alessio 1994b, 87. On the relationship between the study of dialectic and the system of legal studies cf. Otte 1971, 9–10, 17–32; Gualazzini 1974, 31–5.

[7] In the period of the *logica vetus* dialectic "remains centred on the content of *Isagoge*, of the *Categories* and of the *Ermeneia*" (Blanché 1973, 161), which remained the main works available up to the third decade of the 12th century: cf. Vignaux 1990, 13. At the beginning of the 12th century, for example, Peter Abelard still based his entire knowledge of dialectic on the "seven codes"—Porphyry's *Isagoge*, Aristotle's *Categories* and *De interpretatione* (*On Interpretation*), and Boethius' *Liber divisionum*, *Topics*, *De syllogismis categoricis* and *De syllogismis hypotheticis*—and the fundamental Aristotelian works on inferential reasoning did not appear among them: cf. Fumagalli Beonio Brocchieri and Parodi 1996b, 169. On Peter Abelard cf. Louis, Jolivet and Châtillon 1975.

sive object of dialectic learning in the teaching of the liberal arts. This indicates that the *logica vetus* was significantly characterised by a scarce and underdeveloped knowledge of syllogism, i.e., by the limited attention it paid to one of the principal gnostic techniques conceived in classical antiquity. In fact, the Aristotelian texts that are essential to a complete and correct understanding of the rules of inferred reasoning (i.e., *Prior Analytics* and *Posterior Analytics*, the *Topics*, and the *Sophistici elenchi*) do not appear among the sources mentioned. Furthermore, even in those few elementary versions compiled above all in the 6th century by Boethius and disseminated during the *logica vetus* period to give a synthetic illustration of the main dialectical criteria inherited from classical times, syllogism was not dealt with in any particular depth.[8]

On the contrary, in the limited number of early medieval manuals dedicated to logic, a decidedly fundamental and determining role was assumed by those works that gave a detailed illustration of the operation of the other basic heuristic method of Greek philosophy in the cultural heritage handed down to the Middle Ages, that is, *distinctio* (distinction).[9]

The oldest description and use of the *distinctio* method as a general cognitive tool comes from the works of Plato who had given a fundamental role to the technique of διαίρεσις (division or separation) so as to permit a full and thorough understanding of all fields of knowledge.[10] The usefulness of the logic of διαίρεσις—a term then translated by Latin-speaking logicians, by the expressions *divisio* (division) or *distinctio* (distinction)—was based in Plato's eyes on the cognitive efficacy of dichotomy. It is based on the heuristic value inherent in the operation by which a general concept (genus) is subject to division and separates itself into a pair of contrasting concepts (species) (Nörr 1972; Colli 1990, 237). The antithesis between the species comes from the identification of a discriminatory element (a διαφορά, i.e., a difference) that makes it impossible for elements that make up the genus to belong to both the antithetic species at the same time. In other words, the presence or ab-

[8] The elementary synoptic works by Boethius (the fragmentary tract *Introductio ad syllogismos categoricos*, *De syllogismis categoricis* and *De syllogismis hypotheticis*) were the unique sources of knowledge about Aristotelian syllogistic technique at the time of the *logica vetus* and ceased having an influential role only from the 13th century on: cf. Minio-Paluello 1972, 749–63; Blanché 1973, 160–1; Reade 1980, 379–89; Roncaglia 1994, 284; Chenu 1999, 161–73. On the scant knowledge of the Aristotelian doctrine of logic at the time of the *logica vetus* cf. Fumagalli Beonio Brocchieri 1996a; Ebbesen 1999, 26–7; De Libera 1999a, 290. For a detailed description of the phases that covered the gradual reacquisition of the logical works contained in Aristotle's *Organon* within the context of the medieval Christian culture in the West, see De Ruggiero 1946b, 70–5; Minio-Paluello 1972, 743–66.

[9] On the mechanism of *distinctio* cf. Slattery 1958; Bocheński 1972, 55–9. The method of division concerns the entire philosophical cultural tradition, to which all the classical philosophical schools made different contributions: cf. Pozzi 1974, 1.

[10] As regards dialectical method in Plato cf. Viehweg 1962, 75–6; Talamanca 1977, 20–8; Abbagnano 1993, 125–6.

sence of a determined or specific characteristic in each object of the genus—taken as a discreet element of the *distinctio*—necessarily makes that object inherent in one of the species and totally extraneous to the other. We can think, for example, of the contrast between the two qualities (clearly antithetic) of mortal and immortal, which induced medieval writers to construct a division of the genus of rational beings, separating it into two species antinomically represented by mortal rational beings (we are talking about the species which man belongs to) and immortal rational beings.[11]

The technique of dichotomy therefore allows us to acquire a more detailed and precise knowledge of the elements that belong to the genus and that are divided (by virtue of *distinctio*) into differing species. This is because it offers an interpretation that claims that some of these elements possess a typical and specific characteristic distinguishing them from others belonging to the same genre and that, in reality, do not have that particular characteristic.[12] On the basis of the example cited above, a teacher of *logica vetus* would teach that, as a result of the dichotomy of rational beings between mortal and immortal, our range of scientific knowledge about reality would undoubtedly be enriched. This is because it would be possible, by means of this *distinctio*, to identify with certainty that some rational beings (including man) belong to the species of mortal rational beings and to radically exclude their connection with the antonymic species of immortal rational beings (where the concept of divinity comes in).[13]

The heuristic usefulness of *distinctio* induced Plato to give a pre-eminent value to dichotomy as a general tool for the acquisition of knowledge, to the point that the use of dichotomous criteria became common practice in the exercises of the Academy, as is shown by the narrative contained in *Politicus* and in *Sophista*.[14] Aristotle also valued and used διαίρεσις (difference) at the beginning—especially in the early *Historia animalium*, evidently influenced by Plato's thoughts—but later disputed the value and use of dichotomy as a logi-

[11] "The differences used to divide a genus must be opposing in such a way as to exhaust the extension of the genus, so that no individual item belonging to the genus exists that does not belong to only one of the species into which the genus was divided": Pozzi 1992, 21.

[12] Every species is less extensive and more comprehensive than the genus, where by the term *extensive* we mean "the number of subjects of which it is predicable" and by *comprehensive* "the set of characters contained in the term itself": Vanni Rovighi 1962, 54. Species, really because it is more conceptually defined, regards a number of objects that are necessarily less than the genus, which is instead more "extensive" because it includes all the objects belonging to the different species of which it is made up: cf. Jolivet 1959, 67–8; Sordi 1967, 12.

[13] *Distinctio* allows one to obtain an exhaustive definition of every species through the conjunction of ideas that describe, on the one hand the genus, and on the other hand the difference that underlies the division of the genus: cf. Padellaro 1970, 42.

[14] Plato, *Politicus*, 258^{e}–267^{c}; *Sophista*, 218^{e}–221^{c}. On these extracts cf. Kneale and Kneale 1972, 16.

cal and general heuristic tool, contrasting it with the gnostic superiority of the syllogistic method. He did not, however, completely deny the merit of dichotomy as an effective means of organising things in the natural world.[15]

3.1.3. Knowledge of Distinctio *in the Context of the* Logica vetus*: Porphyry's* Isagoge

The importance of methodological reflection in Greek philosophy and the relevance of its philosophical disputes were, however, completely unknown to the teachers of medieval *logica vetus*, who had no direct knowledge of the works of Plato and Aristotle and could not therefore evaluate their teachings in an appropriate way.[16] The only knowledge of dichotomy and syllogism that was available until the 12th century was based on the scant theories set out in those few works from the late Roman period or the early Middle Ages still in existence. These filtered the earlier rich philosophical tradition, re-working it and, for many reasons, simplifying it (Evans 1996, 41; Wieland 1987, 64–6). Despite the unanimous recognition given to Aristotle as a master *par excellence* of dialectic,[17] it was the brief abstracts from the *logica vetus* dedicated to the revelation of classical philosophical teaching that were primarily to predominate as the fundamental works of logic, at least until the beginning of the 12th century. The Platonic criterion of dichotomy, which showed a greater completeness and comprehensibility with respect to syllogism in these texts, was elevated to a point where it became a privileged technique for the acquisition of scientific knowledge.[18]

In particular, the learning of *distinctio* was greatly helped by the simple explanation of the relationship between genus and species contained in a short and elementary book—*Isagoge*—written in the second half of the 3rd century A.D. by the neo-Platonic philosopher Porphyry of Tyrus.[19] The undoubtedly

[15] On the dialectical method in *Historia animalium* cf. Vegetti 1971b, 104–13; on the Aristotelian criticism of the Platonic dialectical method cf. Viano 1955, 55–7; Vegetti 1971a, 519–24; Pozzi 1974, 12–5.

[16] As regards the conviction of the masters of the *logica vetus* that an indirect knowledge of ancient culture was sufficient cf. Bianchi 1997a, 2.

[17] On Plato's and Aristotle's authority at the time of the *logica vetus* cf. Maierù 1972, 10; van Steenberghen 1980a, 936–9; Reade 1980, 380–1; Wieland 1987, 65–6; Jacobi 1988, 236. As regards Gratian's knowledge of Plato cf. Kuttner 1976.

[18] Apropos of the general prevalence of the Platonic gnostic system over that of Aristotle in the context of the *logica vetus*, it has been written that "Platonism in its different forms, transmissions, and variations is until the twelfth century an obvious and basically little doubted part of what we call Christian doctrine or Christian wisdom. […] It is therefore easy to understand that it is Plato and not Aristotle who dominated the thinking of the Christian world so effectively and for so long a time": Wieland 1987, 65.

[19] Concerning the writing of *Isagoge* cf. Bidez 1913, 51–64; Maioli 1969, 3–12; Pepin 1975, 325–8.

simple commentary and the immediate and effective explanation given by Porphyry's work guaranteed it a wide readership for centuries. In fact, the specifically introductory and preparatory approach of *Isagoge* (a literal Latin translation of the original Greek title meaning "Introduction") allowed the reader to understand complicated philosophical concepts by setting them out in a way that was specifically intended to explain and teach them. It was these characteristics of simplicity and clarity that produced an immediate success for Porphyry's book.[20] These aspects of the work likewise explain why the Latin translation of *Isagoge* produced by Boethius in the 6th century—of all the writings of the *logica vetus* explaining how the dichotomous technique operated—played a fundamental role in revealing the diairetic method. It was in substance the simplicity of Porphyry's work that determined the unrivalled good fortune and widespread diffusion of the *distinctio* criterion as a heuristic method of general value.[21]

More precisely, the proposition that Porphyry intended to advance in his writings was the harmonisation of neo-Platonic speculation with the teachings of Aristotle. The objective of reconciling the two great philosophical systems (that of Plato and that of Aristotle) induced the author first of all to describe and explain the five concepts—*genus*, *species*, *differentia* (difference), *proprium* (particular property), *accidens* (accident)—essential for an understanding of Aristotle's *Categories*. The intention to simplify, which had motivated Porphyry to write an introduction to Aristotle's philosophy, induced him in addition to insert a simple explanation in the second chapter of *Isagoge* that made for an intuitive and easy familiarisation with the Aristotelian philosophical approach as set out in the *Categories* (McKeon 1975, 167; Schulthess and Imbach 1996, 56). The distinctiveness of this preparatory teaching model lies in the repeated application of the *distinctio* method in a connected and coordinated series of subsequent *subdistinctiones* (sub-distinctions) which are ever more detailed and specific.

The *subdistinctio* in fact consists of a logical operation by which one of the species created by *distinctio* is, in turn, subject to division in order to generate new dichotomous species; this repeated analytical activity necessarily brings with it an expansion of knowledge of the new species. The gnostic investigation depends on the fact that, with every subsequent dichotomous division, the categories originating from the *distinctio* are enriched with a new specific and particular quality. This quality corresponds to the presence or absence in each species of a new discrete element that forms the *differentia specifica* (spe-

[20] On the care of the masters in the schools of liberal arts about using teaching expedients and books of an elementary nature, so that such materials be made "accessible to mediocre minds" cf. Blanché 1973, 169.

[21] On the fundamental role of Porphyry's works as a preparation for the study of Aristotelian logic in the Middle Ages, cf. Pozzi 1974, 28, n. 85; Stump 1978, 238; Chadwick 1986, 165.

cific difference) from which the next *distinctio* arises.[22] This mechanism, therefore, allows the provision of a more and more detailed description of the objects contained in the *species infima* (or rather, in the final category produced by the various *subdistinctiones*) so that, in the end, it is possible to obtain a meticulous and particular definition from the totality of all the characteristics that distinguish the species involved in this process of progressive sub-distinction. This, as the outcome of the entire analytical reasoning process, forms the sum of all the distinctive qualities of the various species subjected to subdivision (this concept can be summarised in the Latin idiom: *Definitio fit per genus proximum et differentiam specificam*).[23]

The heuristic utility inherent in the mechanism of sub-division thus allows Porphyry to insert a series of *subdistinctiones* in *Isagoge* that serve to clarify the meaning and extension of the Aristotelian category of Substance. This type of genus is raised to a higher grade of diairetic reasoning and is gradually subjected to a meticulous deconstruction that breaks down the genus into pairs of antonymous species; subsequently one of these two species is subject to a further dichotomous *distinctio*, which in its turn becomes the genus of two new species.[24] In this way it was possible to follow a course of successive specification that led from the complex undifferentiated genus of Substance until one arrived at the *species infima* that coincided with mankind. The particularly ramified form assumed by the process of sub-division in the *Isagoge* manuscripts caused its medieval interpreters to give it the name *arbor porphyriana* (i.e., Porphyry's tree).[25] The final result of this "tree-like" process of discretion is the irrefutable demonstration that man—*species infima* of the chain of Porphyrian *subdistinctiones*—belongs to the genus of Substance.

The ramified course of *subdistinctiones* that leads from the genus (Substance) to the *species infima* (man), however, also allows one to obtain a detailed definition of the final category in the reasoning process. In this case it is the idea of "man" that can, as a consequence of the heuristic enrichment provided by the various *subdistinctiones*, be defined with scientific certainty as "bodily substance, living, sensitive, rational, and mortal." This description

[22] Differences or essential qualities combined with genus form the species and, therefore, "essential differences need to be considered in order to divide the genus into species. These differences must be such as to be reciprocally exclusive: they must be reciprocally opposite": Pozzi 1969, 11.

[23] On the descriptive function of *distinctio*, it has been said that "division has as its purpose the art of defining or of describing: it defines the species and it describes the individual things," because definition "is composed of direct genus and specific difference" (Pozzi 1992, 25); on this topic cf. Vanni Rovighi 1962, 69–70.

[24] A graphic model of the chain of sub-distinctions that occur in *Isagoge* is contained in Errera 1995, 19, n. 28, and in Schulthess and Imbach 1996, 57.

[25] "*Isagoge* suggests the idea of a tree only in a verbal sense, but the medieval tradition laid the project out visually": Eco 1993, 57. On the ramified tree-like method of sub-distinctions cf. Pozzi 1992, 16–25; Henry 1999, 35.

comes from the relationship that exists between the various species created by the progressive distinctions in the Aristotelian category of Substance, according to which man, as a rational mortal animal, belongs to the general category of bodily substances and to the sub-category of sentient animate bodies (Errera 1995, 19–20).

From the point of view of the gnostic system, the cognitive usefulness of an individual *distinctio* is, therefore, greatly enlarged and increased by the repetition of divisions, in so far as the linking of *subdistinctiones* constitutes an important logical mechanism of general applicability that is capable of offering a specialised definition of every element included within the *species infima* of a particular "tree" of distinctions.[26] This dichotomous mechanism, whose basic methods were clearly and easily explained by Porphyry, saw to it that the Latin translation of *Isagoge* became the best known and most widespread tract on the subject of *distinctio*—even the most important and authoritative book on logic—in use in the schools of liberal arts until the middle of the 12th century.[27]

3.1.4. The Epistemological Relevance of Distinctio *at the Time of the* Logica vetus

Distinctio and all the other logical structures based on it—like for example the chain of *subdistinctiones* of the *arbor porphyriana*—made up the most authoritative and powerful conceptual tool for acquiring knowledge present in the cultural inheritance of medieval civilisation before the method of syllogistic inference was reacquired and taken up as the basic system of scientific reasoning during the course of the 12th century. As already noted, knowledge of Aristotelian writings dedicated to syllogism was fragmentary at the time of the *logica vetus* and they were known about only through the indirect and incomplete tradition of the Stagirite's teaching contained in the works of Boethius. This lack leads us to the conclusion that the teachers of logic who were active in the schools of liberal arts until the middle of the 12th century (and that is those teachers who taught the rudiments of logic to the first Bolognese glossators, laying the basis of their cultural education) did not consider the difficult and little known discipline of syllogism as the principal technique for achieving a certainty that had the benefit of scientific value.[28] Rather, they pri-

[26] On the relationships between the technique of division and the possibility of arriving at a definition of an object that is subject to *distinctio* cf. D'Onofrio 1986, 183–91.

[27] For the determining role played by Porphyry's *Isagoge*—in the translation and with comments by Boethius—in the study of logic cf. Prantl 1937, 14 (where it is stated that the *Categories* and *Isagoge* "became the principal medieval scholastic texts on logic"), 297–9; Kneale and Kneale 1972, 264; Simondo 1976, 11–2; Gibson 1982, 58–9; Gilson 1983, 165–6; Fumagalli Beonio Brocchieri and Parodi 1996b, 12, 169; Maierù 1993, 286–7; Leff 1992, 314; Ashworth 1994, 352–6.

[28] The explanation offered by Boethius of hypothetical syllogism (the only explanation

vileged the gnostic efficacy of *distinctio*, which was simpler and more intuitive than the syllogism of Aristotle. For these reasons division was the most comprehensible and versatile tool for the acquisition of knowledge that could be made available to the sciences by the limited number of philosophical sources then known and studied.[29]

The logical method of *distinctio* in its Platonic format was essentially clearer and more accessible than Aristotle's syllogism, which instead was associated with complex operational rules aimed at avoiding the creation of logical aberration and paralogism. This fact, connected with the general decadence of culture and study in the early Middle Ages and the already noted disappearance of almost all of the Stagirite's works of logic, inevitably meant less propensity for the schools of liberal arts to deepen their knowledge of syllogism. Greater attention was paid by the teachers of the *logica vetus* to the easier diairetic method, which then came to be considered and described as the heuristic tool *par excellence*. In the 10th century, for example, Gerbertus of Aurillac (enthroned as Silvester II) re-echoed the words of Johannes Scotus by saying that "the art that divides the *genera* into *species*, and resolves the *species* into *genera*, is not the product of laborious human study, but has been identified by the sage in the nature of things themselves, where the Creator of all arts had put it."[30] At the start of the 12th century Peter Abelard, unanimously recognised as the most authoritative exponent of the *logica vetus* (Tweedale 1999, 51) dedicated only a small amount of space to syllogism when writing *Dialectica*: a manual that had been expressly conceived and written as a basic teaching aid for the study of logic.[31]

The undisputed pre-eminence of the dichotomous criterion, certainly known to all students of the liberal arts and generally applicable in every field of knowledge as a basic epistemological canon for all scientific disciplines,[32] thus imposed *distinctio* as the most efficacious tool of formal logic that the

available in the context of the *logica vetus*) has been judged "not without ambiguity": Weinberg 1985, 181. Knowledge of Aristotelian logic until the 12th century cannot therefore be anything but "limited and corrupted": Evans 1996, 42.

[29] "Aristotle had argued that Plato's method of division was no proof, and he sought principles of demonstration in causes rather than definitions. But the tradition of the logic which Abelard received from Boethius had been so thoroughly Platonised that demonstration had become division and definition": McKeon 1975, 176. With reference to the conflict between support for Plato's and Aristotle's theories, it has been underlined that "philosophy oriented itself mainly if not exclusively on Platonism until the twelfth century": Wieland 1987, 64.

[30] The passage cited in the text comes from Reade 1980, 382.

[31] Cf. De Ruggiero 1946a, 243; Blanché 1973, 161–2. On the limited knowledge Peter Abelard had of Aristotle's system cf. Ballanti 1995, 174.

[32] Porphyry's work on *distinctio* was held to be "indispensable in the schools," so that "one can well understand how, both for teaching and for study, one always began with *Isagoge*, which one of the Greek commentators had even indicated as a preliminary condition for eternal bliss": Prantl 1937, 14.

early glossators—deeply influenced by the culture of logic studied in the liberal arts cycle—could avail themselves of. At the beginning of the 12th century it was this tool that was used to build the new legal doctrine that was destined to develop with the explanation and interpretation of the rediscovered sources of Roman law.[33]

3.1.5. The Role of Distinctio *in the Field of Legal Science*

The earliest application of *distinctio* for the study of Justinianian legal texts took place in the scientific reflections produced for teaching purposes by the early teachers at the Bologna *Studium* and were handed down in explanatory notes (i.e., the glosses: a term that gave its name to the entire school) written on the parchment sheets of the *Corpus iuris civilis* (Weimar 1973, 170–1, 227; Dolezalek 1994). The use of dichotomy is already evident in the older layers of glosses, where glosses exist that are believed to be by Irnerius and his pupils. These are based on a lucid use of *distinctio* and allow the building of a doctrinal structure inside which the conglomeration of rules and principles contained in the fragmentary Justinianian legal collection could be placed.[34] On this point, we need to remember that the *Corpus iuris civilis* was a gigantic compendium in which the Byzantine editors of the 6th century had collected and put together the many dissimilar and heterogeneous source documents resulting from a Roman legal tradition that covered many centuries. Consequently, the endless collection of texts that were compiled on Justinian's orders from the laws, ended by suffering not only from redundancy and incoherence, but above all from the absence of an overall doctrinal organisation of their various legal institutes. The treatment of every argument therefore remained fragmented in numerous different passages within the same compilation, with the effect that similar or closely connected laws—which would have needed a uniform doctrinal treatment and one single classification—were located in remote and unrelated parts of the same Byzantine anthology of sources.

However, the jurists held an unshakable theoretical conviction that they would be able to find all the legal knowledge assembled in a harmonious and

[33] "The scholars of logic in the Middle Ages took full advantage of Porphyry's text, grasping the distinction that the predicates contributed to an understanding of categories as much as they were of use to the advancement of division and definition, and in the end to scientific demonstration": Padellaro 1970, 45. As regards Porphyry's tree in particular, we need to consider that "all of the Middle Ages were dominated by the belief (even if unconsciously) that the tree mimicked the form of what was real": Eco 1993, 68. In general on the preparatory role played by the study of the *trivium* arts for the training of medieval jurists cf. Otte 1971, 30; Gualazzini 1974, 31–5, 41; Piano Mortari 1979, 57; Wieacker 1980, 59, 66–7, 71; Gaudemet 1980, 11; Cortese 1982a, 219–20; Paradisi 1994, 873, n. 26.

[34] Cf. Wieacker 1980, 72–4. A detailed examination of the use of *distinctio* in the glosses of the earliest Bolognese teachers can be found in Meyer 2000.

coherent set of irrefutable normative principles. The fragmentary and disjointed nature of Justinianian work made it necessary for the interpreters to invent a rational classificatory system to make it easier to study and memorise the complex normative system contained in the *Corpus iuris civilis* (Grossi 1997, 157).

The glossator's intention was to identify and indicate any analogies or differences that existed between the many Justinianian institutes if they bore such a significant affinity (or a direct and explicit similarity) as to require the use of systematic classification, even if these institutes were found in completely different passages of the collection. Not only all the homogeneous aspects of the different laws on the argument under consideration, but also all possible discrepancies existing between them could find an organic and coherent place in these systems of classification (Errera 1999, 55–60).

The logical method that the jurists regarded best adapted to this systematic restructuring was *distinctio*. Using this method the interpreter subjected the legal principle contained in the source document to a process of division. This made it possible to emphasise the difference between the institutes contained in the glossed legal text and the other institutes in the *Corpus iuris civilis* which, although belonging to the same general legal category, had elements of incompatibility or a directly antithetic character (Otte 1971, 73–97; Otte 1997). In brief, the use of *distinctio* allowed the identification and specification of the differences between those legal precepts intended to regulate analogous, but not entirely similar, legal concepts. The most suitable way of achieving this systematic re-construction of the Justinianian institutes proved to be the drawing up of classifications which, using a few clear conceptual distinctions, provided a clear overall organisation of the discipline in question. On this subject, the *Magna Glossa* produced by Accursius (about the middle of the 13th century) clearly stated that "*divisio est innumerabilis materie brevis compositio.*"[35]

From the very beginning the teachers of the glossators' school in Bologna had conceived different series of *distinctiones* aimed at setting out an exhaustive systematic framework for all that material in the Justinianian collection that had been so completely without an appropriate classificatory system.[36] To cite only some of innumerable possible examples, the Bolognese teachers ap-

[35] "Division is the creation of a synthetic scheme for a wide subject": Accursius 1489, 42*va*, gl. *divisio* ad Inst. 3.13.1. This definition of *divisio*, however, comes from pre-Bolognese times: cf. Errera 1995, 111, n. 52.

[36] The *distinctio* criterion had always been applied in the glossators' school from the beginning: cf. Seckel 1911, 284, 286–8. On *distinctio* as a criterion for drawing up glosses cf. Genzmer 1935, 345–58; Kuttner 1937, 208–11; Paradisi 1962, 302–6; Bellomo 1963, 115–20; Legendre 1965, 365; Paradisi 1968, 629–30; Paradisi 1976, 226–8; Kantorowicz and Buckland 1969, 215; Weimar 1969, 62; Weimar 1973, 142–3; Piano Mortari 1976, 18–9; van Caenegem 1981, 27; Cortese 1982a, 251–2; Fransen 1982, 143; García y García 1994, 230.

plied *distinctio* to give an appropriate order to the doctrine of possession (distinguishing between *possessio naturalis*, natural possession, and *possessio civilis*, civil possession), to title (with the division between *dominium directum*, direct or outright title, and *dominium utile*, effective title), to usufruct (*distinctio* between *usufructus formalis*, usufruct without declared cause, and *usufructus causalis*, usufruct with declared cause), to tenure (*emphyteusis propria*, regular tenure, and *emphyteusis impropria*, irregular tenure), to the law of contract (with a distinction between *pacta nuda* and *pacta vestita*, that is, between "bare" and "enforceable" contracts), and to the subject of legal cause (through the dichotomy between *causa impulsiva*, impelling cause, and *causa finalis*, final cause).[37]

Distinctio had a highly taxonomic effectiveness as can be seen from the extent and importance of its application. This is confirmed by the presence—above all in the older layers of glosses—of synoptic tables where the logical procedure of division is shown graphically instead of verbally. In this type of annotation, which the historians labelled distinction tables, the classification is achieved by a drawing intended to illustrate the theoretical concept. *Distinctio* is expressed by placing all the categories in a drawing where the interconnecting relations between the genus and the species are shown by lines drawn in ink. From a teaching point of view, the changing of a descriptive *distinctio* into a graphical model gave the diairetic method an even greater teaching strength vis-à-vis the already recognised usefulness of division. As a result, the immediate comprehensibility and clarity of the synoptic table gave the graphic portrayal of *distinctio* a most important and significant role among the various explanatory techniques in use at the time by the early Bolognese teachers.[38]

The pre-eminent position of *divisio* among the hermeneutic tools at the disposal of the glossators is also shown by the intention to preserve the results of its use and hand them down in a separate form from that of the graphic glosses. This was done by creating a specific class of works entirely for this purpose. All the numerous *distinctiones* that arose from reflections on the text of the *Corpus iuris civilis* (and originally expressed in the form of notes in the margin of the legal text) were in fact, in time, reunited and transcribed in their own distinct and homogeneous collections. *Distinctiones* were thus able

[37] An overall picture of the importance of *distinctio* for the systematic reconstruction of all these institutes in the glossators' school is found in Wesenberg and Wesener 1999, 54–64. On the importance of the dichotomy between *dominium directum* (or *dominium plenum*) and *dominium utile* cf. Grossi 1968, 144–59; Grossi 1992, 61–3.

[38] The expression "loose distinction - tabular distinction" was used by Besta 1925, 811; Brugi 1936, 29–30. On tabular distinctions cf. also Seckel 1911, 281; Genzmer 1934, 397–403. Apropos of the form of distinctions, Kantorowicz stressed that "if the subject-matter was a legal concept, the form of the distinction was often, especially in the oldest times, that of a genealogical table": Kantorowicz and Buckland 1969, 215.

to acquire their own dignified place among the various works in use in Bologna.[39] The presence of the many collections of distinctions that were created in the course of the 12th century supplies further confirmation of the usefulness that the early glossators recognised in the dichotomous method as a basic tool for the study of and classification of law.

In essence, the application of the logical technique of *distinctio* created by the Bolognese jurists made it easy for the interpreter to master the rich and chaotic mass of legal remedies offered by the Justinianian collection. This was done by breaking down the legal material into an articulate, rigorous and schematic sequence of clear and elementary divisions. Each of these was suitable for illustrating both the link each institute had with the overall category it belonged to, and the particular difference that same institute had with respect to the other (and different) legal instruments in the same general legal category.

3.1.6. The Highpoint of the Doctrinal Development of Distinctio *at the Glossators' School: The "Tree" of* Subdistinctiones

For the entire 12th century the Bolognese school of law knew about and were accustomed to using dichotomy for drawing up glosses and creating appropriate collections of *distinctiones*.[40] But certainly the most daring and complicated application of *divisio* occurred only at the end of that same century in the work of Johannes Bassianus, who refined a method of classifying legal actions based on the technique of *subdistinctio*.

The difficulty of classifying the numerous *actiones* (i.e., legal actions) found in the Justinianian compilation had been a matter that the Bolognese teachers had turned their attention to from the very moment the school had started. In fact, the *Corpus iuris civilis* indicated some categories of actions resulting from a series of general divisions, but this limited categorisation very soon proved to be insufficient for providing a complete and correct view of the subject. This therefore induced Irnerius and some of his pupils to invent a more articulate and complex taxonomic system founded on the application of *subdistinctio*.[41] The attempts to reach an exhaustive classification of legal *actiones* had followed uninterruptedly one after the other with an ever more consistent use of the *subdistinctio* tool. Eventually Bassianus, taking note of the models already created by his predecessors and developing the method further, arrived at a general classificatory system capable of capturing all the

[39] Indexes of the glossators' *distinctiones* were drawn up by Seckel (cf. Seckel 1911) and by Pescatore (cf. Pescatore 1912). A listing of the main *distinctiones* and of the collections of *distinctiones* that have survived, as well as those given in their own modern editions, can be found in Weimar 1973, 229–37.

[40] As regards the glossators' predilection for dichotomous *distinctio* cf. Carcaterra 1972, 291–3.

[41] On *subdistinctio* and on the *subdistinctiones* pyramid cf. Otte 1971, 87–95.

actiones of Roman law in a single, great, all-inclusive scheme that was given the name of *arbor actionum* (i.e., the tree of legal actions).[42]

The operation of the *arbor actionum* is exactly the same as in the chain of *subdistinctiones* that characterises Porphyry's *arbor*, mentioned above: It consists of a progressive subdivision of general categories that allows one to arrive, at the end, at a *species infima* that coincides exactly with each of the Justinianian *actiones*. The heuristic efficacy of the *arbor porphyriana*, applied in this case to the Roman law of legal procedure, therefore allows one to obtain an exhaustive description of every individual *actio* from the chain of sub-divisions that make up the *arbor*. The assembly of information so recovered—usefully synthesised by Bassianus using an original system of symbols—is ideal for establishing a satisfactory overall classification of the entire subject of procedural *actiones*.[43]

The taxonomic aspect that governs the structure of the *arbor actionum* shows that the most complex and advanced gnostic precept applied by the scientific disciplines in the cultural context of the *logica vetus*, namely, the *arbor* of *subdistinctiones*, was also ingeniously used by the Bolognese jurists to make it easier to study and to create the doctrine of the Roman law of legal procedure. Indeed, we should emphasise that not only Bassianus (defined by his contemporaries as an expert in the liberal arts: *extremus in artibus*), but also the earlier glossators (for example, Irnerius and Martinus Gosia) easily mastered and freely applied diairetic methodology. This is shown by the many types of classification that followed one another in the course of the 12th century which provided a satisfactory classification of legal *actiones* using the *subdistinctio* criterion. This criterion was the most refined technique for acquiring knowledge that the *logica vetus*—the one form of logic known about until the middle of the 12th century—could put at the disposal of scientific research. From all this we can see how the earliest generations of Bolognese teachers had already fully acquired and taken shrewd advantage of the heritage of *distinctio*-based technical tools that the *dialectica* of the liberal arts schools of their time had offered, by ably and shrewdly adapting the basic gnostic criteria to legal studies.[44]

3.1.7. The Eminent Role of Distinctio *in the Formulation of Doctrine in the Early Decades of the Glossators' School: The* Quaestiones legitimae

As has just been highlighted, the powerful taxonomic quality of *distinctio* had made the glossators appreciate diairetic technique for its systematic effective-

[42] For all this doctrinal evolution refer to Errera 1995, 121–316.

[43] The complete reconstruction of the classificatory method in Johannes Bassianus' *arbor actionum* can be found in Errera 1995, 290–310.

[44] For example, on Irnerius' competence in the use of the *dialectica* tools cf. Meyer 2000, 88–94.

ness and use it widely in the course of the 12th century. They appreciated its usefulness in delineating and organising classificatory categories, which helped in the systematic reconstruction of the Justinianian legal institutes. All this led to a general application of the *divisio*-based conceptual procedure as a criterion of general classificatory use to help in the learning and memorising of legal principles and also using synoptic schemes. We might recall the Bologna school maxim "*Qui bene distinguit, bene docet*" ("Who distinguishes well, teaches well") as evidence of the use made of *distinctio* for teaching purposes.[45]

However, besides this strictly taxonomic role, dichotomy also had a valuable and powerful hermeneutic efficacy, summed up by the glossator Placentinus with the phrase: "*Quanto magis res omnis distinguitur, tanto melius aperitur*" ("the more a thing is subject to distinction, the better it is understood").[46] In other words, in cases where the qualification of a legal principle was a problem, recourse to *distinctio* allowed the argument in dispute (genus) to be resolved into its different individual aspects (species) so as to help solve the problem of explanation by the identification and differentiation of the terms in conflict.

In the early period of the glossators' school's activities, this hermeneutic use of division showed itself to be the determining factor in the development of Bolognese scientific reflection and allowed the glossators to achieve significant doctrinal advances. The anthological nature of *Corpus iuris civilis* already noted had in fact generated—despite the attempts made by its Byzantine compilers to harmonise it—a flood of contradictions between the different sources, and the presence of these legal antinomies greatly worried the glossators who regarded any contrast between passages in the Justinianian collection of texts as unthinkable. On this point, it has already been said that the study of legal texts from the Roman era was characterised by the Bolognese teachers' resolute confidence in the fundamental coherence and absolute agreement of all the rules described in the various parts of *Corpus iuris*. Every declaration was considered endowed with an unchallengeable *auctoritas* deriving both from its antiquity and, above all, from the divine inspiration that permeated the imperial legal choice. Since all the legal principles contained in *Corpus iuris civilis* had necessarily to be considered beyond criticism (and for that reason also perfectly harmonious), it followed that the discovery of any contradiction between the sources was inevitably attributed to the ignorance of the legal interpreter, who had not, as yet, managed to reveal the necessary systematic connection between the apparently conflicting norms (Errera 1999,

[45] The maxim is cited by Brugi 1921a, 55; Brugi 1936, 30.

[46] Placentinus 1535, 18, II.1 (*De rerum divisione*); the passage is also published in Seckel 1911, 373, n. 5. The same passage by Placentinus is restated substantially unchanged by Pillius: "*Verum quia res omnis quanto magis distinguitur, tanto melius aperitur, multiplex a nobis subiciatur divisio*" ("In reality, since the more one subjects each thing to distinction the better one understands it, we propose an articulated division of the matter under examination": cf. Seckel 1911, 373).

77–81). Consequently, the problem of resolving the incoherencies present in the Justinianian compilation became an ineluctable necessity for the school. Without first resolving every problem of internal cohesion in the assemblage of laws being studied, they would not have been able to progress in the construction of a complete and homogeneous doctrinal system based on the *Corpus iuris civilis*.[47] Furthermore, towards the middle of the 12th century, the same need to resolve legal antonyms also inspired reconciliation between the *auctoritates* (authoritative sources) of Church law that then led to the compilation of Gratian's *Decretum*. This work became the foundation on which—again in Bologna—a school was created centred on the study of canonical law through the explanatory method provided by the gloss.[48]

The attention the glossators dedicated to the problem of doubt in Romano-canonical law led to the birth of a specific hermeneutic activity directed towards reconciling the *contraria* (of the antonymous sources) by the identification of suitable *solutiones contrariorum* (solutions to contrasts among the sources) capable of resolving the inadmissible contradictions present in the legal texts.[49] The work from the glossators' school that conserves the records of this specific activity is the *quaestio legitima*, which both mentions the contrasting dialectical positions between the sources (the identification of the *contraria*) and indicates the *solutio* used to resolve the dilemma and the problem of legal coherence the dispute was about.[50]

The identification of the suitable *solutio* in a *quaestio legitima*, however, involved finding an explanation of the legal contrast so as to reconcile the

[47] At the start of the 12th century, Peter Abelard had become involved with the problem of the method of removing apparent contradictions between equally authoritative texts. In *Sic et non* he indicates the logical tools (of a prevalently Platonic nature) needed to uniformly and rigorously overcome the discrepancies between the *auctoritates* and so to arrive at a construction of truth founded on basic criticism. See in this regard Reade 1980, 388–91, who indicates (on page 390) that for Abelard, the main tool for resolving doubts was to "bear in mind the different meanings of words and their various use by different authors." Also on this topic cf. Codignola 1954, 286–7; Garin 1969, 55–6; Alessio 1994b, 96–7.

[48] The first part of Gratian's *Decretum* in fact consists specifically of *Distinctiones* aimed at showing the *concordia* (harmony) existing between the sources of apparently discordant canon law: cf. Stickler 1950, 208–9. Finally on the *Decretum* cf. Winroth 2000. The same *distinctio* method (although with necessary differences) also forms the basis of Peter Lombard's *Liber sententiarum* produced towards the middle of the 12th century, a text that would become fundamental to the study of theology: cf. McKeon 1975, 185; Alessio 1994c, 130–6. On the relationship between the logic of Abelard and jurisprudence cf. Giuliani 1966, 183–216.

[49] Cf. Cortese 1992b, 468–9. About the *contrarietates* in Byzantine legal texts cf. Pringsheim 1921, 212–9.

[50] Cf. Kantorowicz 1939, 2–31; Stickler 1953, 580–1; Weimar 1973, 222–3; Schrage and Dondorp 1992, 33. For a recent synthesis of doctrinal reflections on the *quaestio* method and on the *quaestio legitima* works cf. Errera 1996, 510–3, n. 30. Finally, as regards the particular type of *quaestio legitima*, called *quare*, which has its own classification in the glossators' school cf. Schulz 1953.

antonymous sources. This explanation indicated the irrelevance (or even more the non-existence) of any conceptual conflict, even if at first sight apparently irresolvable, that existed between the texts being examined.[51] The most effective tool that the glossators had for resolving the contrast without negating the *auctoritas*—and therefore the legal validity—of both conflicting sources, was once again, the use of dichotomy. The interpreter was able to go back to *distinctio* to explain how the two apparently contradictory institutes, while belonging to the same common legal genus, were in reality two different species of that same genus, distinguished by a *differentia specifica* that justified the diverse discipline: "*Contraria tolluntur legis divisione*," that is, "the solution of the contrasts between the sources lies in the conceptual division of the legal text" (Paradisi 1962, 302–5; Otte 1971, 168; Piano Mortari 1979, 59). For this reason *distinctio* on the one hand permitted the preservation of harmony and a reconciliation of the sources (inasmuch as recourse to *divisio* confirmed that both the conflicting institutes belonged in reality to the same common genus), but on the other hand it allowed the distinctiveness of each legal principle to be highlighted. This was really because dichotomy, typical of logical tools, demanded that the contrasting institutes be necessarily antithetic and irreconcilable, insofar as antonymic species are born from a *distinctio* and are therefore characterised by an ineluctable discrete *differentia*.

In conclusion, recourse to the *distinctio* method allowed the glossators of the 12th century to use a tool that was valid both hermeneutically and taxonomically and which showed it possible to harmonise and co-ordinate legal sources that, besides often being contradictory, were also lacking an overall systematic organisation of their institutes. In short it was the use of the versatile diairetic method offered by the *logica vetus* that allowed the early Bolognese jurists to create an effective doctrinal system. Thanks to this they were able to use epistemological rigor and accuracy to analyse and co-ordinate the innumerable legal institutes in Roman and canon law that lacked agreement and an adequate taxonomic order. *Distinctio* therefore represents the cornerstone used by the earliest civil and canon law glossators to build the fundamental dogmas of the science of law and to transform—respectively—the thitherto unrelated source documents of the Justinianian *Corpus* and the het-

[51] In this sense the Bolognese *quaestio legitima* corresponds exactly with the *quaestio* technique applied in the schools of philosophy and theology: cf. Bellomo 1974a, 76. For example, Gilbertus Porretanus (1076–1154) in the first half of the 12th century considered *quaestio*, that he had learnt at the Laon school, as "composed of an affirmation and a negation that contradicts it, each of which seems true. The solution consists in examining the two positions, showing how they are ambiguous; once reformulated in an unequivocal way, the affirmation and the negation will not be contradictory any longer": Puggioni 1993, 39. Peter Abelard said on this that "*Dubitando ad inquisitionem venimus; inquirendo veritatem percipimus*" ("Through doubt we arrive at the question, and thanks to the question we perceive the truth": this passage is cited by Garin 1969, 55).

erogeneous canonical legislation into a structured, harmonious and coherent unitary legal system.[52]

3.2. The Advent of the *Logica nova* in the Second Half of the 12th Century and the Evolution of the *Quaestio* Works

3.2.1. The Rediscovery of Aristotle's Works on Logic and the Birth of the Logica nova

The cultural background and epistemological approach resulting from the use of the methods provided by the *logica vetus* were radically transformed towards the middle of the 12th century when the content of the *dialectica* known and studied in the schools of liberal arts underwent profound changes.[53] This decidedly abrupt and disruptive change was produced by the rediscovery of a vast quantity of Greek philosophical works that had been completely unknown in the Latin world (or little known), but that had on the other hand inspired a lively doctrinal discussion in the Byzantine, Arabic and Jewish worlds and had, consequently, helped the scientific development of those cultures (Vignaux 1990, 46–7). The longing to fill the gap created in the Christian West by the ignorance of the valuable classical writings had the effect of giving birth to an impressive scientific movement directed to the study and teaching of the ancient philosophical doctrines that had fallen into oblivion in the early Middle Ages. A crucial role in the achievement of this was played by the gradual translation that took place, above all in Sicily and the Iberian peninsula, of the original Greek writings (or of their subsequent Arabic versions) into Latin.[54] In fact, a general ignorance of Greek in the schools

[52] We need to bear in mind that some of the earlier glossators were particularly well versed in *dialectica* and also used the Aristotelian technique of syllogism with a certain familiarity (certainly in Irnerius's case), but Irnerius' ability to use inferential logic was not common among his contemporary glossators, to the extent that only the teachers at the end of the 12th century managed to equal the Aristotelian-type argumentative technique of the school's founder: cf. Otte 1971, 140–1.

[53] As generally regards the transformation of the scientific knowledge produced in the 12th century, it has been written that "the traditional frameworks within which medieval thinkers had organised their own knowledge are not capable of accepting and ordering the new doctrines and the new material that came to enrich Western culture in a systematic way": Fumagalli Beonio Brocchieri and Parodi 1996b, 213. The novelty in the study of logic therefore signalled "a moment of profound transformation in the methods and structure of knowledge, a running crisis in cultural ideals": Garin 1969, 28.

[54] "Thirst for knowledge," "desire for redemption," and "sense of cultural inferiority" are spoken of to describe the cultural situation of the Christian West compared with the Greek philosophical culture in the 12th century: Bianchi 1997a, 3. On the activity of translating Greek works into Latin, on the main centres producing translations and on the methodological problems faced by the translators cf. Blanché 1973, 163–4; Reade 1980, 403–7; Knowles 1984, 251–61; Rossi 1994; Fumagalli Beonio Brocchieri and Parodi 1996b, 209–13; Bianchi 1997a, 3–17.

and in the universities of the West had hampered direct knowledge of the works, which had been available only in the original text. This situation of linguistic unintelligibility had made the Hellenic cultural heritage totally inaccessible until the first translations produced in the course of the 12th century had started to become widespread.[55] The same Bolognese teachers from the glossators' school were completely unable to understand Greek, as is shown by the fact that passages from Byzantine sources written in that language were accompanied—at least until a suitable Latin translation was produced—by a single, laconic note that indicated the absolute inability of the jurists to understand their meaning: "*Graecum est, legi non potest*" ("It is written in Greek and therefore cannot be studied").[56]

Also as regards *dialectica*, at the time of the *logica vetus* the general lack of Latin versions had produced a complete ignorance of some of the fundamental manuscripts of Greek thought. These therefore remained completely absent from the Christian cultural scene until the feverish activity of the translators in the 12th century allowed a basic linguistic comprehension, necessary to embark on a reading and understanding of the philosophical doctrine of classical Greece, to be included in the studies of medieval universities.[57] In particular, the most significant discovery in the field of logic undoubtedly concerned the acquisition of a full and complete knowledge of Aristotle's *Organon* (not from an abbreviated and abridged form, as had happened in the past). This was made possible not only by the recovery and translation of some of the Stagirite's fundamental works that had previously been totally unknown, such as *Prior Analytics*, *Topics*, and *Sophistici elenchi*,[58] but also by the new and better understanding of some works that, although already known in the context of the *logica vetus* like the *Categories* and *De interpretatione* (*On Interpretation*), had not been studied in relation to the overall doctrine resulting from the discovery of the other Aristotelian texts.[59] The majority of the

[55] Cf. Evans 1996, 37–8; De Libera 1999a, 293–4. On the fundamental role of Latin in the context of medieval learned culture cf. Haskins 1972, 111–20; Verger 1999, 17–25.

[56] Cf. Calasso 1954, 524. Burgundius Pisanus (1110–1193 ca.) was the first to translate the Greek passages of *Digesta Iustiniani* into Latin; on Burgundius cf. Liotta 1972, 423–8; Classen 1974. In general on this topic cf. Troje 1971.

[57] As regards the inaccessibility of works written in a different language to Latin it has been noted that "the *translatio studii*, the transmission of knowledge, could happen solely in the form of *translatio linguarum*, of a linguistic transposition": Bianchi 1997a, 2.

[58] On the rediscovery of Aristotle's works on logic cf. Prantl 1937, 177–95; Padellaro 1970, 17; Grabmann 1980, vol. 2: 86–102; Knowles 1984, 256–7. In particular sophist theory was completely unknown to the *logica vetus*, so that "it is not by chance that the new interest in Aristotle of the twelfth century started with the effective introduction, in study and doctrinal analysis, of the rediscovered Boethian version of *Elenchi Sofistici*": Minio-Paluello 1972, 757–8.

[59] The medieval authors, deprived of any real historical and philosophical knowledge about the formation of Aristotle's works, saw the *Organon* as a coherent and systematic course of logic: cf. Ebbesen 1999, 22; De Libera 1999a, 337.

new translations of the *Organon* (as well as the re-acquisition of some old and forgotten Boethian translations of Aristotle's writings) were produced in the second or third decade of the 12th century, with the one (but important, as we shall shortly see) exception of the *Posterior Analytics* text, where instead the first versions appeared only about 1150.[60]

The study of these important and fundamental works by Aristotle—finally translated into Latin, and so understandable again—gave rise to a new order of principles and gnostic rules in the study of scholastic philosophy.[61] This was so marked that the arrival of the new conceptual approach in the first half of the 12th century made the new logic distinct from the early medieval logic (*logica vetus*), which was still devoid of the majority of the ideas contained in the *Organon*. From the middle of the 12th century logic showed itself to be inescapably linked to the general scientific changes the rediscovery of the Stagirite's teachings had caused, even taking the name of *logica nova* (the new logic). Added to all this, the period between the end of the 12th century and the start of the 13th saw the rise of the *logica moderna* (modern logic), which represented a further development in the thought and heuristic methods of the medieval "Terminist" philosophers, and integrated and completed the tools offered by Aristotle's *Organon*.[62]

However, this did not mean that the earliest translations of the *Organon* had immediately produced a wide and profound knowledge of Aristotelian logic, even at an elementary level of academic study. A slow progress was imposed by the laborious manual transcription of the newly translated texts and by the need to radically change the centuries-old conceptual positions held by the teachers of *dialectica* in the liberal arts schools. This very likely contributed to slow up and obstruct the reception of the new teachings for some time.[63] However, the process of popularising the new philosophy—initially limited to universities—soon spread with a growing and irrepressible vitality

[60] On the various translations of Aristotle's works on logic, and on the times when they were produced cf. Minio-Paluello 1972, 749; Abbagnano 1993, 523–4; Evans 1996, 42.

[61] On the significance of and problems with the terms "scholastic method," "scholastic philosophy" and "scholastic logic" cf. Blanché 1973, 159–60; Grabmann 1980, vol. 1: 43–53; Reade 1980, 383; Fumagalli Beonio Brocchieri and Parodi 1996b, 265–6. On Scholasticism in general cf. Agazzi 1954, 221–38.

[62] Cf. Haskins 1972, 288–9; Blanché 1973, 164; McKeon 1975, 167–9; Reade 1980, 400; Weinberg 1985, 163; Fumagalli Beonio Brocchieri and Parodi 1996b, 191. Concerning *logica modernorum* (the logic of the "Terminists") cf. Roncaglia 1994, 283–98; De Libera 1999a, 362–71; De Libera 1999b.

[63] On the desirability of not emphasising the immediate cultural effects produced in the Middle Ages by the rediscovery of ancient works and teachings cf. Minio-Paluello 1972, 763–6; Bianchi 1997a, 18. In fact a temporal hiatus exists between the translation of Aristotle's works and their general acceptance in the schools (cf. Knowles 1984, 257). For example it has been shown that Aristotle's works on logic only rarely appear, and then with some delay (not before the beginning of the 13th century), in monastery libraries: cf. Grabmann 1980, vol. 2: 99.

to all the lower levels of the educational system. In the course of the second half of the 12th century,[64] the schools became increasingly aware of the ongoing cultural revolution and started to ensure that the new generations of students—and so also the minds of the future Bolognese teachers—had fully absorbed the heritage of scientific techniques and methods introduced by the freshly acquired knowledge of Aristotle's works.[65] Starting from the middle of the 12th century, the rediscovered teachings of the *Organon* no longer remained the prerogative of an erudite few, but gradually achieved a general level of diffusion through the basic teaching given in the liberal arts schools (Knowles 1984, 258; Bianchi 1997b, 30). In the course of the 13th century the spread of learning necessitated the production of preparatory and elementary handbooks specifically designed to simplify understanding in the schools of the complicated Aristotelian logical structures. These texts, therefore, contributed to further a general and uniform cultural assimilation of the innovative and fundamental logical ideas found in the rich collection of gnostic tools provided by the *logica nova* and the *logica moderna*.[66]

[64] To identify the second half of the 12th century as the period when the Aristotelian texts started to become widespread and well known, following their rediscovery and translation in the first half of the century, cf. Minio-Paluello 1972, 749, 766. On this point cf. Knowles 1984, 251, who fixes the period between 1140 and 1170 as the end of "ancient logic." The beginning of the effective assimilation of Aristotle's works began in the last quarter of the 12th century, but Aristotelian thought only became the accepted philosophical reference system "starting from the first decades of the 13th century": Rossi 1994, 178. We must also remember that the teaching of the *logica vetus* had been a prerogative of the monastic schools, while *logica nova* was taught in the town schools—Episcopal, but rarely lay—that sprang up at the start of the 12th century: cf. Manacorda 1914, t. 1: 269–80; Codignola 1954, 270–5; Puggioni 1993, 46; Fumagalli Beonio Brocchieri and Parodi 1996b, 259; De Libera 1999a, 290, 295. In general on the medieval structure of school instruction see the description given by Merlo in Tabacco and Merlo 1989, 608–18.

[65] On the propulsive role of the universities in the rediscovery, study and teaching of Greek philosophical thought cf. Bianchi 1997b, 25–48; De Libera 1999a, 345. The pre-eminence of the study of dialectic with respect to other fields of secular knowledge at the time of *logica nova* is shown by Tweedale 1993, 71. The predominance of logic in humanist literature between the 12th and the 14th centuries is also seen and extolled by contemporaries, as happens in "Battle of the Seven Arts" by Enricus of Andeli, a work from the beginning of the 13th century which describes how grammar, having gone to war, is routed by dialectic (cf. Gilson 1983, 495–7; De Libera 1999a, 293; also on this topic cf. Garin 1969, 15–27).

[66] On the handbooks of logic compiled to assist in an understanding of the teachings of the *Organon*, as for example Peter of Spain's *Summulae logicales* (he was elected Pope in 1276 taking the name John XXI), William of Shyreswood's *Introductiones in logicam*, Lambert of Auxerre's *Dialectica*, cf. Dal Pra 1960, 463; Vasoli 1961, 314–5; Blanché 1973, 164–5; Pozzi 1992, 6; Abbagnano 1993, 595–7; Fumagalli Beonio Brocchieri and Parodi 1996b, 332; Bianchi 1997b, 35. For the relationship between language and logic, particularly relevant in the *logica modernorum* of the "Terminists" of the 13th century, cf. Markowski 1981.

3.2.2. The Syllogistic Method

Certainly the most relevant aspect of the new gnostic approaches that resulted from the complete knowledge and deeper understanding of *Organon*—and that would show itself to be the harbinger of significant consequences for the subsequent development of Western scientific thought—concerned the complete re-acquisition of the technique of syllogism. It was the lynch-pin of Aristotelian logic and a potent heuristic tool that was able to radically replace the *distinctio* method that had been so widely used until the middle of the 12th century in the culture of the *logica vetus*, at least as regards the epistemology of scientific reasoning.[67]

In his writings, Aristotle proposed a model for logical argument based on three fundamental theories and on a further three theories concerning their practical application. The fundamental theories were: the theory of terms, the theory of propositions and the theory of valid inferences or syllogisms, which were explained, respectively, in the *Categories*, in *De interpretatione* (*On Interpretation*), and in *Prior Analytics*. The theories concerning their application (i.e., the theories of apodictic argument, probable argument and eristic argument) were described in *Posterior Analytics*, in *Topics*, and in *Sophistici elenchi*. Taken together, these theories (*Organon*) unified the study of the different aspects of syllogistic teaching and so allowed a complete mastery of the Aristotelian technique of inferential reasoning (Schulthess and Imbach 1996, 40–1; Casari 1997, 4–5). The complexity of the logical principles to be respected in order to formulate inferences, created a need to understand all the *Organon* texts governing the application of syllogistic logic. These inferences had to be not only valid (to reach logical conclusions by the correct use of syllogism) but also true (to identify conclusions where, besides a correct formal use of syllogism and a technical exactness in the results achieved, one could assume the logical consequence of the inference as truthful—and not just as rationally plausible). The intention was, therefore, to avoid the formulation of fallacious (eristic) reasoning and aberrant paralogism.[68] This general methodological ap-

[67] On syllogism in Aristotle's thought cf. Negro 1968; Ross 1977, 32–8; Thom 1981. The antithesis between Plato's gnostic system and that of Aristotle depended on the fact that the Platonic dialectic imposed "at every step the choice of initial definitions and the testing of these definitions by means of subsequent division or by their consequences. This selective characteristic radically distinguishes dialectic from the deductive process (which is necessarily demonstrative) that Aristotle believed implicit in the nature of all science": Abbagnano 1993, 126. The radical novelty of the scientific theory introduced by the Aristotelian texts caused a general change in the previously accepted "system of interpreting the world" (cf. Wieland 1987, 67), insofar as the translation of Aristotle's works on logic "in turn influenced the thought and methods of the schools": Knowles 1984, 256.

[68] Cf. Abbagnano 1993, 196. Logic in this sense is the science of the "valid form" of reasoning, namely, the study of the criteria used to distinguish correct from incorrect reasoning: cf. Ciardella 1991, 27–30; Bucher 1996, 13–7. On eristic argument and paralogism cf. Berti 1987, 128.

proach would remain—despite subsequent additions and re-formulation—the basic framework for all formal logic until modern times.[69]

The syllogistic form in particular is the vital cornerstone of the entire complicated heuristic Aristotelian system[70] and provides a proper way of obtaining a coherent deduction (an inference) from two premises that are invariably seen (both in classical and medieval times) as linguistic propositions. Aristotle himself affirmed in *Prior Analytics* that "a syllogism is a sentence in which certain things being laid down, something else different from the premises necessarily results, in consequence of their existence."[71]

In this conceptual framework, the theory of terms and the theory of propositions offer the necessary semantic methodological base for understanding the value of the grammatical elements (subject, copula, predicate) and the significance of their correlation inside different possible linguistic propositions (affirmative universal proposition, particular affirmative, universal negative, particular negative).[72] In fact, medieval logic—which ignored the present day semiotic expedients made possible by meta-linguistic and symbolic languages—remains closely linked to the Latin constructions used to express the concepts under investigation. Consequently, the correct qualification of the terms of discourse and the certain identification of their semantic value appears essential for a correct definition of the content of the propositions, on which—as necessary premises of the inference—one must base all syllogistic reasoning.[73] A clear definition of the significance of the expressions used as presuppositions in the inferential logic process, therefore, represents a preliminary and

[69] Above all, the three fundamental theories remained unaltered: cf. Casari 1997, 4. As regards the application of Aristotelian logic in modern and medieval legal science cf. Kalinowski 1971; Capozzi 1976, 25–36; Perelman 1979, 15; Giuliani 1994. The persistence of the value of Aristotelian syllogism has been particularly emphasised in modern law "also after the arrival of the modern logics which supplanted Aristotelian logic and which in any case recognise that the human mind produces logical thought by the same mechanisms, even if the way of expressing or of representing them changes in the course of time with recourse to methods that are ever more sophisticated and precise": Sammarco 2001, 21, n. 26.

[70] In the Aristotelian vocabulary, the syllogistic technique belongs to the conceptual sphere of analysis (which implies a connection with certainty and with irrefutable demonstration) and not to that of synthesis (which instead concerns mere probability but nevertheless opens the road to discoveries that simple analysis could never lead to), as the name of the works dedicated to syllogism themselves (*Analytics*) shows: cf. Panza 1997, 370–83.

[71] Aristotle, *Prior Analytics*, I, 1, 24b 18–20 (Engl. vers. Owen, 82). On this passage from Aristotle cf. Abbagnano 1993, 193. Regarding the syllogistic mechanism cf. Berti 1987, 118; Sanguineti 1987, 123–37; Ackrill 1993, 129–49.

[72] Cf. Viano 1955, 57–62; Łukasiewicz 1968, 120–7; Pozzi 1992, 13–6; Bucher 1996, 121–5.

[73] It has been written that, apropos of the different approaches of medieval and modern logic, "medieval thinkers highlighted the logical structure of natural language whereas modern thinkers construct a symbolic language following logical structures": Pozzi 1992, 5. On the symbols characterizing modern artificial language cf. Lolli 1991, 29–41; Copi and Cohen 1999, 339–89. On the doctrine of *suppositio* and on the medieval attempt to develop semantics cf. Weinberg 1985, 183–4.

unavoidable condition for an effective application of syllogism.[74] However, a rational evaluation of the relations between the individual elements being examined could only come about by using syllogistic reasoning to connect the linguistic propositions. In fact, considering the initial ideas (the premises of the inference) in isolation did not address the problem of their truth or falsity, while the coincidence of premises in a judgement that affirms that one thing is inherent in another generates the difficulty of ascertaining and verifying the overall truth or falsity of the syllogistic conclusion in question.[75]

In a nutshell, syllogism is a technique by which it is possible to infer a third predicative proposition (conclusion) from two predicative propositions (major premise and minor premise) based on the principle of identity and difference (*dictum de omni et de nullo*). In other words, it is based on the principle by which two terms, each identical to a third, are identical to each other (identity), and—on the contrary—two terms of which only one is identical to a third, are not identical to each other (difference).[76] The syllogistic reasoning process finishes with a deduction that is legitimised by the existence of a term which is common to the two premises (middle term). This has the function of connecting the other two major and minor terms, and thus permits a conclusion to be inferred that—given the truth of the premises—must, in turn, necessarily be true.[77] This type of logical method remains unchanged, despite the possible existence of many different syllogistic forms which differ because of the nature of the premises used in their construction.[78] However, in all its diverse forms of expression, syllogism is a formal process which links premises together and aims to show the relationship that explains and clarifies a conse-

[74] During the medieval period, material logic consisted of the study of the content of premises, namely, of the *materia* (substance) of reasoning (*Logica Maior*, major logic), as opposed to the study of links between premises and conclusions which was instead studied as formal logic (*Logica Minor*, minor logic). On this topic cf. Vanni Rovighi 1962, 45–6; Padellaro 1970, 15; Ciardella 1991, 64–5.

[75] Cf. Codignola 1954, 104. Also in the medieval period "the central theme of logic remained that established by Aristotle: declarative discourse," meaning "linguistic configuration about which it makes sense to say it is true or false": Casari 1997, 20.

[76] Cf. Negro 1968, 99–100; Capozzi 1974, 319–31; Ciardella 1991, 71–80. These two fundamental laws of syllogism can also be expressed in these terms: "what is true of the totality of the genus (*omnis*) is also true of the species and of the individual things contained in this genus; what is false for the totality of the genus (*nullus*) is also false for the species and the individual things contained in this genus": Blanché 1973, 174.

[77] Cf. Capozzi 1974, 257–66; Puggioni 1993, 45; Fedriga 1993, 298. On the rules that are essential for the validity of a syllogism and on its various forms (which for reasons of brevity cannot be examined here) cf. Vanni Rovighi 1962, 83–92; Knuuttila 1991, 477–82; Bucher 1996, 125–6; Copi and Cohen 1999, 219–338; Gangemi 2002, 61–79.

[78] In reality, although the syllogistic process has a high level of uniformity, various forms of it exist and it can present itself in various ways (there are at least 24 species of valid inference). Medieval logic, in distinguishing between and classifying these, also resorted to ingenious mnemonic expedients: cf. Fedriga 1993, 298–305; Bucher 1996, 126–38; Casari 1997, 50–4.

quence which is different from the initial presuppositions. This occurs, for example, in the famous inferential argument that starts from the premises concerning the mortal nature of man and Socrates' membership in the human race, and ends by deducing his mortal nature.[79]

The re-exhumation of Aristotle's *Organon* after centuries of oblivion prepared the way for the complete rediscovery of syllogism; for the cultural reacquisition of the most complex, but also most authoritative and effective, gnostic mechanism that Greek philosophy could offer the medieval world. It was in fact Aristotle himself who declared, with full authority, that Plato's process of division should be considered weak and unreliable when compared to syllogism, which was infinitely superior from the point of view of coherence and cognitive usefulness:

> That the division through genera is but a certain small portion of the method specified, it is easy to perceive, for division is, as it were, a weak syllogism, since it begs what it ought to demonstrate, and always infers something of prior matter. (Aristotle, *Prior Analytics*, I, 31, 46a 31–35; Engl. vers. Owen, on pages 153–4)[80]

Distinctio had been the privileged technique for obtaining scientific certainty during the *logica vetus* period, but this demonstration of its weakness led, therefore, to its progressive devaluation and to its ever more effective replacement by syllogism as the main heuristic criterion.[81] Furthermore, the different methodological approach of the *logica nova*—which was destined, from the middle of the 12th century, to revolutionise the concept of received scientific knowledge itself—was not confined to philosophical studies, but inevitably had an effect on the hermeneutic and didactic techniques adopted for the study of law in the glossators' school.[82]

[79] This very popular example of syllogism comes from the medieval period when the premises of inferential reasoning were extended to also include classes of names for individual things that were absent from the Aristotelian system: cf. Łukasiewicz 1968, 109–15; Blanché 1973, 175; Bucher 1996, 131. On the syllogism on Socrates' mortality cf. Codignola 1954, 104–5; Schulthess and Imbach 1996, 45–6.

[80] Cf. Celluprica 1978, 152–3; Zanatta 1996, 107–16.

[81] Bianchi (1997a, 18–9) speaks of an "uncontrollable eruption of the Aristotelian following" in the twelve hundreds and adds that "the history of medieval thought was in the first place the history of reception, interpretation and use of Aristotle's philosophy."

[82] It has, in this sense, been written that "European thought derived, first of all, knowledge as an ideal and a criterion of what it was to be scientific from Aristotle and his followers": Bianchi 1997a, 19. The eruption of the revolutionary doctrine that came from Aristotle's logic broke the previous epistemological laws and introduced "a new conception of reason and of science" (Gregory 1992, 10), leading to a true and proper "increase of rationality in the twelfth century" (Wieland 1987, 69). On this topic Verger (1999, 28) holds that the Aristotelian belief "was first of all a logic, a syllogistic art taken as a demonstrative technique par excellence. Well read medieval men naturally tended to think in syllogistic way."

3.2.3. The Legal Application of Syllogism in the Glossators' School and the Quaestio de facto

Assured by the basic teaching given in the schools of liberal arts, the capillary-like growth in the use of Aristotelian logical principles from the second half of the 12th century on, made a rich heritage of previously unknown or completely neglected logical techniques available to all the scientific disciplines. For this reason, at the same time the rediscovered content of the *Organon* inevitably caused all the sciences, including legal science, to resort to the heuristic ideas in Aristotle's works, thus rendering all previously used research methods antiquated and outmoded.[83] Awareness that the *logica vetus* tools were obsolete required (or better, demanded) that the glossators of the *logica nova* period master and apply a complex of logical rules that had been unknown or little known to the early Bolognese teachers. In particular, the radical conceptual innovation represented by the general replacement of the diairetic method with syllogism as the basic technique for acquiring certainty endowed with scientific value meant that the Bolognese could not refuse to assimilate and adopt it.[84]

The most substantial benefit produced for the glossators' school by this general and fundamental innovation in the methodology of scientific theory must be seen in the birth and gradual development—around the middle of the 12th century—of the *quaestio de facto*. This was a new technique of legal investigation that was destined to rapidly form itself into a separate collection of works that were different and distinct from those containing the glosses.[85]

[83] We need to bear in mind that "Medieval university preparation was in fact based on the study of the *auctoritates*, authoritative works that allowed a systematic body of knowledge to be drawn from them, and every variation in their choice had serious repercussions as much for teaching as for science": Bianchi 1997b, 34. On this subject John of Salisbury († 1180) clearly indicated in *Metalogicon* that non-observance of the appropriate logical rules deprives *sapientia* of all rational structure and of all credibility (cf. Gregory 1992, 22). In particular John of Salisbury affirmed in 1159 that no dialectic from then on could ignore knowledge of the *corpus* of works of Aristotelian logic, insofar as "such knowledge would have been a *conditio sine qua non* for whoever wished to teach logic": Knowles 1984, 258. The arrival of Aristotelian metaphysics had the effect of overwhelming the traditions of the schools and of profoundly changing their teaching, as indicated by Gilson (1983, 406), who likewise underlines the circumstance whereby, "after the discovery of Aristotle's books, the teachers of the liberal arts had acquired a much more substantial authority" (Gilson 1983, 474). Cf. also Paradisi 1968, 625–6; Chenu 1995, 32–5; De Libera 1997.

[84] The way studies were organised meant that only students who were expert in logic would see the wide territory of legal science open to them: cf. Knowles 1984, 259; Flash 1992, 154. Furthermore, the ferocious Parisian condemnation of 1277 against Aristotle's teachings—which we will speak about further—did not concern Aristotle's logic, which was by then itself identified with the teaching of the basic rules of thought from which all disciplines had consistently drawn the rules for discussion and hermeneutic technique: cf. Bianchi 1997b, 36–8. On the glossators' knowledge of Aristotle and syllogism cf. Otte 1968; Otte 1971, 145–55.

[85] On the link between the rediscovery of Aristotelian logic and the affirmation contained

The *quaestio de facto emergens* sprang (as its name clearly suggests) from an event—real or fictitious—brought to the attention of legal science by judicial practice. It concerned the legal doubt (*quaestio*) raised by a specific actual case (*factum*) that could not be easily classified within existing legal paradigms (it would otherwise be treated as a *casus*, i.e., an event that conforms exactly to an abstract situation described in the legal texts).[86]

After the identification of the legal question to be resolved, the *quaestio de facto* involved a disputation over the doubt raised and took the form of a dialectical comparison of two contrasting opinions—conventionally represented in the persons of the *opponens* and the *respondens* (or of the *actor* and the *reus*) who championed two irreconcilable opinions (thesis and antithesis).[87] The antinomy between the two conflicting opinions was the result of the radically antithetic nature of the solutions proposed for application to the actual case under investigation: The difference between the two solutions came from the differing opinions of the opposing dialectics about the applicability, or inapplicability, of a specific norm with which to govern the actual case in point that lay behind the *quaestio*.[88]

Research in the rich archives of Romano-canonical law for the most suitable discipline for a controversial case was justified—and imposed—by the Bolognese teachers' firm conviction that the *ius commune* always and inevitably provided an answer to all those legal needs being generated by the various, changing demands of society. This, therefore, induced the glossators to search only in the *Corpus iuris* for a comprehensive set of rules to govern any legal problem that daily life could produce and that was not already explicitly provided for in existing legal tomes: "*Omnia in corpore iuris inveniuntur*" ("In the *corpus iuris* one can find everything").[89] In this type of research the glossator could not have gained any advantage by turning to *distinctio* (a hermeneutic method that was well known to the earliest Bolognese teachers), because even the boldest subdivision of normative precepts would have only allowed him to split, clarify and specify all the various hypotheses already expressly foreseen in the legal texts. Despite this, it would not have allowed him to ascertain if the

in the *quaestio disputata* in university faculties (also law faculties) cf. Lawn 1993, 11–2; Chenu 1995, 38–40. The first reliable documents indicate that the disputation of legal issues in Bologna probably started about the middle of the 12th century in the Bulgarus school: cf. Kantorowicz 1939, 59–67; Belloni 1989, 7–22; Bellomo 1992a, 74.

[86] Cf. Kantorowicz and Buckland 1969, 208–9; Bellomo 1974a, 24–30; Fransen 1985, 240; Bellomo 1992a, 208–11; Bellomo 1997a. In particular on different types of *casus legis* cf. Di Bartolo 1997.

[87] On the technique of university disputation in legal matters cf. Otte 1971, 156–85; Mayali 1982; Colli 1984, 37–49.

[88] "The recognition that quarrel, controversy and conflict of opinions represented a fact of human life that could not be eliminated is implicit in medieval dialectic": Giuliani 1966, 132.

[89] On this celebrated affirmation contained in the Accursian gloss and on the trust of the jurists in the self-sufficiency of the *scientia iuris* cf. Quaglioni 1990, 126–7.

norm could be extended to analogous cases which were not clearly contemplated in it. In fact, a simple division and subdivision of the legal prescription into its different facets would have led to a definition of the different *casus* (cases) corresponding to individual aspects of the norm being looked at, but would never have permitted the identification of whether or not a particular precept could be applied to events that were not included in that norm. Furthermore, as has already been indicated above, recourse by the jurists to *distinctio* provided the main reason for identifying an appropriate definition of every species, that is, of every legal institute (distinguished by use of the *quaestio legitima* from other species, i.e., from the different institutes belonging to the same genus). However, this did not allow them to determine any possible interactions of the genus (i.e., Roman or canon law) with those legal paradigms which were not provided for in those laws and which were, for this reason, necessarily extraneous to all possible conceptual specifications. This was true as much for the genus as for the species; both for the norm and for all possible conceptual specifications derived from the legal text through the use of *distinctio*.[90]

In other words, even a much more detailed analysis of the sources of *ius commune* conducted through the use of the *distinctio* criterion, would not serve to verify the applicability of the norm to cases not foreseen in the legal text. The existence of a *quaestio de facto* raised this into a problem that was both real and crucial. The solution for this type of hermeneutic difficulty had, therefore, to be sought in a heuristic tool other than *distinctio*, and the rediscovery of Aristotle's logic offered the glossators the type of reasoning that was most suitable for this purpose: syllogism.

3.2.4. The Inferential Mechanism of the Quaestio de facto

In the *quaestio de facto emergens*, the norm whose application is supported or contested does not directly regard the legal paradigm in question (otherwise, as has been said, there would be no *quaestio* but only a *casus*). This causes both the *opponens* and the *respondens* to turn to a syllogism to show beyond all doubt the possibility, or impossibility, of extending the application of the law in question to the controversy. It was, therefore, up to both contenders to provide suitable arguments so that an inferential mechanism could be constructed capable of revealing the necessary logic for the extension of the law to the *factum* (fact), or the error of such an extension.

In more detail, the rules of syllogistic inference[91] required that the *argumenta* (arguments) adopted by the two opposing dialectics—that is, by the

[90] As regards the distinction between definition and demonstration in medieval logic cf. Eco 1993, 51.

[91] On the distinction between categoric and hypothetic syllogism, and between perfect and imperfect inference in a syllogistic context cf. Puggioni 1993, 34–46; Fedriga 1993, 297.

supporters of the antonymous opinions making up the thesis and antithesis—necessarily draw their strength from suitable τόποι (*loci* in Latin, topics in English)[92] capable of justifying and sustaining the contrasting solutions proposed in the *quaestio* in discussion.[93] To clarify the significance of these technical words, we can usefully turn to the concise and illuminating definitions provided in the well known and much used 13th century manual of logic, *Summulae logicales*, by Peter of Spain († 1277).[94] There we read that the *quaestio* is a "*dubitabilis propositio*" ("a proposition in doubt"), while the *conclusio* that settles the *quaestio* is an "*argumento vel argumentis approbata propositio*" ("a conclusion is a proposition proved by an argument or arguments").[95] From this it follows that the determining element for the solution of the *quaestio* is the *argumentum* (described as "*ratio rei dubiae faciens fidem*," i.e., as "a reason producing belief regarding a matter that is in doubt")[96] which however, in turn, depends entirely on the support of a suitable *locus*. In fact, Peter of Spain himself made the statement that "*argumentum per locum confirmatur*" ("an argument is confirmed by means of a Topic").[97]

The structure of the syllogistic argument therefore makes the role of the *locus* fundamental.[98] It consists of the "*sedes argumenti vel id unde ad propositam quaestionem conveniens trahitur argumentum*,"[99] or in other words, of the logical principle (*maxima propositio*) or the authoritative and irrefutable rule (*differentia*), on which the coherence of the *argumentum* is constructed.[100] The effectiveness of the *argumentum* depends, in short, on the application of a *locus* that is able to play the part of a "middle term" between the other two

[92] The use of the Latin term *locus* to translate the Greek word τόπος goes back to Boethius: cf. Ebbesen 1999, 13–4.

[93] "A dialectic *topos* is therefore a 'topic' that contains arguments, a *sedes argumenti*": Puggioni 1993, 32.

[94] On the great prestige given to Peter of Spain's *Summulae logicales* up to the 16th century cf. Fumagalli Beonio Brocchieri and Parodi 1996b, 332.

[95] *Summulae logicales*, *De locis*, 5.02 (Engl. vers. Kretzmann and Stump, on page 226).

[96] *Summulae logicales*, *De locis*, 5.02 (Engl. vers. Kretzmann and Stump, on page 226). This definition of the *argumentum*, originating with Aristotle and Cicero, had already been used by Boethius and by Isidore of Seville: cf. Brugi 1936, 24, n. 9; Sbriccoli 1969, 344–5.

[97] *Summulae logicales*, *De locis*, 5.06 (Engl. vers. Kretzmann and Stump, on page 228).

[98] "The analysis of *loci* (topics) can be seen as an argumentative strategy that aims at discovering those general principles that permit particular conclusions to be inferred. These principles allow the conclusions to be further confirmed and made credible, thus reinforcing the reasoning": Fedriga 1993, 305.

[99] *Summulae logicales*, *De locis*, 5.06: "Topic is the foundation of an argument, or that from which we draw an argument suitable for the question at issue" (Engl. vers. Kretzmann and Stump, on page 228).

[100] In medieval logic the *loci* were distinguished as *maximae propositiones* and *differentiae*: by *maxima propositio* we mean "a general and self-evident principle; the *maxima* does not need to be demonstrated and does not derive from other principles," while "the function of the *differentia* is that of finding the 'middle' for the construction of the reasoning": Puggioni 1993, 33; cf. also Fedriga 1993, 306.

terms (major and minor) contained in the premises in such a way as to lead to a correct syllogistic inference. Basing their views on Cicero, the medieval logicians in fact defined the *locus* as *vis inferentiae*, that is to say, as the essential support of the inference (Puggioni 1993, 33, 45). On this point, the *Summulae logicales* offer a very detailed catalogue of twenty-one possible *loci* to be used in the construction of syllogisms, as for example—to cite only a few of them—the *locus a causa materiali*, Topic from a material cause ("*Ferrum est, ergo arma ferrea esse possunt*": "Iron exists; therefore, there can be iron weapons");[101] the *locus a causa formali*, Topic from a formal cause ("*Albedo est, ergo album est*": "Whiteness exists; therefore, a white thing exists");[102] the *locus a contrariis*, Topic from contraries ("*Hoc corpus est album, ergo non est nigrum*": "This body is white; therefore, it is not black");[103] and the *locus a maiore*, Topic from a greater ("*Rex non potest expugnare castrum, ergo nec miles*": "The King cannot capture the fortress; therefore, neither can a knight").[104] The *locus a simili* (Topic from a similar) obviously had great importance for the legal discipline, and Peter of Spain refers to it as "*habitudo ipsius similis ad aliud simile*" ("The Topic from a similar is the relationship of one similar to another").[105] Legal science made great use of this *locus* to extend the range of Roman and canonical laws to cases analogous to those expressly mentioned in the sources of the *Corpus iuris civilis* and in the collections of decretals.[106]

Furthermore, the glossators who adapted the inferential method to legal studies very soon turned their attention to another of the various *loci* that logic provided; the *locus ab auctoritate* (Topic from authority) described by Peter of Spain as "*habitudo ipsius auctoritatis ad id quod probatur per eam*" ("The Topic from authority is the relationship of an authority to that which is proved by the authority").[107] *Auctoritas* was defined in the *Summulae logicales* as "*iudicium sapientis in sua scientia*": "Authority is the judgment of a wise man in his own field of knowledge." According to logical precepts, *auctoritas* offered elements of certainty and incontestability that were comparable to the immediate argumentative evidence of all the other dialectical *loci* which were based solely on logical principles; consequently, the *argumenta* proposed in

[101] *Summulae logicales*, *De locis*, 5.25 (Engl. vers. Kretzmann and Stump, on page 236).

[102] *Summulae logicales*, *De locis*, 5.26 (Engl. vers. Kretzmann and Stump, on page 237).

[103] *Summulae logicales*, *De locis*, 5.34 (Engl. vers. Kretzmann and Stump, on page 240).

[104] *Summulae logicales*, *De locis*, 5.37 (Engl. vers. Kretzmann and Stump, on page 241). For a list summing up the *argumenta* used by the glossators cf. Brugi 1936, 27; Sbriccoli 1969, 349–50; Otte 1971, 189–211.

[105] *Summulae logicales*, *De locis*, 5.38 (Engl. vers. Kretzmann and Stump, on page 241).

[106] Cf. Cortese 1992b, 476–9; Cortese 1995, 394. The analogical reasoning peculiar to modern legal logic diverges significantly from the *de similibus ad similia* process of the legal science practised by the glossators; for an examination of the differences between the two forms of argument cf. Giuliani 1966, 171–7. In general on analogical interpretation in medieval legal science cf. Piano Mortari 1976, 246–52.

[107] *Summulae logicales*, *De locis*, 5.42.

the *quaestio* disputation could be effectively upheld. The example offered by Peter of Spain was as follows: "*Astronomus dicit caelum esse volubile, ergo caelum est volubile*" ("An astronomer says that heaven is revolvable; therefore, heaven is revolvable").[108] The development of legal science by the glossators (and then by the commentators) led to *auctoritas* (but merely *auctoritas probabilis* and not *auctoritas necessaria*, i.e., only probable authority and not absolutely necessary authority) being used ever more incisively in the building of jurisprudential doctrines. In the end, this led to the development of the phenomenon of the *communis opinio*, where the most widely agreed (and therefore "common") doctrinal opinion to be found in the science of laws came to be identified as the most probable legal truth (Cortese 1992b, 483–90; Cortese 1995, 454–61).

3.2.5. The Role of the Loci loicales per leges probati

Resort to the *auctoritas*—which the works of logic uniquely linked to the *locus ab auctoritate*, just mentioned—was destined to play a fundamentally important role in the field of law, by offering undoubted stability and certainty to the dialectical *argumenta* considered in the legal *quaestiones*. In fact the entire legal science of the glossators was founded on the explanation of works characterised by *auctoritas necessaria*. All the law studied at Bologna came from sources which were said to be antonomastic expressions of the maximum *auctoritas* (the Pope or the Emperor), and this fact implied that the voluminous collection of imperial and canonical sources (the *Corpus iuris civilis*, Gratian's *Decretum* and the *Decretales* collections) constituted an all but inexhaustible and incontrovertible reserve of texts for use in support of dialectical *argumenta*.[109]

The importance given by jurists to *auctoritas* in the sources of the *utrumque ius* (Romano-canonical law) meant that it was not possible to resort to any of the *loci* indicated by the *dialectica* unless the argument invoked found express confirmation and support in a normative text. The *loci* were seen as instruments which could not be ignored in the construction of a valid method of inference, but their use in the legal world was admissible only in the circumstances just described. The fact was that every affirmation contained in the *libri legales* (the volumes containing the collections of law) enjoyed the undisputed and infallible authority conferred on it by the sources from which it came (not subject to dispute because held to be incontestable by definition).[110] This pro-

[108] *Summulae logicales*, *De locis*, 5.42 (Engl. vers. Kretzmann and Stump, on page 243).

[109] For example, the *Causae* that make up the second part of Gratian's *Decretum* correspond to the *quaestio de facto* scheme. In these, appear both the texts of the *auctoritates* cited *pro* and *contra*, and the *solutio* of the legal dilemma set out at the beginning of each *Causa*: cf. Stickler 1950, 209. The approach taken by Gratian would, besides, serve as a model for the development of the oldest canonical *quaestiones*: cf. Fransen 1985, 245.

[110] The *quaestiones de facto*, as analyses of the probable, concern only the possible broad

duced the result that every passage of the different legislative collections then in existence might be used—if pertinent—as a presupposed legal basis for each of the different *argumenta* that needed to be cited to sustain the necessity (or, on the contrary, the impossibility) of extending the law to the actual case that the *quaestio* related to.[111] Indeed, reference to the *auctoritas* of Romano-canonical law was very soon considered not only of much greater help than any other for moulding the syllogistic premises of the *quaestiones de facto*, but also the sole and exclusive procedure that was valid and admissible in the field of law. At the beginning of the 13th century, the glossator Azo rebuked his pupil Bernardus Dorna for having cited non-legal texts in order to confirm an *argumentum*; reminding him that "*non licet allegare nisi Iustiniani leges*" ("it is not permitted to cite anything other than the Justinianian laws").[112]

One of the Vatican codices (*Vat. lat.* 9428) deals with the *quaestio de facto* and gives an effective synthesis of the jurist's way of organising the defence of an *opponens* or *respondens* position based on such premises. In this codex—after the stipulation that doubt and controversy can only exist in a hypothesis that is not already a law ("*ubi casus legis, ibi nulla dubitatio*")—the glossator explains that "*ubi non est casus legis, necesse est ut per argumenta et per legum rationes procedamus*," which means that in the case where an explicit legislative provision does not exist, resort is needed to dialectical arguments that are supported by reference to sources of law.[113] The tool available to the jurist to propose a convincing solution of the *quaestio*—to create a valid and persuasive syllogism—was, therefore, to identify all the norms and their *rationes* (their rational principles) that could be found in all the complex mass of documents making up the *Corpus iuris civilis* and collections of canon law, adequate for producing a convincing *argumentum* in favour or against the suggested extension of the law. It is the *auctoritas* (authority) of the laws cited—assuming the *argumentum* is appropriate for the solution of the *quaestio*—that makes it inevitable that the *ratio* of the *lex*, so identified, brings about the broader application of the law in question (or, on the other hand, the refusal of a wider interpretation), as a necessary consequence of syllogistic reasoning. This causes a possible extension of the effects of the *causa legis* (the reason that inspired the law) to an event not expressly regulated by the legislator.[114]

application of Roman or canonic law, not the (indisputable) certainty and truth of the law itself; cf. Bellomo 2000, 570–1.

[111] The evolution of the technique of citing fragments of Justinianian legislation to support dialectical *argumenta* is summed up in Martino 1997.

[112] The passage is in a *quaestio* by the glossator Azo drawn up in Landsberg 1888, 74. The glossator's statement is commented on by Paradisi 1965, 256.

[113] The codex *Vat. lat.* 9428 has been studied in depth by Bellomo (1992a, 209; 2000, 570).

[114] On the concept of *causa legis* and of *ratio legis* cf. Calasso 1956; Cortese 1962; Calasso 1967, 285–310; Cortese 1992b, 472–6; Balbi 2001, 50–60.

The syllogism applied in the *quaestio de facto* did not draw its persuasive strength from the simple doctrinal opinion of the individual glossator or from the mere logical efficacy of the *locus* invoked. Given the principle that all legal discipline had to be taken from the existing complex of Roman and canon law sources, the inference for a possible extension of the precept in question to new legal cases was necessarily founded on another legal provision. This, thanks to the *auctoritas* of its dictate, justified the reasonableness of the extension beyond all doubt: "*Erubescimus sine lege loquentes*" ("We are ashamed of ourselves when we reason without making reference to a legal text") said the glossators (Sbriccoli 1969, 347).

The common form of *modi arguendi* in the dialectical disputations of legal *quaestiones* indeed shows that not only did each *argumentum* have to be founded on an appropriate *locus*, but also the *locus* had in turn to be rooted in the citing of a precise part of the law from where the glossator could invoke the *ratio* and the *vis* (Cortese 1995, 192–5). This meant that it was not a simple *locus loicalis* (a *locus* based on a logical axiom, as in the case of the *locus* "*a contrario sensu*" considered in its pure conceptual form), but a *locus per legem probatus*; a *locus* supported by an exact legal reference. This consequently gave the *locus* the nature of a *modus arguendi* (argumentative technique) endowed with legal value (for example the same *locus loicalis* "*a contrario sensu*" was expressly confirmed in the Digest—Dig. 1.21.1 pr.—and so became a *modus arguendi in iure*: Bellomo 2000, 579). The *quaestio* was thus formulated in such a way that the delivery of the topic of the disputation followed the indications given in the passages of the *Corpus iuris civilis* used in the discussion of the conceptual justification (*loci loicales*). These had been chosen by the *actor* and the *reus* in support of the opposing dialectical positions (*argumenta*) required to define a correct and convincing syllogism.

The obligation to link the different forms of the *loci loicales* to the legal texts studied by the glossators, therefore, conferred the essential qualification of *loci loicales per leges probati* on them, when used in the *quaestiones de facto*. There were many types of *loci* (dozens of them, among which for example, the *loci* "*a contrario sensu*," "*a simili ad similia*," "*a divisione*," "*a fortiori*" and so on). In the course of the 12th and 13th centuries, the law schools—particularly those outside the Bolognese *Studium*—created appropriate indexes of these *loci* and built up a rich repertoire in order to help the contending parties engaged in the *quaestio* disputation in their work. These indexes are detailed lists containing a series of legal directions for every possible *modus arguendi*. This guaranteed correct argument and allowed the antagonists in the dialectical conflict to concentrate on the logical suitability of resorting to the various *argumenta*, instead of looking for supporting texts in legal sources, thus saving time and effort.[115] With this aim in mind, the glossator Pillius of

[115] Cf. Kuttner 1951, 770–1; Stein 1966, 144–5, 158–9; Weimar 1967, 91–123; Weimar

Medicina, who taught law at Modena, compiled a work towards the end of the 12th century that was significantly entitled *Libellus disputatorius*, which he boasted created a text capable of considerably shortening (from ten to four years) the length of time needed to study law.[116] Pillius managed to reduce the time needed for academic study by simplifying the jurists' task of dialectical discussion in the *quaestiones disputatae*. The maxims (*generalia*) enumerated in *Libellus disputatorius*, in fact, meticulously indicated the corresponding supporting sources; facilitating their direct use as dialectical *argumenta* because it permitted a precise and easy "*contradicentium invicem rationes invenire*" (recovery of normative principles suitable for drawing the dialectical contrast from both parties).[117]

3.2.6. The Dialectical Nature of the Syllogism Contained in the Quaestio de facto *and the Merely Probable Value of the* Solutio

In the *quaestio de facto*, the identification of the *loci* at the base of the *argumenta* (resorting to the *modi arguendi in iure* technique) presents itself as the necessary conceptual foundation for syllogism to function. The applicability, or inapplicability, of a Roman or canonical law precept to the new *factum* described in the *quaestio* was a logical consequence (i.e., the conclusion of a syllogism) that came from the two legal premises invoked by the competing parties (one premise inevitably consisted of the text of the norm whose broader application was being discussed while the other one was represented by the sources cited to justify or reject its extension). Therefore, the solution of the *quaestio* lay in the correct use of an inferential mechanism that, starting from the different correlations between the source passages proposed by *opponens* and *respondens*, indicated the logical need (or otherwise, the absolute irrationality) of extending the norm invoked to the precise legal case that had given rise to the disputation.

This method tried to extract an equally authoritative consequence (the possible broader use of a specific law) from two authoritative premises whose authority came, by definition, from the fact that they were normative texts belonging to the *utrumque ius*. It necessarily tried to do so in a coherent way,

1973, 143; Cortese 1982a, 251–2, 265–6; Colli 1990, 236–8; Cortese 1992b, 470–1, 481; Cortese 1995, 152. This class of works developed about 1180, but did not initially have any success in Bologna: cf. Ascheri 2000, 217. On the collections of *modi arguendi in iure* cf. in particular Caprioli 1963, 1965; Bellomo 1974b.

[116] Cf. Belloni 1989, 54. On Pillius cf. Cortese 1982b, 98–9, who emphasises the "extraordinary theoretical complexity" of *Libellus disputatorius*; Cortese 1995, 148–51.

[117] Cf. Belloni 1989, 53–4; Cortese 1993, 46–7. In the field of canon law, the same aim was pursued by the work known as *Perpendiculum*, on which cf. Kuttner 1951, 771–92. On the relationship between *brocarda*, *loci generales*, *generalia*, *notabilia* and *regulae* (different expressions but frequently used as synonyms) cf. Stein 1966, 145; Schrage and Dondorp 1992, 33.

but it depended directly on an adequate knowledge and precise application of the rules of syllogism and, therefore, closely linked the glossators' *quaestio de facto* to the conceptual techniques of the *logica nova* (Coing 1952, 33–4). The Master who decided the outcome of the disputation resolving the *quaestio* had, for that reason, to be absolutely certain in his grasp of the entire Aristotelian technique of inferential reasoning. This was because his task involved declaring which syllogism, among all those proposed in the discussion, was effectively valid and exact—was suitable for giving a correct solution to the question raised—and which syllogisms were, instead, flawed with incoherence and with such serious imperfections as to invalidate the congruence of the argument; thereby compromising the reasonableness of the inference advanced in the course of the *quaestio*.[118]

However, the role of the Master who settles legal doubt by selecting the most convincing syllogism and rejecting the less plausible ones, indicates that, in the case of the *quaestio de facto*, we are dealing with an inferential mechanism that leads to a "probable truth";[119] to a syllogistic conclusion that does not have the characteristics of a "necessary truth," but that is imposed—from among all the various possible syllogistic inferences suggested in the course of the disputation—as the most likely and convincing solution. Despite this, the *solutio* (the solution) always remains provisional; susceptible to revision when new and better reasoned arguments arrive to undermine the present "truth" and, therefore, to overturn the outcome of the *quaestio*. As the glossator Pillius of Medicina often used to repeat to resolve questions debated in his school, the *solutio* was proposed "*sine praeiudicio melioris sententiae*," without excluding opinions that are possibly more correct (Nicolini 1933, 74; Giuliani 1964, 184). That was what happened, for example, in the case of the *quaestiones quaternales*, those particular questions that were frequently re-examined in the halls at Bologna. These questions were not only repeatedly raised and debated on account of their known effectiveness for teaching purposes, but could sometimes result in differing solutions when, from time to time, new and different arguments were put forward.[120]

[118] "The function of the *Magister* (Master) in disputations is the same as that of a judge": Giuliani 1966, 149. On this point it needs to be stressed that in the second half of the 12th century logicians had concentrated on the study of fallacies (of reasoning that was apparently valid but in reality was contradictory) described by Aristotle in *Sophistici elenchi* (cf. Puggioni 1993, 47), and that for example Adam of Balsham (Parvipontanus) wrote an *Ars disserendi* in 1152 in which he indicated the possibility of teaching the recognition and avoidance of sophisms as a principal aim of the study of logic (cf. Blanché 1973, 183). On the problem of *fallaciae* and *sophismata logicalia* in the field of law cf. Colli 1985.

[119] "The Aristotelian dialectic (contained in the *Topics* and in *Sophistici elenchi*) seems to offer a logic of controversy, of choice, of credibility. On the basis of these texts it appears possible to identify the world of the *probabile* among the 'certainly true' (apodictic discourse) and the 'certainly false' (sophistic discourse)": Giuliani 1966, 143.

[120] Cf. Kuttner 1943, 322; Weimar 1973, 144–5; Fransen 1985, 237, 256–7; Errera 1996, 29.

All this shows that the syllogism used in the *quaestiones de facto emergentes* involves a solely dialectical type of reasoning, which arrives at conclusions that are simply probable (and not yet absolutely certain) because they start from premises that are, in turn, purely probable. Aristotle's *Topics* allowed the medieval logicians to obtain a precise distinction between demonstrative, dialectical and sophistic syllogisms, which depended solely on the different degree of truth in the premises, and not on the form of the syllogism (always equal from a functional point of view).[121] Aristotle said:

> First, then, we must say what reasoning is and what different kinds of it there are, in order that dialectical reasoning may be apprehended; for it is the search for this that we are undertaking in the treatise which lies before us. Reasoning is a discussion in which, certain things having been laid down, something other than these things necessarily results through them. Reasoning is demonstration when it proceeds from premises which are true and primary or of such a kind that we have derived our original knowledge of them through premises which are primary and true. Reasoning is dialectical which reasons from generally accepted opinions. Things are true and primary which command belief through themselves and not through anything else; for regarding the first principles of science it is unnecessary to ask any further question as to "why," but each principle should of itself command belief. Generally accepted opinions, on the other hand, are those which commend themselves to all or to the majority or to the wise—that is, to all of the wise or to the majority or to the most famous and distinguished of them. Reasoning is contentious if it is based on opinions which appear to be generally accepted but are not really so, or if it merely appears to be based on opinions which are, or appear to be, generally accepted. For not every opinion which appears to be generally accepted is actually so accepted. (Aristotle, *Topics*, I, 1, 100a 22–100b 28; Engl. vers. Forster, on pages 273–5)

In particular, the conclusions of dialectical syllogism—which draw their inferential strength from a resort to premises that have the simple status of probable argument (Aristotle called them *endoxa*, or "notable opinions")—in turn, have the value of mere probability.[122] From the point of view of logic, the syllogisms of the *quaestiones de facto emergentes* also used arguments that were simply probable as the premises of their syllogistic reasoning, such as the different *loci loicales*—even if also *per leges probati*.[123] Once applied to the *verba*

[121] In the first book of the *Topics* "Aristotle distinguishes between demonstrative, dialectical and sophistic syllogisms, where the difference is not in the structure of the syllogisms but in the truth content of the premises. The distinction between topics (dialectic) and analytics (demonstration) does not lie in purely formal criteria, but in criteria concerning the content": Pinborg 1993, 345.

[122] Cf. Perelman 1979, 22–33, who in particular (ibid., 30) indicates that "the controversy had as an effect, in the first place, the exclusion of some arguments, showing their irrelevance, in the second place the elimination, because they were unreasonable, of some warmly favoured solutions, without however necessarily imposing one type of argument and only one binding solution." On the theme cf. Viano 1955, 52–5; Zanatta 1996, 45–54.

[123] Peter Abelard had already at the start of the 12th century emphasised that the *loci rhetorici* are based on a deceptive similarity; the link of the *loci* with imperfect inferential mechanisms had therefore determined on Abelard's part an "anti-rhetorical" and "anti-juridical" attitude, that is to say, a disparagement of all the distinctive *loci* of legal experience that led in the end to hostility towards the "controversial" character of the science of the law

(expressions found in the texts) of Roman and canon law by the *opponens* and the *respondens*, these led to opposing, but equally reasonable, results.[124] Furthermore, the fact that the *loci loicales* belonged to the area of probable opinions is indicated beyond doubt by the fact that every *locus* needed to be sufficiently *per leges probatus* in order to be accepted as an *argumentum* in a legal disputation (i.e., had to be supported by suitable references from legal texts), while Aristotelian logic prescribed that the basic principles of demonstrative syllogisms had to be immediately and universally recognised as true, quite apart from the external support that might be offered by any authoritative text. Therefore, the syllogistic conclusion resolving the legal *quaestio* did not possess a demonstrative value that was absolutely true, necessary and certain, but had only the value of an inference that was purely likely and probable; was liable to criticism and rebuttal on the basis of different *argumenta*.[125] On this point, even the most intuitive and potent of the *argumenta*, the *similitudo rationis* (similarity of a rational nature) of the *argumentum a simili*, has been said to "leave us in the field of probability, where no conclusion is certain, rigorous" (Giuliani 1966, 175). Albertus Magnus said in the 13th century that "*in probabilibus si affirmatio est probabilis, etiam negatio opposita probabilis est, quia quod potest esse potest etiam non esse*" ("in the world of the probability, if the affirmation is probable, its exact denial is also probable, because what can be can also not be").[126]

Furthermore, all this is confirmed by the logical and philosophical culture at the time of the glossators, when science itself is rooted in a continuous and uninterrupted comparison of opinions. Scientific progress is seen as an inevitable act of choosing (based on the consensus of the other law experts, the *doctores*, as the only possible criterion of truth)[127] between the various possible dialectical alternatives—all theoretically likely—suggested to solve doctri-

and therefore opened the way to the creeping of "systematic" elements into dialectic and into medieval jurisprudence: cf. Giuliani 1966, 195–7, 214–6.

[124] The reasonableness and the validity of each *argumentum* are indefeasible conditions for its application in the *quaestio*: "The *opinio* is not an arbitrary, subjective impression, but is a judgement based on proof; it is able to completely withstand the refutation of the opposite opinion only if it contains *argumenta veritatis*": Giuliani 1966, 160.

[125] Cf. Pinborg 1993, 352–60. In the dialectic *quaestio* "the search for the truth happens by putting a practical problem to the test and refutation of two opposing positions. […] The choice, the identification of the weightier side cannot be done in abstract, but in relation to circumstantial elements": Giuliani 1966, 144. On the merely probable value of the solution of a *disputatio dialectica* cf. Colli 1984, 45–6; as specifically regards the opinionative nature of the syllogistic *solutio* of a legal *quaestio de facto* cf. Otte 1971, 188; Cortese 1992b, 489, n. 46.

[126] The passage is cited by Garin 1969, 57 and is also given in Bellomo 1996, 37; Bellomo 2000, 569.

[127] The solution of the *quaestio* "is not the result of an individual reason, but is the opinion that is prevalently affirmed—after a long examination of the arguments *pro* and *contra*—in a school": Giuliani 1964, 185.

nal problems.[128] It follows that "until the middle of the 13th century jurisprudence, like dialectic, presents an anti-systemic character"[129] and that law therefore belongs "to the domain of the probable, of opinion, of controversy."[130] In synthesis, from an epistemological viewpoint, the legal science of the glossators consists solely of a *certitudo probabilis* (probable certainty) because the reasoning accepted by the jurists as most probable and likely is not able to completely and definitely exclude the validity of counter-reasoning (Giuliani 1964, 187–90).

3.2.7. The Syllogistic Method as a Doctrinal Tool in the Construction of a Juridical System Based on the Hermeneutic Extension of the Ius commune

The widespread tendency of the university *Studia* to resort to dialectical conflict as a basic hermeneutic and teaching technique determined the undisputed success of the *quaestio* as a versatile tool for obtaining knowledge, and produced a general adoption of the syllogistic form as an essential paradigm of scientific reasoning.[131] In fact, in the 12th and 13th centuries, the *quaestio* acquired a fundamental gnostic role in all disciplines because of its ability to lead quickly to epistemologically correct solutions for all the scientific problems raised and discussed in the universities. Its methodological coherence was guaranteed by a careful dialectical consideration of all the significant elements of the subject under discussion.[132]

[128] On the general tendency of 12th and 13th centuries philosophical and legal speculation to seek the "truth" through dissent, controversy and conflict of opinion—and especially through the dialectic instrument of the *quaestio*—cf. Giuliani 1964, 163–90; Chevrier 1966. Cf. also Giuliani 1966, 147–8, who underlines how all the scientific conclusions obtained by syllogisms aimed at the search for "probable truth" are not "the outcome of an individual reason, but of the efforts and co-operation of entire generations," and also (Giuliani 1966, 158–9) specifies that "the dialectic method is the only valid one where a controversy exists, i.e., a conflict of opinion, of evidence, of authority; dialectic must address practical problems: It is a science of choice, of decision, of action."

[129] Giuliani 1966, 163. With reference to the glossators, Paradisi (1976, 200) spoke of the "limits shown by Bolognese logic compared with general synthesis and systematic construction."

[130] Giuliani 1964, 185, who also observes (1964, 166) how medieval thought prior to the middle of the 13th century "recognised that a vast sector of knowledge (legal, moral, political) is 'probable' in the sense that it escapes scientific determination: And it occupies itself in a search for the limits and techniques of the *ratio probabilis*."

[131] In the medieval *Studia* "lecture and disputation remained the two essential forms of both teaching and examination": Verger 2000, 75. Syllogism "became the general armoury of discourse not only when trying to prove an assertion or give critical reasoning, but also when constructing many of the elaborate structures of medieval knowledge": Knowles 1984, 258. In fact, "the growth and firm establishment of the *disputatio* method in the field of philosophy, as well as its use for theological teaching are linked to Western scholarship's understanding of Aristotle's *Analytics*, *Topics* and *Sophistici elenchi*": Grabmann 1980, vol. 2: 29.

[132] "The theory of syllogism was taught in the schools and universities as a method and teaching model for basic reasoning: So developments in syllogism, including its use as a starting

Also in the law *Studia* (and above all in Bologna) the contrast between *opponens* and *respondens* was considered a valid teaching method and, together with the conceptual coherence of syllogistic reasoning, established the triumph of scholastic debate. This led to the rapid establishment of a *quaestio de facto* class of works alongside the traditional explanatory method provided by the glosses (Montanos Ferrín 1997). It was, therefore, the logical rigour of the disputation process and its solution that determined the rapid success of the *quaestio de facto* with the jurists, and its ever more frequent and widespread application for interpretive and teaching purposes. In fact, the importance of the inferential method and the consequent need to improve the strength and efficacy of their arguments stimulated the Bolognese teachers to pay scrupulous attention to the study of the subtleties in the syllogistic method. This method claimed to be a scientifically perfect technique for the identification of the specific law to be applied whenever there was a new social need for legislation. The evident heuristic conclusiveness of syllogism produced a profusion of dialectical comparisons in the law schools all centred on the possibility of broadening the use of Roman and canon law through analogy. The record of all this laborious doctrinal activity is preserved today in the numerous collections of *quaestiones* that were put together, starting from about the middle of the 12th century, to pass on the subject matter—and the arguments—of the frequent doctrinal disputations, held both in the halls of the universities and in the special formal public sessions dedicated to this type of scientific confrontation.[133]

The glossators' school, as happened in every other scientific discipline at the time, based its epistemological statute ever more consistently on recourse to syllogism. This allowed the jurists—basing themselves exclusively on the legal writings of the *ius commune* and on the *loci* offered by logic—to give ever more new and up to date replies to the legal problems of a changing society, such as that of the later Middle Ages. A multiplicity of new legal forms and institutes (not easily definable under Justinianian law) were spontaneously and chaotically born to satisfy the continually evolving economic interests and social structure of that period. The daily legal experience of the lively modes of communal organisation truly generated a pressing need for normative precepts capable of regulating new cases which were clearly different from the

point for the study and development of other parts of logic, happened through a continuous, pedagogic, practice of disputation": Fedriga 1993, 298. On this point John of Salisbury in *Metalogicon* "strongly emphasises the usefulness of the *disputatio* for individual scientific disciplines": Grabmann 1980, vol. 2: 30. Theology also adopted the *quaestio* as an "obligatory form" of scientific reasoning: cf. Fumagalli Beonio Brocchieri and Parodi 1996b, 268. On this point cf. Glorieux 1968; Gilson 1983, 480–1; Lawn 1993, who examines the establishment of the *quaestio* in all the different scientific disciplines.

[133] As regards the formal public disputation of the *quaestiones* cf. Fransen 1985, 234–6; Belloni 1989, 3–6; Bellomo 1992a, 216–22. On the collections of *quaestiones* cf. Landau 1997.

limited *casus* typically found in the Justinianian collections. Syllogism provided a suitable method—infallible in its logical coherence—for extending the legal arrangements of Romano-canonical law to matters that were original, and did not conform to the unchanging legislative outlook offered by the *Corpus iuris* (Fantini 1998, 172–80). Differently from *distinctio* (which was a formidable technique for explaining texts and for systematically classifying the legal institutes, but was completely unsuitable for advancing new and more extensive readings of the law), the structure of syllogism claimed critical reason, tended towards the dialectical confrontation of conflicting positions, and was ideal for proposing or refuting a suggested extension of a law through the *quaestio de facto* solution.[134] The use of inferential logic therefore offered the glossators the means of constructing an epistemological system to which no one could object, and which, without any legislative modification, guaranteed the extension of Roman law—the *ius vetus* (ancient laws) and, above all, the *ius strictum* (strictly defined laws)—to ever newer legal cases. In this way legal science could avoid recourse to the much criticised and vituperated—but flexible and continually updated—legal font of the *ius proprium* (particular laws). In conclusion, Aristotle's syllogism had been fully rediscovered from the *logica nova* halfway through the 12th century, and from then on was shared as a basic gnostic criterion by all the scientific disciplines. For the glossators it represented an ideal tool that guaranteed, to Roman law above all, a necessary vitality and a constant capacity to evolve. This would otherwise have been impeded by the lack of an industrious and intelligent legislator able to adequately and continually adapt the, by then, centuries old Justinianian laws to the diverse and pressing needs of a changing medieval society.

3.3. The Establishment in the 13th Century of an Aristotelian Epistemology Based on *Posterior Analytics* and the Birth of the Commentators' School

3.3.1. Translations of Posterior Analytics *in the Second Half of the 12th Century*

The Latin translations produced in the early decades of the 12th century to make Aristotelian logic intelligible had the effect of bringing the majority of the *Organon* writings to light again in the Christian world. The overturning of the *dialectica* rules that came about very soon gave a new direction to basic philosophical studies (*logica nova*), which in turn caused a new gnostic approach to be adopted (based on syllogism) in all scientific disciplines. Consequently, by the middle of the 12th century, the rediscovery of the inferential method had already generated useful innovation in the methods applied by

[134] Cf. Bianchi 1997b, 28–9. In fact, "the contraposition makes the choice reasonable; we need to choose after identifying the two alternative sides of a problem. The choice is a task, an act of individual responsibility from which one cannot withdraw": Giuliani 1964, 175.

scientific studies, and it was also destined to spread further in the course of the same century thanks to the schools of liberal arts. Despite all this, during the same period, knowledge of the Aristotelian doctrine on logic still remained, in reality, partially incomplete and lacunose. A complete understanding of the entire work was not possible because of a lack of knowledge of the Stagirite's original epistemological ideas, given in the last part of the *Organon—Posterior Analytics*—which was still completely inaccessible to Western Christian philosophy because of the absence of a Latin version.[135]

The first translator of *Posterior Analytics* (shortly before the middle of the 12th century) was James of Venice,[136] but the criticism of this first version expressed by a certain Johannes, whose identity we are unsure of, brought about new translations: The oldest of these (from Greek) dates from before 1159 and is the work of Johannes himself,[137] another (from Arabic) was written before 1187 by Gerardus Cremonensis,[138] and yet another came from the pen of William of Moerbecke round about 1269.[139] The difficulty of creating a satisfactory Latin version of *Posterior Analytics* had the effect of keeping the medieval *Studia* ignorant of the contents of this noteworthy part of Aristotelian logic for a long time. It therefore started to be studied and used by Latin speaking logicians only in the second half of the 12th century, with the effect that it did not achieve full standard usage as a teaching programme in the schools of liberal arts until the early decades of the 13th century. Consider for example that, according to Roger Bacon, the first course dedicated to a study of *Posterior Analytics* took place in Oxford in the first decade of the 13th cen-

[135] Cf. Schulthess and Imbach 1996, 160. In general, "the arrival of *Posterior Analytics* in the West was slow and difficult" also because no Boethian translation of these works by Aristotle had been handed down to the Middle Ages: cf. Tabarroni 1997, 186–7. The earliest written translation of *Posterior Analytics* had, furthermore, shown itself to be "almost completely unreliable because of errors committed by the transcription of the words written in Greek": Knowles 1984, 257.

[136] Cf. Grabmann 1980, vol. 2: 94–5; Serene 1982, 498; Rossi 1994, 169; Tabarroni 1997, 187, who suggests the years around 1130–1140 as the date when it was translated; De Libera 1999a, 327, 337. On the style adopted by James of Venice in translating Aristotle's works cf. Brams 2000.

[137] On *Translatio Ioannis* cf. Tabarroni 1997, 188; De Libera 1999a, 327, 337–8.

[138] 1187 is the year of Gerardus Cremonensis' death: cf. Dal Pra 1960, 410; Fumagalli Beonio Brocchieri and Parodi 1996b, 213; De Libera 1999a, 338. Knowles (1984, 257) indicates 1187 as the date of Gerardus' translation.

[139] William of Moerbecke's translation of the *Organon* was completed before 1270: cf. Rossi 1994, 177. On the work performed by Moerbecke in translating Aristotle's works (mainly at the behest of Thomas Aquinas) cf. Grabmann 1946, 62–84. On the matter of the various translations of *Posterior Analytics* in the course of the 12th century cf. Minio-Paluello 1972, 749; Schulthess and Imbach 1996, 297; Bianchi 1997a, 13; De Libera 1999a, 337–8. James of Venice's version, however, remained the most used until the arrival of the humanist age: cf. Grabmann 1980, vol. 2: 99; Serene 1982, 498, n. 9; Rossi 1994, 169; Evans 1996, 43; Bianchi 1997a, 13. Also see Grabmann's thoughts (1980, vol. 2: 97–8) on the hypothesis that one of the translations had been produced by Enricus Aristippus Catinensis.

tury (Tabarroni 1997, 188). Indeed, the oldest commentary on this Aristotelian work comes from Robert Grosseteste, Chancellor of Oxford University and Bishop of Lincoln, who wrote it between 1220 and 1230.[140]

The considerable delay—about thirty years—between the first versions of *Posterior Analytics* and translations of the Stagirite's other works on logic was an inevitable consequence of the particular complexity of the Aristotelian text. James of Venice, for example, had preferred to start translating (about 1130) the Greek commentaries on *Posterior Analytics* before dealing with the direct version of the original work (Ebbesen 1999, 9–10), and the mysterious Johannes of the second Latin translation noted in the prologue how "the teachers in Paris preferred to silently ignore the existence of this work, as it seemed obscure to them" (Tabarroni 1997, 188). Again, around 1159, John of Salisbury in *Metalogicon* spoke of *Posterior Analytics* "with a respect full of caution,"[141] complaining above all that the work was not studied because no-one was able to explain the *ars demonstrandi* (i.e., the demonstrative methodology) contained in it.[142]

Further delay in obtaining knowledge of *Posterior Analytics* was caused as a consequence of an absence of translations of it during the early period when the teaching of Aristotle's doctrine of logic was becoming widespread. There was also concern about the correctness of the few translations in circulation—for example, John of Salisbury offers evidence of the widely-held conviction that the *culpa difficultatis* (the reason for the difficulty) of the text was attributable to the fact that it had been "*ad nos non recte translatum*" (incorrectly translated).[143] In fact, the radical methodological innovation contained in *Pos-*

[140] Cf. Dal Pra 1960, 437; Garfagnini 1979, 81; Serene 1982, 498, 501–4; Weinberg 1985, 165; Gregory 1992, 49–50; Abbagnano 1993, 530; Puggioni 1993, 46; Rossi 1994, 175; Bianchi 1997a, 18. In particular Garfagnini (1979, 47) maintains that the 12th century was the moment of the "slow and fragmentary, but continuous and tenacious" assimilation of the Stagirite's doctrine, while it is with the 13th century that we have "the high point of complete absorption of Aristotelian thought by the Latins." Furthermore, we need to consider that the availability of translations of a work does not necessarily coincide with widespread knowledge of it: "to witness the fact that the literary and cultural reception of a work is in large measure determined by the historical situation of the 'recipient' culture, we need to remember that, while from the middle of the 12th century original Latin commentaries on the *Elenchi* began circulating, we need instead to wait until about 1230 to find the first Latin commentary on *Posterior Analytics*, that of Robert Grosseteste": Tabarroni 1997, 187.

[141] This evaluation is in Reade 1980, 400, who likewise indicates that *Posterior Analytics* "were found very difficult." Also Grabmann (1980, vol. 2: 88) explains the initial lack of translations of *Posterior Analytics* "with difficulties over the content indicated by John of Salisbury, therefore, with problems of a didactic nature." On this topic cf. Prantl 1937, 192–3, who formulates the hypothesis that the difficult style of the work was not due to the translator as much as to the inexperience of the copyists.

[142] Cf. *Metalogicon*, IV, 6, 919^{c}–920^{a} (*De difficultate Posteriorum Analecticorum, et unde contingat*). On the subject cf. Rossi 1994, 160.

[143] *Metalogicon*, IV, 6, 920^{a} (*De difficultate Posteriorum Analecticorum, et unde contingat*).

terior Analytics with respect to hitherto dominant epistemological conceptions made it necessary to wait until a much greater number of versions were available from which to choose. Then, one which gave a more accurate, reliable and understandable transposition of the complicated Greek writing into Latin could be chosen, so as to make it possible to begin a confident doctrinal reflection using a clear, trustworthy and uncontested text.[144]

Caution in the translation, study and making of *Posterior Analytics* widely known did not, however, impede all the university *Studia* from progressively dealing with the interpretation of this last part of Aristotelian logic. This development in the conceptual culture of the Middle Ages began in the first decades of the 13th century, and was as difficult as it was ineluctable, because the work formed an integral part of the *Organon*.[145] However, the reading and assimilation of *Posterior Analytics*, the one text of the Aristotelian logical *corpus* still unknown, would gradually produce, in course of the 13th century, an overturning of those epistemological certainties that the study of all the Stagirite's other writings had, until then, installed and planted in the minds of the *dialectica* teachers.[146]

3.3.2. The Re-exhumation of Aristotelian Epistemology

With respect to the gnostic system that had been taught in the schools of liberal arts since the middle of the 12th century, the radical innovation inherent in *Posterior Analytics* lay in the fact that this work by Aristotle did not aim at extending, enriching and defining the syllogistic doctrine already stated in his other writings, but rather expressed a new and different conception of the de-

[144] Serene (1982, 498) writes that "the slow reception of the *Posterior Analytics* by twelfth- and even thirteenth-century philosophers is not surprising in view of the difficulty of the text and the differences between its doctrine and the Augustinian assumptions about truth and knowledge which pervaded early medieval thought," and it has also been indicated (Evans 1996, 42) that this last work of Aristotelian logic "made an unfavourable impression on contemporaries because of its difficulty and was little used until the end of the 12th century and the early years of the following one." Indeed, "the Latin West had never known anything like a scientific theory that was as complex and rigorous as that proposed by Aristotle in *Analytics*": Tabarroni 1997, 187.

[145] Cf. Evans 1996, 60. "With the progress of assimilation of the other parts of the *logica nova* and with the help of new interpretive tools […] also Aristotle's theory of science, as found in *Posterior Analytics*, entered to form part of the stable patrimony of knowledge that every teacher of the Arts had to show he possessed when receiving his title": Tabarroni 1997, 188.

[146] "In the period covering the 12th to the 14th century the concept of science underwent an evolution and a process of semantic and philosophical development that was really astonishing. […] The principal event that started and largely conditioned this evolution throughout this period is undoubtedly the Latin translation of Aristotle's *Posterior Analytics* and the long process of its assimilation by the university culture of the Latin West": Tabarroni 1997, 185–6. On the progressive acquisition of Aristotle's authentic epistemological doctrine in the Middle Ages cf. Garfagnini 1979, 129–37, 193–200.

monstrative force—and, therefore, of the heuristic effectiveness—of inferential reasoning. In particular, the addition of *Posterior Analytics* to the other works of logic in the *Organon* did not bring any substantial modification to the rules of syllogism, which had been already widely described and totally regulated in all its different and complex functional aspects from the moment the *logica nova* had begun to be used. Instead, in reality, it introduced a decisive limit to the value to be given to the mechanism of inference as a general instrument for obtaining scientifically valid certainty (Ross 1977, 41; Schulthess and Imbach 1996, 42).

In fact the Aristotle of *Posterior Analytics* specified that the application of inference did not always and inevitably produce new knowledge which could be useful for the progress of science.[147] This he did without putting the coherence and infallibility of syllogism in doubt; as a tool of dialectical argument it was theoretically beyond criticism, from the point of view of pure logic. If it is in fact true that the most perfect and flawless technique that the *ars demonstrativa* can provide is syllogism, it is also true that simple resort to the syllogistic method shows it, at times, to be useless as a tool suitable for developing and expanding the knowledge inherited by individual scientific disciplines. The reason for this paradox lies in the argument that each science has particular and principal fundamental axioms (*propria principia*) and all new acquisitions of knowledge must necessarily be made to descend from these while pure logic makes use of universal principles and *loci* that, although perfect in themselves, do not have a direct link with any particular science.[148] From all this it follows that the syllogism of pure logic, even if endowed with unquestioned formal rigour and with incontestable probative logic, is not, in reality, heuristically useful for an individual science. According to Aristotle, science, instead, has to obtain all its doctrinal development through syllogisms that use the presupposed fundamentals (the *principia propria*, "postulates" or "axioms") of each discipline as the indispensable premises of every inferential reasoning.[149]

[147] As to the difference between dialectic and science in Aristotle's thought, it is felt that "in reality the fact that, per se, dialectic is not knowledge is in no way incompatible with the possibility that it may be used for science. Also in fact, syllogism per se does not tell us anything, but nothing prevents it being used in demonstrations and that in such a context it can produce a true and proper science": Berti 1987, 131.

[148] In the Aristotelian system of logic "what characterises dialectic, distinguishing it from science, is the fact of arguing on whatever problem, i.e., its universality, and the fact of arguing from opinions that deserve consideration, or *endoxa*, rather than from principles," so that "the argument, or syllogism, of science, i.e., demonstration, starts from true first premises, i.e., from principles, or from premises that in turn are deduced from true first premises, while the argument, or syllogism, of dialectic starts from *endoxa*": Berti 1987, 127.

[149] On Aristotle's epistemology cf. Mignucci 1965. On this point also cf. Codignola 1954, 105; Vanni Rovighi 1962, 181–2; Ross 1977, 41–59; Sanguineti 1987, 162, 204–10; Haren 1992, 14–6; Ackrill 1993, 151–69; Panza 1997, 374.

In other words, despite the uniformity of the syllogistic operating scheme in all forms of inferential reasoning (major premise, minor premise, conclusion), the Aristotelian system identifies the value and efficacy of every syllogistic structure according to the nature of the premises used. These can be of four different types: axioms or *principia* (which give birth to apodictic or deductive syllogism; the only truly demonstrative one, and so the only one that is scientifically valid), probable knowledge (which generates dialectical syllogism with equally probable conclusions, and is therefore non-scientific), rhetorical "loci" that are basic to rhetorical syllogistic reasoning and rhetorical "loci" that are merely apparent (leading to aberrant heuristic reasoning).[150] On the basis of these premises, therefore, we understand that the application of syllogism does not automatically confer demonstrative force to scientific reasoning, but is able to ensure the coherence and epistemological exactness of the new gnostic acquisitions only if the inferential process adopted to identify them has drawn its origin and basis from the *principia propria* of each of the individual sciences.[151] In substance, Aristotle affirms with complete clarity that only demonstrative or apodictic syllogism has a true scientific cognitive efficacy, as the following passage from *Posterior Analytics* (I, 2, 71b 17–25; Engl. vers. Tredennick, on page 31) testifies:

> By demonstration I mean a syllogism which produces scientific knowledge, in other words one which enables us to know by the mere fact that we grasp it. Now if knowledge is such as we have assumed, demonstrative knowledge must proceed from premisses which are true, primary, immediate, better known than, prior to, and causative of the conclusion. On these conditions only will the first principles be properly applicable to the fact which is to be proved. Syllogism indeed will be possible without these conditions, but not demonstration; for the result will not be knowledge.[152]

The doctrine of scientific knowledge handed down by *Posterior Analytics* thus put in crisis the epistemological aspect of the *logica nova*, which had been based on the other Aristotelian works. In fact, this part of the *Organon*, which is specifically dedicated to the theory of science, was translated long after translations of all the Stagirite's other works had been produced and was only accepted in full by the medieval logicians from the 13th century on. It over-

[150] On this Aristotelian division of syllogistic premises cf. Viano 1955, 128–31, 227–49; Sammarco 2001, 21.

[151] Dialectical syllogism does not manage to verify scientific truth because "there is a true and proper leap from discussion of opinions to understanding of the truth: in fact one absolutely cannot draw necessary conclusions from probable premises. Furthermore, when science arrives, dialogue has no reason to exist any more, because absolute objectivity imposes itself on the disputants": Viano 1955, 232. Consequently, the scientific knowledge outlined by Aristotle in *Posterior Analytics* (as interpreted by medieval logicians) identifies itself with "a knowledge that is unchanging and is founded on unquestionably certain axiomatic principles, placed in the brain, that form the basis of the demonstration": Garfagnini 1979, 82.

[152] On this passage from Aristotle cf. Mignucci 1975, 21–3; Celluprica 1978, 157–8.

turned the previously held conception of scientific research, making it necessary to accept a new and different theory of knowledge, inevitably based both on a careful examination of the premises of the syllogism and on the grounds of the validity of the inference. In this regard, Aristotle said:

> Now knowledge is demonstrative when we possess it in virtue of having a demonstration; therefore the premisses from which demonstration is inferred are necessarily true. (Aristotle, *Posterior Analytics*, I, 4, 73a 23–25; Engl. vers. Tredennick, on page 43)[153]

In brief, the epistemological approach laid down in *Posterior Analytics* presented science as an axiomatic-deductive system that was necessarily and ineluctably founded on *principia* that are evident, unquestionable, universal, true, primary and certain in every discipline.[154]

The renewed reading of *Posterior Analytics* produced inevitable cultural consequences, as is immediately clear in the reflections of Scholasticism on this matter—above all in the work of the Paris schools. They went as far as proposing new gnostic canons on the basis of the modifications produced in the Aristotelian matrix of logic known of until then.[155] In this sense, for example, Boethius of Dacia made a distinction in the second half of the 13th century between pure dialectical reasoning and scientific reasoning in its strictest sense, going as far as to theorise that there can no longer be any scientific knowledge that does not derive from the *principia propria* of every individual science:

> Et quia certitudo in scientia habetur ex certitudine suorum principiorum, quia etiam nihil perfecte scitur, donec cognoscuntur sua prima principia usque ad posteriora, ideo, si prima principia cognoscuntur grammaticae, et per illa causaliter omnis effectus in grammatica. (Boethius of Dacia, *Modi significandi*, 4 [*Prooemium*], lin. 21–5)[156]

This teaching led to the conclusion that, in reality, logic presented a mere dialectical interest when it was taken as a separate science; that is to say when it was independent from the *principia propria* of the subject of the syllogistic reasoning. It did not have any concrete demonstrative value and, therefore, did not offer a cognitive use of any scientific importance, as Boethius of Dacia clearly indicated to the reader in this other important passage:

[153] On the piece under examination cf. Mignucci 1975, 55–6.

[154] Cf. Calogero 1927, 19–22; Viano 1955, 133–5; Capozzi 1974, 309–16; Wieland 1987, 73; Abbagnano 1993, 194; Zanatta 1996, 20–39; De Libera 1999a, 353.

[155] On the medieval reworking of the Aristotelian epistemology in *Posterior Analytics* cf. Evans 1996, 59–64.

[156] "Since in science certainty derives from the certainty of its principles, and since furthermore we do not know anything perfectly until we know its first principles and their consequences, for this reason if the first principles of grammar are known, through these, we can know every effect of these principles within the ambit of the grammar, using a causal mechanism."

Sciendum est, quod dialecticus non facit scientiam de conclusionibus scientiarum, quas concludit per communes intentiones, quas invenit in terminis illarum conclusionum. Et ratio huius est, quia non contingit scire rem nisi ex propriis principiis. Dialecticus autem non arguit ex propriis principiis, sed ex communibus intentionibus. (Boethius of Dacia, *Modi significandi*, 34 [q. 8], lin. 54–9)[157]

The Paris philosophers who were active a little after the middle of the 13th century—among whom, besides Boethius of Dacia, we must also include Lambert of Auxerre and Peter of Spain—thus started to distinguish "between a formally valid deduction (i.e., dialectic) and a true deduction (i.e., demonstrative)."[158] From this comes the inevitable consequence that the application of the syllogistic rules taught by Aristotelian logicians in the course of the 12th and first half of the 13th century was inadequate per se as a cognitive tool of universal use and absolute merit (as had been taught in the university *Studia* up to a few decades earlier). It could only perform a useful gnostic function—capable therefore of being a reliable scientific methodology and an authentic epistemological canon—if used on the essential axioms that represented the fundamentals and the *quid proprium* (specific character) of every science. In substance, the rediscovery of the Aristotelian teachings in *Posterior Analytics* provided the basis for new epistemological precepts of philosophy. These demonstrated to all the scientific disciplines that a precise difference of content certainly existed, although not formally, between the dialectical syllogism of pure logic and that of demonstrative science, as the theologian Peter of Auvergne († 1302) clearly pointed out:

Forma syllogismi in dialectico et demonstrativo essentialiter est eadem, quia non differunt nisi solum conditionibus materialibus, que sunt probabilitatis et necessitatis.[159]

The importance given to the content, rather than to the mere form, of inferential reasoning was such that the logicians of the second half of the 13th century also began giving predominance to the ontological substance of scientific

[157] "We need to know that dialectic does not obtain a scientific knowledge of scientific conclusions; this is reached by virtue of the common intentions it finds in the words of those conclusions. The reason for this lies in the fact that we cannot arrive at knowledge of the thing if not from its own principles. Dialectic, instead, does not argue on the basis of *propria principia*, but on the basis of common intentions." For this passage cf. Pinborg 1993, 353–4.

[158] Pinborg 1993, 354, where we also read that in Boethius of Dacia's doctrine, "logical rules express a truth only when they find concrete application." On the importance of the distinction between the logic of the necessary argument (scientific) and the dialectic of hypothetic syllogisms and of probable arguments, found in Lambert of Auxerre and in Peter of Spain, cf. Vasoli 1961, 315.

[159] The translation of the passage is as follows: "The form of dialectical and demonstrative syllogism is essentially the same, for this reason they do not differ if not only for the material conditions that are [those] of probability and necessity." Cf. Pinborg 1993, 359. As regards the origins of the passage cf. ibid., 358, n. 27.

reasoning, with respect to its simple formal rigour.[160] For this reason they also began admitting the existence of valid *consequentiae* (scientific conclusions) as the fruit of arguments that were not strictly syllogistic, as for example in the case of enthymemes (incomplete syllogisms, in that they lack one of the premises).[161]

In conclusion, we can say that those authors who were influenced by the theory of science given in *Posterior Analytics*, highlighted and emphasised the conceptual difference existing between pure logic and real science.[162] They were convinced that the syllogistic method was decidedly inadequate and sterile for cognitive purposes if used on generic logical concepts (extraneous for this reason to the concrete and specific nature of scientific experience). This, therefore, meant that the acquisition of new scientifically valid knowledge was considered indissolubly linked not only to the correct use of the formal rules of syllogistic argument but, above all, to the identification of the *principia propria* belonging to the individual disciplines and to be used as essential and unavoidable logical premises for the construction of scientifically reliable and truthful deductive syllogisms.[163]

3.3.3. The General Adoption of the New Epistemology and the Identification of the Principia propria *of the Individual Sciences*

In light of these considerations, it can be said that the addition of *Posterior Analytics* to the set of texts forming the *Organon* produced such far reaching innovation in the conceptual methods inherited by the scholastic logic of the 13th century, as to inevitably rebound in a radical structural change for all the disciplines. The criteria themselves of what it was to be scientific, on which,

[160] "Starting from the middle of the 13th century the relationship between dialectical reasoning and demonstrative syllogism gradually changed: In particular there was a weakening of the predominant role of categorical syllogism": Fedriga 1993, 308.

[161] Cf. Pinborg 1993, 358–61, who indicates which medieval philosophers had dealt with the problem of enthymemes, and points to how the admission, in the 13th century, of these different forms of deductive argument had by then caused syllogism to lose its privileged position as a gnostic theory. On the expansion of forms of deduction, that took place from the 13th century on cf. Abbagnano 1993, 595; Fedriga 1993, 309–18. As regards the various possible types of enthymeme cf. Copi and Cohen 1999, 312–5. An enthymeme was defined by medieval logicians as *syllogismus abbreviatus* or *imperfectus* (abbreviated or imperfect syllogism): Kahn 2000, 496–7.

[162] Scholasticism did not however reach the point of a radical and drastic separation between the two concepts of science and logic; for example, it has been pointed out that in the 14th century also Ockham, although distinguishing in a very precise way between logic and ontology, "had however to examine what the foundation of scientific propositions was in the real world": Pinborg 1993, 370, n. 47.

[163] "While the logical structure of demonstrative or 'scientific' syllogism is simple, the additional requirements severely limit the number of full-fledged 'scientific' syllogisms": Serene 1982, 498.

up to then, all knowledge had based itself and had set out its doctrinal development, underwent significant change.[164]

In fact, simple knowledge of the inferential techniques (and, above all, of the dialectical *argumenta* and of the *loci* capable of supporting them) was no longer held suitable for offering valid scientific arguments, in so far as not every syllogism—even if rationally correct and valid—served the purpose of producing epistemologically exact *consequentiae*. In reality, this intention could be achieved only by using an apodictic syllogism based on each science's own *principia* and characteristics. This new approach obliged every scientific discipline to identify, at the outset, the complex of *principia propria* on which to build the argumentative methods that would result in the progress of scientific research; only in this way could the use of syllogism give rise to a true *scientia demonstrativa*, i.e., to a correct scientific demonstration.[165] Each discipline would then be able to proceed with the creation of syllogisms that would allow an authentic enrichment of knowledge and, therefore, the possibility of acceptable doctrinal development.

According to Aristotle, in order to be able to play their proper role, these *principia* had to be absolutely universal and necessary, and in order to be so had first of all to be true, primary, and immediate, in such a way as to exist before the conclusion, and to be its cause (Abbagnano 1993, 194). It is evident that previous conceptions of scientific progress, taken as the activity of choosing between dialectical syllogisms—alternative to and conflicting with each other—that were capable of leading to a merely probable "truth," necessarily had to founder. On the horizon lay absolute scientific certainty, obtainable from sure and irrefutable premises by the use of deduction. The new theory of science now proposed apodictic syllogisms that had no need of a dialectical comparison between contrasting opinions, but that needed only to

[164] "Aristotle's *Analytics*, with its rigorously methodological approach, founded on a logical framework (that described in the other *Organon* books, of which it forms the culminating theory) […] imposes a scientific ideal with very precisely defined specific characteristics, by reference to which it is possible to build a hierarchy of knowledge (and therefore its own map and an organisational model of the studies which has profound implications in the field of learning), that very soon becomes determinant, with its inclusions and its exclusions, in the general process of cultural development": Tabarroni 1997, 186. Verger (1997, 105) observed that in 13th century logic "was a complex enough art to stimulate the disciplines of the higher faculties in a remarkable way, because its progress obliged them to constantly question the evidence accepted up to that moment."

[165] Therefore, in order to reach valid conclusions, it was essential that the propositions from which the syllogisms came were scientifically truthful, and every field of knowledge had to identify the first principles that defined it as a science and that provided the propositions on which suitable inferential reasoning could be built: cf. Wieland 1987, 74; Evans 1996, 59. On the concept of *scientia demonstrativa* (demonstrative science) in the 13th century and of the "knowledge-producing syllogism," as well as on the dangers of an excessive generalisation of these concepts, cf. Serene 1982, 496–8.

begin from correct scientific premises (*principia*) in order to produce incontrovertible conclusions not susceptible to dispute.[166]

The new Aristotelian epistemological doctrine established itself ever more incisively from about 1230 on, and greatly influenced the entire history of the evolution of science.[167] This, for example, is shown by the attempt of some Parisian exponents of Scholasticism to transform even theology into a perfect demonstrative science. They tried to found it on the identification of premises that were true, necessary and certain, and from which they could draw unassailable theological consequences in an equally irrefutable manner.[168] The Dominican William of Auxerre († 1231), who had been among the first in Paris to familiarise himself with the epistemological teachings of *Posterior Analytics*, had already started to conjecture a science of theology "conforming to the Aristotelian criteria of science" (De Libera 1999a, 353). Apropos of the fundamental problem of the scientific definition of the object and method of theology (questions said to be of the *ordo disciplinae*), William of Auxerre declared that the articles of faith had an axiomatic value:

> Si in theologia non essent principia, non esset ars vel scientia. Habet ergo principia, scilicet articulos, qui tamen solis fidelibus sunt principia; quibus fidelibus sunt principia per se nota, non extrinsecus aliqua probatione indigentia. (William of Auxerre, *Summa aurea*, III, 12, 1, lin. 64–7; ed. Ribaillier 1986, 199)[169]

It therefore follows from this approach that it is possible to construct a safe rational system of progressive infallible demonstrations that is based on the simple identification of the articles of faith, as the theological *principia propria*: *articuli fidei principia theologiae*.[170] That means that theology, in the system outlined by William of Auxerre, after having "accepted a dogma as a

[166] According to Crombie (1970, 211–2) the idea that permeates the scientific method of the later Scholastics consists of "rational explanation modelled on formal or geometrical demonstration; the idea that a particular fact was explained when it was possible to deduce it from a more general principle," so that science was taken as "a system of deductions from indemonstrable first principles."

[167] Cf. Van Steenberghen 1946, who identifies three periods: the acceptance of Aristotle in Paris (1200–1230), the growth of Aristotle's teachings (1230–1250), the apotheosis of Latin support for Aristotle's teachings (1250–1265). On this theme cf. also Tabarroni 1997, 188–90; Fossier 1987, 158, who states how scientific thought in the 13th century was uniformly linked to a "more or less rigorously Aristotelian" system.

[168] As regards the relationship in general between Aristotelian thought and theology in the 12th and 13th centuries cf. Grabmann 1980, vol. 2: 7–15; Wieland 1987, 70–80; De Libera 1999a, 353–9.

[169] "If theology did not involve principles, it would be neither an art nor a science. It therefore has principles, namely, the articles of faith, which however constitute nothing but principles for believers; for them they are things that are known for themselves that have no need of proof taken from other sources." On this piece cf. Vignaux 1990, 87.

[170] For this form of words cf. Vignaux 1990, 118. On William of Auxerre's doctrine cf. Chenu 1995, 86–7; Colish 2001, 467.

premise, can also proceed to the rigorous deduction of the conclusions" (Vignaux 1990, 88). To quote William of Auxerre again:

Dicitur fides argumentum non apparentium propter articulos fidei, qui sunt principia fidei per se nota. (Ibid., III, 12, 1, lin. 59–60; ed. Ribaillier 1986, 199)[171]

We are not, therefore, talking of proving the article of faith by using reasoning, but of starting from it in order to deduce the entire content of theology, which by its very nature tends to shape itself as an exact progression of syllogistic arguments. In the same way, Phillip the Chancellor († 1236), one of the first exponents of Aristotle's teachings in the university, dedicated his *Summa de summo bono* to the objective of discovering the universal first principles of theology, convinced as he was that "to resolve the problems that present themselves to him theologically, the theologian must identify and study the first principles of all things."[172]

Among the theological followers of this epistemological approach we also find Albert the Great († 1280), who was a great expert on the doctrine, developed by both Latin and Arab "peripatetic" philosophers, directed at an understanding of *Posterior Analytics* (Fioravanti 1994, 299–315). However, the person who stood out most for the great lucidity and efficacy with which he mastered the conceptual *modus operandi* of Aristotle's epistemology, as expressed in the *Organon*, is certainly Thomas Aquinas (1225–1274).[173] Aquinas championed the theory that, using appropriate syllogistic criteria (*rationaliter*), only that which can be shown to begin from sure, universal, necessary and self-evident premises (*per se notae*) enters into the realm of science, while all the rest invariably belongs to the realm of mere opinion.[174]

[171] "Faith is a way of arguing beyond phenomena, by virtue of the articles of faith that are known principles in themselves." Cf. De Libera 1999a, 353.

[172] De Libera 1999a, 355. Eudes Rigaud's ideas develop in a similar way; on which cf. Chenu 1995, 91–2.

[173] Cf. Chenu 1995, 93–131; Tabarroni 1997, 190. It has been written that "Thomas Aquinas is better known for treating theology as a demonstrative science than for contributing to the theory of science. But his consideration of demonstrative science is interesting just because he seems so sympathetic to the details and spirit of Aristotle's enterprise, as is clear from his exposition of the requirements that demonstrative premisses be true, necessary, and certain": Serene 1982, 504. On Thomist philosophy cf. Dal Pra 1960, 451–63. A close examination of the different historiographical positions regarding the importance to attribute to Thomism in medieval philosophy is found in Inglis 1998, 1–13.

[174] Between the 13th and 14th centuries a great debate divided the various theological positions "around the conception of theology as a science, where being scientific was often measured against the yardstick of Aristotelian logic": Gregory 1992, 3. In particular, Thomas Aquinas admitted that some sciences regarding natural phenomena can only partially proceed through rigid scientific demonstration, but was convinced that none of the other disciplines should avoid respecting the rules of the Aristotelian gnosis. On this theme cf. Serene 1982, 504–5; Tabarroni 1997, 192, who also affirms that (ibid., 190) Thomas Aquinas "agreed with Aristotle in holding that the evidence for a scientific proposition consisted entirely of its being

This dramatic distinction, based on Aristotle, between demonstrative syllogistic knowledge (certain) and dialectical inference (simply probable) also obliged Thomas Aquinas to seek the fundamentals of scientific validity applicable to theology (namely, the indemonstrable religious axioms that, from an Aristotelian point of view, are the true theological *principia propria*)[175] that would irrefutably guarantee it a scientific nature, and would thus protect it from being seen as merely a doctrine based on opinions.[176] On this point the following passage from *Summa theologiae* (*STh*, I, q. 1, art. 2) states:

Dicendum sacram doctrinam esse scientiam. Sed sciendum est quod duplex est scientiarum genus. Quaedam enim sunt, quae procedunt ex principiis notis lumine naturali intellectus, sicut arithmetica, geometria, et huiusmodi. Quaedam vero sunt, quae procedunt ex principiis notis lumine superioris scientiae, sicut perspectiva procedit ex principiis notificatis per geometriam, et musica ex principiis per arithmeticam notis. Et hoc modo sacra doctrina est scientia, quia procedit ex principiis notis lumine superioris scientiae, quae scilicet est scientia Dei et beatorum. Unde sicut musica credit principia tradita sibi ab arithmetico, ita doctrina sacra credit principia revelata sibi a Deo.[177]

demonstrated (namely, obtained as the conclusion of a demonstrative syllogism) and therefore derives its epistemic value from that of its premises and from the reliability of the syllogistic inference." For Aquinas, therefore, "knowledge does not exist that is not of and by universal concepts": Alessio 1994d, 336.

[175] In the Thomist system "the articles of faith can act as first principles in the supernatural world. When such principles have been acquired, one can proceed with deductive reasoning, coordinating one doctrine with another and drawing implications from them": Colish 2001, 478. For Thomas Aquinas, therefore, "every science presents itself as a well structured edifice of inferential chains that rests on foundations made up of some indemonstrable first principles": Tabarroni 1997, 191. On the *articuli fidei* (i.e., on the scientific *principia* of theology) in Thomist thought cf. Putallaz 1991, 131–48; Chenu 1995, 93–7. In general, on the concept of science in Thomas Aquinas cf. Martin 1997, 15–31.

[176] On the rationalist and speculative position of Thomist theology cf. Codignola 1954, 292–5; Gregory 1992, 36–53; Schulthess and Imbach 1996, 170–1. As regards Thomas Aquinas' attempt to harmonise theological *principia* based on reason with theological *principia* obtained from evidence offered by the ecclesiastical *auctoritates* (*articuli fidei*) cf. Evans 1996, 62. A comprehensive review of *principia* is given for example in *Summa theologiae*, which consists of a "complete and systematically ordered collection of all the truths of natural and supernatural theology, classified in a logical order, accompanied by their shorter demonstrations, placed between the most dangerous errors that contradict them and the refutation of each of these errors": Gilson 1983, 481–2.

[177] "I answer that, Sacred doctrine is a science. We must bear in mind that there are two kinds of sciences. There are some which proceed from a principle known by the natural light of the intelligence, such as arithmetic and geometry and the like. There are some which proceed from principles known by the light of a higher science: Thus the science of perspective proceeds from principles established by geometry, and music from principles established by arithmetic. So it is that sacred doctrine is a science, because it proceeds from principles established by the light of a higher science, namely, the science of God and the blessed. Hence, just as the musician accepts on authority the principles taught him by the mathematician, so sacred science is established on principles revealed by God" (Engl. vers. Fathers of the English Dominican Province, 2).

According to Thomas Aquinas, theology, which has to all effects and purposes the character of a science, develops deductively by means of syllogistic demonstrations that proceed in an apodictic manner from self-referential principles known per se (the articles of faith) to conclusions that are yet to be understood (Chenu 1995, 101–15, 128–9). Thomas Aquinas uses these words:

Dicendum quod sicut aliae scientiae non argumentantur ad sua principia probanda, sed ex principiis argumentantur ad ostendendum alia in ipsis scientiis; ita haec doctrina non argumentatur ad sua principia probanda, quae sunt articuli fidei; sed ex eis procedit ad aliquid ostendendum. (*STh*, I, q. 1, art. 8)[178]

In synthesis, the Thomist philosophical system is based on Aristotelian epistemology and holds the view that "every science, be it practice or theory, is a cosmos that stands alone, that consists of its own principles." This has the consequence that "the principles of each science consist of something that is irreducible to the principles of any other" (Alessio 1994d, 342).

The scholastic philosophers believed in the distinct plurality of scientific forms of knowledge; all are autonomous and independent because they are all founded on their own *principia*, which are different for and typical of every discipline. Adhesion to this presupposition produced the effect of extending and generalising the scope of the Aristotelian epistemological canon to all sciences. The theory of knowledge based on *Posterior Analytics* did not, in fact, remain exclusively confined to theology, but produced repercussions in all other areas of culture. From the middle of the 13th century, physics, medicine, music, astronomy and all the other disciplines belonging to the world of phenomena tried to identify the *principia* on which they could build their own special doctrinal approach and their own necessary scientific legitimisation. In the search for these *principia*, they found themselves borrowing indispensable basic axioms from such ancient sources as were held to be unquestionably endowed with *auctoritas*, for example, from the works that Aristotle had dedicated to natural philosophy.[179] Evident confirmation of the new epistemological approach in the field of the natural sciences can be found, for example, in John Buridan's († 1359 ca.) comment on Aristotle's treatise *De caelo et mundo*:

Dicendum est quod mundus nihil continet quod non sit scibile, scilicet tanquam significatum per terminos conclusionum demonstrabilium, quia sic omnia sunt scibilia. (Buridanus, *Exposi-*

[178] "As other sciences do not argue in proof of their principles, but argue from their principles to demonstrate other truths in these sciences: so this doctrine does not argue in proof of its principles, which are the articles of faith, but from them it goes on to prove something else" (Engl. vers. Fathers of the English Dominican Province, 5).

[179] "The Aristotelian belief was something much greater that the works of Aristotle and the Latin comments that illustrated them. […] Largely due to the fact that Aristotle's works formed the basis of the *curriculum* of studies of the medieval universities, Aristotle's teachings became the principal, and practically uncontested, intellectual system of Western Europe": Grant 2001, 130. In particular, as regards physics and medicine cf. Crombie 1970, 210–33.

tio et Quaestiones in Aristotelis "De Caelo," I, q. 1 [*Utrum de mundo debeat esse scientia distincta a scientia libri Physicorum*], on page 233)[180]

The compilation of *quaestiones*, based on the new method of studying natural phenomena and of obtaining new scientific conclusions through apodictic syllogism, soon reached widespread proportions (Grant 2001, 193); to the point that, by now, the different disciplines of the natural philosophies were drawing all their possible scientific conclusions from syllogistic demonstrations based on axioms that were unanimously considered necessary and self-evident. These unquestionable and unavoidable premises of all knowledge of the physical world were easily found in Aristotle's books on nature, in Hippocrates' aphorisms, as well as in other authoritative ancient texts.[181] Consequently, the gnostic rules described in *Posterior Analytics* found a wide and fertile testing ground in the vast field of natural science during the course of the 14th century.[182]

Furthermore, Aristotle's epistemology also had an evident and determining influence on the development of the theories current in the Paris school of "Modists": supporters of a "speculative" grammatical science capable of tracing and describing a linguistic structure common to all idioms (Roncaglia 1994, 296–8; Pinborg 1999, 187). The "Modist" writers were active between the second half of the 13th century and the beginning of the following one, and their intention of tracing the universal rules of language shared by all the diverse historical natural languages thus gave grammar the possibility of "legitimately setting itself up as a science, responding to the needs of universality

[180] "The world does not contain anything that is not an object of science, meant therefore, through the words of demonstrable conclusions; in this way in fact all is scientifically knowable." On this argument Ghisalberti (1983, 64, n. 56) specifies that "from Buridan's writings […] it appears that by 'scientific' he means the knowledge of anything signified by the individual words that make up the conclusions of the demonstrations. Since true and proper science is a habit acquired through syllogism, and since the elements that converge at the conclusion are the premises, it follows that the subject matter of scientific knowledge consists of the significant words making up the premises and the conclusion of the demonstration, as also the things signified by such words."

[181] Cf. Grant 2001, 205–12. In fact Aristotle had shown "how one had to use syllogism for the production of scientific demonstration in natural philosophy" (ibid., 237), and for this reason "the natural philosophers of the Middle Ages were convinced that Aristotle's metaphysics and natural philosophy, with their corrections and additions, were sufficient to establish all that could be known about nature. […] To fill the remaining lacunae in their knowledge, they had simply to apply the fundamental principles of Aristotelian natural philosophy" (ibid., 240–1).

[182] Cf. Gregory 1992, 35–6; Garfagnini 1994, 236, 250–4. "The essence of Aristotle's teachings lay in a hard core composed of some fundamental principles of a general character that all natural philosophers of the Middle Ages accepted and that no-one contested. […] These fundamental principles were, not only, never explicitly contested, but all found a series of applications that would have surprised, or even also disturbed Aristotle": Grant 2001, 243, 250.

and of necessity foreseen in Aristotle's *Posterior Analytics* (it is not by chance that this work figures among the principal theoretical bases of the work of the Modists)" (Roncaglia 1994, 297).

Finally, Dante Alighieri's project of applying Aristotelian epistemological rigour to his own *Monarchia* (presumably dated around 1311–1313) was animated by the same intention of organising a highly complex field, like that of politics, in a scientifically irreproachable way. This work was written following peripatetic gnostic rules and was intended to give politics a constitutional basis that was both invulnerable and scientific (Evans 1996, 62), as is clearly evident in the following passage from Dante:

Verum, quia omnis veritas que non est principium ex veritate alicuius principii fit manifesta, necesse est in qualibet inquisitione habere notitiam de principio, in quod analetice recurratur pro certitudine omnium propositionum que inferius assummuntur. Et quia presens tractatus est inquisitio quedam, ante omnia de principio scruptandum esse videtur in cuius virtute inferiora consistant. (Dante Alighieri, *Monarchia*, I, 2)[183]

The Aristotelian roots of the heuristic method accepted by Dante led to *Monarchia* being condemned for its Averroistic and, therefore, heretical inspiration.[184] Similar accusations were levelled against the well known *Defensor pacis* (*Defender of Peace*) written in 1324 by Marsilius of Padua, which showed clear links with Aristotle's epistemological doctrines (Gilson 1983, 829; Vasoli 1994, 517–23). Marsilius had come in contact with the Stagyrite's theory of science both in Padua (the university centre where a radical Aristotelian cult exercised a strong influence) and in Paris (where Marsilius encountered the "Latin" Averroism of John of Jandun).[185] The following excerpt from *Defensor pacis* clearly expresses Marsilius' adhesion to Aristotelian-type gnostic concepts:

Propositum itaque mihi iam dictum negocium distinguam per tres dicciones. In prima quarum demonstrabo intenta viis certis humano ingenio adinventis, constantibus ex proposicionibus

[183] "Now since every truth which is not itself a first principle must be demonstrated with reference to the truth of some first principle, it is necessary in any inquiry to know the first principle to which we refer back in the course of strict deductive argument in order to ascertain the truth of all the propositions which are advanced later. And since this present treatise is a kind of inquiry, we must at the outset investigate the principle whose truth provides a firm foundation for later propositions" (Engl. vers. Shaw, 4–5).

[184] Dante could have obtained his knowledge of Averroës' doctrine from Bologna, where a lively Averroist school flourished in the second decade of the thirteen hundreds. About this cf. Vanni Rovighi 1978.

[185] Marsilius of Padua's philosophical training caused *Defensor pacis* to be different from the majority of political writings of the time, for "the rigour of a systematic process that gives the most accomplished medieval treatment of the theory of the State […] and of the relationships which should exist between political society and the community of 'Christ's faithful,' constituted by the Church and formed, however, by the 'citizens' themselves": Vasoli 1994, 520.

per se notis cuilibet menti non corrupte natura, consuetudine vel affeccione perversa. In secunda vero, que demonstrasse credidero, confirmabo testimoniis veritatis in eternum fundatis, auctoritatibus quoque sanctorum illius interpretum necnon et aliorum approbatorum doctorum fidei Christiane: ut liber iste sit stans per se, nullius egens probacionis extrinsece. Hinc eciam falsitates determinacionibus meis oppositas impugnabo, et impediencia suis involucionibus adversancium sophismata reserabo. In tercia siquidem conclusiones quasdam seu perutilia documenta, civibus tam principantibus quam subiectis observanda, inferam ex predeterminatis habencia certitudinem evidentem. (Marsilius of Padua, *Defensor pacis*, I, 1.8)[186]

Marsilius of Padua was convinced that the political theses given in *Defensor pacis* could be demonstrated using methods that were foolproof (*viis certis*), and that these could be discovered by using human reasoning (*humano ingenio adinventis*) and would be founded on self-evident propositions (*constantibus ex proposicionibus per se notis*). Starting from these propositions, he could then deduce inferential conclusions possessed of an evident certainty by virtue of those premises (*ex predeterminatis habencia certitudinem evidentem*). This conviction clearly links Marsilius of Padua's work to the idea of science described in *Posterior Analytics*, because it shows the author's intention of obtaining every possible scientific conclusion through the application of apodictic syllogism to the *principia propria* typical of political science.

Therefore, all that has just been said shows that scientific disciplines in the course of the second half of the 13th century and in the 14th century all tried their best to explain the fundamental and important *principia* in each field. They then obtained scientifically correct and rationally impeccable conclusions from these principles, using epistemologically irreproachable syllogistic procedures. It is, above all, important to note that this evolution did not only concern the physical or anthropological disciplines, which the logicians of the 13th and 14th centuries held to be the most amenable to human reasoning and the most fertile ground for positive results (Abbagnano 1993, 595). Even areas of knowledge which were completely unrelated to the mechanical sciences, like theology, metaphysics, grammar and politics were involved (Schulthess and Imbach 1996, 169). The adoption of Aristotle's epistemology, as contained in *Posterior Analytics*, caused every individual science to question itself first of all about its own foundations, and about its own essential conceptual premises. The pre-

[186] "I shall divide my proposed work into three discourses. In the first I shall demonstrate my views by sure methods discovered by the human intellect, based upon propositions self-evident to every mind not corrupted by nature, custom, or perverted emotion. In the second discourse, the things which I shall believe myself to have demonstrated I shall confirm by the established testimonies of the eternal truth, and by the authorities of its saintly interpreters and of other approved teachers of the Christian faith, so that this book may stand by itself, needing no external proof. From the same source too, I shall refute the falsities opposed to my conclusions, and expose the intricately obstructive sophisms of my opponents. In the third discourse, I shall infer certain conclusions or useful lessons which the citizens, both rulers and subjects, ought to observe, conclusions having an evident certainty from our previous findings" (Engl. vers. Gewirth, 7).

liminary issue it had to face was, thus, the basic and ineluctable methodological problem of defining the *principia propria* from which all further knowledge was to be drawn.[187] Finally, for a Scholasticism influenced by *Posterior Analytics*, to think is a "métier" that has scrupulously defined laws; and this is true to the point where, unless it respects these laws, science cannot exist.[188]

3.3.4. The Birth of the Commentators' School

The reading and reception of *Posterior Analytics* resulted in the adoption of the epistemological approach it contained, culminating, in the years between 1250 and 1270, in the most illustrious moment of the golden age of medieval philosophy and theology at the Parisian schools (Van Steenberghen 1946, 131–96; Knowles 1984, 397; Verger 1997, 103–8). The ability of this new approach to condition the entire philosophical and theological doctrine so profoundly was such that its advent caused so radical an overturning of methods that the legal world could not remain unaffected by it. The world of law was linked to the application of the same collection of gnostic techniques that the contemporary *dialectica* offered, and therefore evolved in the same way.[189] It is, thus, not surprising that a new way of studying the *Corpus iuris civilis*, based on the reacquisition of Aristotle's original epistemology as expressed in *Posterior Analytics*, was devised and applied really during the same epoch and in the very same place. In particular, between 1260 and 1280, a law teacher and cleric in Orléans, Jacques of Revigny (Jacobus de Ravanio: † 1296), introduced a new technique for interpreting the Justinianian texts, that was different from all previous ones known to science.[190]

[187] "Although we might unite medicine, theology, astronomy, canon law, jurisprudence, and natural science under one common idea—that of scientific rationality which uses conceptual means and aims at general statements—a general conception regarding contents can no longer be established": Wieland 1987, 74. The doctrine proclaimed by Raymond Lull († 1315) in his *Ars Magna* can be considered the culmination of this concept and an indication of the crisis of scientific specialism. In this work he tries to show logic as a universal and fundamental science for all the other sciences, based on the argument whereby "since each science has its own principles, different from the principles of the other sciences, there must be a general science whose principles contain and imply those of the particular sciences, as the particular is contained in the universal": Abbagnano 1993, 598. Cf. also Garin 1969, 62–3.

[188] Cf. Chenu 1995, 101, where we read—regarding the *doctrina sacra*—that science "essentially brings with it a movement of the mind from the known to the unknown, by means of a demonstration, that proceeds from principles (known) to conclusions (to be known). This is its elementary structure, as opposed to immediate knowledge, *intellectus*: It directs all its efforts to and finds its cognitive value in the full initial possession of its principles, which are reached from what is evident." In this way an important scientific *habitus demonstrativus* emerges with the 13th century, based on Aristotle's epistemology: cf. Schulthess and Imbach 1996, 170.

[189] On the changes that took place in the law schools within the general context of the epistemological evolution during the 13th century cf. Verger 2000, 75–6.

[190] The blossoming of the Orléans law school and the reasons for its success form the subject of a fundamental study by Meijers (1959). On this topic also cf. Maffei 1967, 71–3.

The close connection of the new scientific method of studying law with the new heuristic methods developed and tested in the Parisian university environment is indicated really by the place where it developed. In fact, because of the ban on the teaching of Roman law in Paris—sanctioned in 1219 by Pope Honorius III with the decree *Super specula‹m›*[191]—the *Studium* at Orléans had become the closest university centre to the Parisian schools that could be a legitimate testing ground for the scholastic doctrine's new epistemology in the field of legal science. This legitimacy was the result of Pope Gregory IX's authorisation in 1235 of the teaching of Roman law in Orléans.[192]

Indeed, the cultural environment corresponded perfectly to the Parisian model; the Orléans law school was ecclesiastical—both the teachers and the pupils were drawn from the ranks of the clergy—and this fact undoubtedly had the effect of assisting the teachers resort to the innovative gnostic canons found in Aristotle. These had already been authoritatively tested by the theological schools of Paris, and so must also have been well known to those clergy who studied legal matters in nearby Orléans.[193]

Jacques of Revigny applied the scholastic movement's new scientific method to the study of law in a period when the transformation of epistemology was at its height, and which, as already indicated, reached its peak for the theological students of Paris roughly between 1250 and 1270. In fact, Revigny's teaching began in about 1260—the period when, as a simple Bachelor, he put Franciscus Accursii in some difficulty while the Bolognese glossator was giving a lecture at Orléans—and he continued calling the attention of the world of legal studies to the new methods until around about 1280, when he gave up teaching (Cortese 1995, 397–8). Indeed, we need to point out that the gnostic changes that had produced the great cultural flowering in the schools of philosophy and theology of Paris in the years after the middle of the 13th century actually found their longest-lasting development in the field of law. This was because the epistemological innovations introduced in the areas of philosophy and theology were very soon destined to suffer an inevitable decline as a result of hostility on the part of the ecclesiastical hierarchy.[194]

[191] X 5.33.28 (= Potthast 1874, 539–40, n. 6165).

[192] Cf. Meijers 1959, 28; Piano Mortari 1976, 40–1; Cortese 1995, 394–5. On the teaching of law at Paris at the start of the 13th century and on the decree *Super speculam* cf. Coppens 1999.

[193] Cf. Meijers 1959, 6–8, who describes the university at Orléans as a higher college for the clergy and notes that the laity there were referred to as *rustici*. In particular cf. Maffei 1967, 54–7, on the link between Jacques of Revigny and the Dominican environment in Orléans, where that theological teaching would have taken place which would explain "the possession of dialectical techniques which the theologians considered correct and proper, techniques introduced by him into the field of legal argument." On the point also cf. Cortese 1982a, 271–2.

[194] Verger (1997, 110) has pointed out that "the progress of jurisprudence is so much more notable if one thinks that it took place in a period like the last third of the twelve hundreds when the most innovative doctrines in the field of philosophy and theology were in decline."

Despite the importance and soundness of the cultural changes that the adoption of the new Aristotelian epistemology caused, examination of Revigny's works shows that, in reality, the novelty of the scientific approach developed at Orléans did not contain any radical modification of hermeneutic and didactic techniques or of the already noted explanatory works that had previously been in use. In fact, in Revigny's *Lecturae* we find the use, above all, of the pre-existing technique of *quaestio*, including both *quaestiones* that had been disputed and those that had not. This shows how the new hermeneutic method adopted in French circles was based on the same fundamental syllogistic tool that had already been widely tried earlier in Bologna by the glossators. However, differently from the Bolognese *quaestiones*, all the *quaestiones* developed at Orléans present "a more accentuated theoretical flavour than elsewhere and minor practical purpose," as a constant and common characteristic (Cortese 1995, 403).

The reason for the difference between the lively and real Bolognese *quaestiones* that were linked to legal practice and the speculative and abstract *quaestiones* from Orléans lies in their different approaches and aims. If the purpose of the Bolognese glossators had been to extend the range of an individual law's *verba* to a *factum* not expressly contemplated, but subsumable in the *causa* of the *lex* invoked, then the aim pursued by the Orléans teachers was, rather, to subject that law to a penetrating and complete analysis which would allow them to reach the innermost *ratio* of the norm. This *ratio* was the reason for the existence (*principium proprium* of legal science) of the legislative precept to be used as the premise of all further demonstrative syllogisms that would permit the application of that *principium* in practical legal matters.[195] The way this analysis of the *ratio legis* was carried out at Orléans was by successive specification and definition (for example, through the *distinctiones* disguised as *quaestiones* conceived by the most celebrated of Revigny's successors in the Orléans school, namely, Pierre of Belleperche, also called Petrus de Bellapertica).[196]

The conceptual approach of the clergy who taught in Orléans in the second half of the 13th century had been formed by Thomist type theological studies. Consequently, this process would have enabled them to identify the *regula*—i.e., that fundamental *ratio*—from which all other scientific deductions connected with a legal matter could be drawn, as syllogistic consequences. In other words, the discovery of the *principium proprium* from which every law drew its foundations (that involved the identification of the essence of *ratio scripta*)[197] was the essential condition, indicated as such by Aristotle's

[195] The interest paid by the commentators' school to the *ratio legis* inherent in Roman sources has always been stressed as a characteristic feature of the commentators; cf. Solmi 1930, 514; Calasso 1954, 571; Piano Mortari 1986, 31–8.

[196] Cf. Meijers 1959, 102–3; Cortese 1982a, 265. On the extensive structural modification of the *quaestio* at the time of the commentators (despite the preservation of the same terminology used by the glossators in their series of explanatory works) cf. Bellomo 1974a, 66–73.

[197] French legal tradition gives Roman law (also for political reasons linked to the existence

epistemology, for developing any further syllogistic reasoning of a certain and inevitably scientific nature in the field of law. Therefore, differently from the dialectical syllogism of the *quaestio de facto* of the glossators, it would not be liable to dispute, to challenge or to disproof.[198] In fact, "in the domain of the probable it is not sufficient to prove, it is also necessary to persuade; only in demonstrative logic can one avoid consensus, given that demonstration has a necessary character" (Giuliani 1966, 148).

The logical procedure followed by the Orléans teacher, therefore, proceeds from the *ratio* of a law (*principium proprium* of *scientia iuris*) to obtain all its possible scientific consequences through the use of apodictic syllogisms. According to the rules of Aristotelian epistemology, not only are these consequences absolutely incontestable, but are likewise set apart from any comparison with contrary *argumenta*, which they are by now completely irrelevant for identifying scientific truth. This method differs from the glossators' technique, and what counts in it is the direct demonstration of the legitimacy of the principle and of its limits (Maffei 1967, 67). It is from this same principle that all possible consequential scientific results are derived using irrefutable apodictic syllogisms. In other words, the glossators had resorted to dialectical syllogisms and had achieved results that were merely probable and debatable (always liable to be disproved), while Revigny uses the apodictic syllogism and so arrives at scientifically certain and irrefutable conclusions.

When seen in this light, Jacques of Revigny's *Dictionarium iuris* or *Alphabetum* was a truly original and innovative work, in comparison with those in vogue up to then in the law schools, and furthermore, offers clear confirmation of the attention that he gave to the problem of identifying the *principia propria* of legal science (D'Amelio 1972). *Alphabetum* is an encyclopaedia of terms exclusively dedicated to legal entries, for which Revigny often gives a concise but exhaustive definition. The work was unprecedented in the field of law[199] and shows that the adoption of a lexicographical classification, quite unusual until then as a form of legal writing,[200] brought a comprehensive change in the methods used in the world of law studies, which now clearly turned towards the

of strong monarchical power in France) the mere value of a *ratio scripta*, i.e., of a criterion of reasonableness expressed in a written norm: cf. Piano Mortari 1976, 42–3.

[198] Apropos of the method of the "comment," it has been written that "the medieval idea of science was that of Aristotle, of learning built on a base of certain knowledge, deduced by demonstration from supreme and indisputable true principles. Scientific procedures required the use of an argumentative method that had its starting point and support in a complex of necessary and unchangeable eternal principles. […] It did not raise any doubt that jurisprudence had all the attributes of the *scientia*": Piano Mortari 1960, 801.

[199] Roman jurisprudence had been decidedly averse to any process of definition and for a long time subsequent legal science felt the effect of this aversion towards definitions, which had also been expressed in *Corpus iuris civilis*: cf. Orestano 1987, 148–9.

[200] In general on the technique of compiling dictionaries in the Middle Ages cf. Manacorda 1914, t. 2: 246–55.

identification and declaration of a series of definitions to describe fundamental concepts. In the *Dictionarium iuris*, these concepts were listed (aiming for completeness) in alphabetical order so that the entries could easily be consulted. The important aspect is that Revigny states that the definitions he constructed to encapsulate the *quid proprium* of each legal concept were even superior to the Justinianian sources, since "*semper utantur legislatores inpropriis locutionibus*" ("the legislators always used an inappropriate terminology"), from which he draws the conclusion that "*quisquis habeat patulas modo providet aures, audiat et legum lucida verba notet*," or that the true legal axiom to be grasped does not lie in the norm, but in the *lucida verba* (the clear definitions) of the *Dictionarium iuris*.[201] In fact, the construction of an appropriate definition requires the explanation of the *principium* of each institute, which is inevitably identified with its *ratio* (*ratio est anima legis*: the *ratio* is the spirit of the law) and can be effectively synthesized by means of a *regula* designed to be a *plurium similium collectio brevis* (a brief synthesis of many similar concepts).[202] In brief, the system and structure of the *Dictionarium iuris* was intended to perform the ambitious function of offering—as a result of the descriptions it contains—a picture of the *principia propria* of legal science, through which the then dominant epistemological approach could indicate how any further progress might be made in the acquisition of knowledge.[203]

The glossators had been experts in the use of the inferential techniques offered by the *logica nova*, and their use of the dialectical syllogism contained in the *quaestio de facto* had allowed them extend the range of the *verba* of the individual law (the literal wording of the Romano-canonical legislation) to legal paradigms not expressly provided for. This however resulted in conclusions that were merely probable and debatable. Differently from the glossators, Jacques of Revigny applies the new scholastic gnostic method, which is now based on *Posterior Analytics* and is an incontrovertible source of scientific certainty, to the legal world for the first time. For this reason every doctrinal development had to begin from the comprehensive *ratio* of the legal precept, and not any longer from dialectical *argumenta* founded on simple *loci loicales per leges probati* or from premises comparable to those "noteworthy opinions" (*endoxa*) that Aristotle claimed unsuitable for founding a true demonstrative syllogism. All doctrine had to begin from that *principium pro-*

[201] For a rendition of this passage from *Dictionarium iuris* cf. D'Amelio 1972, 67–8.

[202] Cf. Piano Mortari 1986, 32. On the concept of *regula iuris* and on its history in the Middle Ages cf. Caprioli 1961–1962, 267–305; Stein 1966, 131–52; Cortese 1992b, 476–7; Alpa 2000, 30–1.

[203] In the world of law, Revigny's *Dictionarium iuris* satisfies "one of the great intellectual ambitions of the 13th century" that Thomas Aquinas had already addressed in the field of theology, namely, "that of summarising all contemporary knowledge in a vast encyclopaedia": Vincent 1997, 123. On the importance, for the systematic development of legal science, of the appearance of legal dictionaries cf. Giuliani 1997, 143–5.

prium of the *scientia iuris* which would allow all successive inferential reasoning to be obtained from it, and be of an absolutely essentially apodictic nature, so as to increase knowledge of legal doctrine in a way that could not be scientifically disproved. On this subject Pierre of Belleperche says in his *Lectura Institutionum*, for example, that the immediate purpose of his work is to indicate the *mens* (aim) and the *potestas* (efficacy) of the *leges*, and not the examination of their textual detail: "*Causa finalis propinqua est cognitio subiecti et scire mentem et potestatem earum* [scilicet *legum*]" (Petrus de Bellapertica 1536, 24 [*rubrica Institutionum*]).

Mastery of the *principia* (the descriptions of the legal institutes) presented in the *Commentaria* of the Orléans jurists, and in an even more concise form in Revigny's *Dictionarium iuris*, meant that those interpreting them could thus avoid the trouble of having to explain the specific *causa legis* of every law every time they needed to evaluate the possibility of extending it legitimately to an analogous situation (which was, however, always a matter of opinion because it resulted from a dialectical syllogism). Instead, mastery of the *principia* immediately put the entire collection of all true, certain and primary axioms totally at the disposal of the jurist. These axioms proved to be essential for ensuring the solid scientific reliability of the apodictic syllogisms developed from these *principia*, and so provided a means of regulating individual cases in a way that would be irrefutable and uncontroversial.[204]

With respect to the school of the glossators, the French jurists of the second half of the 13th century did not introduce innovations into the logical technique they used, which therefore remained the syllogism, but changed the type of inferential method adopted. Following the distinction laid down by Aristotle, they no longer resorted to dialectical syllogism (based on probable premises and sources of "truth" that, therefore, were likewise open to disproof) but made use of the apodictic syllogism (coming from incontestable *principia*, that was thus suitable for producing syllogistic conclusions endowed with an equally necessary and incontrovertible "truth" from a scientific point of view).[205]

[204] The epistemological change introduced in Orléans led to "a growing movement towards a search for the 'substance' of relations and towards definitions," so that "the search for the substance of things leads—from a new point of view—to a broadening of the legal world of definitions. […] The process of transformation took centuries and brought about the 'translation' of all the Roman heritage into new forms of legal thought and the passage to a new form of *scientia iuris*. It is the creation of a totally new mental habit, still largely dominant today, that in itself generates the conviction that there can be no other": Orestano 1987, 150–1, 392–6.

[205] We need to note that the law historians, from the earliest to the most recent, have as a rule limited themselves to emphasising the importance (and at times to reproaching the exuberance) of resort to dialectical procedures as a distinctive and characteristic element of the origin and development of the Commentator's school: cf. Savigny 1857, 565–7; Ciccaglione 1901, 111–5; Brugi 1921a, 50–61; Besta 1925, 843–73; Solmi 1930, 513–21; Trifone 1943, 231–

3.3.5. The Establishment of the Commentators' School in Italy

The scientific approach that evolved from the method introduced by Jacques of Revigny and perfected by Pierre of Belleperche (who although not a pupil of the former, continued the teaching at Orléans) took the name "school of comment" (from the explanatory work in prevalent use, the *Commentarium*). It represented a radical innovation in the development of the legal science of the second half of the 13th century, in a period when, in Italy, a form of teaching continued to be propounded that was based instead on hermeneutic techniques that were by then antiquated and, above all, scientifically obsolete in light of the new and burgeoning French epistemological method. The innovation developed by the law professors at Orléans was, however, very soon destined to excite interest in Bologna too, despite the fact that the Italian jurists nourished some doubts—which would never be completely appeased—about the suitability of excessive philosophical subtlety in the study of law.[206] By about the end of the 13th century, the Bolognese didactic approach was passé, its methods had been surpassed and it, therefore, rapidly and inexorably fell out of favour under the attack of the new epistemology. As a result of the close links between the French and Italian cultures (and politics), the new approach very soon started to spread rapidly into the universities, where, until then, the method adopted by the glossator's school had reigned undisputed.[207]

6; Calasso 1954, 564–70; Piano Mortari 1960, 796; Pecorella 1966; Horn 1973, 263–4; Orestano 1987, 65, 148; Cortese 1995, 409. In reality, the glossators just as much as the commentators knew and used exactly the same reserve of logical-dialectical techniques, above all syllogism: cf. Cortese 1992b, 468. The difference between the two schools therefore lies not in the diversity of heuristic tools used, but exclusively in the different value attributed to dialectical or apodictic syllogism as a fundamental epistemological canon. As regards the different epistemological structures adopted by the two schools, their common heritage of logical techniques was lacking an overall framework and this has not allowed the historian to grasp the difference existing between the hermeneutic and didactic methods used. These were effectively homogeneous as regards the tools that were adopted (since both were based on inference), but their application started from different syllogistic premises (*endoxa* or *principia propria*). The similarity of the logical techniques used by the glossators and commentators has also prompted some to emphasise the continuity (rather than the break) between the two schools, causing them to hold that the logical foundations remained substantially unaltered despite the change that occurred in legal method: cf. Solmi 1930, 516; Paradisi 1976, 233–8; Astuti 1976, 140–2, 146–8 (who speaks of only the quantitative development, and not about the qualitative difference between the dialectical procedures used in the two schools, and ends by denying any novelty from a methodological and scientific point of view); Cortese 1995, 410 (who speaks of "dialectical techniques that the jurists had tested for some time"). Piano Mortari, above all, expresses a lively criticism of those historical descriptions that highlight aspects of continuity between the various lines taken by medieval jurists, rather than the significant changes in the ideas between the two schools: cf. Piano Mortari 1976, 63–4; Piano Mortari 1979, 202–11.

[206] The opinions of the Italian professors who derided the French contemplative studies of dialectic are found recorded by Meijers 1959, 118–9. On this argument cf. Nicolini 1964, 64.

[207] Meijers (1959, 117–8), for example, records that the legal method developed in France

The person, above all, who introduced the heuristic techniques and epistemological criteria of the French jurists into the Italian universities (Siena, Perugia, Naples, Florence and, perhaps, Bologna) was Cinus Sighibuldi of Pistoia (Cynus Pistoriensis: 1270–1336). An enthusiastic follower of Revigny and of Belleperche (Bezemer 2000), he referred to the French jurists as the *moderni* (moderns) to distinguish them from the *antiqui* (ancient) jurists, namely, those glossators who, although they had already been using the same fundamental, syllogism-based, *quaestio* reference works for some time, had not, however, made the Orléans scientific approach the basis of their legal reasoning. Consequently, they did not form the syllogistic premises of their *quaestiones* correctly, or in conformity with the precepts of the new gnostic approach which, beginning in the second half of the 13th century, had radically changed the fundamental characteristics of scientific rigour.[208] It is significant that the Parisian theologians of the end of the 13th century had already adopted a similar distinction between *antiqui* and *moderni* to indicate the sharp difference existing between the earlier generations of teachers, who had ignored the gnostic approach described in *Posterior Analytics*, and the more recent ones, who instead knew and actually used Aristotle's scientific theory. It is, in short, familiarity with this work of Aristotle that creates quite a sharp distinction between *antiqui* and *moderni* (Chenu 1928; Chenu 1995, 99).

As a result of Cinus' teachings the Italian universities, also, very quickly embraced the new method in full, to the point where, despite the persistent veneration given to the doctrine of the glossators by some Italian jurists,[209] it was really in Italy and not in France that the commentators' school found its most brilliant and highly venerated exponents, for example, Bartolus of Saxoferrato (1314–1357) and Baldus de Ubaldis of Perugia (1327–1400).[210] It was with Cinus of Pistoia in particular that the legal teaching of the Italian schools

was brought to the fore not only by the Italian jurists who had taken themselves off to the Orléans school, but also by the close connection existing between the Roman curia and the Orléans teachers, all of whom were members of the clergy.

[208] Cinus of Pistoia's intention to embrace the "*novitates modernorum Doctorum*" (i.e., the innovations of the *Moderni* doctors) is expressed in Cynus Pistoriensis 1578, 1ra. On Cinus as a jurist cf. Libertini 1974, 23–40; Astuti 1976, 129–52. Bellomo offers a different meaning for the adjectives *antiqui* and *moderni* and, placing his faith on two *Libri magni quaestionum* from the Vatican library, fixes the transition between the two approaches at around about 1270: cf. Bellomo 1974a, 53 (where, however, in footnote 84, we also read that "it cannot be excluded that the name *moderni* serves in general to denominate those doctors of the Italian schools who, in common with some teachers beyond the Alps, gave a lot of space to Scholasticism in their cultural formation and in the actual application of scientific and practical activity"); Bellomo 2000, 545–65, where we read that, besides the merely chronological criterion, there could have been "differences in method that were substantial and radical, or such, however, as to justify the two qualifications" (ibid., 563).

[209] Cinus of Pistoia was ironical about the way the lawyers idolized the *Magna Glossa*: cf. Bellomo 1993, 433.

[210] For a recent work on Bartolus of Saxoferrato cf. Bellomo 1998a, 181–93.

started for the first time to liberate itself from teaching methods that had been based on a direct reading of legal texts, and to turn rather towards an exposition of *principia*, which were scientifically drawn from the legal sources. In addition, the attention of the jurists also became increasingly concentrated on the *regulae iuris* (legal rules), which were summaries of these same *principia*.[211]

On this point we should note, as historiography has suggested, that it was the particular legal context (dominated by *droit coutumier*, the law of custom) and political context (i.e., French monarchical power, which was hostile to the Holy Roman Empire) that provided the main factors which induced the Orléans jurists to interpret and use the Justinianian *lex* through the form of the *ratio scripta* (Meijers 1959, 21–4; Piano Mortari 1960, 797). However, if the new method introduced in Orléans had been linked only to these contingent factors, and the reasons for the change—starting halfway through the 13th century—in the epistemological order of the entire culture were not, instead, of a more general, deeper and comprehensive nature, we would not understand Cinus of Pistoia's interest in this method. Nor, above all, would it be possible to explain why the thought of the French jurists was accepted in Italy, where the situation was different both legally and politically from that of the French (Astuti 1976, 146).

It needs to be said that the Italian teachers began to see the importance of the new method developing in France and were aware that it was useful to identify the *principia* of legal science in the light of the new epistemological system imposed by the reading of *Posterior Analytics*. The importance of the modifications in teaching meant that change was, in fact, comparable to the transformation of a century earlier caused by Pillius of Medicina with his revolutionary *Libellus disputatorius*. As already mentioned, at the end of the 12th century Pillius had managed to shake up the inertia in the teaching methods of the Bolognese teachers by offering his own students a complete collection of the *loci loicales per leges probati*. These allowed savings in time and effort when identifying the legitimate foundations of each dialectical *argumentum*, and so permitted a considerable reduction in the time taken to learn the technique of the legal *quaestio*. This innovation had had great success outside the Bologna *Studium*, and had caused those minor universities which had welcomed the new method to increase in popularity; also in the end causing the Bolognese *alma mater* to take account of Pillius' work.

In the same way, the comprehensive and far reaching epistemological renewal coming from Orléans—and in particular the technique, started by

[211] The observation that the traditional didactic method, based principally on the explanatory reading of legal texts, begins to die out from the time of Cinus (the start of the 14th century) (cf. Bellomo 1993, 430) is linked to the fact that the definite establishment of Aristotle's philosophy in Italy and the development of the Italian Aristotelian movement started only towards the end of the 13th century and lasted until the 16th (cf. Piano Mortari 1976, 65–7).

Revigny, of identifying the legal *principia* in order that they could have a syllogistic use—rapidly highlighted the limits of the traditional Bolognese teaching methods. These methods had been developed in a cultural context that was still deprived of knowledge of *Posterior Analytics*, and was therefore unprepared for welcoming the Aristotelian logical canons imposed by Parisian Scholasticism. In fact, the study of law carried out in Bologna took the *verba* of the law as its essential and inevitable starting point for all hermeneutic reasoning, and the jurist developed *quaestiones* from it by using dialectical *argumenta*. These *quaestiones* were needed to give greater syllogistic efficacy to the specific law source being examined. In this way, it was possible to extend the *lex* of the *Corpus iuris* to actual cases, which could consequently be governed as a result of the same *causa legis*.[212] This is why, for example, what Azo declared in his *Summa Institutionum* (1210 ca.) is significant. He maintained that the base on which the glossators had built the foundations of legal science was essentially the texts of the Justinianian laws: "*ad noticiam ergo legum habendam, que constringit vitas hominum, debet quilibet anhelare ne per iuris ignorantiam a rectitudinis tramite deviare cogatur*."[213] Again, halfway through the 13th century, Odofredus expressed himself in the same way. He based all his didactic method on a series of phases that were inevitably connected to the direct explanation of the text of Justinian's *leges*.[214]

Quite differently, the scientific approach taken by the commentators was not centred on an explanation of passages from *Corpus iuris civilis* in order to give an extensive interpretation of the *verba* of the individual *lex*,[215] but had as its main objective the immediate and specific identification of the legal *sensus* (meaning) of the Justinianian precept. This meaning was obtained by the teacher through a judicious use of a hermeneutic technique intended to explain the *regula*, the *principium proprium* of legal science.[216] Indeed, by using

[212] On the importance in the glossators' school's understanding the Justinianian *verba legis*, and on how the objective of applying the logical tools provided by the dialectical method was the use of analogy to extend the scope of the *verba legis* cf. Piano Mortari 1976, 44–54; Piano Mortari 1979, 180. It has been written on this that in the twelve hundreds and thirteen hundreds "legal thought is dominated by the need to not distance oneself from scientific sources, from the 'dogma' of Justinian's laws, from their own verbal format": Bellomo 1996, 22.

[213] Azo 1506, 346a (*Prooemium*, ca. me.): "Everyone must yearn to have a correct knowledge of the legislative texts that regulate the lives of men, in order that he is not induced by his ignorance to deviate from the straight and narrow."

[214] Odofredus' passage on the didactic method (*Prooemium* in the *Digestum vetus*) is published in Savigny 1854, 734 and is analysed by Haskins 1972, 174–5. On the didactic method in use at Bologna in the first half of the 13th century cf. Bellomo 1974a, 49, n. 76; Bellomo 1992a, 207.

[215] The commentators' school affirmed "the widespread idea of having to stand back from the literal meaning of the words in the interpretive work": Piano Mortari 1986, 36.

[216] It is true that, recalling Cicero, Azo had already stated in the preface to *Summa Institutionum* that every science has its principles and roots ("*habet quaelibet scientia principia et radices, super quibus regulare constituitur fundamentum*": Azo 1506, 346a), but for Azo, this

induction, the commentator could usefully take advantage of the rich doctrine already developed by the glossators to identify the "nature" of the institutes governed by the Justinianian laws,[217] but with the difference that the new approach received from Orléans now made the teacher develop an autonomous process of definition. This allowed him to set aside Romano-canonical sources and replace them with a lucid and exhaustive synthesis (*definitio*) of the legal *principium* present in every law (the "*materia*" of the law),[218] together with all the possible exceptions and specifications made necessary by the specific nature of the argument.[219]

In the 16th écentury, Mattheus Gribaldi Mofa gave a conceptually rigorous description of the commentators' method, in which he clearly reconstructs and summarises how the Justinianian *verba* were distanced by this process of definition in order to achieve a wording of the *regulae* that was imbued with the *ratio* of the Roman law.[220] In his work *De methodo ac ratione studendi* (dating back to 1541) he reveals the nature of the *regulae* used by the commentators, and praises Bartolus and Baldus as unequalled in crafting idioms that were suitable and effective for synthesising the legal *principium* underlying the fonts of Roman law:

foundation lies in the "*noticia legum*" (knowledge of the legislative texts) which appears a few lines earlier in the same preface (on this passage of Azo cf. Bellomo 1992b, 185, n. 34). In reality, the glossators' and commentators' schools had two different conceptions of the basic *principia* of the *scientia iuris*, consequently developing radically different gnostic systems and heuristic methods. It is sufficient for example to reflect on the fact the *regula* explained by the commentators is the result of an inductive syllogistic process which tends to replace the *verba legis*, while the definition created by the glossators generally represents the product of an analytical process based on the *distinctio* used on precisely those *verba* that cannot be set aside: cf. Otte 1971, 212–3; Carcaterra 1972, 302–4. On induction as an argumentative process in Aristotle's logic cf. Vanni Rovighi 1962, 184–8.

[217] The glossators had started to isolate some legal *figurae* that had a precise, unitary "nature" (for example, the *natura contractus*, the *natura obligationis*, the *natura donationis*, etc.). This characteristic, while also being autonomous and independent from individual laws because it preceded all legal activity, could be recognised in the Justinianian legal rules which transposed it into the discipline of positive law: cf. Stein 1966, 131; Bellomo 1993, 460–1.

[218] On the meaning of the *materia legis* adopted by the commentators (different from that taken by the glossators) cf. Horn 1973, 325–6.

[219] The *casus legis* and the *summarium legis* present in the *lecturae* of the commentators synthesised the *causa* of each law in a general and abstract rule, capable of general application in the contemporary legal context: cf. Di Bartolo 1997, 210–5. Already in Riccardus of Saliceto († 1379) the *casus legis* does not any longer represent "the account of the fact nor even the norm with its content," but "the legal principle that is in the norm, […] that runs through the norms as the essential life-blood of their existence, and for this reason it is opportune that it is expressed, as Riccardus does, in a form and way that is ever more refined and synthesised": Bellomo 1996, 30.

[220] On Mattheus Gribaldi Mofa's complex scientific personality, in which the cultural need to preserve the commentators' method combines with that of humanist requirements, cf. Quaglioni 1999.

Neque enim ex universa lege verbum aliquod retinemus, sed ex ratione tacita definitionis generalem regulam subtili interpretatione deducimus, atque ita non quid iurisconsultus dixerit, sed quid senserit explicamus. Quo in genere, duos omnino ex doctoribus nostris excelluisse comperio, Bar‹tolum› et Bald‹um›, qui universas ferme legum sententias ita perstrinxerunt, ut eorum formulis, vel epitomis, nihil aut brevius aut subtilius excogitari possit. (Gribaldi Mofa 1559, 17r–v [I, 8: *Regulas tum ex verbis, tum ex mente legum colligendas*])[221]

If a significant characteristic of the glossators' school had, therefore, been an "undervaluation of the technique of definition," and a rejection of every general abstract concept (Giuliani 1966, 181), then by contrast, the distinctive feature of the commentators' school became a great predilection for definitions, which would find enthusiastic advocates like Bartolus and Baldus (Brugi 1921b, 51). As a result, with the commentators "syllogism is guaranteed by reference to an ontological order which can be known through a knowledge of definition" (Giuliani 1966, 215). In fact, here is a passage by Baldus that makes it clear how the identification of the *principia* must be considered an indispensable premise for deriving any scientific truth:

Qui vult scire consequens, debet primo scire antecedens. Qui vult scire quid rei, debet scire principia rei. […] Est namque diffinitio brevis demonstratio rei per oppositionem factam, que rei amplectitur proprietates. (Baldus 1599, 7ra (ad legem *De iustitia et iure*, l. 1 [Dig. 1.1.1], ad verba *Iuri operam daturum*))[222]

Rather than the examination of its wording, the identification of the innermost and determining rational substance of the law was, therefore, the true objective which the commentators' school strove to obtain from a scientific study of the *Corpus iuris civilis*: "*Nota quod scientia consistit in medulla rationis, et non in cortice scripturarum.*"[223] The immediate knowledge of the legal *principium* (the *medulla rationis*, namely, the "rational core" of the norm) not only allowed the interpreter to avoid the onerous task of having to reconsider the *ratio* expressed by the *verba* of the norm (the *cortex scripturarum*, the wording of the external "bark" of the law) on every occasion, but to avoid, above all, any risk of disputability or disproof being inherent in the inferential reasoning

[221] "We do not draw even a word from any of the law, but, thanks to an elaborate interpretation, we extract a general rule from the implicit *ratio* of the legal provision, and we thus arrange to explain not what the jurist said in the norm, but his thinking. And I ascertained that among all law teachers, two were without doubt the most outstanding in this type of interpretation, and they are Bartolus and Baldus, who summarise the profusion of words found in the laws so briefly that one cannot discover anything briefer or more ingenious than their formulae or syntheses."

[222] "Who wants to know the effects, must know the causes. Who wants to know the nature of every thing, must know its *principia*. […] Definition is in fact a brief exposition created for contrast, which includes the essential properties of each thing." Orestano's considerations on this passage are found in Orestano 1987, 150.

[223] Baldus 1599, 19rb (ad legem *De legibus et senatusconsultis, et longa consuetudine*, l. 17 [Dig. 1.3.17], ad verba *Scire leges*).

based on the *argumentum a similibus*. In fact, one could draw all further doctrinal development from the *definitio* (the fixing and stating of the legal *principium*) in a way that was epistemologically certain, so that "*non perfecte novit artem, qui non novit principia artis*" ("who does not know the *principia* of an art does not know that art perfectly").[224] The possibility or impossibility of applying any legal discipline to a particular fact did not, therefore, derive from the analogous extension of the words of a specific legislative text, but was entirely and easily obtainable by a deductive-syllogistic route (therefore rigorous and not liable to disproof) from the *principia propria* of the *scientia iuris* contained in the norm. The commentators used these *principia propria* directly, in the form of *definitiones*, as the premises for all scientific reasoning.[225]

Indeed, an understanding of the special epistemological character which animates the commentators' school still lives in the words written by Mattheus Gribaldi Mofa in the 16th century. Tracing a clear picture of the scientific criterion behind legal studies, he specifies that "*omnem disciplinam generalibus constare praeceptis, quae ignorare non licet*," i.e., that every scientific discipline consists of general precepts which cannot be ignored.[226] In substance, at more than two centuries' distance from the beginning of the commentators' school, Mattheus Gribaldi Mofa confirms—in an Aristotelian way—that every science is founded on its own general precepts, and that every perfect discipline (like that of the law) must necessarily be deduced from a knowledge of the universally valid principles that govern it:

> Omnis igitur disciplinae progressus, a generalibus praeceptis recte deducitur, quae veluti cuiusque artis fundamenta ad omnium specierum, atque individuorum cognitionem ita necessaria sunt, ut neque ignorari, neque in dubium revocari debeant. Plane ignorari universalia non possunt, sine quibus ad particularium notitiam minime pervenitur. Revocari in dubium non debent, cum vel ipsa sint luce clariora, vel notius supra se habeant nihil. (Gribaldi Mofa 1559, 5v [I, 3])[227]

An examination of the characteristics of the general precepts which Mofa speaks about shows in particular that they must be considered necessary (*nec-*

[224] Baldus 1599, 7va (ad legem *De iustitia et iure*, l. 1 [Dig. 1.1.1], ad verba *Iuri operam daturum*; *additio*).

[225] Giuliani 1966, 181, observes that reasoning *a similibus* is useful and understandable only in the ambit of the probabilistic logic that distinguishes the science of the glossators; if, on the contrary, "the law were certain and rigorous, the processes of justification would be deductive and rigorous, and not those of the *similis ratio*." We would add that, this is really what happens in the science of the commentators.

[226] Gribaldi Mofa 1559, 5r (I, 3, rubrica). For a careful examination of this theme cf. Quaglioni 1999, 200–1.

[227] "All scientific progress must be obtained from general precepts that, as the foundations of every art, are so essential for a knowledge of all the particular and individual expressions that are not to be ignored or put in doubt. Universal principles cannot be ignored because without them knowledge of individual and particular realities is not possible, and they cannot be doubted because nothing exists that is more evident and more certain than them."

essaria), incontestable (*neque ignorari, neque in dubium revocari debeant*), and evident (*luce clariora, vel notius supra se habeant nihil*); it can easily be shown that the character of these precepts corresponds exactly with the nature of the scientific *principia propria* (true, primary, immediate) outlined by Aristotle in *Posterior Analytics*. In a late and mature reflection, Mofa, one of the last to follow the commentators' method, still expressly and repeatedly cites *Posterior Analytics* as one of the principal fonts for a correct understanding of the epistemology fundamental to all in the commentators' school (Quaglioni 1999, 205–6). It is clear that Mattheus Gribaldi Mofa identifies the essential methodology of jurisprudence with the criterion that any progress towards the acquisition of scientific knowledge must necessarily come from general and fundamental precepts:

> Caeterum de effectibus seu individuis scientia esse non potest, sunt enim (secundum Platonem) prope infinita ut nulla arte recipi queant, nullaque disciplina comprehendit. Causas vero universales esse constat et finitas, ex quibus propterea recte fiunt demonstrationes. (Gribaldi Mofa 1559, 8r [I, 4: *Felix qui potuit rerum cognoscere causae*])

In short, we read in these lines a clear, concise, and final description of the Aristotelian scientific method applied by the commentators' school: There can be no science of the particular (of the innumerable *verba legis* that make up the different Roman and canonical *leges*), but there can only be a science of the general (of the limited number of *regulae* or *axiomata iuris* that make up the *principia propria* of the *scientia iuris*).[228]

3.3.6. Legal Principia*, Word Lists,* Consilia*, and the Evolution of the Doctrine of the* Ius commune *in the School at Bologna*

The new gnostic approach was aimed at the construction of a system of synthesising *rationes* (*principia*) from which all scientific, doctrinal developments would be derived through the use of syllogism. The Italian jurists were masters of this gnostic approach, as is shown by the exact and talented way they attempted to progressively perfect and enrich the reserve of *rationes*. These were identified and collected in the extensive *Commentaria* drawn up in the course of the 14th and 15th centuries. However, the work that best documents the synthetic-systematic intentions that were typical of the commentators' science is probably that of the *Dictionarium iuris* compiled by Albericus of

[228] It has been shown that Gribaldi Mofa's *De methodo ac ratione studendi* is an "expression of a rationalism that, in the text as much as in the richness of the marginal notes, assumes the quality of a great *concordia Aristotelis et Corporis iuris*, i.e., of an intrinsic concordance between philosophical principles and legal axioms": Quaglioni 1999, 203. Similarly, in the 17th century Everhard Bronchorst (1554–1627) stated that the legal *regulae* are no other than the indispensable *prima iuris principia*, i.e., the irreplaceable basis of all the deductive reasoning created by the *scientia iuris*: cf. Stein 1966, 166–7.

Rosciate (1290–1360 ca.). This was conceived as an amplification and perfecting of the homonymous work produced almost a century before at Orléans. Revigny's idea of an alphabetical construction of definitions is, in fact, rendered much more extensive and analytical by Albericus, who, in light of the powerful development that the commentators' science had brought about in legal doctrine, creates an even more precise, meticulous, and complete repertoire of legal rules.[229] Consequently, the method used by Revigny finds its most vivid exposition and crowning achievement in Italy, in Albericus' *Dictionarium*, which not only aims at capturing in a single systematic synthesis all the legally relevant *principia propria*—in their Aristotelian sense—drawn from the *Corpus iuris civilis*,[230] but also contains a true and proper mini-treatise of *modi arguendi* under the heading "*Arguitur.*" From these, the reader can obtain all the elements necessary to create any type of inferential argument (apodictic as much as dialectic) that can produce syllogistic conclusions which are formally correct, be they of a scientific nature or of merely probable status.[231]

This organisational format gives legal science a list of entries covering fundamental legal principles (*principia propria*), and a collection of rules that allow the application of syllogistic logic to these principles. The good fortune and longevity of this form of gnostic presentation is also borne out by its reuse in Mattheus Gribaldi Mofa's work *De methodo et ratione studendi*, already mentioned. In the middle of the 16th century, he presented his readers with a substantial series of general legal principles (set out in alphabetical order beginning with "*Absurdum intellectum ab omni dispositione reiiciendum*" up to "*Ultima prioribus derogare*") and of *axiomata iuris* (which have been compared to the aphorisms of Hippocratic literature),[232] together with an examination of the rules of syllogism to be applied to those principles.[233] The list of *principia* indicated in Gribaldi Mofa's *De methodo* represents, in short, an indispensable catalogue of the limited number of *praecepta iuris* from which a multiplicity of scientifically valid syllogistic conclusions could be drawn.[234] In-

[229] On the vitality of this form of presentation, even after Albericus' work cf. Ascheri 2000, 277.

[230] He deals with *principia* such as "*Impugnare non dicitur qui ius suum tenetur*" and "*Ignotus aliquando accipitur non paciscendo*" (these *regulae* are cited by Horn 1973, 350, n. 12). In addition to the *regulae iuris* (which make up the main part of the work), Albericus also inserts an explanation of some words and gives indications of the Justinianian passages connected with some of the entries listed in his *Dictionarium*: cf. Savigny 1857, 627–8.

[231] Cf. Albericus 1581, s.v. "*Arguitur*" (followed by a long list of *argumenta*). Cf. Ascheri 2000, 266, n. 21.

[232] Gribaldi Mofa 1559, 5v–8r (I, 3). The intention of dealing with inferential techniques in a comprehensive manner also induces Mofa to list the *loci communes* that are typical of dialectical syllogisms: cf. Gribaldi Mofa 1559, 32v–42r (I, 17–18).

[233] Gribaldi Mofa 1559, 14v–15r (I, 7: *Regularum usum quam maxime necessarium esse*).

[234] A broad analysis of the format of *De methodo ac ratione studendi* is found in Quaglioni 1999, 206–7.

deed, Bartolus of Saxoferrato had already compared the legal scientific procedure to the gospel parable of the five loaves and two fishes: He held that, starting with five loaves (the five volumes of the *Corpus iuris*, the golden coffer of the *principia iuris*) and with two fishes (namely, the two *sensus legales*, the *literalis* and the *argumentalis*), legal science could produce—as a result of a shrewd syllogistic use of the limited number of premises available—all the infinite scientific conclusions necessary for the world of law.[235]

The confident certainty that the commentators' school placed in the role of apodictic syllogism as the essential and unavoidable epistemological canon for developing legal science saw to it that the consequent meticulous identification of all the *principia* found in the *iura* and in the *leges* of the *Corpus iuris civilis* became an additional powerful tool for extending the efficacy of Roman law. In fact, knowledge of the *ratio* of the norms served as the premise and inevitable conceptual basis for the development of the technique—and works—of the *consilia*.[236] In the *consilia*, the jurists evaluated the conformity or discrepancy of the *principia propria* of the ancient *ius commune* against the various cases offered in reality by legal daily life and, making use of their authoritative doctrinal opinion, they proposed recourse to the *ratio* expressed by the Justinianian norms (a *ratio* not susceptible to aging or to abrogation as a legal *principium*) to regulate matters that were ever new and different (Cortese 1992b, 479–80). A necessary effect of the conceptual *modus operandi* of the authors of the *consilia* was, therefore, the continuous development and progressive enlargement of the normative force of those *principia* which the commentators had authoritatively indicated as the essential scientific basis of the *ius commune*. In this way they determined—also sometimes by virtue of some rather too unscrupulous syllogistic constructions—the steady progress of the *ius commune* and its continuous capacity for expansion.[237]

3.3.7. The Crisis in Aristotelian Epistemology and in Legal Science Based on Syllogism

The powerful doctrine created by the glossators was based on Plato's criterion of *distinctio* and, from the middle of the 12th century, on the rediscovery of Aristotle's syllogism, but was revolutionised in the course of the second half of

[235] "Haec scientia, quae figurata est in quinque panibus, et duobus piscibus, ex quibus saturata est turba; Io‹annes› 6 c. Quid enim aliud quinque panes, nisi quinque volumina lib. ff. huius civilis scientia, scilicet ff. Vetus, Infortiatum, ff. Novum, Codex, et Volumen, duo pisces sunt duo sensus legales, scilicet sensus literalis, et sensus argumentalis. Ex istis enim quinque panibus, et duobus piscibus, totus mundus saturatur": Bartolus 1615, 182vb. For comment on this passage by Bartolus cf. Quaglioni 1990, 134.

[236] On *consilia* literature (*pro parte* or *pro veritate*) cf. Ascheri 1995, 185–209.

[237] As regards the importance of the *consilium* works as a vehicle for the diffusion of the *ius commune* cf. Ascheri 2000, 268–9.

the 13th century by the advent of Aristotle's doctrine on scientific knowledge, as expressed in *Posterior Analytics*. Even this innovation, which had given birth to the method adopted by the commentators, was however destined to wane and be overtaken by the substantial epistemological innovations introduced from the end of the 13th century on.[238]

The earliest roots of the Aristotelian epistemological crisis can be traced back to the condemnation in Paris, in 1277, by Bishop Tempier of 219 philosophical propositions held to be heretical and consequently censored.[239] Two of the propositions condemned as heterodox had, in fact, a direct link with the gnostic technique founded on *principia propria* (immediate and not liable to demonstration) of the individual scientific disciplines. Bishop Tempier criticised any certainty that was based on "*principia per se nota*," or was reached through the use of such principles.[240] In substance, the condemnation was directed against this epistemological approach that relegated the importance of certain assertions (or disproved or denied them). The assertions in question being those that were not composed of *principia* that were immediately evident or were not syllogistically derived from ideas endowed with elementary evidence (the doctrine of necessity or determinism).[241] The approach that had been condemned was that which claimed to identify the basis and foundation of all certain scientific knowledge in the complex of true, necessary and self-evident (*per se noti*) axioms; this was considered by the scholastic philosophers of Paris, in the middle of the 13th century, to be the essential and inevitable starting point for any authentic and believable cultural development. In brief, the condemnation hit the scholastic gnostic system (and especially the Thomist theological system), which regarded the resolute, deductive logic in-

[238] "We can say that as soon as the assimilation of the doctrine contained in *Analytics* ended, in about the middle of the 13th century, an equally intense and fervid process of redefinition started immediately, which, in the last analysis, was critical of the Aristotelian scientific ideals. This led, above all in the 14th century, to the introduction of revolutionary changes to the perspective contained in these ideals": Tabarroni 1997, 186. On this topic cf. Pinborg 1976, 240–51.

[239] On the 1277 condemnation of Averroism cf. Dal Pra 1960, 443; Weinberg 1985, 176–7; Fossier 1987, 154; Vignaux 1990, 56–7. An early condemnation of Aristotelian doctrine had taken place at a Provincial Council held in Paris in 1210 and presided over by Peter of Corbeil, but on that occasion (as at the subsequent condemnation of 1215) Aristotelian logic remained absolutely without any form of sanction: cf. Grabmann 1941, 42–69; Copleston 1971, 272–5; Vignaux 1990, 51; Gregory 1992, 24; Fumagalli Beonio Brocchieri and Parodi 1996b, 262. In general on the hostility towards Aristotle's scientific and philosophical works in the 13th century cf. Grant 1997, 37–43.

[240] The text of the articles in question (3 and 4) can be read in Hissette 1977, 20–1. On the subject cf. Serene 1982, 507, n. 43.

[241] Cf. Crombie 1970, 44–5; Tabarroni 1997, 193. More generally, "the collection of condemned propositions […] precisely indicates, apart from the inevitable deforming and forcing, the cornerstones of a well defined philosophical system: Aristotle's teachings": Fioravanti 1994, 315.

dicated by Aristotle's epistemology as a criterion and measure of being scientific.[242]

A different conception of noetic and intuitive science, different from the Aristotelian, dianoetic, rational model attacked by the Parisian condemnation of 1277,[243] was revived for example in the doctrine of the English Franciscan Duns Scotus († 1308), who taught theology at Oxford. While not contesting the heuristic value of syllogism, he declared that syllogistic logic was insufficient as an exclusive epistemological criterion. Thus, Duns Scotus turned his attention to the importance of perceptual experience and to God's intervention in the cognitive process,[244] and did so to the point of causing a re-evaluation of the Augustinian conception by which knowledge would not be possible without ineffable divine illumination.[245]

Scotus' doctrine anticipates the radical change in the theory of science which took place in the 14th century and which would see another Franciscan don at Oxford, William Ockham (1290–1349 ca.), fiercely opposed to the Aristotelian concept whereby only knowledge obtained through deductive inferential reasoning would give unquestionable scientific certainty.[246] In fact, Ockham's epistemological approach provided for the repudiation of the scholastic claim that only those truths which sprang from a formal-logical process were certain and incontestable when such a process led from axioms noted

[242] Other propositions condemned by Tempier in 1277 are even more explicit in deprecating the philosophers' conviction that they possessed the one true wisdom and in criticising the opinion that noetic and intuitive theology did not have scientific value: cf. Dal Pra 1960, 444–5; Vignaux 1990, 57. Among the writers against whom the Parisian condemnation was most clearly directed is indeed Boethius of Dacia whose radical adhesion to the Aristotelian epistemology was abhorred since it led to a doubting of the scientific validity of the Church's official teachings: cf. Weinberg 1985, 177–9. On the distance between Thomist thought and the rationalism of the radical Aristotelian cult cf. Van Steenberghen 1980b, 75–110.

[243] On the dianoetic position on the problem of scientific truth in Aristotle cf. Calogero 1927, 23–8.

[244] Duns Scotus' doctrine continues the theme evident in the constant Franciscan polemic already conducted by Bernard of Clairvaux (in the 12th century) and by Bonaventura of Bagnoregio (in the 13th century) against cognitive processes based on Hellenic philosophy rather than on what God revealed: cf. Codignola 1954, 291–2; Alessio 1994a, 345–53. On the rivalry between the Platonism (Augustinian and mystical) of the Franciscans and the Aristotelian culture (rational and doctrinal) of the Dominicans cf. Dal Pra 1960, 429, 466–7; Tabarroni 1997, 194–5; Trottmann 1999.

[245] In the same way as Aristotle and Thomas Aquinas, Duns Scotus also "believes that first principles can be evident on the basis of experience, but he insists that the apprehension of the correct premisses of a scientific syllogism does not suffice for scientific knowledge": Serene 1982, 509. Cf. also Gregory 1992, 51–2. On this subject, Vignaux (1990, 109) indicates how, for Duns Scotus, theology does not have the characteristics of a truly scientific reasoning because knowledge of God is not based on appropriate general ideas that can be used as secure syllogistic premises.

[246] Cf. Serene 1982, 514, where we read that, in Ockham's doctrine, "scientific knowledge is not epistemologically decisive."

per se to scientific conclusions endowed with ontological value (McCord Adams 1993). This induced the English philosopher to support the value of empiricism, of knowledge obtained through the intuitive perception of the individual data of experience, from which "probable" truths could be derived. In reality, such truths are not deducible from necessary and self-evident premises, even if these are endowed with scientific certainty, nor are they susceptible to rigorous syllogistic demonstration.[247] Furthermore, Ockham's denial of the absolute and exclusive scientific value that the 13th century awarded to causal connection (fundamental for the operation of Aristotelian logic but incompatible with the religious postulate of divine omnipotence) irremediably compromised the overall value of the inferential demonstrative structure, and consequently invalidated the entire gnostic efficacy of an epistemology based on syllogism.[248]

The slow eclipse of the ideal of a theory of knowledge in which syllogism was an infallible technique that was universally valid for obtaining a complex of ideas of incontrovertible scientific esteem from unchangeable and eternal *principia propria* therefore coincides with the change in the concept of demonstrative science. This change took place when the new nominalist and probabilist philosophical currents based on perceptive experience established themselves.[249] At the beginning of the 15th century, Peter of Ailly († 1420), following this line, got to the point of saying that "*philosophia Aristotelis seu doctrina magis debet dici opinio quam scientia* […] *et ideo valde sunt reprehensibiles qui nimis tenaciter adherent auctoritati Aristotelis*" ("Aristotelian phi-

[247] Cf. Crombie 1970, 234–5; Mugnai 1994. "In the epistemological field, Ockham's starting point is the primary importance given to an intuitive knowledge of the particular as a font of scientific evidence," which he puts alongside the "traditional categories of the immediate knowledge of principles *per se noti* and of the knowledge of conclusions syllogistically derived from necessary and evident premises": Tabarroni 1997, 196.

[248] Ockham's logic "abandons the Aristotelian attempt at a rigorous process capable of re-examining the categories of reality themselves. Science can, therefore, be only about the particular, outside of pure, formal-logical discourse: the Aristotelian-Thomist claim of the universality of knowledge is abandoned for a more modest programme of particular and probable knowledge, based on a continual resort to experience": Garfagnini 1979, 271. For this reason, according to Ockham, all knowledge comes from sensitive intuition alone and not from reason, which leads instead to confused and uncertain conclusions at an ontological level: cf. Fossier 1987, 155; Gregory 1992, 55–6. In fact in Ockham's conception, the world is totally subject to the inscrutable will of God, with the consequence that Ockham's epistemology is characterised by a radical empiricism in which knowledge can be obtained only from experience through "intuitive cognition": cf. Vignaux 1990, 120–32; Grant 1997, 43–7; Grant 2001, 213–4.

[249] "Ockham's attack on contemporary physics and metaphysics had the effect of eliminating reliability from the majority of principles on which the system of physics was based in the 13th century": Crombie 1970, 236. Tabarroni observes (1997, 197) how "with Ockham the Aristotelian ideal of demonstrative science was confined exclusively to the field of formal knowledge of an analytical nature," thus producing a "fracture […] in the long debate on the subject of scientific knowledge" in the course of the 14th century (ibid., 199). Cf. Grassi 1994.

losophy or doctrine must be considered more an opinion than a science […] and therefore those who adhere too tenaciously to Aristotle's authority are very wrong").[250] However, already in the course of the 14th century Ockham's influence had shown itself to be deep and decisive, producing "a widespread tendency to accept empiricism as the foundation of all possible knowledge," and this process developed to the point where "empiricism and the refusal of the reality of what is not observable became characteristic traits of the style of nominalist thought, in the fields of science and philosophy."[251]

As regards the world of law in particular, the decline of the Aristotelian epistemological system would inevitably signal a crisis in the commentators' school. This school of law was itself based on the conception of demonstrative science as received and taught in the 13th century in the medieval *Studia*, and which was destined in the course of the following century to encounter drastic opposition. The crisis of the scholastic Aristotelian cult entered an acute and irreversible phase with Ockham,[252] and would cause the birth of new schools, including those dedicated to a study of the law. These would be founded on epistemological criteria that were different from and incompatible with the Aristotelian methods that had, until then, dominated the doctrinal development of the schools of *ius commune*.[253] Late medieval legal science, built on the *logica vetus* and on the *logica nova* (and inseparably linked to these logical models), started to fade away with the 15th century, despite the fiery defence of this scientific method (*mos italicus*) on the part of the last supporters of the commentators' school (Cortese 1995, 477). In fact, in the first half of the 14th

[250] Petrus de Alliaco 1513, 83vb (I Sent., q. 3, art. 3). The passage cited from Peter of Ailly is examined by Gregory 1992, 56. On this subject cf. also Fossier 1987, 160–2; Le Goff 1991, 142–5.

[251] Grant 1997, 47. On the empirical and sceptical tendencies of the 14th century cf. Crombie 1970, 237–8. However, we need to specify that the Parisian teachers of the Arts, in the same period, were far from wanting to completely undermine the Aristotelian foundations of the scientific vision of the world: cf. Tabarroni 1997, 202–3. In general on the characteristics of Scotus' and Ockham's doctrines, as well as on those of the Parisian philosophers that were inspired by the thoughts of the Oxford theorists, cf. Heer 1991, 272–6; Tabarroni 1997, 197–204.

[252] Cf. Garfagnini 1979, 271. One of the consequences that Ockham's doctrine had on theological studies was therefore "a general tendency to eclecticism and to scepticism": Verger 1997, 123. Ockham's epistemological doctrine even generated "a taking of sceptical positions with respect to the possibility of scientific knowledge in general": Tabarroni 1997, 197.

[253] "It was certainly not against dialectic per se that the humanist jurists railed. But they could not support the decadent Aristotelian-scholastic dialectic of the commentators and proposed a new one. […] It is clear from what we have said that the humanist problem of a new logic, different from the medieval Aristotelian-scholastic one, was also profoundly felt by the jurist supporters of this humanist approach": Piano Mortari 1978, 138–9. On this theme cf. Cortese 1992a, 490; Manzin 1994, 23–61. The first generic skirmishes of the crisis generated by an unfettered abuse of dialectic, had already begun in the first half of the 14th century: cf. Fioravanti 1992, 175–6.

century, the uncontrollable stream of innovations that came in the field of philosophy apropos of demonstrative scientific procedure, gradually but ever more insistently, led to the challenging of the centrality and ontological priority of the *Corpus iuris civilis*. It led to the birth of a new doctrinal approach (*mos gallicus*) stimulated by criticism of the previous legal science, whose conclusions were held to be unreliable and lacking absolute value (Maffei 1956, 153–76; Birocchi 2002, 7–12).

Even before the criticism coming from the *mos gallicus* jurists descended on the followers of the commentators' school, the decadence of the *mos italicus* had already been ordained by a supplanting of Aristotle's gnostic method and by the obsolescence of the entire cognitive approach of late medieval science. Its collapse had dragged down with it all the epistemological techniques founded on syllogism, and among them, also, the scientific criterion adopted by the commentators.[254] The emergence of the new doctrine of legal humanism and the development of its philological approach, thus, found its roots and theoretical foundations in the most characteristic aspect of the nominalist science of the 14th century, namely, in the "heuristic and probative value given to the techniques of linguistic analysis in the construction of scientific discourse."[255] The end of confidence in Aristotelian syllogism, held to be devoid of scientific value by the Ockhamist logicians, was consequently the decisive cause of the gradual but inevitable loss of prestige of the entire commentators' school. Their complete gnostic structure was considered obsolete, ineffective and arbitrary, and so was generally repudiated by successive intellectuals.[256]

[254] Calasso speaks of a "fatal wearing away" of the dialectic technique used by the commentators: cf. Calasso 1959, 72. On the progressive abandoning of the Aristotelian scientific ideal cf. Gregory 1992, 58–9; Graziano 1992, 47–55. As regards the possible link (also disputed in doctrine) between modern science and the final developments in medieval epistemology cf. de Muralt 1991, 26–36; Bianchi 1994, 488–9; Grant 2001, 252–308.

[255] Tabarroni 1997, 203, who adds (ibid., 204) how "the definite abandonment of the postulate of isomorphism between science and reality which had been correctly identified in the previous century as the indispensable metaphysical support of the Aristotelian ideal of science" became a determining factor in the 14th century. On the epistemological innovations immediately following the Middle Ages cf. Mamiani 1999. As regards the field of the physical sciences cf. Butterfield 1998. For conceptions of the nature of science and scientific explanation from the 16th century on cf. Bechtel 2001.

[256] The modern historian tends however to re-dimension the clear break between the *mos italicus* and the *mos gallicus*, to tone down the contrast between the two cultural systems and to stress instead the elements of continuity between the two models: cf. Maffei 1956; Quaglioni 1999; Minnucci 2002, 1–10.

Chapter 4

POLITICS IN WESTERN JURISPRUDENCE

by Kenneth Pennington

In his work *Politica methodice digesta* that he published in 1603 Johannes Althusius defined politics as the "art of associating [*consociandi*] men for the purpose of establishing, cultivating, and conserving social life among them" (Althusius 1964, 12). Althusius was an early modern German jurist who firmly believed that human social institutions were and should be regulated by law. "Common law [*lex communis*], which is unchanging, indicates that in every association [...] some persons are rulers (heads, overseers, prefects) or superiors, others are subjects or inferiors. For all government is held together by *imperium* and subjection" (ibid., 14–5). "Local laws [*leges propriae*] are those enactments by which local associations are ruled" (ibid., 16). Althusius did not think of politics as being primarily the art of conflict but the art of living together. Law provided the foundation of a community's social structure.

Althusius lived in the waning years of the *Ius commune*, the common law that was taught in all of Europe's law schools until the Protestant Reformation. It was not a set of statutes. Rather, it was a set of norms and a jurisprudence that was based on ancient Roman, canon, and feudal law. It provided a rich source of principles for all European jurists. Although he was a Protestant, Althusius drew heavily upon legal traditions and sources of Pre-Reformation Europe. His *Politics* is studded with references to Hostiensis (Henricus de Segusio), Panormitanus, (Nicolaus de Tudeschis), Bartolus of Sassoferrato, Baldus de Ubaldis, and many others. He summarized five centuries of jurisprudence in the *Ius commune* that dealt with all aspects of human concourse.

The *Ius commune* was born in the late eleventh century.[1] In the early Middle Ages, Europe was a land without jurists. With the establishment of law schools, first at Bologna and then in other Italian, French, and Spanish cities, jurists began to discuss issues that may be broadly defined as political. In the modern world we primarily think of politics as a continuing struggle between parties with differing ideological and economic beliefs. From the thirteenth to fifteenth the Italian city states did have competing, organized parties striving for control of political institutions of their communities. The rest of Europe, for the most part, did not. Medieval jurists dealt with political matters in two ways. They analyzed and developed legal rules for the governance of political institutions from the office of the prince to the corporate governance of cities, secular and ecclesiastical corporations (guilds, cathedral chapters, monaster-

[1] For the history and importance of the *Ius commune* see Bellomo 1989.

ies), and representative assemblies. The jurists were also called upon to render opinions on legal questions that arose from political conflicts in medieval society. They became experts who were asked to solve problems, answer questions, and advise princes. Law was established as an important branch of learning, and jurists became an indispensable class in the political life of European society (see Fried 1974; Brundage 1995; and the essays collected in Bellomo 1997b, especially Bellomo 1997c and 1997d).

4.1. The Jurisprudence of Sovereignty in the Twelfth and Thirteenth Centuries

Law became important in political debates of the second half of the eleventh century. The conflict between Pope Gregory VII (1073–1085) and the German Emperor Henry IV (1056–1106) generated a mountain of literature. One of the first signs that law would play a role in political disputes was a treatise written by a certain Petrus Crassus. He used Roman and canon law to defend Henry IV and cited Justinian's *Institutes* to establish the principle that kingdoms cannot be ruled without laws (Petrus Crassus, *Defensio Henrici IV. regis*, 1.432–453; see the Latin text and the German translation in Schmale-Ott 1984).

As law became important in politics and in all other parts of medieval society schools were established to teach it. Stories circulated about how the teaching of law originated. Not surprisingly some of these tales credited rulers with encouraging the teaching of Roman law. One of the most intriguing is a report by a German chronicler, Burchard of Biberach, that Matilda, Countess of Tuscany, petitioned Irnerius to teach the books of Justinian's compilation. Whether the story is true or not it reflects an assumption of the early twelfth century that rulers were interested in fostering the study of ancient Roman law and that the knowledge of law would enhance a ruler's authority. In any case Irnerius was a major figure of the early twelfth century who taught law in Bologna, advised the Emperor Henry V (1106–1125), and served as a judge in Tuscany (Cortese 1995, 58–61; on Irnerius, see Spagnesi 1970). Legal historians generally credit him and an even more shadowy figure, Pepo, for establishing Roman law as a field of study in Bologna.

The reign of the German emperor Frederick I Barbarossa (1152–1190) marked the beginning of the jurists' using their recondite knowledge in the service of the prince. Frederick recognized the importance of jurists and protected the Law School at Bologna with an imperial decree, the *Authentica Habita* (1155), that granted the students at Bologna special privileges. Three years later at an imperial Diet in Roncaglia (near Piacenza) Frederick opened the assembly with an oration that contained a remarkable number of references to texts of the *libri legales*, the textbooks used at Bologna (ibid., 67, 164, 167). The emperor tacitly cited Justinian's Digest, Code, and Institutes to

justify his rule. The texts of the *libri legales* legitimized his authority but also protected the rights and liberties of his subjects. When he proposed new laws, as he did at Roncaglia, he promulgated them but, he said, the people confirmed them by accepting them through customary usage. He proclaimed that laws must be just, possible, necessary, useful, and suited to the time and place. He concluded by pointing out that one may not judge laws after they have been established. Rather one must judge according to the laws. All of these points were taken from the *libri legales* (Pennington 1993d, 10–1).

Frederick's speech at Roncaglia was not an isolated example of the importance of law for imperial rhetoric and policy. Godfrey of Viterbo wrote a poem that exalted Frederick's legislative authority and employed the standard metaphors of the new jurisprudence to describe the imperial office: The emperor was living law and could promulgate, derogate, or abrogate law (ibid., 11–2).

Frederick promulgated new laws that treated the emperor's rights and prerogatives in Italy at Roncaglia. An Italian chronicler wrote that Frederick summoned law professors from Bologna to advise him on his imperial rights that were due to him. One of the laws is particularly instructive.

> The prince possesses all jurisdiction and all coercive power. All judges ought to accept their administration from the prince. They should all swear the oath that is established by law.

This law was entirely based on principles of Roman law. Frederick did not know Latin and was not educated in law. He gathered men around him who were experts of the *libri legales*, the new legal science. European princes would follow Frederick's lead for the next 700 years. They gave jurists positions of power and authority in their curiae and used them as trusted and advisors. The laws that were promulgated at Roncaglia began a long tradition of medieval jurists' contributing to the formation of a jurisprudence of sovereignty.

It is instructive to compare the promulgation of King Henry II (1154–1189) of England's Constitutions at Clarendon (1164) to Frederick's legislative work at Roncaglia. Henry made no claim to have the authority to legislate. He gathered his barons and bishops together to "recognize" royal liberties and prerogatives.[2] A "recognition" of law was the same term used to discover the facts of a case by jurors in early English writs. In England law was not a manifestation of royal prerogative; it was a fact that could be discovered by examining the customs of the realm. There is no trace of the new jurisprudence of monarchical authority in the rhetoric that justified the Constitutions (on the Constitutions see Helmholz 2004, 114–8). The English kingdom would only begin to be influenced by the legal theories of sovereignty of the *Ius commune* in mid-thirteenth century when the author called Bracton at-

[2] Prologue to the Constitutions: "facta est ista recordatio vel recognitio cuiusdam partis consuetudinum et libertatum et dignitatum antecessorum suorum."

tempted to describe the prerogatives of the king using some of the same texts and language that were used to exalt Frederick Barbarossa's authority at the Diet of Roncaglia (Tierney 1963a, 295–309).[3]

A story that circulated among the jurists illustrates the authority that jurists began to exercise in medieval society. The setting of the story was the Diet of Roncaglia. It may or may not be true. The protagonists were two of the four great doctors and teachers of Bologna, Bulgarus and Martinus. Frederick had summoned these experts to Bologna to advise him. While riding with them on horseback on day, Frederick asked them whether according to law he was the Lord of the World (*dominus mundi*). The idea of the emperor's being the *dominus mundi* was probably inspired by a passage in the Justinian's Digest (Dig. 14.2.9). In a passage taken from a commentary on the Rhodian Law of the Sea, the Emperor Antoninus declared that he was the "Master of the World" (*tou kosmou kurios*). Another text of Roman law became closely associated with the imperial title in the minds of the jurists. In a law that was included in his Code, *Bene a Zenone* (Cod. 7.37.3), Justinian did not claim the title, Lord of the World, but he did assert that the emperor could be understood to own all things. If the emperor owned all things, it was a short step for the jurists to conclude that the emperor was, indeed, the Lord of the World.

Frederick must have heard from people in his court that the emperor had these grand titles. He asked the jurists what authority and prerogatives such titles bestowed upon the imperial office. "Am I legally the Lord of the World," he asked. The tradition reported that Bulgarus declared that he was not the lord over private property. Martinus responded that he was, in fact, Lord of the World. Frederick rewarded Martinus' sycophantic answer with a gift of a horse (Pennington 1993d, 17–30).

In the second half of the twelfth century the jurists who glossed Justinian's codification dealt with these texts and others that touched upon the emperor's prerogatives. They concluded that the prince did not have jurisdiction over his subjects' private property under normal circumstances. Rights to private property were protected by natural law. One point should be emphasized. When Frederick asked whether he was Lord of the World, no jurist interpreted his question as asking whether other kings were subject to him. That question did not interest them. It would be left to Pope Innocent III to broach that question at the beginning of the thirteenth century. The twelfth-century jurists focused on the emperor's authority to take the rights of his subject away and his prerogative to abrogate law arbitrarily. In other words they were interested in the relationship of the prince to the law (see the discussion of Tierney 1963b, 378–400).

[3] See Nederman 1988, 415–29, who does not understand the importance of the *Ius commune* for Bracton's political thought.

The Roman law *libri legales* gave the medieval jurists very fragmented texts upon which they could construct a theory of princely authority and of the prince's relationship to the law (see Stein 1988, 37–47, especially 44–6). There is little in the Digest on a theory of law. A text in the Digest from the Roman jurist Gaius stated that natural reason established law that is observed among all human beings. It is called the *Ius gentium* or law of peoples. This law and the customs and laws of individual cities (*civitates*) constituted the laws under which human beings lived (Dig. 1.1.9). The *libri* also contained some definitions of terms at the beginning of the Digest. The medieval jurist, who began to study and comment upon ancient Roman law did not, however, have a coherent set of texts upon which they could create a jurisprudence that treated the nature of law. That task was taken up by Gratian, who began to teach canon law at Bologna in the early twelfth century.

When Gratian began teaching at Bologna, Irnerius was teaching Roman law at about the same time. Until recently the only secure fact that we knew about Gratian was that he compiled a collection of canons that later jurists called the *Concordia discordantium canonum*. This cumbersome title was later shortened to the Decretum. It very quickly became the most important canonical collection of the twelfth century and later became the foundation stone of the entire canonical jurisprudential tradition. It was not replaced as a handbook of canon law until the *Codex iuris canonici* of 1917 was promulgated.

Since the work of Anders Winroth in 1996 we have learned much more about Gratian. Winroth discovered four manuscripts of Gratian's collection that predated the vulgate text of the Decretum. Since then another manuscript of this early recension has been discovered in the monastic library of St. Gall, Switzerland. Although all five manuscripts must be studied in detail before we fully understand their significance, some conclusions can already be made. The first recensions of Gratian's work were much shorter than the last recension. The differences between the recensions mean that Gratian must have been teaching at Bologna for a significant amount of time before he produced his first text that circulated. There was a significant period of time between when he began teaching and the final version of the Decretum. Most evidence now points to Gratian's having begun his teaching in the 1120's. He continuously revised his text until the late 1130's or early 1140's. In spite of its defects—organization was its primary flaw—it immediately replaced all earlier collections of canon law in the schools (Winroth 2000; Larrainzar 1999; see also Larrainzar 1998).

Gratian became the "Father of Canon Law" because the last recension of his collection was encyclopedic and because with his "case method" he provided a superb tool for teaching. His vulgate version of the Decretum was a comprehensive survey of the entire tradition of canon law.

Gratian introduced jurisprudence into canonical thought. His first innovation was to insert his voice into his collection to mingle with those of the Fa-

thers of Nicaea, St. Augustine, and the popes of the first millennium. He did this with dicta in which he discussed the texts in his collection.[4] He pointed to conflicts within the texts and proposed solutions. His dicta made the Decretum ideal for teaching, and the Decretum became the basic text of canon law used in the law schools of Europe for the next five centuries.

In addition to the novelty of his dicta, Gratian created a collection of canon law that was organized differently than any previous collection. In his earliest version of the text, Gratian focused on 33 cases (*causae*). In each case he formulated a problem with a series of questions. He then would answer each question by providing the texts of canons that pertained to it. When the text of the canon did not answer the question without interpretation or when two canons seemed in conflict, Gratian provided a solution in his dicta. Gratian's hypothetical cases were effective teaching tools that were ideally suited to the classroom. Gratian was the first teacher to use cases to teach law.[5]

Perhaps the most important parts of Gratian's work for the beginnings of European jurisprudence were the first twenty distinctions of the 101 distinctions (*distinctiones*) in the first section of his Decretum that he added to his original text. In these twenty *distinctiones* he treated the nature of law in all its complexity. Gratian must have realized that he could not teach law by looking only at cases and questions of fact. He had to make his students understand the sources of law. As I pointed out above, the *libri legales* did not discuss the relationship between the different types of law. Gratian did that in his first twenty distinctions. These twenty distinctions stimulated later canonists to reflect upon law and its sources.

Gratian began Distinction One with the sentence: "The human race is ruled by two things, namely, natural law and usages" (*Humanum genus duobus regitur naturali videlicet iure et moribus*). The canonists grappled with the concept of natural law and with its place in jurisprudence for centuries. Their struggle resulted in an extraordinary rich jurisprudence on natural law and reflections on its relationship to canon and secular law. Brian Tierney has noted that "natural law [did not] constitute a significant limitation on the legislative competence" of the prince. It was also not "a kind of detailed pattern of legislation laid up in heaven." Rather, natural law provided a moral basis for deciding whether a given enactment was a good and just law (Tierney 1963b, 388). It was a set of norms that evolved in European jurisprudence through a long gestation in the arguments of the jurists (see Pennington

[4] Gratian may have been influenced by the dicta that he found in Alger of Liège's *De misericordia et iustitia*, although it is difficult to know how Gratian would have learned of Alger's work; see Kretzschmar 1985, 141–54.

[5] One manuscript contains a text of the Decretum with only *Causae*. I believe that this manuscript contains a version of Gratian's Urtext. See Pennington 2003, and the expanded version, Pennington 2004b.

2004c, 417–20). In some cases, the jurists found justifications in sacred scripture for their arguments about which norms were based on natural law. In others, they could discover no precedents in sacred scripture. Instead they relied on norms that had evolved in the *Ius commune*. These norms conformed to reason, reason so compelling that they expressed eternal truths. We shall see that the jurists used norms and principles that they defined as natural law to limit the authority and prerogatives of the prince.

Gratian concluded that natural law dictated that "Each person is commanded to do to others what he wants done to himself," connecting natural law with the biblical injunction to do unto others what you would have them do unto you (Matthew, 7.12). By defining natural law as the duty to treat other human beings with care and dignity, Gratian encouraged jurists to reflect upon a central value of natural law: the rendering of justice and the administering of equity in the legal system. The inspiration for Gratian's dictum was two texts in Justinian's Digest (Dig. 1.1.9–10). Most of the texts that Gratian used were taken from the *Etymologiae* of Isidore of Seville (560–636). Isidore combined the various traditions of natural law that had circulated in the ancient world. He defined it as being the law common to all nations that was established by the instigation (*instinctus*) of nature, not by human legislation. Examples of natural law were marriage and the procreation of children, "one liberty of all human beings" (*una libertas omnium*), and the acquisition of property taken from the heavens, earth, and sea. Natural law was, as the Roman jurists had earlier concluded, natural reason. To define the contents of natural law Gratian placed Isidore's definition of natural law on the first page of his Decretum (D. 1 c.7). Together with the texts of Roman law in Justinian's compilation, Gratian's Decretum became one of the standard introductory texts for the study of law (the *Ius commune*) in European law schools, and Isidore's definition became one of the most important starting points for all medieval discussions of natural law.

Gratian also discussed the various types of human law: unwritten custom, civil law, the law of a city or of a people, including definitions taken from Roman law. Law was a hierarchy. Under Gratian's schema, laws were not simply reflections of different usages in various communities. All law had to be evaluated according to standards that transcended human institutions. Law was also intimately connected to people. The prince could not exclude his subjects from being a central source of law. The people could not only make law, they could approve it. Gratian ended his treatment of legislation by defining how law became valid: "Laws are established through promulgation and validated when they are approved by the acceptance of the people" (D. 4 d.a.c.4: "cum moribus utentium approbantur"). Remarkably, Frederick Barbarossa used these very words when he described his conception of his legislative authority at Roncaglia (Pennington 1993d, 10, n. 11).[6]

[6] Otto of Freising, *Gesta Frederici*, Liber 4, Chapter 5: "Nostis autem, quod iura civilia

Gratian and Frederick marked the beginning, not the end, of the jurists' contemplation of the role of the prince in making law. The jurists read the texts in the *libri legales* that described the emperor's supreme legislative authority and were uncertain how to reconcile the authority of the medieval prince with the powerful tradition of customary law. Customary law had dominated Europe for centuries. Almost all local legal systems were based on customary law in the twelfth century. Frederick Barbarossa's legislation at Roncaglia is one of the few examples that we have in the twelfth century of a monarch's consciously exercising his authority to make new law. The assizes of King Roger II of Sicily are another.

The twelfth-century jurists did not agree about the relationship of custom to new legislation. Irnerius wrote that custom that was established by long usage should be preserved, particularly if it were not contrary to reason and did not contradict written law. He did not, however, think that custom could abrogate the decrees of the prince. "All power of making law has been transferred to the prince" (Pennington 1988, 425). Other jurists argued that under certain circumstances, particularly with the tacit approval of the prince, custom could derogate from, if not abrogate, law. A maxim began to circulate in legal circles that "custom was the best interpreter of law."

During the course of the twelfth century jurists focused much more on the power of the prince to make new law than on the right of the people to establish and be governed by their own customs.[7] A few jurists noted that society needed new laws because change demanded them. By the end of the twelfth century canonists had created a new concept to describe the law promulgated by the prince or by governing institutions: positive law (*ius positivum*). The term remains a fundamental legal concept in our understanding of law.

The change from a legal system that recognized custom as the primary source of law to one that gave primacy of place to positive law was a difficult one. Southern European societies made the transition more quickly and easily than did those of Northern Europe. The Italian city states were the first to codify their customs and revise those codifications regularly as their institutions and courts evolved. Pisa, for example, produced a code of its laws by the middle of the twelfth century (Wolf 1973, 573–86).

Gratian, Irnerius and the early jurists took most of their assumptions about law and its relationship to princely authority from Germanic customary law and feudal law. Customary law emphasized the contractual relationship between the people and the prince. Consequently, for early jurists the prince had a sacred duty to defend the laws and customs of the land. The prince was

nostris beneficiis in summum provecta, *firmata ac moribus utentium approbata satis habent roboris*, regnorum leges, in quibus quod ante obtinebat postea desuetudine inumbratum est, ab imperiali remedio vestraque prudentia necesse habent illuminari."

[7] Paolo Grossi (1997) laments this development in medieval law and society.

bound by the law. They thought that law should be reasonable and just. Most importantly, the prince could not exercise his legislative authority arbitrarily.

At the beginning of the thirteenth century the jurists developed new ways of looking at law. Until then they had focused on the content of law when they decided whether a law was just or not. They presumed that law must be moral, ethical, equitable, and, most importantly, reasonable. As new theories of legislation emerged from the *Ius commune*, the jurists began to look at the sources of human law and the institutions that produced positive law. It was then that they discovered the will (*voluntas*) of the prince as a source of law. When they introduced the will of the prince into political discourse, they created a new political language that became "the basis of a new philosophy of law with Marsiglio [of Padua] and [much later with] Hobbes and was the original kernel of the recently dominant theory of legal positivism" (Black 1984, 55). The jurists were the first to look upon the will of the prince as being a primary source of law. A canonist, Laurentius Hispanus (ca. 1190–1248) was the first jurist to peer into the body of the prince to find his will.

Pope Innocent III (1198–1216) inspired Laurentius to reflect upon the will of the legislator. No pope or other medieval ruler shaped the political thought of the medieval jurists more than Innocent.[8] In his decretals the pope exalted papal political power. Innocent emphasized the pope's fullness of power (*plenitudo potestatis*) within the Church. Although the term was coined in the early Church, Innocent found it particularly useful for describing his authority. During the thirteenth and fourteenth centuries, secular rulers adopted papal terminology to describe their power and authority.

Innocent issued a decretal letter, *Quanto personam*, in 1198 in which he made an unprecedented pronouncement on the roots of papal authority. He claimed that the pope exercised divine authority when he granted a bishop the right to leave his church.

> God, not man, separates a bishop from his church because the Roman pontiff dissolves the bond between them by divine rather than by human authority, carefully considering the need and usefulness of each translation. The pope has this authority because he does not exercise the office of man, but that of the true God on earth.

Laurentius quickly understood the implications of Innocent's rhetoric. He believed that royal and papal authority were divinely ordained. That was a widely-held idea in late antique, medieval, and early modern political thought.[9] Innocent, however, took this commonplace of medieval political thought and took it a significant step further. He asserted that the pope's authority rested upon divine authority and also that the pope shared in God's authority. That was a significant innovation. For the future it meant that the

[8] Examples to support this generalization can be found in Pennington 2004e, 314–9.
[9] Canning 1996, 16–20, is an excellent summary of these ideas.

pope could exercise power that had hitherto been reserved only to God. Areas of law that had earlier been defined as based on divine law—marriage and vows especially—could now be subject to papal authority. If the pope shared authority and power with God, he could abrogate or derogate divine law that had been formerly beyond his jurisdiction.[10] When Laurentius commented upon *Quanto personam* he defined a ruler's legislative authority in a novel and unprecedented way:

> Hence the pope is said to have a divine will […] O, how great is the power of the prince; he changes the nature of things by applying the essences of one thing to another […] he can make iniquity from justice by correcting any canon or law, for in these things his will is held to be reason [*pro ratione voluntas*] […] And there is no one in this world who would say to him, "Why do you do this?" […] He is held, nevertheless, to shape this power to the public good.

No jurist had ever made the claim that the prince could make laws that were unreasonable and unjust. The jurists always agreed that laws should be just and reasonable. Laurentius, however, asserted that reason was not the only standard by which law should be judged. The will of the prince and his will alone could be considered a source of human law. Earlier jurists had never distinguished clearly between the content of law and the source of law. Laurentius was the first jurist in European jurisprudence to argue that the content of law had no necessary connection to its source. It had been a doctrine of faith among the jurists who commented on Gratian's tract *De legibus* that laws that were not reasonable were null and void. Laurentius, however, argued that the will of the prince must be supreme. He did not, however, argue that the prince could act arbitrarily. Later jurists did not use the maxim that he cited, "Pro ratione voluntas" (taken from Juvenal's *Satires*) as a justification for tyranny.

Frederick Barbarossa's jurists who discussed the authority of the emperor in the twelfth century had a different and more primitive view of monarchical authority. When they called the prince the "Lord of the World" and declared that he was "legibus solutus" (not bound by the laws), they focused on his status. The prince was sovereign, he was superior to the law, but he had to submit himself to the law. They did not explore the source of law or of the prince's authority or the relationship of the prince and the law.

The reason for their reluctance to confront the issue of the relationship of the prince and the law was primarily because in the twelfth century the prince was not the only or even the main source of law in society. Only in the thirteenth century when princes began to legislate regularly did the jurists begin to think about the source the prince's authority and to develop new definitions of the prince's power.

[10] On the implications of Innocent's thought for the pope's power to dissolve a marriage bond, see Noonan 1972, 129–36. On vows see Brundage 1969, 66–114.

Henricus de Segusio († 1271), or Hostiensis, was one of the most important and influential jurists of the thirteenth century (Pennington 1993b, 758–63, and, in English, Pennington 1993c). His career took him to Paris, London, and Rome. He wrote the most extensive commentary on canon law produced by any jurist in the thirteenth century. His work is characterized by a deep understanding of the political world, secular and ecclesiastical, and a profound interest in the language of political power and authority.

Hostiensis was sensitive to legal questions that touched the structure of institutions. He developed a jurisprudence that described the power of secular and ecclesiastical princes in remarkably new ways. More than any earlier jurist he delved into the meaning of the terms that the jurists had been accustomed to use when they described power and authority in medieval society. He extensively analyzed the traditional terminology. He explored the term "Plenitudo potestatis" (fullness of power) that had long been used to describe the power of the pope and that was beginning to be used to describe the authority of the secular prince in minute and careful detail (Watt 1965, 161–87).

Like Laurentius Hispanus, Hostiensis was inspired by Pope Innocent III. Even more than Laurentius he emphasized the divine foundations of papal power. He decorated Innocent's claims in *Quanto personam* with extravagant rhetoric. While commenting on Innocent's decretal letters he wrote that all political authority comes from God. All princes exercised their authority by divine mandate. The pope, he asserted, had a singular status. Hostiensis based his commentary on Laurentius' but greatly enhanced the pope's power. Whatever the pope does, he wrote, he acts on God's authority. The pope is the vicar of God. The curia of the pope in Rome was God's curia. Whatever the pope does is licit as long as he does not err in the faith. Whenever he acts "de iure" he almost always acts as God.[11]

The pope exercised divine authority and presided over a consistory that reached from heaven to earth. Pope Innocent III might have thoroughly relished Hostiensis' rhetoric. One inexorable conclusion that one might draw from Hostiensis' commentary is that if pope's authority is divine, then his law must also be divine. This logical conclusion did not escape Hostiensis. Divine law is the "Ars artium" (Science of sciences) that comprises human and canon law. Roman law is divine because the emperors created the rules of procedure by divine inspiration. The emperor is the living law (*lex animata*) whom the Lord has given to men and to whom He has subjected the law. Canon law was also divine. Theology was the head of the Church, canon law the hand, and Roman law the feet. Sometimes the hand of the Church leads the head; sometimes the feet. Hostiensis did not create a new jurisprudence of law but outfitted traditional definitions with remarkable metaphors.

[11] This paragraph and the following are based on Pennington 1993d, 48–75.

In one respect Hostiensis did break with previous jurisprudence. He insisted that canon law was a part of divine law and that the pope, as vicar of God, promulgated laws that should be considered divine. A similar metaphor for the secular prince circulated in canon law. When the prince issues laws, they are divinely promulgated through his mouth (*leges divinitus per ora principum promulgatae*).[12] This is true, concluded Hostiensis, only indistinctly. Only the pope could promulgate law divinely. "The pope, not the emperor, is the general vicar of Christ."

Hostiensis' most important and lasting contribution to the language of political thought was creating a new set of terms to describe sovereignty and the power of the prince. Ancient Roman jurisconsults introduced the jurists of the *Ius commune* to the basic language of sovereignty. The Roman jurisconsult Ulpian coined the most widely used definitions of the prince's authority: "What pleases the prince has the force of law [*Quod principi placuit vigorem legis habet*]" (Dig. 1.4.1) and "The prince is not bound by the law [*Princeps legibus solutus est*]" (Dig. 1.3.31). Twelfth-century jurists used these two maxims to establish two principles: That the prince can legislate and that he can change law. The jurists also expressed the concept of legislative sovereignty with the maxim "An equal cannot have authority over an equal [*Par in parem imperium non habet*]." This maxim expressed their conviction that a ruler could not bind his successor. No twelfth-century jurist permitted the prince to act or to legislate arbitrarily.

Roman jurists called the emperor's power to legislate, command, and judge "imperium" or "potestas." Ulpian wrote that the Roman people had transferred "imperium" to him (Dig. 1.14.1). Most medieval jurists thought that the people's bestowal of power on the prince could not be revoked. Borrowing from theologians' terminology describing the power of God, Hostiensis gave the pope a glorified new definition of his authority. The pope and God both ruled by a "potestas absoluta" and "potestas ordinata" (Courtenay 1990 and Moonan 1994). Since Hostiensis thought that the pope promulgated law divinely he followed the logic of his theory and concluded that terminology describing God's power should also apply to the pope. The pope was the first human being to wield divine power, but jurists soon bestowed "potestas absoluta" on secular princes.

Like Laurentius before him Hostiensis blazed a new path for the jurisprudence of sovereignty. He separated legal thought from primitive Germanic ideas of kingship that law was custom and that the king was bound by the law. With his "potestas ordinata" the pope had the authority to exercise jurisdiction over positive law; "Potestas absoluta" enabled the pope to exercise extraordinary authority and jurisdiction. With this exalted power the pope

[12] From a letter dated 874 of Pope John VIII (872–882) written to the German Emperor Louis II (850–875) and included in Gratian's Decretum (C.16 q.3 c.17).

could legislate in matters touching the law of marriage and vows, areas of the law that had been considered a part of divine law and outside papal jurisdiction.

"Potestas absoluta et ordinata" played a very important role in the future. Later jurists defined the prince's power with these terms and sometimes concluded that the prince could take the rights of subjects away when he exercised his absolute power. In combination with Laurentius' "pro ratione voluntas" the jurist used "potestas absoluta" to create more a sophisticated jurisprudence of sovereignty. The prince was the source of law. He was not always limited by reason or morality. Under some conditions the prince could promulgate laws that were contrary to reason. He could sometimes act contrary to the precepts of justice. The jurists justified these aberrations of political behavior by citing two other norms: the common good of society and great necessity. By the later Middle Ages the jurists could defend the prince who acted contrary to law, custom, and who violated individual private rights. Hostiensis laid the foundations for later jurists to embrace an absolutism that ignored the traditional rights of subjects.

Alongside this development, however, medieval "constitutionalism" remained an important strand of thought in medieval jurisprudence. Many jurists were reluctant to adopt a theory of absolutism that did not limit the prince's power. Their first line of defense against arbitrary power was the rights of subjects. From early in the twelfth century jurists asserted that property rights were founded on precepts of natural law or the "ius gentium." Further, the prince did not have the right to alienate his lands. When the jurists argued that property rights were grounded in natural law they could claim that the prince could not violate those rights since he had no jurisdiction or sovereignty over natural law. It was a higher law that transcended human positive law.

The alienation of property was a key issue for the jurists. From the late twelfth century they realized that rights that attached to the office of the prince and not to his person belong not to the prince but to the common good. A forged document drew their attention to the issue. In the so-called Donation of Constantine the emperor was purported to have bestowed his imperial rights on the Church. The document was a forgery of the late eighth or early ninth century.[13] The text of the forgery was included into canon law by Gratian. In the early thirteenth century Pope Honorius III (1216–1227) issued a decretal letter, *Intellecto*, in which he asserted that the King of Hungary could not alienate royal lands that injured his kingdom and the crown. Honorius laid down the doctrine of inalienability in canon law. The canonists immediately expanded the principle to the ruler of the Church. A little later the Roman lawyer Accursius argued that the Donation of Constantine was not

[13] The standard treatment is Maffei 1969.

a binding document. The emperor, he concluded, could not injure the rights of future emperors (*par in parem imperium non habet*). The jurists established the doctrine of inalienability of rights as being a significant limitation on monarchical power.

The jurists of the *Ius commune* created another powerful limitation on the power of the prince: the "ratio iuris" (reason of law) and the norms of law.[14] They coined legal maxims that were taken from Roman law, early medieval legal thought, and from their own analysis. These maxims were touchstones of justice and equity in law and can be found in their commentaries, the decretals of popes, and in secular laws. They provided benchmarks with which the acts of the prince could be judged.[15]

In the thirteenth century the jurists began to discuss monarchical power and authority and create a jurisprudence based on contemporary secular law. The Emperor Frederick II (1212–1250) issued the first royal code of laws in 1231, the Constitutions of Melfi, also known as the *Liber Augustalis*. In the prologue to his codification he (or, more likely, his jurists) discussed the authority of the prince.[16] The prince is an instrument of God. His duty is to establish laws, to promote justice, and to correct and chastise wrongdoers.[17]

> Thus we, whom God has elevated beyond any hope man might have cherished to the pinnacle of the Roman empire and to the singular honor of all other kingdoms at the right hand of divine power, desire to render to God a two fold payment for the talents given to us, out of reverence for Jesus Christ, from whom we have received all we have.

In a later constitution Frederick contrasted his authority with that of the ancient Roman emperors.

> It is not without great forethought and well-considered planning that the Quirites [Roman citizens] conferred the right and *imperium* of establishing laws on the Roman prince through the *Lex regia*. Thus the source of justice might have its source from the same person that defends justice: he who ruled through the authority established by Caesar.

The descriptions of authority that we find in the *Liber Augustalis* resonate and reverberate with the doctrine that we have described in the *Ius commune*.

The pope was a ruler who claimed universal jurisdiction over all Christendom. When Frederick Barbarossa asked Martinus and Bulgarus if he were the

[14] Ennio Cortese's book, *La norma giuridica: Spunti teorici nel diritto comune classico* (1962), remains the most detailed and important discussion of norms in the *Ius commune*.

[15] I discuss the origins of several key norms, "Necessitas legem non habet," "Quod omnes tangit" and "Ne crimina remaneant impunita," in Pennington 2000, 350–4.

[16] The most thorough discussion of Frederick's codification and its influence remains Calasso 1957.

[17] These texts and my discussion of the *Liber Augustalis* are based on Pennington 1988, 441–2.

Lord of the World, the jurists ignored the obvious meaning of the question: Did the emperor hold a higher office and exercise jurisdiction over kings? Martinus and Bulgarus interpreted Frederick's question as being whether he could take the rights of his subjects away. Could the emperor take away the property rights of his subjects?

Frederick Barbarossa may have had more interest in his status in relationship to other kings than the jurists did. The English King Henry II wrote a letter to Frederick in which he bestowed the title "Dominus mundi" on the emperor. Henry might have thought that he pleased the emperor with that title. However, modern historians have found the question whether this indicated that the emperor claimed superiority over kings much more interesting than the medieval jurists did. They have argued that the national monarchies could not be sovereign until they had been freed from the yoke of imperial universal jurisdiction. Yet this question did not seem to be important to the jurists. None of them broached the question whether the emperor exercised *de facto* or *de iure* sovereignty over other European Christian princes.

Some modern historians have asserted that the "state" did not exist in medieval Europe because local authorities and kings could not exist under the umbrella of these two universal rulers. How could states exist when jurists argued that the pope had the right to judge princes and their subjects in a number of different matters? A true state could not exist if its sovereignty was not untrammeled. Some jurists did present an exalted view of imperial power and prerogatives. The canonist Johannes Teutonicus wrote in a gloss that eventually became a part of the Ordinary Gloss of canon law:

> The emperor is over all kings […] and all nations are under him […] for he is the Lord of the World […] even Jews are under him […] and all provinces are under him […] unless they can show themselves to be exempt […] none of the kings can have prescribed an exemption, since prescription has no place in this […] A kingdom cannot have been exempted from imperial authority, since it would be without a head […] and that would be monstrous. Rather all must give the emperor tribute, unless they are exempt […] All things are in the power of the emperor. (Johannes Teutonicus, *Apparatus glossarum in Compilationem tertiam*, 84–5)[18]

If Johannes had been in the emperor's company at Roncaglia, Frederick would have probably given him a stable of horses for his glorious summary of imperial authority.

Not all the jurists found Johannes' glorification of imperial power edifying. Sometimes their reaction was clearly based upon a nascent sense of national identity. In reaction to Johannes' gloss the canonist Vincentius Hispanus (ca. 1180–1248) would have none of his exaltation of Teutonic virtue (see Post 1964, 487–93).

[18] On this passage and what follows see Pennington 1993d, 32–7.

Make exception, Johannes Teutonicus, of the Spanish, who are exempt by the law itself. They did not admit Charlemagne and his peers into their lands. I, Vincentius, say that the Germans lost their *imperium* through their own stupidity. […] Only the Spanish have obtained *imperium* through their virtue.

Oddly, Pope Innocent III (1198–1216) was the first to state categorically that the kings were independent of the emperor. Innocent issued a decretal letter, *Per venerabilem* in 1202 in which he stated that the king of France recognized no superior in temporal affairs. Innocent's decretal was included into canonical collections, and the jurists began to analyze Innocent's comment. Some concluded that kings were subject to the emperor *de iure*, but not *de facto*. Others argued that kings were entirely independent and free from imperial jurisdiction. They created a maxim to describe royal independence: "Rex in regno suo imperator est" ("A king is emperor in his kingdom"). By the middle of the thirteenth century this maxim had become a commonplace.

Modern historians have argued about the maxim's precise meaning. Some historians have pointed out the maxim is not an unambiguous justification for royal independence from universal imperial rule. In the period from ca. 1270–1330, the jurists of the *Ius commune* used the maxim to argue three different points. First, that every king is independent of the emperor and that every king can exercise the same prerogatives within his kingdom as the emperor. The king was, in other words, the prince of Roman law. Second, that the kings were not independent of the emperor but that they did have the same prerogatives as the emperor in their kingdoms. Third, that kings were independent of the emperor but could not exercise the same prerogatives as the emperor in their kingdoms. They were not princes. Whatever the case, by the late Middle Ages the jurists had created a sophisticated and nuanced jurisprudence of sovereignty that shaped the political arguments of early modern European thinkers.

4.2. The Importance of Feudal Law for Political Institutions in Medieval Society

The jurists created a vigorous doctrine of kingship and defined the relationship of the prince and the law with originality and creativity. Roman law provided them with their terminology, but Christian conceptions of justice and duty shaped their thought. Feudal law revealed to the jurists another side of the prince's nature: his limitations and duties to his subjects.

Feudal law was born in an age without jurists. It was customary, unformed, and existed in a wide variety of texts. There was no pervasive paradigm of European feudal law as there was for Germanic customary law. The sources from all over Europe in the period from 800 to 1000 contain the terms lord (*dominus*), vassal (*vassalus*), fief (*beneficium* or *feudum*). Later jurists would carefully analyze and define their meaning. Historians, however, have learned that when they find these

words in early medieval sources, they cannot simply assume that these words describe the lord and vassal relationship that is often found in later feudal law: that a lord had bestowed a fief upon a vassal in return for military service. The vassal had sworn homage and fealty to the lord. This was the basis of the feudal contract and established a complicated set of norms that governed the prince's duties and obligations to his vassals. It also defined a vassal's duties to his lord.[19]

The word that described a fief in the tenth and eleventh centuries (sometimes, but not always, a piece of land) was generally *beneficium*. Although the word, "feudum," from which the English word *feudal* is derived, is found in early sources, it replaces *beneficium* as the standard word to describe a fief only during the twelfth and thirteenth centuries. For political relationships the feudal contract had several advantages over a contract in Roman law. The feudal contract could be inherited and broken for political reasons. When a feudal contract passed from one generation to another, the bonds that the contract cemented were renewed in public ceremonies that reminded each party of its obligations, rights, and duties.

Law can exist without jurisprudence, but law without jurisprudence creates ambiguities that can be destructive of the public good. Unless there are jurists to interpret the law, the rights of persons and institutions are never secure. Although Roman and canon law had standard *libri legales* there were no books or standard texts for feudal law. By the twelfth century feudal customary law began to define far more than just the relationship between the lord and his vassal. Secular and ecclesiastical institutions were involved in legal relationships that were feudal. Clerics took oaths to their bishops; kings took oaths to the pope. There was a need for written law and a jurisprudence that would provide an interpretive tool to understand what these oaths meant. Monasteries had feudal ties with persons and institutions. Bishops had feudal relationships with men and towns. Towns had feudal contracts with other towns and persons. The nobility had traditional feudal contracts with vassals but also with towns. Feudalism, in other words, had become much more than the contract that regulated and defined a relationship between a "lord" and a "vassal." Lawyers who studied the new *Ius commune* at Bologna and other schools realized that texts were needed to make feudal law a discipline.

The books of feudal law were finally formed in the second half of the twelfth century out of disparate sources. Obertus de Orto, a judge in Milan, sent his son Anselm to study law in Bologna ca. 1154 and 1158. Anselm reported to his father that no one in Bologna was teaching feudal law. Obertus

[19] "Feudalism" and feudal law have been the subject of much controversy in the recent literature. Reynolds (1994) has published a broad, interpretive work whose discussion and analysis is sometimes exasperatingly unclear. Shorter and less tendentious articles by various authors on feudal law and institutions in France, Germany, England, Kingdom of Sicily, Scandinavia, Poland and Bohemia, Hungary, Iberian peninsula, and the Latin East and institutions can be found in the *Lexikon des Mittelalters* 5 (1991, 1807–25).

wrote two letters to his son (that may be rhetorical conceits) in which he described the law of fiefs in the courts of Milan. It may be that the primary reason why Obertus wrote these two letters was that a compilation of customary law was being undertaken by the commune of Milan. Whatever the case may have been, Obertus' two letters became the core of a set of texts for the study of feudal law. Obertus put his letters together with other writings on feudal law, especially from Lombard law, to create the first of three "recensions" of the *Liber feudorum* (in the manuscripts the book was named *Libri feudorum, Liber usus feudorum, Consuetudines feudorum*, and *Constitutiones feudorum*). The manuscripts of the first two recensions reveal that there was no standard text. Some of them included eleventh- and twelfth-century imperial statutes of the emperors Conrad II, Lothair II, and Frederick I. The second recension often contained a letter of Fulbert of Chartres and additional imperial statutes. Typical of legal works in the second half of the twelfth century the jurists and scribes added texts of various types (*extravagantes*) to this recension. Almost no two manuscripts contain exactly the same text. The jurists did not comment on the *Liber feudorum* of Obertus. The text's entry into the schools must have been slow. The first jurist to write a commentary on the *Liber* was the jurist of Roman law, Pillius. He wrote his commentary on the second recension of the *Liber feudorum* ca. 1192–1200, probably while he was a judge in Modena. He did not comment on all parts of the *Liber*. Although the letter of Fulbert of Chartres circulated in many manuscripts he did not gloss it. He left the interpretation of Fulbert's letter to the canonists (Gratian had placed the letter in his Decretum). This fact illustrates an important point about feudal law in the twelfth century: Its jurisprudence was not the product of one area of law but of the *Ius commune*.[20]

The final or vulgate recension of the *Liber feudorum* added constitutions of the Emperor Frederick II, the letter of Fulbert, and other texts that had circulated in the twelfth-century manuscripts. Accursius, the most important jurist of Roman law in the thirteenth century, wrote a commentary based on Pillius' in the 1220's. It may have gone through several recensions, not all by Accursius. Accursius also wrote the Ordinary Gloss on the rest of Roman law at about the same time. His authority and the importance of feudal law combined to give *Liber feudorum* with Accursius' Ordinary Gloss a permanent place in the *Ius commune*.[21]

Feudal relationships generated legal problems and court cases in the later Middle Ages. The earliest reports of court cases involving feudal disputes and

[20] On the formation of the *libri feudorum* see Weimar 1990, who has examined the development of the *Liber feudorum* with admirable thoroughness, and a short summary in Weimar 1991, 1943–4. See also Di Renzo Villata 2000.

[21] The *Liber* and the Ordinary Gloss have been reprinted with a commentary by Mario Montorzi (1991).

using feudal law date to the late twelfth century, and their numbers proliferate during the thirteenth and fourteenth centuries. As the number of these cases increased, jurists were called upon to write *consilia* (legal briefs) to solve them. I shall discuss some of the *consilia* that jurists wrote for feudal legal problems in Section 4.4 below.

The feudal oath was the central element in the feudal relationship. The use of oaths to cement political and social relationships was not peculiar to European society. In almost all human societies oaths embedded in rituals created social bonds.[22] The feudal oath of fidelity that a vassal took to his lord is almost emblematic of the popular and scholarly image of medieval social relationships. In the *Liber consuetudinum Mediolani*, a compilation of the customs of Milan that was promulgated in 1216, there is an oath that the vassal should take to his lord:

> I, [James], swear that henceforward I will be a faithful man or vassal to my lord. I will not lay open to another what he has entrusted to me in the name of fealty to [my lord's] injury. (Besta and Barni 1949, *Liber consuetudinum Mediolani anni MCCXVI*, 121; my translation)[23]

The text of the custom enigmatically concludes: "Many things are contained in these words, which are difficult to insert here" (ibid.).[24] The sentence would have been puzzling, however, only to those who did not know feudal law. A thirteenth-century jurist reading this text would have recognized immediately that the compilers of the customs were referring to a letter of Bishop Fulbert of Chartres (1006–1028).

By 1216 Fulbert's letter had been the most important legal text for defining the oath of fealty for a century. The letter's origins lie in a request that William V, count of Poitou and duke of Aquitaine, made to Fulbert asking for advice about the obligations and duties that a vassal owed to a lord. William had troubled relationships with his vassals. In his reply (ca. 1020) Fulbert wrote a short treatise on feudal relationships that circulated fairly widely.[25] Gratian treated clerical oaths in Causa 22 and placed it in the earliest version of his Decretum (C. 22 q.5 c.18) ca. 1124. It became a *locus classicus* for canonistic discussions of the feudal contract and the relationship of the lord and vassal.[26]

Fulbert told William that when a vassal took an oath to his lord six things were understood to be contained in it, whether explicitly expressed or not: to

[22] There are a very good set of articles on the oath in *Lexikon des Mittelalters* 3 (1986) 1673–92.

[23] "Iuro ego N. quod amodo fidelis ero homo sive vasallus domino meo. Nec illud quod mihi nomine fidelitatis commiserit, alii ad eius detrimentum pandam."

[24] "In quibus verbis multa continentur, quae his inserere difficile est."

[25] On the history and the sources of the letters see the fundamental Giordanengo 1992a and 1992b.

[26] See Pennington 2004a upon which these paragraphs on feudal law are based.

keep his lord safe, to protect him from harm, to preserve the lord's justice, to prevent damage to his possessions, and to not prevent the lord from carrying out his duties. Fulbert alleged that he got this list from written authorities, but his exact source, if there were one, has never been discovered. For the next four centuries jurists cited Fulbert's list of obligations and duties as being central to the feudal oath of fealty. The text in Gratian's Decretum reads:

> The form of fidelity that anyone may owe to a lord and vice versa, may be found in a letter of Bishop Fulbert.
>
> Since I was asked to write something about the oath of fidelity, I have noted for you these things which follow from the authority of books. Whoever swears fidelity to his lord should always have six things in mind: safe, secure, honest, useful, easy, possible. Safe, namely, that he not injure his lord with his own body. Secure that he not injure his secret interests or his defenses through which his lord can be secure. Honest that he not injure his lord's justice or in other matters which seem to pertain to his honesty. Useful that he not injure his lord's possessions. Easy or possible, that that the good, which his lord could easily do, he would make difficult, and that what would be possible, he would make impossible for his lord. A faithful man should pay heed to these examples.
>
> It is not sufficient to abstain from evil, unless he may do what is good. It remains that he faithfully gives his lord counsel and help in the aforementioned matters, if he wishes to be worthy of his benefice [fief] and safe in the fidelity that he has sworn. The lord also ought to render his duty to his faithful man in all things. If he does not, he may be thought of as faithless, just as he, who in consenting or telling lies will be perfidious and perjurious. (Gratian, *Decretum*, St. Gall Stiftsbibliothek 673, fol. 158 [C. 22 q.5 c.18]; my translation)

Huguccio (ca. 1190) was the first canonist to give Fulbert's letter a close reading and an extended commentary. At the beginning of his commentary he noted that many things are tacitly understood when someone took an oath, vow, or made a promise.[27] He then discussed each of the six tacit obligations listed by Fulbert. The first, that a vassal could not injure his lord's body without cause or unjustly, Huguccio interpreted through the norms of the jurisprudence of the *Ius commune.* If there were cause or reason (*causa et ratio*) a vassal could injure his lord. These two norms (cause and reason) were, perhaps, the most powerful in medieval jurisprudence and generally trumped any rule, law, custom, or statute.[28] If the vassal were a judge or a magistrate—a social situation into which only urban vassals would probably fall—he could punish his lord if he merited it.[29] According to Huguccio, Fulbert's principle

[27] Admont 7, fol. 316r (A), Klagenfurt, Stiftsbibliothek XXIX.a.3, fol. 221r (Kl), Klosterneuburg, Stiftsbibl. 89, fol. 273v (K), Lons-le-Saunier, Archives departementales du Jura, 16, fol. 304v (L), Vat. lat. 2280, fol. 242v (V): s.v. *in memoria*: "Cum iurat et postquam iurauit ut ea obseruet que etsi in tali iuramento non exprimerentur, tamen intelliguntur ibi comprehendi. Multa enim in sacramentis et uotis et promissis etiam non expressa subintelliguntur, arg. supra eodem q.ii. Ne quis (c.14), Beatus (c.5)."

[28] The comprehensive and detailed study of *causa* and *ratio* in the *Ius commune* remains Cortese 1962, especially vol. 1, chaps. 3–7.

[29] Admont 7, fol. 316r (A), Klagenfurt, Stiftsbibliothek XXIX.a.3, fol. 221r (Kl), Klosterneuburg, Stiftsbibl. 89, fol. 273v (K), Lons-le-Saunier, Archives departementales du

of honesty encompassed two points. A vassal could not injure a lord's justice or his women. First he observed that according to customary law, even though it was unwritten, a vassal could not testify against his lord in court. Again he looked to other norms of the *Ius commune* to qualify the prohibition. If justice and cause demanded it, the vassal could testify against him because his lord had no justice.[30] Then Huguccio turned to sexual morality. Perhaps he had read too many French *lais* about the sexual misconduct of the nobility. He defined vassal's honesty as not violating the women who surrounded his lord. The lord's wife and daughter were, understandably, not to be touched. Huguccio, however, also included any other woman in the lord's home. In sum, the vassal should not do any dishonest thing in his lord's house.[31] This may be another example of Huguccio's propensity to embrace moral absolutes, what later canonists called the "rigor of Huguccio" (see Müller 1994, 137). In any case, Johannes Teutonicus placed only his lord's wife and daughter outside a vassal's predatory field.[32]

Huguccio then turned to the vassal's obligation to give his lord counsel and help. His first point was the vassal was only obligated to give aid when the lord needed help in licit and honest affairs. If the lord was injured, a vassal should respond immediately, but within reasonable limits (*moderatio inculpatae tutelae*) and with attention to the admonition of Saint Paul in Romans 12:19: An enemy should be treated with respect; disarm malice with kindness.[33] The concept of justifiable defense that Huguccio cited (*moderatio inculpatae tutelae*) is taken from Roman law and slowly penetrated the *Ius commune* during the twelfth century.[34] It was typical of twelfth-century jurists

Jura, 16, fol. 304v (L), Vat. lat. 2280, fol. 242v (V): s.v. *in corpore suo*:"iniuste, sine causa uel ratione, nam si uassalus de corpore suo iniuste sine causa uel ratione, nam si vassallus est iudex uel officialis bene potest punire dominum in corpore si meruerit (meruit K) sic puniri."

[30] Ibid., s.v. *de iustitia*: "Numquid non potest ferre testimonium contra dominum et quidem iure consuetudinis, licet non sit scriptum receptum est ut uassallus non audiatur contra dominum, sicut nec libertus auditur (auditus L) contra patronum. Mihi tamen uidetur quod ubi dominus fouet iniustam causam et hoc scit uassalus, licite potest ferre testimonium contra eum, nec tunc in dampnum erit ei de sua iustitia quod ibi dominus non habet iustitiam cum iniustam foueat causam."

[31] Ibid., s.v. *ad honestatem*: "Non ergo debet accedere ad uxorem eius uel filiam uel aliam feminam in domo eius manentem uel alia inhonestas in domo facere, arg. de pen. di.v. Consideret (c.1)."

[32] Johannes Teutonicus to C.22 q.5 c.18, s.v. *ad honestatem* (printed in many fifteenth– and sixteenth–century editions of Gratian's Decretum).

[33] Ibid., s.v. *consilium et auxilium*: "In licitis et honestis. Puta pro defensione sui et suarum rerum licite, tamen iniuriam enim illatam domino licet uassallo incontinenti repellere cum moderatione tamen inculpate tutele, et non contra preceptum Apostoli scilicet quo dicitur 'Non uos defendentes,' etc. (Romans 12.19)."

[34] Its earliest appearance seems to be in a statute of Diocletian and Maximianus from A.D. 290 that entered the Justinianian Code at 8.4.1. The concept is cited by John of Salisbury, Alanus de Insulis (of Lille), and can be found in the letters of Pope Innocent III, e.g. (Po. 595).

to combine Roman and Biblical precepts to establish a legal norm (Helmholz 1996, 149–51, 164–5, 314–5, 344–7).

Huguccio then turned to the question of the moral and legal responsibility of a vassal to defend others. Nobody should sin for himself or for another, he reflected, but at the same time everyone has an obligation to defend anyone from injury.[35] Huguccio's presumption is completely contrary to the norms of British and American common law where the doctrine of nonfeasance has held sway. Under the influence of the *Ius commune*, however, most civil law legal systems have a duty-to-assist other persons in their jurisprudence.[36] Huguccio had no doubt that every man had a duty to assist another person. For him the duty to render aid reflected in some way a person's commitment to the common good. If everyone has an obligation to render assistance, he wondered, what is the legal force behind the vassal's duty to help his lord? How would a vassal's duty to a lord differ from his duty to aid others in distress?[37] He found the answer to that question in a conciliar canon: "I say that the vassal is bound to his lord [by the oath of fealty] more willingly and more specially—just as in the conciliar canon from the Council of Toledo in Gratian's Decretum. That canon stated that oaths to uphold promises make the breaking of those promises to be feared."[38] Huguccio quoted a phrase from the canon and expected that his readers would supply the complete quotation: "Specific promises are more to be feared than general vows."[39] Later canonists followed Huguccio's lead and insisted that a vassal must do more than just defend his lord when he is in danger. Alanus Anglicus (ca. 1200) formulated a lapidarian expression of the precept: "Although the oath of fealty does not expressly state it, a vassal should give heed that his lord may not be injured."[40] Tancred (ca. 1215) and following him, Bernardus Parmensis in the Ordinary Gloss (ca. 1245), insisted that persons who swore oaths of faithfulness and obedience must not only protect them from attack and harm but

[35] Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Non enim pro se uel pro alio debet quis peccare, set eodem modo tenetur iniuriam repellere a quolibet."

[36] Feldbrugge 1966, 630–1, states that "however, Roman law and scholastic thought were unfavorably inclined toward legislation of this nature […] since World War II […] almost every new criminal code contains a failure-to-rescue provision." He seems unaware of the deep historical roots of the idea in the ethical and moral world of the *Ius commune*.

[37] Huguccio to C.22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Quid ergo prodest iuramentum uassalli domino?"

[38] Ibid.: "Dico (quod *add.* KL) propensius et specialius ei tenetur et 'Solet plus timeri etc.' (D. 23 c.6)."

[39] Gratian, D. 23 c.6: "Solet enim plus timeri quod singulariter pollicetur quam quod generali sponsione concluditur."

[40] Alanus Anglicus to C. 22 q.5 c.18, Seo de Urgel 113 (2009), fol. 131r–131v, s.v. *consilium et auxilium*: "Operam enim dare debet ne domino noceatur, licet hoc in fidelitate non exprimatur, arg. ff. locati, In lege (D. 19.2.29 [27]), ff. de uerborum oblig. In illa stipulatione (D. 45.1.50)."

they were bound to protect them from plots and dangerous plans.[41] This principle remained an important part of the oath of fidelity.[42] It also shaped the mores of political action in European society for centuries.

A vassal's obligation to aid his lord militarily was Huguccio's next topic. He formulates several hypotheticals. What if the lord wishes to seize his fief or his property? The vassal must not obey his lord unless his lord's war were just. The vassal is not bound to obey if his lord moved against him personally.[43] What, however, if his lord attacked his son or his father? Huguccio's answer relied on juridical distinctions drawn for the family, kin, and vassals of excommunicates.[44] The vassal did not have to obey his lord when his son and father lived under the same roof. Otherwise, if his lord were waging a just war against his family, the vassal was held to obey his lord.[45]

Huguccio addressed his final topic at the end of his commentary. Fulbert's letter laid down the norms that a vassal must adhere to if he were worthy of his fief. Huguccio noted that the other side of the coin was that if a vassal showed himself unworthy by violating these principles, his lord could take his fief (*beneficium*) away from him.[46] He then linked the rules governing a vassal's loss of his fief to the ecclesiastical sphere. What if, he asked, a cleric offered legal protection and assistance (*patrocinium*) in a case against his own church or against his bishop to whom he has sworn fidelity? Huguccio thought that the cleric should lose his benefice unless he was pursuing his own legal case or that of his own people. He concluded by noting that while their lords are excommunicated, those who have sworn oaths of loyalty are not compelled to obey them.[47]

[41] Tancred to 1 Comp. 1.4.20(17)(X 2.24.4) (Ego episcopus), Admont, Stiftsbibliothek 22, fol. 3v, Alba Iulia, Bibl. Batthyaneum II.5, fol. 3v, s.v. *Non ero neque in consilio neque in facto ut uitam perdat aut membrum*: "Hoc non sufficit, immo 'opportet eum ubicumque senserit dominum periclitantem ad prohibendas insidias, occurrere,' C. quibus ut indignis l.ult. (Cod. 6.35.12) xxii. q.v. De forma, ubi suppletur quod hic de fidelitate minus dicitur e contrario." The quotation that Tancred took from Justinian's Code is from a statute of Justinian in 532 A.D. in which the emperor clarified for Pope John II the meaning of "sub eodem tecto" in the Senatusconsultum Silanianum that punished slaves for not defending their masters.

[42] Cf. Ryan 1998, 219, who thinks Fulbert's letter that Tancred cited has "virtually nothing in common with the contents of the decretal *Ego episcopus*." As Huguccio's commentary has made clear, the two letters both deal with the duty of a person who has sworn fealty to a lord to protect him from harm.

[43] Huguccio to C. 22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Quid si uelit inuadere illum uel res eius? In hoc casu non ei tenetur obedire nisi iustum esset bellum. Item non tenetur ei contra se."

[44] See Vodola 1986, 63–4, 101–5, for a discussion of the canon that Huguccio cited.

[45] Huguccio to C. 22 q.5 c.18 (MSS cit.), s.v. *consilium et auxilium*: "Set numquid contra filium uel patrem tenetur ei obedire? Non si in una domo simul morantur, arg. xi. q.iii. Quoniam multos (c.103). Alias si iustum esset bellum contra filium uel patrem forte tenetur ei obedire."

[46] Ibid., s.v. *si beneficio dignus*: "Innuitur a contrario quod si dignum se non exhibeat in supradictis, dominus potest ei auferre ei beneficium."

[47] Ibid., s.v. *si beneficio dignus*: "Quid ergo si clericus prestiterit patrocinium contra

The canonists who wrote after Huguccio expanded upon the jurisprudence that he created for the oath of fealty. Importing another definition from Roman jurisprudence, Alanus commented that a vassal who betrayed his lord fell under the Roman law of treason.[48] The jurists liked that connection. A number of them repeated it.[49] Johannes Teutonicus copied this gloss into his Ordinary Gloss, where it remained a principle of feudal law until the end of feudalism. The Roman law of treason specified the death penalty for the crime. The canonists transformed a traitor from a perjurer into a capital felon. It was no small step. They marked a stage in the development of law in which the rights and honor of the lord became identified with much more than another person. He became the symbol of the territorial state. The *Chansons de geste* had long emphasized a warrior's faithlessness as the ultimate betrayal ("trahison") in a world of honor (Nelson 1988, 223, 236–7). At the beginning of the thirteenth century the jurists of the *Ius commune* followed the poets.[50]

Fulbert of Chartres' letter in Gratian's Decretum provided the canonists with an opportunity to enter directly into the feudal world. The church had long used oaths of obedience, and, as we have seen, the canonists saw the ecclesiastical oath as an institution governed by the same rules as the secular feudal oath of fealty. Canon law continued to contribute to the jurisprudence of feudal law after the twelfth century but did not produce any legislation as central as Fulbert's letter. Pope Innocent III (1198–1216) touched upon feudal matters in many of his letters. Two of them entered the official collections of canon law under the title *De feudis*. One of these letters shaped feudal law in an important area: the right of a lord to bestow a fief when he had taken an oath not to bestow a fief on someone else. Feudal law in the later Middle Ages found its jurisprudential roots in Roman law, canon law and in secular legal systems. This cross-fertilization accounts for the vigor of feudal law until the end of the sixteenth century. As we shall see in part four of this chapter the jurists used the norms of feudal law to define political relationships until the seventeenth century.

ecclesiam suam uel episcopum cui fecit fidelitatem? Meretur amittere beneficium nisi in propria causa et forte suorum, arg. di. xcvi. Si imperator (c.11) et not. quod dum domini sunt excommunicati non coguntur fideles obseruare ista, ut xv. q.vi. Nos sanctorum iuratos (c.4)."

[48] Alanus Anglicus to C. 22 q.5 c.18, Seo de Urgel, Biblioteca del Cabildo 113 (2009), fol. 131r–131v, s.v. *in damnum domino suo*: "Forte litteras uel nuntium hostibus eius mittendo, quod qui fecerit reus maiestatis erit, ff. ad leg. Iul. ma. l.i., iii. (Dig. 48.4.1, 3)."

[49] *Ecce vicit leo* to C.22 q.5 c.18, Paris, Bibl. nat. lat. nouv. acq. 1576, fol. 232r (P), Sankt Florian, Stiftsbibliothek XI.605, fol. 85r–85v (S), s.v. *de munitionibus*: "idest de castris suis que ei commisit que si rediderit (tradiderit P) inimicis reus est lese maiestatis, ut ff. ad leg. Iul. ma. l.iii."

[50] For later jurists' treatment of rebellious vassals and treason, see Pennington 1993d, 96–7, 169–70, 195, 259.

4.3. The Jurisprudence of Secular and Ecclesiastical Institutions

Monarchy was the primary form of government in the Middle Ages. Although the Italian city states established republican forms of government in the twelfth and thirteenth centuries, by the fifteenth century most had reverted back to princes. As most medieval jurists, Dante was convinced that monarchy was the proper and legitimate form of government when he wrote *Monarchia* in the early fourteenth century. The legitimacy of monarchies was rarely seriously questioned.[51]

It was typical for medieval people to think of themselves as belonging to various collective organizations. Some of these groups were local. Others occupied a larger stage. In the twelfth century the jurists began to define the relationships of these organizations to one another and the legal rights of the individuals within them. The jurists named these organizations, secular and ecclesiastical, "universitates." A good example of their thought is the canon law of ecclesiastical corporations, especially the legal status of the bishop to his chapter. The cathedral chapter constituted a "universitas" or corporation that represented the local church. By the thirteenth century, a bishop's power and the exercise of his office were limited by a new conception of the bishop's juridical personality that embraced the joint authority of the bishop and the cathedral chapter (Gaudemet 1979b, 55–102; Gaudemet 1979a). The jurists of the *Ius commune* used rules and norms that the canonists developed and applied them to other corporate entities from secular guilds to church councils and, in part, even to the Roman curia.[52]

In the period between ca. 1180 and 1300, the canonists generally concurred that the bishop and chapter together constituted the basic administrative unit of the diocese. The canons of the cathedral chapter usurped the rights of the lower clergy and spoke for the people and the clergy of the entire diocese. To describe this new juridical entity, the canonists worked out corporate theories. In canonistic thought, the relationship of the bishop and the cathedral chapter divides into three categories: What the bishop can do in the name of the church; what the chapter may do without the consent of the bishop; and what the bishop and chapter ought to do together. The canonists limited both the bishop and chapter considerably in what they could do alone. Normally, a bishop and chapter had to alienate property, to confer benefices and offices, to ordain priests and to judge cases in the episcopal court jointly. One canonist, Johannes Teutonicus, asked whether the consent of the parish priests was necessary in some cases, a question that may have still been asked by recalcitrant conservatives in the early thirteenth century. In the late twelfth century Huguccio and Laurentius thought that in some cases parish

[51] One notable exception was Ptolemy of Lucca; see Blythe 1997, and 1992, 92–117. On the controversy that revolved around Dante's *Monarchia*, see Cassell 2004.

[52] For what follows see Pennington 2002.

priests ought to be consulted by the bishop and chapter. Johannes and the later canonists were not, however, inclined to let the parish priests share in the governance of the diocese.[53]

One can detect attitudes about the proper governance of the *universitas* in a letter from late in the pontificate of Innocent III. The bishop of Vic, Guillem, ruled over a difficult and contentious cathedral chapter. While on a visit to Rome he must have complained to the pope about his canons and pleaded for papal intercession to support episcopal authority. Innocent issued a decretal letter to the bishop in which he laid down the general rule that reasonable enactments of the cathedral chapter should not be thwarted by a few canons. He mandated that when the bishop and the "potior et sanior" members of the chapter ordained something, unless the smaller part of the chapter's objections were supported by reason, the will of the bishop and chapter should prevail. Innocent concluded that if the canons refused to come to the chapter's meeting or if they left during disputes, their absence could not be considered grounds for appealing the decisions of the bishop and *maior et sanior pars* of the chapter (Freedman and Masnou 2002, 118). Since the beginning of the twelfth century jurists and popes had used the phrase "maior et sanior pars" to describe the members of a monastic community or of a cathedral chapter who had the legal right to rule and to consent to measures established by the *universitas* (corporation) with the abbot or the bishop. As we will see below, the same terminology began to be used to describe a majority of electors when secular corporations chose their rectors. These principles of reason and of majority became cornerstones of the jurists' political thought in the microcosm and the macrocosm.

If the participation of the entire clergy in the governance of the diocese represented the old world, we can discern a tension in canonistic electoral theory between the rights of the local cathedral chapter and the expanding claims of papal power. Electoral theory is important for understanding the relationship of the person of the bishop and his territorial domain, his diocese. The bishop gradually became a stranger in a strange land during the thirteenth and fourteenth centuries. They were no longer native sons who were born in the local diocese; they were not even committed to a stable, monogamous marriage with their churches. We can see in the jurisprudence of thirteenth-century electoral theory a reflection of the old and new order of episcopal power.

The key to the canonists' views on election is their opinions on what constitutes a numerical majority in an election. The canonists adopted the term *maior et sanior pars* from the rules governing the governance of the *universitas* and used it to describe a majority of the electors in a corporation. The *maior et sanior pars* was not a numerical majority—although it could be—but was

[53] Johannes Teutonicus to C. 12 q.2 c.73 v. *consensum*.

the most important part of the corporate body. Geoffrey Barraclough (1933–1934, 277) has written optimistically that "it is striking enough that the church had the wisdom to reject the democratic fallacy of 'counting heads,' and to attempt an estimate of the intelligence and enlightened good faith of the voters." What may have seemed wise in the context of 1934 does not resonate as well today. Nonetheless, Barraclough's generalization is off the mark for the Middle Ages because the Church did not have the wisdom to reject fallacious democratic reasoning until the first half of the thirteenth century. The double papal election of 1159 had demonstrated to the canonists the dangers of rejecting democracy. In this case the papacy and the canonists quickly concluded that elections based on the principle of majority rule avoided schism and fostered stability. At the Third Lateran Council of 1179 a conciliar canon established the rule that a pope-elect must have the consent of a two-thirds majority in the college of cardinals.

In the early thirteenth century Johannes Teutonicus propounded a theory of election that advocated a clear numerical majority in ecclesiastical elections.[54] But Johannes was one of the last of the Old School. His theory was rejected by Bernardus Parmensis and, most importantly, by Pope Gregory IX, who stated in the decretal, *Ecclesia vestra*, that the *maior et sanior pars* must not always be a numerical majority.[55] The most interesting aspect of Johannes' electoral theory is his view on electing an "extraneus," a foreigner, as bishop. As we have seen, until the twelfth and thirteenth centuries, most bishops were local men. Although Johannes was a fervent democrat in ecclesiastical elections, he was a committed oligarch when an ecclesiastical corporation wanted to elect an *extraneus*. Johannes may have been reacting to the increasing presence of foreign shepherds among local flocks. He believed that an *extraneus* could be elected only if there were no worthy candidates to be found locally, and only if the election were almost unanimous. Almost unanimous in this case means all but one. If the chapter elected an *extraneus* but two canons favored a local candidate, the two canons become the *maior et sanior pars* no matter how many canons voted for the other candidate.[56]

Johannes' electoral theory reflects his conviction that foreign shepherds should not care for local flocks. He believed that an *extraneus* could be elected only with great difficulty, and he believed that even the pope could not provide a bishop to an unwilling flock. Johannes firmly rejected the constitutional structure of the church that was slowly evolving during his lifetime.

Johannes Teutonicus was in a minority. All the later canonists agreed that the cathedral chapter could elect an *extraneus* if the bishop had been elected

[54] Johannes Teutonicus to 3 Comp. 1.6.7 (X 1.6.22) v. *solum plures* (ed. Pennington 1981) 59.

[55] X 1.6.57.

[56] Johannes Teutonicus to 4th Lat. c.23 (4 Comp. 1.3.8 [X 1.6.41]) v. *ipsius quidem ecclesie* (ed. García y García 1981) 210–1.

by the *maior et sanior pars*. Johannes, the old conservative, conceived of the church as being a local institution, serving local interests, and controlled by local people. In general his ecclesiology emphasized local rights. His idea that local rights were important remained an important element in the medieval *Ius commune*.

Johannes' jurisprudence of the norms governing the "universitas" was kept alive in the secular sphere if not in the ecclesiastical, especially in the governments and guilds of the Italian cities (Black 1984, 44–65). By the later Middle Ages the church was moving steadily towards centralization. The bishop became a prince who ruled over his territory. His territory was more clearly defined than it had ever been, and his jurisdiction over institutions within his territory was more vigorously defined than it had ever been. The bishop, however, became less a creature of the diocese. The bonds between a bishop and his flock were attenuated and the legal relationship between them diminished. By the later Middle Ages, when bishops were often appointed by papal mandates rather than elected by local cathedral chapters, the metaphors that had traditionally described the *bonus pastor* often became more and more rhetorical embellishments rather than descriptions of reality. The diocese and the bishopric were the forerunners of the modern state. Bishops, like secular princes, exercised increasingly centralized jurisdiction over their territories. What happened within the structure of the Church was replicated in the Italian city states where despotism in one form or another replaced communal, corporate rule.

In ancient Roman law a "universitas" was an association of persons in both public and private law. The jurists used the terminology of Roman law to describe medieval corporations but expanded the scope and importance of corporate theory in law. Already in the twelfth century an anonymous jurist called "the people" a "universitas." Although the norms governing corporate governance were established by the jurists of the *Ius commune*, these norms were modified by local custom and practice. From their thorough analyses of corporate law, the jurists created a doctrine of community. In particular, they defined the relationship of the head of the corporation to the members. What was particularly significant was that corporate theory began as a juridical description of small groups but became a tool that the jurists used to describe the secular state and the entire Church. As Brian Tierney has put it:

> The decretalists themselves, down to Innocent IV, certainly had no intention of providing arguments for critics of papal sovereignty; but in fact a more detailed analysis of the structure of corporate groups was precisely what was necessary to provide a sounder juristic basis for the rather vague "constitutional" ideas that occur in decretist works. (Tierney 1955, 96)[57]

[57] See the discussion of corporate theory in the enlarged edition of Tierney's seminal book: Tierney 1998, 95–118.

Consequently, for a complete understanding of the political thought of the medieval jurists one must delve into their corporate theory of representation.

The bishop's position in the "universitas" could be seen from two perspectives. He could be seen as the sole ruler of the cathedral chapter and the diocese. He could also be seen as a ruler who shared his authority with the canons of his chapter. In the early twelfth century Gratian had put some texts into his Decretum that stipulated that a bishop must govern with the consent of his chapter. In later canonical collections there were two titles that touched directly upon the relationship of the bishop and his chapter: "Concerning those things which a prelate may do without the consent of his chapter" and "Concerning those things which a greater part of the chapter may do."[58] A number of papal decretals under these two titles established the norms by which cathedral chapters should be governed. The bishop could not alienate ecclesiastical property, he could not unilaterally grant clerics benefices and stipends, he could not make any important decision without the advice and consent of his chapter. After reading these papal decretals no canonist could have possibly concluded that a bishop could act alone without his chapter in all matters.

A much more authoritarian bishop was attractive for a few canonists. Pope Innocent IV (1243–1254) was a distinguished canonist. He rejected the model of corporate governance supported by most canonists (Tierney 1955, 107; 1998, 99; see also Melloni 1990).

> Rectors who govern corporations have jurisdiction and not the corporations. Some say that a corporation may exercise jurisdiction without rectors. I do not believe it.

Innocent put forward a simple, absolutist theory of corporate government that may have been influenced by Roman law. The Roman jurists did not have a sophisticated theory of corporations. The model of rulership that emerges in the texts of Roman law is that the people bestow authority on the prince but do share in his rule.

When the canonists described corporate governance within the Church they developed a much more complex model of governance. The question of authority arose most often when ecclesiastical property and stipends were at issue or when the corporation was involved in litigation. The jurists created rules that dictated when a rector and the members of a corporation should act together or when they could or should act separately. They constructed a model of rulership in which sometimes the rector would sit in the corporation and act with the members and when the rector would act independently. Hostiensis, for example, argued that when the bishop sat in his chapter as a canon, his vote was equal to that of any other member of the chapter. If, however, the chapter was negligent, then the bishop could exercise all the rights of the chapter alone. If the bishop acted in matters that touched his preroga-

[58] Titles in the *Compilationes antiquae* and the Decretals of Gregory IX, X 3.10 and 3.11.

tives, his vote was equal to that of all the members of the chapter. In this case, the bishop could make decisions with the vote of one other canon. The bishop and one other canon constituted the "maior et sanior pars." Hostiensis was careful to protect the rights of the church against negligent prelates and canons. When the "status ecclesiae" (state of the church) was at stake, that is, fundamental rights and duties that touched the well-being and prerogatives of the entire local church (*universitas*), the bishop must have the consent of the *maior et sanior pars* of the entire chapter.

Medieval political thought was influenced in two ways by the jurists' theory of corporations. The jurists described the complicated relationship between the prince and his subjects in the macrocosm with the same rules that they applied to the microcosm. Their ideas about the proper relationship of the bishop to his chapter, the pope and his curia, the prince and his court, and, ultimately, the prince in his representative assembly (council or parliament) became fundamental norms for a just and proper doctrine of rulership.

The juridical personality of the group quite naturally became a concern of the jurists. During the late twelfth and early thirteenth centuries the jurists began to realize that the corporation could be represented by a delegate that they named a procurator, *syndicus*, or *advocatus*. This delegated official could defend the interests of the *universitas* in court. His actions, the jurists decided, would be binding on the members of the *universitas*. The delegate possessed "plena potestas" or "generalis et libera administratio." With proper mandates the official could sell, buy, lease, make contracts as well as represent the interests of the *universitas* in court. The jurists placed two significant limitations on the exercise of his authority. He could not exceed the terms of his mandate and could not injure the rights of the *universitas* (Tierney 1998, 108–17).[59]

The jurisprudence of representation entered European society through the Church. As we have seen, the cathedral chapter became a larger part of ecclesiastical governance in the early thirteenth century. When Pope Innocent III convened the Fourth Lateran Council he instructed bishops to inform members of their chapters to "send good men to the council."[60] After having been summoned to the Fourth Lateran Council, chapters were not shy about asserting their new rights to participate in councils. They quickly claimed the right to be represented by procurators and through those representatives to be voting members of local synods.

Archbishops and bishops were not universally happy with the claims of chapters, and the issue was joined. In 1216 the archbishop of Sens refused to

[59] See Pennington 2004d on which the following paragraphs are based.

[60] See the excellent discussion of Kay 2002, 97–101. Until relatively late the canonical tradition attributed *Etsi membra* to Pope Innocent III; see Kemp 1961, 43–4, who also gives a brief survey of canonistic commentary on the decretal.

permit representatives of the cathedral chapters in Sens to participate in a provincial synod. The chapters appealed to Pope Honorius III. The pope supported their claim decisively in the decretal *Etsi membra*. The pope's arenga was a stirring sermon on the corporate body of the Church and the interdependence of each individual member.

> Although the members of Christ's body, which is the Church, do not have one function but diverse ones […] He placed each person in that body so that the members constitute one body. The eye cannot say to the hand "I don't need what you do" or the head to the feet, "you aren't necessary to me." Still more important, the weaker members of the body seem to be necessary.[61]

Honorius instructed the archbishop and his suffragans that he intentionally wrote his arenga for them as an admonition. The archbishop had denied representatives (*procuratores*) of the cathedral chapters admittance to comprovincial councils in which matters touching their interests were treated. The archbishop had defended his position in a letter to the pope.[62] Honorius, however, did not find his reasons, whatever they were, convincing.

> We and our brothers the cardinals were in complete agreement that those chapters ought to be invited to such councils and their nuncios [*nuntii*] ought to be admitted to the business of the council, especially those about matters that are known to concern the chapters.[63]

Further, Honorius concluded, the archbishop should follow the mandate of this decision in the future. "When the head gives the members their due the body shall not experience the ravages of schism but will remain whole in the unity of love."[64]

[61] Translation based on Richard Kay's (2002): "Etsi membra corporis Christi, quod est ecclesia, non omnia unum actum habeant set diuersos […] prout vouluit in ipso corpore posuit unumquodque, ipsa tamen membra efficiunt unum corpus, ita quod non potest oculus dicere manui 'tua opera non indgeo' aut caput pedibus 'non estis michi mecessarii,' set multomagis que videntur membra corporis infirmiora esse necessaria sunt." Kay edits and translates the original text cited above on pages 541–3. Tancred included it in *Compilatio quinta* 3.8.1 and Raymond de Peñafort placed it in the Gregoriana, X 3.10.10.

[62] Ibid.: "Hec idcirco premisimus quia provincie vestre capitula cathedralia suam ad nos querimoniam transmiserunt quod vos procuratores ipsorum nuper ad comprovinciale concilium convocatos ad tractatum vestrum admittere noluistis, licet nonnulla soleant in huiusmodi tractari conciliis que ad ipsa noscuntur capitula pertinere […] et intellectis nichilmominus litteris quas nobis super eodem curastis negotio destinare."

[63] Ibid.: "Nobis et eisdem fratribus nostris concorditer visum fuit ut ipsa capitula ad huiusmodi concilia invitari debeant et eorum nuntii ad tractatus admitti, maxime super illis que capitula ipsa contingere dinoscuntur."

[64] Ibid.: "Ideoque volumus et presentium vobis auctoritate mandamus quatinus id decetero sine disceptatione servetis […] Quatinus capite membris et membris capiti digna vicissitudine obsequentibus corpus scismatis detrimenta non sentiat set connexum in caritatis unitate consistat."

Richard Kay calls Honorius' decretal "a landmark in the development of representative government."[65] He is absolutely right. The canonists immediately expanded the right to attend provincial councils by representatives of cathedral chapters into a more general right of persons whose interests were affected by the business of the council. During the thirteenth century provincial synods included representatives of cathedral chapters as a matter of course (see Condorelli 2003). *Etsi membra* became a key legal justification that persons and ecclesiastical institutions had the right to send representatives to assemblies that dealt with issues pertaining to their interests and that they, through their representatives, had the right to consent to new legislation. The decretal also justified claims of representation in the secular realm.

Honorius III's decretal became a part of canon law, and canonists commented on it for the next four centuries. Shortly after Honorius promulgated *Compilatio quinta* in 1225, Jacobus de Albenga alluded to the fundamental but unarticulated principle that lay at the heart of *Etsi membra*, a norm that was decisive when the pope and his cardinals decided to support the canons and not their archbishop and bishops.[66] Honorius, he wrote, embraced the right of cathedral chapters to participate in councils "because what touches them ought to be decided by them."[67] In the middle of the thirteenth century Bernardus Parmensis explicitly quoted the maxim in his Ordinary Gloss to the decretal that Jacobus alluded to: What touches all ought to be approved by all (*Quod omnes tangit ab omnibus approbari debet*).[68] Jurisprudential norms of the *Ius commune* were powerful tools for shaping institutions in medieval society. *Etsi membra* is a splendid example of how a legal principle could inform a judicial decision and regulate the rules governing the calling of a council. The logic of the decretal's argument could be understood as meaning that any council should invite persons who were not normally present in the deliberations of the council when it dealt with matters touching their interests. Jacobus de Albenga saw the logical implications of the decision and explained that although lay persons were not normally invited to church councils, if the issues that were to be decided by the council touched their interests, they too should be summoned. Such issues could be matters of faith and of marriage.[69]

[65] Ibid., 538.

[66] Post 1964, 234–5, connected "Quod omnes tangit" and *Etsi membra* more almost sixty years ago.

[67] Jacobus de Albenga to 5 Comp. 3.8.1, s.v. *contingere (*Admont, Stiftsbibliothek 22, fol. 295r and Cordoba, Biblioteca de Cabildo 10, fol. 327v): "quia quod eos tangit ab eis comprobari debet, ut liiii. di. c.i. et lxvi. c.i et viii. q.i. Licet (c.15)."

[68] Bernardus Parmensis to X 3.10.10, s.v. *contingere*: "Et merito quia quod omnes tangit ab omnibus debet comprobari."

[69] Jacobus de Albenga to 5 Comp. 3.8.1, s.v. *contingere (*Admont, Stiftsbibliothek 22, fol. 295r): "Laici vero huiusmodi conciliis interesse non debent nisi specialiter uocarentur, ut lxiii.

Not every pope was as sympathetic to Honorius III's conception of the Church as an interdependent body with mutual rights. As Brian Tierney has noted many years ago:

> The canonists' tendency to personify the individual churches, to discuss problems of their internal structure in terms of anthropomorphic imagery, did not influence the actual content of their doctrines so much as is sometimes supposed. The head-and-body metaphor could so easily be adapted to support any constitutional solution. (Tierney 1998, 95)

Tierney demonstrated that Pope Innocent IV, who was also a great jurist, had a unitary vision of the corporation, the papacy, and the Church, and he conceived each as "regimen unius personae."[70] When Innocent came to gloss Honorius' *Etsi membra* he did not want to deal with a text with which he had so little sympathy. "Repeat what we have said in our commentary above on the canon of the Fourth Lateran Council *Grave*."[71] And if his readers or listeners did as they were instructed they learned again the pope's uncompromising "strict authoritarianism" (Tierney 1998, 98). In *Grave* Pope Innocent III had decreed that prelates and chapters who are convicted of bestowing ecclesiastical benefices upon unworthy candidates more than two times should lose their authority to confer benefices. Provincial councils were to investigate and judge these cases.[72] First Innocent distinguished between episcopal and provincial councils. He noted that only bishops of the province must be summoned to the provincial council that would judge these cases of irresponsible electors but that abbots, priests, and the clergy of the city should be summoned to episcopal councils.[73] Innocent conceded that cathedral chapters ought to be summoned to provincial councils when matters that concerned them were treated. Otherwise they were not admitted to provincial councils unless it were a matter of "honesty" or "counsel."[74] Advice, however, was very

Adrianus, in fine (c.2) uel nisi specialiter tractaretur causa fidei, ut xcvi. di. Vbinam (c.4) uel nisi tractaretur de matrimonio, tunc enim cum tales cause eos tangant possunt interesse, ut xxxv. q.v. Ad sedem (c.2). jac." Bernardus repeated Joacobus' gloss in his Ordinary Gloss.

[70] Tierney discusses the corporate theories of Innocent and Hostiensis in Tierney 1998, 98–108. See also the important study Melloni 1990, especially 165.

[71] Innocent IV, *Commentaria* to X 3.10.10, s.v. *capitula* (Venice 1570) 460: "Repete quod diximus supra de prebend. cap. Grave (X 3.5.29)."

[72] X 5.5.29 (4th Lat. c.30). Norman Tanner has provided an English translation of the conciliar canon in Tanner 1990, 1: 249. A French translation can be found in Duval et al. 1994.

[73] Innocent IV, *Commentaria* to X 3.10.10, s.v. *provinciali concilio*: "Ad hoc concilium de necessitate vocandi sunt episcopi et non alii […] et hoc de archiepiscopali sive provinciali concilio. Ad episcopale autem concilium vocandi sunt abbates, sacerdotes, et omnem clerum civitatis et dioecesis convocare debet episcopus. Sunt autem episcopi sic congregati in concilio provinciali loco ordinarii in omnibus causis quae vertuntur inter episcopos et clericos […] Immo plus dicimus quod iidem episcopi sine concilio sunt ut iudices oridinarii in omnibus causis clericorum quae ad concilium referuntur."

[74] Ibid.: "Capitula autem cathedralium ecclesiarum tunc sunt vocanda ad concilium

different from a legal right to participate in conciliar affairs. Innocent's silences speak even more clearly about his conception of the Church than what he does say. He completely ignores the earlier discussions about the rights of laymen, cathedral chapters, and others to participate in councils. His vision of his Church did not include the idea of representation and consent in the body politic. Later jurists, however, accepted the right of corporations to be represented in church councils and secular assemblies. Pope Innocent IV's views remained in abeyance until the sixteenth century, when "strict authoritarianism" had a revival in the ecclesiastical and secular realms.

As the jurists explored and developed a jurisprudence that governed the *universitas*, they created norms that regulated the political life of medieval and early modern society. Perhaps the most significant norm that they established was "Quod omnes tangit, ab omnibus approbari debet" ("What touches all ought to be approved by all"). Consent and counsel of the members of the *universitas*, whether it was a guild or a kingdom, became a cornerstone of juristic thought. As time went on, these principles were applied to the pope and the college of cardinals, the bishop and his chapter, the rector and his *universitas*, and the prince and his realm. The doctrines of corporate governance became a counterweight to the old and still powerful theories of monarchical rule. They were not just alternatives to monarchical rule. The jurists argued that these norms of corporate governance should be integrated into princely government. They were a powerful force for limiting the power of the prince. The jurists, more than any other group, created "medieval constitutionalism" (Pennington 1988, 444–53).

4.4. The Jurists' Role in Shaping the Political Thought from 1250 to 1500

If one were to look at only the commentaries of the jurists on Roman, canon, and feudal law of the late Middle Ages one would be struck by the great continuities in political thought from the twelfth to the seventeenth century. Many of the issues that the jurists discussed were the same. They discussed the authority of the prince and the rights of his subjects. They continued to elaborate and expand their understanding of corporate theory. They responded to contemporary political institutions. The city states of Italy made them consider the relationship of small local states to the empire and national monarchies. Many questions were raised about the juridical structures of these new states. Could they legislate? Did their rulers have the same author-

provinciale cum de eorum factis agitur, infra de his quae fiunt a praelat. sine consen. cap. c. finali (*Etsi membra*, X 3.10.10), alias non nisi de honestate vel propter consilium (concilium ed.), 63 (64 ed.) dist. c. Obeuntibus (c.35)." D. 63 c.35 was canon 28 of the Second Lateran Council, in which cathedral chapters were ordered to take into account the advice (*consilium*) of "religiosi viri" and not to exclude them from their deliberations.

ity as the prince? Did the rights and duties of the rectors and members of the *universitas* apply to them? In the end the jurists answered yes to all these questions.[75]

The jurists developed their political ideas when they explicated the texts of ancient Roman, canon, and feudal law. Although they commented on these texts with a constant eye on the structures and institutions of the societies in which they lived—their jurisprudence was not desiccated academic law—their greatest contributions to political thought came as recognized experts from whom European rulers sought legal advice (Pennington1994a and 1994b; see the remarks of Walther 1998, 245–7). The literary vehicle that they used in their work was the *consilium*.[76] Jurists wrote *consilia* (legal briefs) at the request of clients who ranged from princes to city states, from judges to litigants (Ascheri 1980). They presented the facts of the case and then solved it after having presented both sides of the argument. For some jurists writing *consilia* became a significant source of income. One of the most prolific jurists, Baldus de Ubaldis, was said to have earned 15,000 ducats just for writing *consilia* on testamentary substitutions (Pennington 1997a, 52). Early the jurists also began complaining about the pay they received for their efforts. Between 1246 and 1312, Jacobus Palliarensis of Siena wrote a *consilium* for Amadoris de San Gimignano and noted that "his small payment was transformed into a large stipend by the affection of the judge who had sent it to him" (Chiantini 1997, 30). As we have seen, princes sought the opinions of jurists in the twelfth century. Although Frederick Barbarossa did not, it seems, ask Martinus and Bulgarus for a written opinion about the breadth of his political authority, the emperor's question reflected the rising status and importance of jurists for medieval politics.

By the end of the twelfth century we have some evidence that judges turned to jurists for professional opinions about legal cases. The earliest examples demonstrate that judges and institutions turned to famous teachers of law for opinions.[77] These teachers applied their expert knowledge and the principles and norms of the *Ius commune* to questions of law and questions of fact in the local courts.[78] This process demonstrates that the jurisprudence of the *Ius commune* transcended the practices of the local courts and at the same time was seen as a set of authoritative norms that served as guideposts and benchmarks for legal practice. The jurists could not know the customary and statutory law of all the local jurisdictions where they were asked for opinions,

[75] For the political thought of the late medieval jurists see Canning 1988, 454–76 and Cortese 1995, 2: 247–52.

[76] On the *consilia* see Bellomo 2000, 465–70 and passim; the essays in Baumgärtner 1995 and Ascheri, Baumgärtner, and Kirshner 1999 are also valuable.

[77] See the two examples from the early thirteenth century printed in Pennington 1990.

[78] Chris Wickham (2003, 210–1) discusses two *consilia* of unknown jurists in the 1190's.

but their knowledge of the norms of the *Ius commune* was seen as indispensable for bringing local practice into concordance with universal principles of justice, reason, and equity.[79]

We have a singular example of Pope Innocent III issuing a *consilium* in a political matter in 1203. The tract was included in his register and later in collections of canon law. In his register it has the rubric *Consilium quod dominus papa Innocentius misit crucesignatis sine bulla*. No other letter in the entire corpus of Innocent's letters was labeled a *consilium*. That fact is remarkable for two reasons. As we have seen, a *consilium* had become the term designating a response written by jurists to a particular legal problem. A *consilium* was neither a judgment nor a binding statement of law on those for whom it was written. Even if written by the pope, a *consilium* was advisory and not normative. The rubric stated that Innocent sent the *consilium* to the crusaders "sine bulla." Consequently, his *consilium* was not a definitive judgment, and we may understand "sine bulla" as underlining that point.

The contents of the *consilium* reflect Innocent's attitudes and motivations at a key moment during the Fourth Crusade in which the Venetians and the crusaders were taking a course that would lead them to the walls of Constantinople. It was a military and political decision that Innocent opposed but that he could not hope to control. Innocent permitted the crusaders to sail with the Venetians until they reached the lands of the Saracens or the province of Jerusalem. Innocent compared the Venetians to an excommunicated *paterfamilias*. In the *Ius commune* a *paterfamilias* was the head of a family. Family members did not have to shun contact with him if he were excommunicated. Innocent warned the crusader, however, not to wage war with the Venetians after they reached the lands of the Saracens unless the Venetians had been absolved. When the crusaders received Innocent's *consilium* they certainly understood that the pope issued it for political purposes with the help of his curial jurists. The document warned them indirectly not to attack Constantinople and not to collaborate with the Venetians after they reached the Holy Land. This is the first political *consilium* that we have in the *Ius commune*.[80] Bulgarus and Martinus gave Frederick Barbarossa oral opinions. From the early thirteenth century the jurists regularly responded to questions in writing.

Although Innocent III's *consilium* was a precocious anticipation of a rich genre, it differed from the *consilia* that began to flourish in the fourteenth

[79] Julius Kirshner (1999, 108–30) discusses whether the *consilia* had the authority of precedents in law courts. He cites various opinions about whether *consilia* had precedential authority, whether the medieval *Ius commune* had a concept of precedent, and surveys earlier literature.

[80] On this *consilium* see Pennington 2000. The jurists at this time would not, however, have drawn a clear distinction between Innocent's admonitions contained in a papal letter and this one that is labeled a *consilium*.

century in significant ways. First, and most importantly, the *consilia* were written by private, professional jurists. They were not written by princes and popes. If rulers who possessed legislative and judicial power and authority had written *consilia* their purpose would have been obviated. They would have been considered legislation rather than advice. In the case of Innocent's *consilium* the canonists included it into the collections of canon law. They transformed the document from advisory to depositive. *Consilia* were primarily meant to be advisory. Their purpose was to counsel the great and the small about the juridical norms that were significant for a particular legal problem. *Consilia* became an important literary genre because they were written by jurists who attempted to persuade, not to mandate. They became authoritative because of the prestige of the jurist who wrote them but even more from the power and force of the arguments contained in them. The reason of the law was far more important than the status of the jurists.

The second half of the thirteenth century marked the beginning of the Age of *Consilia* that would last for the rest of the Middle Ages. By the sixteenth century *consilia* rivaled commentaries as the most important genre of legal writing. We do not have copious numbers of *consilia* from the period from 1250 to 1300. In this period, jurists wrote *consilia* for private clients. They were paid modest amounts. Their *consilia* became part of the court archives. They did not circulate. They were not collected (see Chiantini 1995, with citations to recent literature).

The jurists were soon asked to render opinions on delicate political matters. An early example is a *consilium* written by Jacobus de Belvisio (ca. 1270–1335) and Jacobus de Butrigariis (ca. 1274–1347) who were doctors of civil law at the Law School in Bologna. Belvisio had been an advisor to the Angevin king who ruled the Kingdom of Naples, Charles II of Anjou († 1309). Sometime around 1309 both jurists were asked to write a *consilium* about the feudal rights and obligations contained in a feudal contract. The podestà of Castello di Monte, in the territory of San Gimignano, had sworn a feudal oath to the representative of Charles I of Anjou, the King of Naples (1225–1285), John Britaud, the Vicar of Tuscany. Forty years later the jurists were asked to define the terms of the contract between the Angevin king and the Castello and its men (*universitas et homines castri Montis*).[81] This relationship between a prince and a city is a splendid example how the obligations of feudal law and concepts of representation in canon law melded together in medieval society.

The two jurists began with a prologue in which they indicated their purpose. A *consilium* demands justice and truth. Justice means that rights should be granted to everyone. Truth means that God guides them to seek the truth in law and in rights. The *universitas* and its heirs had sworn an oath of fealty and homage to the king and his heirs. The jurists saw their task as exploring

[81] Mario Ascheri has printed this *consilium* in Ascheri 1985, 77–80.

what this act had meant in the *Ius commune*. To define what a vassal's obligations were from having sworn the feudal oath, they cited texts and jurisprudence from canon law.

The question remained, however, what the obligations of a person who swore a feudal oath were if he were not a vassal, courtier (*domesticus*), or *familiaris regis* (a special dignity at the Angevin court) and if he were not placed under the perpetual and continual jurisdiction of the king. The feudal contract stated that the men were to "defend and preserve royal property to the best of their ability against all other communes [*universitates*] and persons." However, the jurists did not think that their obligations extended beyond the borders of Tuscany.[82] Nonetheless, the vassals were obligated to wage war against the enemies of the king in Tuscany if the king waged war there. The jurists insisted that vassals were not bound to the terms of the contract and do not have a duty to serve their lord beyond reasonable jurisdictional limitations established by written documents.[83] Furthermore, the "bonus dominus" must protect and preserve the rights and property of his vassals. They concluded by stating unequivocally that the rights in the feudal contracts could not be prescribed.

Jacobus Belvisio and de Butrigariis used the norms and principles taken from canon, Roman, and feudal law to interpret the feudal contract concluded forty years earlier. They repeated several times the six key concepts for understanding a feudal contract: *incolume, tutum, honestum, utile, facile, et possibile* (uninjured, safe, honest, useful, easy, and possible). These concepts were not taken from Roman or feudal law. As we saw in section two, they were contained in a letter of Fulbert, bishop of Chartres († 1028), in which he had defined the obligations of the vow of fealty. That chapter of Gratian's Decretum had become the locus classicus for discussions of the feudal contract. The two jurists also used corporate law to understand the relationship between the feudal lord and his subjects. As in the case of Castello di Monte, procurators with full power (*plena potestas*) could bind the *universitas* not only in the present but also in the future. Oaths of fealty bound corporations as firmly as they bound persons. At the end of their *consilium* the jurists noted how much they were paid for their work: eight gold Florins.[84]

One of the first jurists to produce a collection of his *consilia* was Oldradus de Ponte. He was a professor of law and advocate in the Roman curia in Avignon. He was born in Lodi and died sometime after 1337, probably in Avi-

[82] Ibid., 79: "quod non teneantur extra Tusciam nisi comode et sine suis expensis et dampno facere possent."

[83] Ibid. Magnus Ryan has written an essay (Ryan 1998) in which he argues that the jurists did not understand the oath of fealty. He comes to this conclusion with only a superficial examination of the evidence. Much more satisfying is Giordanengo 1999, who presents an overview of the evidence that should be studied on this question.

[84] Eight Florins contained ca. 28 grams of gold (28.35 grams in one ounce).

gnon. Oldradus studied law in Bologna at the end of the thirteenth century. He was a layman, married with three sons, one of whom became a jurist. Lay canonists were not unusual in the fourteenth century. He entered the entourage of Cardinal Peter Colonna in 1297 for a short time, and later he taught law at the University of Padua until ca. 1310. He left Padua for the papal court in Avignon. Oldradus served as an auditor and judge in the Rota (papal judicial court) at Avignon. He may have also taught in the law school at the court in Avignon. From the evidence of his *consilia* Oldradus was the most important jurist at the papal court from ca. 1311 to 1337. An Englishman at the curia, Thomas Fastolf, wrote that Oldradus was still discussing cases with auditors in the Rota ca. 1337. That is the last certain notice we have of his life. He met Petrarch at Avignon, and the poet called him the most famous jurist of the age (McManus 1999, with complete bibliographical references).

His *consilia* dealt with a wide range of political problems. Many of them do not name litigants and do not describe a particular court case. They seem to have been written in response to legal questions that had been posed at the papal court in Avignon. He wrote *consilia* on the rights of non-Christians, Jews and Muslims. Although he thought that it was legal to wage war against Muslim's in Spain, he argued that when they lived peacefully in Christian society their rights should be protected (Oldradus de Ponte 1990). Oldradus' life and *consilia* illustrate the position that jurists had achieved in medieval society. Their opinions were sought and paid for. A knowledge of law was seen as a valuable tool for analyzing and solving political problems.

A conflict that arose between Emperor Henry VII (1309–1313) and King Robert of Naples (1309–1343) raised a number of complicated problems for the papal court, Oldradus de Ponte, and the jurists. Henry demanded Robert's support for his political plans in Northern Italy. After Robert had thwarted Henry's plans to be crowned emperor in St. Peter's, the two rulers became implacable enemies.[85]

Henry's conception of his office was as elevated as Frederick Barbarossa's. In a letter that he sent to the kings of Europe he declared that God had established him as the one prince to whom all men should be subject. The city of Rome was the seat of ecclesiastical and imperial power. Pope Clement V (1305–1314) entered the fray. He demanded that Henry promise not to invade Robert's kingdom and asked him to submit his dispute with Robert to papal arbitration. In 1312 Henry broke with Robert and issued a public denunciation of him. He accused Robert of treason and summoned him to the imperial court. He threatened that he would proceed against Robert even if the king did not appear in his court.

A number of jurists wrote tracts that defended Henry's actions. Others wrote tracts and *consilia* in support of Robert (Pennington 1993d, 172–8).

[85] See Pennington 1993d, 165–71 for this paragraph and what follows.

Clement V turned to the most distinguished jurist in his curia, Oldradus de Ponte, and asked him to write two *consilia* on the legal issues of the dispute (ibid., 179–83). In the first, Oldradus dealt almost exclusively with the question of due process. He posed a series of questions about the legitimacy of Henry's summons of Robert to his court. Is a summons issued to a place where a defendant has notorious enemies invalid? If so, is a subsequent trial and judgment also invalid? Oldradus argued that two considerations must be taken into account when examining a summons: the "execution of intent" and the manner through which the summons is brought. The execution of intent is the defendant's knowledge of the summons and his ability to defend himself. This element was a principle of the *Ius commune* and cannot be omitted. Oldradus observed that the right of self-defense is granted to everyone in extrajudicial matters by natural law, and, consequently, a person has the right to defend himself by natural law. There can be no defense without knowledge. If the prince would render a judgment without all necessary knowledge, he would take a defense away from a man that is granted by natural law. This is also a principle of the *Ius commune*, concluded Oldradus, and the prince may not violate it. A summons is the means by which knowledge is brought to the court. The means by which a summons is delivered is not established by natural law. A summons can be delivered by a nuncio, letter, or edict. The means are regulated by positive law, and the prince can, therefore, summon anyone as he wishes.

In the second *consilium* Oldradus grappled with the other issue raised by the dispute: Did the emperor exercise jurisdiction over other kings and over the king of Sicily? He drew his arguments from many sources and decisively rejected the emperor's claim that he was "dominus mundi." The Roman people could not have bestowed more power on the emperor than they themselves held. They did not exercise authority over other nations, therefore they could not make him lord of the world. God did not establish imperial rule since there were no scriptural justifications for it. He cited a metaphor of the bees that imperialists had used to justify the emperor's authority. "One bee who is king," he wrote, "is not king of all bees."

One feature of Oldradus's *consilium* is particularly striking: He did not deny the universality of the emperor by subjecting him to the pope. Oldradus was no hierocrat. His comment at the end of the *consilium* is telling. After reviewing the arguments of the canonists for the emperor's sovereignty, he concluded that their thought was a result of their nationalities: Johannes Teutonicus was a German, the others were Italians; therefore, as subjects of the emperor, they supported his claims of sovereignty. Only the Spanish opposed German claims. Oldradus's *consilium* became a focal point for considering the universal authority of the emperor in the later Middle Ages. Jurists and publicists incorporated it into their works, and supporters of the late medieval empire debated his thesis.

In these *consilia* Oldradus put forward two arguments to justify Robert of Naples' position. The first was new and had slowly evolved in the thought of the jurists during the previous fifty years. The prince could not deny a subject his right of due process when this right was grounded in natural law. The second argument was not as new and had been debated for two centuries. Oldradus maintained that the emperor was not "dominus mundi" and did not exercise jurisdiction outside the borders of the German empire.

Oldradus' *consilia* marked a new stage in the role of jurists in politics. In earlier political disputes the opinions of the jurists were ephemeral documents written for a particular dispute, at a particular time, in a particular place. Oldradus' *consilia*, however, were compiled into a collection that circulated widely in manuscript form. With the advent of printing they circulated even more universally. His *consilia* were reprinted numerous times in the fifteenth and sixteenth centuries. Oldradus' and the jurists' *consilia* were transformed from temporally limited legal arguments on particular cases to general political statements about the right order of medieval political institutions. They articulated the political principles developed by the jurists of the *Ius commune* and provided concrete examples of how these norms could be applied. Jurists read and cited Oldradus' *consilia* for the next three centuries. *Consilia* became one of the main vehicles for the circulation of the political principles of the *Ius commune*.

After Oldradus every major jurist who wrote *consilia* collected and published them. The great majority were devoted to the mundane affairs of everyday life: wills, dowries, contracts, and marriage cases. Jurists wrote *consilia* for individuals, corporations, and princes. When the jurists wrote *consilia* about the institutions of medieval society they often provided insights into the political life of communities that no other sources offer.

Bartolus of Sassoferrato (ca. 1313–1357) was one of the most revered jurists in Italy during the fourteenth century. His fame has endured until the present day. His career as a teacher and jurist was at the dawn of the Age of *Consilia*. He produced ca. 400 *consilia*, which are many fewer than the large numbers that later jurists would write. Although most of his *consilia* did not treat political problems, there is one that does offer an example of his political thought.

In ca. 1258 the commune of Spoleto granted some inhabitants of Arrone a place that came to be called Montefranco. The commune granted these men and their heirs liberty and a privileged legal status as free men (*libertas et franchisia*). They would have the same liberties as the citizens of Spoleto. In return the men promised the commune to build a fortification and to render annual services. These services probably included the defense of Spoleto. Montefranco was on a hill 400 meters high and was a splendid position to defend Spoleto from the South. The men of Montefranco lived there for forty years and never paid taxes to Spoleto. In the 1330's Montefranco and other

fortified towns surrounding Spoleto resisted the commune's attempts to integrate them into the political life of the commune. In particular, they resisted paying taxes. Montefranco asked Bartolus to write a *consilium* that was probably presented in the communal court of Spoleto. Bartolus posed two questions: Could Spoleto impose taxes on Montefranco and would their immunity from taxation extend to goods that they had subsequently acquired? (Bartolus 1529, *Consilium* 59, fol. 19r–19v).

Bartolus first broached the question of citizenship: Were the men of Montefranco citizens of Spoleto or inhabitants of the city? If Montefranco were part of the territory of Spoleto Bartolus had no doubt that any person who was born there was a citizen of the commune. Bartolus argued that the commune granted the men of Montefranco the right to build a fortification. When Spoleto concluded that pact the commune bestowed all rights of lordship and jurisdiction on Montefranco. Therefore, Montefranco was no longer a part of the territory of Spoleto. However, Bartolus then noted that this argument was not valid because it was a principle of the *Ius commune* that no one could alienate lordship and jurisdiction unless it were returned to a higher authority from whom they received it. Bartolus finished this part of his *consilium* by stating that Montefranco is part of the territory of Spoleto, but not simply a part. Spoleto's jurisdiction was limited by contracts, conditions, and privileges (*immunitates*) that were given to the men who established Montefranco.

What are the people of Montefranco obligated to? Bartolus quoted from the original agreement: They must serve in the army, take part in the parliament, "hold a friend for a friend" (Quintilianus, *Institutio oratoria*, 5.7), receive a podestà, and pay a certain amount annually. The original inhabitants of Montefranco promised that and no more. Bartolus cinched his argument with a norm from testamentary law: "Those things that one wants to be bound by make clear that in other things one does not want to be obligated." Since the men of Montefranco did not obligate themselves to pay taxes, Spoleto could not impose taxes on them. Bartolus noted that even though Spoleto promised to treat them as citizens one may not conclude that they had the authority to impose taxes on them as if they were citizens.[86] Bartolus asserted that when Spoleto promised to grant the men of Montefranco the same liberty and franchise as the citizens of Spoleto, the commune cannot now claim that they are obligated to more than what was contained in their contract. "It is certain," Bartolus concluded, "that the men of Montefranco believe with just reason that they are free from the burden of paying taxes. They have not paid taxes for forty years and more. They are free and cannot have new taxes imposed upon them."

[86] For Bartolus' theory of citizenship see Kirshner 1973, especially 707–9. Kirshner does not discuss this *consilium*.

When Bartolus turned to the issue of whether the commune could tax the property acquired since the contract had been made, he turned to the jurisprudence of canon law. The canonists had argued that papal privileges that exempted monasteries from tithes could be interpreted as exempting future property from tithes (Pennington 1984, 162–77). Bartolus applied the same norms and cited the same papal decretals to argue that the new property of the men of Montefranco was also exempt. "The men of Montefranco are exempt, their heirs are exempt, the heirs of their heirs are exempt to infinity," trumpeted Bartolus at the end of the *consilium*.

Bartolus' *consilium* illustrates interplay of institutions and rights in medieval society. The jurists mediated and controlled relationships in society by bringing their knowledge and expertise to bear on political questions. The norms of the *Ius commune* provided them with the tools to analyze political problems. Their status as respected and valued experts made their opinions important in European courts and also in the schools. The case law in the *Ius commune* had been confined to the appellate decisions of the popes in canonical collections. By the end of the fourteenth century the proliferation of *consilia* provided secular and ecclesiastical courts with additional authoritative statements of law that were cited in the courts and pondered in the schools.

Baldus de Ubaldis (1327–1400) succeeded Bartolus as the most renowned European jurist. Baldus taught at the law schools of Perugia, Florence, and Padua. He began teaching at the university of Pavia in 1390. The powerful ruler of Milan, Giangaleazzo Visconti, had appointed him to the post, and he remained there until his death in 1400. When Giangaleazzo summoned him, he was the most distinguished Italian jurist of his time, and his fame had begun to rival that of his old teacher in Perugia, Bartolus (on his life and works, see Pennington 1997a).

Baldus wrote several thousand *consilia*, many of which have never been printed. After arriving in Pavia, he rendered several important political opinions for his new lord. Legal historians have long known of these *consilia* that Baldus composed for Giangaleazzo. In his sixteenth-century biography of Baldus, Diplovatatius mentioned *consilia* touching upon Giangaleazzo's affairs. In one of these *consilia*, "Rex Romanorum," Baldus discussed the legal questions revolving around Giangaleazzo's assumption of ducal authority in Lombardy. Baldus struggled with, and slowly began to resolve, the issues that touched fundamental legal prerogatives of the Visconti's *signoría*. "Rex Romanorum" offers us a rare glimpse of how a medieval jurist wrote, and then rewrote, a *consilium* treating a delicate political and legal problem.[87]

[87] For the text of "Rex Romanorum" and a more detailed discussion of the textual tradition see Pennington 1992 (reprinted with many corrections: see Pennington 1993a). For Baldus' other "political *consilia*" dealing with other feudal problems of Giangaleazzo, see Pennington 1997b.

Baldus began to write "Rex Romanorum" in response to the objections of some Italians to the German Emperor Wenceslaus's bestowal of Lombardy on Giangaleazzo as general imperial vicar in 1395. With his privilege in hand, Giangaleazzo claimed the ducal title for himself and argued that all cities and lordships were now subject to him as their feudal lord. Wenceslaus had granted Giangaleazzo all imperial rights and lordships in Lombardy. He declared that he made this grant with certain knowledge and from his fullness of power, notwithstanding any concessions, constitutions, immunities, liberties, and privileges that anyone might possess.

The privilege raised several legal problems. It encroached upon the rights of imperial vassals in Lombardy and broke longstanding diplomatic ties between the emperor and local authorities. Some German princes claimed that the emperor did not have the authority to grant such a privilege because it injured the imperial patrimony.

Baldus raised two questions in the beginning of the first version of "Rex Romanorum." In the first, he asked whether a nobleman, who held a city not mentioned in the privilege, but whose city contained a part of a diocese that Wenceslaus had bestowed upon Giangaleazzo, must acknowledge Giangaleazzo's lordship. The second question was whether Wenceslaus had granted all jurisdiction and power to Giangaleazzo and whether he could recognize who was or who was not an imperial vassal according to his will.

In fact, if we may judge from the space that he allotted to each question, the second was of far greater importance to Baldus. He devoted only a few lines to the first question. In his earliest draft of the *consilium*, he concentrated on whether Wenceslaus could transfer all imperial jurisdiction and power to Giangaleazzo. If Giangaleazzo had seen this early version of the *consilium*, he might not have been pleased. Baldus restricted Wenceslaus's privilege considerably. Could the emperor order a vassal who holds him as his liege lord to swear allegiance to another lord? Baldus concluded that it would be dangerous to believe the emperor had this authority. Further, if one thought that Wenceslaus could revoke earlier privileges, then his successor might do exactly the same. Giangaleazzo and his children might lose everything that Wenceslaus had granted them. Echoing the constitutional provisions of the Magna Carta, he noted that if a feudal lord wronged his vassal, he should appeal to his peers at the lord's court. If this failed, he could wage war against his lord.

Baldus concluded his argument with a hope and a proverb. His hope was one that he would repeat several times later on in the *consilium*: That Giangaleazzo would listen to opinions that might not please him. In his proverb, Baldus quoted a King who wished that he would not bestow a larger but a more stable kingdom upon his son. Baldus's message to Giangaleazzo was clear: Treat the rights of imperial vassals in Lombardy with respect.

After discussing these issues, Baldus ended the first draft of the *consilium*

with a remark that seems an afterthought: All this is true if one presupposes that the emperor-elect can bestow such a privilege.

In the next stage of composition, Baldus tackled other problems connected with Giangaleazzo's ducal rights. In his first analysis, Baldus dealt with the emperor's authority to derogate or abrogate legislation: Could the emperor abrogate or derogate imperial privileges that his predecessors had bestowed upon the princes of Lombardy? Since then he read *consilia* of Christophorus and Paulus de Artionibus[88] in which they argued that the pope could neither revoke a fief nor change its terms to a vassal's detriment. These two *consilia* raised an issue that Baldus had not considered. When Wenceslaus had granted Giangaleazzo lordship over Lombardy, he broke his feudal contracts with his Lombard vassals. The jurists who commented on feudal law had developed a very sophisticated theory of how contracts bound the prince. By the end of the thirteenth century, most jurists agreed that the prince could not unilaterally break a contract with his vassal. Baldus sat down and added a short treatise on contracts. He argued that feudal contracts could only be changed with the consent of the parties. A contract with the prince could not be valid if its force were dependent on his will alone. The prince is a rational creature and ought to be subject to reason. He should not break contracts without cause. In doubtful matters, one should never assume that the prince wishes to dispossess someone of their rights.

Baldus continued his discussion of whether a prince could transfer an unwilling vassal to another lord. Drawing analogous examples from marriage, slave, and contract law, he argued both sides of the issue. In his conclusion, he did not resolve the issue but raised an entirely different question: Did Wenceslaus diminish imperial authority by granting his privilege? To this question, Baldus could give a confident, if somewhat irrelevant answer: No.

Baldus turned next to feudal oaths. Vassals in Giangaleazzo's lands are obligated to render the feudal oath to him, but if they refuse, they should lose only their fiefs and should not be punished further. In the end, however, Baldus again affirmed his position that the prince should not force an unwilling vassal to accept a new lord and made a plea that Giangaleazzo should understand that any right he wished to exercise must be based on equity. If not, it was unjust.

Baldus made another important addition to the first part of the *consilium* at the very end. A contract, he wrote, was different from a privilege. The prince is bound to observe a contract by natural law, and this is one case in which the prince is not presumed to have acted with cause if he were to break a contract. In his earlier statement on contracts, Baldus had not treated the issue of cause—a key element in the jurists' theory of contracts—nor had he based his argument on natural law. Now, however, he formulated a general statement on

[88] The *consilium* of Christophorus Albericius in Bologna, Collegio di Spagna, 236, fol. 121v–124r may be the one that Baldus cited.

the inviolability of contracts with which almost every jurist between 1200 and 1700 might have agreed.

In this *consilium* Baldus touched upon almost every element of the jurists' ideas of princely authority.[89] The task was not an easy one for him. Although he had treated many of the questions separately in his commentaries on the *Corpus iuris civilis* and in his commentaries on canon and feudal law, when asked to analyze Giangaleazzo's rather straightforward problem, he did not find it easy to bring what he had written about the emperor together. Naturally, he was sensitive to the political dangers of giving Giangaleazzo an unsatisfactory answer. He had lived for most of his life in republican city states, and their constitutional problems undoubtedly attracted his attention more than those of the prince. He had written other *consilia* that touched upon the political problems in Europe, most notably on the Papal Schism of 1378.[90] His *consilia* treating the rights of Giangaleazzo and the Papal Schism underlines a fundamental point about the literary genre. The jurists were forced to synthesize the rich, fecund, and complex traditions of the *Ius commune* when they treated a complicated political case. This task was one that they had never faced in their great commentaries, but it was a task that played an important role in shaping European political thought.

At the end of the Middle Ages the Age of *Consilia* was in full swing. Most jurists produced few works of commentary but many *consilia*. By the end of the fifteenth century it was the most important genre in law. Great political events were often subjected to minute analysis in *consilia* commissioned by princes. The dramatic events surrounding the murder of Giuliano de' Medici compelled the supporters of the Medici to commission a number of jurists to write *consilia* on the issues of the case. The protagonists in Giuliano's murder were worthy foes. On the one side stood the pope, Sixtus IV, the spiritual leader of Christendom and temporal prince of Central Italy; on the other, Lorenzo, first citizen of Florence.[91]

Sixtus had excommunicated Lorenzo after he had escaped the assassins whom the pope had probably hired. Lorenzo had no doubts about the injustice of pope's duplicity. On 19 June 1478, he wrote to René of Anjou:

> I know that the only crime I have committed against the pope is, and God is my witness, that I live and that I did not suffer death […] On our side we have canon law, on our side we have natural and political law, on our side we have truth and innocence, on our side God and mankind.

Sixtus's bull of 1 June, 1478 had condemned Lorenzo as a son of iniquity and a rebel against the Church. Sixtus used the new printing press to give his bull

[89] Scholars have disagreed about whether Baldus granted Giangaleazzo "absolute power" in this *consilium*; see Pennington 2004e, 305–19.

[90] Walter Ullmann analyzed Baldus' *consilia* on the Schism in Ullmann 1948, 143–60.

[91] For a detailed discussion of these events and the *consilia* see Pennington 1993d, 238–68.

wide circulation. The Signoria of Florence responded to Sixtus's letter on 21 July, in an apologia probably written by Bartolomeo Scala. They rejected Sixtus' allegation that Lorenzo was a tyrant. The pope had the authority, they observed, to wage war against the Turks, but to wage war against a Christian ruler was quite another matter. Both Sixtus' original bull and the Signoria's response to it were pieces of propaganda aimed at a larger public.

Lorenzo and his advisors must have been aware that they needed more than propaganda to discredit Sixtus' excommunication and interdict, and a number of jurists were called upon to defend Lorenzo. They quickly responded with detailed rebuttals and provided Lorenzo with a formidable defense. By the end of July 1478 he had already received tightly argued and lengthy *consilia*.

Four *consilia* have been preserved from this controversy. Each *consilium* contains extensive discussions of the political and the legal ramifications of the Pazzi Conspiracy. Bartolomeo Sozzini (Socinus) (1436–1507), the doctors of Florence who represented the entire college of doctors (undoubtedly the doctors of law), Francesco Accolti, and lastly, Girolamo Torti (Hieronimus de Tortis) wrote *consilia* defending the Medici.

When Lorenzo wrote to René of Anjou in the middle of June, he must have known about the main arguments that could be made in his defense. The rhetorical flourish of his elegantly cadenced litany—that canon law, natural law, and God supported him—should not obscure the essential truth of his statement. All the *consilia* make the same argument: Two centuries of Romano-canonical procedural law supported Lorenzo, and these procedural rules were not just a part of positive canon law but were based on a higher law, natural law. Each jurist made the same fundamental point: Even the prince's (in this case the pope's) "potestas absoluta" could not subvert the judicial process. They established that when Sixtus condemned Lorenzo, he had violated procedural rules to which even the pope must adhere. There was no longer any doubt that the supreme prince of Christendom was bound by the procedural rules of the *Ius commune.*

The jurists' defense of Lorenzo de' Medici provides remarkable illustration of the political role that the jurists played in medieval society. By the end of the fifteenth century, Lorenzo's dramatic rhetoric in his letter to René of Anjou was more than just rhetoric. Law was staunchly on his side. Jurists inside and outside Florence leant their legal expertise to his defense. In their *consilia*, the lawyers summarized two centuries of juristic thought about the relationship of the prince and the law. Their task was not daunting. In their commentaries the jurists had created a sophisticated doctrine of "due process" that Pope Sixtus violated when he condemned Lorenzo without a hearing. A defendant's right to present his case in court had become so embedded in juristic thought that even the prince's absolute power could not dislodge it.

The writings of these jurists transmitted the jurisprudence of due process into the early modern period. Due process of law became part of the intellectual baggage of every jurist who studied the *Ius commune*, and natural law continued to be the sturdy foundations upon which key elements of judicial procedure rested. Bartolomé de Las Casas, Jean Bodin, Samuel Pufendorf, Johannes Althusius, and Benedict Carpzov incorporated these norms of procedure created by the medieval jurists into their works.

4.5. Law and Political Thought 1500–1700

The Renaissance is not a meaningful concept in the history of law and jurisprudence nor in the history of political thought.[92] The jurists of the sixteenth and seventeenth centuries dealt with the same problems, used the same texts, were shaped by the same norms and jurisprudence as the jurists of the fourteenth and fifteenth centuries. The jurisprudence of the *Ius commune* was too potent an intellectual construct to be significantly distorted or completely dismantled by developments in philology and religion.[93] Recent scholarship has demonstrated that the Protestant Reformation had only a modest impact on law. In his fine study of Lutheran jurisprudence in the sixteenth century, John Witte Jr. (2002, 168) concluded that:

> It must be emphasized that there were dozens of other Evangelical moralists and jurists [besides Melanchthon, Eisermann and Oldendorp] in the first half of the sixteenth century who wrote on law, politics, and society. Sometimes their views echoed those of Melanchthon, Eisermann, or Oldendorp. Sometimes, they adhered more closely to the traditional teachings of medieval canonists and civilians. The Lutheran Reformation did not produce a single or uniform jurisprudence.

Witte has shown that the Protestant jurists' conception of politics was virtually the same as their predecessors'. They believed that magistrates must obey their own laws. Natural law limited their authority and power. The *Ius commune* was the font of legal reason (Witte illustrates this very well in his discussion of their conception of equity). Protestant jurists adopted a key element of prior political thought and incorporated it fully into their work: the common good (ibid., 140–68).

The same may be said of the great jurists of the sixteenth and seventeenth centuries. The Northern jurists who practiced what has been called the "mos gallicus" used the tools of philology to recover the texts of Roman law. They used the same tools that Erasmus used to study the Bible and that Lorenzo Valla and others employed to produce texts that were cleansed of detritus of

[92] This generalization has been and remains controversial. It underpins, however, the conclusion of this essay.

[93] The literature on "humanistic jurisprudence" is enormous but also inaccessible to most English-speaking scholars. The modern debate has centered on reactions to Troje 1971.

centuries. Some scholars have contrasted this "Humanistic Jurisprudence" with the "mos italicus." In Italy, they generalize, law remained trapped in the grip of medieval jurists. These generalizations have a grain of truth but obscure several important points. When they wrote about political power, the humanists discussed many of the same issues in exactly the same language as their medieval and Italian colleagues. They depended on the same set of norms embedded in the *Ius commune*. The practitioners of the "mos gallicus" were just as interested in the practice of law and in the foundation of political life in law as their southern counterparts. They were not scholars who distanced themselves from the real world. Perhaps the most significant difference between these jurists (North and South of the Alps) and their predecessors was their interest in systematically exploring subjects. Jean Bodin's *De republica*, Prospero Farinacci's *Praxis et theoricae criminalis*, and Hugo Grotius' and Samuel Pufendorf's works all illustrate a commitment to creating comprehensive surveys that treated certain aspects of law.[94]

Not all or even the most important humanist jurists produced systematic treatments of political thought. Perhaps the most important French jurist of the sixteenth century, Jacques Cujas (Cujacius) (1522–1590), scattered his remarks about the authority of the prince, the structure of society, and the sources of law throughout his works in good medieval fashion. His most important conclusions about the prince and the state echo the thought of the medieval jurists. Reason and the common good are the foundation stones upon which society rests (Cujas 1658, *Paratitla in libros ix. Codicis*, Cod. 8.52). There can be no people without law, and the people must consent to the law for it to be valid (ibid., Dig. 1.1.7). He concluded, in traditional fashion, that the prince is bound by the laws (ibid., *Observationes* Liber 15.30 [to Dig. 1.3.31]). A medieval jurist would have found nothing strange in his conclusions or in his reasoning. His political thought may have been cloaked in the refined language of the humanists but his conclusions resonate with older discourses.

Indeed, during the sixteenth century, jurists described the authority of the prince with the same terminology that their predecessors had used since the thirteenth. The prince had "plenitudo potestatis," "potestas absoluta," "ordinata," and was "legibus solutus." Historians cannot, however, agree whether the jurists in the sixteenth century changed the meanings of these terms. A key issue that has sparked much debate is whether medieval jurists attributed "true" sovereignty to the prince and whether sixteenth-century jurists interpreted these terms as granting the prince absolute power, untrammeled by any limitations. Did absolutism replace medieval constitutionalism?

[94] See the still useful and masterful Maffei 1956, and, more recently, Bellomo 1989, 217–29. See also the essays, in Burns and Goldie 1991, by Donald Kelly, Francis Oakley, J.H.M. Salmon, and Julian H. Franklin.

It is beyond the scope of this chapter to solve this problem. We have seen that medieval jurists interpreted the authority of the prince in a variety of ways—from what might be described as "constitutional" to "absolutistic." A brief comparison of medieval and early modern definitions of absolute power might illustrate the range of meanings that absolute power had in the writings of the late medieval and early modern jurists.

The great Italian, Protestant jurist turned Englishman, Albericus Gentilis, wrote a tract in 1605 in which he discussed the nature of monarchy.[95] He observed that royal power is absolute, that is, without limits. The prince is "legibus solutus," and what pleases the prince has the force of law, for his will is held to be reason (Albericus Gentilis 1605, 8, 11, 24). No medieval jurist would have quarreled with Albericus. However, he continued in a different vein: "And they define absolute power as that through which he can take away a right of another, even a great right, without cause" (ibid., 10). Most of his predecessors would have parted company with him at this point. The jurists of the *Ius commune* were not, for the most part, absolutists.

Sixteenth-century political thought has a rich variety and texture. William Barclay, a Scotsman, studied law on the continent and subsequently became a professor of Roman law at Pont-à-Mousson and Angers. His most significant work of political theory was *De regno et regali potestate* (Barclay 1600). Although some scholars have called him an absolutist and staunch proponent of divine right monarchy, if one reads him carefully, his language and thought is simply a statement of the Roman law principle "Princeps legibus solutus est,"—the prince may transcend positive law through his absolute power—and he borrows extensively—often with direct quotes—from the glosses of the canonists. He did not depart significantly from the norms of "medieval constitutionalism."

Perhaps the best-known commentary on a ruler's authority and power in the sixteenth century is Jean Bodin's *De republica* (see Franklin 1991). Some scholars have summarized sovereignty in Bodin's *De republica* as "high, absolute, and perpetual power over citizens." The prince "gives laws to all his subjects" without seeking anyone's or any group's consent. Bodin's prince was absolute "and even if his commands are never 'just or honest,' it is still 'not lawful for the subject to break the laws of his prince'."[96] If they are right, Bodin seems to have broken sharply with traditional definitions of political power, and his prince was absolute as few others before him were.

Bodin created an exalted and rarified vision of political power, but in his prefatory letter he denied that his *De republica* broke with the past. He discussed the prince's authority in Book 1, Chapter 8 of the *De republica* and

[95] For further detail and more complete bibliographical references for what follows, see Pennington 1993d, 275–84, on which the next pages on Jean Bodin rest.

[96] These quotations in this paragraph are taken from Skinner 1978, 285–8.

adopted the terminology of power that the jurists had created in the jurisprudence of the *Ius commune*. "Maiestas," he wrote, cannot be limited by time, by a greater power, nor by any law. "Maiestas" meant that the prince was not bound by the law. In other words, Bodin equated "maiestas" with the prince's absolute power to change, abrogate or derogate positive law. He explained that the kings of France were loosed from the law and possessed absolute power. As a justification of his contention, he cited a famous *consilium* by Oldradus de Ponte in which Oldradus had equated kings with the emperor and insisted that European kings were not subject to imperial jurisdiction. Bodin defined absolute power with language that is redolent with echoes of the past:

> What is absolute power, or rather power that has been freed from the law? No one has yet defined it. If we define absolute power as that which is above all laws, then no prince possesses the rights of sovereignty. All princes are bound by divine, natural, and the common law of all nations.[97]

Any late medieval jurist could have written this definition of political authority. Natural law had traditionally limited the prince.

Medieval and early modern jurists always used natural law and the norms of the *Ius commune* to limit the prince. They also used amorphous concept that they called "status regni" or, in the church, "status ecclesiae." The state of the realm or the state of the church was an inviolable body of law, custom, and tradition that was not subject to the authority of the prince. Bodin declared that none of the laws from which the prince derives his "imperium" can be arrogated or derogated. An example, he noted, was the Salic law from which French kings derived their authority and which was the very foundation of the kingdom. Assemblies of the people, he argued, could not limit the prince's sovereignty.

Natural law was the kernel of medieval jurisprudence that blossomed into a coherent intellectual system harnessing the will of the prince.[98] Bodin adopted all the limitations of the prince's sovereignty that the jurists had developed during the prior three centuries:

> Those who state that princes are loosed from laws and contracts give great injury to immortal God and nature, unless they except the laws of God and of nature, as well as property and rights protected by just contracts with private persons.[99]

[97] "Quid autem sit absoluta, vel potius soluta lege potestas, nemo definiit. Nam si legibus omnibus solutam definiamus, nullus omnino princeps iura maiestatis habere comperiatur, cum omnes teneat lex divina, lex item naturae, tum etiam lex omnium gentium communis, quae a naturae legibus ac divinis divisas habet rationes" (Bodin 1594, I, 8).

[98] The jurists never thought that natural law was simply what was contained in the New Testament; see Pennington 2004.

[99] "Qui autem principes, legibus et pactis conventis solutos esse statuunt, nisi Dei praepotentis ac naturae leges, tum etiam res ac rationes cum privatis iusta conventione contractas excipiant, maximam immortali Deo, ac naturae iniuriam inferunt" (Bodin 1594, I, 8).

To support his allegation, he cited Accursius's famous gloss to *Princeps* (Dig. 1.3.31(30)) in a marginal footnote, reaching back three centuries for an authority to define princely power. As Brian Tierney brilliantly demonstrated when he dissected Accursius's gloss forty years ago, although modern historians have misread him, Bodin would have understood Accursius's references and allusions as no modern reader can (Tierney 1963b, 387–97). Accursius held contracts to be inviolable and secure from the arbitrary power of the prince. His commentary on *Princeps* is an extended discourse on the prince's obligation to submit himself to positive law. Bodin reached back into Accursius' Ordinary Gloss on Justinian's Digest and adopted his thirteenth-century principles.

Medieval and early modern jurists distinguished between contracts that the prince made with private citizens and those he concluded with other princes or cities. They also noted that contracts between citizens and non-citizens had a different legal status. Bodin did not use these distinctions to augment princely authority by arguing that the prince could render some contracts invalid but not others. The prince could not break any contract he entered into; he was bound to uphold the law. He cited a recent event in French history to support his contention. The French *parlement* had vigorously maintained that Charles IX could not sunder his agreements with the clergy without their consent. Bodin rejected the views of those canonists like Panormitanus, Antonio de Butrio, Francesco Zabarella, and Felinus who had argued that the prince's contracts were "natural obligations" and only validated by civil law. Although Bodin may not have understood his predecessors' thought on contracts accurately, he vigorously rejected any attempt to enhance the authority of the prince to break contracts arbitrarily. Who can doubt, he asked rhetorically, that obligations and contracts have the same nature?

In the preceding pages we have discussed the intricate development of juristic ideas about a just trial and fair legal procedures—what in Anglo-American common law is called due process of the law. We have noted that when earlier jurists discussed due process, they invariably raised the issue whether the prince could subvert judicial procedure through his absolute power or "plenitudo potestatis." We have also seen that early modern jurists embraced medieval conceptions of due process. When we turn to Bodin's *Republic*, we find no discussion of due process or the prince's role in the judicial process. The explanation for this omission is simple. Bodin limited his prince much more than any medieval jurist would have thought possible: He barred him from the courtroom. Medieval jurists had understood that when the prince presided over a court, he violated basic legal principles that forbade a judge to participate in cases that touched his own interests. In Book 4, Chapter 6 of the *Republic*, Bodin proves that the prince should not serve as a judge in his kingdom. In contrast to his discussion of the prince's absolute power in Book 1, Chapter 8, he cited very few legal citations and gave only a few references to earlier jurists. His reticence is not inexplicable. No earlier jurists had ever

argued that the prince could not preside over his own court. The key question is whether Bodin would have adopted the principles of due process that we have discussed, even if he banned the prince from the courtroom. He referred to judicial procedure in one brief, but telling passage:

> Therefore, if a contract is natural and common to all nations, then obligations and actions have the same nature. No contract and obligation can be conceived that is not common to nature and all nations.[100]

Bodin cited three texts of Roman law to justify his statement. One of them, *Ex hoc iure*, was the key passage in the Digest that discussed the origins of judicial procedure.

Bodin's theory of contracts is one of the keys to understanding his relationship to past jurisprudence. He noted that although some contracts might arise from the positive laws of a city, the prince would still be obligated to observe those agreements even more than a private person. Furthermore, the prince cannot abrogate pacts even with his most exalted power. All the most important jurists, observed Bodin, agreed on this point.

Like many other late medieval jurists, Bodin considered Angelus de Ubaldis a prime example of those jurists who granted the pope, emperor, and kings inordinate, unrestrained power. Angelus's opinion was not as straightforward as his interpreters imagined, but Bodin dubbed him one of those "pernicious adulators" of the prince's power. Nonetheless, he noted that most jurists—citing Cinus, Panormitanus, Baldus, Bartolus, and others—believed that the prince could not arbitrarily expropriate the goods of private citizens. Bodin concurred. Bodin delivered a ringing condemnation of absolute power as an arbitrary and tyrannical authority in *De republica*:

> Since the jurists abhor that plague and dispute many things of that sort brilliantly, nevertheless they make an absurd exception. They say that if the prince wishes to use his highest, absolute power, that [he may expropriate private property] as if they would say that it is in accordance with divine law to dispossess citizens with force and arms. The Germans call the right of the powerful to despoil the weak the law of pillage. Pope Innocent IV, who was an extraordinarily learned jurist, defined this power as the authority to derogate ordinary law. They claim that this great power of the prince can abrogate divine and natural law.[101]

[100] "Igitur si conventio naturalis est ac gentium omnium communis, obligationes quoque et actiones, eiusdem esse naturae, consequens est. At nulla fere conventio, nulla obligatio cogitari potest, quae non sit et naturae et gentium omnium communis" (Bodin 1594, I, 8).

[101] "Sed cum pestem illam abhorreant, ac multa in eo genere praeclare disputent; illud tamen absurde, quod hanc exceptionem subiiciunt, nisi summa, et ut ipsi loquuntur, absoluta potestate uti velit, quod perinde est, acsi dicerent, vi et armis oppressos cives diripere fas esse. Potentiores enim hoc iure adversus inopiam tenuiorem uti consueverunt, quod praedatorium ius rectissime appellant Germani. At Innocentius iiii. pontifex Romanus, iuris utriusque peritissimus, summam illam, sine legibus, solutam potestatem definiit, ordinario iuri derogare posse. Illi vero summam potestatem ad legum divinarum ac naturalium abrogationem pertinere voluerunt" (ibid.).

Bodin did not embrace (what he thought was) Innocent IV's absolutism. He accepted the commonly held limitations on the prince's absolute power and rejected the arguments of Angelus de Ubaldis and others who granted the prince great power to subvert the established order. Bodin concluded, just as so many of his predecessors had also concluded, that the prince could not expropriate property without a just cause.

Bodin raised the question whether the prince was bound by the contracts of his predecessors. The jurists had discussed this issue in connection with the Donation of Constantine and had generally agreed that the prince was bound to observe the contractual and testamentary provisions of his predecessors. Bodin pointed out that the prince's hereditary obligations must be upheld. Why must we discuss this distinction, he asked, since wills and contracts are a part of the law of nations? For Bodin the answer was simple. The law of nations is not inviolable, unless it is also supported by divine and natural law. The prince may revoke iniquitous laws even if they are part of the law of nations—such as the law of slavery.

What should be clear by this point is that Bodin's conception of sovereignty was unthinkable without the work of his predecessors. His definition of absolute power was taken from earlier jurists, and the limitations that he placed upon the prince were adopted from their thought. His argument that contracts, private property, and actions were based on natural and divine law were items that he easily took from the shelves of medieval jurisprudence. He did not cite the opinions of medieval and Renaissance jurists arbitrarily or willfully, but he knew their thought and their idiosyncrasies well. We may conclude that Bodin's conception of sovereignty that he expounded in Book 1, Chapter 8 of the *De republica* would not have offended the most constitutionally minded jurist of the Middle Ages.

Bodin's contribution to the history of political thought was conceptual rather than substantive. The medieval and Renaissance jurists rarely wrote systematically about sovereignty. When they referred to the *loci classici* of the prince's authority, the glosses and commentaries on these texts did expound a coherent doctrine. But not a coherent work which could be entitled "On sovereignty." They were content to paste their glosses together in their minds rather than writing an extended commentary on the Prince's *maiestas*. In this sense, Bodin was right when he wrote that no one had ever defined the prince's power—no one had written a systematic tract describing sovereignty. That was Bodin's contribution to political thought. And it is an example of the importance of sixteenth- and seventeenth-century jurists. In the next century, Hugo Grotius (1583–1645) and Samuel Pufendorf (1632–1694) would develop and refine the genre of the legal treatise with numerous tracts on war, peace and politics.[102] Even a casual reading of their work reveals there deep

[102] See the recent bilingual edition of Grotius' (2001) *De imperio summarum potestatum*

and profound debt to the jurisprudence of the *Ius commune*. When Grotius, a Protestant, wished to define the "supreme power" that ruled society he quoted Pope Innocent IV's *Commentary on the Decretales of Gregory IX* (just like Jean Bodin) and cited three legal maxims that he took from the *Ius commune* to illustrate how the prince's authority was limited by legal norms (Grotius, *De imperio summarum potestatum*, Chapter 6.13, on pages 318–9). The age of the *Ius commune* was waning, but its persuasive force was not yet spent. It would be another century before the rise of national legal systems, the balkanization of legal education, and the triumph of the vernacular languages over Latin in these systems would transform a decline into a death rattle.

To end where this chapter began: with Johannes Althusius. When Althusius defined politics as the "art of associating (*consociandi*) men for the purpose of establishing, cultivating, and conserving social life among them," he described the task that the jurists of the *Ius commune* had accomplished in the prior four centuries. They used a dead legal system (Roman law), canon law, and feudal law to define and measure the political bonds in European society. Many of the norms that they created still shape our political thought and thinking today.

circa sacra, edited by Harm-Jan van Dam, with an excellent bibliography. On Pufendorf, see Pufendorf 1997.

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