Medieval sovereignty: Marsilius of Padua and Bartolus of Saxoferrato : a study on the medieval origin of the idea of popular sovereignty

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Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato

A Study on the Medieval Origin of the Idea of Popular Sovereignty.

DISSERTATION

to obtain the degree of Doctor at
the Maastricht University,
on the authority of the Rector Magnificus,
Prof. Dr. G.P.M.F. Mols
in accordance with the decision of the Board of Deans,
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CHAPTER ONE

INTRODUCTION: IN SEARCH OF MEDIEVAL SOVEREIGNTY

- 1.1) The definition of the subject and the scope of the study.
- 1.2) The Middle Ages between history and myth.
- 1.3) The fourteenth century: 'autumn' or 'spring' of European life?
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1.1) The definition of the subject and the scope of the study.

This book researches the normative presuppositions and character of medieval sovereignty.¹ In approaching such an interesting as well as controversial subject, we pursued two principal goals. First, we have tried to detect the presence of the idea of sovereignty in the Middle Ages and possibly determine the sense, or the senses, in which we can speak of it at all, and speak of it as the fundamental postulate of medieval constitutional order. The medieval idea of order is a relevant reference here, and it constitutes a complex framework, mainly due to its ontological implications. Only by stripping it to its fundamental features is it possible to picture it as a universe articulated in a hierarchy of subordinate and super-ordinate relationships, in which everything is virtually subject to something higher than itself, answers to its own purpose, and achieves its good. The medieval concept of order is a relevant reference because, as it will be argued in the coming chapters in particular, the idea of sovereignty and that of order are complementary. The former, at least as far as the medieval period is concerned, presupposes the idea of a superior constituent order – *ordo ordinans* – of which it is a manifestation. At the same time, the existing or constituted order in all its forms – *ordo ordinatus* – presupposes a principle of sovereignty as regulative criterion of which, in turn, it is an expression. This context is usually neglected by theorists and historians influenced by legal positivism. Nonetheless, we have tried to shed some light on the meaning and position of sovereignty in such a context. Secondly, we focused on Marsilius of Padua (1275/80-1342/43) and Bartolus of Saxoferrato (1314-1357) to assess the validity of the argument that sees in their theories of sovereignty an important antecedent of modern popular sovereignty.² Walter Ullmann

¹ We employ the adjective *normative* to denote the axioms against which claims and courses of action ought to be evaluated. In this sense, a normative doctrine or theory is one on what values ought to be held, defended, propagated, and even fought for against others.

² See A. Gewirth, *Marsilius of Padua: the Defender of Peace* – I – *Marsilius of Padua and Medieval Political Philosophy* (1951), pp. 236-56. New York-London, 1964; A.

credited the former with the merit of having promoted the political sovereignty of the people in the perspective of political philosophy, and the latter with that of having legally justified the practice of popular government.³ Along this interpretative path, Michael Wilks claimed that the Paduan writer began to prefer "a totalitarian democracy of the type later to be preached by the revolutionaries in France".⁴ In the light of these judgements, we resolved to address the question of the historical significance of the Marsilian and Bartolist contribution to the theory of sovereignty and in particular of their attempts to give sovereignty a foundation. Hence, in treating the problem of medieval sovereignty, we paid particular attention to its foundational aspects. This approach, as we shall argue at length in the following chapters, is hopefully useful in two directions. On the one hand, it aims at clarifying how the problem of medieval sovereignty partially coincided with the problem of its location, which is a problem of paramount importance in modern legal and political thought. On the other hand, by the comparative examination of the theories of sovereignty of Marsilius and Bartolus, it aims at further clarifying the meaning and position of law and politics as disciplines of study in medieval knowledge. We shall treat the latter question in the next three paragraphs. First, a few words on the structure and inspiration of this work are due.

As far as the organisation of the matter is concerned, the book is divided into two parts. The first part has a general character. After the introductory chapter concerned with the definition of the subject, scope, and context of the research, which also aims at providing an account of the status of medieval sovereignty in modern historiography (chapter 1), a chapter on medieval sovereignty and methodology follows (chapter 2). In it, we tried to shed some light on the ways in which the medieval sources of law and government have been approached and understood, and we will discuss the consequences of the identification of *auctoritas* with *potestas*. The treatment of the methodologies employed in the field of medieval law and government should help the reader in properly addressing and delimiting the domain of medieval sovereignty with a view to the question of its significance.

Marongiu, "Il principio della democrazia e del consenso (*Quod omnes tangit, ab omnibus approbari debet*) nel XIV secolo" in *Studia Gratiana* 8 (1962), pp. 555-75 (see also: "The theory of democracy and consent in the fourteenth century" in F.L. Cheyette [ed.], *Lordship and Community in Medieval Europe*, pp. 404-21. New York, 1968); J.M. Kelly, *A Short History of Western Legal Theory* (1992), p. 130. Oxford, 2001; G. Fassò, *Storia della filosofia del diritto – I – Antichità e medioevo* (1966), pp. 231, 249. Roma, 2001; P. Leupen, *Keizer in zijn eigen rijk. De geboorte van de nationale staat*, pp. 129, 147. Amsterdam, 1998. Although somehow critical towards the view of Marsilius as forerunner of democratic sovereignty, J.S. McClelland associated him to the theory of 'popular sovereignty'. See J.S. McClelland, *A History of Western Political Thought*, pp. 142-7. London-New York, 1996.

³ See W. Ullmann, *Principles of Government in the Middle Ages* (1961), p. 282. London, 1966.

⁴ See M. Wilks, "Corporation and representation in the *Defensor pacis*", in *Studia Gratiana* 15 (1972), pp. 252-92, 269.

Sovereignty is then examined as a linguistic problem and special attention is paid to the major etymological and semantic aspects of its emergence in medieval vocabulary (chapter 3). In this chapter, sovereignty is not only examined from the standpoint of linguistic analysis, but also as a sociological and constitutional problem. The subsequent chapter treats the problem of the limits to the exercise of sovereignty in the light of a number of relevant literary passages abstracted from Greek, Roman, and Christian sources, all seen as forming the background to the medieval ideology of sovereignty (chapter 4). The first part of the research ends with a chapter providing an account of the correlation between sovereignty and *iurisdictio*, *dominium*, and *potestas* (chapter 5).

The second part of the book has a specific character and begins with a chapter concerned with the life, works, and historical significance of Marsilius of Padua (chapter 6). The chapter that follows examines the problem of sovereignty in Marsilius with a view to the complexity of his thought, to his approach to, and understanding of papal fullness of power, and the presuppositions of his doctrine of statehood and law (chapter 7). Then, the life, works, and historical significance of Bartolus of Saxoferrato are examined (chapter 8). Finally, the problem of sovereignty in Bartolus, with a view to his conception of the relationship between Empire and Church, of statehood, and of law are treated (chapter 9). The final section of the book contains the conclusions that the research allowed us to draw (chapter 10). We should add that we view this research as a 'philosophical journey' to go ideally back to the roots of the idea of sovereignty. The whole book can be thus read as a movement through a number of concentric circles successively diminishing in circumference and forming an inverted cone, a sort of Dantesque funnel, which is the lowest and central point, where the reader will find Marsilius of Padua and Bartolus of Saxoferrato with their theories of sovereignty. To better accomplish this particular journey, we have adopted a hermeneutic approach.

The inspiration we followed in writing this book might seem antiquarian, and so it is somehow. Yet, in academic work and intellectual pursuit, past and present can hardly be kept separated. The questions that this book is tentatively set to answer arose from present concerns as well. This is a time of radical transformations in the theory and practice of sovereignty whose character, implications, and consequences have not yet been fully assessed. Increasingly, scholars in different disciplines, as well as informed public opinion, pay attention to phenomena like 'global governance' and 'multilevel jurisdiction' in opposition to national state-sovereignty and traditional state-jurisdiction, or to issues like the establishment of the so-called 'European Constitution' and 'European Citizenship'. At the same time, due to geopolitical reasons, the prospects of Western democratic sovereignty and rule of law have been turned into a matter of pressing concern. Parallel to all favourable appeals to governance against government, and to civil society against State apparatuses, the demand of security on a global scale against

global risks has increased to an unprecedented level.⁵ To meet such a set of demands, it has been suggested, the 'state of emergency' has seemingly become a dominant paradigm of government.⁶ This kind of phenomenon transformed the nature and the meaning of the distinction between the traditional forms of sovereignty. As long as the nation-state constitutes the fundamental horizon of all communal life, the problem of sovereignty could be reduced to the question of its location, and of who within the established legal and political order is invested with certain powers. Now, just as in the Middle Ages, it seems that the problem of sovereignty cannot entirely be reduced to the problem of its location within the boundaries of the nation-state. And now the nation-state is not the only agent involved in the struggle for super-ordination and law-making control.

The subject of sovereignty in the historical perspective constitutes a huge field of research and we had to draw lines somewhere. Given the position of sovereignty in the context of medieval order, and given the normative aspects of the latter, the choice to concentrate on some legal and political sources was almost an inevitable one. Scholars of incomparable talent and erudition have already concerned themselves with medieval sovereignty. In entering into a dialogue, so to speak, with discourses expressed in the form of texts on good government, we inevitably felt like 'dwarfs on the shoulders of giants'. How to avoid, then, any "*superfluitas tediosa*"?⁷ The results achieved in the history of the medieval idea of sovereignty constituted, and will most likely continue to constitute, orthodox interpretations subject in any case to change and transformation. In the mind of the scholars who concerned themselves with the topic that we tried to examine, their own views partially or entirely replaced what they perceived as past heterodoxies, which, as Janet Coleman remarked, "may not have been heterodox in their own times".⁸ The existence of a gap between actual perception, crystallized in orthodox interpretations and past understanding, has represented an incentive for us in undertaking the task of exploring the domain and nature of medieval sovereignty. Every history of ideas, of which this book is an episode, inevitably presents gaps. The most rewarding goal of this research might be considered achieved, and

⁵ On the current shifts from government to governance and their implications, see G.E. Lock, "Ringing the Changes: mutations in the idea of political change" in R.H. Lieshout, K. van Kersbergen, G.E. Lock (eds.), *Expansion and Fragmentation. Political Change and the Transformation of the Nation-State*, pp. 23-42. Amsterdam, 1999; S. Cassese, *La crisi dello Stato*, pp. 3-20, 21-35. Roma-Bari, 2002. On the notion of global risks, see U. Beck, *Risikogesellschaft: auf dem Weg in eine andere Moderne*, pp. 25-66. Frankfurt am Main, 1986.

⁶ See G. Agamben, *Stato di eccezione*, pp. 9-43. Torino, 2003. This, in Agamben's view, is a notable and unprecedented variant of what in German legal terminology is called *Ausnahmezustand* or *Notstand*, in the Anglo-American *martial law* or *emergency powers*, and in the French *état de siège*.

⁷ See Dante Alighieri, *Monarchia*, I, I, 4.

⁸ See J. Coleman, *A History of Political Thought - II - From the Middle Ages to the Renaissance*, p. 2. Oxford, 2000.

our own desire fulfilled, if the reflections presented to the reader contribute to filling in even an infinitesimal portion of those gaps.

The question of the context of this study must now be addressed. It is a twofold context, which can be pictured as consisting of two concentric circles. The temporal context, the Middle Ages, constitutes the wider circle, whereas the disciplinary context, medieval law and government, constitutes the smaller circle. Let us deal with the former first.

1.2) The Middle Ages between history and myth.

The fourteenth century is the *saeculum* in which Marsilius of Padua and Bartolus of Saxoferrato lived and it constitutes the context within which their respective intellectual contribution to the solution of the problem of sovereignty will be examined and where possible assessed in this study. John K. Hyde portrayed the fourteenth century as an epoch of crisis and depression, one, as the visual arts came to emphasise, marked by “the gulf between man and the supernatural” and the “human powerlessness before the inscrutable will of God”.⁹ Its distinguishing features are said to be three: *bellum*, *fames*, and *pestis*.¹⁰ All these features played a central role in the propagation of the image of the Middle Ages as a long period of decay. In the attempt to grasp the essence and significance of the Marsilian and Bartolist solutions to the problem of sovereignty, one should pose the question of the validity of the interpretative paradigm centred upon the notion of *crisis*. More particularly, we should ask whether their views are an expression of any particular *Weltschmerz*, and, if so, in what sense.

In relation to the fourteenth century idea of sovereignty, various elements suggest using the notion of *crisis* cautiously. Any time we employed it, we did so to convey that new configurations of sovereignty emerged in a situation of intellectual uncertainty about the dogmas or principles that had been generally thought of as forming the basis of political coexistence. Yet, the uncertainties, which are said to mark the fourteenth century, have ambivalent implications. In the field of law, for instance, the tension between *ius commune* and *ius proprium* reached one of its highest peaks bearing the seeds of important developments yet to come, like the emergence of the nation-states. In politics, successful attempts in the direction of administrative and judiciary centralization had already been made on the side of the papacy and of the territorial monarchies. Even the Empire, which is commonly said to have undergone a fatal process of weakening, strengthened its position as Germanic territorial unit. From a social and economic point of view, manufacture, trade, and money circulation expanded and until the outbreak of the ‘Black Death’, the population of the continent grew significantly. Finally, in the sphere of learning, although political theory was not a

⁹ See J.K. Hyde, *Society and Politics in Medieval Italy. The Evolution of the Civil Life: 1000-1350*, p. 179. London, 1973.

¹⁰ See W. Blockmans en P. Hoppenbrouwers, *Eeuwen des onderscheids. Een geschiedenis van middeleeuws Europa*, pp. 356-86. Amsterdam, 2002.

discipline at the medieval universities, and, as Jürgen Miethke recently wrote, “could be picked up at any of the four faculties of the scholastic university”, the desire to establish the *civilis scientia* independently from the *civilis sapientia* of the jurists was as vivid as probably never before.¹¹ In relation to the abundant writings produced to set out rival claims during the struggles between the papacy and the temporal powers in the fourteenth century, we could thus properly speak of a “growth of political thought”.¹² At this point, we should pose the question of the sense in which all these phenomena might be seen as an expression of crisis. Were fourteenth century people aware of living in a period of crisis?

Perhaps more than any other epoch in Western history, the Middle Ages have been the focus of opposite value-oriented interpretations and harsh battles of taste; a container for commonplaces.¹³ The scholarly study of many medieval topics began in the early mid-nineteenth century, but the idea of the Middle Ages is an intellectual structure developed by fifteenth and sixteenth century humanists, full of hope towards the rise of an epoch of ‘cultural awakening’ based upon a revival of the most authentic treasures of the ancient past. In an attempt to elaborate a coherent picture for events of different nature and significance, which occurred throughout a huge period of time, past and present authors found in the notion of *crisis* a powerful notion to associate with the Middle Ages as a whole. A number of Enlightenment scholars, from Leibniz to Voltaire, turned the medieval period into something to be left languishing forever in the dungeon of ‘the Dark Ages’. In opposition to this view, with Montesquieu, a number of authors exalted the medieval period as the ‘golden age’ of limited authority. As has been recently recalled, from the 1750s onwards the Middle Ages began to be accepted as integral to the European past.¹⁴ Historicist thinkers such as

¹¹ See J. Miethke, “Practical intentions of scholasticism: the example of political theory”, in W.J. Courtenay and J. Miethke (eds.), *Universities in Medieval Society*, pp. 211-28, 212. Leiden, 2000. Despite the fact that the political Aristotle played an important role in the political theories of the late Middle Ages, Miethke recalled that the most famous texts of political theory, like Thomas Aquinas and Ptolemy of Lucca’s *De regno*, Aegidius Romanus’ *De regimine principum*, John of Salisbury’s *Policraticus*, Marsilius of Padua’s *Defensor pacis*, William of Ockham’s *Dialogus*, John Wyclif’s *De dominio civili*, and Nicholas of Cusa’s *De concordantia catholica* were not commentaries on his *Politics*. At the very beginning of his major work, Marsilius of Padua used the expression “*civilis sciencia*” to denote the character of Aristotle’s *Politics*. See Marsilius de Padua, *Defensor pacis*, I, I, 3.

¹² See B. Tierney, *The Crisis of Church and State: 1050-1300* (1964), pp. 193-210. Toronto, 1999.

¹³ See G. Sergi, “L’idea di medioevo” in E. Artifoni et alia, *Storia medievale*, pp. 3-41. Roma, 2000.

¹⁴ The distinction between the Enlightenment authors who held a positive view of the Middle Ages and those who held a negative view does not coincide with that presented by Jonathan Israel between “Radical Enlightenment” and “conservative” or “moderate mainstream Enlightenment”. See J. I. Israel, *Enlightenment Contested. Philosophy, Modernity, and the Emancipation of Man 1670-1752*, p. 11. Oxford, 2006. See

Johann Gottfried Herder contributed to correct the Enlightenment's negative judgement.¹⁵ Romantic writers made medieval life a matter of aesthetics and came to idealise the medieval contrast of shadows and lights, which could hence rise to the rank of transfigured reality heavily charged with symbolic significance. In *Die Christenheit oder Europa* (1799), Novalis fixed the canons of the romantic and nostalgic exaltation of medieval Christianity.¹⁶ In the perspective of historians like Edward Gibbon, whose monumental *The History of the Decline and Fall of the Roman Empire* (1776-87) is an icon of distaste towards the Middle Ages, asking whether medieval men and women were aware of living in a period of crisis amounts to asking whether they were aware of belonging to an epoch of "darkness and confusion".¹⁷ If, moreover, we take as our focus the idea of the Renaissance as revival of the splendour of pagan antiquity as provided by Jacob Burckhardt in *Die Kultur der Renaissance in Italien* (1860), we should ask whether they were aware of living in the Middle Ages *tout court*. Since these questions have to do with the context of our research, we thought it important to pay some attention to them in this introductory chapter.

The conventional character of the idea of the Middle Ages was consolidated with the establishment of history as an autonomous discipline of study between the second half of the sixteenth and the first half of the seventeenth century. There is no uniformity of judgement as far as the division of the historical periods is concerned. Some authors fixed the beginning of the Middle Ages with the deposition of Romulus Augustulus in 476, and the end with the discovery of America in 1492. Others considered the sack of Rome in 410 as *dies a quo* and the capitulation of Constantinople in 1453 as *dies ad quem*. Usually the fifth and sixth centuries are included in late antiquity, whereas the fifteenth century is of interest to the historians of modern times. Italian historians distinguish between *alto medioevo* – from fifth to eleventh century – and *basso medioevo* – from eleventh to fifteenth century.

also his *Radical Enlightenment. Philosophy and the Making of Modernity 1650-1750*, pp. 11-13. Oxford, 2001.

¹⁵ See P. Raedts, "Representations of the Middle Ages in Enlightenment historiography" in *MHJ* 5/1 (2002), pp. 1-20. See also W. Kerrigan and G. Braden, *The Idea of the Renaissance*, pp. 3-35. Baltimore (Md.), 1989.

¹⁶ See Novalis, *Die Christenheit oder Europa* (1799) in *Novalis Schriften. Die Werke Friedrich von Hardenbergs*, III, pp. 495-524, 499 (eds. R. Samuel, H-J. Mähl, G. Schulz). Stuttgart, 1968.

¹⁷ See E. Gibbon, *The History of the Decline and Fall of the Roman Empire* (1776-87), I, xl (ed. J.B. Bury). London, 1909. In his 1796 autobiography too Gibbon referred to "the darkness" of the Middle Ages. See E. Gibbon, *Autobiography*, p. 136. London, 1948. Among the historians concerned with the alleged negative characters of the Middle Ages there are some who acknowledged some positive aspects too. At the beginning of the twentieth century, W.P. Ker, for example, wrote that "the paradox of the Dark Ages" is that, although that epoch "at first seems to be so distinctly marked as a gap and interval between the ancient and modern worlds, it is in its educational work and general culture both ancient and modern". See W.P. Ker, *The Dark Ages* (1904), p. 26. London-Edinburgh, 1955.

English speaking historians use the expression *high Middle Ages* to denote the period between twelfth and thirteenth century, considered the zenith of medieval civilization. German speaking historians call *Frühmittelalter* the period between fifth and eighth century; *Hochmittelalter* the period between ninth and eleventh century; *Spätmittelalter* the period between the twelfth and fifteenth century.¹⁸ Certainly, medieval man was not aware of belonging to an age of 'darkness and confusion', nor to an age that stood between the splendour of antiquity and that of the Renaissance.¹⁹ According to various authors, although medieval people were aware of historical change, they had no consciousness of history comparable with the type of consciousness that we possess today.²⁰ Along with a number of practical obstacles to the formation and circulation of historical scholarship, the Christian teaching that in order to enter the kingdom of Heaven we must humble ourselves and become like children is said to have exercised strong influence on medieval people.²¹ This teaching presupposes the idea that the greatest wisdom is the fear of the Lord and that humility comes before honour: God sets his face against the arrogant and shows favour to the humble.²² Consequently, as St. Isidore of Sevilla (560-636) pointed out in his *Sententiae*, he who lives in accordance with earthly wisdom is foolish, but he who lives in accordance with divine wisdom is blessed: "*omnis qui secundum saeculum sapiens est, secundum Deum stultus est [...] omnis qui secundum Deum sapiens est, beatus est*". The only purpose of knowledge, he affirmed, is the search of God and pursuit of an honest life.²³ Learning for its own sake is, in the words of St. Bernard of

¹⁸ See G. Sergi (2000), pp. 6-7.

¹⁹ See J. Pelikan, *The Growth of Medieval Theology: 600-1300*, pp. 1-10. Chicago, 1978.

²⁰ As Ewart Lewis suggested, that is probably the main reason why the question of the origin of political authority, namely the question of what made political authority legitimate, "was not, for medieval publicists, primarily an historical question". They tried to answer it "in terms of purposes assumed to be permanent and sought their premises in the nature of man and the providence of God". See E. Lewis, *Medieval Political Ideas*, I, p. 140. London, 1954.

²¹ See the Gospel according to Matthew: "*et advocans parvulum, statuit eum in medio eorum et dixit [...] nisi conversi fueritis et efficiamini sicut parvuli, non intrabis in regnum caelorum. Quicumque ergo humiliaverit se sicut parvulus iste, hic est maior in regno caelorum. Et qui suscepit unum parvulum talem in nomine meo, me suscipit*" (Mt, 18, 1-5).

²² "*Similiter, adulescentes, subditi estote senioribus. Omnes autem invicem humilitatem induite, quia Deus superbis resistit, humilibus dat gratiam. Humiliamini igitur sub potenti manu Dei, ut vos exaltet in tempore, omnem sollicitudinem vestram proicientes in eum, quoniam ipsi cura est de vobis*" (1 Pe 5, 5-6); "*Timor Domini disciplina sapientiae, et gloriam praecedat humilitas*" (Prv 15, 33); "*Plenitudo sapientiae est timere Deum*" (Eccli 1, 22). See also the Gospel according to St. Luke (1, 46-55), where the Holy Virgin Mary exalts humility.

²³ See Isidorus Hispalensis, *Sententiae*, II, I, 1. The author wrote: "*primum est scientiae studium quaerere Deum, deinde honestatem vitae cum innocentiae opere*" (II, I, 3). He argued: "*beata vita cognitio divinitatis est [...] cognitio divinitatis virtus boni operis est [...] virtus boni operis fructus aeternitatis est*" (I, 1). St. Isidore relied on the traditional distinction between knowledge and opinion too. He wrote: "*omnis sapientia scientia et*

Clairvaux (1090-1153), 'shameful curiosity' and 'shameful vanity' ("*turpis curiositas*"; "*turpis vanitas*").²⁴ In his own collection of 'sentences', Peter Lombard (ca. 1100-1160) too, on the basis of the equivalence between *sapientia* and *scientia*, affirmed that the highest *sapientia*, that is, 'knowledge of all that is the case' - of good and evil, past, present, and future, as well as of temporal and eternal - belongs to God alone, and it will never be attained by any human being.²⁵ Finally, in the *Speculum iuris*, drawn up in the early 1270s and revised in the late 1280s, Gulielmus Durandus (1237-1296) asserted that 'all knowledge comes from God' and that 'Christ himself is knowledge': "*omnis scientia [est] a Deo [...] ipse Christus est scientia*".²⁶ In the twelfth century, however, parallel to popular and vernacular chronicles, monasteries and princely courts were the principal centres of historical scholarship. History was neither taught in the schools, nor was accorded any special place in the university curricula. In Biblical exegesis, the masters of theology chiefly used history in the form of *exempla*. The jurists, who generally stressed the immutable majesty of Roman law, hardly referred to it properly. The production of historical texts took the form of theological and universal history, or, both in Latin and vernacular, of national and regional history, past and present. Originally, and for a long time after, the authors of history came largely from monastic environments and were often paid by a prince or a city. This means that princes and noblemen often made use of examples, whether or not historically correct, to support "the legal or political theses they were called upon to defend as part of their official functions".²⁷ Like any other field of knowledge, history, Alexander Murray wrote, originally "had to defend its title to the Christian's reader attention". It "could not itself claim to count as a liberal art". Nonetheless, it was morally useful, "the *exemplum* being the illustrative story from real life".²⁸ Indeed, the only history of importance to the Christian was that which justified his creed. This kind of moral and eschatological concern is at the centre of the history of the Church by

opinatione consistit [...] melior est autem ex scientia veniens quam ex opinatione sententia [...] illa vera est, ista, dubia" (II, I, 8).

²⁴ In Sermon 36 on the Song of the Songs, St. Bernard of Clairvaux restated that God opposes the arrogant and favours the humble. Knowledge must be directed "*ad sobrietatem*" because the Scriptures do not prohibit knowledge but lust for knowledge: "*non prohibet sapere, sed plus sapere quam oportet*". See Bernardus Claraevallensis, *Sermones super Cantica Canticorum*, 36, I and III.

²⁵ See Petrus Lombardus, *Sententiae in IV libris distinctae*, I, XXXV, 2: "*sapientia vero vel scientia de omnibus est: scilicet bonis et malis, et de praesentibus, praeteritis et futuris, et non tantum de temporalibus, sed etiam de aeternis [...] ista temporalia [...] ipse solus [Deus] perfecte novit, cuius scientiae comparatione omnis creaturae scientia imperfecta est*".

²⁶ See Gulielmus Durandus, *Speculum iuris*, pars prima, proemium, § 19, fol. 5. Venetiis, apud haeredes Vincentii Valgrisii, 1576.

²⁷ See J. Verger, *Men of Learning in Europe at the End of the Middle Ages*, pp. 19-22. Notre Dame (Ind), 2000.

²⁸ See A. Murray, *Reason and Society in the Middle Ages*, p. 131. Oxford, 1973. See also E. Breisach, *Historiography: Ancient, Medieval and Modern* (1983), pp. 77-106, 121-37. Chicago-London, 1994.

Eusebius of Caesarea (ca. 260-340), written between 311 and 317. This work was intended to account for the origins of Christianity starting from the 'economy' and 'theology' of Christ, namely from the dispensation of God in Christ through the incarnation of the divine Logos and the ascription of divinity to Christ himself.²⁹ The early Christian apologists often referred to the idea of *media aetas* or *medium aevum*, but such a reference had eschatological, not chronological meaning. According to the doctrine of salvation, the whole of human history is the *medium tempus* between Christ's First and Second Coming. St. Augustine (354-430), for instance, conceived of the course of history as *procursus* and men's life throughout it as *peregrinatio*. In a passage of *De civitate Dei* (413-26/27), given that our life is 'spent and ended in few days' ("*paucis diebus ducitur et finitur*"), he provocatively asked whether it matters under whose rule a "*homo moriturus*" lives, if the ruler, or the rulers, do not force him to impiety and iniquity. He contrasted the *veritas* of the City of God to the *vanitas* of the Earthly City, whereby, as king Salomon is said to have put it (Eccles 1, 9, 10), that which is done is that which shall be done and 'there is no new thing under the sun'.³⁰ Moralistic intentions form the major concern of historical writing from Cassiodorus (ca. 490-ca. 583) and St. Gregory of Tours (538-594) to the Venerable Bede (672/3-735) and Otto of Freising (ca. 1111/14-1158).³¹ In the dedication to the emperor Frederick I (1152-1190), Otto of Freising, restating the well known juristic principle of the *absolutio legibus* (Dig. 1, 3, 31), recalled that kings alone are set above 'the laws of this world', and recommended knowledge of history as proper and advantageous with a view to both living in the fear of God and advancing in prosperity. He explained he had written his book 'in bitterness of spirit' ("*amaritudine animi*"), led by the turbulence of the times that preceded Frederick's reign. He had not presented the events in a chronological order, but rather wove them together 'in the manner of a tragedy' ("*in modum tragediae*") as an introduction to the rest of the souls and resurrection.³² As we

²⁹ See Eusebius, *Ecclesiastical History*, I, I, 5.

³⁰ See Aurelius Augustinus, *De civitate Dei*, V, 17 and XII, 13. The author wrote: "*Quid est quod fuit? Ipsum quod erit. Et quid est quod factum est? Ipsum quod fiet; et non est omne recens sub sole. Qui loquetur et dicet: Ecce hoc novum est, iam fuit saeculis quae fuerunt ante nos*" (XII, 13).

³¹ Bede's *Historia ecclesiastica gentis Anglorum*, written in 731, was aimed at instructing king Coelwulf and 'those over whom divine authority has appointed to rule'. In the preface, Bede affirmed that history of good men and good deeds is an incentive to imitate the good. History of evil men and deeds has a function too, for it teaches about the harmful and perverse to be avoided. See Beda Venerabilis, *Historia ecclesiastica gentis Anglorum*, proemium: "*sive enim historia de bonis bona referat, ad imitandum bonum auditor sollicitus instigator; seu mala commemoret de pravis, nihilominus religious ac pius auditor sive lector devitando quod noxium est ac perversum, ipse sollertius ad exsequenda ea quae bona ac Deo digna esse cognoverit, accenditur [...] historiam memoratam in notitia tibi simul et eis, quibus te regendi divina praefecit auctoritas*".

³² See Otto Frisingensis, *Chronica sive Historia de duabus civitatibus*, proemium: "*honestas ergo erit et utilis excellentiae vestrae historiarum cognitio, qua et virorum fortium gesta Deique regna mutantis et cui voluerit dantis rerumque mutationem patientis virtutem*".

shall see, both Marsilius of Padua and Bartolus of Saxoferrato provided a peculiar historical account of sovereignty. Inevitably, so different as they were in personality, not only did the accounts offered differ from each other significantly, but the underlying visions of history did so too.

1.3) The fourteenth century: 'autumn' or 'spring' of European life?

The fourteenth century has stimulated a great deal of historical research. The very evaluation of it constitutes a riddle. Francesco Calasso defined the *Trecento* as a 'nameless century', in contrast to the fifteenth century as the century of Humanism, the sixteenth as the century of Baroque, and the eighteenth as the century of the Enlightenment. He also referred to it as the 'bewildering century', due to the extraordinary chain of traumatic, if not catastrophic, events affecting the whole of Europe.³³ The fourteenth century appears as a period of decay, especially if compared to the twelfth and thirteenth centuries, which for a long time have been said to be 'the greatest of centuries', or, more simply, epochs of awakening, growth and achievement, as argued in various scholarly works since the publication by Charles Haskins of *The Renaissance of the Twelfth Century* in 1927.³⁴ We should avoid the risk of ending up repeating familiar though exaggerated, or even unfounded, judgments that at best foster misinterpretation, if not prejudice. It may be claimed that the capacity of the fourteenth century to produce intellectual disconcert has not ceased yet. A number of questions are still left with no definitive answers - did it mark the very end of the Middle Ages and of feudalism, and the early beginning of modern times in Europe? Was it really a time of decline, or rather of regeneration? Besides the generous attempt to describe it as a sort of Dantesque Purgatory whereby 'pain gives way to hope', there is general agreement among historians that apparently there was not much awareness of a dawn to come among contemporaries. In this sense, the rather constant increase in population until shortly before the outbreak of the plague in 1347-8 is a relevant circumstance not to be forgotten. Generally, the expectations of the contemporaries, John H. Mundy wrote, "were those inculcated in them and in their fathers by the experience of earlier and happier ages".³⁵ Although today scarcely adopted in academic courses, and ignored in intellectual circles, Johan Huizinga's *The Autumn of the Middle Ages* remains one of the all-time best-selling books on late medieval

ac potentiam considerando sub eius metu semper degatis ac prospere procedendo per multa temporum curricula regnetis. Unde nobilitas vestra cognoscat nos hanc historiam nubilosius temporis, quod ante vos fuit, turbulentia inductos ex amaritudine animi scripsisse ac ob hoc non tam rerum gestarum seriem quam earundem miseriam in modum tragediae texuisse et sic unamquamque librorum distinctionem usque ad septimum et octavum, per quos animarum quies resurrectionisque duplex stola significatur in miseria terminasse".

³³ See F. Calasso, "L'eredità di Bartolo", in *BSDC*, I, pp. 2-21, 4.

³⁴ Francesco Calasso saw the ideal of the *patria communis*, as well as that of liberty bound by law and equity, as the core of the medieval *renaissance*. See F. Calasso, *Gli ordinamenti giuridici del rinascimento medievale* (1949), pp. 38-9. Milano, 1965.

³⁵ See J.H. Mundy, *Europe in the High Middle Ages, 1150-1309*, p. 119. London, 1973.

history.³⁶ More particularly, it focuses on the sense of decadence which accompanied medieval civilisation to an end. More a fascinating imaginative exercise than a work of scholarly research according to some authors,³⁷ Huizinga's investigation has exercised, and to some extent still exercises, a powerful influence on the perception of late medieval European society as a whole. He vividly portrayed what he understood to be the exhaustion of the most authentic spirit of medieval culture, a compound made of a thoroughly religious-based dualistic conception of the world, universalistic ideals, and hierarchically organized ways of life. A widespread and intense attention to the particular and the naturalistic is said to have prevailed instead. All things in life, from government to art, from religion to law, were then presenting themselves in violent contrast and impressive forms. What is more striking according to the Dutch historian was that all such things were at the same time of a proud and yet cruel public character. The clash between adversity and happiness, misery and honour and wealth then displayed the directness and absoluteness of the pleasure and pain experience in child-life, he asserted. Although the major features of medieval civilisation managed to survive for quite a long time, their existence, Huizinga seemed to suggest, was a lifeless existence, frozen and hardened as they were in the form of mere icons of the past. The tide was turning inexorably. In some respects, Huizinga's thesis seems fit to represent the situation of civil life in certain areas of medieval Italy during the fourteenth century. According to Hyde, the most relevant casualty of those "chaotic years" was in fact "the self-confidence of the governing classes and their faith in the way of life which had been built up laboriously over the centuries". Painting and literature, in particular, were used as a powerful and evocative tool to emphasise the human lack of power before "the inscrutable will of God".³⁸ Jacques Paul too focused on the decisive role played by the instability and violent incoherence of sentiments - in particular by the sentiment of decay and death - in what he saw as the emergence of the "sensibilité nouvelle" between fourteenth and fifteenth century.³⁹ On the other hand, historians of economic such as Norman J. Pounds openly called for scepticism towards writers like Huizinga who "have combined to spread a blanket of gloom over the last century and a half of the

³⁶ Huizinga's *Herfsttij der middeleeuwen* is a study on the cultural history of the Low Countries and northern France of the fourteenth and fifteenth centuries. It was first published at Haarlem in 1919. For a recent English translation from the 1921 Dutch second edition, see R.J. Payton and U. Mammitzsch (eds.), *The Autumn of the Middle Ages*. Chicago, 1996.

³⁷ See N.F. Cantor, *Inventing the Middle Ages*, pp. 380-90. New York, 1996. The author doubts that naturalism and the concern for the particular had made their first appearance at the end of the fourteenth century. He also doubts that the conclusions concerning the Low Countries and northern France can be generalised to other areas in Europe.

³⁸ See J.K. Hyde (1973), p. 178.

³⁹ See J. Paul, *Histoire intellectuelle de l'occident medieval*, p. 392. Paris, 1973.

Middle Ages".⁴⁰ Steven A. Epstein wrote that although fourteenth century Europe was an "overwhelmingly rural society", and cities were like "islands in a sea of villages and hamlets", socially and economically they played the function of magnets, centres of production and of distribution and consumption of the production accumulated in the countryside they controlled and administrated.⁴¹ This phenomenon is found in the expansion of manufacturing, trade, and money circulation, especially in some areas of the Italian peninsula, in the Low Countries, and along the coasts of the Baltic Sea, one of its most important causes. The consequent consolidation of new enterprising social groups – the so-called *popolo grasso* in central and northern Italy, for example – has had a lasting effect on the configuration of the problem of sovereignty and its concrete settlement. Thus urban civilization, according to Max Weber, constituted the basis for the dialectic between oligarchic and popular forces. This dialectic favoured in turn the occasional establishment of popular governments led by craftsmen – the so-called *popolo minuto* in central and northern Italy again.⁴² So, whether or not Huizinga's representation is to be listed among the 'narratives of decline', and whether or not he underestimated the seeds of regeneration present in that epoch, remain substantially controversial matters. In any case, as Norman Davies suggested, "it may be wise to resist the metaphor of the waning medieval twilight".⁴³ Michel Mollat even argued that instead of the 'autumn' of the Middle Ages it is more appropriate to speak of a 'spring'. He referred to the fourteenth and fifteenth centuries as "siècles agités", but yet saw the whole epoch as "l'âge de la polyphonie".⁴⁴ From the point of view of law and government, a modernising view like that advanced by Brian Tierney, for example, establishes that the "whole political framework of early modern Europe" finds its roots in the fourteenth century.⁴⁵

⁴⁰ See N.J.G. Pounds, *An Economic History of Medieval Europe* (1974), p. 444. London-New York, 1994. The author argued that the Huizinga-type of judgement has a shallow basis. "The ever-present danger of the plague and the certainty that whatever it struck, mortality would be high and no respecter of rank or age", he wrote, "cannot have been without its influence on literature and art and perhaps also on man's attitude to business and investment". Yet, "the threat of plague must have hung over the later Middle Ages as that of nuclear war has done over our own recent past". "It cannot be said", he wrote, "that the last half century has been marked by any great exuberance and buoyancy of spirit" (p. 444).

⁴¹ See S.A. Epstein, "Urban Society", in D. Abulafia (ed.), *The New Cambridge Medieval History*, V, pp. 26-37, 26. Cambridge, 1999.

⁴² See M. Weber *Wirtschaft und Gesellschaft*, IX, 7, pp. 727-814. Weber contrasted the medieval predominance of the so-called *homo oeconomicus* to the so-called *homo politicus*, a model that has been of central importance in ancient Athens and Rome.

⁴³ See N. Davies, *Europe. A History* (1996), p. 385. London, 1997.

⁴⁴ See M. Mollat, *Genèse médiévale de la France moderne*, pp. 7-8. Paris, 1970.

⁴⁵ See B. Tierney and S. Painter, *Western Europe in the Middle Ages, 300-1475* (1970), p. 463. Boston, 1999.

1.4) Law and government in the Middle Ages.

The idea of sovereignty is generally placed within the general domain of law and government. We shall use the expression 'law and government' to denote the fundamental practices providing the framework for the various possible configurations of sovereignty, on the presupposition that changes in the configuration of sovereignty are determined not by constitutional or legal events alone, "not by the making or unmaking of constitutions or of laws, but by political happenings", which "shift the load of power from one group to another".⁴⁶ Where can the domain of law and government be located in the context of the sciences, and of medieval sciences in particular?

Undoubtedly, law and government as a whole constitute a field difficult to delimit precisely. Law, as Ronald Dworkin pointed out, is "an interpretative concept", which can be employed according to different meanings diachronically and synchronically, and which, in any case, does not have an identity apart from that recognised by those who interpret it.⁴⁷ In this respect, the position of specialised legal practitioners is considered of crucial importance to the theoretical understanding of law. In modern scholarship, the term 'government' is used to mean both the function of governing and the body of officials in charge of that function. If we turn to the Middle Ages, a delimitation of the kind remains problematic for law and government was then the focus of both legal thought and political philosophy. The distinction between these two fields of knowledge, to which Marsilius and Bartolus belonged respectively, is said not to have been as clearly marked in the medieval period as it is now. Accordingly, as Walter Ullmann claimed, "the medieval science of government" is primarily, if not exclusively, "the prerogative of the jurists".⁴⁸ This view presupposes two arguments: first that the area now covered by political philosophers was then covered by professional lawyers; and second, as a corollary, that law and government belonged to scholarly culture. These two arguments have important implications and require careful scrutiny by whoever ventures into the field of medieval law and government.

The first argument has to do with the problem of the classification of the sources of medieval law and government.⁴⁹ We know that they are varied and are not only the production of jurists, but also, as Janet Coleman recalled, of theologians, philosophers, bureaucrats in the service of lay and ecclesiastical institutions, and even of "poets, dramatists, local chroniclers, merchants, religious men and women".⁵⁰ Among these sources, particularly relevant in connection with the topic that we are treating here, were the *specula regum* or

⁴⁶ See T.C. Hartley and J.A.G. Griffith, *Government and Law. An Introduction to the Working of the Constitution in Britain* (1975), p. 7. London, 1981.

⁴⁷ See R. Dworkin, *Law's Empire*, p. 410. Harvard (Mass.), 1986.

⁴⁸ See W. Ullmann (1966), p. 280.

⁴⁹ On this problem, see P. Deumier et T. Revet, "Sources du droit" in D. Alland et S. Rials, *Dictionnaire de la culture juridique*, pp. 1430-34. Paris, 2003.

⁵⁰ See J. Coleman (2000), II, p. 9.

principis, examples of which occurred from late antiquity throughout the Middle Ages and beyond. However, claiming, as is often done, that the juristic concern for governmental matters was a consequence of the fact that medieval politics was not an autonomous discipline with its own subject matter and methodology, and had not yet disengaged itself from the dominance of practical morality, rhetoric, and theology, is a rather misleading argument. Religious or lay political authorities, Jacques Verger wrote, constantly “felt the need to accompany their action with an effort to legitimate and justify it ideologically”.⁵¹ In Italy, and in France, where throughout the thirteenth century the question of whether the monarch, recognising no superior in temporal matters, could exercise imperial prerogatives within the boundaries of his kingdom, was debated, the jurists greatly contributed to make power legitimate.⁵² Elsewhere, like in England, since the beginning of the thirteenth century, a number of chronicles and even popular writings witnessed the state of the discussion on the size of the monarch’s prerogative *in regno suo*. Moreover, as the *Policraticus* (1159) by John of Salisbury (1115/20-1180) indicates, learned culture in general, not learned law alone, has been a resource. Geographical distinctions have played a limited role in this matter, because learned culture has been concerned with political power everywhere in the Latin West. “Conflicts between popes on one side, secular princes on the other”, Beryl Smalley wrote, “produced theories which grew in grandeur and precision in proportion to their distance from the facts of political life”.⁵³ This was the case in France at the turn of the thirteenth century, for example, where abundant controversial literature on the struggle between Boniface VIII (1294-1303) and Philip IV (1285-1314) was produced.⁵⁴ The argument that attributes to the medieval jurist almost exclusive competence in matters of law and government on the basis of the lack of autonomy on the side of

⁵¹ See J. Verger (2000), p. 104.

⁵² One of the earliest assertions that the French monarch acknowledged no superior in temporal affairs has been found in the decretal *Per venerabilem* (X 4, 17, 3) issued by pope Innocent III in 1202. On the origin of this principle a number of distinguished legal historians debated widely. See F. Ercole, “L’origine francese di una nota formola Bartoliana” in *Archivio Storico Italiano* 73/2 (1915-16), pp. 241-94; E.M. Meijers, “Het romeinsche Recht in de Middeleeuwen” in *TvR* 2 (1920-21), pp. 343-51; F. Calasso, *I glossatori e la teoria della sovranità* (1945), pp. 110-16. Milano, 1957; R. Feenstra, “Jean de Blanot et la formule *Rex Franciae in regno suo princeps est*” in *Fata iuris romani. Etudes d’histoire du droit*, pp. 139-49. Leiden, 1974 (originally in *Etudes d’histoire du droit canonique dédiées à Gabriel Le Bras*, II, pp. 885-95. Paris, 1965); K. Pennington, *The Prince and the Law, 1200-1600*, pp. 31-2, 96-7. Berkeley (etc.), 1993; M. Caravale, *Ordinamenti giuridici dell’Europa medievale*, pp. 518-24. Bologna, 1994.

⁵³ See B. Smalley, “Church and state 1300-1377: theory and fact”, in J.R. Hale, J.R.L. Highfield, B. Smalley (eds.), *Europe in the Middle Ages*, pp. 15-43, 15. London, 1965.

⁵⁴ On this controversy and its impact on law and government literature, see the classic R. Scholz, *Die Publizistik zur Zeit Phillips des Schönen und Bonifaz VIII*. Stuttgart, 1903. See also R.W. Carlyle and A.J. Carlyle, *A History of Medieval Political Theory in the West – V – The Political Theory of the Thirteenth Century*, pp. 375-93. Edinburgh-London, 1936. See also B. Tierney and S. Painter (1999), pp. 479-93.

political thought somehow avoids questioning the status of law, which is commonly said to have emerged in the medieval period as an independent science. Determining precisely the sense in which law was an autonomous field of knowledge is beyond the scopes of this study. Yet, it is advisable to adequately address the question of the sense in which lay and ecclesiastical jurisprudence became “each a science in its own right”, and the former in particular became “autonomous and soon rose to be a challenge to theology”.⁵⁵ Most medieval jurists have exalted the expansive virtue of law as *ratio scripta* and the nature of their discipline (*iuris prudentia*) as the most genuine wisdom, awareness of divine and human affairs, as well as knowledge of the just and unjust.⁵⁶ As we shall see when we examine in particular the legal and political ideas of Bartolus of Saxoferrato, most medieval jurists conceived of their field of expertise as that of an autonomous discipline, a macro-cosmos, embracing virtually everything.⁵⁷ The difference between the medieval macroscopic conception and ours, that is, a microscopic conception whereby law is a circumference tightening around a precise nucleus in the universe of knowledge and experience, is remarkable. This fact suggests that any time we turn to the question of the medieval origin of legal thought, we should specify the sense, or the senses, in which we call medieval jurisprudence an autonomous science. Finally, the question we may ask is: could the medieval conception of law be developed without any influence from the doctrines that influenced the liberal arts in the Middle Ages? The answer to this question seems negative, and some examples will illustrate the point we are advancing here. Within the liberal arts tradition, often the target of juristic scepticism, we find evidence of the fact that medieval jurisprudence, even its very definition as a field of knowledge, emerged in a context of eclectic exchange with other disciplines, not in isolation. Following the Stoic tradition, Cicero, whose legal and political ideas continued to be accessible to medieval learned culture, defined wisdom (“*sapientia*”) - the foremost of all virtues - as ‘knowledge of things human and divine’. And he distinguished it from prudence (“*prudentia*”), ‘the practical knowledge of things to be sought for, and of things to be avoided’.⁵⁸ We shall treat this important point again in the following paragraphs.

⁵⁵ See E.H. Kantorowicz, “Kingship under the impact of scientific jurisprudence” in M. Calgett, G. Post and R. Reynolds (eds.), *Twelfth-Century Europe and the Foundations of Modern Society* (1957), pp. 89-111, 91. Madison (Wis), 1961.

⁵⁶ See Dig. 1, 1, 1: “*ut eleganter Celsus definit, ius est ars boni et aequi. Cuius merito nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profiteamur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes*”.

⁵⁷ On the social implications of this assumption, see E. Cortese, *Le grandi linee della storia giuridica medievale*, pp. 318-20. Roma, 2001. See also C.M. Radding, “Legal theory and practice in eleventh century Italy” in *Law and History* 23 (2003), pp. 377-81.

⁵⁸ See Cicero, *De officiis*, I, XLIII [153]: “*princepsque omnium virtutum illa sapientia [...] rerum est divinarum et humanarum scientia*”. Elsewhere, Cicero explained that

Now it suffices to remark that in the perspective of Ulpianus the distinction between wisdom and prudence disappeared. As we have previously recalled, Ulpianus gave law (*ius*) the rank of wisdom by defining it 'true philosophy' (Dig. 1. 1. 10), and placed its essence of 'knowledge of things human and divine' and 'of the just and unjust' under the heading of *iuris prudentia* (Inst. 1. 1. 1).⁵⁹ In the *Institutiones divinarum et saecularium litterarum* (ca. 562), Cassiodorus (ca. 490- ca. 583), a contemporary of the emperor Justinian whose work Marsilius cited in the *Defensor pacis*, minimised the role of *ius* by re-establishing a direct link between 'true philosophy' or 'wisdom' – the 'art of all arts' and 'discipline of all disciplines' – and the knowledge of human and divine affairs given the boundaries of human capability.⁶⁰ We find the same concept restated in the work of Alcuin of York (735-804).⁶¹ What about the jurists, heirs to Ulpianus: did they accept such a restoration? They did not, but continued to operate on the basis of conceptual tools borrowed from other disciplines, like theology. This seems to be the case of Placentinus (d. 1192), for example. In the *Sermo de legibus* (ca. 1186), presumably written by the latter to defend legal practice from the ecclesiastical charge of deception and opportunism, the author argued that law is reason itself, and also that the fundamental legal principles contradict neither the laws of nature nor divine law but rather actualise them in concrete situations.⁶² As historian of Canon law Stephan Kuttner pointed out, in dealing with the definition of justice, by referring to Plato's idea that justice is the virtue especially beneficial to the worse off, Placentinus manifested a certain openness, if not favour, towards the liberal arts tradition, and the philosophical tradition more generally.⁶³ Finally, in Baldus de Ubaldis (1327-

'prudence' consists in the knowledge of things which are good, bad, and neither good nor bad. See *De natura deorum*, III, XV [38]: "*prudentia [...] quae constat ex scientia rerum bonarum et malarum et nec bonarum nec malarum*". For an account of Cicero's impact on early Christian authors, see H. Baron, "Cicero and the Roman civic spirit in the Middle Ages and early Renaissance", in *Bulletin of the John Rylands Library* 22 (1938), pp. 72-97; C.J. Nederman, "Nature, sin and the origins of society: the Ciceronian tradition in medieval political thought", in *JHI* 49 (1988), pp. 3-26.

⁵⁹ See Dig. 1, 1, 10 and Inst. 1, 1, 1: "*iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*".

⁶⁰ See Cassiodorus, *Institutiones*, II, III, 5: "*philosophia est divinarum humanarumque rerum, in quantum homini possibile est, probabilis scientia; aliter philosophia est aers atrium et disciplina disciplinarum*".

⁶¹ See Alcuinus, *Dialogus de rhetorica et virtutibus*, § 322: "*porro sapientiam veteres philosophiam vocaverunt, id est, omnium rerum humanarum atque divinarum scientiam*".

⁶² H. Kantorowicz edited the sermon in "The poetical sermon of a medieval jurist. Placentinus and his *Sermo de legibus*" in *Journal of the Warburg Institute* 2 (1938), pp. 111-35. See also J. Verger (2000), pp. 28-9; E. Cortese (2001), p. 294.

⁶³ Placentinus wrote: "*iustitia autem quiescit in mentibus iustorum [...] Iuris prudentia est scire quid sit iustum, quid iniustum, quid illicitum in divines humanisque, sive forensibus negotiis; differt ergo multum iurisprudencia a iustitia. Siquidem iurisprudencia praecipit sive dignoscit, iustitia tribuit. Item iustitia est quoddam summum bonum, iurisprudencia medium, item iustitia virtus est iurisprudencia scientia [...] Iustitia est secundum Platonem*

1400) we find the statement that there exists an inextricable link between practical wisdom (*philosophia moralis*) and law; and the former in particular is solemnly described as 'mother and gate to all laws'.⁶⁴ From this very limited view of the links existing between medieval legal thought and the other disciplines we might conclude that the assertions examined are rhetorical expedients. Yet, in doing so, we could then no longer ignore the question of the meaning of that type of rhetoric.

The second argument is that law and government was chiefly a matter of scholarly culture. Susan Reynolds warned against the risk of exaggerating the importance of the impact of Roman and Canon law on the mentality and political beliefs of medieval men and women. Like many others, she pointed out that law and government was not the exclusive prerogative of men of learning. Commoners too, as well as noblemen and kings, and even peasants, apprehended and cherished principles of conduct and ideas, although not necessarily coherently and just in the form of assumptions about rights and duties. To understand collective practices and activities, this author suggested looking not so much at scholarly work, but at the records of law-suits, charters and chronicles, and at all the other documents in which those practices and activities were recorded. Their compilers, she claimed, were usually much closer to real life than were most of the treatise-writers.⁶⁵ It is not entirely clear why Reynolds considered the authors of the treatises to be so distant from every-day life concerns, as in law, more than in other areas, a sufficiently high degree of exchange between scholarly and popular culture was established.⁶⁶ A significant increase in the rate of literacy, mainly due to the proliferation of small grammar schools in towns as well as in the countryside of various regions of Western Europe between the twelfth and thirteenth centuries, as well as the litigious character of medieval man witnessed by the enormous mass of legal rulings on utterly futile matters and often minute transactions between the commonest of people recorded in the registers of notaries, brought about a general and widespread ability to understand the essence of relatively simple texts like statements of arbitration, judicial records, deliberations of city councils, royal remissions of grace,

virtus, quae plurimum potest in his, qui minimum possunt [...] in personis miserabilibus evidentius clarescit iustitia". See Placentinus, *Summa institutionum, de iustitia et de iure* § 6-8, fol. 2., apud Ioan. Frellaeum et Gulielmum de Guelques, Lugduni, 1536. See also S. Kuttner, "A forgotten definition of justice" in *The History of Ideas and Doctrines of Canon Law in the Middle Ages*, V. London, 1980 [originally in *Studia Gratiana* 20 (1976), pp. 75-109].

⁶⁴ In Baldus de Ubaldis, *philosophia moralis* is "*legum mater et ianua*". See Baldus de Ubaldis, *In primam Digesti veteris partem, de iustitia et iure, huius studi* § 6, fol. 9. Venetiis, 1577.

⁶⁵ See S. Reynolds, *Kingdoms and Communities in Western Europe, 900-1300*, pp. 4-5. Oxford, 1984. More recently, the author explained that the charters of liberties, rather than conceding new liberties, merely reflected *de facto* individual and collective practices. See S. Reynolds, *Ideas and Solidarities of the Medieval Laity. England and Western Europe*, pp. 1-20. London, 1995.

⁶⁶ See E. Cortese (2001), pp. 318-9.

ordinances, letters of credit, rental and sales contracts, marriage licenses, and testaments. Obviously, ordinary people did not possess the knowledge of professional lawyers, but they shared with the latter a certain faith in 'the power of law'. That is why in this respect we can speak of a 'popular legal culture'. The lawyers, who in turn shared a number of beliefs and kinds of knowledge with ordinary people, "would have not been able to attain the rank and prestige they enjoyed had there not been a general consensus about their legitimacy and the efficacy of their discipline", Verger wrote. Moreover, princes, townships, and religious orders called for their aid, considered indispensable to defend liberties and privileges without which both individuals and institutions felt "vulnerable to all sorts of demands and even to violence".⁶⁷

1.5) Medieval sovereignty and historiography.

Can we speak of sovereignty in regard to the Middle Ages, and if so in what sense? This *vexata quaestio* has engaged a relatively high number of scholars in law, history, legal and political philosophy, and political science throughout the past two hundred years. In conducting research on the significance of the idea and problem of sovereignty, a pressing need remains to avoid anachronism. The employment of the term *sovereignty* in relation to medieval law and government has been the focus of controversy, either neglected or promoted without much clarification. Partially, this controversy is a consequence of the fact that the history of the idea of sovereignty and that of the idea of State overlap.⁶⁸ In the attempt to detect the traces of the notion of sovereignty in medieval sources, we must consider that its meaning might have changed as a response to the variation in the legal and political vocabulary considered. Changes of this kind usually imply a range of other and different ideas, doctrines, and references, some of which may seem alien to us. In this field, moving cautiously is necessary to avoid confusion arising from terminology. At the same time, we should try to avoid any excess of zeal, for the risk of 'throwing the baby out with the bathwater' is high in this field too.

Terminological and conceptual accuracy constitute a resource of paramount importance in intellectual work. Yet, especially in matters concerning medieval law and government, the risk is very high indeed of seeing our attempts to establish a vocabulary similar or even coincident to ours, or a vocabulary devoid of ambiguity, frustrated. Acknowledging that medieval authors used a different vocabulary and wrote about law and politics in a way that significantly differs from the way their successors have done does not mean that they had no idea of sovereignty. In this book, we tried to determine the major features of medieval sovereignty by applying the distinction that Susan Reynolds made in relation to the analysis of medieval statehood to the analysis of sovereignty. She suggested separating the concept

⁶⁷ See J. Verger (2000), pp. 35-6.

⁶⁸ See E. Maulin, "Souveraineté" in D. Alland et S. Rials (2003), pp. 1434-39.

of the State from the phenomenon of the State, and argued that the absence in medieval literature of what looks to modern scholars like the modern concept of the State is no argument against the existence in the Middle Ages of the States as phenomena.⁶⁹ Accordingly, the alleged absence in medieval sources of exact Latin equivalents for the English *sovereignty*, and, above all, the absence of what we would now call 'the modern understanding of sovereignty' are not arguments against the existence of medieval sovereignty as a phenomenon. To illustrate how complex the quest for terminological and conceptual accuracy in historical research about sovereignty is, we shall now refer to the controversy about the medieval origin of the term *State* and provide some examples taken from history of law and of legal and political ideas. This way of proceeding is justified by the fact that the history of the idea of sovereignty and that of the idea of State, as we already said, overlap. In the course of the digression, an attempt will be made to separate one history from the other. Yet, that they overlap is a fact to take account of and, possibly, to exploit in the light of the scope of the book.

In reviewing Wilk's study on the problem of papal sovereignty in *Augustinus Triumphus* (1243-1328),⁷⁰ Gaines Post benevolently criticised the author for having employed terms like *popular will*, *absolutism*, *State*, and *sovereignty*, which were either not current in the Middle Ages, or were used with meanings different from the ones familiar in twentieth century legal and political theory.⁷¹ Leaving aside the fact that throughout his book Wilks constantly warned the reader any time he deliberately used modern terminology, Post himself frequently used the terminology in question. For example, in his *Studies in Medieval Legal Thought* (1964) this distinguished scholar focused on the medieval use of the word *status*.⁷² In the Middle Ages, this word generally meant situation or condition of groups of individuals. Post widely referred to it "in the belief", Reynolds wrote, "that it will reveal ideas" about the modern notion of State.⁷³ In particular, Post used the term *State* arguing that its origin as "abstract entity, being superior to all private rights" is to be traced back to the mid-thirteenth century. Since "an abstract entity cannot exercise sovereignty", he wrote, "the head of the independent state who recognized no superior and was emperor in his own realm was the actual sovereign". Finally, he portrayed the prerogatives of the prince in maintaining "the common and public welfare" as the same thing as sovereignty.⁷⁴ As far as we can see, the latter assertion on the actual sovereign does not differ in meaning from the one made by Wilks on the same issue.

⁶⁹ See S. Reynolds, "The historiography of the medieval state" in M. Bentley (ed.), *Companion to Historiography*, pp. 117-38, 120. London-New York, 1997.

⁷⁰ See M. Wilks, *The Problem of Sovereignty in the later Middle Ages: the Papal Monarchy with Augustinus Triumphus and the Publicists*. Cambridge, 1964.

⁷¹ See G. Post, *Speculum* 39 (1964)[A], pp. 365-73.

⁷² See G. Post, *Studies in Medieval Legal Thought*, pp. 333-67, 368-414. Princeton (NJ), 1964 [B].

⁷³ See S. Reynolds (1984), pp. 323-4.

⁷⁴ See G. Post (1964) [A], p. 367.

The State, Wilks wrote, is the “intangible representative of the community which is personified by the head of government”.⁷⁵ Like Post and Wilks, Tierney too saw the origin of the modern term *State* in the Latin *status*, used “to extend the authority of rulers by justifying extraordinary or extra-legal actions undertaken by them for the defence of the community” as well as “to define a condition of public welfare that the ruler himself was not permitted to disrupt”.⁷⁶ Raoul van Caenegem moved along the same line. The Belgian historian agreed that out of its early meaning the more specific meaning of ‘welfare of the commonwealth’ was established in spite of all uncertainties concerning the dichotomy between *ius publicum* and *ius privatum* caused by what has been called ‘the patrimonial concept of the State’.⁷⁷ Indeed, from the *Glossa magna* compiled by Accursius (d. 1263) to the commentaries of most jurists, the notion that public law is concerned with the State, whereas private law is concerned with the utility of individuals was constantly reaffirmed.⁷⁸ The claim that the distinction in question was indefinitely blurred in the medieval period is grounded if not exaggerated. Unfortunately, in the hands of several authors, this interpretative paradigm has been turned into a monolithic judgement pretending to cover the whole area of medieval law and politics. We should consider instead that the patrimonial theory of the State is just one theory among others, moreover applying to particular forms of government, not all, even in the Middle Ages. It would be misleading, we believe, to keep on arguing that it is only in modern times that the patrimonial conception fades away finally giving room for proper sovereignty. What do we mean by ‘modern times’? To answer a question of the kind is outside the scope of this study, and yet we should draw the attention of the reader to the fact that in ‘modern’ authors such as Jean Bodin and Thomas Hobbes, as we shall see, we find a patrimonial concept of the State.⁷⁹

⁷⁵ See M. Wilks (1964), p. 158. This view, as we shall see, is the core of Wilks’ interpretation of Marsilius’ political thought. The author claimed that according to Marsilius “the Roman emperor, being the embodiment of the state, is “*pars principans, pars valentior*, and therefore *legislator humanus* all rolled into one”. See M. Wilks (1972), p. 283.

⁷⁶ See B. Tierney, “Medieval canon law and Western constitutionalism” in *Church Law and Constitutional Thought in the Middle Ages*, XV, p. 14. London, 1979 (originally in *Catholic Historical Review* 52 [1965], pp. 1-17).

⁷⁷ See R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, pp. 1-6. Cambridge, 1995. This author recalled that gradually the expression *status regni* lost the second word given that in due course of time the notion of ‘state’ became genus to the species ‘monarchy’ (p. 5).

⁷⁸ See Inst. 1, 1, 4: “*publicum ius est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet*”.

⁷⁹ Hobbes wrote: “*in monarchia autem bonum publicum et privatum idem sunt*”. See T. Hobbes, *Leviathan*, I, XIX. On the patrimonial concept of the State and its developments, see M.T. Guerra Medici, “Le origini dello stato moderno tra *res familiaris* e *res publica*” in D. Maffei, I. Biocchi, M. Caravale, E. Conte, U. Petronio (a cura di), *A Ennio Cortese*, II, pp. 174-95. Roma, 2001.

More striking than these examples might be recalling that Marsilius was aware of the problem here at stake. He even argued that monarchy, whereby the ruler has property of everything in a given community, disposing of things and persons according to his own will, just as the head of a family in his own household, is one of the five ways to one person's rule.⁸⁰ At any rate, roughly one hundred and fifty years after the composition of Bartolus' *De regimine civitatis* (1355), the term *State* had steadily entered the political and legal vocabulary. It was in use specifically to denote centralised and organised political communities.⁸¹ In *Trattato circa il reggimento e governo della città di Firenze* (1498), a short tract belonging to the tradition of republican civic culture literature written during the last months of his existence, the Dominican monk Girolamo Savonarola treated the problem of the "*governo delle città e degli stati*" attacking tyranny as Bartolus in particular had done, and stating, as Marsilius had done, that "*il fine dello stato è infatti l'unione e la concordia del popolo*".⁸² A few years later, in *De principatibus* or *Il Principe* (1513), Niccolò Machiavelli generally referred to "*stati*" and "*domini che hanno avuto e hanno imperio sopra gli uomini*".⁸³ Finally, in his *Politicorum libri sex* (1589), Justus Lipsius, being particularly concerned with monarchical sovereignty, employed the word "*status*" in relation to the "*triplex*" distinction within the genus "*imperium*": "*Principatus, Optimatum, et Populi status*".⁸⁴

In relation to the notion of sovereignty, the focus of this research, we ought to treasure Post's observation that expressions like *auctoritas*, *maiestas*, *summa potestas*, and *plena potestas* were employed in the Middle Ages to denote sovereignty. Hence, if we maintain that it is possible to speak of medieval sovereignty, the problem remains how to disentangle the medieval from the modern meaning of sovereignty. The question is puzzling because the expressions mentioned by Post continued to be widely used beyond the boundaries conventionally set to delimit the long medieval period. In *De iure belli ac pacis* (1625), for example, Hugo Grotius extensively used the locution

⁸⁰ See Marsilius de Padua, *Defensor pacis*, I, IX, 4.

⁸¹ For an account of the use of the term *status* in the fifteenth century, see Q. Skinner, *Visions of Politics – II – Renaissance Virtues*, pp. 368-413. Cambridge, 2002.

⁸² See G. Savonarola, *Trattato sul governo della città di Firenze* (a cura di F. Buzzi), pp. 165-71. Casale Monferrato, 1996. Taking as example the political situation of Italy in his days, Marsilius lamented that, being peace and concord taken away, all kinds of hardships and troubles inevitably will befall any political community. See Marsilius de Padua, *Defensor pacis*, I, I, 2. For an account of some of the major aspects of the political thought of Savonarola, see also G. Lock en F. Maiolo, "Machiavelli en Savonarola tegenover het saeculum" in *Wijsgerig perspectief* 1 (2003), pp. 17-32.

⁸³ See N. Machiavelli, *Il Principe*, I (ed. G. Inglese), p. 7. Torino, 1995. Felix Gilbert underlined that the problem of the nature of the principality was a recurrent literary theme since medieval times. Referring to central Italy in particular, in the second half of the fifteenth century re-emerged a vivid interest in the topic witnessed by a large number of treatises, including Machiavelli's work. See F. Gilbert, *Machiavelli e il suo tempo*, pp. 109-17. Bologna, 1977.

⁸⁴ See J. Lipsius, *Politicorum libri sex*, II, II.

summa potestas to denote the sovereign power.⁸⁵ The same goes in respect to *Leviathan* (1651) by Thomas Hobbes.⁸⁶ In the *Tractatus theologico-politicus* (1670), which contains important statements for the theory of sovereignty, Baruch Spinoza too used “*summa potestas*”, or “*ius summae potestatis*”, “*ius imperii*”, or “*ius summum imperandi*” to denote unrestrained supreme political authority.⁸⁷ The latter is regarded as the core of “the idea of true sovereignty” and constitutes the “juristic desideratum” that Wilks saw as “always been implicit in the papal claim to the *plenitudo potestatis*”.⁸⁸

Is there any continuity in meaning between medieval and modern texts concerned with sovereignty? To answer this question we should try to determine how medieval jurists used the notions of *status*, *summa* or *plena potestas*, *maiestas*, *imperium*, and *persona ficta*. Presumably, only in the nineteenth and twentieth centuries the notions of *State*, *sovereignty*, and *legal person*, which we regard as the modern equivalent for those terms, form a conceptual compound and, consequently, the core of the modern theory of the State. The latter views the State, acting as a juridical person any time it is involved in relations of any kind, internally or externally, as a political authority recognising no superior, being above all other possible authorities within a definite territory, and as the exclusive source of the law and its implementation. Did medieval jurists and political philosophers think of them as a conceptual unity too? This question will if possible be answered in the following chapters.

Many distinguished authors viewed Jean Bodin as the icon of modern sovereign statehood. With the French jurist, it has been claimed, sovereignty is taken to be the attribute that distinguishes the State from all other groups. Securing the independence of government from external intervention and reducing legal constraints internally are thus seen as the two general ends of

⁸⁵ See H. Grotius, *De iure belli ac pacis*, I, III, 7: “*summa autem illa [civilis potestas] dicitur, cuius actus alterius iuri non subsunt, ita ut alterius voluntatis humanae arbitrio irriti possint reddi*”.

⁸⁶ See, for example, T. Hobbes, *Leviathan*, I, XVIII-XIX.

⁸⁷ See B. Spinoza, *Tractatus theologico-politicus*, XVI, 18 and 20. To the power of God, that is, nature, Spinoza associated a supreme power to everything: “*naturae enim potentia ipsa Dei potentia est, qui summum ius ad omnia habet*” (XVI, 2).

⁸⁸ Wilks cited a passage of the *Speculum iuris* in which Durandus stated that the pope, as vicar of Christ, has no superior on earth and can do, say, and turn into law whatever he pleases. See M. Wilks (1964), p. 151. Referring to the pope, Durandus wrote: “*de aliquo facit nihil, mutando etiam rei naturam [...] Immutat ergo substantialem rei naturam, puta faciendo de illegitimo legitimum [...] De nihilo aliquid facit [...] Solutus est legibus [...] ergo [...] nulli subset, nec ab aliquot iudicatur [...] Ipse habet utrumque gladium, scilicet temporalem et spiritualem ex commissione Dei [...] Ipse est successor Petri et vicarius Iesu Christi [...] vicem [...] veri Dei gerens in terris [...] apud eum est pro ratione voluntas et quod ei placet, legis habet vigorem*”. See Gulielmus Durandus, *Speculum iuris*, pars prima, *De legato*, 6.§. *Nunc*, § 42-3, 50, 52, fol. 50-1. Venetiis, apud haeredes Vincentii Valgrisi, 1576. On the importance of Durandus’ *Speculum*, see E. Cortese, *Il diritto nella storia medievale – II – Il basso medioevo*, p. 379. Roma, 1995; K. Pennigton (1993), pp. 162-4.

his doctrine of law and government.⁸⁹ In this way, Johann Sommerville wrote, sovereignty became “a logically necessary feature of every state”. According to this author, sovereignty was seen as “the only practical alternative to anarchy”, and, given the nature of man, to “mayhem”.⁹⁰ The argument that proper sovereignty was only hinted at in the medieval period and does not become fully apparent before Bodin is highly controversial. Already in the 1950s, Marcel David lamented that too many scholars had too easily regarded Bodin as the first author having inserted the term *sovereignty* into the legal and political vocabulary of the West.⁹¹ More recently, Kenneth Pennington argued that while Bodin might have exaggerated the novelty of his analysis of political authority, some historians “have exaggerated the novelty of his exaggeration”.⁹² For example, in his 1880 study on the contribution of Johannes Althusius to the historical developments of natural law political theories, Otto von Gierke spoke of Bodin and Althusius as ‘the milestones of a new epoch’. In particular, he credited the former with the merit of having provided the first scientifically accurate configuration of sovereignty in association with the concept of State.⁹³ In more recent times, Hans Kelsen inserted the term *sovereignty* within the domain of the science of law and State. He referred to Bodin’s theory as one of fundamental importance in the establishment of the State as exclusive subject of sovereignty. Yet, he rather anachronistically criticised the alleged founder of the doctrine of sovereignty for his ‘methodological syncretism’. At the same time, Kelsen listed Bartolus

⁸⁹ For an account of this thesis from the 1960s onwards, see F. Meinecke, *Die Idee der Staatsräson in der neueren Geschichte*, p. 67. München, 1963; J. Dennert, *Ursprung und Begriff der Souveränität*, p. 56. Stuttgart, 1964; G.H. Sabine and T.L. Thorson, *A History of Political Theory* (1931), p. 377. Hinsdale (Ill.), 1973; H. Quaritsch, *Staat und Souveränität – I – Die Grundlagen*, p. 83. Frankfurt am Main, 1970; idem, *Souveränität. Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland vom 13. Jahrhundert bis 1806*, p. 34. Berlin, 1986; I. Geiss, *Geschichte griffbereit. Begriffe (5). Die sachsystematische Dimension der Weltgeschichte*, p. 342. Dortmund, 1993; O. Beaud, *La puissance de l’état*, pp. 56-68. Paris, 1994; A. de Benoist, “What is sovereignty?” in *Telos* 116 (1999), pp. 99-118, 100; A. Adamová in “Souveränität und Gesamtstaat im Werk des Johannes Althusius und dessen Beziehung zur tschechen Koföderation von 1619” in *ZSS (Ger.Abt.)* 119 (2002), pp. 157-74, 158; D. Kostakopoulou, Floating sovereignty: a pathology or a necessary means of state evolution? in *OJLS* 22/1 (2002), pp. 135-56, 139-40.

⁹⁰ See J.P. Sommerville, “Absolutism and royalism” in *CHMPT*, II, pp. 347-73, 350-1. Since “the necessity of sovereignty” was “deduced from contentions about human nature and mankind’s objectives, and not merely from the abstract concept of the state”, the author argued, “the advent of Bodinian sovereignty did not lead absolutists to abandon theorising in terms of God’s laws and man’s purposes”.

⁹¹ See M. David, *La souveraineté et les limites juridiques du pouvoir monarchique du IX au XV siècle*, pp. 13-20. Paris, 1954.

⁹² See K. Pennigton (1993), p. 8.

⁹³ See O. von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien. Zugleich ein Beitrag zur Geschichte der Rechtssystematik*, II, 2, I, p. 83, and II, 3, II, 1, pp. 149-50. In O. von Gierke (hg.), *Untersuchungen zur Deutschen Staats- und Rechtsgeschichte*, VII. Breslau, 1880.

of Saxoferrato among the theorists of sovereignty, and acknowledged that from the latter to Bodin and beyond, sovereignty never ceased denoting a condition of superiority or supremacy.⁹⁴

On the ground of the conceptual unity comprising sovereignty, statehood, and legal personality, a landmark in modern historiography on sovereignty, properly sovereign states are thought to have been impossible in medieval society. In opposition to this kind of methodological dogma, we have tried to rescue the historical significance of medieval sovereignty by treating it independently from statehood, and national statehood in particular.⁹⁵ We have employed the term *sovereignty* to generally denote the condition of political supremacy in a community ordained to the attainment of what Marsilius called 'sufficiency of life': "*bona vita*", "*salus civilis*", "*vivere bene*", or "*sufficienter vivere*".⁹⁶ Emphasising the organisational elements, we have used the term *State* as synonym for *commonwealth* and equivalent to *regnum* or *civitas* when used interchangeably and in their broadest meaning by Marsilius.⁹⁷ In this sense, the fortune of the term *civitas* crossed the conventional borders of the Middle Ages. Grotius again, in order to better locate sovereignty, argued that *civitas* denotes what he called 'the common

⁹⁴ See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, § 1-2, pp. 2-5. Tübingen, 1920.

⁹⁵ Susan Reynolds argued that the concept of nation-state implies the exercise of political authority over the people of a given territory united by a significant degree of common culture and belief in a common history. See S. Reynolds (1984), pp. 250-6. R.W. Dyson spoke of nation-states in the introduction to his English translation of *De ecclesiastica potestate* by Aegidius Romanus (c. 1247-1316). The author wrote that the struggles between Boniface VIII and Philip IV were "a collision of two incompatible principles", namely "the ideal of a universal papal monarchy transcending territorial boundaries" and "the new conception, so rapidly supplanting older feudal loyalties, of the consolidated nation-state, brooking no interference from without and acknowledging no sovereign but its king". See R.W. Dyson, *Giles of Rome on Ecclesiastical Power. The "De ecclesiastica potestate" of Aegidius Romanus*, xii. Woodbridge-Dover, 1986.

⁹⁶ See Marsilius de Padua, *Defensor pacis*, I, I, 2; I, I, 5; I, IV, 1-5. It is perhaps interesting to notice that Justus Lipsius referred to similar ideas while defining, in the opening pages of his *Politicorum libri sex*, 'civil life' as that which we enjoy in community with other people, to the mutual benefit or profit: "*Vitam civilem definio, quam in hominum societate mixti digimus, ad mutua commoda sive usum*". See J. Lipsius, *Politicorum libri sex*, I, I.

⁹⁷ See Marsilius de Padua, *Defensor pacis* I, I, 1. The existing structures and layers of power in a given community pre-ordained at the attainment and maintenance of 'sufficiency of life' constitute something common to every species of 'temperate government', namely the essence of every *regnum*. Alan Gewirth claimed that Marsilius employed the term *regnum* in this broad sense against others, like John of Paris for instance, who restrict it to a monarchic kingdom. See A. Gewirth (1964), I, pp. 117, 126-7. Susan Reynolds implicitly disagreed with this interpretation by arguing that the Latin translators of the 'political' Aristotle in describing the perfect community often qualified it by expressions like *civitas vel regnum*, *civitas vel gens*, or *civitas vel provincia*. See S. Reynolds (1984), p. 322.

subject' ("*subjectum commune*") of sovereign power as distinguished from the 'proper subject' ("*subjectum proprium*"). He had recourse to the organic metaphor to illustrate the point and said that if the body is the 'common' subject of sight, the eyes are the 'proper' one.⁹⁸ Hobbes, as we noted already, referred to the traditional distinction between the "*tria genera civitatum*".⁹⁹ And in the *Tractatus theologico-politicus*, while treating the *crimen laesae maiestatis* and explaining that an enemy is one who lives apart from the State, and does not recognise its authority either as a subject or as an ally, Spinoza spoke of "*imperium civitatis*" (power of state).¹⁰⁰

Inquiring into the domain of medieval sovereignty also means dealing with two opposite interpretations, around which two ideal groups of scholars gathered in the course of time. Moved by political concerns, by loyalty towards the requirements of positivistic legal thought, or often by both, a number of distinguished nineteenth and twentieth century authors denied the existence of sovereignty in the Middle Ages on the basis of the already mentioned correlation between sovereignty, statehood and legal personality. Other authors affirmed it instead. Referring to both categories, London Fell wrote that they all share a common trait, that is, a 'modernist' orientation, one which causes reading today's concerns, principles and criteria "back into the past eras as a gauge for proving or disproving" the presence of certain "prototypes".¹⁰¹ The divide between the scholars of the two groups, however, is not chronological, nor it is based upon homogeneous characteristics. So, among nineteenth century scholars, some affirmed the existence of medieval sovereignty, and others denied it. The same goes for twentieth century scholars. And among those who opted for the affirmative thesis, some emphasised its limitations, others its virtual absoluteness. According to the supporters of the negative thesis, proper sovereignty is modern. Some argued that the adjective 'modern' is even pleonastic: sovereignty is either modern, or it is not. With the fall of the *pars occidens* of the Roman Empire, it is held, a certain distinguished sense of the commonwealth, the antecedent of the

⁹⁸ See H. Grotius, *De iure belli ac pacis*, I, III, VII: "*Haec ergo summa potestas, quod subiectum habeat videamus. Subiectum aliud est commune, aliud proprium: ut visus subiectum commune est corpus, proprium oculus*".

⁹⁹ See T. Hobbes, *Leviathan*, I, XIX: "*distinctio civitatum a distinctione oritur personae summam habentis potestatem. Quoniam ergo summa potestas unius hominis est, vel plurium; et siquidem plurium, aut omnium [...] aut certorum hominum a caeteris distinctorum: tria tantum esse possunt civitatum genera, nempe monarchia, ubi summa potestas in uno homine est; democratia, ubi summa potestas in coetu hominum est, in quem coetum quilibet civis admittitur; et aristocratia, ubi summa potestas in coetu civium est qui optimates dicuntur*".

¹⁰⁰ See B. Spinoza, *Tractatus Theologico-politicus*, XVI, 17-18: "*Porro hostis est, quicumque extra civitatem ita vivit, ut neque confoederatus, neque ut subditus imperium civitatis agnoscit*".

¹⁰¹ See A.L. Fell, *The Origins of Legislative Sovereignty and the Legislative State – IV – Medieval or Renaissance Origins? Historiographical Debates and Deconstructions*, p. 200. New York, 1991. This author suggested seeking the truth by combining elements from both interpretations.

modern one, came to an end. In the view of modern interpreters, medieval society was fragmentary, pyramidal and hierarchical, and based upon personal rather than impersonal bonds. Sovereignty would hence be incompatible with built-in and traditional privileges and customs.¹⁰² McClelland affirmed that to speak of State and sovereignty in the Middle Ages is misleading. Medieval rulers, he wrote, were not sovereign “in anything like the ancient or modern senses”, and in fact they were “so hemmed in by feudal law and the customs of the realm that they were free agents in only a very limited sense”.¹⁰³ On the ground of the identification between sovereignty, statehood and legal personality, and in Gierkean fashion, this author claimed that, the idea of the State being somehow lost after the end of the ancient world, “truly modern political theorising looks back to the ancient world and forward to a time when the modern state will be perfectly achieved”.¹⁰⁴ The underlying argument here is that if medieval sovereignty did not reflect any of the principles embodied in modern sovereignty, then it reflected no idea of sovereignty at all. In the next chapter, we shall examine more closely whether one can draw the conclusion that medieval sovereignty was not proper sovereignty from postulating limited or divided political power for the whole Middle Ages. Scholars willing to detect the presence of sovereignty in the Middle Ages, by contrast, claim that is perfectly plausible to speak of medieval sovereignty and do not see feudalism – a somewhat unfortunate notion foreign to the Middle Ages themselves – or theocracy as impediments to its emergence. Often, they turn to ‘papal monarchy’ to emphasise that the Church developed “a model of concentrated decision-making power and a pyramidal structure of institutional organisation well before European states came into existence”.¹⁰⁵ To shed light on the models that influenced the formation of modern sovereignty, they refer to the theory of centralisation in the field of judicial decisions and legislation as, for example, put into practice from Gregory VII (1073-85) to Innocent III (1198-1216), and beyond. It is usually argued that one of the most important legal means by which the Petrine primacy was then realised was the jurisdiction of the Pope as ordinary judge of the whole Church in the

¹⁰² See G. Poggi, *The State: Its Nature, Development and Prospects*, p. 25. Cambridge, 1990.

¹⁰³ See J.S. McClelland (1998), pp. 131-2. This thesis presupposes that any unit of political power derived its legitimacy from feudal investiture. It has been observed that it is difficult to account for the legitimacy of any unit of political power in terms of feudal investiture though. See G. Tabacco, *Dai re ai signori. Forme di trasmissione del potere nel Medioevo*, pp. 15-66, 108-45. Torino, 2000.

¹⁰⁴ See J.S. McClelland (1998), p. 136.

¹⁰⁵ See J. Coleman (2000), II, p. 22. The expression ‘papal monarchy’ is employed from the early 1960s onwards by English-language historians mainly, although not always with the same meaning. Besides the already mentioned 1964 study by M. Wilks, see J.A. Watt, *The Theory of Papal Monarchy in the Thirteenth Century: The Contributions of Canonists*. London, 1965; K. Pennigton, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries*. Philadelphia (Penn.), 1984; C. Morris, *The Papal Monarchy*. Oxford, 1989.

context of the general framework provided by the Catholic tradition. We find this principle stated in the *Concordantia discordantium canonum*, also known as *Decretum*, compiled by Gratian (d. ca. 1160) around 1140: “*sola enim Romana ecclesia sua auctoritate valet de omnibus iudicare; de ea vero nulli iudicare permittitur*”. The Canonist spoke of the *Romana ecclesia* as the only one “*cuius auctoritate maius non est*”.¹⁰⁶ It has been said that the theory of government of Gregory VII in particular was monarchical, “not in the sense of a feudal monarchy” but more “in the sense of the imperial Roman tradition”. Under God and the divine law, “the pope was absolute”. Moreover, “as the Church had kept alive the conception of public authority in the face of the decentralising influences of feudalism, so it was the first power to apply the conception in its own political reconstruction”.¹⁰⁷ Some authors spoke of a development from lordship to sovereignty within the boundaries of the *regalis potestas* of the monarchs, and in particular of the French monarchs.¹⁰⁸ A number of scholars belonging to the second group applied the evolutionist approach systematically, and interpreted medieval sovereignty as the precursor of modern sovereignty. In some of them, we find the argument that “the whole political framework of early modern Europe” has its roots in the fourteenth century.¹⁰⁹ In the following chapters, we shall examine more closely the negative paradigm and try to demonstrate in what sense its major theoretical presuppositions made it an inadequate analytic tool in various attempts to determine whether an idea of sovereignty existed in the Middle Ages. Now some problematic aspects of the affirmative thesis, one that in our view seems more adequate in the research of medieval sovereignty, will be briefly treated.

We must be aware that it is one thing to be engaged in the research of the medieval origin of modern sovereignty, it is another to try to investigate the meaning of medieval sovereignty *iuxta propria principia*, something inherent to this as well as other studies. Research into the medieval origin of modern sovereignty - perhaps like any other genealogical inquiry - is an unfortunate one for at least two reasons. First, the supporters of the affirmative thesis usually approach matters of medieval law and government by paying almost exclusive attention to elements and authors appearing to have contributed to the rise of modern ideas and institution. This approach presents the disadvantage of not adequately accounting for the elements and authors that

¹⁰⁶ See C. 9, q. 3, c. 9-10. In the *Speculum iuris*, Durandus will call the Church “*thronus Dei*” and “*paradisus voluptatis*”. See Durandus, *Speculum iuris*, pars prima, proemium, § 1, fol. 1, and § 6, fol. 2. Venetiis, apud haeredes Vincentii Valgrisi, 1576. See also K. Pennington (1984), pp. 13-42, 43-74; A. Padoa-Schioppa, “Hierarchy and jurisdiction: models in medieval canon law” [A] in A. Padoa-Schioppa (ed.), *Legislation and Justice*, pp. 1-15. Oxford, 1997.

¹⁰⁷ See G.H. Sabine and T.L. Thorson (1973), p. 222.

¹⁰⁸ See O. Guillot, A. Rigaudière, Y. Sassier, *Pouvoirs et institutions dans la France médiévale. Des temps féodaux aux temps de l'État*, II, pp. 90-2. Paris, 1994; S. Reynolds, *Fiefs and Vassals*, pp. 3-10, 17-34. Oxford, 1994.

¹⁰⁹ See B. Tierney and S. Painter (1999), p. 463.

are not easily or directly connectable to modern achievements. Everyone knows how laudable coming to understand the processes through which modern legal and political ideas and institutions developed is. Yet, as Stephen Lahey suggested, it is desirable to avoid any arbitrary "devaluation of the study of that which did not contribute as obviously to modernity".¹¹⁰ The second reason is slightly more complex. First, the application of any consistent evolutionist approach may lead to looking at legal and political ideas and institutions as part of pre-determined patterns of development, which is something extremely difficult to demonstrate and highly improbable altogether. Medieval legal and political theory knew sovereignty in two related forms, the normative and the structural one. In the form of the normative postulate, sovereignty functioned as an umbrella-concept justifying the rich variety of relationships of super- and subordination existing within the hierarchical order of society. This typically medieval coexistence of a plurality of powers has generally been praised by followers of the affirmative thesis, and despised by the supporters of the negative thesis. The latter seem to have paid scarce attention to the normative significance of the plural model of powers and saw in it a sign of decay or weakness. They regarded it as anarchy, something that modern law and government finally managed to overcome. Modern legal and political thought managed to do this, they usually say, by turning "the power to give laws to citizens collectively and severally, without the consent of a superior, an equal, or an inferior" into the primary attribute of sovereignty.¹¹¹ The supporters of the affirmative paradigm may instead be credited with the merit of having paid a great deal of attention to the normative implications of that model. They exalted the coexistence of a plurality of powers for it guaranteed limited government and prefigured a 'balance of power' *ante litteram*. The critique to be possibly made is thus of a different type. How can they apply the genealogical method if the intention is to compare systems of law and government that at the same time they consider antithetic? How does a search of origins fit discontinuity? In their persistent desire to trace back the origin of modern sovereignty to the Middle Ages, they do acknowledge that the systems to be compared are radically different but fail to account for the factors of change that so heavily mark the antithesis at stake. The affirmative approach seems rather unfortunate from the point of view of structural analysis. In the structural perspective, sovereignty appears to be an expression of ongoing struggles for power that in turn constitute a constant factor inherent or latent to any more or less organised political community throughout time and space. What kind of origin might be sought if the

¹¹⁰ See S.E. Lahey, "Wyclif on rights" in *JHI* 58 (1997), pp. 1-20, 1.

¹¹¹ See G.H. Sabine and T.L. Thorson (1973), p. 378. Sabine explained that "the other attributes – the power to declare war and treat for peace, to commission magistrate, to act as a court of last resort, to grant dispensations, to coin money, and to tax – all are consequences of the sovereign's position as legal head of the state". In this context, the achievement would be that the sovereign's enactment changes custom, "but not custom enactment".

particular configurations of sovereignty and the underlying struggles for power are structurally contemporaneous? How to get out of this vicious circle, and does it make sense to speak of origin at all in this circular type of relationship? From the Augustinian doctrine of the lust for power to the Hobbesian view of life as a restless desire for power after power, there seems to be no proper way back to any particular origin, not in the linear or progressive sense at least. To find clear traces of the existence of sovereignty as a permanent structural element, yet subject to change, we need to look at the long series of struggles for power and recognition, and the quest for order recorded in European history.

The difficulty of moving within the interpretative context concerning medieval sovereignty is also a product of a number of taken-for-granted assumptions. Among the latter there is one we wish briefly to treat here to provide the reader with further evidence of the complexity of the matter under examination. Followers of the affirmative paradigm see limited power as the major characteristic of medieval sovereignty and oppose it to modern sovereignty, seen, as in Spinoza for instance, like a virtually unlimited power. Spinoza spoke of "*arbitrium summae potestatis*" and affirmed that the sovereign may always take advice from any fellow man, but is not bound to recognise anybody as superior judge, nor anyone besides itself as bearer of any title of right which might be detrimental to sovereignty itself. Even in the face of a prophet sent by God who attests his mission by indisputable signs, the sovereign power must recognise no human superior but God alone. Finally, Spinoza conceded that it was perfectly legitimate for the sovereign, at his own risk and loss, to refuse obedience to God as revealed in His law. He specified that neither civil law nor natural right constituted a serious obstacle to the virtually unrestrained power of the sovereign. The latter posits civil law, and so he is above what he posits. Natural right is dependent on the laws of nature, whose aim is the good of humanity, but being part of the order of nature, these laws belong to the inscrutable and eternal mind of God of which man has no knowledge whatsoever.¹¹² In *Metaphysische Anfangsgründe der Rechtslehre* (1797), part of *Die Metaphysik der Sitten*, Immanuel Kant spoke of true sovereignty as unlimited power as well. He distinguished the "Autokrator", who has all powers, from the "Monarch", who has only the *summa potestas*, namely the highest power. The former is true sovereign, not the latter.¹¹³ It is commonly held that the conflict between normative values

¹¹² See B. Spinoza, *Tractatus Theologico-politicus*, XVI, 2; XVI, 20: "*atque hoc ius summam potestatem retinuisse affirmo, quae quidem homines consulere potest, at neminem iudicem agnoscere tenetur, nec ullum mortalem praeter se alicuius iuris vindicem, nisi prophetam, qui expresse a Deo missus fuerit, quique id indubitatis signis ostenderit. At nec tunc quidem hominem, sed Deum ipsum iudicem agnoscere cogitur. Quod si summa potestas nollet Deo in iure suo revelato obedire, id ipsi cum suo periculo, et damno licet, nullo scilicet iure civili vel naturali repugnante; ius enim civile ab eius decreto tantum pendet; ius autem naturale pendet a legibus naturae [...] hoc est, aeterno Dei decreto nobis incognito accommodatae sunt*".

¹¹³ See I. Kant, *Metaphysische Anfangsgründe der Rechtslehre* (1797), § 51, in P. Natorp (ed.), *Kant's gesammelte Schriften*, VI, pp. 203-372. Berlin, 1907.

and mere power deeply nourished modern law and government with potentially catastrophic effects. Was a similar kind of conflict alien to the Middle Ages? Modern sovereignty may be said to possess a “volcanic quality” and accordingly depicted as “a force erupting with little or no regard for current social norms”, and at the same time capable of establishing new norms.¹¹⁴ Does this description fit medieval sovereignty too? At first sight, it does not, for many medievalists fashioned the notion of medieval sovereignty as limited power precisely against the standard of unrestrained and arbitrary power. Too rigidly associating the Middle Ages with limited government and by contrast modern times with unrestrained government is simplistic and misleading. The most authentic significance of the concern with limiting powers that several medievalists considered the core of the ‘medieval ideology of power’ would be in fact incomprehensible without sovereignty having shown its destructive potential in the Middle Ages too.¹¹⁵ As sovereignty has then not yet manifested its volcanic nature, would it make sense to speak of ‘medieval constitutionalism’ as a movement towards subjecting mere might to the rule of right?¹¹⁶ To St. Augustine, sovereignty meant fratricide, for Romulus killed Remus to found Rome and worldly law and government is “an inadequate set of conventionally established authorities backed by coercive force” underpinned by “fallen man’s perverse self-love”.¹¹⁷ A judgement of the kind necessarily implies knowledge of the actual danger of sovereignty. In medieval society, both superior and inferior had the duty to co-operate for the realisation of *ius*, an ‘order of things’ possibly reflected by, and embodied into validly issued and binding rules, and yet transcending it due to their metaphysical foundation. A duty of the kind would only make sense before the drama of arbitrary rule. In this perspective, we can speak, as Jürgen Miethke suggested, of the medieval ‘ethics of sovereignty’, and refer to the process of construction and destruction of a ‘juridical vision of power’, as Diego Quaglioni called it.¹¹⁸ The conflict between ethical values and power, which denotes the presence of unrestrained practices of power, cannot be considered alien to the Middle Ages. In *Ad Gebehardum liber* (1083-85), for instance, Manegold of Lautenbach (c. 1045-1103/11) claimed that the people cease to have a duty to obey the sovereign and have the right to depose him in the case the latter has denied or

¹¹⁴ See A. Murray (1973), p. 7.

¹¹⁵ See A. Padoa-Schioppa, *Il diritto nella storia d’Europa: il medioevo*, pp. 242-43. Padova, 1995.

¹¹⁶ See C.H. McIlwain, *Constitutionalism: Ancient and Modern*, pp. 67-92. New York, 1947.

¹¹⁷ See J. Coleman (2000), I, p. 322.

¹¹⁸ See J. Miethke, “Politische Theorien im Mittelalter”, in H.J. Lieber (ed.), *Politische Theorien von der Antike bis zur Gegenwart*, pp. 47-156. München, 1991; D. Quaglioni, *La sovranità*, p. 14. Roma-Bari, 2004. In the accounts of these two authors, the adjectives *juridical* and *ethical* are used interchangeably for they both refer to the normative foundation of the best possible configuration of sovereignty and its limits.

violated fundamental principles of justice.¹¹⁹ Discussions about prudence provide further evidence of the actual danger of unrestrained practices of sovereignty. We have already recalled that Cicero defined 'prudence' as "*the practical knowledge of things to be sought for and of things to be avoided*", and "*knowledge of things which are good, evil, and neither good nor evil*".¹²⁰ Throughout the Middle Ages, as the 'mirrors' for the instruction of princes indicate, *prudentia* presented an ambivalent nature.¹²¹ Alexander Murray spoke of a "*double entendre*" of it. In the Christian sense, Stoic in origin, it is a cardinal virtue placed at the top of the moral pyramid, the one that "distinguished aids and obstacles to the love of God", and which "included the deliberate choice of the moral course". In the second, worldly, sense, prudence is synonymous with "circumspection" or "usefulness of intelligence". It denotes "the ability to understand the matters presented to one, to reach quick decisions, to see the reasons behind cases, and to avoid being deceived through ignorance".¹²² Both meanings belonged to medieval culture, although there is a marked preference among historians towards stressing the importance of the moral variety of it. In his study on the legal and political thought of Philip of Leyden (ca. 1328-1382), Piet Leupen, for instance, insisted on the latter meaning of prudence and recalled that since written and unwritten law "did not in practice provide enough guarantees against a tyrant", it was necessary to take account of the human side of the ruler. Like any other person, he "had to be educated, had to learn from, and listen to others". Cultivation of the moral virtues was needed "to fulfil his public office properly". The 'mirrors of princes' and the help of the philosophers "showed the inexperienced ruler his duty, which was to submit voluntarily to the laws of the land". Apart from the Lord's punishment, "which lay in store for the king as for every man", no punishment existed.¹²³ In the sixteenth century, in his *Politica*, Justus Lipsius distinguished between

¹¹⁹ See Manegoldus, *Ad Gebhardum liber*, § XLVII: "*cum enim nullus se imperatorem vel regem creare possit, ad hoc unum aliquem super se populus exaltat, ut iusti ratione imperii se gubernet et regat, cuique sua distribuat [...] omnibus videlicet iusticiam impendat. At vero si quando pactum, quo eligitur, infringit, ad ea distribuenda et confundenda, que corrigere constitutus est, eruperit, iuste rationis consideratione populum subiectionis debito absolvit, quippe cum fidem prior ipse deseruerit, que alterutrum altero fidelitate colligavit. Huc accidit, quod populos nequaquam iuramento ad hoc se cuiquam obligat, ut ad quoscumque furentis animi inpetus obediat, aut, quo illum furor et insania precipitat, illum necessitudo subiectionis sequi compellat. Aut enim quisque iuste et qua fieri debet ratione regibus et principibus iurat, aut iniuste et qua fieri non debet ratione. Sequamur utraque et, qua servanda sunt ratione, videamus*".

¹²⁰ See Cicero, *De officiis*, I, XLIII [153]; *De natura deorum*, III, XV [38].

¹²¹ For an account of this ambivalence, see L.K. Born, "The perfect prince: a study in thirteenth and fourteenth century ideals" in *Speculum* 3 (1928), pp. 470-504.

¹²² See A. Murray (1978), pp. 123, 132-37. Even when used in God's service, worldly prudence, the author said, could never be the virtue which theologians made 'wagon-driver' of the others.

¹²³ See P. Leupen, *Philip of Leyden: a Fourteenth Century Jurist. A Study of His Life and Treatise "De cura reipublicae et sorte principantis"*, p. 167. Leiden-Zwolle, 1981.

moral and political prudence. There the author defined the latter as 'a life upright in character and every action, from a principle of integrity',¹²⁴ and the former in classical terms as the ability to understand and chose 'what is to be sought or avoided, both in private and in public'.¹²⁵ Do we need to wait for modern law and government to re-discover such a distinction? As we shall see, Marsilius too clearly distinguished 'prudence' from 'moral virtue'.¹²⁶

It will be interesting to see how all that has been said so far fits the requirements of medieval public law doctrines, which form a system open to two dimensions simultaneously. One is immanent and is the dimension of the dialectic between superior and inferior. This immanent dimension found expression in the *ordo ordinatus*, the *visibilia* of legal and political life. Within it, the notion of *potestas* played a fundamental role. The other is the transcendent dimension, which is associated with the *ordo ordinans*, the *invisibilia* of legal and political life. It is dominated by the notion of *auctoritas*.¹²⁷ Putting into question the image of the Middle Ages as a monolithic age of faith and limited power does not invalidate the hypothesis that medieval sovereignty rested upon moral and metaphysical presuppositions. Only an arbitrary exclusion of the latter from the sight of the enquirer leads us to conclude that the idea of sovereignty was unknown in the Middle Ages, or, if known, only in the form of limited authority. After the successful spreading of the concept of law as a sovereign's command at the beginning of the nineteenth century,¹²⁸ twentieth century legal positivism concentrated its attention on what in medieval terms would be called the *ordo ordinatus*, on the *visibilia* and *mutabilia* of legal and political life alone. As we shall see in the next chapter, the narrow delimitation of the field of law caused the capital distinction between *auctoritas* and *potestas* gradually to lose its significance and heuristic potential. Even an unorthodox thinker like Marsilius, who usually employed *auctoritas*, *potestas*, and *iurisdictio* interchangeably, distinguished mere power

¹²⁴ See J. Lipsius, *Politicorum libri sex*, I, VI: "*nec probitatem aliud hic intellego, quam rectam in moribus et actione omni vitam, ex honesti norma*". The author specified that *probitas* does not, strictly speaking, belong to politics but to morality.

¹²⁵ See J. Lipsius, *Politicorum libri sex*, I, VII: "*prudencia [...] quam definio intellectum et dilectum rerum, quae publice privatimque fugiendae aut appetendae*".

¹²⁶ Together with "*legum scienciam*", prudence and moral virtue constituted the necessary "*qualitates principantis perfecti*". See Marsilius de Padua, *Defensor pacis*, I, XV, 1.

¹²⁷ Post recommended using *auctoritas* and *potestas* with distinction for "sometimes *auctoritas* is stronger than *potestas*". See G. Post (1964) [A], p. 367. Implicitly referring to this distinction between *auctoritas* and *potestas*, Bertrand de Jouvenel introduced the slightly different one between "Autorité" and "autorité". He wrote: "l'Autorité est, et doit être dans la perspective de sa fin salutaire, un concept statique". On the contrary, "l'autorité est un concept dynamique dont la fonction est de décrire le processus effectif de la politique par lequel des personnalités sont constamment en train de gagner ou de perdre en 'stature' et en 'poids'". See B. de Jouvenel, *De la politique pure*, p. 147. Paris, 1977.

¹²⁸ See G. Fassò, *Storia della filosofia del diritto - III - Ottocento e Novecento* (1970), pp. 22-39. Bologna, 2002.

or propensity to power ("*potencia*") from the rightful authority by which some people rule ("*per quam [...] alicui vel aliquibus datur auctoritas principatus*").¹²⁹

¹²⁹ See Marsilius de Padua, *Defensor pacis*, I, XV, 1.

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or propensity to power (*potencia*) from the rightful authority by which some people rule (*per quam [...] alicui vel aliquibus datur auctoritas principatus*).¹²⁹

¹²⁹ See Marsilius de Padua, *Defensor pacis*, I, XV, 1.

CHAPTER TWO

MEDIEVAL SOVEREIGNTY AND METHODOLOGY

2.1) Interpretative problems in the history of legal and political ideas:

2.1.1) Sovereignty and the quest for competence.

2.1.2) Sovereignty and the quest for meaning.

2.2) Medieval sovereignty between *auctoritas* and *potestas*.

2.1) Interpretative problems in the history of legal and political ideas:

2.1.1) Sovereignty and the quest for competence

The methodological questions confronting the scholars concerned with the historical study of legal and political ideas, including sovereignty, are several and complex. The issue of what properly constitutes a historical study remains a particularly difficult one. Recovering the past in its totality is chimera, and full disinterest and objectivity are impossible to achieve. The term *history* and the adjective *historical* appear in the title of various studies more as a tribute to tradition than as an indication of method. Too often, we see the past evaluated on the basis of present concerns in scholarly writings. This manipulation of the past is somehow inevitable. It always occurs for purposes that are parochial in one sense or the other, and if we wish to refrain from parochialism in historical research we should definitely be careful in assuming with Ian Shapiro - as if it were an iron law of historical research - that the purpose of the history of ideas is to gain a greater critical understanding of the present.¹ In fact, we are never in a condition to fully determine whether we will gain such understanding or not, and to what extent. In relation to the study of medieval legal and political ideas there is a peculiar difficulty to deal with. Medieval jurists, and medieval authors more generally, made statements of which the content is unequivocally metaphysical. From the point of view of logical positivism, or of the general mentality associated with it, metaphysical utterances are nonsense. Hence, the historian of ideas who deals with medieval texts runs the risk of seeing a great deal of the statements which he examines dissolving in his hands, so to speak,

¹ See I. Shapiro, "Realism in the study of the history of ideas" in *HPT* 3/3 (1982), pp. 535-78. According to this author, the study of history "is rooted in the concerns of the present", and "should be geared towards a critical understanding of the ideologies of the present" (p. 536).

condemned to irrelevance, or to the status of fantasy.² In the view of Paolo Grossi, if extensively and consistently applied to historical inquiry, positivism denies for the study of epochs distant from ours the possibility for lawfulness to exist independently from legality narrowly understood.³ As we shall explain in the course of this chapter, to overcome this difficulty we followed Quentin Skinner's approach based upon the idea that political and public law writings should be understood as forms of political actions whose significance is mainly given by the normative and pragmatic intentions of the authors in writing them.⁴ This means that the historical significance of certain statements, and of the texts in which the latter appear, should be sought beyond just ascertaining their logical meaning with a view to formulating testable and general conclusions, which is exactly what positivist historians recommend. In the first two paragraphs of this chapter, we shall address a number of methodologically relevant questions and attempt to accommodate the demands that we believe those questions present to us. Like any selection, the one we made has no character of timelessness and is far from being exhaustive; and accommodating those demands obviously does not mean solving interpretative problems. We

² "Logical positivists", H. Fiegl wrote, "were adamant in excluding as nonsensical any question that, in the light of logical analysis, revealed itself to be absolutely unanswerable". See H. Fiegl, *Inquires and Provocations. Selected Writings: 1929-1974*, p. 24. Dordrecht (etc.), 1981. See also A.J. Ayer, *Language, Truth and Logic* (1936), pp. 5-16, 33-45. London, 1962. On the major characters of positivism in general, see R. Carnap, "Logical foundations of the unity of science" in R. Boyd, P. Gasper, J.D. Trout (eds.), *The Philosophy of Science*, pp. 393-404. Cambridge (Mass)-London, 1991. However, one could repeat with Wittgenstein that "whether a proposition can turn out false after all depends on what [we] make count as determinants for that proposition". See L. Wittgenstein, *On Certainty*, § 5, p. 2 (ed. G.E.M. Anscombe and G.H. von Wright). Oxford, 1969. Wittgenstein explained that "the words 'non-sense' and 'sense' get their meaning only in particular cases and may vary from case to case". "We can still talk of *sense*", he argued, "without giving a clear meaning to 'sense', just as we talk of winning or losing without the meaning of our terms being absolutely clear". For Wittgenstein the meaning of a symbol – and propositions having metaphysical character are symbolic – is the way it is used: "to know the meaning of a symbol is to know its use". See L. Wittgenstein, "Philosophy" in *Wittgenstein's Lectures. Cambridge, 1932-1935. From the Notes of Alice Ambrose and Margaret MacDonald*, §§ 17, 25, pp. 21, 29 (ed. A. Ambrose). Oxford, 1979.

³ See P. Grossi, *Mitologie giuridiche della modernità*, pp. 2-11, 43-82. Milano, 2001.

⁴ See Q. Skinner, "Some problems in the analysis of political thought and action" in *Political Theory* 23 (1974), pp. 277-303. The concept of truth, this scholar wrote, "is irrelevant to the enterprise of explaining beliefs". See Q. Skinner, *Visions of Politics – I – Regarding Method*, pp. 2-5. Cambridge, 2002. This view has been also held by L. Wittgenstein and J.L. Austin. See L. Wittgenstein, *Philosophical Investigations* (1953), p. 146, 53-4 (trans. by G.E.M. Anscombe). Oxford, 1963. For Austin, "to say something is to do something". See J.L. Austin, *How To Do Things With Words* (1955), pp. 94. Oxford, 1975.

shall focus in particular on the questions of competence and of meaning with a view to the major features and most problematic aspects of the formalist approach in the historical study of law and its relationship with positivist thought.

The possibility of properly addressing and understanding the question of sovereignty in historical perspective largely depends on method. Awareness of methodological problems has been acquired with some difficulty, and only a minority of scholars, who themselves confine its use to a minority of the questions they treat, engage in preliminary discussions of method.⁵ How to explain this reluctance? It is probably the effect of the kind of acquiescence that scholars who are part of the same research programme, or who simply share the same views on the nature and function of historical investigation, show towards the interpretative paradigms to which they adhere.⁶ This kind of acquiescence is related to interpretative familiarity, as Charles Radding explained. In scholarly work, this scholar argued, "inferences are transmuted by familiarity into facts", no longer disputable, which are "incorporated into broader or more detailed interpretations". "Just as borders once meant to reflect current social reality or

⁵ As far as legal history is concerned, see, for example, F. Wieacker, *Methodik der Rechtsgeschichte in Augewählte Schriften I*, pp. 27-49, 50-61, 84-102 (ed. D. Simon). Frankfurt am Main, 1983; J.M. Scholz, "Zum modus operandi des Rechtshistorikers" in *Ius Commune* 21 (1994), pp. 281-305; J. Gaudemet, "Morale, droit et histoire du droit" in *ZSS (Kan.Abt.)* 114 (1997), pp. 12-21; C.H. van Rhee, "Geen rechtsgeleerdheid, maar rechtswetenschap!" in *Rechtsgeleerd Magazijn Themis* 4 (2004), pp. 196-201.

⁶ The notion of 'research programme' has been widely debated during the 1960s and 1970s. In the view of Thomas Kuhn, all branches of science are characterised by more or less open struggles for power aimed at the conquest of hegemonic positions, although they contradict the sense of rigour, sobriety, and rationality commonly expected to govern scientific progress. The rigidity in defending the research programmes, Kuhn claimed, often entails the deterioration of intellectual pursuit. There are no rational standards to compare research programmes with each other, for each of them has self-referential standards. See T.S. Kuhn, *The Structure of Scientific Revolutions* (1962), pp. 43-51, 66-91. Chicago-London, 1996. Imre Lakatos maintained that science is "a battleground of research programmes", and that scientific progress is due to the proliferation of rival programmes encouraged by "progressive and degenerative problem-shifts", not a mere accumulation or "succession of bold theories and their dramatic overthrows". He viewed research programmes as an expression of "mature science". Lakatos argued that criticism usually does not eliminate a refutable programme as fast as Popper imagined, being refutation "a long and often frustrating process". Questionable or even false theories tenaciously resist criticism and continue to exist parallel to other, better, theories. See I. Lakatos, "Falsification and the methodology of scientific research programmes" in I. Lakatos and A. Musgrave (eds.), *Criticism and the Growth of Knowledge*, pp. 91-195, 171-5, 179. Cambridge, 1970. For Paul Feyerabend, ideology, historical knowledge, and self-awareness "play a decisive role in the debate between rival methodologies". See P. Feyerabend, *Against Method. Outline of an Anarchistic Theory of Knowledge*, p. 183. London, 1975.

political expediency acquire a reality of their own and are defended because they are familiar, so scholarly interpretations embedded in the discipline become easier to repeat than to revise".⁷ In the second paragraph, we shall address the question of the significance of *auctoritas* and *potestas*, which constitute probably one of the most interesting heuristic tokens for precisely establishing the sense in which the problem of medieval sovereignty can be understood as that of the relationship between two distinguished, though interconnected, dimensions: the *ordo ordinans* and the *ordo ordinatus*. These two dimensions turned around two regulative principles, one of which – *auctor iuris homo* – symbolised the human legislator, and the other – *auctor iustitiae Deus* – the divine legislator, the ultimate source and foundation of law-making as a whole.⁸

A preliminary methodological issue concerns what we may call 'the quest for competence', that is, the theoretical competence to treat sovereignty in historical perspective. This is a foundational question. In the subjective sense, the problem of competence is about finding out who are the scholars supposed to address and answer the question of the historical significance of sovereignty. In the objective sense, it is about determining the bases for the adjudication of such competence. Most people, including specialists, have little difficulty in recognising law as a clearly identifiable field containing unifying features and a distinctive character. The dividing line between theory and practice, or better between the practice of making the law and that of studying it – two diverse, though connected, productive moments of legal experience – is dull. In fact, legal theorists delimit the province of legal knowledge by relying on criteria abstracted from the practice of law as it is broadly understood. Hans Kelsen explained that on the presupposition that there is a legal order considered superior to other orders of rules – like that associated with the State – an autonomous science of law concerned with the cognition and description of legal norms and norm-constituted relations between norm-determined facts could emerge. In this way, the independence of legal science is tailored to meet the requirements and the characteristics of its very object.⁹ Yet, notable are the differences between the way we currently conceive competence and the way in which medieval man did. To grasp what is probably the main difference, we ought to look not at the extrinsic characteristics of the legal profession, but at the

⁷ See C.M. Radding, "Vatican Latin 1406, Mommsen's Ms. S, and the reception of the Digest in the Middle Ages" in ZSS (Rom.Abt.) 110 (1993), pp. 501-51.

⁸ Azo wrote: "*nam auctor iuris est homo, auctor iustitiae est Deus*". See Azo, *In I librum Institutionum, De iustitia et iure*, § 4, in *Summa Azonis*, fol. 1048. Venetiis, apud Paulum Ugolinum, 1595. See also M.G. Fantini, "*Auctor iuris homo iustitiae Deus. La misura del diritto nel basso medioevo*" in *Iustitia* 44/4 (1991), pp. 391-462.

⁹ See H. Kelsen (1920), § 21, p. 86. See also H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1932), pp. 72-113. Wien, 1960. See also *Pure Theory of Law*, pp. 71-107 (trans. By M. Knight). Berkeley, 1978.

substantive values or ideology presupposed in the jurist's work.¹⁰ Today's jurist, the offspring of the faculties of law themselves, heirs of the medieval law schools, is a professional concerned with matters of law and generally convinced that the latter, if the legislator does his job properly, can be always identified "with certainty as matters of fact without dependence on controversial moral arguments".¹¹ Strict professionalism is his distinctive virtue. Accordingly, he does not concern himself with the philosophical or ethical implications of those matters, in spite of his personal commitment and resolve.¹² In certain particular circumstances, a special type of tension characterises the way the jurist experiences the political implications of his work. On the one hand, in various forms he contributes to the definition of the content of the law. On the other hand, in the case such content contradicts his personal moral commitments, he may seek isolation or even opposition to better protect his independence from political interventionism.¹³ This tension, witnessed by a huge number of cases, has a long history and seems inevitable since the time when the sovereign power and its law have claimed to regulate virtually all aspects of social life setting themselves up as the supreme 'guardian of society'.¹⁴ Given that "the specific character of law", as Herbert Hart recalled, consists of being an extraordinary "means of social control",¹⁵ the tension between engagement and independence might thus constitute the juristic profession's tragedy.

Let us finally address the question of sovereignty. Who is competent in treating it? Jurists answer that they are competent in treating it. This is the case, we presume, on the basis of a syllogism. In its simplest form, the syllogism can be formulated in the following terms: 1) sovereignty belongs to law; 2) the jurist is concerned with the law; 3) the jurist has competence in treating sovereignty. Let us elaborate a little further on this view. Given that state sovereignty makes state legislation an independent field of experience and object of study, to say

¹⁰ We use the term *ideology* to generally denote the set of beliefs relating to societal matters, which are in turn regarded as the basis for the justification of individual and collective actions. Referring to medieval man, H. Martin spoke of "un animal idéologique". See H. Martin, *Mentalités médiévales. XIe – XIIIe siècle* (1996), pp. 11-14. Paris, 1998.

¹¹ See H.L.A. Hart, *The Concept of Law* (1961), p. 251. Oxford, 1994.

¹² In an article about the relationship between legal learning and practice and philosophy, M.B.E. Smith invited philosophers to be modest about the importance of their contribution to the legal profession, and concentrate on the presentation of normative theories and related criticism alone. This scholar claimed that it would be advisable for jurists to ignore philosophical ethics, and philosophy in general. See M.B.E. Smith, "Should lawyers listen to philosophers about legal ethics?" in *Law and Philosophy* 9 (1990), pp. 67-93, 87-91.

¹³ See G. Zagrebelsky, "Diritto per: valori, principi o regole?" in *Quaderni* 31/II (2002), pp. 865-97, 867.

¹⁴ See J. Raz, *Practical Reason and Norms*, pp. 136-9, 154. London, 1975.

¹⁵ See H.L.A. Hart (1994), p. 39.

that there is an independent science of law is to say with Kelsen again that state sovereignty and "Positivität des Rechtes" coincide.¹⁶ Hence, as soon as consensus is achieved on the view that sovereignty is a "product of the legal imagination",¹⁷ it is logical to assume that jurists, and legal historians as far as the historical dimension is concerned, have the competence to treat this topic. Among legal historians, Frederic Maitland affirmed in his introduction to the translation into English of Gierke's *Die publicistischen Lehren des Mittelalters* - a section of the monumental *Das deutsche Genossenschaftsrecht* (1841-1921) - that the medieval philosophical discussions on political authority were nothing but "sublimated jurisprudence". Political philosophy, Maitland thought, is "compelled" to work with tools that "have been sharpened, if not forged, in the legal smithy".¹⁸ The syllogism leading to attributing to jurists the exclusive competence to treat sovereignty is contradicted by the reality of scholarly work. Jurists and political thinkers, for instance, engaged in discussions on which of the respective disciplines had priority in treating sovereignty. Among political theorists, Harold Laski conceived sovereignty as one of the basic elements of the 'grammar of politics'.¹⁹ We find parochialism among jurists and political thinkers alike. What matters here is to consider that the debates on the idea of sovereignty which occurred in different fields paved the way for the laments about the difficulty of inserting such topic into one specific domain of knowledge. On sovereignty, as Alan James put it, there is an "intellectual quagmire", not the type of clarity expected to pervade scholarly investigation.²⁰

As far as medieval learning is concerned, the solution to the problem of competence presents distinguished features mainly due to the particular presuppositions of reasoning about law in medieval times. According to some scholars, the competence of medieval jurists to treat matters of sovereignty depended on their peculiar sense of justice. In the opinion of Joseph Strayer, for example, love for justice in its various manifestations, not prestige and wealth directly, was "a way of asserting the authority and increasing the power of the

¹⁶ See H. Kelsen (1920), p. 86 (§ 21). The author wrote: "damit erscheint aber die Souveränität des Staates [...] identisch mit der Positivität des Rechtes".

¹⁷ See B. de Witte, "Sovereignty and European integration: the weight of legal tradition", in *Maastricht Journal of European and Comparative Law* 2 (1995), pp. 277-304, 277. The author conceded that sovereignty is the product of "political ideology" too, and traces its origin back to the seventeenth century through the so-called Westphalian model.

¹⁸ See O. von Gierke, *Political Theories in the Middle Ages*, viii. Cambridge, 1900. *Die publicistischen Lehren des Mittelalters* is in turn a section of *Die Staats- und Korporationslehre des Altertums und des Mittelalters und ihre Aufnahme in Deutschland*. See O. von Gierke, *Das deutsche Genossenschaftsrecht* (1841-1921), 3 vols., Graz, 1954.

¹⁹ *A Grammar of Politics* is the title of a book that the political thinker published in 1925. On Laski's attack against the monist theory of sovereignty, see H. Shinoda, *Re-examining Sovereignty. From Classical Theory to the Global Age*, pp. 85-87. London-New York, 2000.

²⁰ See A. James, *Sovereign Statehood. The Basis of International Society*, p. 13. London, 1986.

king or greater lords" in the early medieval period.²¹ Medieval juristic work had important political implications. With the rediscovery of Roman law, Raoul van Caenegem wrote, statesmen, officials, and jurists had become increasingly persuaded that "controlling the law is the way of controlling society".²² As soon as emperors, kings, princes, prelates as temporal lords, and the communes started offering jurists possible prestigious and remunerative careers in the domestic and administrative service, medieval jurists knew the tension between the desire to be involved in politics, and the opposite desire to stay away from it. In relation to the Italian case, Emanuele Conte traced the origin of the juristic concern with, and its proximity to political power to the mid-thirteenth century, and contended that originally not the jurists, but "lay and ecclesiastical publicists" made the law an instrument to pursue political ends.²³ Mariateresa Fumagalli Beonio Brocchieri emphasised the active political role that the jurists played since the very beginning.²⁴ The tension between personal engagement and independence was not equally felt among jurists across medieval Europe. In England, for example, for a long time the tendency was that of favouring the employment of clerics in the central offices of the monarchy. In France, contradictory trends confronted each other. On the one hand, after a number of specific prohibitions issued in various councils, from that of Rheims (1131) to that of Montpellier (1215), Honorius III (1216-1227), the pope who crowned Frederick II (1215-1250) emperor in Rome in 1220 had prohibited the teaching of Roman law at the University of Paris with the bull *Super Speculam* on November 22, 1219.²⁵ It was only in 1235 that his successor Gregory IX (1227-1241)

²¹ See J.R. Strayer, *On the Medieval Origins of the Modern State*, p. 29. Princeton (NJ), 1970.

²² See R.C. van Caenegem, *Judges, Legislators, and Professors*, p. 68. Cambridge, 1987.

²³ See E. Conte, "De iure fiscali: il modello statutale giustiniano come programma dell'impero svevo nell'opera di Rolando da Lucca (1191-1217)" in *TvRG* 69 (2001), pp. 221-44.

²⁴ See M. Fumagalli Beonio Brocchieri, *Il pensiero politico medievale*, pp. 57-59. Roma-Bari, 2000.

²⁵ See X, 5, 33, 28. Walter Ullmann thought that with the prohibition the pope gave support to the desire of king Philip II Augustus (1180-1223) to preserve French customary law from the potentially subversive intrusion of the imperialist Roman law. See W. Ullmann, "Honorius III and the prohibition of legal studies" in W. Ullmann, *Law and Jurisdiction in the Middle Ages*, XIII. London, 1988 (originally in *Juridical Review* 60 (1948), pp. 177-86). Stephan Kuttner thought that, taking into consideration the concern of various *magistri theologiae*, the pope intended to preserve the prominent position of the study of theology at Paris against the rising interest for medicine and law. See S. Kuttner, "Papst Honorius III. und das Studium des Zivilrechts" in S. Kuttner, *Gratian and the Schools of Law: 1140-1234*, X. London, 1983 (originally in E. von Coemmerer (ed.), *Festschrift für Martin Wollf: Beiträge zum Zivilrecht und internationalen Privatrecht*, pp. 79-101. Tübingen, 1952). Cortese, supporting the interpretation of Kuttner, added that it was of fundamental importance in the struggle against the heretic movements of those years to preserve the status of theology at Paris. See E. Cortese (1995), II, p. 395. See also

authorised that teaching at Orléans.²⁶ Yet, in southern France, *iurisperiti* and *causidici* contributed to local politics by means of their engagement in feudal principalities, in consular cities, and in cathedral chapters already in the second half of the twelfth century. It was not until the reign of Philip IV that the monarchy made systematic political use of scholastic learning.²⁷ As far as Italy is concerned, Ennio Cortese wrote that it is plausible that the jurists participated more actively in the political developments of communal life from the thirteenth century onwards as the extensive resort to the *quaestiones statutorum* indicates.²⁸ On the other hand, it is precisely in Italy that the access to administrative offices was laicised towards the mid-twelfth century. Most of the time, clerics were excluded from those offices, and the best graduates in law played a major role already towards the end of the twelfth century. As early as the end of the twelfth century, when the papal pursuit of centralization had already engaged the field of legislation, and Frederick I Barbarossa, with the help of the legists, attempted to define with accuracy the *iura regalia* by the list codified at Roncaglia in 1158, canon and civil lawyers were at work in the physical or intellectual proximity of the actual centres of power seeking a balance between competing authoritative claims.²⁹ As Cortese pointed out, already around 1150, in Tuscany, *causidici* and *iudices* played the role of *sapientes* and were very active in delivering *consilia* on matters of public relevance based upon some knowledge of Roman law.³⁰ Most scholars maintain that between the twelfth and thirteenth century the imperial and monarchic law was almost entirely aimed at developing what in modern terminology is called administrative and judicial structures of State control. The

J.A. Brundage, "From classroom to courtroom: Parisian canonists and their career" in ZSS (Kan.Abt.) 114 (1997), pp. 342-361.

²⁶ See R. Feenstra, "L'École de droit d'Orléans au treizième siècle et son rayonnement dans l'Europe médiévale" in *Revue d'histoire des Facultés de droit et de la science juridique* 13 (1992), pp. 23-42.

²⁷ See J. Verger (2000), pp. 95-103. See also M.A. Rodríguez de la Peña, "Rex scholaribus impendebant – the king's image as patron of learning in thirteenth century French and Spanish chronicles: a comparative approach" in *MHJ* 5/1 (2002), pp. 21-36.

²⁸ See E. Cortese, *Il rinascimento giuridico medievale*, pp. 66-71. Roma, 1996.

²⁹ See P.N. Riesenbergh, *Inalienability of Sovereignty in Medieval Political Thought*, p. 6. New York, 1956; J. Verger (2000), pp. 96, 100; J. Coleman (2000), II, pp. 29-38; P. Grossi (1999), pp. 203-10. As far as the type of engagement of canon lawyers is concerned, see J. Canning, "Power and the Pastor: a reassessment of Innocent III's contribution to political ideas" in J.C. Moore, *Pope Innocent III and His World*, pp. 245-57. Aldershot, 1999; K. Pennington (1984), pp. 13-42; J.A. Brundage, "The ethics of the legal profession: medieval Canonists and their clients" in J.A. Brundage, *The Profession and Practice of Medieval Canon Law*, II. Ashgate, 2004 (originally in *The Jurist* 33 [1973], pp. 237-48).

³⁰ See E. Cortese (1996), pp. 13-20. In the service of the Italian communes we find doctors of law who came either from patrician families concerned with trade, or from more modest families that had immigrated from the *contado*. See also E. Artifoni, "Città e comuni" in E. Artifoni et alia (2000), pp. 363-86.

formation of the European states, it has been argued, is to be considered as a process of "progressive appropriation by the State of the task of administering the law in its various manifestations".³¹ Charles McIlwain has seen that process as one of growth of the European national state. In particular, he saw in the nationality principle "the greatest of all factors" in the transition phase "from a medieval into a modern world". The "chief historical prerequisite to the growth of a conception of sovereignty", he argued, "is the existence of a nation with a governmental organ competent to make true law".³² The process of consolidating the territorial monarchies, however, happened at different speeds in different areas of Europe. Matters of obligation, of individual or collective status, and property, Laurent Mayali recalled, were mainly left to the domain of custom instead.³³

The medieval jurists' proximity to the territorial centres of power should not surprise us. Peter Riesenbergh treated this question by dividing the jurists up into three distinct parties. The first group included "the legists in the service of the national states", who employed the discussion on the inalienability of sovereignty "to free their kingdoms from the supremacy of the emperor". The second group included "the more traditionally minded Roman lawyers who placed legal obstacles in the path of an emperor who would mutilate and ultimately destroy the universal secular *imperium*". The third group included "the canonists who were interested in preserving intact those countries held in fief from the Holy See". Obviously, membership in these groups was not restricted to the doctors of the two laws. In fact, Riesenbergh continued, "allied with them in every instance was the publicist or apologist who utilized legal arguments" and "who was likely as well to draw heavily upon his theological, historical, and logical training".³⁴ It is difficult to precisely indicate a *dies a quo* in respect of such a complex matter as the political use of the law. Posing the question of the politicisation of law as we understand it now for the Middle Ages

³¹ See A. Padoa-Schioppa, "Conclusions: models, instruments, principles", in A. Padoa-Schioppa (1997)[B], p. 337.

³² C.H. McIlwain, *The Growth of Political Thought in the West. From the Greeks to the End of the Middle Ages*, p. 391. New York, 1932. See also P.N. Riesenbergh (1956), pp. 3, 19, 81. The thesis that traces the origin of the European nation state to the twelfth and thirteenth centuries is questionable. For an account of its controversial aspects, see G. Sergi (2000), pp. 20-22. On the problem of the *nationes* in the Middle Ages, see W. Pohl, "L'universo barbarico" in E. Artifoni et alia (2000), pp. 65-88.

³³ See L. Mayali, "Lex animata – rationalisation du pouvoir politique et science juridique (XIIe-XIVe siècles)" in A. Gouron and A. Rigaudière (eds.), *Renaissance du pouvoir législative et genèse de l'État*, pp. 131-64, 160-1. Montpellier, 1988. See also P. Grossi, *L'ordine giuridico medievale*, pp. 50-2. Milano, 1999; A. Gouron, "Continuité et discontinuité dans l'histoire du législative medieval: Réflexions sur une recherche collective" in J-P. Genet, *Genèse de l'État moderne. Bilans et perspectives* (Actes du colloque de Paris, 19-20 septembre 1988), pp. 217-26, 222-3. Paris, 1990.

³⁴ See P.N. Riesenbergh (1956), pp. 20-1.

is misleading. In medieval society, law was instrumentality *par excellence*. Likewise, defending medieval jurists from the charge of having entertained seductive relationships with the powers of the day is vain, given the authoritative character of the jurists' statements. That is why, we suppose, there is not much point in denouncing a possible instrumental use of the law in the hands of the jurists as something pathological, or as a deviation. Such a denunciation and the related apology of the medieval jurists' independence rather reflect actual concerns about the, often, problematic relationships between executive and judiciary organs in today's State's life.

In the *Defensor minor*, Marsilius of Padua described how the jurists have intervened in political life since the early days of the then young jurisprudence, namely by means of their authoritative statements about the law. He recalled that there existed at least two sorts of *iudices*: legal experts or doctors and rulers. Authority is handed to the ruler properly called ("*principans proprie vocatur*"), and he is given the power to punish the wrongdoers.³⁵ The legal experts or doctors ("*iurisperiti sive doctores*") had no such power, but could teach about the content of human law, in the same way that bishops or presbyters do in matters related to divine law.³⁶ As exemplified in Bartolus of Saxoferrato's *De regimine civitatis*, jurists were generally convinced that it was their proper task to concern themselves with problems of political authority, the main normative reason being that peace and justice, then often under consideration, are the ultimate ends of law and government.³⁷ Unlike a number of nineteenth and twentieth century positivist jurists, medieval jurists, as well as most seventeenth and eighteenth century jurists, had an inclusive, not an exclusive, attitude towards the treatment of ethical matters, which they considered a relevant province of both legal theory and practice. What are the bases of a competence so understood? Certainly, factors such as the proximity to the centres of power and

³⁵ See Marsilius de Padua, *Defensor minor*, XIII, 7: "*Et rursum quoniam duplex est iudex, unus quidem doctor solummodo et fortassis etiam de aliquibus operator [...] Alius vero iudex est principans proprie vocatus, cui tradita est auctoritas et data coactive potestas ad transgressors legum per poenas arcendos*".

³⁶ See Marsilius de Padua, *Defensor minor*, XIII, 10: "*Sunt et alii iudices secundum legem humanam vocati iurisperiti sive doctores, nullam coactivam auctoritatem habentes inquantum huiusmodi arcendi quemquam in hoc saeculo, per poenam, aliquam realem aut personalem, ad agendum licitum aliquid aut illicitum omittendum, sed solummodo ad docendum et aliquid operandum secundum legem humanam, quemadmodum episcopi sive presbyteri secundum legem divinam*".

³⁷ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 103: "*pax et unio civium debet esse finalis intentio regentis*" (II, 103). Unless otherwise indicated, the quotes from Bartolus' treatise are taken from D. Quaglioni, *Politica e diritto nel Trecento italiano. Il "De tyranno" di Bartolo da Sassoferrato (1314-1357), con l'edizione critica dei trattati "De Guelphis et Gebellinis", "De regimine civitatis" e "De tyranno"*. Firenze, 1983. See also Bartolus de Saxoferrato, *Consilia, Quaestiones et Tractatus*, fol. 152-3. Venetiis, 1575. Compare it on this point with Marsilius de Padua, *Defensor pacis*, I, I, 8; I, IV, 1.

the prospects of wealth and glory greatly contributed to a certain redundant representation of law as the 'queen-discipline'. Yet, it is also true that the jurists managed to excel socially and politically, not so much because they originally retained positions of power but because the art and the texts which they mastered were held in high esteem and deemed to possess immutable wisdom, a "vérité éternelle", by those in power.³⁸ The Accursian principle *omnia in corpore iuris inveniuntur* was an important instrument in the attempt to legitimise the political *status quo*. Franz Wieacker thought that the importance of the jurists' contribution, certainly initially, was due to their techniques, which rendered a certain treatment of public affairs convenient. Along with these factors the metaphysical concept of law, which the jurists commonly held, played a role in configuring their competence.³⁹ In these respect, a certain degree of continuity, at least in general, does exist between diverse medieval authors such as Roger Bacon (c. 1214-c. 1293), who conceived the *practica scientia*, comprising "*moralis et civilis scientia*", as being about "*de salute hominis per virtutem et felicitatem*",⁴⁰ and Baldus de Ubaldis, who, as we have seen already, thought of *philosophia moralis* as 'the mother and gate to all laws', and modern authors such as Adam Smith, for example, who treated jurisprudence and ethics as "the two useful parts of Moral philosophy".⁴¹ Medieval man, however, shared with the legal specialist the view that the law had to be the implementation of God-given values to be found, defined, declared, and preserved for the sake of justice.⁴² As Durandus put it, the promulgation of the laws by all earthly rulers was the way to voice God's will: "*et iura sunt divinitus per ora principum promulgata*".⁴³ Cynus of Pistoia (1270-1336) restated this view by affirming that "*omnis lex est inventio et donum Dei*".⁴⁴ So, in order to identify the objective bases of juristic competence, we have to look at the configuration of law as knowledge divinely founded. We shall see how the employment of the notion of *causa* was an occasion to manifest the jurist's openness towards metaphysical considerations, which we would now consider

³⁸ See D. van Auweele et M. Oosterbosch, "*Consilia Iuridica Louvaniesia. A propos de trois recueils d'avis juridique du XVe siècle*" in F. Stevens et D. van Auweele (eds.), *Houd voet bij stuck. Xenia iuris historiae G. van Dievoet oblata*, pp. 105-48, 105. Leuven, 1990. See also R.C. van Caenegem, "Lawyers and Holy Books" in *Index* 22 (1994), pp. 419-31, 426; E. Cortese (1996), pp. 42-7.

³⁹ See F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, (1952), pp. 93-6, 565. Göttingen, 1967.

⁴⁰ See Roger Bacon, *Operis maioris pars septima - Moralis philosophia*, I, I, in J.H. Bridges (ed.), *The Opus Majus of Roger Bacon*, I, p. 224. Oxford, 1897.

⁴¹ See A. Smith, *The Theory of Moral Sentiments* (1759), VII, IV, 34 (eds. D.D. Raphael and A.L. Macfie). Indianapolis (Ill.), 1984.

⁴² See P. Grossi (1999), pp. 135-44. See also R. Orestano, *Introduzione allo studio del diritto romano*, pp. 186-93. Bologna, 1987.

⁴³ See Gulielmus Durandus, *Speculum iuris*, pars prima, proemium, § 20, fol. 5. Venetiis, apud haeredes Vincentii Valgrisi, 1576.

⁴⁴ See Cynus de Pistorio, *In Codicem et aliquot titulos [...] digesti veteris doctissima commentaria*, proemium § 9. Francoforti ad Moenum, apud I. Feyerabendt, 1578.

external to the law. Now, let us focus on the case of Bartolus of Saxoferrato, which is illuminating. In one doctoral sermon attributed to him and dedicated to his brother Bonaccursius, Bartolus celebrated the grandiosity of the *civilis sapientia* as science “*in se perfecta existens*”. Borrowing a powerful image from the Apocalypse of John (Apc 18, 7), the jurist elevated law to the rank of ‘the queen of the sciences’ and proclaimed that ‘she will never be a widow’. The jurist sanctioned the superiority of law over logic and mathematics, and made it the standard against which all sciences ought to be evaluated, save theology – the only science superior to law. As evidence in support of this view, Bartolus oddly mentioned that the jurists occupy the very first position in civic parades and official ceremonies, preceding all other citizens.⁴⁵ It is interesting to recall that prior to Bartolus, Henricus de Segusio (1200-1271) compared the *civilis sapientia* with the *asinina species*, and *theologia* with the *equina species*.⁴⁶

On the ground of what has already been said, the treatment of sovereignty seems the proper task of the jurists, and that of medieval sovereignty of legal historians. In this perspective, Walter Ullmann once lamented the reluctance on the side of other scholars to benefit from the findings achieved by historians of law. He argued that a kind of ‘unwritten code’ prevented juristic principles and ideas from entering into the exposition of medieval history. He suggested transcending ‘the artificial barriers’ between history of law and other sciences, and advocated a ‘fusion’ of historical and legal findings in order to bring about a more adequate understanding of medieval society.⁴⁷ Hardly any historian today omits mentioning the contribution of civil lawyers and canonists to the definition

⁴⁵ See Bartolus de Saxoferrato, *Sermo domini Bartoli in doctoratu domini Bonaccursii fratris sui in Consilia, Quaestiones et Tractatus*, fol. 182. Venetiis, 1575. The sermon deals with the “*essentialis bonitas et perfectio istius civilis sapientiae*”. Bartolus wrote: “*omnes enim aliae scientiae in se minus perfectae videntur, quia aliarum scientiarum egent suffragio. Non enim perfectus potest esse philosophus, nisi primo sit logicus, nec medicus potest esse perfectus, nisi existat philosophus, nec canonista potest esse perfectus, nisi hac civili sapientia fuerit eruditus, ut evidentia facti demonstrat. Haec autem scientia sola, in se perfecta existens, nullius alterius scientiae eget suffragio [...] non logicorum, non philosophorum, [non] canonistarum [...] sed ipsa tanquam in seipsa existens omnibus suffragatur. Ait enim de seipsa: ‘Sedeo regina, vidua non sum, luctum non videbo’ [...] si ab hac civili sapientia logica, philosophia, medicina vel alia quamvis scientia damnaretur, a nemine nominaretur scientia; et tamen quaelibet scientia est inquantum ab hac civili sapientia sustentatur, excepta sola sacra theologia, cui hanc scientiam fateor esse suppositam [...] Nam videtis iuristas omnibus antecedere, et tempore processionum faciunt iuristas, qui omnibus patrocinantur, praecedere*”.

⁴⁶ Hostiensis wrote: “*sed [...] maior est et dignior equina et asinina? Et [...] est quod equina theologiae scientiae, asinina civili sapientiae poteris comparare*”. See Henricus de Segusio cardinal Hostiensis, *Summa aurea*, proemium, § 12, fol. 10. Venetiis, 1574.

⁴⁷ See W. Ullmann, “Historical jurisprudence, historical politology, and the history of the Middle Ages” in B. Paradisi (a cura di), *La storia del diritto nel quadro delle scienze storiche*, pp. 195-224. Firenze, 1966.

and delimitation of medieval political authority.⁴⁸ With few exceptions, legal historians usually do not mention in their accounts the contribution made by political philosophers and theologians, nor do they refer to the external circumstances that influenced or favoured juristic work. This practice is the result of the adoption of a formalist or isolationist method, as we shall see. It is now perhaps convenient to mention that both the legal notion of sovereignty and the isolationist juristic historical analysis present ambiguities. First, sovereignty constituted a domain on which both juristic work and political pressure insisted and the two overlapped. Edward Gibbon asserted that without taking into consideration imperial politics and ideology we fail to understand how Roman jurisprudence attained "full maturity and perfection". He suggested that the various lawyers could only become so eminent by offering their services not so much to the imperial cause but rather to the cause of the emperors. That is probably the main reason why the great jurists of the second and third centuries A.D. "concurred in teaching that [...] the emperor was freed from the restraint of civil laws, could command by his arbitrary will the lives and fortunes of his subjects, and might dispose of the empire as of his private patrimony".⁴⁹ It should be recalled that in nineteenth century legal scholarship, after having repudiated conceptual jurisprudence and echoing a variety of intellectual inputs, in *Der Kampf ums Recht* (1872) and *Der Zweck im Recht* (1877-84), Rudolph von Jhering focused on the vital interests behind legislation and legal scholarship.⁵⁰ Second, juristic historical analysis owes some of its most important conceptual tools to the contribution of other disciplines. As the history of the notion of *causa* reveals, the ties between medieval legal knowledge and the other sciences were close. Cortese affirmed that although the university elaboration on the Aristotelian four causes exercised a certain influence on the jurists, the reference to them in the prologues of their works had originally a rhetorical and ornamental character. Only gradually they made use of the four causes to define and solve individual legal problems.⁵¹ Undoubtedly, this is the case but we

⁴⁸ See, for example, J. Canning, *A History of Medieval Political Thought, 300-1450*, pp. 114-25. London-New York, 1996; J. Coleman (2000), II, pp. 29-38.

⁴⁹ See E. Gibbon (1909), I, p. 136-7. See also T. Honoré, *Emperors and Lawyers* (1981), pp. 71-138. Oxford, 1994.

⁵⁰ See F. Wieacker (1967), pp. 450-56; G. Fassò (2002), III, pp. 188-95. See also F. Wieacker, "Rudolph Jhering" in ZSS (Rom.Abt.) 86 (1969), pp. 1-36.

⁵¹ This scholar spoke of "omaggio a freddi insegnamenti della retorica". See E. Cortese, *La norma giuridica. Spunti teorici nel diritto commune classico*, I, p. 214. Milano, 1962-64. See also E. Cortese (1995), II, pp. 187-91. For a typically juristic account of the use of 'cause' in medieval jurisprudence, see the classic E.M. Meijers, "Les theories médiévales concernant la cause de la stipulation et la cause de la donation", in *TvRG* 14 (1936), pp. 365-97. In Canon law, 'cause' became synonym for *aequitas* and *ratio*. See G. Le Bras, Ch. Lefebvre, J. Rambaud, *L'age classique: 1140-1378. Sources et théorie du droit*, pp. 352-84.

cannot ignore the fact that such references bore important political and philosophical implications. The employment of *causa* in public law, for instance, was more than a technical solution to a technical problem. While dealing with the customary basis of the *potestas statuendi* of some *civitates*, Bartolus employed the notion of *causa* explaining that the constant observance and adherence to a conduct constitute the "*causa remota*" of custom strictly speaking, whereas the line of tacit consent of the people constitutes its "*causa proxima*".⁵² Had Bartolus not focused on the latter element, the large legislative autonomy of certain *civitates* - something extremely important from the political point of view - would have been left without juridical justification. Moreover, it is particularly interesting to consider that when Bartolus produced his commentaries, the identification between the notion of *causa finalis* and the principle *propter finem agere* was taken for granted and operated in both private and public law.⁵³ To emphasise the importance of such identification while elaborating on the notion of *ratio legis*, Bartolus himself specified that "*causa est de preterito et ratio de futuro*".⁵⁴ The *ratio legis*, identified with the *causa finalis*, is thus the substance of all juridical phenomena, the substance supposed to inform the whole system of laws.⁵⁵ The importance of such identification was known to Cynus of Pistoia, to whom Bartolus has been very close, who above all restated the philosophical teaching that "*scire est rem per causam cognoscere*". In relation to the nature of the *leges* and of the interpretative tasks of the jurist, he distinguished the *causae essendi* from the *causae fiendi*, and then subdivided the former into *causa materialis* and *causa formalis*, and the latter into *causa finalis* and *causa efficiens*, ending up stating that the *causa finalis proxima* of juristic interpretation was "*subiecti cognitio*" and the *causa finalis remota* was "*felicitas seu fictio felicitatis*". For Cynus the primordial *causa efficiens* of all laws was "*ipse Deus, cuius Romanus populus in*

Paris, 1965. See also I. Birocchi, *Causa e categoria generale del contratto. Un problema dogmatico nella cultura privatistica dell'età moderna: il Cinquecento*, pp. 145-53. Torino, 1997.

⁵² Bartolus wrote: "*nam usus et mores sunt causa consuetudinis, dico causa remota. Nam causa proxima est tacitus consensus [populi] qui colligi[tur] ex usu et moribus*". See Bartolus de Saxoferrato, *In primam Digesti veteris, de legibus senatusque consultis et longa consuetudine, de quibus* [2] § 10, fol. 19, Venetiis, 1575. Previously, Bartolus defined custom: "*consuetudo est ius non scriptum moribus et usibus populi vel a maiori parte ipsius, ratione initiatum et continuatum et introductum habens vim legis*" (*ibidem* [1] § 6, fol. 18). In this passage, Bartolus explicitly mention the notion of 'weightier part'.

⁵³ See E. Cortese (1995), II, 191-5.

⁵⁴ Bartolus wrote: "*et longa est differentia inter causam prout hic sumitur et rationem, quia causa est de preterito et ratio e futuro [...] Sed si ratio legis non est de preterito, sed de futuro, tunc viget legis observantia cum viget ratio*". See Bartolus de Saxoferrato, *In secundam Infortiati partem, de conditionibus et demonstrationibus, quod autem* § 18, fol. 112, Venetiis, 1575.

⁵⁵ See E. Cortese (1995), II, p. 187. See also M.G. Fantini, *La cultura del giurista medievale. Natura, causa, ratio*, p. 99. Milano, 1998.

hoc suum organum [fuit]".⁵⁶ As if to suggest that the juristic tribute to the Aristotelian causes was not simply decorative, Pierre de Belleperche (c. 1250-1308), unlike Cynus, did not refer to the Roman people as efficient cause of the law in the *Lectura institutionum*. Belleperche, in fact, specified that the immediate efficient cause was the emperor Justinian ("*immediata causa [efficiens] fuit Iustinianus*"), whereas the mediate cause was ("*causa mediata fuit Deus*") of whom the emperor acted as organ.⁵⁷ Eventually, Lucas de Penne (ca. 1320-ca. 1382) confirmed that God does nothing without reason: "*nihil etiam Deus agit in terra sine causa*".⁵⁸ Beyond the public and private law use of it, *causa* was one of the constituent elements of the universal 'order of things', an order that ranged from the macroscopic to the microscopic level. According to Maria Grazia Fantini, medieval jurists could base their preliminary treatment and employment of *causa* on having as background not directly Aristotelian logic but rather the latter as filtered by theological commentaries on the book of Genesis.⁵⁹ Aristotelian logic and the Scriptures formed the background for the treatment and employment of *causa* jointly, namely in a manner that makes it difficult for us to establish whether logic precedes revelation, or vice versa. In one of his early fourteenth century letters, Dante Alighieri (1265-1321), for example, presents the typically scholastic view that the natural *ratio* and the *auctoritas* of the Scriptures prove that the glory of God shines through the whole universe, although in certain regions more than in others.⁶⁰

Given the influence of the other sciences on medieval jurisprudence, we should also try to determine whether it is the law influencing patterns of social and economic behaviour, or vice versa. Jurists, David Johnston argued, are sometimes inclined to focus on "the *elegantia* of a legal rule or interpretation", and at other times on the *utilitas*, namely "the social utility of a rule".⁶¹ The

⁵⁶ See Cynus de Pistorio, *In Codicem et aliquot titulos [...] digesti veteris doctissima commentaria, proemium* § 9. Francoforti ad Moenum, apud I. Feyerabendt, 1578.

⁵⁷ See Petrus de Bellapertica, *In libros Institutionum [...] commentarii*, rubrica § 30. Lugduni, apud haeredes Simonis Vincentii, 1586. Belleperche also distinguished the "*causa finalis propinqua*", which is "*cognitio subiecti et et scire mentem et potestatem earum*", from the "*causa finalis remota*", which is "*felicitas*", namely the *vita aeterna* gained by proper government (§ 30).

⁵⁸ See Luca de Penna, *Commentaria in tres posteriores libros Codicis Iustiniani, de his qui non impletis stipendiis*, l. *Ignominiae*, § 2, fol. 294. Lugduni, apud Ioann. Iacobi Iuntae, 1582. Luca defines *causa* as "*principium eiusque rei*" (§ 4), and explains in Aristotelian terms that the latter differs from *ratio*: "*nam causa praecedat, ratio vero sequitur. Causa enim est impulsus animi ad aliquid agendum, ratio est agendorum ex causa venientium ordo, secundum philosophum [Aristoteles]*" (§ 8).

⁵⁹ See M.G. Fantini (1998), pp. 57-65, 142-72.

⁶⁰ See Dante Alighieri, "Epistola XIII", § 20: "*dicit ergo quod 'gloria primi motoris', qui Deus est, 'in omnibus partibus universi resplendet', sed ita ut 'in aliqua parte magis, et in aliqua minus'. Quod autem ubique resplendeat, ratio et auctoritas manifestat*".

⁶¹ See D. Johnston, *Roman Law in Context*, pp. 28-9. Cambridge, 1999.

tension between the crystal-clear beauty of legal constructs and their utilitarian vocation places legal historians between Scylla and Charybdes, so to speak. How can we combine aesthetics with pragmatism? What is the proper relationship between scientific rigour, aesthetic contemplation, and political engagement? Certainly, from the twelfth century onwards, men trained in the exegetical interpretation of the Bible, or of Roman law texts, produced a great degree of "clarté organisatrice" in the field of law and government.⁶² This fact does not mean that the series of intellectual efforts made to design viable models of sovereignty can be regarded as merely the effect of Biblical exegesis, and of the rediscovery of both Roman law and of Aristotelian philosophy. In many cases, Johnston observed, it is possible to detect "some broad social or economic significance in the order in which different legal remedies are created". The same problem is posed in accounting for legal change. "Developed legal systems tend to take on a *monumentum* of their own", he continued, so that changes in the law may be brought about by "intellectual creativity" on the side of the jurists, "with the aim of improving or rationalising the legal system". On the other hand, "changes and developments might equally be the result of social pressure, or demands, to be able to do certain things within the framework of the law". Johnston concluded that "in one case the social element will be predominant and in another the technical".⁶³ The author does not say which element prevails in the last instance. The *causidici* were very keen on serving munificent and powerful clients, in turn very keen on making use of the law experts.⁶⁴ Although "law is more than a set of rules designed to preserve the power of the ruling class", Peter Stein and John Shand argued, stability and security, at which law aims, function especially in the interest of the ruling class, which "cannot allow disorder to prevail" if the ruling class is to maintain control of society. On the other hand, due to the fact that "those holding power are not prepared to have it limited", law "aims to control all exercise of power by subjecting its use to fixed rules".⁶⁵ Is this picture not adequate in relation to medieval society? Actually, in Marsilius we also find that law has to do with securing the position of the ruling part. Law, he said, has two purposes. First, it aims at securing civil justice and common benefit. Its secondary purpose is providing security for the rulers, especially hereditary ones, and long duration for government.⁶⁶ There probably is no

⁶² See M. Bloch, *La société féodale* – I – *La formation des liens de dépendance*, p. 189. Paris, 1939-40.

⁶³ See D. Johnston (1999), pp. 28-29.

⁶⁴ See J. Verger (2000), pp. 83-121.

⁶⁵ See P. Stein and J. Shand, *Legal Values in Western Society*, pp. 24-25, 29-58. Edinburgh, 1974.

⁶⁶ See Marsilius de Padua, *Defensor pacis*, I, 11, 1: "*eius [legis] secundum ultimam et propriisimam significationem ostendere volumus necessitatem finalem: principaliorum quidem civile iustum et conferens commune, assecutivam vero quondam principantium, maxime secundum generis successionem, securitatem et principatus diuturnitatem*". Also in the

solution to the 'quest for competence', for sovereignty is a viscose matter altogether. The wish to cut the Gordian knot constituted by the interconnectedness of law, politics, and ideology would at best show once again the degree to which the historical study of legal and political ideas is affected by the application of formalist criteria, which are not adequate in conveying the significance of past events and ideas. A different path to significance in the historical perspective should, and can, be sought.

2.1.2) Sovereignty and the quest for meaning

The second question we wish to treat is related to what has been called 'the quest for meaningfulness' in historical investigation.⁶⁷ As we pointed out, jurists generally claim to be the scholars competent in the analysis of sovereignty on the ground of the fact that they have concerned themselves with matters of law and government. From a normative point of view, in the Middle Ages they did this with a view to promoting peace, justice and social rest. Today, to the extent that jurists do concern themselves with law and government, they do so if the law in its various expressions compels them to do so. The attachment to such matters is thus procedural. In our view, the 'quest for meaning' gains special importance in the historical study of law any time the 'isolationist' approach becomes the predominant methodological paradigm.

There is general agreement among scholars that history ought to be a logically sound and descriptive discipline. In one of his methodological studies, Max Weber argued that in order to obtain objective historical knowledge, the historian must always seek to separate knowing from evaluating, the will to ascertain 'the truth of facts' from the need of defending one's own ideals. So,

Defensor minor, Marsilius deals with the characteristics of human and divine law. See *Defensor minor*, I, 2: "lex vero duplex est, quaedam divinam, quaedam humana. Et sumendo legem in ultima et propria significatione [...] lex divina est praeceptum Dei immediate absque humana deliberatione, de humanis actibus voluntariis fiendis aut omittendis in hoc saeculo, pro fine tamen optimo sive statu cuilibet homini convenienti in futuro saeculo consequendo. Praeceptum, inquam, coactivum transgressionum ipsius in hoc aeculo, sub poena seu supplicio eisdem inferendo in futuro saeculo, non in isto; et dicitur lex ista praeceptum Dei immediate absque humana deliberatione, quoniam licet divina fuerit per hominess promulgate, puta per apostolos et evangelistas, hoc tamen non fuit per ipso neque per ipsorum deliberationem, tamquam per causam efficientem immediate, sed per ipsos tamquam instrumenta per Deum sive Christum inquantum Deum, velut causam efficientem immediate moventem ipsos ad hoc". See also I, 4: "lex vero humana est praeceptum universitatis civium, aut valentior parties eius, legem ferre debentium ipsorum immediate deliberatione de humanis actibus voluntariis cuilibet fiendis vel obtinendis in hoc saeculo pro fine optimo sive statu convenienti cuilibet homini in hoc saeculo consequendo, praeceptum, inquam, coactivum transgressionum ipsius in hoc saeculo per poenam sive supplicium hiisdem transgressoribus inferendum".

⁶⁷ For a discussion of this issue, see J. Tosh, *The Pursuit of History* (1984), pp. 177-92. Harlow, 1999; L. Jordanova, *History in Practice*, pp. 91-113. London-New York, 2000.

establishing, preserving, or modifying any table of values, that is knowledge of what ought to be, is always to be distinguished from conceptually reconstructing and ordering factual data, that is knowledge of what is.⁶⁸ Marc Bloch remarked that properly 'doing history' depends on the historian's desire for truth, which must nourish passion for analysis, explanation, and understanding, not moral judgment.⁶⁹ There seems to be no agreement on the ways to achieve these goals. In nineteenth century positivist thought, the need to reshape human life by means of reliable knowledge is said to have played a central role.⁷⁰ In *System of Logic* (1843), for example, John Stuart Mill expounded his view that "the moral sciences", including history, had been out of step with progress for too long. To emancipate their disciplines from the "backward state" in which they had been abandoned, moral scientists and historians should turn them into proper sciences by the consistent adoption of the statistical and quantitative methods of analysis.⁷¹ In this perspective, all scientific endeavours are directed towards ascertaining the causal relations between observable phenomena and the general

⁶⁸ See M. Weber, "Die Objectivität sozialwissenschaftlicher und sozialpolitischer Erkenntnis" in *Archiv für Sozialwissenschaft und Sozialpolitik* 19 (1904), pp. 22-87. The article also appears in J. Winckelmann (ed.), *Gesammelte Aufsätze zur Wissenschaftslehre* (1922), pp. 146-214. Tübingen, 1951.

⁶⁹ See M. Bloch, *Apologie pour l'histoire ou Métier d'historien* (1945). Paris, 1993. Federico Chabod expounded a similar view in his 1943-44 lectures at the University of Milano first, and then in his 1947-48 and 1958-59 lectures at the University of Rome. These lectures have been summoned and published in F. Chabod, *Storia dell'idea d'Europa* (1961), pp. 15-18. Roma-Bari, 1995.

⁷⁰ According to George Mosse, although during the nineteenth century various attempts to apply science to society were constantly made, the positivist mentality generally "lacked the eighteenth century belief in reason as well as that century's optimism in the potentialities of man". See G.L. Mosse, *The Culture of Western Europe. The Nineteenth and Twentieth Centuries* (1961), p. 205. Boulder-London, 1988. The application of science to society reached its climax then, but "this climax occurred at precisely the same time that science itself began to discard the idea that there is a discovered truth which was irrevocable once it had been discovered" (p. 205).

⁷¹ See J.S. Mill, *A System of Logic Ratiocinative and Inductive* (1843) in J.M. Robson (ed.), *Collected Works of John Stuart Mill*, VIII, pp. 931-42. Toronto, 1974. An early modern example of the positivist mentality is to be found in the lament for the "*pueritia scientiae*" elevated by Francis Bacon in the *Novum Organum* (1620). See J. Spedding (ed.), *The Works of Francis Bacon*, I, p. 125. London, 1857. In *Cours de philosophie positive* (1830-42), and *Catéchisme positiviste* (1852), Auguste Comte defended the advent of a 'positive era' of material and intellectual development following the backward ones – the theological and the metaphysical. For a critical examination of the bases of 'scientific history', see R.G. Collingwood, *Speculum mentis or The Map of Knowledge*, pp. 208-9. Oxford, 1924. "Science", the author provocatively wrote, "is the question whose answer is history" (p. 186). See also G-H. Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik* (1960), in *Gesammelte Werke*, I, pp. 15-24, 201-22. Tübingen, 1986; L. Jordanova (2000), pp. 91-113.

laws governing them. Among logical positivists it is repeatedly said that there is no fundamental logical difference between the principles according to which we explain natural changes and those according to which we explain social changes.⁷² Everyone knows that if rules of logic are ignored, accurate statements about anything are impossible. Yet, as long as statements are expected to convey meaning, we should also deal with the question of what is meaning, namely what kind of meaningfulness we can hope to achieve in the context of historical investigation. This problem gives us the chance to elaborate on the notion of significance and possibly distinguish it from that of meaning as narrowly understood in conceptual or logic formalism.

Generally, something is said to be significant in two senses, one of which may be called phenomenal or naturalistic, and the other conceptual. Within the domain of the natural sciences, Bertrand Russell explained, "to say that a fact is significant is to say that it helps to establish or to refute some general laws", on the presupposition that the most appropriate method consists in "observing such facts as will enable the observer to discover general laws governing facts of the kind in question".⁷³ Sovereignty could then be described as a distinct phenomenon, as an *événement* whose significance resides in its aptness to confirm or refute some general laws of development. Georg W.F. Hegel and Henry Sumner Maine can be taken here as distinguished examples of scholars concerned with the laws of historical development. But what kind of laws would then be at stake? In *Vorlesungen über die Philosophie der Weltgeschichte* (1822-23), with regard to medieval history, Hegel claimed that the struggles for sovereignty have been the instrument through which the European nation-states affirmed their internal and external independence, on the presupposition that the rationality of the Spirit pervading World-History had set the conditions for their inevitable emergence and affirmation as ethical substances.⁷⁴ In *Ancient Law* (1861), Maine repeatedly referred to the general and progressive laws of development valid for every society, which partially led, and still lead, mankind from the pre-eminence of *status* to that of *contract*. The force of such laws allows

⁷² For a critical discussion of this set of assumptions, see P. Winch, *The Idea of a Social Science and its Relation to Philosophy* (1958), pp. 66-94. London, 1995. For an account of the influence of these positions on historiography, see E. Breisach (1994), p. 272-90.

⁷³ See B. Russell, *The Scientific Outlook* (1931), pp. 40, 3. London-New York, 2001.

⁷⁴ See G.W.F. Hegel, *Vorlesungen über die Philosophie der Weltgeschichte* (1822-23) in G.W.F. Hegel *Werke* (eds. E. Moldenhauer and K.M. Michel) 12, pp. 477-88. Frankfurt am Main, 1970. In the *Grundlinien der Philosophie des Rechts* (1821), Hegel had defined the State in the following terms: "Der Staat ist die Wirklichkeit der sittlichen Idee – der sittliche Geist, als der offenbare, sich selbst deutliche, substantielle Wille, der sich denkt und weiss und das, was er weiss und insofern er es weiss, vollführt" (§ 257). See G.W.F. Hegel *Werke*, 7, p. 398. Frankfurt am Main, 1970. In the *Enzyklopädie der philosophischen Wissenschaften im Grundrisse* (1830), he restated that "Der Staat ist die selbstbewusste sittliche Substanz" (§ 535). See G.W.F. Hegel *Werke*, 10, p. 330. Frankfurt am Main, 1970.

peoples and civilizations to move out of “the infancy of mankind”.⁷⁵ He distinguished societies based on their degree of development, asserting that “the stationary condition of the human race is the rule, the progressive the exception”. In most dynamic societies like the Western, Sumner Maine argued, legal civilization progresses from a primitive stage in which law prevails as a system of symbolic fictions to an advanced stage in which law prevails as legislation. The transition requires an intermediate passage, that in which the equitable administration of justice prevails.⁷⁶ We shall further treat the question of the philosophies of history underlying historical investigation in this paragraph. At this point, we only wish to emphasise that any attempt to determine the nature of such laws is deemed to raise controversies due to the double confusion - between laws in the naturalistic and in the historical sense, and between historical trends and empirical social laws - which it necessarily embodies, and marks the transition from merely historical investigation to philosophical history.⁷⁷

There is another, conceptual, sense in which something can be called significant. To avoid being embroiled in any theory of historical development, some jurists took a distance from philosophy of history and adopted conceptual formalism as their guiding mode of analysis. So, in the perspective defended by nineteenth century German jurists such as Georg Puchta, Bernhard Windscheid, and Carl von Gerber, sovereignty was seen as a concept, perhaps one of the most important in law, whose significance coincided with its literal meaning in accordance with legal usage and vocabulary, and with its logical coherence in respect of the legal system of which is part.⁷⁸ This approach has two important implications. The first we have already seen - sovereignty and statehood become indistinguishable from each other. As we shall more specifically argue in the next

⁷⁵ See H. Sumner Maine, *Ancient Law* (1861), pp. 3, 7, 55, 85-9, 390-3. London, 1930.

⁷⁶ See H. Sumner Maine (1930), p. 30-1. On Maine, among others, see L. Capogrossi Colognesi, *Modelli di stato e famiglia nella storiografia dell'800*, pp. 43-98. Roma, 1994.

⁷⁷ Popper referred to ‘the historicist attitude’ in particular. The historicist, he argued, is a type of thinker who “does not recognize that it is he who select and order the facts of history” but is convinced that history itself “determines, by its inherent laws” our problems and our future. It is typical of the historicist attitude to believe that “by contemplating history we may discover the secret, the essence of human destiny”. See K.R. Popper, *The Open Society and its Enemies - II - The High Tide of Prophecy: Hegel, Marx, and the Aftermath* (1945), pp. 266-8. London, 1962. On the prospects of philosophical history, see A. Fucker, “The future of the philosophy of historiography” in *History and Theory* 40 (2001), pp. 37-56.

⁷⁸ Several scholars considered formalism the dominant paradigm in nineteenth century German legal science. See F. Wieacker (1967), pp. 399-401. See also R. Orestano, *Introduzione allo studio del diritto romano*, pp. 221-90. Bologna, 1987. To Philipp von Heck, who was an opponent of legal formalism, we owe the expression *Begriffsjurisprudenz*, and to Jehrung the expression *Konstruktionjurisprudenz* to denote the Pandectist movement. See G. Fassò (2002), III, 178-83.

chapter, such an identification, if used as a heuristic tool, impedes us in detecting the traces of sovereignty in the Middle Ages due to the difficulty of detecting the traces of statehood in the modern sense. It is sufficient to recall now with Padoa-Schioppa that not all the activities of the State in the course of its formation and consolidation in the Middle Ages “can be included under the general heading of law”, and that not everything that then belonged to the domain of law “can be traced, directly or indirectly, to the State”. Much of what has been qualified as medieval law, this author argued, “came into being, and continued to exist outside the state, and not infrequently in opposition to the State”.⁷⁹ The second implication is that the goal of the historian should be reconstructing the past from written legal sources that are examined exegetically.⁸⁰ In the first decades of the twentieth century, the historian of Roman law Fritz Schulz advocated the ‘isolationist’ approach, a variety of legal conceptual formalism. By using this approach, he sought to separate the observable facts in law – legal norms, categories, institutes, and concepts – from the material and intellectual context in which they had been produced.⁸¹ Legal conceptualism as a whole can be seen, *mutatis mutandis*, as a great adaptation and actualisation of the teaching concerned with the “*historia juris interna*”, a teaching expounded by Gottfried Leibniz in *Nova methodus discendae docendaeque jurisprudentiae* (1667), whereby ‘internal historical jurisprudence’ is defined as pertaining “*quae variarum rerum publicarum jura recenset*”.⁸² This reference is important because it is precisely on the basis of a rather inaccurate fusion of historical and conceptual elements that a

⁷⁹ See A. Padoa-Schioppa (1997)[B], p. 337.

⁸⁰ This approach echoes that of the *école de l'exégèse*, which flourished in France during the nineteenth century and was connected to the movement towards codification that had developed in Austria and Prussia. See F. Wieacker (1967), pp. 416-30; G. Fassò (2002), III, pp. 57, 180-3.

⁸¹ See F. Schulz, *Prinzipien des römischen Rechts*, p. 13. München, 1934. Later on this scholar came to assert that there is a number of relevant questions concerning the nature and the implications of legal concepts and institutions that can be better answered by broad historical research than by dogmatic exegesis. Schulz acknowledged that the political and economical circumstances in which legal principles and rules are formed to be excluded from analysis are too important. See F. Schulz, *Classical Roman Law*, pp. 1-4. Oxford, 1949.

⁸² See G.W. Leibniz, *Nova methodus discendae docendaeque jurisprudentiae*, II, § 28, in *Wilhelm Leibniz Sämtliche Schriften und Briefe – Philosophische Schriften*, 6/1, pp. 257-364, 313. Berlin-New York, 1971. Leibniz presented a fourfold partition of jurisprudence: “*didacticam seu positivam ea continentem quae in Libris Authenticis expresse extant [...] historicam, originem, auctores, mutations, abrogationesque legume enarrantem; exegeticam, ipsos Libros [...] interpretantem [...] polemicam seu controversiarum, casus in legibus indecisos ex ratione et similitudine definientem*” (II, § 2, p. 293). He attributed great value to the “*historia juris externa*” too, which is said to be “*necessaria*”. So, Roman history is necessary “*ad intelligendum jus civile, Ecclesiastica ad intelligendum jus canonicum; media ad intelligendum jus feudale; nostrum temporum ad intelligendum jus publicum*” (II, § 29, p. 315).

kind of 'sloppy' legal positivism, as Kelsen himself put it, could emerge towards the end of the nineteenth century.⁸³ However, it is difficult to determine to what extent the scholars who adhered, or adhere, to the formalist paradigm have been influenced by the ideas of the rationality and virtually gapless character of law as a system and of its knowledge, ideas which are of paramount importance among the members of the Law School of Göttingen, chiefly Gustav Hugo, of the Historical School, Friedrich Carl von Savigny, and most Pandectists.⁸⁴

One of the most controversial aspects of formalist analysis is implicit, not explicit. Legal norms and concepts, the conventional and dogmatic starting point, are treated as facts in the same sense in which phenomena are treated as facts in the natural sciences. If our understanding of Kelsen's critique of his positivist predecessors is correct, the error that affects certain types of legal conceptualism is the consequence of an arbitrary identification of the core of positive law ("Positivität des Rechts") with the validity of law ("Geltungsgrunde des Rechts"), and of the latter with the objectivity of law ("Faktizität des Rechts"). Kelsen argued that in the attempt to bypass Natural law and its pretension to base the validity of legal norms upon metaphysical presuppositions, several jurists, including Carl Bergbohm and Gustav Radbruch, had based the validity of the legal norms upon both the acts of will of the sovereign power, that is the State, and constant and effective obedience to the content of those legislative acts on the side of citizens or subjects. Since in the classical positivist view the power of the State as a fact coincides with the fact of law making, all the elements that are part of the law-making process, including norms and concepts, were considered facts too. Kelsen attacked this set of arguments because of their tautological character. He rightly objected that posing the question of the foundation of the legal norms' validity is posing a question about the reasons why those norms ought to be posed at all, not a question about the reasons why those norms are effectively obeyed. The latter is a separate question to which the legal positivists, Kelsen said, gave a pseudo-answer by claiming that the posited legal norms are to be obeyed in as much as they are posited. According to Kelsen, for whom the 'positive' character of law is derived from the *Grundnorm*, law and fact constitute two separate orders. Legal science is knowledge of logical constructs – the norms – not of ordinary facts, let alone that the norms are in his view as real as ordinary facts.⁸⁵ Eventually, the equation between norms and facts, the jurist said, was also an axiom which hard-core legal positivism derived from the Historical School and the interest of its members in

⁸³ See H. Kelsen (1920), pp. 88-101 (§ 22, 23, 24).

⁸⁴ According to F. Wieacker, Savigny expounded his faith in the gapless character of the legal system as system of sources and in the rational character of legal science mainly in his *System des heutigen römischen Rechts* (1839). See F. Wieacker (1967), pp. 436, 381-99. See also R. Orestano (1987), pp. 228-32, 239-70. On the Historical School, see also G. Fassò (2002), III, pp. 40-57.

⁸⁵ See H. Kelsen (1920), pp. 88-92 (§ 22).

historical facts.⁸⁶ Lately, Kelsen focused again on the fundamental difference between the natural sciences, centred upon the principle of causality, whereby certain relationships among phenomena are governed by necessity, and law as 'normative social science', which is centred upon the principle of imputation, whereby the relationships between norms is governed by the will of the legislator.⁸⁷

If we turn to the explicit presuppositions of formalist analysis, starting from the assumption that legal norms and concepts are facts, we see that hardly anything is said about the relations existing between the latter and the events of different kinds causally related to them. In fact, by this omission, the causal role of legal and political ideas, and the material substratum underlying them, in both the reproduction and modification of the social world are eluded. The legal experience of the past is thus reduced to the understanding of 'the verbal means to understanding'.⁸⁸ Such a reduction is particularly striking and is most likely the effect of a lack of critical awareness, or simply acquiescence towards a venerable interpretative tradition, about the axioms of the virtually gapless character of law and of legal science, and of the rational character of the archetype of all modern law in the European continental tradition, the *Corpus iuris civilis*. These two axioms of legal history are intermingled. The belief that the Roman *leges* were *ratio scripta* in particular has a long history, which finds its basis in the medieval period and an important vehicle of transmission in modern scholarship. In the early Middle Ages, the texts authorised by Justinian were regarded as having "quasi-biblical character".⁸⁹ As we have recalled, they were held in high esteem and deemed to embody supreme and immutable wisdom. But what does this judgement explain? In fact, it might be not entirely clear what the relationship is between the idea of wisdom and rationality which is said to be embodied in the Roman law texts and the equally traditional insistence that one of the most important features of Roman lawyers was the "aversion to far

⁸⁶ Kelsen denied legal history the status of science. See H. Kelsen (1920), p. 90 (§ 22).

⁸⁷ Kelsen emphasized that in the natural sciences the relationship between conditions (causes) and consequences (effects), expressed in a law of nature, is independent of man's interference. The principle of causality says: if *A* is, then *B* is (or will be). The principle of imputation says: if *A* is, then *B* ought to be. See H. Kelsen (1960), pp. 78-94.

⁸⁸ Gadamer argued that the most authentic object of understanding is not the verbal and conceptual means of understanding, but the world of interests, desires, resolve, and achievement as it appears to us and which embraces virtually everything about which understanding can be reached, in the forms and to the extent it can be reached. See H-G. Gadamer (1986), I, pp. 449-50.

⁸⁹ See P. Stein, *The Character and Influence of the Roman Civil Law. Historical Essays*, p. 3. London, 1983 (originally published as "Logic and experience in Roman and Common law" in *Boston University Law Review* 59 [1979], pp. 437-51). See also F. Wieacker (1967), p. 56.

reaching abstractions",⁹⁰ and that "Roman law is not readily accessible to the laymen" due to the high degree of sophistication of its "detailed rules" developed by professional jurists who "did not give much attention to the theory of law".⁹¹ This kind of theoretical gap perhaps suggests that in legal history not only has not much been done with regard to demythologising such an assumption, but also that the nature of the very idea of rationality has not been adequately discussed, neither in general, nor in details. For example, hardly any historian, Vincenzo Piano Mortari observed, explained the meaning of the esoteric references to mathematics inserted in the constitution *Tanta* in order to justify the division of the *Digesta* into seven parts. Undoubtedly, such an issue is of marginal importance to the knowledge of how Roman private law was effectively organised, and would be altogether of antiquarian curiosity. Yet at the same time, to know more about such apparently insignificant details may contribute to a better assessment of the sense in which the *Digesta* could be regarded *ratio scripta*.⁹² There must be some awareness on the side of formalist legal historians about the risk of turning the axioms of the gapless character of law and legal science and of the rational character of the *Corpus iuris* into the kind of metaphysical statements that logical positivism wants to eliminate. But awareness of it alone does not prevent us from continuing to venerate the traditional teaching. In respect to current issues, formalist legal theorists are inclined to get out of the impasse produced by the incoherence and irrationalities of positive law by blaming the 'bad legislator' for impeding the full actualisation of the potentiality of both the legal system and legal science.⁹³ Finally, formalist legal historians are inclined to elude an essential problem of historical knowledge. In fact, "however detailed a historical discourse may be", Ernst Nagel argued, "it is never an exhaustive account of what actually happened". In the light of "the inexhaustibly numerous relations in which a given event stands to other events, no account can ever render the full reality of what has

⁹⁰ See F. Schulz (1949), pp. 1-4. See also V. Arangio-Ruiz, *Istituzioni di diritto romano*, p. 15. Napoli, 1954.

⁹¹ See P. Stein, *Roman Law in European History*, p. 1. Cambridge, 1999. This scholar insisted on the conventional distinction between the Greeks, who "speculated a great deal about the nature of law and about its place in society", but had not particularly developed sets of laws due to the little room they gave to the "science of law", and the Romans, who were interested "in the rules governing an individual's property and what he could make another person do for him by legal proceedings" (p.1). How much of our attitude towards the law do we find in this view?

⁹² See V. Piano Mortari, *Aspetti del pensiero giuridico medievale* (1979), p. 38. Napoli, 1992. A recent article by Tony Honoré on the ways in which Tribonian organised the compilation of the *Digesta* may be taken as an example of the approach reducing the historical significance of an event or of a text to its internal logical meaning. See T. Honoré, "How Tribonian organised the compilation of Justinian's Digest" in ZSS (Rom.Abt.) 121 (2004), pp. 1-43.

⁹³ See G. Zagrebelsky (2002), p. 867.

occurred".⁹⁴ Exactly the same can be said in relation to the historical knowledge of legal norms and concepts, including sovereignty. An alternative way to 'significance' in history in general, and legal history and history of legal and political ideas in particular, should, and can, be sought. Indeed, medieval sovereignty is neither an observable fact in the sense in which natural phenomena are said to be observable in the natural sciences, nor a mere individual *événement* in the sense in which an event is said to take place in scientific history. Rather, it is a constellation of thought or belief in the ability to command obedience by coercion and the exercise of jurisdiction in a political community, which has been handed over to us in the form of written and visual witnesses,⁹⁵ which we may intellectually detect through the *temps long* approach,⁹⁶ and which presupposes struggles for power in turn as an expression of both material and non-material concerns.⁹⁷ In the perspective of Robin Collingwood, sovereignty as an idea may be taken as a "testimony", not of what happened, but of what the people who debated and wrote about it wanted their contemporaries to believe, or wanted to believe themselves.⁹⁸ In accordance with such presuppositions, if we understand his point of view correctly, Skinner, as

⁹⁴ See E. Nagel, "The logic of historical analysis" in H. Feigl and M. Brodbeck (eds.), *Readings in the Philosophy of Science*, pp. 688-700, 691. New York, 1953.

⁹⁵ In recent scholarship, the importance of the medieval iconography of power relationships has been emphasised. See, for example, S. Bertelli, "*Rex et sacerdos*: the holiness of the king in European civilization" and G. Danbolt, "Visual images of papal power: the legitimation of papal power in the thirteenth and fifteenth centuries" in A. Ellenius (ed.), *Iconography, Propaganda, and Legitimation*, pp. 123-45, 147-71. Oxford, 1998.

⁹⁶ In a 1958 article, Fernand Braudel treated the "dialectique de la durée". History is duration. Not duration, but the fragmentation of it into sections and parts, he claimed, is the direct product of our creativity. See F. Braudel, "Histoire et sciences sociales. La longue durée" in *Annales d'histoire économique et sociale*, 13 (1958), pp. 725-53 (now in *Écrits sur l'histoire*, pp. 41-83. Paris, 1966). The dialectic of duration is a conception presenting philosophical connotations, and can be compared with that of Henri Bergson. In *L'Évolution créatrice* (1907), he thought of time as duration and *création continue*. He wrote: "Car notre durée n'est pas un instant qui remplace un instant [...] la durée est le progrès continu du passé qui ronge l'avenir et qui gonfle en avançant". See H. Bergson, *Œuvres*, p. 498 (eds. A. Robinet et H. Gouhier). Paris, 1963. In *La pensée et le mouvant* (1934), Bergson restated his critical position towards the historians' habit to have recourse to a 'spatial' conception of time: "Si le mouvement est une série de positions et le changement une série d'états, le temps est fait de parties distinctes et juxtaposées [...] La succession ainsi entendue – semblable à celle des images d'un film cinématographique [...] marque un déficit: elle traduit une infirmité de notre perception, condamnée à détailler le film image par image au lieu de la saisir globalement. Bref, le temps ainsi envisagé n'est qu'un espace idéal" (pp. 1259-60).

⁹⁷ For an account of the influence of *la culture matérielle*, see J.-M. Pesez, "Histoire de la culture matérielle" in J. Le Goff, R. Chartier, J. Revel (eds.), *La nouvelle histoire*, pp. 98-132. Paris, 1978.

⁹⁸ See R.G. Collingwood (1924), p. 237.

we pointed out already, advanced his contention that political and public law writings should be seen as a form of political action, and their historical meaning should be understood by recovering the possible intentions of the authors who produced them. In an article published at the beginning of the 1980s, Shapiro, who shared with Skinner the view that legal and political writing is political action anyway, claimed that the approach of the Cambridge historian is 'conservative', not because it has a particular doctrine to defend but because it undermines the causal roles of political and legal ideas in the reproduction of the social world.⁹⁹ As far as we are concerned, we do not see how Skinner's approach may be regarded as alien or in contrast to realist concerns. What matters here is the meaning we attribute to the terms *realist* and *realism*. If the task of the realist scholar, as Shapiro suggested, is to discover the ways in which political and legal ideas are deeply embedded in the reproduction of the economic, social and political world, then Skinner is a realist scholar. In fact, to suggest that in defending particular ideas or doctrines a writer 'does something' is to suggest that that author may well contribute to the reproduction of the economic, social and political world. Finally, in Skinner's method we also find the traces of that special type of realism conceived of by Karl Popper, which has as its focus the need to treat ideas and doctrines as an instance in the universe of theoretical problems. Popper called this universe "world three", and argued that it forms, along with the world of physical occurrences - "world one" - and the world of the states of mind - "world two" - the horizon of our temporal experience.¹⁰⁰ The claim that methodological formalism serves the purpose of clarity and coherence is not a sufficient condition to infer that the approach at stake ought to be applied to medieval law and government. What we should avoid is what Skinner called the "mythology of coherence". It is often said that the duty of the scholar is to discover the 'inner coherence' of a writer's doctrine. Frequently, past writers are classified according to models to which they are expected to conform, and that are entirely or partially alien to them. This procedure gives the thoughts of the major authors of the past "a coherence, and an air generally of a closed system, which they may never have attained or even aspired to attain".¹⁰¹ However defined, a possible alternative approach should consider that even in a special

⁹⁹ Shapiro wrote that "political and philosophical ideas are deeply embedded in the reproduction of the economic, social and political world". The task of the realist scholar is to discover "the specific forms which this embeddedness takes in practice". See I. Shapiro (1982), p. 578. In our opinion, the use of the adjective *conservative* is ambiguous given the context. However, Shapiro rightly poses the question of how to account for non-intentional effects or distorted intentions.

¹⁰⁰ See K.R. Popper, *Objective Knowledge: an Evolutionary Approach* (1972), pp. 106-52, 153-90. Oxford, 1989. Massimo Cacciari saw Europe's intellectual memory as an 'archipelago' of *tópoi* and questions that engaged generations of thinkers and scientists. See M. Cacciari, *L'Arcipelago*, pp. 19-21. Milano, 1997.

¹⁰¹ See Q. Skinner (2002), I, p. 68.

province of the history of ideas as medieval sovereignty the only understanding and observation possible are understanding and observation of a "knowledge of what mind has done in the past".¹⁰² In historical investigation, Friedrich von Hayek recalled, we deal with "beliefs or opinions" forming our data "irrespective of whether they are true or false".¹⁰³ The historical significance of medieval sovereignty in general, and of the Marsilian and Bartolist theories in particular, may be properly understood if they are treated as much as possible not only according to the literal meaning embodied in the writings of the authors concerned, but also according to what they may have intended or meant to *do* by writing what they wrote. In this perspective, words and doctrines, including the medieval doctrines of sovereignty, are deeds. People, Skinner emphasised, generally employ language "not merely to communicate information", but "to claim authority" for some of their utterances. In this perspective, language is an instrument "to create boundaries of inclusion and exclusion".¹⁰⁴

The medieval examples of using a peculiar language to claim authority are numerous. Let us consider, to illustrate the point, one particular aspect of the troubled relations between Gregory VII (1073-1085) and Henry IV (1050-1106). Repeatedly, it has been observed, the pope told the emperor that he had no trust in him. How to interpret the pope's assertions? One possibility is interpreting them as an expression of a certain state of mind aimed at making the emperor aware of a certain situation. If this was the case, we should focus on the correspondence between words and mental facts, and the purpose of the pope's speech act would be merely informative. Another possibility is interpreting them as one way to make the emperor believe that the pope had no trust in him.¹⁰⁵ In this case, the purpose of the pope's speech act would be to provoke a certain course of actions on the side of the emperor. Another example of 'how to do things with words' may be found in Gregory's *Dictatus papae* (1075).¹⁰⁶ The statements contained in that document are not a mere description of a certain state of affairs, and their purpose is not informative. Rather, they aim at authoritatively producing a particularly relevant political construct: the *pontifex imperator*.¹⁰⁷ When, implicitly referring to the Donation of Constantine, Gregory VII stated that the pope has the right to make use of the imperial signs ("*Quod solus possit uti imperialibus insigniis*", VIII) and to depose emperors ("*Quod illi*

¹⁰² See R.G. Collingwood, *The Idea of History* (1946), pp. 218. Oxford, 1961.

¹⁰³ See F.A. von Hayek, *The Counter Revolution of Science. Studies on the Abuse of Reason* (1952), p. 47. Indianapolis (Ill.), 1979.

¹⁰⁴ See Q. Skinner (2003), I, pp. 5, 27-56.

¹⁰⁵ For this interpretation, see G.M. Cantarella, *Il sole e la luna. La rivoluzione di Gregorio VII papa: 1073-1085*, p. 6. Roma, 2005.

¹⁰⁶ We referred to the text of the *Dictatus papae* edited in M. Lupoi, *Alle radici del mondo giuridico europeo. Saggio storico-comparativo*, appendix XXIII. Roma, 1994.

¹⁰⁷ See M. Miglio, "Progetti di supremazia universalistica" in E. Artifoni et alia (2000), pp. 435-63, 445.

liceat imperatores deponere", XII), the statements themselves made the Donation valid.¹⁰⁸ The same goes for the Gregorian statements contained in the *Auctoritates Apostolice Sedis* (1077). When the pope declared that "*nulla scriptura est autentica sine auctoritate eius*" (5); that "*Pape omnis potestas mundi subdi debet*" (26) and "*regna mutare potest*" (27); and that "*solī Pape licet in processionibus insigne, quod regnum vocatur, portare cum reliquo imperiali*" (32), the pope was 'doing things with words'.¹⁰⁹ Finally, it should be obvious that the *iuxta propria principia* approach does not help in establishing or refuting any general law as would be appropriate if we were to apply the methodology of the natural sciences to the historical study of legal and political ideas. A pressing need, as Skinner said, remains to avoid turning history, and history of legal and political ideas in particular, into "a pack of tricks we play on the dead".¹¹⁰

We now wish to draw attention to what may be seen as a hidden prescriptive presupposition of formalism as applied to the historical study of the law. Formalist legal theorists assume that the natural sciences' method *ought to be* applied also in the study of law, past and present, and concentrate on legal language, especially on the presupposition that legal propositions are meaningful only if they express that which is legally verifiable, namely contained in authoritative legal sources. What kind of knowledge of medieval law and government can legal formalism as applied to history produce? Does this method help us in properly addressing the question of sovereignty in historical perspective, and in properly understanding medieval sovereignty in particular? Positivism, as generally understood, is a collection of somehow heterogeneous philosophical doctrines about knowledge, rejecting metaphysics. More particularly, it assumes that explanations lacking reasoning related to experimental conclusions are not true knowledge. These doctrines have a long history, but, strictly speaking, they have mainly been expounded in the work of a number of eminent nineteenth and twentieth century thinkers. The positivist perspective is governed by four general axioms: the scientific method is unitary, scientific knowledge is value-free, the insights that we formulate in general terms have no 'real' references other than individual concrete objects, and there is no fundamental difference between essence and phenomenon. Logical positivism, as we said, takes language as its focus and aims at isolating, in our statements about the world, the contents that convey certainty about the world itself and consequently deserve the name of science. Moreover, it provides the criteria that make it possible to distinguish between what may be and may not be reasonably asked and possibly answered. The expression 'legal positivism' is a familiar one, but it is somehow misleading. It is used generally to designate both a distinct field of knowledge, that is, descriptive legal science or jurisprudence, and its

¹⁰⁸ See G.M. Cantarella (2005), pp. 39-47. See also G.M. Vian, *La donazione di Costantino*, pp. 81-3. Bologna, 2004..

¹⁰⁹ See G.M. Cantarella (2005), pp. 180-2, 341-2.

¹¹⁰ See Q. Skinner (2003), I, p. 65.

object, that is, the law as a man-made system comprising “the positive law only to the total exclusion of those concepts of law based upon” elements “transcending the empirical reality of the legal system”.¹¹¹ We should avoid confusing the medieval description of *ius positivum* with modern descriptive legal science, for their respective presuppositions are notably different. In the first case, no description of positive law bore the mark of an anti-metaphysical position.¹¹² In the case of modern descriptive legal science, the anti-metaphysical standpoint is an essential feature instead. On the other hand, the expression ‘legal positivism’ refers to approaches to law that in spite of their focus on legal concepts and effective legal systems present notable differences. Indeed, under the heading ‘legal positivism’ we find both the *allgemeine Rechtslehre*, advocated by Adolf Merkel, Carl Bergbohm and others, and the *analytical jurisprudence* expounded by Jeremy Bentham and John Austin. Most eighteenth and nineteenth century legal positivists refuted the claim that some principles or rules of human conduct are discoverable by reason alone, as maintained in the Natural law tradition.¹¹³ Yet, not all of them assumed that there is no necessary connection between law and morals. While the jurists of the *allgemeine Rechtslehre* were rather inclined to keep matters of law separated from all philosophical matters, including ethics, “English jurists”, Michael Lobban argued, “did not see

¹¹¹ See L.B. Curzon, *Jurisprudence* (1993), p. 87. London, 1995. See also H. Kelsen (1920), § 21, p. 87; F. Wieacker (1967), pp. 348-513.

¹¹² Petrus Abelardus (1079-1142) was a logician and philosopher contemporary to Irnerius, and very much interested in law. He thought that on the basis of logic all most complex issues arising from the study of the *Corpus iuris* could be solved. In the *Dialogus inter Philosophum, Judaeum et Christianum*, he wrote: “*ius quipped aliud naturale, aliud positivum dicitur. Naturale quidem jus est quod opera complendum esse ipsa quae omnibus naturaliter inest ratio, persuadet, et idcirco apud omnes permanent, ut Deum colere parentes amare, perversos punire, et quorumcumque observantia omnibus est necessaria, ut nulla unquam sine illis merita sufficient. Positivae autem iustitiae illud est, quod ad hominibus institutum, ad utilitatem scilicet vel honestatem tutius muniendam vel amplificandam [...]*”. See Petrus Abelardus, *Dialogus inter Philosophum, Judaeum et Christianum*, col. 1656. For an account of the meaning of positive law in the Middle Ages, see S. Kuttner, “Sur les origines du terme droit positif” in S. Kuttner, *The History of Ideas and Doctrines of Canon Law*, II. London, 1980 (originally in *Revue historique de droit français et étranger* 15 (1936), pp. 728-40); K. Pennigton (1993), pp. 119-64.

¹¹³ See H.L.A. Hart (1994), pp. 185-212, 302; M.H. Kramer, “Dogmas and distortions: legal positivism defended” in *OJLS* 21/4 (2001), pp. 673-701. For a critical approach to legal positivism, see J. Finnis, *Natural Law and Natural Rights* (1980), pp. 3-19. Oxford, 1993. In spite of Kelsen’s teaching, legal positivism appears today as a church, David Dyzenhaus argued. For this author, criticism of it attracts charges of ‘sloppiness, confusion, and misinterpretation’. See D. Dyzenhaus, “The genealogy of legal positivism” in *OJLS* 24/1 (2004), pp. 39-67. See also G. Zagrebelsky (2002), pp. 865-97.

law as cut off from morals".¹¹⁴ For the followers of Bentham and Austin, law had to serve the purpose of social reform based upon utilitarian considerations. Therefore, 'positive law' and 'positive morality' were equally important components of *analytical jurisprudence*.¹¹⁵ Moreover, while these thinkers based their understanding of human utility on "observation and induction from the tendencies of human actions" and were aware of the fact that "such observation and classification could never be perfectly complete",¹¹⁶ the former took not human action but the system of valid norms as the fact to observe, study, and classify, on the presupposition that full knowledge and understanding of such object was achievable.¹¹⁷ In a speech titled *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*, delivered in 1847 and published the year after, Julius von Kirchmann, then state attorney and renowned positivist jurist, criticised the idea that legal knowledge was a science able fully to describe and explain its own object, and that the latter could be treated as if it had eternal stability. He emphasized the *ad hoc* character of the adaptation of the method of the natural sciences to law, an adaptation regarded as naïve. The main argument against the scientific character of the study of law was that while in the natural sciences the observable phenomena retain similar characteristics throughout time and space, in law the contents of which we wish to obtain knowledge constantly change. He compared the task of the jurists to the action of 'worms living on rotten wood', and emphasised the contingent character of law and of legal knowledge by his statement that 'three words of reform from the legislator, and whole bookshelves of legal science become waste paper'. Moreover, in law there are no necessities of the kind regulating the phenomena observable in the natural sciences, and in the study of law, the chance to be influenced by environmental factors and personal motives is bigger than in the natural sciences.¹¹⁸ As already pointed out, in the perspective of Kelsen, legal positivism has taken the form of a *Pure Theory of Law* concerned with the cognition and description of legal norms and norm-

¹¹⁴ See M. Lobban, "Was there a nineteenth century English School of Jurisprudence?" in *JLH* 16/1 (1995), pp. 34-62, 53-4.

¹¹⁵ Philip Schofield argued that Austin defined the proper 'province' of jurisprudence in a much narrower way than Bentham had done. The former "drew a firmer distinction between analysis of legal terms and reform of the law", namely "between jurisprudence and legislation". With Austin, Schofield, concluded, "the role of the jurist was equated with that of the expositor, and the censorial dimension was pushed into the background". See P. Schofield, "Jeremy Bentham and nineteenth century English jurisprudence" in *JLH* 12/1 (1991), pp. 55-88, 63-5. On the relationship between Bentham's political radicalism and religion, see P. Schofield, "Political and religious radicalism in the thought of Jeremy Bentham" in *HPT* 20/1 (1999), pp. 272-91.

¹¹⁶ See P. Schofield (1991), p. 65.

¹¹⁷ See G. Fassò (2002), III, pp. 176-87.

¹¹⁸ See G. Fassò (2002), III, pp. 162-3. See also F. Wieacker (1967), p. 415.

constituted relations between norm-determined facts.¹¹⁹ Accordingly, a number of legal practitioners, legal theorists, and historians have condemned anything exceeding the domain of authoritative positive considerations and formalist analysis to irrelevance. In more recent times, Herbert Hart promoted a view of law that is both general and descriptive. General, he said, in the sense that “it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution”, and descriptive in the sense that “it is morally neutral and has no justificatory aims”.¹²⁰ Legal positivists, Joseph Raz explained, seek “to identify law on the basis of non-evaluative characteristics only”.¹²¹ Notwithstanding, even taking into proper consideration this contention, we may still realise that the positivistic approach fails to throw adequate light on what medieval lawyers thought, because, per definition, such an approach excludes from its scrutiny many of the ideas and doctrines that medieval jurists were impregnated with. As we noted already, by positivistic standards, most of those ideas and doctrines are to be relegated to the universe of the legally irrelevant. On the one hand, in fact, the positivistic approach recalls that law is “a complex social and political institution”, but on the other, as soon as it is employed in the context of historical inquiry, it becomes an instrument whose internal logic manifests itself by rubbing out all the historical elements that do not fit the time-free canons of the positivistic mentality. Positivist legal historians, in the perspective of Collingwood, are thus scholars who *want* an actual fact “to behave as if it were a mere example of some abstract law”. In this way, they reduce historical matters to order “by sheer mutilation”.¹²² The alternative to this, it must be said, would be coming to terms with the fact that “legal history is part of political history”, as van Caenegem argued. In his view, this is the case because the political

¹¹⁹ See H. Kelsen (1960), pp. 72-113. See also H. Kelsen (1978), pp. 71-107.

¹²⁰ See H.L.A. Hart (1994), pp. 239-40. Hard-core positivist jurists, Hart explained, are convinced that the law must “provide reliable public standards of conduct” to be identified “with certainty as matters of plain fact without dependence on controversial moral arguments” (p. 251).

¹²¹ See J. Raz (1975), p. 165. See also his *Ethics and Public Domain*, pp. 194-221. Oxford, 1994. For an account of the current debate on the competing claims about the way we make sense of law as an institutionalised system of norms, see N. Papaspyrou, “On the nature of jurisprudence”, in *Rechtstheorie* 30 (1999), pp. 161-78. In defence of positivistic legal history, Andrew Lewis argued that this discipline must consist in a type of “intellectual history” concerned with “the ways lawyers think”. The author does not explain what the latter expression and the adjective *intellectual* mean or stand for. See A. Lewis, “Legal positivism: some lessons from legal history” in S. Guest (ed.), *Positivism Today*, pp. 65-76, 76. Aldershot, 1996.

¹²² See R.G. Collingwood (1924), pp. 226-7. This philosopher argued that history is irreducible to science due to the impossibility to have a full detection and understanding of the totality of facts. History “as a form of knowledge”, he wrote, “cannot exist” (p. 238).

developments in various countries have been largely responsible “for the respective importance of the judiciary, the legislature, and the law faculties in the shaping of the law”.¹²³ According to Peter Fitzpatrick, legal formalism is part of the intellectual project of modernity and bears mythological elements in misleading mundane fashions.¹²⁴ But what is this project about? It seems to be a twofold and contradictory project whose major goals faced considerable adaptation. On the one hand, it favours security over liberty, seeking to concentrate the monopoly of legislation and coercive force in the hands of the State against social chaos and anarchy.¹²⁵ On the other hand, it promotes liberty and appears as a discourse centred upon a promise of definitive emancipation from limitations of all sorts, which sees in state legislation the most effective instrument to achieve its goals. In the view of Grahame Lock, the current rhetoric of emancipation consists of unreliable source linking science as instrumental rationality and individual self-determination, and is a discourse to which many of us owe a quasi-religious loyalty mostly unconsciously. In this perspective, we are far from having moved “into an era of consistent anti-dogmatism” and “we have substituted new dogmas for old”.¹²⁶ It seems quite clear that in the positivistic context questions about how men arrive at knowledge are not posed, and the fact that certain rules and criteria *ought to be* constantly applied to all domains of knowledge is a prescription, a value-oriented programme, and not a neutral matter of fact.¹²⁷ The legal positivistic discourse is thus dogmatic in the same sense in which alternative concepts of law and legal reasoning are said to

¹²³ See R.C. van Caenegem (1987), p. 108.

¹²⁴ See P. Fitzpatrick, *The Mythology of Modern Law*, p. 3, 48, 55. London-New York, 1992.

¹²⁵ Carl Bergbohm affirmed that positive law is the only law functioning as effective law. Presupposing statehood, it is the only type of law able to secure order. Natural law or rational law bears the seeds of dissolution for any community, and of anarchy. See C. Bergbohm, *Jurisprudenz und Rechtsphilosophie: kritische Abhandlungen*, p. 407. Leipzig, 1892. In this work, the author reduced *Rechtsphilosophie* to positivist *allgemeine Rechtslehre*. In Raz’s view, the law claims authority to regulate all aspects of social life and sets itself as the supreme ‘guardian of society’. The law is a system of norms providing a method of settling disputes authoritatively. Legal norms provide binding guidance for the public institutions whose function is to settle disputes by ‘binding applicative determinations’ and for private individuals whose behaviour may be evaluated and judged by those institutions. See J. Raz (1975), pp. 154, 136-39.

¹²⁶ See G. Lock, “Dogma, heresy and voluntary servitude: from the second millennium to the third”, in *Episteme* 7-8-9 (2001), pp. 9-28, 9. See also his *Oikoumenes promachoi* – Rede uitgesproken door Prof.dr. G.E. Lock bij de aanvaarding van zijn ambt van gewoon hoogleraar in de Politieke filosofie in verband met de Europese rechtscultuur aan de Universiteit Leiden (25 november 2003), pp. 7-11.

¹²⁷ See L. Kolakowski, *Positivist Philosophy: from Hume to the Vienna Circle* (1966), pp. 9-19. Harmondsworth, 1972. In Mosse’s opinion, philosophical positivism was mainly about setting forth political and social theories “in the mantle of scientific truth”. See G.L. Mosse (1988), p. 204.

be dogmatic - therefore deserving annihilation - by legal positivism itself. This truth is relatively difficult to pin down because, as Lock noted, one of the most striking characteristics of the organizing core of the new dogmas is a kind of "anti-dogmatic pretension" forming a discourse strong enough to dull the edge of criticism and even awareness on the point.¹²⁸ There are three main practical advantages in adopting legal formalism in the historical study of the law: concreteness, relative easiness, and independence. The application of the formalist paradigm to legal historical investigation guarantees a constant focus on the established legal order, the man-made *ordo ordinatus*. This focus is commonly taken to be the manifestation of adherence to the fact, and adherence to the fact constitutes an attitude usually praised for its own sake (concreteness). As John Finnis said in relation to Austin's methodological imperativism, legal positivists generally make sure that the guiding terms and concepts of their explanatory models share the 'simplicity' and 'definiteness' found in geometry.¹²⁹ Returning to the positivistic model thus guarantees, at least in theory, a kind of geometrical mastery in relation to the topics examined. This means that there is always the chance to pre-determine the boundaries of the field to be explored and consequently to increase the margins for control and success (relative easiness). We should consider that this approach contributes to reinforcing the idea that law is a "distinct, unified, and internally coherent" field of expertise (independence).¹³⁰ This picture has important implications for it corresponds to a certain configuration of the division of intellectual labour. When Weber, in a famous lecture on professional intellectual labour delivered at the University of München in November 1917, recalled that all modern scientific inquiry presupposes institutional frameworks enabling its feasibility and the production of *useful* results, he emphasised that turning scientific research into a profession had become an unavoidable occurrence and that the degree of specialization in the various branches of knowledge appeared to be subject to a virtually unlimited increase. He then concluded that the fate of those who do research is to operate in a climate that 'knows no prophets, nor God'.¹³¹

¹²⁸ See G. Lock (2001), p. 10.

¹²⁹ See J. Finnis (1993), p. 5.

¹³⁰ See P. Fitzpatrick (1992), p. 3.

¹³¹ See M. Weber, *Wissenschaft als Beruf* (1919) in *Max Weber Gesamtausgabe – I – Schriften und Reden*, Bd. 17, pp. 49-111, 106 (eds. H. Baier, M.R. Lepsius, W.J. Mommsen, W. Schluchter, J. Winckelmann). Tübingen, 1992. Gadamer rejected such an approach arguing that historical sciences interest us "surely not because they are sciences, but because they tell us something that is philosophically relevant, that is, regarding questions that do not concern controlling some field of objects". See H-G. Gadamer et alia, *Gadamer in Conversation. Reflections and Commentary*, p. 110. New Haven-London, 2001. For Feyerabend, "science has ceased to be a philosophical adventure, and has become a business". "Scientists who are as much in need of emotional and financial support as everyone else, especially today", he wrote, "will revise their 'decisions' and

Eventually, that picture neglects that in constructing a conception of law, we are not engaged in a mere description of legal practices but in an evaluative constructive enterprise. Without evaluation "one cannot determine what descriptions are really illuminating and significant", Finnis wrote.¹³² In this perspective, Kuhn's advice to relate scholarly work and its development to the concrete political and social circumstances in which professional communities of committed scholars struggle for their interpretative paradigms might be of interest, as most of the shifts in the criteria determining the legitimacy of both problems and suggested solutions are to a large extent influenced by the 'value-impregnated' character of the membership and loyalty of any research community.¹³³ In the attempt to determine whether legal formalism is a useful tool in the search for medieval sovereignty, we should also consider another important feature. The most significant peculiarity of law as formalist science, Kelsen said, is that it regulates its own creation and application.¹³⁴ This is possible because its very object, namely each legal system, has self-referential character. According to Kelsen, this character consists of the "Positivität des Rechtes", and an "Ursprungsnorm" guarantees this character.¹³⁵ If we turn to it we may realise that what we are dealing with is in fact law as *causa non causata*. To illustrate this point, William Conklin argued that Kelsenian legal reasoning took a "linear direction" towards an "authorizing origin". We should refer to the latter if we want to maintain that each legal system is autonomous and authoritative. All positive law is thus "authored" and the authorizing agents "can be located on an institutional pyramidal hierarchy". Conklin is convinced that the authorising origin "has taken on the character of an invisible *arche* not unlike the unmoved mover of Aristotle and Aquinas".¹³⁶ Kelsen himself acknowledged that the choice of the "Ursprungsnorm" as starting-point is rather arbitrary.¹³⁷ At this point, we see that the formalist view of an *ordo ordinatus* as *causa non causata* contradicts philosophical positivism for which all phenomena presuppose causes. However, that view is entirely inadequate to represent the

they will tend to reject research programmes on a downward trend". See P. Feyerabend (1995), pp. 196-7.

¹³² See J. Finnis (1993), p. 19. See also R. Dworkin (1986), pp. 46, 87-96, 407-13. On this approach, see N. Papaspyrou (1999), pp. 163, 166-70, 178. For a critical account of Dworkin's position, see H.L.A. Hart (1994), pp. 244-54.

¹³³ See T.S. Kuhn, "Logic of discovery or psychology of research?" in I. Lakatos and A. Musgrave (1970), pp. 1-23.

¹³⁴ See H. Kelsen (1960), pp. 72-3.

¹³⁵ See H. Kelsen (1920), § 23, p. 94.

¹³⁶ See W.E. Conklin, *The Invisible Origins of Legal Positivism. A Re-reading of a Tradition*, pp. 295-7. Dordrecht, 2001.

¹³⁷ Kelsen called that starting-point "Verfassung" and specified that "die hypothetische Ursprungsnorm ist nur eine oberste Erzeugungsregel". See H. Kelsen (1920), § 24, pp. 96-7.

major characteristics of medieval legal knowledge. According to Cynus of Pistoia, for example, it would be contradictory to present the *ordo ordinatus* as a *causa non causata* for "*certum [...] secundum rectum et verum ordinem, quod causa causatum, et materia materiatum praeedit*".¹³⁸

We should now take up again the issue we touched upon previously in this paragraph, namely that of the possible relationship between medieval sovereignty and the philosophical views underlying historical investigation. One of the clearest signs of the ambiguity of sovereignty as idea is given by the fact that the theoretical discussions on its status generally, although not always explicitly, presuppose conflicting visions or philosophies of history. It is not easy to detect their presence due to the influence of the paradigm that sees the scientific description of sovereignty as something that should not be affected by interdisciplinary considerations. As we pointed out in the introductory chapter, some scholars deny the possibility to speak of sovereignty in the Middle Ages. Others claim that medieval man knew sovereignty and struggled for it, even if, like in the case of Charles McIlwain, sovereignty in the Middle Ages has been "so blurred and indistinct as to be almost undiscoverable".¹³⁹ The modernist theses, either in the negative or in the affirmative variety, imply a philosophy of history in the sense that they directly or indirectly consider modern times to be the centre of human history and all the rest either a preparation for modernity or a further development of it. They appear to share the same evolutionist standpoint when they conceive the progress of legal and political ideas as one part of a pre-determined and general pattern of development. The negative thesis, as we have seen, sees the variety of relationships of super- and subordination in medieval European society as the type of anarchy that modern law and government managed to overcome by turning the power to give laws over to citizens "without the consent of a superior, an equal, or an inferior" into the primary attribute of sovereignty.¹⁴⁰ By contrast, scholars who are convinced that the roots of modern sovereignty are to be found in the Middle Ages do not see political and legal fragmentation to be in contradiction to the postulate of supreme political authority. The former do not convincingly explain why the evolutionist model would hold true from modern times onwards, but not for the medieval

¹³⁸ See Cynus de Pistorio, *In Codicem et aliquot titulos [...] digesti veteris doctissima commentaria, proemium* § 5. Fancoforti ad Moenum, apud I. Feyerabendt, 1578.

¹³⁹ For the author this is the result of "the long sway of the feudal theory *dominium* in the Middle Ages". See C.H. McIlwain, "A fragment on sovereignty" in *Constitutionalism and the Changing World. Collected Papers* (1939), pp. 47-60, 47. Cambridge, 1969.

¹⁴⁰ See G.H. Sabine and T.L. Thorson (1973), pp. 378. The authors explained that "the other attributes - the power to declare war and treat for peace, to commission magistrate, to act as a court of last resort, to grant dispensations, to coin money, and to tax - all are consequences of the sovereign's position as legal head of the state". In this context, the achievement would be that the sovereign's enactment changes custom, "but not custom enactment".

period. The latter do not clearly account for the application of the evolutionist model to systems of law and government, the medieval and the modern, which they themselves consider to be opposite in many respects. Approaching legal and political ideas from the evolutionist standpoint might be expedient. Yet, it is puzzling that the sense in which we speak of origin and development in the field of legal and political ideas is regarded as self-evident. The risk to produce not historical accounts but what Skinner called “mythology of doctrines” is high. In his view, sometimes historians are inclined to evaluate past authors on the basis of themes and agendas that are mandatory to themselves within the scientific or research programme they are part of. Even if a bias like this is in practice difficult to avoid, too easily we end up either negatively judging authors of the past for having failed to come up with a doctrine on one of the mandatory themes, or congratulating them for their clairvoyance. They should never be seen as having contributed to debates “the terms of which were unavailable to them”, Skinner said.¹⁴¹

2.2) Medieval sovereignty between *auctoritas* and *potestas*.

In the opinion of Kelsen, as we have seen, the positivist doctrines of law emerged as an articulated reaction against the Natural law doctrines.¹⁴² While the latter are generally ‘dualist’, the former are ‘monist’ and aim at eradicating any dualism in law, for example that constituted by the distinction between *auctoritas* and *potestas*. This distinction, which finds its roots in Roman law, and has a metaphysical foundation, forms the heuristic basis from which we started investigating medieval sovereignty. The reference to these notions poses a number of questions. First, the translation of the *auctoritas* and *potestas* into current languages presents specific problems. We resolved to translate *auctoritas* with *authority*, and *potestas* with *power*.¹⁴³ We employ the English term *authority* as denoting something prior to *power*, and more particularly to denote the metaphysical foundation of the exercise of power.

In European legal cultures, a process of gradual assimilation made these two concepts coincident. Secularisation, the related emphasis on the coercive aspects of power, and now globalisation with the parallel phenomenon of the apparently uncontrolled proliferation of the sources of law, eroded any viable

¹⁴¹ See Q. Skinner (2003), I, p. 60.

¹⁴² See H. Kelsen (1920), § 21, p. 86.

¹⁴³ In his study on medieval sovereignty, David translated *auctoritas* with *sovereignty*. He wrote: “de l’*auctoritas* à la souveraineté, il y a une assez remarquable continuité. Le mot souveraineté sert en français à rendre les deux notions que désignait jusque là le terme *auctoritas*: autorité suprême d’une part; refus de reconnaître un supérieur dans l’exercice d’un pouvoir légitime d’autre part”. See M. David (1954), p. 67.

and effective distinction between *auctoritas* and *potestas*.¹⁴⁴ It should not be surprising that the reduction of authority to mere power, especially in the context of the tragic events and outcomes of two world wars, made the search of the limits of state sovereignty a matter of special concern to a large part of twentieth century legal scholarship.¹⁴⁵ In a certain sense, we are the sons and daughters of such a reductive process and thus the orphans of *auctoritas* when *potestas* alone triumphs.¹⁴⁶ This complex process of erosion and assimilation has several causes, which are simultaneously material and cultural in the broad sense. Harold Laski, who had considerable influence in both Britain and America, sharply criticised 'the monistic theory of the State', which became dominant in the late nineteenth century due to the doctrines of a number of German jurists and political thinkers. His *Studies in the Problem of Sovereignty* (1917) constitutes an attempt to demonstrate that political authority and the effective power of the State differ, in that the former does not depend upon the will of the latter – the *ordo ordinatus*, we would say – but on the consent of the members of the political community. The State is merely one of the associations to which people feel allegiance. It is a matter of will and desire and not of essence that the State's laws have pre-eminence and more usual acceptance than any other association.¹⁴⁷ The process that led to the erosion of the distinction *auctoritas/potestas* is paradoxical in many senses, and first because it found in twentieth century liberalism a powerful vehicle of transmission. Liberalism is commonly considered the best remedy against totalitarianism, but liberal legal thought is monist. Hannah Arendt, who advanced an acute analysis of the implications of legal monism, stressed the fact that, due to its anti-dogmatic standpoint, liberalism opposed the superiority of any divinely founded authority over mundane legitimate power. Consequently, it managed to produce an odd result: if there is no authority prior to power, namely no order beyond the

¹⁴⁴ See G. Agamben (2003), pp. 95-113. See also W.E. Conklin (2001), pp. 59-61; S. Mannoni, "Globalizzazione, diritto, stato" in M. Sbriccioli et alia, *Ordo iuris. Storia e forme dell'esperienza giuridica*, pp. 358-72. Milano, 2003; A. Supiot, *Homo juridicus. Essai sur la fonction anthropologique du Droit*, pp. 228-36, 236-40. Paris, 2005.

¹⁴⁵ "The most pressing problem of modern government", McIlwain wrote, is "the preservation of the delicate balance between order and liberty". See C.H. McIlwain, "Government by law" in C.H. McIlwain (1969), pp. 266-82, 277.

¹⁴⁶ See R. Heinze, "Auctoritas", in *Hermes*, 60 (1925), pp. 348-66, 358.

¹⁴⁷ See H.J. Laski, *Studies in the Problem of Sovereignty*, pp. 1-25. New Haven (CT), 1917. Due to his disillusionment with liberalism, Laski shifted to Marxism in the 1930s. Yet, he considered liberal pluralism a stage on the road to the latter. He began to attack legal and political monism as an expression of the capitalist State whose pre-eminence concealed the discrepancy between government and society. Legal and political monism remained a false belief of the politically dominant class. See H.J. Laski, *A Grammar of Politics* (1925), iii-xxi. London, 1938. See also *The State in Theory and Practice* (1935), p. 209. London, 1945.

existing political and legal order, liberal monism won't save us from the risk of arbitrary and unrestrained might.¹⁴⁸ Hardly anybody today would be willing to think of sovereignty beyond power. The common opinion is that either authority is power, or it is not. Daniel Philpott, for example, wrote that "in the *Respublica Christiana*, there was no supreme authority within a territory, manifestly no sovereignty".¹⁴⁹ The problem is that if we follow such opinion we are almost forced to conclude with Spinoza and Kant that only the bearer of all powers, not of the highest power (*summa potestas*), is in fact true sovereign.¹⁵⁰ This is probably one of the main intellectual features of our being 'modern' in matters of law and government. Can we say that this is the destiny of Western law and government? Answering this question goes beyond the boundaries of our study. While the abandonment of the dualism between authority and power has been, and still is, welcomed as a 'liberal' or even 'democratic' achievement, the impossibility of speaking of sovereignty without being concerned with its limits remains tragic. It goes beyond the scope of the present study to evaluate this paradox too. We just wish to treat medieval sovereignty by placing the dualism of *auctoritas* and *potestas* at the centre of attention. In this way, we hope to take a distance from an identification that has become a new dogma in legal and political thought, and, at the same time, to do justice to medieval mentality.

In Roman law, only *auctoritas* could be constituent and regulative of *potestas*. The latter denotes a right to act in accordance with the norms regulating a particular office, whereas the former denotes moral primacy, whether personal or impersonal.¹⁵¹ Taking as his focus Gratian's use of the term, Stephan Kuttner emphasised the threefold meaning of *auctoritas* in the Middle Ages. The first meaning is that denoting the intrinsic value of a text or the prestige of a writer behind it. The second meaning, which is the one that interests us especially, is that concerning the dignity vested in the holder of an office or in a body. The third one is that denoting the mere power to govern that is inherent in an office. Often, he explained, *auctoritas* was seen an "imponderable dignity".¹⁵² The

¹⁴⁸ See H. Arendt, *Between Past and Future*, p. 97. New York, 1961.

¹⁴⁹ See D. Philpott, *Revolutions in Sovereignty. How Ideas Shaped Modern International Relations*, p. 77. Princeton (NJ), 2001.

¹⁵⁰ See B. Spinoza, *Tractatus Theologico-politicus*, XVI, 2; XVI, 20; I. Kant, *Metaphysische Anfangsgründe der Rechtslehre* § 51.

¹⁵¹ See A. Berger, *Encyclopaedic Dictionary of Roman Law*, pp. 368-9, 640. Philadelphia (Penn.), 1953; G. Calboli, "Auctoritas", in *Der Neue Pauly. Enzyklopädie der Antike*, 2, coll. 266-7. Stuttgart-Weimar, 1997; L. de Libero, "Potestas", *ibidem*, 10, coll. 232-3. Stuttgart-Weimar, 2001.

¹⁵² See S. Kuttner, "On *auctoritas* in the writing of medieval canonists: the vocabulary of Gratian" in S. Kuttner, *Studies in the History of Medieval Canon Law*, VII, pp. 73, 79. London, 1990 (originally in S. Kuttner, *La notion d'autorité au Moyen Age: Islam, Byzance, Occident*, pp. 69-80. Paris, 1982). In medieval law and government, David wrote, *auctoritas* and *potestas* "apparaissent comme deux aspects du pouvoir politique

specific term *potestas* denoting a legally sanctioned power-position is a derivation from the general *potentia*, an active property condensed in the ability to exercise control over others.¹⁵³ In the Middle Ages, as Jeannine Quillet recalled, the term *potestas* was used in three distinguished, and yet related, perspectives. In the political perspective, *potestas* appears in expressions such as *potestas dominandi et praesidendi*, *potestas publica*, *potestas regalis* or *regia*, *potestas saecularis*, or *temporalis*, or *terrene*. In the legal perspective, it appears in expressions such as *potestas iurisdictionis*, and *potestas iudiciaria*. Finally, in the canonical and ecclesiological perspective, it appears in expressions such as *potestas clavium* or *ordinis*, *potestas dimittendi et retinendi*, *potestas ecclesiastica*, *potestas sacramentalis*, *potestas magisterial*, *potestas spiritualis*, *potestas ligandi et solvendi*, and *plenitudo potestatis*.¹⁵⁴ The specific term *auctoritas* as synonymous with right or power to authorize is a derivation from the verb *augeo* denoting the power to increase in quantity and/or in value, in number, in intensity, in might, dignity etc. The term *auctor*, moreover, refers to the prime mover or agent, in other words to a *causa prima* or *efficiens*.¹⁵⁵ In a famous letter addressed to the Emperor Anastasius I (491-518), pope Gelasius I (492-496) distinguished the "*auctoritas sacrata pontificum*" from the "*regalis potestas*" conveying such a substantive meaning as the pre-eminence of the moral and spiritual teaching of the Church.¹⁵⁶ From a causal point of view,

fondamentalement un: une même réalité en somme, vue simplement sous deux angles différents". See M. David (1954), p. 34. For an account of *auctoritas/potestas* in the Middle Ages, see also G. Tabacco, *La relazione fra i concetti di potere temporale e di potere spirituale nella tradizione cristiana fino al secolo XIV*, pp. 19-22, 111. Torino, 1950; S. Mochi Onory, *Fonti canonistiche dell'idea moderna dello stato*, pp. 12-6, 67, 87-9, 111-25, 131, 160, 229, 288. Milano, 1951; R. Folz, *L'idée d'Empire en occident du V au XIV siècle*, pp. 14-5. Paris, 1953; M. David (1954), pp. 20-45; J. Gaudemet, "La souveraineté au Moyen Age. A propos d'un ouvrage récent", in *TvR*, 22 (1954), pp. 461-68.

¹⁵³ McIlwain said that when the causal link between *potestas* and *auctoritas* was clear, the two terms were used interchangeably, but when the causal relation was broken or unclear, and *potestas* was merely factual, the latter was identified with *potentia*. See C.H. McIlwain, "Sovereignty" in C.H. McIlwain (1969), pp. 26-46, 26.

¹⁵⁴ See J. Quillet, "Note sur le concept de pouvoir politique au Moyen Age" in J. Sojcher et G. Hottois (eds.), *Philosophie et Politique*, pp. 137-47, 137-8. Bruxelles, 1980-81.

¹⁵⁵ See E. Forcellini, G. Furlanetto, F. Corradini, G. Perin (eds.), *Lexicon totius latinitatis* (1864-1926). Padova, 1965; C. Du Cange (ed.), *Glossarium mediae et infimae latinitatis*, I, p. 467. Paris, 1937-38.

¹⁵⁶ See Gelasius I, *Epistula ad Anastasium imperatorem*, VIII. Cortese, originally of the opinion that the two terms were used interchangeably for rhetorical purposes and to seek stylistic variety, acknowledged that the distinction in question conveyed a substantive meaning such as the pre-eminence of the moral and spiritual teaching of the Church. See E. Cortese (1962-64), II, p. 207; E. Cortese (1990), pp. 216-7; E. Cortese (2001), p. 36. Ullmann argued that the Gelasian principle is to be interpreted as a hierocratic statement. See W. Ullmann, *The Growth of Papal Government in the Middle Ages. A Study in the Ideological Relations of Clerical to Lay Power*, pp. 20-3. London, 1955; W. Ullmann

any authority presupposes power but not any power is authoritative in the sense just described. The difference is clearly illustrated by a passage from Augustine's *De ordine*, where the author distinguishes divine from human authority in order to emphasise that the most authentic authority is the divine:

*"auctoritas autem partim divina est, partim humana: sed vera, firma, summa ea est quae divina nominatur [...] illa ergo auctoritas divina dicenda est, quae non solum in sensibilibus signis transcendit omnem humanam facultatem, sed et ipsum hominem agens, ostendit ei quosque se propter ipsum depresserit [...] humana vero auctoritas plerumque fallit".*¹⁵⁷

Augustine's construction is centred upon the universal authority of God, "*fons vitae [...] unus et verus creator et rector universitatis*" and "*regnator universae creaturae*", and presupposes an idea of *ordo* by which "*turpis [est] enim omnis pars universo suo non congruens*".¹⁵⁸ To Rufinus (d. ca. 1192), the author of the *Summa Decreti* written between 1157 and 1159, is attributed the distinction between *auctoritas* and *administratio*, the former being the distinctive mark of the papal office alone.¹⁵⁹ According to the French canonist, there exists an ontological distinction between the execution of decisions concerning secular matters (*administratio*), and its moral foundation (*auctoritas*). The pope, being *vicarius Christi*, holds both spiritual and temporal powers: "*summus pontifex, qui beati Petri est vicarius, habet iura terreni regni*".¹⁶⁰ The fact that frequently, in medieval sources, the terms *auctoritas* and *potestas* were used interchangeably creates

(1966), pp. 57-8. See also W. Ensslin, "*Auctoritas und Potestas. Zur Zwei-Gewalten-Theorie des Papstes Gelasius I*", in *Historisches Jahrbuch Görresgesellschaft*, 74 (1955), pp. 661-73.

¹⁵⁷ See Aurelius Augustinus, *De ordine*, II, IX, 27. In this work, Augustine argued that "*ordinem rerum, Zenobi, cum sequi ac tenere cuique proprium tum vero universitatis, quo cohercetur hic mundus et regitur, vel videre vel pandere difficillimum hominibus atque rarissimum est*" (I, I, 1). Moreover, he defined order as follows: "*ordo est quem si tenuerimus in vita perducet ad Deum; et quem nisi tenuerimus in vita, non pervenimus ad Deum*".

¹⁵⁸ See Aurelius Augustinus, *Confessionum libri tredecim*, III, 8.

¹⁵⁹ See H. Singer (ed.), *Die Summa decretorum des magister Rufinus*, D. IV and VIII, pp. 13, 22. Paderborn, 1902. See M. David (1954), p. 36.

¹⁶⁰ Rufinus wrote: "*sed animadvertendum est quod ius aliud est auctoritatis, aliud amministrationis. Et quidem ius auctoritatis quemadmodum in episcopo, ad cuius ius omnes res ecclesiastice spectare videntur, quia eius auctoritate omnia disponuntur; ius autem amministrationis sicut in yconomo, iste enim habet ius amministrandi, se auctoritate caret imperandi: quicquid aliis precipit, non sua, sed episcopi auctoritate indicit [...]. Ipse vero princeps post ipsum [=pontificem] auctoritatem habet seculares regendi, et preter ipsum officium amministrandi: etenim nec apostolicum secularia, nec principem ecclesiastica procurare oportet*". See H. Singer (1902), D. XII, p. 47. See also S. Mochi Onory (1951), pp. 12-6, 87-91, 160-3. M. David (1954), pp. 25-8; E. Cortese (1962-62), II, 206-7.

interpretative difficulties. As the *Dictionarium iuris* by Albericus de Rosciate (ca. 1290-1360) reports, the term *potestas* could be used as synonym for *auctoritas*, but also for *iurisdictio*, *potentia*, *dominium*, and *dignitas*. Albericus, *summus practicus*, recalls that the first bearer of *potestas* is God, that the *potestas Dei* is the foundation of all earthly *potestates*, and that there are two major *potestates* in this world: the *potestas pontificalis* and the *potestas regalis*. Given the priority of the divine over the human, even the Emperor must be subject to the pope.¹⁶¹ This means that the pope's *potestas* is qualitatively superior to that of the Emperor. Baldus de Ubaldis (1327-1400) was to defend the doctrine that the pope alone, who holds both keys and is the guarantor of justice on earth, is superior to the Emperor: "*et non est negandum quod papa, qui habet claves coeli et mundi traditas sibi ad iustitiam, est maior imperatore*".¹⁶² In spite of a certain terminological confusion, Marcel David pointed out that expressions like *auctoritas plena* and *plena potestas* denoted political authority in the mundane sense. Yet, since superiority in power is something different from mere fullness of power, the expression *auctoritas superlativa* was used to denote authority divinely founded, and to designate the *superioritas* of the pope, *vicarius Christi*, over all temporal rulers.¹⁶³ Henricus de Segusio, explained that he who has the plenitude of power, including the pope, has the plenitude inherent to holding that particular office: "*qui habet plenitudinem potestatis, habet plenitudinem officii*".¹⁶⁴ The fact that in various circumstances the terms *auctoritas* and *potestas* were used with different meanings leads us to explore a field full of pitfalls. To emphasise the ontological and moral superiority of *auctoritas* over *potestas*, the expression *auctoritas primaria* was also used. In the *Somnium Viridarii* (ca. 1376), a dialogue between a knight and a cleric regarding the duty owed to the French monarch and the Church, the *clericus* restates the principle that the Church is a mystical body whose head is

¹⁶¹ He wrote: "*potestas Dei praeceat omnium hominum potestatem [...] potestas non est nisi a Deo, sive iubente, sive permittente [...] potestas est duplex, pontificalis et regalis [...] sicut antecedent divina humana, et celestia terrene, et spiritus carnem, sic antecedit potestas pontificalis regalem [...] imperator debet subesse potestati pape*". See Albericus de Rosate, *Dictionarium iuris, tamen civilis quam canonici*, fol. 252. Venetiis, 1651. In dealing with the term *auctoritas*, Albericus wrote: "*authoritate sacra pontificum regitur iste mundus plenam auctoritatem habent rectores sedis apostolice*" (fol. 31).

¹⁶² See Baldus de Ubaldis, *In primam partem digesti veteris*, proemium § 19, fol. 3. Venetiis, 1557.

¹⁶³ David wrote: "*cette potestas plena, pour autant qu'elle n'est pas attribuée par les canonistes au pape et par les romanistes à l'empereur, est donc nul doute une autre façon de designer, non pas l'auctoritas superlativa, mais une auctoritas à portée simplement relative ou comparative [...] un pouvoir plein n'est pas forcément supreme*". Consequently, the *plena auctoritas* or *plena potestas* of the Emperor "après le sacre, ne peut donc, dans son esprit, être suprême. Sa portée est seulement relative". See M. David (1954), pp. 37-40.

¹⁶⁴ See Henricus de Segusio cardinal Hostiensis, *Summa aurea*, I, *De auctoritate et usu pallii, quid sit pallium*, § 2, fol. 154. Venetiis, 1574.

the pope. From this first principle it follows that he is *princeps* in both spiritual and temporal matters but only as far as the *auctoritas primaria* is concerned. In fact, while in spiritual matters the pope holds his powers as a manifestation of *auctoritas primaria*, and has the related power of *immediata executio*, in temporal matters he holds his power *ex primaria auctoritate* alone, being the power of *immediata executio* in the hands of the temporal rulers. Precisely with a view to preserving the integrity of his divine authority, the pope transferred the jurisdiction over all secular matters to the earthly rulers.¹⁶⁵

In the legal-historical perspective, the question of the meaning of the two terms here in question has been related to that of their institutional location. But is speaking about origins in the institutional sense the same as speaking about foundations in the ontological sense? Sovereignty has always been difficult to define in theory and to locate in practice. In his *Rechtslehre*, for instance, Immanuel Kant argued that researching the 'historical origin' ("Geschichtsurkunde") of the process that leads to the establishment of a particular institutional order is vain ("vergeblich").¹⁶⁶ In scholarly literature, 'origin' and 'foundation' are notions that have often been treated as identical.¹⁶⁷ Walter Ullmann, for example, argued that the problem of locating sovereignty coincides with "the problem of the seat of final jurisdiction".¹⁶⁸ We believe that this kind of identity is controversial, for if every foundation is an origin, not every origin is foundational in the ontological sense. Likewise, as we have seen, if every authority is a power, not every power is authoritative strictly speaking. We therefore suggest that answering the question of the location of authority and power is not answering the question of their foundation and meaning.¹⁶⁹ Most medieval civil lawyers addressed the question of the origin of sovereignty starting from Roman law. Accordingly, they focused either on the *lex regia de imperio*, which affirmed that the Roman people were the original bearer of all powers, including the *potestas condendi leges*, and that they transferred "*omnem imperium et omnem potestatem*" to the *princeps*, or to the superior *dignitas* on the side of the Emperor.¹⁷⁰ In the case when the *populus Romanus* was presented as

¹⁶⁵ See M. Schnerb-Lièvre (ed.), *Somnium Viridarii*, I, II, VI. Paris, 1993-95. The *Songe du Vergier* is the 1378 French version of the *Somnium Viridarii* produced for the monarch Charles V (1338-1380) in the years following the French *débauche* against the English at Poitiers in 1356 and the harsh *jacquérie*. On the significance of this work, see J. Quillet, *La philosophie politique du Songe du Vergier (1378). Sources doctrinales*. Paris, 1977.

¹⁶⁶ See I. Kant, *Metaphysische Anfangsgründe der Rechtslehre*, § 52.

¹⁶⁷ On the problematic aspects of the concept of origin in the political perspective, see J. Freund, *L'essence du politique* (1965), pp. 77-79. Paris, 2004.

¹⁶⁸ See W. Ullmann (1966), p. 20.

¹⁶⁹ See P. Grossi (1999), pp. 130-5.

¹⁷⁰ See Dig. 1, 4, 1: "*Quod principi placuit, legis habet vigorem: utpote eum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat*". See also Cod. 1, 17, 1, 7; Inst. 1, 2, 6. See E. Cortese, (1962-64), II, pp. 169-239.

the original *locus* of sovereignty, the term *populus* meant 'organised people', namely the political community. St. Isidore of Seville had already restated in Ciceronian fashion that "*populus ergo tota civitas est coetus humanae multitudinis, iuris consensus et concordi communione sociatus*".¹⁷¹ Locating sovereignty by the Roman people is nothing but moving within the boundaries of the *ordo ordinatus*, an order merely presupposed and even obscure as far as its foundation is concerned.¹⁷² Considering the problem of the location of sovereignty from the point of view of the *ordo ordinans* means posing the question of the foundation, not just of the origin, of both people's and Emperor's *potestas condendi leges*. Roman law deals with this problem in an ambiguous manner for only the Emperor is said to be above the laws, being *minister Dei*.¹⁷³ That is why a decision given by the Emperor had the force of law.¹⁷⁴ The ambiguity of Roman law on the point increases once it is said, as in the constitution *Digna vox*, that being subject to the laws is considered to be proper to the majesty of the Emperor.¹⁷⁵ The paradox of a sovereign being outside and inside the legal order has not ceased over time to constitute a matter of special concern.¹⁷⁶ As far as the question of the identification of sovereignty is concerned, we shall refer to the notion of *iurisdictio* as the key to answering that question.

In medieval texts *iurisdictio* is given the same role of supreme legal and political instance that in modern sources is attributed to sovereignty. Accordingly, it has been seen as the principal 'image of political power'.¹⁷⁷ In his *Summa Codicis*, Azo (d. 1220) defined *iurisdictio* as the major public law power

¹⁷¹ See Isidorus Hispalensis, *Etymologiarum libri XX*, IX, V, 5-6. See also Cicero, *De republica*, XXV: "*populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus*".

¹⁷² Cortese noted that any time the notion of 'people' was subject to discussion, the Roman private law principle that "*nemo plus iuris ad alium transferre potest quam ipse habet*" (Dig. 50, 17, 54) was invoked to lend support to the configuration of sovereignty contained in the *lex regia*. See E. Cortese (1962-64), II, p. 180.

¹⁷³ In the constitution *Deo auctore* it is said: "*Deo auctore nostrum gubernantes imperium, quod nobis a caelesti maiestate traditum est, et bella feliciter peragimus et pacem decoramus et statum rei publicae sustentamus*".

¹⁷⁴ See Dig. 1, 3, 31: "*princeps legibus solutus est*".

¹⁷⁵ Cod. 1, 14, 4: "*Digna vox maiestate regnantis legibus alligatum se principem profiteri: adeo de auctoritate iuris nostra pendet auctoritas; et re vera maius imperio est submittere legibus principatum*".

¹⁷⁶ See G. Agamben, *Homo Sacer. Il potere sovrano e la nuda vita*, pp. 19-35. Torino, 1995. Martin Loughlin suggested that there must always be a constituent power functioning as "the generative principle of public law", and "being relational, political power does not reside in any particular *locus*". See M. Loughlin, *The Idea of Public Law*, pp. 112-3, 81-86. Oxford, 2003.

¹⁷⁷ See P. Costa, *Iurisdictio. Semantica del potere politico nella pubblicistica medievale: 1100-1433* (1969), p. 95. Milano, 2002. See also M. David (1954), pp. 43-5; J. Avril, "Sur l'emploi de *iurisdictio* au Moyen Age (XIIe-XIIIe s.)" in ZSS (Kan.Abt.) 114 (1997), pp. 272-82.

established with a view to securing justice and equity: "*est autem iurisdictio potestas de publico introducta cum necessitate iuris dicendi et aequitatis statuendae*".¹⁷⁸ William of Ockham (ca. 1285-c. 1347) spoke of the sovereign in universalistic and jurisdictional terms as "*caput primum et supremus iudex cunctorum mortalium*", placing the emphasis on the traditional identification of *princeps* and *iudex*.¹⁷⁹ We shall examine the links between sovereignty and jurisdiction in chapter five. Now it suffices to recall that in the *Defensor pacis*, Marsilius referred to the theoretical possibility of universal jurisdiction, while discussing the eight different senses of *plenitudo potestatis*. In the passage concerned, he explained that plenitude of power could be understood as supreme coercive jurisdiction over all governments, peoples, communities, groups, and individuals in the world, or over some of them at least.¹⁸⁰ In the *Defensor minor*, on the basis of the identification between right (*ius*) and law (*lex*), Marsilius asserted that generally, as the term indicated, *iurisdictio* meant 'pronouncement of right'.¹⁸¹ He specifically argued that the latter denotes four types of authoritative activity. In the first sense, 'jurisdictional' describes the activity of the *prudentes* who conceive the rules for civil life. In the second sense, 'jurisdictional' qualifies the activity of the *doctores* who expound and explain the content and purpose of such rules. In the third sense, 'jurisdictional' is used to refer to the activity of the legislator who promulgates the rules in the form of coercive precepts binding upon all. In the fourth sense, 'jurisdictional' characterizes the activity of providing the rules with specific sanctions against possible transgressors. In the third and fourth senses, 'jurisdictional' qualifies the activity of the legislator, and in the fourth sense the activity of the *pars principans*, namely of the *iudex seu princeps* acting on behalf of the legislator, given that his power to coerce is revocable by those who gave it to him.¹⁸² It is worth pointing out already at this stage that a certain ambiguity in

¹⁷⁸ See Summa Azonis, *In tres libros Codicis, De iurisdictione omnium iudicum et de foro competenti*, § 1, fol. 176. Venetiis, 1596.

¹⁷⁹ See Gulielmus de Ockham, *Octo quaestiones de potestate papae*, II, VIII.

¹⁸⁰ See Marsilius de Padua, *Defensor pacis*, II, 23, 3: "*tercio vero modo intelligi potest plenitudo potestatis ea, que supreme iurisdictionis coactive super omnes mundi principatus, populos, communitates, collegia et singulas personas; aut rursum in aliqua horum*".

¹⁸¹ See Marsilius de Padua, *Defensor minor*, I, 2: "*iurisdictio igitur sicut sonat vocabulum est dictio iuris, sive dicere ius; ius autem idem est quod lex*".

¹⁸² See Marsilius de Padua, *Defensor minor*, I, 5: "*rursus autem ius dicere sive legem dicere, quantum ad praesens sufficiat, quattuor modis convenit: uno siquidem modo inveniendō regulam sive rationem agendorum civilium; secundo modo dicendo sive exponendo aliis; tertio modo promulgando eam per modum praecepti coactivi, quemadmodum dictum est, universaliter ad omnes subesse seu legem ferre debentes; quarto modo convenit legem dicere per modum praecepti coactivi particulariter contra unumquemque transgressorem ipsius. Primo autem modo dicere legem convenit prudentibus inventoribus ipsius; secundo modo doctoribus ipsius sive habentibus auctoritatem docendi; tertio modo et quarto cum auctoritate coercendi propria et prima simpliciter transgressions ipsius, convenit latori legis eiusdem; quarto vero modo convenit ius*

the manner of referring to both authority and power was not alien to Marsilius too, who usually paid a great deal of attention to definitions. On the one hand, he used the two terms interchangeably to denote coercive political power ("*coactiva potestas*") generally.¹⁸³ On the other hand, he maintained that *auctoritas* and *potestas* could retain different meanings and positions. As suggested by one passage from the *Defensor minor*, he was perfectly aware of the substantive implications inherent in the distinction between *auctoritas*, which he himself designated as "*tradita*", and *potestas*, which he designated as "*data*".¹⁸⁴ Yet he insisted that the powers of priests are not jurisdictional, therefore coercive. He argued that the expression 'spiritual power' does not denote someone's jurisdiction, which in his view is coercive power exercised by means of sanctions against property or persons for the sake of worldly order.¹⁸⁵ In opposition to the tradition that attributed pre-eminence to *auctoritas*, the mark of spirituality, over any temporal *potestas*, Marsilius called *potestas* the spiritual power, and *auctoritas* the secular one. By the pre-eminence of *auctoritas* over *potestas*, Christian doctrine provided the general framework for the *ordo ordinans* exceeding any given effective manifestation of power relations. Did Marsilius intend to turn the tradition upside-down? Probably the fragment in question only shows that, as far as temporal matters are concerned, Marsilius, in order to denote both spiritual and secular prerogatives, used the terms *potestas* and *auctoritas* interchangeably. In fact, the contrast between "*potestas spiritualis*" and secular "*auctoritas seu iurisdictio*" suggests that the former merely had moral significance "*in hoc saeculo*". We find several examples of this interchangeable use of the two terms in the *Defensor pacis* too, whenever Marsilius deals with the prerogatives of command over the multitude of people on the side of the *pars principans*.¹⁸⁶ The

dicere sive legem iudici seu principi auctoritate legislatoris iam dicti, cum potestate cogendi transgressores, non propria simpliciter, sed ab altero sibi data et ab eodem possibili revocari".

¹⁸³ See Marsilius de Padua, *Defensor minor*, XIII, 9. Marsilius refers to John Chrysostom (*De sacerdotio*, 1, II, c. 3) and Hugh of St. Victor (*De sacramentis*, II, II, 7) to defend the thesis that priests can exercise coercive power only through lay officials: "*omnis coactiva potestas in hoc saeculo datur a legibus sive principibus [...] personae ecclesiasticae [...] iurisdictiones coactivas videlicet per personas saeculares exercent*".

¹⁸⁴ See Marsilius de Padua, *Defensor minor*, XIII, 7: "*iudex est principans proprie vocatus, cui tradita est auctoritas et data coactiva potestas ad transgressores legum per poenas arcendos; et est hic siquidem iudex secundum legem humanam, de quo dixit Apostolus, quod 'Non sine causa gladium portat', id est coactivam et armatam potestatem habet, 'quoniam minister Dei est, vindex in iram ei, qui malum agit'*".

¹⁸⁵ See Marsilius de Padua, *Defensor minor*, XIII, 3: "*et propterea, cum nominator potestas spiritualis, non debet intelligi per talem potestatem auctoritas seu iurisdictio cuiusquam, poena reali aut personali in hoc saeculo coactive, sed qualem docendi et operandi, exhortandi et arguendi*".

¹⁸⁶ See Marsilius de Padua, *Defensor pacis*, III, 3: "*solis sibi convenire auctoritatem precipiendi multitudini communiter aut divisim*". As most interpreters have underlined, Marsilius' most obvious concern was papal plenitude of power, and the major purpose of his

problem which Marsilius had to face was that the particular nature of the powers attributed to the pope by the doctrine of the *vicariatus Christi* seemed to obliterate any significant difference between the dimension of the *ordo ordinans* and that of the *ordo ordinatus*, a difference which he nevertheless intended to preserve.

writings was, as Joseph Canning put it, to destroy the papal claim intellectually. See J. Canning, "The role of power in the political thought of Marsilius of Padua" in *HPT* 20/1 (1999), pp. 21-34, 22.

CHAPTER THREE

THE PROBLEM OF SOVEREIGNTY

- 3.1) Sovereignty as linguistic problem.
 - 3.1.1) The emergence of 'sovereignty' and 'sovereign' in the medieval vocabularies.
- 3.2) Sovereignty as sociological problem.
 - 3.2.1) Sovereignty in Georg Simmel and Max Weber.
- 3.3) Sovereignty as constitutional problem.
 - 3.3.1) Sovereignty and the medieval constitutional problem.
 - 3.3.2) Sovereignty: an ambiguous construct?
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3.1) Sovereignty as linguistic problem

3.1.1) The emergence of 'sovereignty' and 'sovereign' in the medieval vocabularies.

Medieval sovereignty, we argued, is not an event but a constellation of thought occupying one portion of a theoretical universe distant from the one we currently refer to in our discourses on law and government. In this chapter, we shall provide a conceptual map of the sites from which historical investigation on sovereignty, directly or indirectly, departed in the past decades. The sites in question are the scholarly areas in which sovereignty has been treated as a problem. In the etymological perspective, we shall focus on some twelfth and thirteenth century sources to show the senses in which the noun *sovereignty* and the adjective *sovereign* were originally employed, and to possibly explain why most jurists have been reluctant to use it. In the sociological perspective, we shall examine how Georg Simmel (1858-1918) and Max Weber (1864-1920) approached the problem of sovereignty and show that their analyses of the mechanisms of obedience are relevant in understanding medieval sovereignty and sovereignty in general. Finally, we shall explain in what sense the problem of sovereignty can be treated as the constitutional problem *par excellence*. In particular, we will draw attention to the ways in which modern scholars in legal science and constitutional thought have treated sovereignty.

It is commonly maintained that sovereignty is about supremacy. The term *sovereignty* generally denotes the position of supremacy of somebody, or something, in respect of somebody, or something else. Historically, the struggles

for power resulting in more or less fixed hierarchical relations between superiors and inferiors are quests for sovereignty, and constitute what in linguistic analysis is called 'referent'. The typically medieval case of the *maioritas* of the spiritual power against the *minoritas* of all secular powers, which Gregory VII claimed to be the fundamental feature of the only proper and just political and legal order, may be seen as a referent in the linguistic sense. Moving within the boundaries of linguistic analysis, sovereignty is a particular instance, namely a *signum* in one of the two senses expounded by St. Augustine in *De doctrina Christiana* while treating the rules for interpreting the Holy Scriptures. Whatever we learn, Augustine argued, we learn it through signs - "*res per signa discuntur*". He generally called 'sign' a particular thing that makes some other things come to mind, besides the impression that those things present to our senses: "*signum est res praeter speciem, quam ingerit sensibus, aliud aliquid ex se faciens in cogitationem venire*". There are "*naturalia signa*" and "*data signa*". The 'natural signs' - like smoke, which signifies fire, or a footprint, which reveals that an animal has passed by, or the expression of a face revealing certain emotions - produce knowledge of something beyond intention. The 'given signs', like words, are signs that people usually produce in order to show whatever they have felt or learnt and these belong to the domain of intention or the will to signify.¹ In this sense, to recur to the terminology of Ferdinand de Saussure, sovereignty may be taken as particular 'signifier'.² In the same perspective, it may be taken as a 'signified' too, namely as an idea or form in the sense expounded by St. Thomas Aquinas (c. 1225-1274) - "*per ideas intelliguntur formae aliarum rerum, praeter ipsas res existentes*".³ A major difficulty in treating medieval sovereignty *sub specie communicationis* consists in exactly determining the nature of the links existing between the referent, the signified, and the signifier or signifiers. This is a semiotic problem that, due to the limits of this study, cannot be dealt with at length. We take for granted, however, the very possibility that links the three elements - referent, signifier, and signified - do exist. We will rather briefly deal with one specific aspect of this problem. What is the vocabulary which the word *sovereignty* belongs to? As we have already seen, the term in question is generally ascribed to the vocabulary of law and government. What kind of vocabulary is this? We have seen that it is difficult to treat law and government as a unitary

¹ See Aurelius Augustinus, *De doctrina Christiana*, I, II, 2. See also II, I, 1; II, I, 2; II, II, 3.

² This scholar defined the linguistic sign as "le total résultant de l'association d'une signifiant à un signifié". He spoke of the sign as "la combinaison du concept et de l'image acoustique". He called the concept "signifié", and the acoustic image "signifiant" and insisted on the arbitrary character of every linguistic sign. See F. de Saussure, *Cours de linguistique générale* (1915), pp. 99-100, 104-13. Paris, 1960.

³ In this sense, it is a representational model permitting our understanding of a thing, a referent, a concrete and particular state of affairs, and yet somehow independent in respect to the thing or referent to which it refers: "*forma autem alicuius rei praeter ipsam existens*". See Thoma Aquinatis, *Pars Prima Summae Theologiae*, Q. 15, art. 1.

discourse, for law and politics are usually seen as two distinguished disciplines. Was this the case in the Middle Ages too? As we suggested, in so far as any affirmative answer to this question is available, we ought to move cautiously in this area. In medieval sources we find numerous traces revealing the existence of a virtually unitary vocabulary for law and government. In spite of the fact that medieval theorists in general, and jurists in particular, framed their definitions and distinctions in a rather rigid manner, Paul Vinogradóff once noted, they were "moving in a society where the elements of law and political order" had to be somehow "discovered anew".⁴ It is reasonable to assume that the latter favoured the kind of intellectual freedom necessary to the virtually unitary treatment of relevant matters of law and government. This might be the case even if, as we recalled, the jurists were usually the ones claiming to be the only competent specialists who could properly treat those matters. What is relevant in this respect is that they claimed they were entitled to do so on the basis of the Roman law vocabulary, an authoritative vocabulary they were proud to master. Before we look into this matter any further, let us consider another important point. Let us suppose we were able to precisely reconstruct and delimit the borders of a unitary vocabulary for medieval law and government. Still, we should account for the relevant linguistic variations within it. These variations especially concern sovereignty, where locutions ranging from *summa potestas* or *summum imperium* to *sovereignty*, *political authority* and the equivalent in each European language essentially denoted a common referent. Linguistic analysis shows that the boundaries between diverse vocabularies, diachronically and synchronically, are never too rigid. Different locutions, Émile Benveniste argued, might very often descend from common semantic bases. That is why, he noted, if one inquiry takes only into account the portion of vocabulary within which a certain term appeared, the risk of gradually neglecting the original object of investigation increases.⁵ We shall take this observation as a guiding principle in the exploration of the etymological origin and development of sovereignty. At this point, our approach to the matter becomes genealogical.

Etymologically, the term *sovereignty* is not a modern acquisition and it has been used in a legal and political sense in vernacular language prior to Bodin. Today's lexicographers substantially agree on tracing its origin back to ancient French and vernacular Italian.⁶ The *Dictionnaire historique de la langue française*

⁴ See P. Vinogradóff, *Roman Law in Medieval Europe* (1909), p. 69. Oxford, 1961.

⁵ He wrote: "le problème est d'atteindre dans le lexique une réalité indo-européenne. Si en effet on se borne à considérer la portion du vocabulaire qui peut être définie complètement et immédiatement par des correspondances régulières, on est condamné à voir peu à peu l'objet de l'étude se dissoudre". See É. Benveniste, *Le vocabulaire des institutions indo-européennes*, II, p. 179. Paris, 1969.

⁶ The term maintains a common phonetic and morphological structure in Western European languages: *Sovereignty* (adj. *sovereign*) in English; *Souveränität* (adj. *souverän*) in German; *Soevereiniteit* (adj. *soeverein*) in Dutch; *Sovranità* (adj. *sovrano*) in Italian;

(1992), for instance, derives the noun *sovereignty* from the early twelfth century French *suveraineté* and relates the adjective *sovereign* to the eleventh century provincial *sobiran*, in turn derived from the classical Latin root *super-* through the vernacular Italian *soprano*. The *Larousse Dictionnaire étymologique* (2001) specifies that the Old French *suveraineté* appeared in religious literature around 1120. In particular, it appears in the *Psautier d'Oxford*, a prose translation of the Gallican version of some Psalms originally made in England, possibly at Canterbury. The *Dizionario etimologico della lingua italiana* (1988) detects the presence of the adjective *sovrano* in one of the earliest, though fragmentary, document of Italian 'volgare', the *Ritmo laurenziano*, also known as *Cantilena di un giullare toscano*, a poem composed by an unknown minstrel presumably around 1190 in southern Tuscany. In it, Grimaldesco, Bishop of Jesi, is opportunistically prised as 'sovereign of the whole Christian commonwealth' - "*sovrano de tutto regno cristiano*".⁷ This rather sarcastic passage indicates that by the end of the twelfth century the adjective *sovereign* was at least part of political vocabulary. It is doubtful, as many thought and still think, that *sovereignty* did not exist in legal vocabulary. In the *Coutumes de Beauvaisis*, a commentary on French customary law presumably written in 1283 by Philippe de Rémi de Beaumanoir (c. 1250-1296), the term *sovereignty* appeared as the chief attribute of the barons' power, as well as of the king: each baron is sovereign within his barony like the king is sovereign in his kingdom.⁸

Almost three hundreds years later, again in France, Jean Bodin employed the term *sovereignty*. In the first book of *Les Six Livres de la République* (1576), while defining sovereignty as "*puissance absolue et perpetuelle d'une Republique*", Bodin said that no lawyer, nor political philosopher prior to himself, has ever managed to supply a proper definition of sovereignty. Yet, he acknowledged that throughout history different peoples used different names to denote supremacy in power. Among others, the Romans used the word *maiestas*, the Greeks *kyrion*

Souveraineté (adj. *souverain*) in French; *Soberanía* (adj. *soberano*) in Spanish; *Soberania* (adj. *soberano*) in Portuguese.

⁷ See A. Asor Rosa et alia (a cura di), *Antologia della letteratura italiana - I - Il Duecento e Trecento*, p. 27-30. Milano, 1965.

⁸ The author wrote: "*chascuns barons est souverains en sa baronie. Voirs est que li rois est souverains par dessus tous et a de son droit la general garde de tout son roiaume, par quoi il puet fere teus establissemens comme il li plect pour le commun pourfit, et ce qu' il establist doit estre tenu*". See P. de Beaumanoir, *Coutumes de Beauvaisis* (ed. A. Salmon), I, XXXIV, 1043. Paris, 1899. See also M. David (1954), pp. 68-70. About one hundred years later, the *miles* protagonist of the *Somnium Viridarii* restated that the king of France is sovereign in his own kingdom: "*planum est quod rex Francie dicitur dominus in temporalibus regni suo*". See *Somnium Viridarii*, II, LXVII. In the *Songe du Vergier* - the 1378 French version of the *Somnium Viridarii* - the expressions *primaria potestas* and *dominium* are translated as *souveraineté*. See A. Lemaire, *Les lois fondamentales de la monarchia française*, p. 47. Paris, 1902.

archon and *kyrion politeuma*, the Renaissance Italians *segnoria*, and the Hebrews *tomech šebet*.⁹ With the latter notation, Bodin probably meant to suggest that the phenomenon of sovereignty had an old history, and that a variety of words had been used to refer to it in different places, at different times.¹⁰ We might take Bodin's statement as a superfluous notation, but in doing so we would neglect the fact that his approach to political authority was 'essentialist' in the same sense in which the approach of most medieval jurists to law was 'essentialist'. Let us explain what we mean when we call the juristic approach in relation to sovereignty 'essentialist', recurring to the philosophical vocabulary. Sovereignty may be compared with substance in the Aristotelian sense. Confronted by the several names used to denote being, Umberto Eco noted, Aristotle sought to demonstrate in *Metaphysics* that there is identity in substance beyond plurality in language. Given the many names used for it, being is precisely that which is said in many ways, whose variation from time to time and place to place does not affect the thing which being is.¹¹ Similarly, the substance of sovereignty may be seen as the permanent referent beyond the totality of different locutions denoting it. In fact, how can we doubt that the struggles for power are not quests for supremacy? Obviously, many are the ways to conceive of, and justify those

⁹ See J. Bodin, *Les Six Livres de la République*, I, 8. Saved otherwise specified, all Bodin's quotes in this study are taken from the 1593 tenth French edition. In the preface to his *De majestate politica*, Jacobus Bornitius criticised Bodin for having credited himself with a false merit: "*quasi ipse solus jura Imperii intellexisset et detexisset, cum vetustissimis Iureconsultis nota fuerint*". See *Jacobi Bornitii Tractatus duo: I. De majestate politica et summo imperio ejusque functionibus; II. De praemiis in republica decernendis deque eorum generibus differentiis et mutationibus*, Lipsiae, apud Henningum Grosium seniore, 1610. The passage appears in F. Buzzì, *Teologia, politica e diritto tra XVI e XVII secolo*, p. 273. Milano, 2005. The significance of Bodin's configuration of sovereignty has come to be the center of considerable controversies among scholars. See in particular J.W. Allen, *A History of Political Thought in the Sixteenth Century* (1928), pp. 394-444. London, 1951; C.H. McIlwain (1932), pp. 364-94; J.N. Figgis, *The Divine Rights of the Kings*, pp. 126-30. Cambridge, 1934; W.F. Church, *Constitutional Thought in Sixteenth Century France*, pp. 194-244. Cambridge (Mass.), 1941. See more recently, D. Parker, "Law, society and the state in the thought of Jean Bodin" in *HPT* 2/2 (1981), pp. 253-85; A.L. Fell, *Origins of Legislative Sovereignty and the Legislative State – III – Bodin's Humanistic Legal System and the Rejection of 'Medieval Political Theology'*, pp. 42-76, 100-15. Boston, 1987; A.L. Fell, *Origins of Legislative Sovereignty and the Legislative State – V/1 – Modern Origins, Developments and Perspectives against the Background of 'Machiavellism': Pre-modern 'Machiavellism'*, pp. 145-62. Westport (CT), 1993.

¹⁰ J. Hoffman, an author persuaded that sovereignty can be defined if detached from statehood, argued that Bodin "made possible to identify" the phenomenon of "sovereignty in pre-modern forms". See J. Hoffman, *Sovereignty*, p. 37. Buckingham, 1998.

¹¹ See U. Eco, *Semiotica e filosofia del linguaggio*, xiii-xiv. Torino, 1984. See Aristotle, *Metaphysics*, IV, 2 (1003b); VII, 6 (1031b).

quests. But all aim at the establishment of a particular order considered the proper one. These observations, we believe, may strengthen the conclusion suggested in the 1930s by McIlwain. This scholar argued that it was perhaps easy for the seventeenth century followers of Bodin to “emphasise the evident absolutist tendencies of his thought to the exclusion of some of its more liberal elements drawn from medieval precedent”. There is less excuse, he said, “for any view so one-sided in a modern historian than in a publicist of the time of Henry IV or Louis XIII”. In fact, “the more liberal parts of Bodin’s conception of kingship are a heritage of the Middle Ages”, and “the development of the absolute monarchy into an arbitrary one is a modern achievement”.¹² Scholars such as Julian Franklin, Vincenzo Piano Mortari, Simone Goyard-Fabre, Ennio Cortese, Ginevra Conti Odorisio, Kenneth Pennigton, Jean Fabien Spitz, Diana Thermes, and Diego Quaglioni concluded that Bodin’s definition of sovereignty bore no particular new element.¹³ In fact, despite the fact that the French jurist in part sought to take some distance from the imperialist implications of Roman law, and despite his claim that no lawyer, nor political philosopher prior to himself, has ever managed to supply a proper definition of sovereignty, he continued using traditional Roman law terminology. In the 1591 Latin edition of his work, Bodin used terms like *maiestas*, *imperium*, and *summa potestas*: “*maiestas est summa in cives ac subditos legibusque soluta potestas*”.¹⁴ We are inclined to think that the lexical variations occurred to denote supremacy or *superioritas* in a political community did not necessarily correspond to changes on the side of both signified and referent. Hence, if we want to find clear elements of discontinuity in respect to the medieval tradition, we have to look beyond Bodin’s discourse, which still reflects the major features of the medieval ethical conception of law. What, if not a certain metaphysical *ethos*, made Bodin insist on

¹² See C.H. McIlwain (1932), p. 388. Given the context, it seems that the author used the adjective ‘liberal’ in a broad sense.

¹³ See J.H. Franklin, “Bodin and the end of medieval constitutionalism” in H. Denzer (ed), *Jean Bodin. Verhandlung der Internationalen Bodin Tagung in München/Proceedings of the International Conference on Bodin in Munich/Actes du colloque international à Munich*, pp. 151-66. München, 1973; V. Piano Mortari, *Il potere sovrano nella dottrina giuridica del secolo XVI*, pp. 34-63. Napoli, 1973; S. Goyard-Fabre, *Jean Bodin et le droit de la république*, pp. 159-71. Paris, 1989; E. Cortese “Sovranità” in *Enciclopedia del diritto* 43 (1990), pp. 205-24, 221; G. Conti Odorisio, *Famiglia e Stato nella ‘République’ di Jean Bodin*, p. 21. Torino, 1993; K. Pennigton (1993), p. 8; J-F. Spitz, *Bodin et la souveraineté*, p. 124. Paris, 1998; D. Thermes, *Ripensare Bodin. Pubblico e privato nel cittadino premoderno*, pp. 89-93. Roma, 2002; D. Quaglioni, *La sovranità*, p. 69. Roma-Bari, 2004. See also M. Scattola, “Diritto medievale e scienza politica moderna nella dottrina della sovranità di Jean Bodin” in *Ius Commune* 26 (1999), pp. 165-209; R. Foqué, “Op de drempel van de moderniteit. De soevereiniteitsleer van Jean Bodin”, in *Wijsgerig perspectief – “Soevereniteit”*, 2 (2000), pp. 3-18.

¹⁴ See Ioannes Bodinus, *De Republica libri sex*, I, 8, Fancoforti ad Moenum, apud Ioannem Wechelium et Petrum Fischerum consortes, 1591.

the paramount importance of the fundamental laws of God, of nature, and of the kingdom as limitation to the sovereign power?¹⁵

If prior to Bodin, the term *sovereignty* was already part of the vernacular political and legal vocabularies, why did medieval jurists prefer to employ terms such as *maiestas*, *summum imperium*, *summa potestas*, and *plenitudo potestatis*? One possible answer has to do with the 'conservative' attitude of the juristic class, and with an important normative corollary of it. During the twelfth and thirteenth centuries, Roman and Canon lawyers - as well as apologists and other writers - discussed the prerogatives and functions that had to be exercised within the political community if the latter was to exist and flourish. The jurists appear to have thus greatly contributed to the establishment of law and government as a unitary discourse. This work of edification, due to their position in society, gave them the chance to set forth the criteria to select the proper terminology and exclude the one considered not adequate, like for example the terminology used by men of learning who were not jurists. As soon as we turn to medieval non-legal sources, we see that *sovereignty* and *sovereign* appear in the vernacular languages to denote supremacy in respect of moral, spiritual, and even aesthetic excellence.

In the *Convivio* (1304-07), for instance, Dante Alighieri declared in Aristotelian and Thomistic fashion that between superior and inferior to be the proper natural order of things claiming Latin to be sovereign over Italian vernacular: "*comandare lo subietto a lo sovrano procede da ordine perverso – ché ordine diritto è lo sovrano a lo subietto comandare [...] lo latino è sovrano del volgare*". In the same work, the term *soprano* is used to denote the highest of the ten heavens, namely the Empyrean: "*lo cielo Empireo [...] è lo luogo di quella somma Deitade [...] Questo è lo soprano edificio del mondo, nel quale tutto lo mondo s'inchiude, e di fuori dal quale nulla è*". The word *sovrano* denotes God the Almighty in a passage in which Jesus Christ is described as 'the Emperor of the Universe': "*noi semo ammaestrati da colui che venne da quello [...] da lo Imperadore de l'universo, che è Cristo, figliuolo del sovrano Dio*". Finally, the adjective *sovrana* appears to denote God's omnipotence in a passage in which the question of the relation between the human soul and God is treated, and the conception of man as 'divine animal' restated: "*e quell'anima che tutte queste potenze comprende, e perfettissima di tutte le altre, è l'anima umana, la quale*

¹⁵ On Bodin's religiosity, see P. Mesnard, "Le Platonisme de Jean Bodin" in *Bulletin de l'Association Guillaume Budé*, pp. 352-61. Paris, 1954; W.H. Greenleaf, "Bodin and the idea of order" in H. Denzer (1973), pp. 23-38; M. Horowitz, "La religion de J. Bodin reconsidérée: Le Marrane comme modèle de tolérance" in *Jean Bodin. Actes du Colloque Interdisciplinaire d'Angers (24 au 27 May 1984)*, I, pp. 201-9. Angers, 1985. Skinner emphasized the novelty of Bodin insisting on the absolutistic and secular aspects of his doctrine of sovereignty. See Q. Skinner, *The Foundations of Modern Political Thought – II – The Age of Reformation*, pp. 284-301. Cambridge, 1978. For a similar opinion, see M. Terni, *La pianta della sovranità. Teologia e politica tra medioevo ed età moderna*, p. 156. Roma-Bari, 1995.

con la nobilitade de la potenza ultima, cioè ragione, partecipa de la divina natura [...] l'anima è tanto in quella sovrana potenza nobilitata e dinudata da materia, che la divina luce [...] raggia in quella: e però è l'uomo divino animale da li filosofi chiamato".¹⁶ The adjective appears in *Inferno* too. In one passage, Virgil uses it as soon as he sees the great four poets of Antiquity – Homer, Horace, Ovid, and Lucan – pointing them out to Dante. Homer in particular is called 'sovereign poet'.¹⁷

We can rightly speak, we believe, of a fluctuation of the term *sovereignty* between diverse vocabularies since its first appearance in southern French and Italian vernacular literature. Medieval jurists managed to elude the problems inherent to that fluctuation, in particular the problem of the formation of the juristic vocabulary. The event should not be surprising and no claim is made here that the jurists should have bothered taking care of that problem resisting a temptation that we might label 'professional parochialism'. Right or wrong, the Roman law vocabulary was assumed to be exhaustive and paradigmatic as far as law and government were concerned. The jurists were somehow bound by a terminology charged with traditional meanings, for the *leges* ideally represented the successful overcoming of every *genus* or *natio*, and more generally of any partial law.¹⁸ The idea that the medieval jurists might have preserved the integrity of their discipline by avoiding, when possible, non Justinian language might be considered odd. After all, due to the eclectic tendencies of some jurists, we could say, an eclectic use of language would not be too strange. Such a concept held by, say, Placentinus, who, following the Christian doctrine restated in Canon law, maintained that law ought to be "*generalis sanctio, cuncta iubens honesta, prohibens contraria*", would definitely appear eclectic to us.¹⁹ Yet, it was

¹⁶ See Dante Alighieri, *Convivio*, I, vii, 4-5; II, iii, 8-11; II, v, 1-2; III, ii, 14, in C. Vasoli e D. De Robertis (a cura di), *Opere minori*, I-II, pp. 2-891. Milano-Napoli: 1987.

¹⁷ See Dante Alighieri, *Inferno*, IV, 88 in U. Bosco e G. Reggio (a cura di), *La Divina Commedia*. Firenze: 1978. In *Paradiso*, in a speech of St. John, the adjective is referring to the highest of the person's loves. There, following the Scriptures, St. John suggests making God the highest love and accordingly employing the faculty of reason: "*per intelletto umano e per autoritadi a lui concorde de' tuoi amori a Dio guarda il sovrano [...]*". See *Paradiso*, XXVI, 48. In *Il Fiore* (CXLIV), a series of sonnets attributed to Dante that summarise the narrative of the *Roman de la rose*, again God is qualified as sovereign: "*lo Dio sovrano*". See D. De Robertis e F. Contini (a cura di), *Opere Minori*, I/I, pp. 553-798. Milano-Napoli, 1973.

¹⁸ See F. Calasso, *Medio evo del diritto – I - le fonti*, p. 253. Milano, 1954.

¹⁹ See Placentinus, *Summa Institutionum, De iustitia et iure*, § 4, fol. 2. Lugduni, apud Ian. Frellaeum et Gulielmum de Guelques, 1536. Following in turn the traditional teaching on the divine foundation of *iustitia*, Gratianus had emphasized that the purpose of law is prescribing the just and prohibiting the unjust. See *Decretum magistri Gratiani*, C. 23, q. 4, c. 42: "*Quomodo ergo reges Domino serviunt in timore, nisi ea, que contra Domini iussa fiunt, religiosa severitate prohibendo atque plectendo? Aliter enim servit, quia homo est, aliter etiam quia rex est. Quia homo est, servit vivendo fideliter; quia rex est, servat leges iusta precipientes et contraria prohibentes convenienti vigore sanctiando*".

possible for medieval jurists to hold an ethical concept of law and at the same time refuse to use terminological contamination when necessary. For a long time, explicitly borrowing from non-legal sources remained a border not to cross. Doing so must have meant not only abandoning the ideal *communis patria*,²⁰ and admitting that the *civilis sapientia* knew gaps, but also challenging the common ethos in juristic professionalism. But was it all a matter of professional pride? To answer this question, an important corollary of juristic professionalism must be considered now. Most jurists believed, or pretended to believe, in the divine origin of the *imperium*. Connecting himself to an already existing tradition, Accursius (d. 1263), for example, explained in his gloss to Novella 73 that “*imperium [...] Deus de coelo constituit*”, while “*populus Romanus de terra*”. He further argued that “*Deus constituit permittendo, populus Dei dispositione*”, and that – a notation very important in the light of the distinction *auctoritas/potestas* – “*Deus constituit auctoritate, populus ministerio*”.²¹ Cynus of Pistoia reaffirmed that “*Deus e coelo constituit imperium*” in his commentary to the constitution *Cunctos populos*.²² In one of his commentaries on the first book of the Digest (Dig. 1, 4, 3), he specified that “*imperator a populo est, sed imperium, cuius praesidiatu imperator dicitur divinus, a Deo*”.²³ The circumstance in question had obvious political implications. But again from the point of view of the internal coherence of medieval juristic professionalism, it should be easy to realise that going beyond the vast terminology provided by the venerable *leges* expression of divine kinship was something unorthodox. The orthodoxy of the jurists was peculiar and manifested itself in various forms. Donald Kelly observed that sometimes it was so rigid that “it was not ignorance but professionalism” leading the jurists “to accept certain etymologies which obviously contradicted linguistic possibility”, like in the case of the derivation of the word *feudum* from *fides* or *fidelitas*.²⁴ What can we conclude? It is hard for us to think of the medieval juristic vocabulary as a self-sufficient treasury. Undoubtedly, this was what most medieval jurists believed, or pretended to believe, even if, in fact, other vocabularies had contributed to its formation. The elusive attitude of those professionals towards the semantic foundations of their field of expertise by no

²⁰ See Dig. 50, 1, 33: “*Roma communis nostra patria est*”.

²¹ See Glossa *de coelo in Authenticum, de instrumentorum cautela et fide, § quia igitur*, Coll. VI, in Accursii Glossa, IX.

²² See Cynus de Pistorio, *In librum I Codicis, de summa trinitate et fide Catholica*, l. *Cunctos populos*, § 3. In *Cyni Pistoriensis in Codicem et aliquot titulos primi pandectorum tomi, id est, digesti veteris doctissima commentaria* (1578)[I].

²³ See Cynus de Pistorio, *de constitutionibus principum*, l. *beneficium* § 1. In *Cyni Pistoriensis in Codicem et aliquot titulos primi pandectorum tomi, id est, digesti veteris doctissima commentaria* (1578)[II]. See also E. Cortese (1962-64), II, pp. 200-1. In the *Somnium Viridarii*, the *miles* reaffirmed that the emperor received his sovereign powers directly from God: “*immediate a Deo*”. See *Somnium Viridarii*, II, XIII.

²⁴ See D.R. Kelly, “Law” in CHPT, pp. 66-94, 74.

means leads to the conclusion that *sovereignty* was a notion that did not exist yet. The claim made here is that the history of the absence of the word *sovereignty* from most medieval juridical writings may be seen as the history of an elusion.

3.2) Sovereignty as sociological problem

3.2.1) Sovereignty in Georg Simmel and Max Weber.

Sociological analysis is worthy of attention, for legal historians as well as historians of legal and political ideas derived from it some of the most important conceptual tools and frameworks that they employed in their examination of sovereignty in the historical perspective. It is not always easy to detect the traces of the sociological contribution in historical scholarly work, because either the authors who benefited from sociology did not adequately acknowledge their intellectual debt, or the contribution in question has been so indirect that many made use of sociological categories assuming the latter to be autochthon elements in historical investigation. Sociological analysis, however, treated sovereignty as a complex compound of ideological and material elements, and in various ways accounted for its genealogy and morphology. In this perspective, the analysis of Georg Simmel and Max Weber in particular are attempts to explain why the supremacy affirmed in the case of one individual or group is at the same time denied in the case of other individuals or groups. As a matter of fact, this is precisely one of central questions treated by Maitland in the introduction of his 1900 English translation of von Gierke's *Die publicistischen Lehren des Mittelalters*.²⁵

Simmel also thought of political authority and the related legitimacy as features proper to all types of political organisations. With his genealogical and morphological analysis, he sought to bypass the static configuration of sovereignty, often presupposed in sociological analysis, as well as in legal and political theory, but also to possibly reconcile mere power and legitimacy.²⁶ The

²⁵ See O. Gierke (1900), xi.

²⁶ Collingwood moved in that direction as well. He spoke of the division between ruling and ruled as the first of the three fundamental laws of politics, and thought of it as a universal trait of community life. "The first law of politics", he said, has descriptive character, and "is that a body politic is divided into a ruling class and a ruled class". The second law has an axiological character, implying that at least some members of the ruled class ought to have the chance to access the ruling class. The barrier between the two classes must be "permeable in an upward sense". The presence of "rule-worthiness", which is quality needed to make men fit to be rulers, should be determined by "passing some kind of judgement as to suitability for ruling". Eventually, the third law refers to the degree of recognition on the side of the people in respect of the suitability for ruling of the members of the ruling class. In this sense, there must be "a correspondence between the ruler and the ruled, whereby the former become adapted to

need to make sense of this antinomy has been signalled among others by McIlwain, who, rightly in our opinion, pointed out that the forces that lie behind what we call government “are not *de jure* but *de facto*”.²⁷ Since the time of *Philosophie des Geldes* (1901), Simmel maintained that behind the phenomenon of power stood a dynamic set of relatively free, ambiguous perhaps, social relations based upon conflicting tendencies, like, for example, the push towards security and that towards liberty. Not only the justification, but also the imposition and consolidation of political power implied reciprocity.²⁸ That is why in his view super-ordination (or domination) and subordination do not constitute a mere problem of hierarchy, but rather of interaction, open to both coercion and freedom simultaneously.²⁹ In *Zur Philosophie der Herrschaft* (1907) and in *Soziologie* (1908),³⁰ he claimed that any relevant manifestation of supremacy has a consensual character to a large extent.³¹ The ambivalent disposition of the individuals towards obedience and liberty was in his view expression of permanent characteristics of people’s psychological attitudes.³²

Several thinkers prior to Simmel drew the attention to this point. In *Esprit des lois* (1748), Montesquieu expounded his public law and in a certain sense touched upon what we may call the mystery of sovereignty. In accordance with traditional legal and political thought, he distinguished between three types of government - republican (democratic and aristocratic), monarchic, and despotic.

ruling as distinct from other persons, and the latter to being ruled by as distinct from other persons”. See R.G. Collingwood, *The New Leviathan*, pp. 188-90. Oxford, 1940. For J. Hoffman there is no possible reconciliation between force and legitimacy, for “if legitimacy requires a relational acceptance of common values” mere force “disrupts this commonality”. The latter, he said, “involves treating subjects as objects and people as things”. See J. Hoffman (1998), p. 48.

²⁷ See “Sovereignty” in C.H. McIlwain (1969), pp. 26- 46, 35. See also J. Freund (2004), pp. 135-39.

²⁸ See G. Simmel, *Philosophie des Geldes* (eds. D.P. Frisby und K.C. Köhnke). Frankfurt am Main, 1989 (in O. Rammstedt [ed.], *Georg Simmel Gesamtausgabe*, 6).

²⁹ See D.P. Frisby, *Georg Simmel*, pp. 118-19. London-New York, 1984.

³⁰ *Zur Philosophie der Herrschaft* originally appeared in *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich*, 2 (1907), pp. 1-33. See now in A. Cavalli und V. Krech (eds.), *Aufsätze und Abhandlungen. 1901-1908*, Bd. 2, pp. 142-79. Frankfurt am Main, 1993 (in O. Rammstedt [ed.], *Georg Simmel Gesamtausgabe*, 8). In the same volume, see also *Soziologie der Ueber- und Unterordnung*, pp. 180-257. See also *Soziologie* (in O. Rammstedt [ed.], *Georg Simmel Gesamtausgabe*, 11. Frankfurt am Main, 1992). See in particular “Über- und Unterordnung. Exkursus über die Überstimmung”, pp. 160-283.

³¹ This kind of consensus has nothing to do with political consensus in the liberal and democratic sense, whereby consensus is supposed to be formed on the basis of free will and total immunity from coercion. See J.A. Hoffman, *Sovereignty*, pp. 43-53. Buckingham, 1998.

³² See G. Simmel, *Soziologie* in O. Rammstedt (1992), 11, p. 171.

He argued that each of them has a specific nature derived from a distinct regulative principle.³³ The latter orders them to assume a certain configuration. The foundational aspects of each regulative principle, Montesquieu acknowledged, were particularly difficult to be brought to full clarity by investigation, for they had their roots in the human passions, the most effective cause of the establishment of each type of sovereignty.³⁴ In one essay on the first principles of government, David Hume, for instance, said that “nothing appears more surprising to those who consider human affairs with a psychological eye, than the easiness with which the many are governed by the few”, and the submission with which “men resign their own sentiments and passions to those of their rulers”. Hume added that “when we enquire by what means this wonder is effected” we find that “force is always on the side of the governed” and “the governors have nothing to support them but opinion”. On “opinion only”, Hume argued, “government is founded”, and this applies to “the most despotic and most military governments, as well as to the most freer and popular”.³⁵ The inextricable links between obedience and sovereignty were at the centre of the speculation of John Austin for whom “if a determined human superior not in a habit of obedience to a like superior receives habitual obedience from the bulk of a given society, that determined superior is sovereign in that society, and the society, including the superior, is a society political and independent”. Austin was yet convinced a “party truly independent” could exist, and this was not the society as collection of subjects but “the sovereign portion of society”.³⁶ Lately, Harold Laski stressed that “there is no sanction for law other than the human mind”, and “it is sheer illusion to imagine that the authority of the State has any other safeguard than the wills of its members”.³⁷ Emphasising the enigma of

³³ See Montesquieu, *Esprit des lois*, II, 1 ; II, 2, in *Œuvres complètes* (ed. R. Caillois), II, p. 239. Paris, 1949.

³⁴ See Montesquieu, *Esprit des lois*, III, 1 -3, in *Œuvres complètes*, II, pp. 250-51. Paris, 1949.

³⁵ See D. Hume, “Essay IV - Of the First Principles of Government” in T.H. Green and T.H. Grose (eds.), *David Hume. The Philosophical Works – III – Essays, Moral, Political and Literary*, I, pp. 109-13, 109-10. Aalen, 1964. Hume distinguished “opinion of interest”, which is “the sense of the general advantage which is reaped from government”, from “opinion of right to power”, which is “the attachment which all nations have to their ancient government, and even to those names which have had the sanction of antiquity”. Upon these two kinds of opinions together with that concerning the right to property, Hume argued, “are all governments founded and all authority of the few over the many” (p. 111).

³⁶ See J. Austin, *The Province of Jurisprudence Determined* (1832), VI, p. 166. Cambridge, 1995.

³⁷ Laski contended that sovereignty means “the ability to secure assent”. The will of the sovereign, being it a person or a body, obtains pre-eminence over the wills of others on the basis of obedience and acceptance primarily. It is a will competing with other wills, and “surviving only by its ability to cope with its environment”. “Should it venture into dangerous places it pays the penalty of its audacity”, running the risk of ending up “into

obedience, the British constitutional lawyer Albert Venn Dicey, for whom "limited sovereignty is a contradiction in terms" as well, asserted that the only supreme or sovereign body in a state is "the will of which is ultimately obeyed by the citizens of the state".³⁸ Benedetto Croce affirmed that in the relationship between those who rule and those who are ruled, sovereignty belongs to the relationship itself.³⁹ Finally, identifying the sovereign power with "a person or body of persons whose orders the great majority of the society habitually obey and who does not habitually obey any other person or persons", Hart explained that "in every human society, where there is the law, there is ultimately to be found latent beneath the variety of political forms" a "simple relationship between subjects rendering habitual obedience and a sovereign who renders obedience to no one".⁴⁰ We should be aware that obedience and opinion, the bases of political authority, find no adequate treatment in authoritative legal texts. Considering this point and looking at the ways in which sovereignty grew throughout European history, we may realise that sovereignty hardly flourished meeting any of the criteria conceived of by legal and political scholars.

In general, Simmel held, sovereignty had two sources: force and prestige. He distinguished the objective nature of the former from the subjective nature of the latter, specifying that even in the case of authority based upon force, people's subjective and psychological dispositions play an important role. At some point during the struggles for power, some individuals prevail over other individuals. The surrenders grant to the winners, or to the visions and ideas the latter stand for, a virtually irresistible objective status, irrespective of the reasons for doing so. Force turns into authority, namely something objectified and virtually indisputable, due to a complex psychological process culminating in the recognition of the righteousness of one person, a group of persons, and even supernatural entities, Simmel said. This kind of recognition is bestowed from below and may be considered the core of the "ascending" model for the formation of power, which, for the Middle Ages, Ullmann traced back to the passage of *imperium et potestates* from the Roman people to the emperor

impotence by disagreement". See H.J. Laski (1917), p. 14. See also J. Freund (2004), pp. 101-07, 153-83.

³⁸ See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), pp. 68, 73. London, 1987. Dicey called the doctrine of the legislative supremacy of Parliament a "keystone" and a "dogma" of British constitutional thought. "Parliament", he wrote, "can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation". There is no power that "under the English constitution, can come into rivalry with the legislative sovereignty of Parliament" (pp. 69-70). On Dicey's importance in legal theory, see J. Stapleton, "Dicey and his legacy" in *HPT* 16/2 (1995), pp. 234-56.

³⁹ See B. Croce, *Etica e politica* (1931), pp. 186-92, 331-41. Milano, 1994.

⁴⁰ H.L.A. Hart (1994), p. 50.

sanctioned by *Lex regia*.⁴¹ In the case of sovereignty based upon prestige, superordination lacks the objective status inherent to the first type of sovereignty. In terms of universal acceptance, it is therefore weaker than the latter. Simmel came to the conclusion that when the authority is vested in a force whose legitimacy is related to standards believed to be objective there is more room for reciprocity and freedom than in the case in which prestige rules. The importance of reciprocity and voluntary obedience, which are the bases of legitimacy, lead us to consider that the feudal structures existing in medieval society are not necessarily incompatible with some forms of sovereignty. More particularly, the medieval forms of social and political reciprocity may thus be seen as one of the constitutive elements of medieval sovereignty.

In *Wirtschaft und Gesellschaft* (1922), Max Weber examined the material and ideological aspects of political power at length on the ground of an extensive comparative analysis of historical data.⁴² He introduced the important ideal-typical distinction between power ("Macht") and political authority or domination ("Herrschaft"). The first denotes the condition of the social actor who successfully carries out his own will in spite of any possible resistance, and regardless of the ground on which his act of will is based. The second denotes the condition of the social actor who carries out his own will and receives obedience by a given group of persons instead. In the case of political authority, discipline, namely the habit of obeying in stereotyped forms, plays a decisive role, according to Weber. Only when and where the latter is established, the acts of will carried out take the form of orders or commands. Moreover, the acts of will become commands only if a hierarchically organised social structure exists. In turn, such a structure ("Herrschaftsverband") acquires political character when its existence and stability are continuously safeguarded by the threat and application of physical force on the side of the ruling group within a given territory. Eventually, in order to be qualified as state in the modern sense, a ruling organisation so described must be comprised of a special group of executives ("Verwaltungsstab") that successfully upholds the claim to the monopoly of the legitimate use of coercion in the enforcement of its orders. In Weber, the basis for the distinction between mere power and political authority

⁴¹ This scholar spoke of "ascending" or "populist" and "descending" or "theocratic" conceptions of government and law. See W. Ullmann (1966), pp. 20-26. See also O. Gierke (1900), pp. 43-46.

⁴² For an approach to political authority as a compound of material and ideological aspects, not only of legal and psychological, see G. Burdeau, *Traité de science politique* (1949-57), I, pp. 51-360. Paris, 1980. Georges Burdeau saw the "sédentarité" as one of the main 'material factors' to the establishment of political authority. He included in the list "le sol" and "le contact avec les groupes voisins" as well. When the idea of the priority of the natural society over the political is not a mere "hypothèse de raisonnement" – like in Hobbes, Lock, and Rousseau – it is only an ideological instrument. See G. Burdeau (1980), I, pp. 53-62, 121-22.

is both quantitative and qualitative.⁴³ In another passage of his work, while treating mere power, he made another distinction between two types of overall powers. The first type is derived from mere economic relations and is entirely based upon a plurality of market-oriented needs and interests. This power is virtually monopolistic in the economic sense ("die monopolistische Herrschaft auf dem Markt"), and is based upon mere persuasion. The second type is derived from a position of sanctioned authority, like that of the *pater familias* or of the military commander ("die Herrschaft kraft Autorität"), and consists in the power to command obedience ("autoritärer Befehlsgewalt").⁴⁴ In regard to the influence of the material factors on the quest of sovereignty, Weber observed that within any human aggregate coercive powers are first of all used to protect the vital interests of both the individual members and of the group. He acknowledged that these basic interests have an economic character. Primarily, they concern the distribution of the resources necessary for self-preservation. Originally, many are the groups concerned with economically oriented protective tasks. We find not only parental, but also religious and military ties operating in that respect. At this stage of development, even though the existing groups may have effective control over given territories ("Gebietsherrschaft"), the use of coercive powers ("Gewaltsamkeit") is not yet subject to a monopoly of any sort. It becomes so with the emergence of a ruling class, namely of a separate group of persons able to exploit skills and resources better than other concurrent groups. Due to the monopolisation of the coercive powers for the purpose of regulating internal relationships, a proper political community ("politische Gemeinschaft") is finally established. It connotes the sovereign state in its early stages.⁴⁵ Once a political community has been established, the successful exercise of sovereignty largely depends on the degree of obedience that the people concerned are willing to show. It is obedience legitimising sovereignty, although, in a circular manner, sovereignty promotes obedience in various ways. The problem of the legitimation of political authority is essentially an ideological question. Sovereignty, as Strayer put it, "exists chiefly in the hearts and minds of its people", and "if they do not believe it is there, no logical exercise will bring it to life".⁴⁶ Weber argued that there are three ideal-typical principles that constitute the source of legitimacy: charisma, tradition, and rationality. These are non-legal elements presupposed by any legal order. The attempts to legitimise sovereignty are constantly accompanied by more or less successful attempts to self-justification. Given the fact that social and natural inequalities ("Kontrasten des Schicksals") exist, Weber explained that those who are better off normally feel the need to justify the legitimacy of their privileged position through ideologically oriented accounts of the distribution of merit and guilt. These

⁴³ See M. Weber, *Wirtschaft und Gesellschaft*, I, 16-17, vol. I, pp. 28-30.

⁴⁴ See M. Weber, *Wirtschaft und Gesellschaft*, IX, 1, vol. II, pp. 541-45.

⁴⁵ See M. Weber, *Wirtschaft und Gesellschaft*, VIII, 1-2; IX, 1-3, vol. II, pp. 514-19, 541-50.

⁴⁶ See J.R. Strayer (1970), p. 5.

attempts of self-justification are usually realised by means of appeals to sets of principles – charismatic, traditional, and rational – believed to be of a superior rank.⁴⁷ Weber's investigations, as well as Simmel's reflections, stress the ambiguous and tragic character of the establishment and growth of sovereignty. The same type of considerations probably inspired St. Augustine. A famed passage of *De civitate Dei* may be taken to represent the medieval awareness of the ambiguous character of sovereignty. Augustine elaborated on the difference between kingdoms and bands of robbers, and implicitly referred to the crucial importance of obedience. He provocatively assured that bands of robbers, as well as kingdoms, are made up of men, based upon an agreement, directed by leaders, and able to share all that is beneficial according to accepted norms. Borrowing the anecdote from Cicero's *De republica*, he presented the answer that a pirate once gave to Alexander the Great. When the latter asked the former what he was thinking of, that he should molest the sea, the pirate said that he was doing on a small scale exactly what the king was doing on a large scale.⁴⁸

3.3) Sovereignty as constitutional problem

3.3.1) Sovereignty and the medieval constitutional problem

We will now try to elaborate on the possible sense in which we can speak of sovereignty as constitutional problem with regards to the Middle Ages. We should start by saying that historically it is relatively easy to understand how, through the political struggles for the establishment of written constitutions containing the authoritative configuration of sovereignty, in modern legal and political thought the problem of sovereignty became the constitutional problem *par excellence*. One of the central aspects of modern legal and political thought is moreover constituted by the insistence on the inextricable links between sovereignty and statehood.⁴⁹ Generally, the modern doctrines of law and

⁴⁷ See M. Weber, *Wirtschaft und Gesellschaft*, IX, 3, vol. II, pp. 548-50. Weber also distinguished between conventional and legal legitimacy. He explained that if the deviations occurring within the established social order will result in no more than a reaction of disapproval, the social order in question has a mere conventional legitimacy. If they will result in a reaction of coercion applied by a certain staff of people in order to bring about compliance, the social order has legal legitimacy instead.

⁴⁸ See Aurelius Augustinus, *De civitate Dei*, IV, IV: "*eleganter enim et veraciter Alexandro illi Magno quidam comprehensus pirata respondit. Nam cum idem rex hominem interrogaret, quid ei videretur, ut mare haberet infestum, ille libera contumacia: Quod tibi, inquit, ut orbem terrarum; sed quia [id] ego exiguo facio, latro vocor; quia tu magna classe, imperator*".

⁴⁹ The references in this sense are numerous. Among others, see F.H. Hinsley, *Sovereignty*, pp. 2, 21, 121, 125. Cambridge, 1986; A. Vincent, *Theories of the State*, p. 32. Oxford, 1987; A. Heywood, *Political Ideas and Concepts. An Introduction*, p. 49. London, 1994; M. Fowler and J. Bunck, *Law, Power, and the Sovereign State. The Evolution and the Application of the Concept of Sovereignty*, pp. 157, 163. Philadelphia (Penn.), 1996.

government focused on the problem of domestic order, peace, and stability. They treated sovereignty as the primary means to those ends, on the presupposition that the causes of quarrels and even war denote absence or weakness of sovereignty. The control of the law, and of public law in particular, became the specific and complementary means in that enterprise. In his *Traicté des Seigneuries* (1608), Charles Loyseau (1564-1627) affirmed that “la Souveraineté est du tout inseparable de l’Etat” (II, 4).⁵⁰ Hence, as Loughlin put it, “sovereignty stands as a representation of the autonomy of the political and is the foundational concept of modern public law”.⁵¹ Let us recall, however, that the whole series of attempts aimed at limiting the exercise of state’s sovereignty is considered typically modern too. In this respect, the semantic area of ‘the constitutional’ came to coincide partially with that of ‘constitutionalism’, which is a particular doctrine on how the exercise of state sovereignty ought to be configured in order to preserve individual political liberty.⁵² Historians of modern law and government and several medievalists addressed the question of the constitutional order through the lenses of constitutionalism. Authors such as Figgis, Tierney, Sigmund, and Oakley apparently moved along this path when they looked at medieval conciliarism recognising it as one of the most important sources for the modern idea of the constitutional limitations to political power. For Cary Nederman the differences between constitutionalism in the modern sense and medieval constitutional thought remain significant.⁵³ It is hardly contested that modern legal and political thought paid a great deal of attention to sovereignty in the context of the *ordo ordinatus*, and placed the constitutional problem within such context. How can we think of sovereignty as constitutional problem in the Middle Ages?

The first step to be made in order to answer this question is to consider that the medieval man of learning generally thought about societal matters in

⁵⁰ See C. Loyseau, *Traicté des Seigneuries*, II, 4. The passage appears in in R. Derathé, “Bodin dans l’Histoire des Théories de la Souveraineté” in H. Denzer (1973), pp. 245-60, 254.

⁵¹ See M. Loughlin (2003), pp. 72-3. Loughlin defined the distinctive characteristic of public law by its object: “the activity of governing” (p. 5). He conceived public law as “an assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition and sustain the activity of governing” (p. 30).

⁵² See B. Croce (1994), pp. 331-41.

⁵³ See C.J. Nederman, “Conciliarism and constitutionalism: Jean Gerson and medieval political thought” in *HEI* 12/3 (1990), pp. 189-209; “Constitutionalism - medieval and modern: against neo-Figgiste orthodoxy (again)” in *HPT* 17/2 (1996), pp. 179-94, 94. Nederman and Oakley in particular engaged in an interesting controversy throughout the 1990s. Of F. Oakley, see “Natural law, the *Corpus mysticum*, and consent in conciliar thought from John of Paris to Matthias Ugonius” in *Speculum* 56 (1981), pp. 786-810; “Legitimation by consent: the question of the medieval roots” in *Viator* 14 (1983), pp. 303-35; “Nederman, Gerson, conciliar theory and constitutionalism: *sed contra*” in *HPT* 16/1 (1995), pp. 1-19.

dialectical terms with a view to pursuing a final harmonization of the two distinguished earthly and transcendent dimensions. It seems reasonable to assume that this quest for harmonization - "*omnis autem concordantia differentiarum est*" wrote Nicholas of Cusa (1401-1464) in *De concordantia catholica* (1433)⁵⁴ - had its background in the acute perception of the effects of wrongdoing and the widespread awareness that divine and human justice cannot be coincident and notably differ, as authoritatively argued by St. Gregory the Great (c. 540-604).⁵⁵ From the point of view of the *ordo ordinatus* with its charge of worldly experience and limitedness, in spite of political fragmentation in medieval societies, the need to secure peace and cohesion by coercion within the community was a public law priority. As Paolo Prodi recalled, in the wake of Christian doctrine human justice and coerciveness, the offspring of sin, could never pretend to change the reality of sin itself, but only contrast violence by violence, and intervene by restitution and compensation.⁵⁶ The tradition of Roman law was an obvious reference. The Digest provided important authoritative statements about the function of the law in the public law's domain. In one by Papinian (d. 212), law is "*commune praeceptum, virorum prudentium consultum, delictorum, quae sponte vel ignorantia contrahuntur, coercitio, communis reipublicae sponsio*" (Dig. 1, 3, 1). In another one, destined to be remembered by medieval students, the primary 'virtue' of it consists in "*imperare, vetare, permittere, punire*" (Dig. 1, 3, 7).⁵⁷ St. Isidore of Seville referred to this fourfold function of the law restating that "*non autem regit, qui non corrigit*". This set of principles then entered the canonist tradition through the *Decretum*.⁵⁸ In the *proemium* of the *Constitutiones regni Siciliae* or *Liber Augustalis* issued by Frederick II (1194-1250), the sovereign reaffirmed the special character of his office charged with the care of the "*mundi machinam*" ordained by the divine providence. He recalled that the basis of his own duty to *iustitiam colere* and *iura condere* is to be found in "*ipsa rerum necessitate cogente, nec minus divinae provisionis instinctu, principes gentium sunt creati, per quos posset licentia scelerum coerceri*".⁵⁹ In the first

⁵⁴ See Nicolaus Cusanus, *De concordantia catholica libri tres*, I, I.

⁵⁵ See Gregorius Magnus, *Moralia in Job*, V, 1: "*cum valde occulta sint divina iudicia, cur in hac vita nonnumquam bonis male sit, malis bene, tunc occultiora sunt cum et bonis hic bene est et malis. Nam cum bonis male est, malis bene, hoc fortasse deprehenditur quia et boni, si qua deliquerunt, hic recipient ut ab aeterna plenius damnatione liberentur; et mali bona quae pro hac vita faciunt, hic inveniunt ut ad sola in posterum tormenta pertrahantur*".

⁵⁶ See P. Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto*, pp. 43-4. Bologna, 2000.

⁵⁷ See *Decretum magistri Gratiani*, D. 4 c. 3: "*omnis autem lex aut permittit aliquid [...] aut vetat [...] aut punit [...] aut praecipit*".

⁵⁸ See Isidorus Hispalensis, *Etymologiarum*, V, XIX, 1; IX, III, 4. See also *Sententiarum*, XLVIII, 7.

⁵⁹ See *Constitutiones regni Siciliae* imperator Federici II, *De legibus et consuetudinibus, aliis antiquatis, quae dicitur constitutio*, *proemium*, § 10, Neapoli, 1786.

decade of the fourteenth century, in his *Lectura* on this passage of the *Liber Augustalis*, the jurist Andreas of Isernia (d. ca. 1316) did not miss the chance to reaffirm with no hesitation that “*princes enim positus est ut faciat iustitiam et iudicium, id est iustum iudicium*”. In case of denial of such duty, “*non dicitur rex*”.⁶⁰ Philosophical and theological speculation had continued to be concerned with the quest of the just order. In his commentary on Aristotle’s *Nicomachean Ethics*, having explained that “*contemplative felicitas est [...] imitatio divini intellectus*” and that this kind of happiness “*melior est quam civilis*”, St. Albert the Great (1200-1280) insisted on the expediency of the exercise of ‘prudence’ for the latter “*ponens est in omni virtute*”. As to emphasise the gulf between the contingent and the eternal, this scholastic author focused on the special character of *iustitia* in the light of Christian teaching, and distinguished it from justice generally understood, which, he affirmed, coincided with legality.⁶¹ Finally, laying down the basis for a definition the fame of which is commonly attributed to the pen of his pupil St. Thomas Aquinas, St. Albert the Great conceived of *lex* as “*ratio autem ordinis in civilibus iudiciis est mensura et regula politici*”.⁶² Lately, St. Thomas Aquinas reminded that the laws of the community aim “*ad ordinationem hominum ad invicem*”.⁶³ It must be recalled that juristic reasoning had already absorbed this teaching. Placentinus, for instance, maintained that *ius* is knowledge and prescription of the good and the equitable, while “*iustitia virtus est*” precisely on the presupposition of *ius* and *iustitia* being inextricably linked to each other.⁶⁴

If we wish to understand how, and in what sense, sovereignty was the primary constitutional problem in the Middle Ages, we have to look precisely at the notion of *ordinatio*, not at that of *constitutio*, and consequently at the type of links existing between the dimension of the *ordo ordinatus* and that of the *ordo ordinans*. In modern law and government, the term ‘constitution’ and the expression ‘constitutional law’, in the words of Albert Venn Dicey who had in mind the British constitution, generally denotes “all rules which directly or

⁶⁰ See Andrea de Isernia, *Utriusque regni Siciliae Constitutiones*, proemium, fol. 2. Lugduni, 1568. On the characteristics of the codification issued by Frederick II and the successive jurist interpretation, see M. Caravale, *La monarchia meridionale. Istituzioni e dottrina giuridica dai Normanni ai Borboni*, pp. 137-66. Roma-Bari, 1998.

⁶¹ See Albertus Magnus, *Super Ethica*, X, I and I, VIII. The author wrote: “*prudentia, cuius est eligere utilia a nocivis, non secundum quod est in speculatione tantum, sed secundum quod immiscet se operi, ponens medium in omni virtute [...] iustitia specialis virtus est, secundum quod proprie dicitur, sed generalis dicitur, secundum quod est legalis*” (I, VIII).

⁶² See Albertus Magnus, *Super Ethica*, V, XI. Let us recall that Aquinas affirmed that law “*nihil est aliud quam quaedam rationis ordinatione ad bonum commune, ab eo qui curam communitatis habet promulgate*”. See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, Q. 90, art. 4.

⁶³ See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, Q. 104, art. 1, in *Sancti Thomae Aquinatis Opera Omnia* (ed. Leonina), VII, p. 258. Roma: 1892.

⁶⁴ See Placentinus, *Summa institutionum, De iustitia et iure*, fol. 1-5. Lugduni, apud Ioan. Frellaeum et Guilelmus de Guelques, 1536.

indirectly affect the distribution of the exercise of the sovereign power in the state", including the rules defining "the members of the sovereign power", those regulating "the relations of such members to each other", and those determining "the mode in which the sovereign power, or the members thereof, exercise their authority".⁶⁵ The term *constitutio* was usually employed in its narrow meaning as equivalent for *lex* in accordance with the Roman law tradition. St. Isidore of Seville, hence Gratian, insisted on the image of *lex* as "*constitutio scripta*".⁶⁶ Later on, in *De concordantia catholica* Nicholas of Cusa used it again in this sense to emphasise that "*omnis constitutio radicatur in iure naturali [...] per quem principatum coercentur a malis subditi et eorum regulatur libertas ad bonum metu poenarum*".⁶⁷ We should add now that the notion of *ordinatio* could be understood in two senses, jurisdictional and transcendent. To clarify the meaning of this assertion, let us draw the attention to the point of view offered by Thomas Aquinas, which is particularly interesting not only because it presents the character of a synthesis, but also because it constituted 'a new departure', as scholars such as Yves Congar and Ewart Lewis argued.⁶⁸ Apparently during his second sojourn in Paris between 1269 and 1272, after St. Albert the Great had already done so presumably between 1263 and 1265, Aquinas attended to a commentary on the first two books, and part of the third, of the *Politica* of Aristotle, whose Latin version around 1260 William of Moerbeke (c. 1215-1286) had significantly revised and improved. In the prologue, Aquinas outlined the domain and character of constitutional knowledge in the medieval sense, which is "*politica*" or "*civilis scientia*". Aquinas affirmed that the highest community is the 'political' community, it being aimed at establishing and maintaining the basic conditions for the sufficiency of life, and that as a whole such community is prior in importance to any other whole which human mind is able to comprehend and produce by itself. Hence, to rationally comprehend the articulation, structure, and phenomenology of that particular whole, called "*communitas civitatis*" or "*civitas*", we need to produce a doctrine or a theory of it, which is "*civilis scientia*". The knowledge so obtained is 'practical'. It is not merely descriptive of its object, but it contributes to the configuration of it. Since it is not simply knowledge of how-to-do-things, but of how to regulate people's behaviour with a view to the 'good life', the "*civilis scientia*" has a moral character.⁶⁹ Following Aristotle's third book, Aquinas explained that a

⁶⁵ See A.V. Dicey (1987), p. 23.

⁶⁶ See Isidorus Hispalensis, *Etymologiarum*, V, III, 2; D. 1 c. 3.

⁶⁷ See Nicolaus Cusanus, *De concordantia catholica libri tres*, I, I.

⁶⁸ See Y. Congar, "Aspects ecclésiologiques de la querelle entre mendiants et séculiers dans la seconde moitié du XIIIe siècle et le début du XIVe" in *Archives d'histoire doctrinale et littéraire du Moyen Age* 36 (1961), pp. 35-151; E. Lewis, "The 'positivism' of Marsiglio of Padua" in *Speculum* 38 (1963) pp. 541-82, 544. See also E. Lewis (1954), I, pp. 31-87.

⁶⁹ See Thoma Aquinatis, *Sententia libri politicorum* (*Super Politicam*), A 69-70. Here St. Thomas affirms that "*communitas civitatis ordinata ad per se sufficientia vitae humanae [est]*".

constitution is the "*ordo civitatis*" by which the various offices and magistracies are regulated, and especially the highest governing office.⁷⁰ The description of the latter is full of important implications for the "*ordo civitatis*" and it appears as a very dynamic whole. It is, Aquinas said, both "*politica*", namely constitutional science, and "*politeuma*", namely the concrete hierarchical distribution of offices. These two levels are inseparable and what is even more important to stress here is that according to Aquinas, the holder of sovereign powers, being it individual or collective, is in fact the first mover of that order. Let us examine St. Thomas Aquinas' passage:

*"et dicit quod politica nichil est aliud quam ordinatio civitatis quantum ad omnes principatus qui sunt in civitate, sed precipue quantum ad maximum principatum qui dominator omnibus aliis principatibus. Et hoc ideo quia politeuma civitatis, id est positio ordinis in civitate tota consistit in eo qui dominator civitati; et talis impositio ordinis est ipsa politia. Unde precipue politia consistit in ordine summi principatus, secundum cuius diversitatem politiae diversificantur; sicut in democratiis dominator populus, in oligarchies quidem pauci divites; et ex hoc est diversitas harum politiarum".*⁷¹

At this point, given the vivid image of the constitutional problem offered by Aquinas and the configuration of sovereignty as "*impositio ordinis*", what prevents the "*ordo summi principatus*" from turning into the "*arbitrium summae potestatis*" to which Spinoza referred? In Spinoza too, as we have seen, the holder of the sovereign powers is the first mover, or the centre, of the *ordo ordinatus*.⁷² In other words, the question concerns the difference between the medieval and the modern ways to conceive sovereignty. We are inclined to think that in this matter the possible answers are a matter of preference, perspective, and emphasis. Continuity and discontinuity are not fixed starts in the constellations of thought. If we look at the comparison between medieval and modern sovereignty as constitutional problem from the point of view of discontinuity, we could argue that political liberty in the Middle Ages especially concerned communities and groups, and individuals in so far as they were members of those aggregates. The regulative instances governing the life of the latter must have often appeared in the clothes of actual sovereigns. Yet, the need of an identification of the supreme regulative instance, namely of the authoritative basis for the exercise of any concrete power to command, with a set of fundamentally just and unchangeable principles to be correctly interpreted and implemented by rulers whose position was assumed to be that of *curatores* or guardians of the office and responsibilities entrusted to them, was a matter of concern. Groups, as well as individuals related to groups – chiefly jurists and statesmen – had the task of bringing those

⁷⁰ See Aristotle, *Politics*, III, IV, 1 (1278b).

⁷¹ See Thoma Aquinatis, *Sententia libri politicorum (Super Politicam)*, A 201.

⁷² See B. Spinoza, *Tractatus Theologico-Politicus*, XVI, 2 and 20.

principles close to daily life and to the needs of administering the community. Clearly, a supreme regulative instance so intended was more than a ruler, or a ruling body, having the power of life and death, namely the *merum imperium* in the original sense.⁷³ It was more than a “*politeuma*” in the sense expounded by Aquinas. Aquinas himself, among others, suggested that the problem of sovereignty as a constitutional problem partially exceeded its organizational elements. As we have seen already, he treated the problem of sovereignty as a matter of *ordinatio*, and we argued that the latter had jurisdictional implications. Now we have to consider how the jurisdictional character of *ordinatio* emerged and what its relationship is with the *ordo ordinans*. In this way, a tentative answer to the question of the difference between the medieval and the modern law and government can be given.

In the question 104 of *Prima Secundae Summae Theologiae*, Aquinas restated the distinction between rules that are binding “*ex ipso dictamine rationis*” and rules that are binding “*ex aliqua institutione divina vel humana*”. He called “*praecepta iudicialia*” the rules enacted by a human or by the divine legislator aiming at regulating the life of men in their relationships that are binding on the basis of authoritative and societal constraints, not of reason alone. Aquinas explained that the adjective *iudicialis* came from *iudicio*, an activity proper to the highest magistrates of the community, including the *princeps* as *supremus iudex*. Proper to the *princeps* is not only settling quarrels, but also governing “*de omnibus pertinentibus ad populi communitatem et regimen*”, he said.⁷⁴ Finally, discussing the relationship between the Law of the Jews in the Old Testament and the New Law of Christ, Aquinas anchored the jurisdictional construction to *iustitia*:

“*praecepta enim iudicialia pertinet ad virtutem iustitiae; nam iudicium dicitur iustitiae executio. Iustitia autem est perpetua et immortalis*”.⁷⁵

⁷³ See P.N. Riesenbergh (1956), p. 8. See also J. Hoffman (1998), p. 35.

⁷⁴ See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, Q. 104, art. 1: “*praecepta iudicialia [...] a iudicio [...] sunt quae non habent vim obligandi ex ipso dictamine rationis, quia scilicet in se considerate non habent absolute rationem debiti vel indebiti; sed habent vim obligandi ex aliqua institutione divina vel humana [...] si autem in his quae pertinent ad ordinationem hominum ad invicem, talia dicuntur praecepta iudicialia. In duobus ergo consistit ratio iudicialium praeceptorum: scilicet ut pertineant ad ordinationem hominum ad invicem; et ut non habeant vim obligandi ex sola ratione, sed ex institutione [...] Ad principem autem pertinet non solum ordinare de his quae veniunt in litigium, sed etiam de voluntariis contractibus qui inter homines fiunt, et de omnibus pertinentibus ad populi communitatem et regimen. Unde praecepta iudicialia non solum sunt illa quae pertinent ad lites iudiciorum; sed etiam quaecumque pertinent ad ordinationem hominum ad invicem, quae subset ordinationi principis tanquam supreme iudicis*”.

⁷⁵ See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, Q. 104, art. 3. Aquinas wrote: “*iudicialia praecepta non habuerunt perpetuam obligationem, sed sunt evacuata per adventum Christi [...] autem iudicialia [...] sunt [...] ad disponendum statum illius populi, qui ordinabatur ad Christum*”.

In this passage, we see that the jurisdictional activity as a whole is nothing but "*iustitiae executio*". This notation has important implications, because it marks the normative impossibility for the *auctoritas iustitiae* to be reduced to mere *potestas* and *iurisdictio*. We may agree with Paolo Prodi when he acknowledges that the core of such impossibility, on the basis of Augustinian theology and through the efforts of Gregory the Great, is constituted by the affirmation of a law of God broadly understood as 'pedagogy for the peoples of Europe'.⁷⁶ Therefore, it seems reasonable to assume that sovereignty has been perceived in foundational terms as twofold. Strictly speaking, the *ordo iustitiae* to which each configuration of sovereignty was expected to conform must have coincided with *auctoritas*, the true *ordo ordinans*. In this context, the instrumentality of any *potestas* or *ordo ordinatus* is what gave rise to all sorts of claims of conformity to the superior standard of order on the side of emperors and popes, or *regna* and *civitates*. Marsilius of Padua and Bartolus of Saxoferrato also took part in the heated controversies about those claims. The metaphysical construction just presented did not prevent the medieval man of learning to be able to fix his eyes on the concrete aspects of power. As Aquinas himself pointed out, if the political communities had registered significant changes in their internal order, the laws of those communities – their order – had to be changed accordingly.⁷⁷ This is the level at which the problem of order became a concrete matter and concern to groups and individuals in their daily life. The Christian idea of order could well be thought of as "*modus entium*", as Baldus de Ubaldis put it,⁷⁸ namely as the highest standard against which the adequacy and coherence of all conducts, decisions of common relevance, and all *potestates* ought to be evaluated.

3.3.2) Sovereignty: an ambiguous construct?

Posing the question of the ambiguity inherent to the idea of sovereignty amounts to examining some of the most striking characteristics of this idea, according to modern scholarship. Various authors presented it as an ambiguous construct.⁷⁹ The latter, it is often said, constitutes a paradox, a drama, and a

⁷⁶ See P. Prodi (2000), p. 43.

⁷⁷ See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, Q. 104, art. 3: "*praecepta iudicialia ab hominibus instituta habent perpetuam obligationem, manente illo statu regiminis. Sed si civitas vel gens ad aliud regimen deveniat, oportet leges mutari. Non enim eadem leges convenient in democrtatia, quae est potestas populi, et in oligarchia, quae est potestas divitum [...] Et ideo etiam, mutato statu illius populi, oportuit praecepta iudicialia mutari*".

⁷⁸ See Baldus de Ubaldis, *In primam Digesti veteris partem commentaria*, proemium, § 4, fol. 2. Venetiis 1577.

⁷⁹ For example, see S.I. Benn and R.S. Peters, *The Principles of Political Thought*, pp. 301-3. New York, 1959. D. Kostakopoulou claimed that the term 'sovereignty' gained currency

mystery at the same time. Is this true, and if so, why? If this is the case for modern sovereignty, is it so for medieval sovereignty too? To answer these questions, we should first find out what is the interpretative paradigm within which it is possible to pose the very question of the ambiguity of sovereignty. The paradigm in question is the one offered by the already mentioned view identifying sovereignty with statehood, and more particularly by the view that takes 'internal sovereignty' as its focus. This modern expression denotes "the internal affairs of the state and the location of supreme power within it. An internal sovereign is therefore a political body that possesses ultimate, final, and independent authority; one whose decisions are binding upon all citizens, groups, and institutions in society".⁸⁰ We have seen already how ambiguous the bases for the legitimacy of sovereignty are, namely opinion and obedience. We have also seen that the traditional medieval justification for government and law was the need of *scelerum coerceri*. We may presume that medieval man was aware of such 'internal' dimension of sovereignty. From the point of view of the latter, it is probably not inaccurate to suggest that there is a certain degree of continuity throughout the various historical phases.

In medieval times, the image most frequently used to symbolise 'internal sovereignty' is the sword, the *gladium materialis*. The latter has been a powerful symbol beyond the Middle Ages. Martin Luther (1483-1546), for example, continued to see it as the distinctive symbol of secular authority. In *Von Weltlicher Oberkeit* (1523), he affirmed that 'the sword' existed since the beginning, when Cain murdered his brother Abel, and yet, by a sovereign decision, God suspended punishment for Cain's sake.⁸¹ Commenting on St. Paul (*Rom* 13: 1-4), Luther reaffirmed that the rulers do not bear the sword in vain and power is 'the handmaiden of God' against all wrongdoers.⁸² In the *Institutio Christianae Religionis* (1536-59), Jean Calvin (1509-1564) insisted that the secular and the spiritual kingdoms are distinct but in no way incompatible with each other. He argued that the end of secular government, while we remain in this world, is to foster and protect the external worship of God, defend the true religion and the good condition of the church, accommodate the requirements of human society, mould our conduct to civil justice, reconcile us one to another, and uphold and defend the common 'peace and tranquillity'.⁸³

in the second half of the sixteenth century thanks to Bodin. See D. Kostakopoulou (2002), pp. 135-56, 139-40.

⁸⁰ See A. Heywood (1994), p. 51.

⁸¹ See M. Luther, *Der Christ in der Welt* in K. Aland (ed.), *Luther Deutsch*, Bd. 7, pp. 9-51, 10. Stuttgart-Göttingen, 1967.

⁸² See M. Luther, *Der Christ in der Welt* in K. Aland (1967), p. 23.

⁸³ See J. Calvin, *Institutio Christianae Religionis* in P. Barth-W. Niesel (eds.), *Joannis Calvini Opera Selecta*, V, p. 473. Geneve, 1974. Calvin wrote: "*verum ut distinctum istud regiminis genus a spirituali illo et interno [...] at huic destinatum est, quandiu inter hominibus agemus, externum Dei cultum fovere et tueri, sanam pietatis doctrinam et Ecclesiae statum defendere,*

An important factor contributing to the ambiguity of sovereignty, which is related to the equation between sovereignty and statehood, consists in the possibility for a given mighty, therefore superior, power to guarantee legal order and, at the same time, to exceed it by freeing itself from the constraints it had established for the sake of the very same order. In this case, the differences between the modern and medieval theories of sovereignty appear perhaps more obviously. Let us look again at John Austin's elaboration to uncover this factor. Austin affirmed that positive law is "law set by political superiors to political inferiors". In this context, superiority "signifies might", Austin said, and this is nothing but "the power of affecting others" by the means of law – being every law a "command" – "with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct" to the "wishes" of those in the position of superiority.⁸⁴ Sovereignty is "incapable of limitation". "Supreme power limited by positive law is a flat contradiction in terms". If this were the case, "a series of sovereigns ascending to infinity" would govern a given community. The case, Austin argued, "is impossible and absurd".⁸⁵ In respect of positive law, a sovereign power is strictly speaking both neither lawful, nor unlawful, neither just, nor unjust. "If it were lawful or unlawful, in respect of the positive law of its own independent community, it were lawful or unlawful by law of its own making", which is an absurdity according to Austin. If it were lawful or unlawful "in respect of the positive law of another independent community" it were so "by the appointment of another sovereign". In this case, Austin concluded, "it were not an actual supreme but an actual subordinate".⁸⁶ As we may notice,

vitam nostrum ad hominum societatem componere, ad civilem iustitiam mores nostros formare, nos inter nos conciliare, communem pacem ac tranquillitatem alere; quae omnia supervacua esse fateor, si praesentem vitam extinguit regnum Dei, quale nunc intra nos est. Sin ita voluntas dei, nos dum ad veram patriam aspiramus, peregrinari super terram: eius vero peregrinationis usus talibus subsidies indigent: quia ipsa ab homine tollunt, suam illi eripiunt humanitatem" (IV, 20, 2). Later on, in *Du Pape* (1817), Joseph de Maistre restated the idea that the power to command and coerce is necessary given the very condition of man. Man, he said, is able of both morality and wickedness, and although he might be 'right in his mind', he remains potentially 'perverse in his will'. The author spoke of "la nécessité absolue de la souveraineté" and wrote: "l'homme en sa qualité d'être à la fois moral et corrompu, juste dans son intelligence et pervers dans sa volonté, doit nécessairement être gouverné; autrement il serait à la fois sociable et insociable, et la société serait à la fois nécessaire et impossible". See J. de Maistre, *Du pape* (1817) II, 1 and 2, pp. 132-34. Paris, 1872.

⁸⁴ See J. Austin (1995), I, pp. 18-29. For a critical account of Austin's imperative theory of law, see W.E. Conklin (2001), pp. 137-70.

⁸⁵ See J. Austin (1995), VI, p. 212.

⁸⁶ See J. Austin (1995), VI, p. 282. In the same lecture, he said that "in every society political and independent, the actual positive law is a creature of the actual sovereign". Positive law is what it is "through the power and authority of the present supreme government". Finally, he confirmed that "might is requisite to the enforcement of the law considered as positive law".

Austin's reasoning presupposes the axiom of the absoluteness of state independence in both senses of 'internal sovereignty' and 'external sovereignty' respectively.⁸⁷ In this perspective, moreover, there is sovereignty *in* the state, as well as sovereignty *of* the State.

It is hard to resist the temptation to define sovereignty as an unfortunate notion. The State is "loved for its promise of order and stability", H. Harding wrote, "and "feared for its threat of coercion by the power which does the ordering".⁸⁸ According to Jacques Maritain, no concept has raised so many harsh and conflicting issues in the nineteenth and twentieth centuries, involving so many jurists and political theorists, as the concept of sovereignty.⁸⁹ The practice of the sovereignty of a State has evoked great hopes when associated with such positively accepted values as the liberty of the nation and the immunity from external interference, namely when it functions as 'protective mantle'. On the contrary, it has evoked fear and sorrow when associated with the danger of its own unpredictable and irresponsible abuse in the justification of domestic tyranny, or of the violation of international order and of the democratic rule of law. All this suggests that when force is employed, legitimacy, which is usually appealed to in support of the latter and seen as the highest guarantee of the goodness of power as coercion, is undermined. Using force against force, J. Hoffman said, "places us in the helpless position of having to undermine freedom in order to secure it".⁹⁰ If we further elaborate on 'the paradox of sovereignty', we encounter 'the drama of sovereignty'. The Charter of the United Nations (1945) reflects this kind of practical ambivalence as well. On the one hand, it proclaims that the organisation itself is based on the "respect for the principle of equal rights and self-determination of peoples" (Art. 1,2) and on the "sovereign equality of all its members" (Art. 2,1). On the other hand, it defends the universal rights of the individual against those very sovereign member states (Art. 1,3).

In twentieth century scholarship, various authors, under the influence of various instances and with a view to a heterogeneous set of purposes, insisted on the validity of the distinction between political or *de facto* and legal or *de iure*

⁸⁷ See A. Heywood (1994), pp. 51-54.

⁸⁸ "The tracing of this ambivalence is the key to the history of the state", the author said. See H. Harding, "The origins of the concept of the state" in *HPT* 15 (1994), pp. 57-72, 58. See also F.H. Hinsley (1986), pp. 16-7.

⁸⁹ See J. Maritain, *Man and the State* (1951) p. 29. Washington (D.C.), 1998. The author considered sovereignty "intrinsically wrong and bound to mislead" for he identified it with "absolutism" and "omnipotence". He moreover noted that sovereignty is "a curious example of those concepts which are right in one order and wrong in another" (p. 49). Maritain had already expressed the opinion that the concepts of sovereignty and absolutism must be 'scrapped'. See "The concept of sovereignty", in *American Political Science Review* 44 (1950), pp. 343-57.

⁹⁰ See J. Hoffman (1998), p. 49.

sovereignty.⁹¹ This analytic distinction has represented to many people an optimal way of approaching matters of international politics and of delimiting the possible disastrous effects to which the arbitrary practice of sovereignty might lead. 'Political' sovereignty consists in mere power, of the effective ability to command obedience through the virtually unrestrained monopoly of coercive force. 'Legal' sovereignty has a tautological character for it consists in the legal right to command obedience through the legitimate and regulated monopoly of coercive force, and to issue binding rules for all. This picture of sovereignty has been seen as the reflection of "a difference of emphasis" on the legal and political aspects inherent to the constitutional problem.⁹² Twentieth century legal scholarship has especially looked at the doctrines of sovereignty by both Hans Kelsen and Carl Schmitt. The impact of their doctrine on contemporary legal science has been notable indeed.⁹³ Although the distinction between political and legal sovereignty is widely referred to, its presuppositions are as vague as its implications ambiguous. Dicey, who apparently believed in the validity of the divide between *de facto* and *de iure*, stressed the fact that when we use the term 'sovereignty' we denote "a merely legal conception" for that term refers to "the power of law-making unrestricted by any legal limit".⁹⁴ Here again we are faced by the riddle of the purely juridical conception of power. What kind of juridical construction is allowing the absence of legal limitations on the side of the sovereign? Does the founding instance of the juridical order have legal nature? Is such a theory not one that reaffirms the pre-eminence of mere might? As Julien Freund observed, the juridical reasoning that lies behind the view distinguishing political from legal sovereignty is a (legal) procedural reasoning. But procedure stems from power. Therefore, procedure can only justify or to some extent legitimise power, not constitute it.⁹⁵ Some authors focused on the economic bases of the struggles for power and opposed formalist representations of sovereignty due to their misleading character. This kind of representation, they argue, conceals the concrete involvement of the sovereign power in the current economic relations.⁹⁶ McIlwain's notation that the forces that lie behind law and government are *de facto* comes back to mind here. In the light of such

⁹¹ See A.V. Dicey (1987), pp. 71-85.

⁹² See A. Heywood (1994), p. 49.

⁹³ On Schmitt, see, among others, P. Hirts, "Carl Schmitt's decisionism" in C. Mouffe (ed.), *The Challenge of Carl Schmitt*, pp. 7-17. London, 1999.

⁹⁴ See A.V. Dicey (1987), p. 72.

⁹⁵ See J. Freund (2004), pp. 119-20.

⁹⁶ See J. Rosenberg, *The Empire of Civil Society*, pp. 84-87. London, 1994. This author denounces the misleading character of the liberal discourse on sovereignty. Sovereignty, he argues, is the product of the prevailing economic forces in the Marxian sense, and comes about when the rise of the capitalist division of labour makes it possible for the State to be abstracted as a purely political and legal public institution. Under capitalism, sovereignty is thus characterized by the fictitious egalitarianism of market relations.

considerations, we should avoid treating that divide between political and legal sovereignty as a dogma of law and government. It is no more than a conventional scheme, and to the extent that it is useful, its virtue appears pretty modest for it attempts to enforce meaningfulness and logical consistency upon a matter that can hardly be reduced to a coherent picture.

3.3.3) Sovereignty: a modern idea?

A number of authors are convinced that the seeds of modern sovereignty are to be found in the medieval period, and that the theory and practice of sovereignty is closely related to national statehood. McIlwain, who saw in nationality “the greatest of all factors” in changing Western Europe “from a medieval into a modern world”, claimed that “the chief historical prerequisite to the growth of a conception of sovereignty is the existence of a nation with a governmental organ competent to make true law”. Although the formal recognition of that concept had to wait for “a clearer apprehension than yet existed”, in the later Middle Ages “such nations, such governmental organs, and such law, were rapidly taking shape in many parts of Western Europe”.⁹⁷ McIlwain also called “the transition from the medieval theory of *dominium* to the modern theory of sovereignty” the “theoretical concomitant of the development of the modern nation-state”.⁹⁸ As we pointed out already, Peter Riesenberg also saw in the consolidation of the sovereignty of the national monarchies and the Italian city-states one of the major developments of the thirteenth century.⁹⁹ Other authors, whether or not convinced that, with Bodin, the doctrine of sovereignty becomes modern, maintain that national statehood properly speaking, is a typically modern phenomenon.¹⁰⁰ As Alan James noted, from the fact that the exercise of sovereign authority presupposes the permanence of people in a given territory does not always follow that the people concerned have been necessarily organised according to any unifying ethnic principle, especially if we think of medieval Europe.¹⁰¹ Ethnicity existed prior to the eighteenth century. In the Middle Ages, the notion of *natio* embodied all factors which we would place under the heading ‘ethnicity’. But the medieval *natio* does not coincide with the

⁹⁷ See C.H. McIlwain (1932), p. 391. The king of the feudal age, he said, “became the national monarch of modern times” (p. 389).

⁹⁸ See C.H. McIlwain (1947), p. 160.

⁹⁹ See P.N. Riesenberg (1956), p. 81.

¹⁰⁰ See N. Matteucci (1993), pp. 17, 30, 81. In the perspective of constitutional and administrative law, see respectively M. Fioravanti, “Stato e costituzione” and L. Mannori e B. Sordi, “Giustizia e amministrazione” in M. Fioravanti (ed.), *Lo Stato moderno in Europa. Istituzioni e diritto*, pp. 3-36; 59-101. Roma-Bari, 2002.

¹⁰¹ See A. James (1986), p. 34. The author sees sovereignty as “the one and only organising principle in respect of the dry surface of the globe”. National states have three characteristics in common: territory, people, and government.

modern nation. It is however only towards the end of the eighteenth century that the revolutionary idea of the pre-eminence of the nation in political and legal life finds its full affirmation in France. Only then sovereignty became a steady attribute of the nation and was transferred from what was perceived as the distant and arbitrary apex of the political system to the nation. Enormous difficulties arose then about the proper definition of the multitudes that initiated the process of verification of the mandates of the deputies in the General States. Where they 'People' or 'Nation', or both? ¹⁰² The article 3 of the *Déclaration des droits de l'homme et du citoyen* gave an answer to this question: "*le principe de toute souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément*".¹⁰³

Let us focus now on the claim, mentioned several times so far, that sees statehood and sovereignty inseparable. This view implies the contrast between legal and political monism, which is its core, and medieval political fragmentation. Some historians, following von Gierke, see the long *intermezzo* between the collapse of Roman statehood and the emergence of modern statehood as marking the eclipse of proper sovereignty. This thesis - the so-called 'ancient-modern paradigm' - confines medieval law and government to the rank of a mere intermediate passage in the transition from ancient to modern sovereignty.¹⁰⁴ In Gierke's view, classical Greece and Rome, not medieval Europe, provided the crucial contribution to modern legal and political theory. He thought that no proper concept of sovereign statehood existed in the Middle Ages. Unlike the modern sovereign state, the medieval was not an independent political entity, free from the bonds of morality, natural law, and feudal custom. Moreover, it is claimed, it was not an abstract corporation existing apart from its members. The characteristics of the medieval political communities have nothing to do with the theory and practice of the state as the all-comprehensive and exclusive community, "the one and only expression of that common life which stands above the life of the individual".¹⁰⁵ Gierke's thesis has influenced a great

¹⁰² See H. Shinoda, *Re-examining Sovereignty. From Classical Theory to the Global Age*, pp. 45-62. London-New York, 2000. For an account of the economical aspects of the formation of national sovereignty, see also M. Sonenscher, "The nation's debt and the birth of the modern republic: the French fiscal deficit and the politics of the revolution of 1789" in *HPT* 18/1 and 2 (1997), pp. 64-103, 270-83.

¹⁰³ The article is quoted in J.H.W. Verzijl, *Human Rights in Historical Perspective*, p. 55. Haarlem, 1958.

¹⁰⁴ See O. von Gierke (1900), vii.

¹⁰⁵ See O. von Gierke (1900), p. 94. A.L. Fell argued that von Gierke looked at secular and national prototypes, deeming theocratic ideals as an obstacle. He traced von Gierke's position back to the political ideology supporting the edification of the Prussian and Bismarckian *Reich*, characterised by the tendency to make the sovereign legally omnipotent. See A. London Fell (1991), IV, pp. 36, 84. See also H.F. Dyson, *The State*

number of historians. John Neville Figgis, for example, regarded the Church contamination inherent in the theories of papal monarchy negatively. He thought that the Church was the modern state 'by transference'. He maintained that "the omnipotent territorial State" did not exist. It might have been "a dream", he wrote, "or even a prophecy", but "it was nowhere a fact". What we call the state was then "a loosely compacted union with rights of property and sovereignty everywhere shading into one another and the central power struggling for existence".¹⁰⁶ Rice and Grafton held that the division of power between royal lords and great vassals characterised feudal statehood. The latter, the authors argued, is "an intermediate political type", standing between "decentralised feudal government" and "the sovereign state", as properly understood. Proper sovereignty, though in a new fashion, emerged out of medieval dispersion. They specified that before the mid-fifteenth century "European states were more feudal than sovereign", whereas after the mid-sixteenth century "they were more sovereign than feudal". Under the rule of feudal statehood, they continued, "the authority to wage war, to tax, to administer and enforce the law" – the typical prerogatives of the statehood as we know it now – were "privately owned as legal, hereditary rights by members of a military landed aristocracy". In fact, "the feudal monarch shared with the magnates of his realm many of those powers which a Roman emperor had held intact". Hence, that system of government "rested on a confusion of public power with private property", and while the feudal monarchs were incapable to impose effective administrative centralisation, "private persons exercised state powers as rights derived from their ownership of property".¹⁰⁷ We find the same view expounded in the already mentioned book by Guus Nifterik on Vázquez de Menchaca's elaboration on popular sovereignty. Referring to a short essay by Vermeulen and van der Wal,¹⁰⁸ Nifterik contrasted the dynamism of modern Europe with the static situation in the Middle Ages. While addressing the question of political absolutism, he spoke of the Middle Ages as a period of chaotic fragmentation. Nifterik added that political absolutism was one way to successfully overcome fragmentation. I am not entirely sure whether Nifterik assumed absolutistic sovereignty to have been the only proper sovereignty. Certainly, he too saw

Tradition in Western Europe. A Study of an Idea and Institution, p. 25. Oxford, 1980; Q. Skinner (1978), II, p. 353.

¹⁰⁶ See J.N. Figgis, *Studies of Political Thought from Gerson to Grotius, 1414-1625* (1905), p. 18. Cambridge, 1907.

¹⁰⁷ E.F. Rice and A. Grafton, *The Foundations of Early Modern Europe, 1460-1559*, (1970), pp. 110-11. New York, 1994.

¹⁰⁸ See B.P. Vermeulen en G.A. van der Wal, "Grotius, Aquinas, and Hobbes. Grotian natural law between *lex aeterna* and natural rights" in *Grotiana* 16/17 (1995/96), pp. 55-83.

statehood and sovereignty as inseparable.¹⁰⁹ We must say that it is not clear how the medieval world, described as fragmented and unsteady, can be judged static at the same time. For the modernist thesis, the rise of state sovereignty is seen as a process articulated in two phases. The first coincides with the falling apart of the medieval political order based upon the dual supremacy of the Church and the Empire during the sixteenth century. The second consists in the realisation of the 'Westphalian State's Model'. Many scholars consider the Peace of Westphalia that settled the Thirty Years' war (1618-1648) as the symbol of the modern turn in European political and constitutional life. Robert Jackson, for example, denied the existence of sovereignty in the Middle Ages. He affirmed that the medieval political map was not "a territorial patchwork of different colours" representing "independent countries under sovereign governments whose populations had clearly conceived national identities". The medieval map was instead "a confusing intermingling of lines and colours of varying shades and hues". Europe, he argued, "was not divided up into exclusive sovereignties, but was covered by overlapping and constantly shifting lordship". Given the fact that lordship involved a property right over a particular territory, Jackson concluded that the latter did not imply sovereignty in the proper, modern, sense.¹¹⁰ Daniel Philpott emphasised that before Westphalia, the most significant features of political authority in Europe were "incompatible with sovereign statehood". Before 1648, "dispersed authority" ruled in Europe, after 1648, "sovereignty prevailed".¹¹¹ Even acknowledging the degree of novelty inherent to the seventeenth century developments, we should not forget that the universalistic prerogatives of church and empire coexisted with the particularistic prerogatives of the rising monarchies for a long period of time. In legal terms, this view is comforted by the tension we know existed between *ius commune* and *ius proprium*. From the political point of view, the *regna* were in a relative sense only the 'particular' as opposed to the 'universal'. The *regnum* too, according to Aquinas for instance, possessed the character of universality. In *Quaestiones disputatae de malo*, the author wrote: "*omnis agens agit propter finem et propter aliquod bonum. Et hoc manifeste apparet in rebus humanis: nam rector civitatis intendit aliquod bonum particulare quod est civitatis bonum, rex autem, qui est illo superior, intendit bonum universale, scilicet totius regni pacem*".¹¹²

¹⁰⁹ See G.P. Nifterik, *Vorst tussen volk en wet: over volkssouvereiniteit en rechtsstatelijkheid in het werk van Fernando Vásquez de Menchaca (1512-1569)*, pp. 9-12. Deventer, 1999. This scholar too attributed to Bodin the merit of having disentangled statehood from the medieval limitations.

¹¹⁰ See R. Jackson, "Sovereignty in world politics: a glance at the conceptual and historical landscape" in *Political Studies*, 47-3 (1999), pp. 431-56, 435.

¹¹¹ Philpott acknowledges that Westphalia was not "an instant metamorphosis", the "creation *ex nihilo* of the modern system". See D. Philpott (2001), pp. 77, 80.

¹¹² See Thoma Aquinatis, *Quaestiones disputatae de malo*, Q. 1, art. 1. The thesis echoes the well-known principle of *rex superiorem non recognoscens in regno suo est imperator*.

Undoubtedly, the Middle Ages knew fragmentation. The first form of fragmentation to consider is the disintegration of the Carolingian Empire, a long process that can be divided into roughly three phases. In the first phase, during the ninth century, distinct territorial political units – the *regna* – like the French, the Germanic, and the northern Italian, emerged. The second phase, in the tenth century, saw the division of the French kingdom into territorial principalities. The third, mainly in the eleventh century, was marked by further fragmentation of public authority and the rise of feudal landholders. The latter constantly acted as small-scale sovereigns. Political life was small scale, and the mass of the population living under the political control of knightly castellans was kept in order by arbitration, by the balance of feudal allegiances, and by the threat of excommunication if they broke their engagements. Fragmentation was so that “within a single agglomeration”, van Caenegem wrote, “neighbouring areas, districts and even buildings could fall under different legal systems and belong to different courts of aldermen, guilds, feudatories, lords, rural deans or hundreds”.¹¹³ Moreover, the feudal relations were so to imply “a type of government in which political power was treated as a private possession and was divided among a large number of lords”.¹¹⁴ Given that the authority of a lord over his vassals, of a landowner over the peasants on his estate, of the governors of a guild over the members, and of the father over his children were no less effective and legitimate than imperial, royal, or princely sovereignty, the problem remains how to interpret such a complex phenomenon. Medieval society generally accepted a multitude of autonomous sources of legitimate power, dispersed over a wide variety of persons and bodies. We do not see how this fact can be used as an argument against the existence of medieval sovereignty. In fact, to consider ‘legal centralised uniformity’ the proper criterion to evaluate the consistency of medieval sovereignty is arbitrary and leads to very odd conclusions. For example, considering that monarchs like Louis XIV (1638-1715) – *le Roi Soleil* – and Louis XV (1710-1774) – *le Bien-Aimé* – did not manage to overcome the strength of the *coutumes* and impose legal uniformity from north to south, and that it took “the personal interest and drive of a military dictator to produce the great national codes of the early nineteenth century”, we should conclude that in France proper sovereignty did not exist before Napoleon.¹¹⁵

¹¹³ See R.C. van Caenegem, *European Law in the Past and the Future. Unity and Diversity over Two Millennia*, p. 23. Cambridge, 2002. Of the same author, on this point in particular, see also “Government, law, and society”, in J.H. Burns (ed.), *The Cambridge History of Medieval Political Thought*, I, pp. 174-210. Cambridge, 1988.

¹¹⁴ See J.R. Strayer, “The two levels of feudalism”, in J.R. Strayer, *Medieval Statecraft and the Perspectives of History*, p. 63. Princeton (NJ), 1971 (originally in R.S. Hoyt (ed.) *Life and Thought in the Early Middle Ages*, pp. 51-65. Minneapolis (Minn), 1967). As C.H. McIlwain put it, “every king was feudal lord or *dominus* as well as *rex*, and many of his people, feudal vassals as well as subjects”. See C.H. McIlwain (1932), p. 388.

¹¹⁵ See R.C. van Caenegem (2002), p. 35.

Conspicuous historical evidence shows how peculiar the medieval configurations of sovereignty have been. The peculiarity of medieval sovereignty is no argument against its existence.

There is another aspect of the view identifying sovereignty with statehood to consider. The scholars who claim that the post-Carolingian crisis of authority stands for total or partial absence of sovereignty usually look at the struggles for power between royal lords and magnates in terms of 'usurpation' of public prerogatives or 'privatisation' of public rights. Speaking of the modern prince, it has been said that "he has drawn back into his own hands those public powers usurped from him by the magnates of the feudal age".¹¹⁶ This view relies on the anachronistic assumption – if rigorously applied to the medieval period – that all legitimate powers belong to the State. In this perspective, there is a sphere of public rights, which belong exclusively to the state, and there is a sphere of private rights proper to the individuals. Consequently, an individual, or groups of individuals, who exercise public rights without being appointed by the State through legitimate and formalised procedures are to be considered 'usurpers'. Were usurpers the regional and local warriors who ruled and offered security throughout the Latin West after the end of the Carolingian empire? Can we really maintain that the dukes of Normandy or Aquitaine, or the counts of Flanders and Anjou, were usurpers? Regarding them usurpers seems a misleading simplification. The assumption that the Middle Ages lacked officialdom too must be critically approached. Even though the distinction between public and private law was very often ignored, or eluded, and even though the patrimonial and dynastic principles were strongly held, we know of officials responsible for judicial, fiscal and military tasks being appointed and paid by the Crown from the end of the twelfth century onwards. These officials gradually replaced old-style feudal actors. In some parts of Europe, high courts and local courts have been introduced. The creation of royal jurisdictions consisting of professional judges and laymen became a formidable means by which the European monarchs increased their control over the territory, namely sovereignty.¹¹⁷ What can finally explain the success of the identification of sovereignty with statehood? A definitive and univocal answer probably does not exist. Strayer suspected that a type of unconscious projection is to be found behind the reduction of sovereignty to statehood. Today, he wrote, "a man can lead a reasonably full life without a family, a fixed local residence, or a religious affiliation, but if he is stateless he is nothing, he has no rights, no security, and little opportunity for a useful career". There is no "salvation on earth" for him "outside of the framework of an organised State". Yet, he noted, there have been

¹¹⁶ See E.F. Rice, and A. Grafton (1994), p. 113.

¹¹⁷ See E. Isenmann, "Medieval and Renaissance theories of State finance"; W.M. Ormrod and J. Barta, "The feudal structure and the beginnings of State finance"; W.M. Ormrod, "The western monarchies in the later Middle Ages", in R. Bonney (ed.), *Economic Systems and State Finance*, pp. 21-52; 53-79, 123-60. Oxford, 1995.

periods, like the Middle Ages, when "it was the man without a family or a lord, without membership in a local community or a dominant religious group, who had no opportunity, who could survive only by becoming a servant or a slave".¹¹⁸ It is perhaps the force of our current image of the relationships between man and State which negatively influences our image of the medieval political universe. Before closing this section, one more 'popular' view needs to be questioned.

The identification of sovereignty with absolutistic statehood in particular gave way to the related identification of the former with the idea of the reason of state. The theorists of sovereignty as 'reason of state' focused on the unrestrained monopoly of force on the side of a centralised power, and treated the conditions for the attainment of such a monopoly. They are to be credited with the merit of having looked at the concrete struggles underlying the processes that led to the establishment of centralised nationally based authorities. They portrayed social peace and the balance of interests within a political community as a goal to be attained at any cost on the conviction that once the sovereign power is established and recognised as legitimate it can act as a 'mortal God'. In Machiavelli, like in Marsilius of Padua and Bartolus of Saxoferrato, domestic peace is the fundamental condition for the steady exercise and expansion of political authority. His considerations on sovereignty presupposed the existence of two opposite tendencies. Machiavelli explicitly speaks of two basic social dispositions - "*dua umori diversi*" - namely the disposition of the people, everywhere anxious not to be oppressed, and that of the nobles, everywhere apt at dominating. Given the circumstances, the prince, who is part of the social setting as well, must attempt to balance the two fundamental social forces by valuing the nobles and, at the same time, by not making himself hated by the people.¹¹⁹ Considering the external relations of the political community, it is the task of the sovereign to decide about war and peace. Machiavelli underlined that the ruler must have no other object except war, its organisation, and its discipline. The art of war, he seemed to suggest, is essential to sovereignty.¹²⁰

The very notion of 'reason of state' constituted the specific theme of *Della Ragion di Stato* (1589) by Giovanni Botero. Also this author focused on the distinction between 'ordinary' or 'common' reason and the 'reason of state', that is, 'political' reason. From the point of view of the latter, the most difficult task for the ruler - "*artefice*" - is the maintenance of the State - "*materia*". For Botero the fundamental condition for the maintenance of the State is the peaceful

¹¹⁸ See J.R. Strayer (1970), p. 4.

¹¹⁹ See N. Machiavelli, *Il Principe*, IX. See also N. Machiavelli, *Discorsi sopra la prima deca di Tito Livio*, I, 3-5.

¹²⁰ See N. Machiavelli, *Il Principe*, XIV: "*debbe, adunque, uno principe non avere altro obietto né altro pensiero [...] fuori della guerra e ordini e disciplina di essa; perché quella è sola arte che si aspetta a chi comanda*". See also F. Guicciardini, *Dialogo del reggimento di Firenze*, p. 161-63 (ed. R. Palmarotti). Bari, 1932.

coexistence of the subjects. Once the latter is secured, the ruler may eventually concern himself with expansion, which is the second and decisive constitutive feature of the idea of 'reason of state'. Giovanni Botero wrote:

*"Stato è dominio fermo sopra popoli; e Ragione di Stato è notitia di mezzi atti a fondare, conservare e ampliare un Dominio così fatto [...] senza dubbio che maggiore opera si è il conservare [...] la conservazione di uno Stato consiste nella quiete e pace de' sudditi".*¹²¹

Botero's approach notably differed from Machiavelli's, for the acquisition, maintenance, and expansion of sovereign power always ought to be related to the moral excellence of the prince. In Machiavelli, as it is known, political reason, that is, the reason of state, should always dictate what to do, and what not to do in the given circumstances. This is probably the only imperative Machiavelli managed to distil from the *"lunga esperienza delle cose moderne"* and the *"continua lezione delle antiche"*, as he affirmed in the *dedica* of *Il Principe*. This fact is not surprising, given that his approach consisted in moving along the unusual path of realistic examination of matters of law and government.¹²² This approach is based upon the identification of sovereignty with statehood and one of the most known Machiavelli's passages on the reason of state must be read accordingly. Let a prince set about the task of conquering and maintaining his state, Machiavelli said, and his methods will always be judged honourable and will be universally praised.¹²³

Given the peculiar characteristics of the idea of order, we should anyway anticipate that the identification of sovereignty with 'reason of state' is not an adequate instrument of analysis to properly understand the problem of sovereignty in the Middle Ages as a constitutional problem. The reduction of sovereignty to 'reason of state' does not account for the normative foundation and justification of the dialectic of super- and subordination as they generally appeared in the medieval period. This kind of reduction eludes a question that the medieval man of learning, as well as the common man, attributed great importance to. The point, as Hoffman put it, is that "sovereignty can exist even though a conception of absolute and illimitable state power has yet to develop".¹²⁴ The lack of this conception, the fragmentary character of medieval politics, and the incoherent application of the distinction between public and private law with regards to the Middle Ages are no arguments against medieval sovereignty. If fragmentation most likely denotes struggle for sovereignty in a

¹²¹ See G. Botero, *Della Ragione di Stato*, § 5-15. On the concept of 'reason of state', see M. Viroli (1994), pp. 155-84.

¹²² See N. Machiavelli, *Discorsi sopra la prima deca di Tito Livio*, I, proemio.

¹²³ See N. Machiavelli, *Il Principe*, XVIII: "facci dunque uno principe di vincere e mantenere lo stato: e' mezzi saranno sempre iudicati onorevoli e da ciascuno laudati".

¹²⁴ See J. Hoffman (1998), p. 36.

situation of plurality of powers, we may also consider that the divide between private and public law fully displays its potentials once sovereignty is consolidated.¹²⁵ We should thus avoid taking modern achievements as the standpoint to evaluate the ways the problem of sovereignty manifested itself in the Middle Ages retrospectively. The diameter of sovereignty differs from that of statehood in all its variants.

3.3.4) Sovereignty in legal science and Constitutionalism.

In the view of Georges Burdeau the “*phénomène constitutionnel*” is inherent to the life of any human aggregate.¹²⁶ Benveniste suggested that beneath language lie the traces of the quest for order, embodied in the struggles for power. The dramatic search for a viable principle of authority reveals that ‘order’ and ‘sovereignty’ are distinct but coordinated ideas. Historically, there is no order without sovereignty, and there is no sovereignty without order. On a parallel basis, if there is no state in the modern sense without sovereignty, then sovereignty exists beyond modern statehood. In this specific sense we can understand McIlwain’s statement that “sovereignty is no essential part of the abstract conception of a state”.¹²⁷ In general, the establishment of any societal order, therefore sovereignty, presupposes subjects that act or attempt to act to gain a position of supremacy. To show that ‘order’ and ‘sovereignty’ are correlated ideas, Benveniste cited Homer. In *Odyssey*, Homer used the picture of “the land of the Cyclopes” to represent the condition of mankind in the absence of order, that is to say, under the rule of mere might. The Cyclopes formed “an insolent and lawless folk”. “Neither assemblies for council have they, nor appointed laws”, and “they dwell on the peaks of the mountains in hollow caves, and each one is lawgiver to his children and his wives”. Finally, “they have no regard for one another”.¹²⁸ Another evocative picture of life in the absence of order, therefore sovereignty, belongs to the imagination of Hobbes. In *Leviathan* (1651), Hobbes portrayed it as “solitary, poor, nasty, brutish, and short”.¹²⁹ Modern scholars have looked at the problem of sovereignty as a constitutional problem mainly from two points of view, that of legal science narrowly understood and that of constitutionalism. Both can be considered as attempts to deal with the theoretical and practical ambiguity of sovereignty. The problem is to determine whether legal science and constitutionalism, given their respective characteristics, are able to account for the foundation of sovereignty, and if so, in what sense. Answering these questions is important because it helps to shed

¹²⁵ See P. Anderson, *Lineages of the Absolute State*, pp. 15, 28. London, 1974.

¹²⁶ See G. Burdeau (1983), IV, pp. 8-18. For this author the legal and political constitution of a community is preceded by its social and economical constitution.

¹²⁷ See C.H. McIlwain (1939), pp. 47-60, 47.

¹²⁸ See E. Benveniste (1966), II, pp. 99-100. See Homer, *Odissey*, 9, 105-15.

¹²⁹ See T. Hobbes, *Leviathan*, I, 13.

some light on the nature and aptness of formalist legal science and constitutionalism in respect of the search for medieval sovereignty.

Modern legal science appears to have been particularly concerned about state sovereignty. In his *Commentaries on the Laws of England* (1765-69), William Blackstone emphasised that how the different forms of state actually began "is a matter of great uncertainty and has occasioned infinite disputes". However they began, and by whatsoever right "they subsist", the English jurist said, "there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority in which the *iura summi imperii*, or the rights of sovereignty, reside".¹³⁰ "Wherever the supreme authority in any state resides", Blackstone argued, "it is the right of that authority to make laws". So, "the power of making laws constitutes the supreme authority".¹³¹ This kind of power "is the greatest act of superiority that can be exercised by one being over another". "Sovereignty and legislature are indeed convertible terms", and "one cannot subsist without the other".¹³² "A state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man", Blackstone wrote. If it is to act as one man, "it ought to act by one uniform will". Political communities are made up of "many natural persons, each of whom has his particular will and inclination". It follows that "these several wills cannot by any natural union be joined together". At this point, the English jurist introduced the figure of the "political union", formed by the consent of all natural persons "to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted". Blackstone specified that this political will "is, in different states, according to their different constitutions, understood to be law".¹³³ These passages, and in particular the idea of the will of the state as expression of the laws of the political union, offer the chance to appreciate how politics and law are very consciously perceived to be linked with each other in the age of the Enlightenment. Moreover, Blackstone provided a definition of state as locus of power distinct from either the ruling body or the people subject to it. It seems to me that this kind of definition is the one that Skinner was thinking of in his account of modern statehood. In this respect, Harding's contention that Skinner account "created a mysterious new entity" seems untenable.¹³⁴ Finally, referring to the British constitution, Blackstone advanced his theory of the separation of powers. "The legislature of the kingdom", he said, "is entrusted to three distinct powers, entirely independent from each other". The first power is the monarch, the second "the lords spiritual and temporal", and thirdly "the house of commons".

¹³⁰ See G. Jones (ed.), *The Sovereignty of the Laws. Selections from Blackstone's Commentaries on the Laws of England*, p. 36. London, 1973 (from now onwards *Commentaries*).

¹³¹ See W. Blackstone, *Commentaries*, p. 39.

¹³² See W. Blackstone, *Commentaries*, p. 34.

¹³³ See W. Blackstone, *Commentaries*, p. 39.

¹³⁴ See Q. Skinner (1978), II, p. 355; H. Harding (1994), p. 58.

The aggregate body of the three powers “composes the British parliament”, which has “the supreme disposal of everything”.¹³⁵ Some years after the publication of Blackstone’s *Commentaries*, Immanuel Kant expounded his theory of the State as ‘general will’ articulated in three distinct powers, the so-called *trias politica*. He Kant spoke of a *potestas legislativa*, the truly sovereign power in charge of making the laws, of a *potestas rectoria*, the executive organ that governs in accordance with the laws, and of a *potestas iudiciaria*, in charge of the function of settling quarrels and attributing to each his own according to the laws. Kant presented his ideas about the rational, juridical, liberal, and formal State. The rationality of it should derive from its conformity to the principles of pure reason translated into organizational standards.¹³⁶ The juridical character of the state in his doctrine depends on the existence of an *ordo ordinans*, which, as in Kelsen who relied upon Kant on several points, coincides with the constitution of the State. The emphasis on the written constitution is of paramount importance. In legal and political doctrine, the word ‘constitution’ generally refers to the ways political communities happen to be constituted, organised and ruled. In a more restricted sense, such a term indicates the authoritative texts in which the fundamental principles of the exercise of political authority are laid down. Historically, constitutions symbolise all efforts made to rationalise power, namely to reduce might to right. So, in his *Rights of Man* (1791-92) for instance, Thomas Paine stressed that government without a constitution is power without right. Its liberal character derives from the protection that the constitution of the state guarantees to certain fundamental individual rights. Eventually, the formal character of Kant’s construction is peculiar, and is to be understood as the neutrality of the public authorities in respect of the individual motivations behind any legitimate conduct.

Constitutional legal science, as we have seen in the previous paragraphs, is chiefly concerned with the fundamental rules that compose the system of government as a whole.¹³⁷ Formalist legal science focuses on the study of such authoritative texts and sees no lawfulness beyond positive law. It provides, as Burdeau put it, a ‘construction’ which is ‘logic’ but ‘bookish’.¹³⁸ Legal formalism holds that most questions about the constituent power have a non-legal character. Burdeau recognised that the study of the “pouvoir constituant” as

¹³⁵ See W. Blackstone, *Commentaries*, p. 37.

¹³⁶ See I. Kant, *Metaphysische Anfangsgründe der Rechtslehre* (1797), § 45-47.

¹³⁷ See E. Barendt, *An Introduction to Constitutional Law*, p. 2. Oxford, 1998. “Legal rules”, the author wrote, “are those which are interpreted and enforced by the courts, while non-legal rules are the customs or conventions regarded as imposing obligations, although they are not enforceable by the judges”. The author also stressed the importance of the political circumstances in which constitutions are drafted and adopted: a) emancipation of a country from a colonial regime; b) establishment of the fundamental principles of a new system of government subsequent to a revolution.

¹³⁸ See G. Burdeau (1983), IV, p. 7.

opposed to the “pouvoirs constitués” is of exceptional difficulty, and that the idea of *ordo ordinans* is not at all “docile à l’analyse juridique” for it is hybrid.¹³⁹ It is a hybrid of extraordinary importance due to its implications. Treating the characters and purpose of the constitution, Thomas Paine (1737-1809), for example, asserted that “a constitution is a thing antecedent to a government, and a government is only the creature of a constitution”. In fact, Paine continues, “the constitution of a country is not the act of its government, but of the people constituting a government”.¹⁴⁰ The problem of the *ordo ordinans* has been described as the conceptual ‘monster’ that legal science has unsuccessfully tried to tame in the course of time. The principles and concrete circumstances out of which the constituent power originates usually exceed the fundamental norms aspect of the *ordo ordinatus*.¹⁴¹ The nature of the constituent power may be misrepresented in the objective sense if reduced to a “Grundnorm”, and in the subjective sense if reduced to the nation instead. The question of the constituent order has been expelled from the domain of legal science. The gap so created between constituent and constituted order is the result of the internal logic of legal positivism. Kelsen, as we have pointed out already, approached sovereignty in formalistic terms, concentrating on the *de iure* aspects of it. He defined sovereignty as “the quality of the State as a normative order”, and distinguished between “internal” sovereignty, concerned with “the relation of the state to its objects” - territory and people - and “external”, concerned with “the relation of the State to other States”. He underlined that the absence of subjection by a state to the national law of another state constitutes the mark of its independence. He was convinced that the independence of the state is compatible with the obligations imposed upon it by international law. In this sense, “if by sovereignty an unrestricted power is meant, it is certainly incompatible with international law”, which is seen in turn as a super-national sovereign normative order.¹⁴² Is the reduction of the *ordo ordinans* to the positive order not an arbitrary reduction, useful for classificatory purposes only? This theory presupposes what it refuses to account for. If the acts of establishment of a legal order had no intrinsic and original normative character, the order so established would be the result of being based upon a vacuum of lawfulness. How to make sense of this vacuum? Does it make sense at all to imagine such a

¹³⁹ See G. Burdeau (1983), IV, pp. 181-5. Burdeau argued that the notions of “légimité” and “légitimité” have relative character, and there are no objective criteria to found the latter especially (pp. 147-51).

¹⁴⁰ See T. Paine, *Rights of Men*, p. 71.

¹⁴¹ See A. Negri, *Il potere costituente. Saggio sulle alternative del moderno* (1992), p. 21. Roma, 2002.

¹⁴² See H. Kelsen, *Principles of International Law* (2nd ed.), pp. 192-7. New York, 1966. See also “Sovereignty and International law” in W.J. Stankiewicz (ed.), *In Defense of Sovereignty*, pp. 115-31. Oxford, 1969.

vacuum of lawfulness? Moreover, is seeing the “Pouvoir indivisualisé”¹⁴³ as the constituent power not an arbitrary identification, useful for ideological purposes only? Jurists who adopted the social contract theory point of view saw the constituent order as the one established by the social contract. The merit of this theory is that it re-introduces the *ordo ordinans* within the boundaries of legal science. Yet, the approach is misleading because it ignores that the will to contract does not produce but presupposes the principles essential to the constituent order. Social contract theory as embodied in legal science makes the constituent power a constituted one. Eventually, jurists inspired by Carl Schmitt emphasised effectiveness by reducing sovereignty to decision in the case of emergency. Schmitt lamented in general that in ‘formalistic’ legal science the rightness of a sovereign act or order is systematically reduced to its procedural validity. On the ground of the dialectic enemy/friend, Schmitt believed that sovereignty could never be entirely reduced to an impersonal set of procedures predetermined in the face of a social need to produce decisions in the last instance. This is the problem of sovereignty, namely the fact that there might be actors forced by the circumstances to act beyond the boundaries set out by the normative order. This was precisely the problem that, according to Schmitt, Kelsen did not resolve but simply neglected in his attempt to rationalize and objectify the exercise of the supreme political power in the mere terms of jurisdiction and normative competence. For Schmitt, there is a moment in the life of a political community at which the sovereign decision springs out of a normative vacuum; thus it is not derived from a norm positively intended.¹⁴⁴ Can the problem of sovereignty be reduced to decision in the state of emergency? Does it make sense to speak of a vacuum of lawfulness?

Controversies on the possible justifications of the constitutional order “never disappeared from Western consciousness”, and indeed innumerable political conflicts have been caused by “struggles for the Constitution”.¹⁴⁵ At this point, constitutionalism intersects the paths of constitutional thought and legal science. For H.A. Lloyd ‘constitutionalism’ means “advocacy of a system of checks upon the exercise of political power”.¹⁴⁶ Constitutionalism is a long-

¹⁴³ G. Burdeau (1983), IV, p. 139.

¹⁴⁴ See C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, p. 31-2. München-Leipzig, 1922.

¹⁴⁵ See R.C. van Caenegem (1995), p. 23. Behind the search for limited government, B. Tierney wrote, “there were always at least two claimants [...] for century after century neither was able to dominate the other completely”. The existence of at least two great powers “competing for allegiance instead of only one compelling obedience enhanced the possibilities for human freedom”. The suppression of such duality by means of absolutism first and totalitarianism afterwards, Tierney claimed, determined the end of the medieval Constitutionalist tradition. See B. Tierney (1988), p. 2.

¹⁴⁶ See H.A. Lloyd, “Constitutionalism”, in J.H. Burns and M. Goldie (1991), II, pp. 254-97. See also A. London Fell (1996), V-2, pp. 127-210.

standing political ideology. It is the theory and practice of limited government. Its historic starting point is generally the impact of political authority on the members of the community and their possessions. European constitutionalism stands for the subjection of every power to the law, and for the autonomy and primacy of some fundamental individual rights. More precisely, such a doctrine sees the law of the contract as the basis for the transition from the *ordo ordinans* to the *ordo ordinans*. Constitutionalism seems more apt than formalistic legal science to account for the foundation of sovereignty. From the ideological standpoint, we presume it is appropriate to speak of 'medieval constitutionalism'. The latter, in one of its primary formulations, regarded the king as a party to a contract with the community's leading class, with whom he was expected to negotiate. The king, van Caenegem wrote, was not "a majestic legislator who issued decrees according to his 'pleasure' and whose *placitum* had the force of law".¹⁴⁷ Such a theory is found in Henry of Bracton (1210-1268) one of its most refined medieval interpreters. In *De legibus et consuetudinibus Angliae*, written in the first half of the thirteenth century, Bracton maintained that the king has no equal within his realm and must not be under any man, but he also asserted that he is subject not only to God but to the laws as well. For Bracton there is no real king when mere will rules rather than law. Consequently, the law makes the king and not vice versa.¹⁴⁸

In medieval constitutionalism, the normative is a feature transcending positive law. More precisely, in the Christian tradition, as we shall see in the next chapter, from St. Isidore of Sevilla to St. Thomas Aquinas, not to mention the notable efforts of the Canon lawyers, it represented the standard against which positive law ought to be evaluated. As a doctrine of the limits to political authority, constitutionalism shares some of the elements that are part of the doctrines of the normative foundation of sovereignty and order. Yet, in it too the dimension of the *ordo ordinatus* prevails as the exclusive domain of concern. The liberal ideological elements are so dominant that alternative justifications of the constituted order are relegated to the sphere of irrationality, or condemned to irrelevance. If such a position appears legitimate from the standpoint of ethics and political action, still from a theoretical point of view it eludes the fundamental question of the first foundation. Also in this case, the diameter of the problem of constitutionalism does not coincide with that of the problem of sovereignty as a foundational problem, one in which the origin and nature of the guiding principles for the establishment of order are to be examined.

¹⁴⁷ See R.C. van Caenegem (1988), I, p. 192.

¹⁴⁸ So Bracton stated his view: "*parem autem non habet rex in regno suo. Ipse autem rex non debet esse sub homine. Ipse autem rex non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem [...] Non est enim rex ubi dominatur voluntas et non lex*". See H. Bracton, *On the Laws and Customs of England*, II (ed. G.E. Woodbine), p. 33. Cambridge (MA), 1968.

3.3.5) Popular sovereignty as “normative postulate” in European constitutional thought.

Sovereignty has been seen as the ‘logical postulate’ of any system of order according to law. If there is to be uniformity of legal rules in a community, it has been argued, there must be a single ultimate source of law. A significant number of scholars has seen, and still sees, this concept of sovereignty as typically modern. In its background they detect the fear that competing powers, subject to no common superior, would only lead to anarchy. But what is so ‘modern’ about this concept?

Hideaki Shinoda, who recently studied the character of the links between sovereignty and modernity, defined the latter narrowly as the period that began in the second half of the eighteenth century. In any case, “before the sixteenth century the idea of sovereignty was not established as a principle of the political community, and of international society”. “Only in the process of modernity”, the author wrote, “did people *consciously* understand it as such”. It was in this process that “the idea of state sovereignty took shape in people’s minds and constituted their thoughts and behaviours”. In this author’s opinion, what characterises ‘modernity’ as a whole is the “conceptualisation of abstract notions”, including sovereignty. “The lack of God in the modern age”, wrote Shinoda, “was compensated for by abstract notions like sovereignty that were expected to sustain autonomous human activities”.¹⁴⁹ More recently, Jonathan Israel provided a convincing and detailed historical analysis of the character of the links between sovereignty and modernity. Philosophically, he argued, ‘modernity’ is conceived as “an abstract package of basic values – toleration, personal freedom, democracy, equality racial and sexual, freedom of expression, sexual emancipation, and the universal right to knowledge”. Traditionally, ‘modernity’ and ‘Enlightenment’ are closely related. Yet, as we mentioned already at the beginning of the first chapter, in order to grasp the essence of ‘modernity’ so intended, according to Israel, we should recognize that in fact there have been two enlightenments, at war with each other from the very outset of the Enlightenment tradition in the late seventeenth century. Therefore, we should differentiate “Radical Enlightenment” from “conservative” or “moderate mainstream Enlightenment”. From the 1660s onwards, a relatively small group of radical thinkers spread widely between England, the Netherlands, Italy, France, and Germany continuously redefined the key intellectual and political issues by teaching that human society should be based on reason alone, personal liberty, equality, and freedom of thought and expression. They were everywhere denounced, banned, and reviled. Mainstream Enlightenment thinkers were dominant in terms of support, official approval, and prestige. They constantly attempted to find a middle ground between reason and faith, freedom and

¹⁴⁹ See H. Shinoda (2000), pp. 10-11.

authority. Yet, Israel argued, “the universal opposition of churches, governments, universities, and leading publicists, as well as the great bulk of the common people, could not alter the fact that it was precisely [the] philosophical radicals [...] who often seemed to evince the greatest intellectual consistency”. Between the 1660s and the 1770s, they even managed to infiltrate popular culture and opinion. ‘Modernity’ thus derives from the radical wing. However, ‘modernity’ “is the rich nuanced brew which arose as a result of the ongoing conflict not just between these two enlightenment but also (or still more) between both enlightenments, on the one hand, and, on the other, the successive counter-enlightenments”, which sought to overthrow both streams of the Enlightenment.¹⁵⁰ As a corollary, following the analysis of Israel, we should cast our attention to the notion of ‘revolution’ for is of crucial importance for understanding modern sovereignty. What historians of modernity are trying to pinpoint when they investigate the phenomenon of modernity, and within modernity the problem of revolution, Israel argued, “is the difference between social, cultural, and political renewal expressed theologically, traditionally, and dynastically, on the one hand, and, on the other, far-reaching action and reform justified in secular, non-theological, and non-customary ideological terms”. By the 1670s and 1680s, “the feasibility and fear of ‘revolution’ as a planned, deliberate attempt to replace the existing foundations of society had become a real possibility and was widely recognized as an immediate threat”. “At risk”, this author wrote, “were not just the traditional forms of monarchy, aristocracy, and ecclesiastical power but also all prevailing moral, devotional, and intellectual systems”. As the vast pamphlet literature produced in various European countries between the 1688 and 1700 shows, a number of commentators considered the so-called ‘Glorious Revolution’ of 1688-91 in Britain, Ireland, and the English colonies in America as “wholly unjustifiable and illegitimate”, while others considered it “a restoration of the ‘true’ or legitimate institutional order”. But, Israel recalled, “there was also a conspicuous and vocal fringe of radical Whigs and republicans both in Britain and the Netherlands who, with very different premises and aims in mind, proclaimed the ‘late Revolution’ a great turning point, a linear transformation, introducing a fundamentally new type of polity justifiable exclusively on the basis of ‘philosophical’ principles, without drawing any legitimacy from tradition, precedent, royal lineages, or theology”. In the eighteenth century this way of thinking became increasingly widespread in America and western Europe.¹⁵¹ By contrast to all that has been said so far,

¹⁵⁰ See J.I. Israel (2006), pp. 11-2.

¹⁵¹ According to Israel, “the basic difference between pre-modern revolts and upheavals and modern revolution [...] is that, with the former, justification of social and political change inevitably invoked theological *fundamenta*, customary law, and veneration of tradition while modern revolutions quintessentially legitimize themselves in terms of, and depend on, non-traditional, and newly introduced, fundamental concepts”. See J.I. Israel (2006), pp. 3, 7, 8.

medieval law and government drew their legitimacy from tradition and theology even if medieval society knew a plurality of sources of law, some of which were situated beyond the political community organised as a State. It is important to recall that in the Middle Ages the word *sovereignty* was not used in the modern sense – the word denoted *superioritas* and any superior was sovereign in a particular sense. But from this fact does not follow, as Bertrand de Jouvenel thought, that in the Middle Ages men lacked abstract thinking and consequently a proper concept of sovereignty.¹⁵² Distinguishing sovereignty from statehood allows us to see how the medieval plural system of law within the framework of the *ius commune* and the idea of sovereignty are not in opposition to each other.

In modern legal and political thought, popular sovereignty constitutes a 'normative postulate'. In *De la démocratie en Amérique* (1830-40), Alexis de Tocqueville spoke of 'the dogma of popular sovereignty' ("le dogme de la souveraineté du peuple") and called popular sovereignty itself 'the law of the laws' ("la loi des lois").¹⁵³ In the famed Gettysburg Address of 1863, President Lincoln provided a memorable definition of popular sovereignty as 'government of the people, by the people, for the people'.¹⁵⁴ This formulation came to symbolise the current theory of the sovereign democratic state, a theory presupposing "the idea of a community that rightly governs itself and determines its own future".¹⁵⁵ It is based upon the assumption, formulated by Jean-Jacques Rousseau, that there is a substantial difference between ruling over a multitude of subjects and ruling over a community of free citizens.¹⁵⁶ Such a theory prescribes that democratic government should be at the service of the people and not the people at the service of the government. That is why, as has been pointed out, "*demos precedes cracy*".¹⁵⁷ The modern theories of popular sovereignty see the people as a whole as the original source of political authority, namely as *ordo ordinans*. To secure the legal and political supremacy of the

¹⁵² See B. de Jouvenel, *Sovereignty: An Inquiry into the Political Good* (trans. J.F. Huntington), p. 171. Cambridge, 1957.

¹⁵³ Tocqueville wrote: "en Amérique, le principe de la souveraineté du peuple n'est point caché ou stérile comme chez certaines nations: il est reconnu par le mœurs, proclamé par les lois; il s'étend avec liberté et atteint sans obstacles ses dernières conséquences. S'il est un seul pays au monde où l'on puisse espérer apprécier à sa juste valeur le dogme de la souveraineté du peuple, l'étudier dans son application aux affaires de la société, et juger ses avantages et ses dangers, ce pays-là est assurément l'Amérique". See A. de Toqueville, *De la démocratie en Amérique*, IV, in *Œuvres complètes d'Alexis de Tocqueville* (ed. Madame de Tocqueville), I, pp. 93-95. Paris, 1888.

¹⁵⁴ See H.S. Commager (ed.), *Documents of American History* (1930), pp.428-29. New York, 1958.

¹⁵⁵ See D. Held, *Models of Democracy* (1987), p. 352. Cambridge, 1996.

¹⁵⁶ See J.-J. Rousseau, *Du contrat social*, I, V, in *Œuvres complètes* (eds. B. Gagnebin-M. Raymond), III, p. 359. Paris, 1964.

¹⁵⁷ See G. Sartori, *The Theory of Democracy Revisited*, p. 34. Chatham (NJ), 1987. See also H. Shinoda (2000), pp. 35-44.

people, the modern concept prescribes that the exercise of political authority is legitimate only if bestowed from 'below', namely if it is emanation and expression of the will of the people. The latter are, in the Ciceronian sense, not a mere collection of human beings, but an assemblage of people associated in a fundamental agreement with respect to justice and the common good.¹⁵⁸ Analytically, the theory of popular sovereignty concerns both the sources of political authority and the conditions for the legitimate and correct exercise of such authority. These theories are genealogical and legitimising at the same time. As genealogical theories they look like descriptions. In fact, what they describe is not an established fact of nature, but the fact that the people in a given territory are to be the primary source of political authority. This is the occurrence that the theories in question intend to secure. The theories of popular sovereignty, even though formulated through a number of descriptions, have a normative character in their genealogical variants too. The use of the descriptive method has been constantly subordinated to an end that is not descriptive but prescriptive. This is frequently the case in modern constitutions. Article 1 of the 1947 Italian Constitution, article 20 (2) of the 1949 Basic Law of the Federal Republic of Germany, and article 3 of the 1958 French Constitution can well be interpreted in the genealogical sense. In all of them, it is stated that sovereignty belongs to the people.¹⁵⁹ By means of the analysis of their respective historical backgrounds, we easily see that the statements in question are essentially prescriptive in so far as they command the maintenance of the democratic principle as the standard for directing and judging human conduct and institutional life. If there is anything that those assertions describe, it is democratic desire. The prescriptive character of the theory of popular sovereignty in the genealogical sense is even more clearly expressed in article 3 of the Stalinist constitution of the Union of Soviet Socialist Republics (1936). In this, it was stated that political authority is vested not in the people as such but in the "the working people".¹⁶⁰ As theory of legitimacy, the theory of popular sovereignty shows its prescriptive character more clearly. The view that the exercise of political authority is legitimate only if it is an expression of the will of the people constitutes the core of the US Constitution of 1787. The preamble unequivocally reveals the prescriptive character of popular sovereignty:

"We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence,

¹⁵⁸ See Cicero, *De republica*, I, XXV: "*populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus*".

¹⁵⁹ "Sovereignty belongs to the people"; "All state authority emanates from the people"; "National sovereignty belongs to the people". See A.J. Peaslee (ed.), *Constitutions of Nations*, III/1, pp. 496-527 (Italy), 357-98 (Germany), 308-30 (France). The Hague, 1968.

¹⁶⁰ "All power in the USSR is vested in the working people of town and country as represented by the Soviets". See A.J. Peaslee (1968), III/2, pp. 989-1007.

*promote the general Welfare, and to secure the Blessings of Liberty to ourselves and our Prosperity, do ordain and establish this Constitution for the United States of America".*¹⁶¹

In *Du contrat social* (1762), Jean-Jacques Rousseau portrayed sovereignty as the inalienable and indivisible exercise of the General Will.¹⁶² The polity and its members are normatively regarded as one and the same, and the sovereignty of the people is the proper authority, as it ought to be.¹⁶³ In conclusion, the principle that the people are the titular holder of the right to exercise political authority in a given territory is essentially prescriptive. Historically, if it is the origin of the secular idea of popular sovereignty that we seek, as Jonathan Israel suggested in contrast to a considerable part of current historiography, which continues to see generally the origin of the modern concept of popular sovereignty in the so-called 'Atlantic' republicanism of the English gentry,¹⁶⁴ it is to the Dutch radical writers of the late 1650s and 1660s that we have to look. Writers such as Franciscus van den Enden (1602-1674), Pieter de la Court (1618-1685) and Johan de la Court (1622-1660), Johan de Witt (1625-1672), Spinoza, Adriaen Koerbagh (1632-1669) and Johannes Koerbagh (1634-1672), under the stimulus of the political ideas of Machiavelli and Hobbes, must be credited with having "initiated an important new trend in western political thought". Due to its egalitarian nature, Israel argued, "Dutch seventeenth-century democratic republicanism was distinctively 'modern' in a sense in which no other European republicanism of the period, including Britain's, can genuinely be said to have been".¹⁶⁵

To what extent can the principle of popular sovereignty as normative principle be reduced to its formal arrangements? The analysis of the theories of Marsilius of Padua and Bartolus of Saxoferrato will hopefully shed some light on the difficulty, for medieval law and government at least, of reducing the problem of sovereignty to that of its bookish configurations. In the modern sense, behind the notion of 'constituent power' we find the desire of the many to free themselves from oppression and coercion and thus to govern themselves. Instead, in the Middle Ages, men of learning usually placed the *ordo ordinans* at the level of transcendent standards, the only standards able to found both the people's and the ruler's capacity to apply the *ordo ordinatus*. Christian tradition, which we find as a source of influence to both Marsilius and Bartolus, constituted an attempt to rationalise such a desire by harmonising it with divine

¹⁶¹ See H.S. Commager (1958), pp. 138-49, 139.

¹⁶² See J.-J. Rousseau, *Du contrat social*, II, I-II, pp. 368-71.

¹⁶³ See J.-J. Rousseau, *Du contrat social*, I, VII, p. 363.

¹⁶⁴ See, for example, F.C. Beiser, *The Sovereignty of Reason*, pp. 5-7, 16-17, 326-7. Princeton (NJ), 1996; R. Porter, *Enlightenment: Britain and the Creation of the Modern World*, pp. 4-47, 483-4. London, 2000.

¹⁶⁵ See J.I. Israel (2006), p. 241. See also J.I. Israel (2001), pp. 159-212.

transcendence. In the next chapter, we shall treat the major features of the Christian approach to the problem of the foundation of sovereignty.

CHAPTER FOUR

SOVEREIGNTY AND ITS FOUNDATION IN CHRISTIAN DOCTRINE

- 4.1) Antiquity, Christian apology, and knowledge.
- 4.2) Distant echoes of justice and legality: pre-Christian normative positions.
- 4.3) The Christian synthesis.

4.1) Antiquity, Christian doctrine, and knowledge.

One of the greatest difficulties that historians usually face in interpreting medieval law and government consists in setting aside the image of medieval civilisation as static and rigid in opposition to the ever-changing modern world. According to this view, medieval man hardly knew the tension between freedom and security which makes modern European constitutional and political history look like an imaginary pendulum swinging between two poles, one whereby "at one time private rights is the chief concern of the citizens", and at another "the prevention of disorder that threatens to become anarchy".¹ On a parallel basis, a contradictory claim in this field of study becomes visible when some authors insist on describing the medieval period as one of conflict and fragmentation. There is no reason to assume either that medieval man lacked the experience of conflict, or that he experienced it more dramatically than modern man did. Obviously, the features of the twentieth century conflicts made the problems of power very dramatic. But this does not detract from the perception that medieval man had of the struggles for power, and more particularly of the obstacles to his freedom that he experienced. Common sense would tell us that medieval man knew the tension between freedom and security, and even something very similar to what in modern political philosophy is called 'negative freedom'. Factual liberty, says Placentinus, consists in the natural power of doing whatever we please as long as it is not prohibited by the law or impossible: "*libertas est naturalis facultas faciendi quod libet nisi quod prohibetur, idest non prohibita vel impedita*".² In the *Dictionarium iuris* Albericus de Rosate speaks of *libertas* as the primordial state of man: "*libertas est primaevus status hominis*".³

The claim we advance is that all doctrinal justifications of limited authority, whatever form the latter has taken, have presupposed the traumatic experience of might. The present chapter deals with the ways in which the search of limits to sovereignty appeared in some of the most influential textual sources

¹ See C.H. McIlwain (1947), p. 136.

² The jurist explains that "*duplex est libertas [...] et de iure et de facto*". See Placentinus, *Summa Institutionum, De iure personarum*, foll. 8-9. Lugduni, apud Ioan. Frellaeum et Gulielmum de Guelques, 1536.

³ See Albericus de Rosate, *Dictionarium iuris*, fol. 177. Venetiis, 1656.

of the Christian doctrine, with a view to determining whether, and to what extent, the latter maintains continuity with the pagan tradition. "Paganism and Christianity owned different destinies", Harold Allen Drake wrote in his historical study and translation of the *Tricennial Orations*, composed by Eusebius of Caesarea in 335/6 for events connected with the Thirtieth Jubilee of the Emperor Constantine the Great. "Fated to travel divergent paths, for one brief moment these two great rivals met on common ground, and embraced". According to this scholar, that "period of embrace" was "the Age of Constantine".⁴ On the same basis, we could also say that the space of such embrace was the idea of sovereignty.⁵ We shall first pay some attention to the extent to which medieval legal and political thought was embedded with pagan antiquity. As Peter Riesenbergh pointed out, in the historical study of legal and political ideas there is always the danger of reading "influence or relationship" into the similarity of two or more pieces of writing, and of two or more authors. The similarity that we find and which is the result of the vocabulary adopted may be just called "the traditional statement of a problem".⁶ We are aware of this danger and we shall move carefully along the path of the historical study of sovereignty. Yet, we are prepared to suggest that there are, or at least might be, perennial problems in law and politics. The historical study of legal and political thought cannot be blamed for this, for there seems to be no alternative path for our understanding to move along; only through this kind of inquiry does the image of the past perception of the struggles for power remain vivid. Structurally, the problem of sovereignty must have been nothing new, in its essential characteristics, for medieval man. The very words of St. Augustine come to our aid. Commenting on Ecclesiastes, he asked: 'what is that which has

⁴ See H.A. Drake, *In Praise of Constantine: A Historical Study and New Translation of Eusebius' Tricennial Orations*, p. 79. Berkeley-Los Angeles-London, 1975.

⁵ Significant elements of the Christian doctrine are found in the background of both Marsilius' and Bartolus' theories of sovereignty respectively, although absorbed and worked out in different ways and for different purposes. As we shall see, the question of the modernity of both authors has attracted the attention of a number of distinguished scholars, but to evaluate such a modernity is not an easy task. According to von Gierke, Marsilius of Padua was the only writer in the Middle Ages "proclaiming in advance those principles of the State's absoluteness, which would only attain maturity in a then distant future". See O. von Gierke (1900), p. 20. For a critical account of this thesis, see G. Billanovich, "Giovanni XXII, Ludovico il Bavaro e i testi classici", in *Medioevo* 5 (1979), pp. 7-22. In the case of Bartolus of Saxoferrato, Cecil Sidney Woolf thought that he anticipated modern developments in matters of public law. See C.N.S. Woolf, *Bartolus of Saxoferrato. His Position in the History of Medieval Political Thought*, pp. 160-61. Cambridge, 1913. See also G. Fassò (2001), I, pp. 227-31.

⁶ See P.N. Riesenbergh (1956), p. 14.

been? The very thing that shall be. And what is that which has been done? The very thing that shall be done; and there s nothing new under the sun'.⁷

"By its own philosophy of history", Étienne Gilson wrote, "the Middle Ages was led to conceive itself placed at a decisive moment of the drama that opened with the creation of the world". The general picture was that humanity "had never ceased to change from the days of its infancy". But now it was "on the eve of the great final transformation".⁸ Before the transmission of ancient knowledge and wisdom had found its centre in the universities between the eleventh and twelve century, the Church was the only subject able to access and propagate Antiquity's cultural legacy. For a long time, it remained a hegemonic force in cultivation and erudition, consequently in the control of both.⁹ The process of acquisition and transmission led by the Church was a complex and laborious one, for it involved preservation, reinterpretation, modification, and innovation on the ground of her own pastoral concerns. A significant number of medieval scholars even posed the question of whether what they inherited could be accepted at all in the light of the Christian idea that the most authentic 'good life' is a post-historical state. They thought of the 'good life', Janet Coleman wrote, not as something "achievable by a rationally guided human will nor by human action in history", but rather as something achievable "by the selective and unpredictable gift of divine grace".¹⁰ Remarkable was the difference between the notion of 'good life', to which Bartolus too adhered, and that of a 'sufficiency of life', which Marsilius exalted, extrapolating it from Aristotelian sources.

⁷ Aurelius Augustinus, *De civitate Dei*, XII, 14: "*quid est quod fuit? Ipsum quod erit. Et quid est quod factum est? Ipsum quod fiet; et non est omne recens sub sole. Qui loquetur et dicet: Ecce hoc novum est - iam fuit saeculis quae fuerunt ante nos*". St. Augustine divided history into six ages, in analogy with the six ages of the life of a single person: infancy, childhood, adolescence, youth, maturity, and senility. He otherwise divided it into three ages considering mankind's spiritual progress. So, in its infancy mankind stands in front of the law, in its maturity it stands under the law, and eventually in its old age it stands under the Grace of God. While the earthly city is full of lust for power and *vanitas*, the *civitas Dei* is the only *veritas*. Provocatively, he asked: 'as far as this mortal life is concerned, which is passed and ended in a few days, what difference does it make for a man who is soon to die, under what ruler he lives, if only the rulers do not force him to commit unholy and unjust deeds? ("*quantum enim pertinet ad hanc vitam mortalium, quae paucis diebus ducitur et finitur, quid interest sub cuius imperio vivat homo moriturus, si illi qui imperant ad impia et iniqua non cogant?*" [V, 17]).

⁸ See É. Gilson, *The Spirit of Medieval Philosophy* (1931/32), p. 397. New York, 1940.

⁹ It is between the eleventh and twelve centuries, when University teachers acquired an autonomous social status, that the term *clericus* became synonymous with *vir litteratus*. Before that time, *clericus* meant *orator* - he who prays. See J.-C. Schmitt, "Clercs et laïcs" in J. Le Goff en J.-C. Schmitt, *Dictionnaire raisonné de l'Occident médiéval*, I. Paris, 1999; R. Imbach, "Clercs et laïcs" in C. Gauvard, A. De Libera, M. Zink, *Dictionnaire du Moyen Âge*. Paris, 2002.

¹⁰ See J. Coleman (2000), I, p. 227.

Christian good life was understood as eternal salvation, whereas "*bene vivere*" was the *causa finalis* in the Marsilian theory of the *civitas*. Marsilius indeed used expressions like "*vita sufficiens*", "*vivere sufficienter*", and "*sufficientia vitae*" to emphasise the naturalistic components of individual and collective life.¹¹

Are we to treat medieval law and government as a sort of transmission belt for ideas from antiquity to modern times? In the twelfth century, Richard Southern argued, many scholars had the idea that "knowledge was reaching a new and probably final peak" and that "they were living in a time when the consummation of all knowledge, and perhaps of all history, was not far off". Until about the end of the eleventh century, however, the *antiqui* were thought of as being very ancient, and the *moderni* comprised those who had received and transmitted ancient learning for the last three or four hundred years. The major characteristic of modernity so interpreted was "to have served as a link in a chain of transmission stretching over several centuries preserving and conveying the learning of the ancient world" to the present. This usage implied that the 'ancients' were best, and the 'moderns' were "no more than transmitters". The general purpose of knowledge was thus "to hold on to the past in the face of threatened destruction". The concept of the present and expectations about the future changed during the twelfth century, although the sense of ancient glory was not lost. The role of the *moderni* "was still not to add a really new body of knowledge" but "to improve on the past by greater refinement and arrangement, and by the rediscovery of lost texts".¹² William Courtenay pointed out that up to the fourteenth century the labels *modernus* and *moderni* mainly referred to 'contemporary authors'. Only gradually, in the middle years of that century at Paris and Oxford, did those terms "[shift] meaning in a way that allowed [them] to acquire ideological content". When Wyclif's attack "arrived on the Continent and joined forces with Hussite theology, the stage was already set for a widening

¹¹ See Marsilius de Padua, *Defensor pacis* I, IV, 1-2; I, IV, 5.

¹² See R.W. Southern, *Scholastic Humanism and the Unification of Europe – Foundations*, pp. 185-89. Oxford, 1995. This view is substantially in accordance with the presuppositions of the interpretations provided in the late 1950s and 1970s by two distinguished historians of the Renaissance, Hans Baron and Felix Gilbert. Both were concerned with the problem of identifying the period and the circumstances in which 'moderns' became a proper name for a specific group of scholars, and 'modern' a proper adjective for an ideology. Due to his own theory of the rise of civic humanism, Baron's argument was that the first endorsement of modern political, cultural, and intellectual values came from Renaissance Italy. See H. Baron, "The querelle of ancients and moderns as a problem for Renaissance scholarship", in *JHI*, 20 (1959), pp. 3-22. According to Neal Ward Gilbert, the ideological division between the *via antiqua* and the *via moderna* was a fifteenth century phenomenon that had its roots primarily in John Wyclif's realist attack on Terminist logic. See N.W. Gilbert, "Ockham, Wyclif, and the Via Moderna", in W. Zimmermann (ed.), *Antiqui und Moderni. Miscellanea Mediaevalia* (9), pp. 85-125. Berlin, 1974. See also S.E. Lahey (1997), p. 20; A. Black, *Political Thought in Europe, 1250-1450*, pp. 79-82. Cambridge, 1992.

conflict between *antiqui* and *moderni* within the arts faculties and eventually the theological faculties of Europe".¹³

The problem of assessing power, worldliness, and the pre-Christian legacy was not an easy one. The men of learning generally had an ambivalent attitude towards those issues. In *De doctrina christiana*, St. Augustine affirmed that the statements of the philosophers, especially the Platonists, which happen to be consistent with Christian faith should not cause alarm. Consequently, he invited all Christians to act towards pagan authors as the people of Israel did towards the treasures of the Egyptians when leaving Egypt: in order to make better use of them, they claimed those treasures for themselves at God's command.¹⁴ St. Isidore of Sevilla was sceptical about the pagan legacy for, as we have seen, he argued that "*qui secundum saeculum sapiens est secundum Deum stultus est*". The purpose of knowledge is to help lead an honest life for the sake of God's glory.¹⁵ Gratian epitomised the Christian view on the "*saeculares litterae*" by referring to the episode of Jerome reproached by the angel for having read Cicero. He restated the principle that knowing pagan writings is good as a means of liberation from error: "*legimus, ne ignoremus; legimus, non ut teneamus, sed ut repudiemus.*"¹⁶ In this context, the passage from John of Salisbury's *Metalogicon* (1159) is perhaps very suggestive, where the author reported a saying attributed to Bernard of Chartres (d. 1124/30), a *magister* whose 'modern' approach to the study of the literary sources of the past he greatly admired. According to Bernard of Chartres we are 'like dwarfs on the giants' shoulders'. This privileged position allows us to reach out with our sight to things that we could not possibly see on our own.¹⁷

¹³ See W.J. Coutenay, "Antiqui and moderni in late medieval thought", in *JHI*, 48 (1987), pp. 3-10. According to this author, the split between Wyclif's realist logic and Hussite theology on the one hand, and the Terminism of Pierre d'Ailly and Jean Gerson on the other, constituted the core of the so-called "Wegestreit" and the basis for the determination of the content and form of University teaching. See also H.A. Oberman, "Via antiqua and via moderna: late medieval prolegomena to early reformation thought" in *JHI*, 48 (1987), pp. 23-40.

¹⁴ See Aurelius Augustinus, *De doctrina christiana*, II, XL, 60. On the medieval reception of *De doctrina christiana* on this subject, see J. Le Goff, *La civilisation de l'occident médiéval*, p. 148. Paris, 1964.

¹⁵ See Isidorus Hispalensis, *Sententiae*, I, 2-3.

¹⁶ See *Decretum magistri Gratiani*, D. 37 c. 7 and c. 9.

¹⁷ See Ioannes Saresberiensis, *Metalogicon*, III, 4, 44-50: "*fruitur tamen aetas nostra beneficio praecedentis, et saepe plura novit non suo quidem praecedens ingenio, sed innitens viribus alienis, et opulenta doctrina patrum. Dicebat Bernardus Carnotensis nos esse quasi nanos gigantum umeris insidentes, ut possimus plura eis et remotiora videre, non utique proprii visus acumine, aut eminentia corporis, sed quia in altum subvehimur et extollimur magnitudine gigantea*". The same image is found in a twelve-century book by Alexander Neckam or Neckam (1157-1217) titled *De naturis rerum libri duo*. It is partly an encyclopaedia of natural sciences and partly a commentary on Ecclesiastes. In it we find that "*nos sumus*

4.2) Distant echoes of justice and legality: pre-Christian normative positions.

In various ancient literary sources, justice is praised beyond legality. With the intensification of the social conflict in ancient Greece for example, the demand for written laws by the freemen of low birth rapidly increased. Once the first compilations of written laws were made, the judges were still noblemen, but they were then bound to administer justice in accordance with the established standards of *diké*, by which 'due share' in the legal sense was originally meant.¹⁸ The parties involved in a dispute, Werner Jaeger argued, were usually said to give and take *diké*. Yet, the latter was also understood as the more general principle on which one could rely in case of *hybris*, namely of illegal action, concrete violation of *nomos*. Even if originally *hybris* was the opposite of *diké*, under the influence of the cult of Apollo and Dionysus at Delphi, it grew into a religious concept. The Apollonian ideals of order, clarity, and moderation could not have sunk so deeply into ordinary men's mentality if the wild excitement of Dionysus had not first broken the ground, sweeping away justice. The term *hybris* finally came to signify aggrandisement of man against the gods. In Apollo's code, the worst outrage against heaven was not to think human thoughts and to aspire beyond the limits fixed for man.¹⁹ The will to justice that grew up in the life of the city-state, Jaeger said, became a very powerful new

quasi nani stantes super humeros gigantum". See T. Wright (ed.), *De naturis rerum libri duo*, 78. London, 1863. By portraying his contemporaries as dwarfs standing on the shoulders of the giants, Bernard most probably meant that scholars had to learn from the *antiqui*, including the pagans, to properly write in Latin. John of Salisbury apparently broadened the meaning of that teaching suggesting that Christians somehow had to treasure the contribution of the ancient pagan writers who came close to the truths of Christian faith. Gilson credited *Metaphysicon* with the merit of having transmitted to us some knowledge of Bernard of Chartres. In it, he presented as an excellent *grammaticus*, "un professeur remarquable, soucieux de cultiver l'intelligence et de former le goût de ses élèves plutôt que de les accabler sous une inutile érudition". John of Salisbury "il estimait néanmoins que la fréquentation des grands écrivains de l'antiquité classique était chose indispensable". See É. Gilson, *La philosophie au Moyen Âge : des origines patristique à la fin du XIVe siècle* (1922), p. 259. Paris, 1947.

¹⁸ The word contained the idea of determining and paying a penalty.

¹⁹ The practice of *sophrosyné* - the virtue by which a man could learn to remember his limits - constituted the major remedy against the lust for power and immoderate ambition. In the legal terminology lying at its origin, there were words to signify concrete offences but not yet abstract expressions to denote the quality through which one might avoid committing these offences and escape transgression. While *diké* meant enforceability of justice, *themis* meant sovereignty of justice as been laid down by custom. At a certain point, the word in use to denote that quality was *dikaíosyné* (righteousness). So the ideal of justice had begun to be embodied in a special type of human character and a peculiar *areté*. It became the virtue par excellence even if originally the term *areté* was used to indicate any kind of excellence.

educational force, comparable to the ideal of warlike courage in the old aristocratic culture. Only after *nomos* was codified did the general idea of righteousness acquire a palpable content, and it consisted in obedience to the laws issued by the sovereign authority.²⁰ The sacred derivation of sovereignty in ancient Greek beliefs denoted its titanic and rather sinister nature.²¹ The Homeric *Iliad* shows preference for kingly sovereignty: "no good thing is a multitude of lords; let there be one lord, one king, to whom the son of crooked-counselling Cronos has given the sceptre and judgements, so that he may take counsel for his people".²²

Among many several illuminating passages from the writings of a number of eminent Greek thinkers and historians, it is perhaps convenient to focus our attention on Thucydides, because he stated that the final arbiter of any potential order is might, not right. He illustrated the case by the example of the little island of Melos in his *History of the Peloponnesian War*. The brave Melians saw that they could not appeal to the Athenians' sense of justice, because the Athenians recognised no standard but their own political advantage. They attempted to prove that it was advantageous for the Athenians to observe moderation in using their superior power in the face of the possibility of greater future misfortune on their side. The Athenians explained that their interest compelled them to annex the little island. The world, they affirmed, would otherwise have interpreted its neutrality as a sign of Athens' weakness. They observed that they had no interest in destroying the Melians, and warned them not to assume the inappropriate role of heroes, for the old chivalrous code had no validity in modern imperialist policy. They even discouraged them from placing their trust blindly in the divine. The latter, the Athenians claimed, was by nature always on the side of the big battalions.²³ For the Athenians "*the powerful exact what they can, while the weak yield what they must*".²⁴ Athenian realism is evident in the following passage:

²⁰ See W. Jaeger, *Paideia. Die Formung des griechischen Menschen* (1939), I, pp. 140-59. Berlin, 1959.

²¹ See Homer, *Iliad*, I, 297; II, 196-205. This aspect is revealed by the material element attached to sovereignty, namely the sceptre (*skeptron*). Literally, it was the stick used to make walking easier. The sceptre descended in the hands of Agamemnon from Hephaestos, son of Zeus, volcanic force and divine personification of the fire that burns within the earth and bursts forth in volcanic eruption located in Mount Etna, in Sicily. See *Iliad* II, 100-105. The second component of sovereignty was the so-called *thémistes*, that is, the set of divinely inspired non-written laws often derived from oracles originally invoked by the head of the *génos* in order to solve controversies internal to his family.

²² See Homer, *Iliad*, II, 205.

²³ According to Jaeger, what is really new about the Melian episode is that it is the first statement of the principle that might is right. See W. Jaeger (1959), I, pp. 292-303.

²⁴ See Thucydides, *History of the Peloponnesian War*, V, 89.

"of the gods we hold the belief, and of men we know, that by a necessity of their nature wherever they have power they always rule [...] we neither enacted this law nor when it was enacted were the first to use it, but found it in existence and expect to leave it in existence for all time, so we make use of it, well aware that both you and others, if clothed with the same power as we are, would do the same thing".²⁵

Thucydides opposed unrestrained sovereignty - that is, the right of the strong as a natural right - to the old order and moral code whereby sovereignty, justice and order were necessarily linked. The principle of unlimited sovereignty forms therefore a realm of its own, with laws of its own, probably not abolishing the traditional *taxis* but certainly separated from it.

Plato, as well as Aristotle, occupied a special position in the mind of the medieval men of learning because of the role he let reason's ordering play.²⁶ He claimed that reason's ordering is indeed true law. In *The Laws*, the idea of sovereignty of law meant precisely reason's supremacy over pleasures and lust - lust for power in particular. Wherever the rulers knew no continence, there was "no means of salvation". To Plato, the laws must have regard "to the benefit of the established polity, whatever it may be, so that it may keep in power forever and never be dissolved". So the lawgiver must set up laws with the "primary aim" of securing the permanence of his own authority. It follows that the lawgiver identifies his enactments with the just and will punish every transgressor "as guilty of injustice". Plato went on to argue that where offices of rule were open to competition, "the victors [...] monopolise power in the state so completely that they offer not the smallest share in office to the vanquished party or their descendants". In such a situation, the laws are enacted in the interest of a section - "the justice they ascribe to such laws is [...] an empty name". In conclusion, the art of ruling is proper "to that man who is most obedient to the laws". In fact, "wherever in a state the law is subservient and impotent, over the state I see ruin impending", Plato said. "Wherever the law is lord over the magistrates, and the magistrates are servants to the law, there", he said, "I descry salvation and all the blessings that the gods bestow on states".²⁷ That in Plato sovereignty of law is sovereignty of reason is also confirmed by another passage: "no man [...] is naturally able both to perceive what is of benefit to the civic life of men and, perceiving it, to be alike able and willing to practise what is best [for] his mortal nature will always urge him on [...] self-interested action [...] pursuing pleasure [...] above justice". Yet, he continues, "if ever there should arise a man competent by

²⁵ See Thucydides, *History of the Peloponnesian War*, V, 105. In the same passage the Athenians said: "with regard to the divine favour, we have good reason not to be afraid that we shall be at a disadvantage [...] of all men with whom we are acquainted they [...] consider what is agreeable to be honourable, and what is expedient just".

²⁶ See M. Oldoni, "Culture: dotta, popolare, orale" in E. Artifoni et alia (2000), pp. 387-433.

²⁷ See Plato, *The Laws*, IV, 713-15.

nature and by a birthright of divine grace to assume such an office, he would have no need of rulers over him". "No law or ordinance is mightier than knowledge" and "nor is it right for reason to be subject or in thrall to anything, but to be lord of all things". Given that such a nature exists only in small degree, we must opt for the second best, namely "ordinance and law".²⁸ Finally in *Politics*, Aristotle, after having reminded us that the starting-point of his inquiry was the question whether it was more advantageous to be ruled by the best men or by the best laws, concluded that "it is preferable for the law to rule rather than any one of the citizens". He argued that "even if it be better for certain men to govern, they must be appointed as guardians of the laws and in subordination to them".²⁹

As far as ancient Rome is concerned - the ideal *communis patria* of most medieval men of learning - the expression *maiestas populi Romani* designated her supremacy.³⁰ For as long as the republican tradition lasted, the Romans knew no other name for the State than the one denoting the entire community - *populus Romanus*.³¹ When in 48 BC, after having crushed the faction of the remaining triumvir, Pompeius, Caesar claimed the title of *imperator*, the latter ceased to mean 'right to command' in the merely military sense to become synonymous with "absolute control of all matters for all time".³² In *The Lives of the Caesars*,

²⁸ See Plato, *The Laws*, IX, 875a-c.

²⁹ See Aristotle, *Politics*, III, XI, 3; 1287a.

³⁰ To this expression was often related the *crimen laesae maiestatis*. See Dig. 48, 4, 1, 1: "proximum sacrilegio crimen est, quod maiestatis dicitur. Maiestatis autem crimen illud est, quod adversus populum Romanum vel adversus securitatem eius committitur".

³¹ Expressions like *res publica* and *res populi* originally designated the affairs pertaining to the Roman citizenry. The term 'people', J-C. Richard wrote, "est intrinsèquement militaire et [...] il s'applique aux hommes en âge de servir". See J-C. Richard, *Les origines de la plèbe romaine. Essai sur la formation du dualisme patricio-plébéien*, p. 130. Roma, 1978. Jean Gaudemet wrote that "*populus* désigne une certaine personnification de la cité" and "la formule *Senatus populusque Romanus* l'évoque". He followed the Ciceronian tradition according to which "la *res publica* est la chose du peuple". So the term "ne désigne pas une forme constitutionnelle déterminée, mais une organisation politique dont la forme peut varier". See J. Gaudemet (1982), pp. 354-5.

³² See Dio Cassius, *Roman History*, LIII, 16. Julius Caesar's leadership was based upon the support of the lower ranks of Roman society against the higher. The latter, "while recognizing that the leader of the armed forces of the state must have supreme authority, were unwilling to surrender their privileged position." See M. Rostovtzeff, *A History of Ancient World - II - Rome*, pp. 175-78. Oxford, 1927. Under Vespasian, the army's bestowing of the imperial title gained a specific legal validity. Gaudemet defined the *imperium* as "pouvoir de commandement fondé sur la force et le prestige du chef". Only the military leader has the right to celebrate the triumph after the victory in war. After the victory "il est [...] salué du titre d'*imperator*" and "en tant que titulaire de l'*imperium*, le chef militaire dispose d'un pouvoir disciplinaire absolu sur ses troupes, emportant le droit de vie et de mort, sans recours au peuple". See J. Gaudemet (1982), p.

Suetonius referred to a curious dream that Caesar had while conducting a military campaign in Spain. He had become impatient after noticing a statue of Alexander the Great in a temple of Hercules. He thought he had done nothing noteworthy, yet at a time of life when Alexander had already brought the world under his rule. The following day, having been dismayed by a dream in which he raped his own mother, his assistants reassured him about the real meaning of it. He was told the dream meant that he was destined to rule the world, since "*mater [...] non alia esset quam terra*".³³ Suetonius also recalled that from the time of the consulate onwards, Caesar conducted all the affairs of state "*unus [...] et ad arbitrium*" (I, XX). Although he administered justice with conscientiousness and strictness (I, XLIII) and he equalled, if not surpassed, the fame of his predecessors in eloquence as well as in the art of war (I, LV), neither in his military nor in his political career, the author claimed, Caesar had shown integrity (I, LIV). Of himself he apparently said "*Caesarem [...] non regem esse*" (I, LXXIX). The statement is reported to symbolise both the essence of the revolutionary turn in Roman theory and practice of sovereignty and the fatal destiny of the leader, who "*nullos non honores ad libidinem cepit et dedit*" (I, LXXVI). Nevertheless, the image of the Deified Julius was definitively established: "*in deorum numerum relatus est, non ore modo decernentium sed et persuasione volgi*" (I, LXXXVIII). It was Caesar's great-nephew and adoptive son, Octavian, who ended the civil wars and established the so-called *Pax Romana*.³⁴ The *urbs* had become synonymous with *imperium Romanum*, which in turn stood symbolically for *orbis terrarum*. Suetonius referred to his virtues saying that he was prudent enough not to give in to the desire to increase his *imperium* or *gloriam* at any cost. Like Julius Caesar, he administered justice in a highly conscientious way. He too insisted on military rule based upon popular support. Contrary to Caesar, Octavianus restored the Senate to its original privileged position. The *optimi status auctor* is, however, said to have acted as usurper. In fact, Suetonius reports, he had extorted the consular mandate by the force of the sword.³⁵ At a famous meeting of the Senate in 27 BC, Octavian formally proclaimed the restoration of the Republican constitution. Yet he proclaimed that he had to accept a number of extraordinary prerogatives of

331. See also G. Crifò, *Lezioni di storia del diritto romano* (1994), pp. 170-76, 231, 241-42. Bologna, 2000.

³³ See Suetonius, *The Lives of the Caesars*, I, VII.

³⁴ Referring to this achievement, Augustus wrote: "*rem publicam a dominatione factionibus oppressam in libertatem vindicavi*". See J. Gagé (ed.), *Res gestae divi Augusti*, 1, 1. Paris, 1977. Augustus' account of his own accomplishments is to a large extent preserved and it represents the most direct source of his political ideas. It was published in the Senate after his death and perpetuated by various inscriptions in Rome and elsewhere. The document is also known as *monumentum Ancyranum* since the most complete version first discovered was an inscription on the temple of Augustus at Ancyra, the modern Ankara.

³⁵ See Suetonius, *The Lives of the Caesars*, II, XXI; II, XXVIII.

both military and administrative types for the sake of the maintenance of republican order, against internal and external enemies, that in fact were alien to the Republican tradition. He saw himself as *princeps*, and in his hands all the most important governmental, military, and sacred functions were concentrated. On the same occasion, the Senate added to his former style, *Imperator Caesar Divi Filius*, the title of *Augustus*.³⁶ Mikhail Rostovzeff wrote that previously the title of *Augustus* had been applied only to certain gods "to imply that they were 'augmenters' and creators of something different and better". Such a title was conferred upon Octavianus as "the restorer and 'augmenter' of the State, the man invested with the highest authority – *auctoritas* – a word derived from the same root as the word *Augustus*".³⁷ According to Dio Cassius, this term meant that he was more than human. He suggested that sovereignty was somehow changed "in the interest of greater security, for it was [...] impossible for the people to be saved under a republic". Yet, he remarked that in spite of the appearance of having derived his power from the laws, Octavian had arbitrarily taken to himself all the most relevant functions and titles originally reserved to the senate and to the *populus*. From his time, he wrote, "there was, strictly speaking, a monarchy", a system by which all his successors could be "free from all compulsion of the laws".³⁸

In *De vita et moribus iulii Agricolae*, the voice of Tacitus arose to lament the absence of limitations on the power of the insatiable and deadly Romans, who had felt no shame in calling peace their mere will to power. "Robbers of the world", Tacitus said, "now that earth fails their all-devastating hands, they probe even the sea". And "if their enemy have wealth, they have greed; if he be poor, they are ambitious". "East nor West", continued the historian, "has glutted them", and "to plunder, butcher, steal, these things they misname empire: they make a desolation and they call it peace".³⁹ The Principate begun displaying ever more openly its character of an autarchy,⁴⁰ and towards the end of the first

³⁶ See Suetonius, *The Lives of the Caesars*, II, LVIII: "*Patris patriae cognomen universi repentino maximoque consensu detulerunt ei*".

³⁷ See M. Rostovtzeff (1927), p. 179.

³⁸ See Dio Cassius, *Roman History*, LIII, 16-17. Augustus was prone to repeat that he had no more *potestas* than his colleagues in magistracy had. Yet, he solemnly stated that he was superior to all others in *auctoritas*. In *Res gestae divi Augusti*, 6, 34 we read: "[...] *rem publicam ex mea potestate in senatus populique Romani arbitrium transtuli*". It is generally said that the Augustean *auctoritas* did not have a specific legal content, but it rather meant personal and moral influence. Yet, a viable hypothesis is that by *auctoritas* and *potestas* being brought ever closer to each other, the former assumed legal relevance.

³⁹ See Tacitus, *Agricola*, 30, 4-5: "*et infestiores Romani, quorum superbiam frustra per obsequium ac modestiam effugias. Raptores orbis, postquam cuncta vastantibus defuere terrae, iam mare scrutantur: si locuples hostis est, avari, si pauper, ambitiosi, quos non Oriens, non Occidens satiaverit: soli omnium opes atque inopiam pari adfectu concupiscunt. Auferre trucidare rapere falsis nominibus imperium, atque ubi solitudinem faciunt, pacem appellant*".

⁴⁰ In the next paragraph, we shall see that in Eusebius of Caesarea's praise of Constantine, the autocratic 'faculty' or 'capacity' of the Emperor has two related

century AD, the process of deification of the Emperor and the practice of legal and political absolutism were substantially accomplished.⁴¹ A letter by Domitian mentioned by Suetonius becomes a sort of ideological manifesto. In it, with arrogance, Domitian affirmed that "*Dominus et deus noster hoc fieri iubet*".⁴²

During the first decades of the second century AD, under the Emperor Hadrian, the magistracies and the Senate were politically insignificant. The *consilium principis* took over the latter's legislative prerogatives. Gibbon recalled that "the victory over the Senate was easy and inglorious". In fact, "every eye and every passion were directed to the supreme magistrate, who possessed the arms and treasure of the state".⁴³ It is commonly maintained that the period of relative peace which lasted for nearly two and a half centuries, from Augustus to the house of Severus, did not produce any substantial strengthening of the empire. Control over the whole of it was impossible due to military and political instability, and severe economic crisis. In 284 AD, Diocletian undertook the ambitious task of re-organizing the imperial administration and overcoming the lack of a stable and central authority, universally obeyed. Most of his attempts caused permanent changes in the theory and practice of sovereignty. Under his reign, inaugurating the so-called Dominate, the Emperor became *Jovius* and *sacratissimus dominus*.⁴⁴ This might be considered the apex of the Augustan dream as described, for example, by Dio Cassius, namely the dream of being independent and supreme over both himself and the laws in order to be able to do everything he wished and refrain from doing anything he did not wish.⁴⁵ If one dream, so to speak, took the floor, another one had vanished. Lucretius' vision of an original state of war from which the impersonal sovereignty of the laws finally emerged was in fact no more than a faded dream.⁴⁶

functions. It denotes the superiority of the spiritual over the material, and at the same time it symbolises the political subordination of the inhabitants of the Empire to a single ruler.

⁴¹ Generally, the process of apotheosis did not occur while the *princeps* was still alive. Referring to Nero, Suetonius wrote: "*Petulantiam, libidinem, luxuriam, avaritiam, crudelitatem sensim quidem primo et occulte et velut iuvenili errore exercuit, sed ut tunc quoque dubium nemini foret naturae illa vitia, non aetatis esse*". See Suetonius, *The Lives of the Caesars*, VI, XXVI.

⁴² See Suetonius, *The Lives of Caesars*, VIII, XIII.

⁴³ See E. Gibbon (1909), I, p. 136.

⁴⁴ He is also said to have introduced the practice of the *adoratio*. On autocratic ideology, as Gibbon wrote, "the Asiatic Greeks were [its] first inventors, the successors of Alexander, and Alexander himself, the first object of this servile and impious mode of adulation". "The conquerors", he continued, "soon imitated the vanquished nations in the arts of flattery". See E. Gibbon (1909), I, p. 76.

⁴⁵ See Dio Cassius *Roman History*, LIII, 28.

⁴⁶ See Lucretius, *De rerum natura*, 5, 1141-47: "*res itaque ad summam faecem turbasque redibat, imperium sibi cum ac summatum quisque petebat. Inde magistratum partim docuere*

Before concentrating our attention on the complex attitude that the Christians manifested towards law and government we have to refer to the Ciceronian presuppositions of the Christian theorisation. In spite of the general habit on the side of a, fortunately not too large, number of continental European legal historians of undermining Cicero's contribution as a legal theorist, this author must be considered of importance for the establishment of the juridical and ethical vision of medieval sovereignty. He was one of the few authors of pagan antiquity whose writings continued to be accessible throughout the whole Middle Ages.⁴⁷ Cicero's most relevant works, from the point of view of legal and political theory, *De re publica* and *De legibus*, were not known directly but indirectly through a number of intermediary patristic sources, including the works of Lactantius (ca. 250-ca. 320), St. Ambrose (ca. 340-397), and Augustine. Other Ciceronian works, like *De officiis* and *De inventione*, among the most widely read in the medieval West, contained many passages relevant from the point of view of law and government. In recent times, while treating the question of the diffusion of social and political naturalism in medieval Europe, Cary Nederman claimed that, next to the rather overrated Aristotelian tradition and the Augustinian tradition, there has been a third "clearly delineated tradition of thought, taking its substance from the writings of Cicero".⁴⁸ It is a tradition that, among other things, served as a complementary background to most medieval theories of justice and against tyranny. What did this tradition say? In *De legibus*, Cicero expounded the view of "*natura confirmatura ius*". He argued that it is "*stultissimum*" to reduce justice to mere conformity to written laws and local customs. He pleads in favour of the universality of justice - "*unum ius*"⁴⁹ - seen as "*una lex*" or "*recta ratio*" binding all "*hominum societas*". He opposed the view that utility is the standard against which the activity of *condere leges* had to be measured. Utility itself, he said, will overthrow justice based upon mere utility, for anyone who thinks it profitable, if he able to do so, will violate the laws. Likewise, he opposed the view that the law is mere command, namely expression of the will. In fact, the latter is well capable of sanctioning abuses of any sort.⁵⁰ This doctrine, as we shall see, also served as complementary background to the theory of the conditions for the true law as expounded by St. Isidore of Seville and Gratian.⁵¹

creare iuraque constituere, ut vellent legibus uti. Nam genus humanum, defessum vi colere aevom, ex inimicitiis languebat; quo magis sponte sua cecidit sub leges artaque iura".

⁴⁷ See H. Baron (1938), pp. 72-97.

⁴⁸ See C.J. Nederman, "Nature, sin and the origins of society: the Ciceronian tradition in Medieval political thought", in *JHI*, 49 (1988), pp. 3-26. See also G. Post (1964)[B], p. 494-561; A. Black (1992), p. 20.

⁴⁹ See Dig. 1, 1, 1, whereby Ulpianus declared "*jus [...] a justitia*".

⁵⁰ See Cicero, *On the Laws*, I, XV-XVI.

⁵¹ See Isidorus Hispalensis, *Etymologiarum libri XX*, V, XXI. The law ought to be "*honestas, iusta, possibilis, secundum naturam, secundum consuetudinem patriae, loco temporisque*".

4.3) The Christian synthesis.

As far as the idea of sovereignty is concerned, one of the earliest examples of how the so-called 'Christian synthesis' worked is to be found in an oration by the above-mentioned Eusebius composed for the Thirtieth Jubilee of Constantine the Great. The *Oratio de laudibus Constantini* (336) is not only a rhetorical idealisation of the Emperor and a source for the history of his life, but also an interesting example of 'political theology', for it offers a normative account of the transition from the pagan configuration of sovereignty to the Christian. In it Eusebius attempts to explain how the concepts of legitimate authority and royal power penetrated men's minds, how the principle of autocracy imposed itself, and tells about the medium which made known to human beings ideas which are invisible and incorporeal.⁵²

The age of Constantine, Harold Drake wrote, can be seen as "the meeting ground between pagan and Christian thought". The early fourth century in particular was a "strange shadow world", one "wherein monotheists could be Christian or pagan", and "wherein the Father and the Son, the Supreme Being and the Logos, were concepts not yet monopolized by one faith". Although the gap between the pagan notion of sovereignty and the Christian notion was deep, "the bridge was short", Drake said.⁵³ Eusebius "adapted pagan tradition to Christian uses".⁵⁴ Various elements of the eulogy prove that this was the case. For example, Eusebius pictures Constantine as the sovereign who first focused his thoughts on heaven: "*this is a sovereign who calls on the Heavenly Father night and day, who petitions Him in his prayers, who yearns for the highest kingdom*".⁵⁵ Outfitted "*in the likeness of the kingdom of heaven*", the Emperor is said to pilot "*affairs below with an upward gaze, to steer by the archetypal form*".⁵⁶ The motif of Constantine as the first ruler who longs for the incorruptible kingdom of God "corresponds to a prominent motif in Imperial portraiture developed during [the] late part of Constantine's reign". This motif is commemorated for us in the remains of a statue of the Emperor that stand in the courtyard of Rome's Palazzo dei Conservatori on the Capitoline Hill. The Emperor's eyes, as the enormous marble head witnesses, "are fixed upward, away from the cares of this world, in

conveniens, necessaria, utilis [...] nullo privato commodo, sed pro communi civium utilitate conscripta". See also *Decretum magistri Gratiani*, D. 4 c. 1 and c. 2.

⁵² See Eusebius, *Oratio de laudibus Constantini*, IV, 1-2, in H.A. Drake (1975), p. 88.

⁵³ See H.A. Drake (1975), p. 73. On Constantine, see B. Leadbetter, "Constantine" in P.F. Esler, *The Early Christian World*, II, pp. 1069-87. Oxon-New York, 2000.

⁵⁴ See H.A. Drake (1975), p. 57.

⁵⁵ See Eusebius, *Oratio de laudibus Constantini*, IV, 5, in H.A. Drake (1975), p. 89.

⁵⁶ See Eusebius, *Oratio de laudibus Constantini*, III, 5, in H.A. Drake (1975), p. 87. The author restated the view that "*monarchy excels all other kinds of constitution and government*" (III, 6).

an eternal gaze on the heavens".⁵⁷ According to a number of pagan writers, the Emperor's success or failure on earth depended on divine support. The Bishop of Caesarea maintains continuity with the pagan panegyrists when he concedes Constantine a special relationship to God, namely the position of God's favourite. In *De vita Constantini*, which Eusebius left unfinished at his death, he called the Emperor "*Deo carus*".⁵⁸ In the panegyric, the Emperor is said to be "*friend*" of the Supreme Sovereign, being him "*supplied from above by royal streams and confirmed in the name of a divine calling*".⁵⁹ "Emperors", Drake wrote, "came increasingly to rely on their connection with a divine *comes*", namely a special companion "whose favour and support would justify their rule and assure them of victory".⁶⁰ On these presuppositions, the Emperor's capacity to properly legislate is an imperfect mirror image of God's infinite capacity to justly legislate. At the same time, Drake argued, it constitutes a transfiguration in Christian terms of the pagan theory of the ruler as 'animate law'.⁶¹ According to pagan writers, the Deity leaves the care of others to lesser gods. For example, in one of the fragments of the so-called *Corpus Hermeticum*, a collection of Greek, Latin, and Coptic religious, astrological, and philosophical writings dating probably from the first to the third century AD, Isis tells Horus that the king on earth is the last of gods but first of men.⁶² In his panegyric, Eusebius did not attribute the role of a deity to Constantine. Rather he affirmed that in the Heavenly Kingdom, the first Christian Emperor "can expect not just eternal life but a more exalted position", that of "eternal rule".⁶³ "*The Ruler of all*", Eusebius wrote, "*has rewarded the leader and cause of this excellence with such long-lasting honours that not even three ten-year periods suffice for his rule, but instead He bestows it for as long as possible, and extends it even into far distant eternity*".⁶⁴ Eventually, we find traces of pagan

⁵⁷ See H.A. Drake (1975), pp. 3, 47.

⁵⁸ See Eusebius, *De vita Constantini*, III, 25. The Emperor is also said to be "*idoneus Dei minister*" (III, 5).

⁵⁹ See Eusebius, *Oratio de laudibus Constantini*, II, 1, in H.A. Drake (1975), p. 85. Being "God's friend", Constantine has been furnished by the Supreme Ruler with special "natural virtues". "His ability to reason has come from the Universal Logos, his wisdom from communion with Wisdom, goodness from contact with the Good, and justness from his association with Justice. He is prudent in the ideal of Prudence, and from sharing in the Highest Power has he courage". Moreover, Constantine bears the title of sovereign "with true reason". Therefore, "he has patterned regal virtues in his soul after the model of that distant kingdom". See Eusebius, *Oratio de laudibus Constantini*, V, 1-2, in H.A. Drake (1975), p. 89.

⁶⁰ See H.A. Drake (1975), pp. 58, 75. See also A.D. Nock, "The Emperor's divine comes" in *JRS* 37 (1947), pp. 102-16.

⁶¹ See H.A. Drake (1975), pp. 58, 160, n. 15.

⁶² See A.D. Nock et A.J. Festugière, *Corpus Hermeticum* XXIV, 3 (vol. IV, p. 54). Paris, 1954.

⁶³ See H.A. Drake (1975), p. 75.

⁶⁴ See Eusebius, *Oratio de laudibus Constantini*, VI, 2, in H.A. Drake (1975), pp. 90-1. What matters here, Drake observed, is not whether Eusebius drew his model "directly from

influence when Eusebius provides an elaborate image of the Emperor driving, like the sun, a chariot pulled by the four Caesars:

"as the light of the sun shines upon settlers in the most remote lands by the rays sent off from itself into the distance, so too does he assigns [his sons] like beacons and lamps of the brilliance emanating from himself [...] Thus, having yoked the four valiant Caesars like colts beneath the single yoke of the Imperial chariot, he controls them with the reins of holy harmony and concord. Holding the reins high above them, he rides along, traversing all lands alike that the sun gazes upon, himself present everywhere and watching over everything".⁶⁵

The sun was a popular symbol of pagan monotheism. Sometimes, it was worshipped as a physical body. Since the time of Plato, pagan men of learning "had been taught to recognize it as only the visible representation of the Ideal Good". The early Christians, however, accepted the Biblical 'Sun of Righteousness' (*Sol Iustitiae*) and 'Sun of Salvation' (*Sol Salutis*) as being symbols of their faith. Consequently, they had often been confused with sun worshippers by their opponents.⁶⁶

Whatever influence pagan tradition had on the political theology of the early panegyrists, we should not look on the Christian doctrine of the earthly sovereignty as something fixed throughout time. This doctrine underwent significant changes in the course of time. In *De ecclesiastica potestate* (1301-2), for instance, Aegidius Romanus referred to the second book of Hugh of St. Victor's *De sacramentis Christianae fidei* (II, II, IV) as demonstrating that "*errant itaque dicentes quod eque a Deo [sunt] sacerdotium et imperium vel [...] potestas regia*" and that "*potestas ergo regia non fuit constituta de mandato domini, nisi per potestatem ecclesiasticam*". To achieve this goal, Aegidius recalled that Moses originally reigned as "*rector et iudex*" in both spiritual and secular affairs. To properly deal

pagan writers or accepted Christian authorities". "Either way, the central point remains that educated pagans had no quarrel with this position". See H.A. Drake (1975), p. 58. The author claimed that although the Bishop of Caesarea emphasised that God rules the world through His Logos, He "uses no intermediary in dealing with Constantine". In fact, He "treats Constantine and the Logos as relatively equal coordinates". See H.A. Drake (1975), p. 57. Yet, we may observe that Eusebius preserves the intermediate function of the Logos: "*the Governor of this entire cosmos, the One who is over all, through all, and in all, visible and invisible, the all-pervasive Logos of God, from whom and through whom bearing the image of the higher kingdom, the sovereign dear to God, in imitation of the Higher Power, directs the helm and sets straight all things on earth*". See Eusebius, *Oratio de laudibus Constantini*, I, 6, in H.A. Drake (1975), p. 85. Eusebius defends the supreme co-rulership of God and His Logos: "*the Only-Begotten Logos of God endures with His Father as co-ruler from ages that have no beginning to ages that have no end*". See Eusebius, *Oratio de laudibus Constantini*, II, I, in H.A. Drake (1975), p. 85.

⁶⁵ See Eusebius, *Oratio de laudibus Constantini*, III, 4, in H.A. Drake (1975), p. 87.

⁶⁶ See H.A. Drake (1975), p. 73.

with such a heavy burden, Moses kept the power to decide on spiritual matters for himself and gave a number of wise men - "*odientes avariciam, sequentes veritatem*" - the task of settling quarrels among the people of Israel. Emperors, kings, and all secular rulers, Aegidius argued, are the actual heirs of those ancient judges in temporal matters (1 Sam 8, 4-10; Es 18, 21-22). Aegidius mentioned the episode of the elders of Israel asking the prophet Samuel to give them a king (1 Sam 8, 4-7). So, David acceded to the throne.⁶⁷

It is commonly acknowledged that medieval Western Europe grew out of a fusion between the legacy of the Roman tradition in government and law, the reception of Christianity during the last decades of the fourth century AD, and the emergence of the Germanic kingdoms during the fifth and sixth centuries.⁶⁸ Christianity had become the official religion of the Roman Empire in 380 AD, by decree of the Emperors Valentinian II and Theodosius I. Its acceptance in late antiquity had remarkable consequences on medieval society. Christianity, in fact, provided the basic conceptual framework for the development of the medieval idea of sovereignty. However, the Hebrew tradition constitutes an important source of influence on the Christian definition of sovereignty. To this tradition belongs Melchizedek, king of Salem and priest of God, a figure widely cited in medieval sources. King David is said to have looked to him in the attempt to unite royal and sacerdotal powers. Because of the conquest of Jerusalem, David and his house became heirs to Melchizedek's dynasty of priest-kings. In such an archaic, mysterious warrior-figure, as is revealed by Psalm 110, 4, we find *regnum* and *sacerdotium* united. Melchizedek was believed to be greater than either Abraham or his descendant, Levi. Psalm 110, 4 refers to eternal priesthood after the order of Melchizedek precisely: "*Tu es sacerdos in aeternum secundum ordinem Melchisedech*". The author of the letter to the Hebrews then cited Psalm 110, 4 to assimilate Jesus Christ to Melchizedek. By so doing, he laid down the foundation for the superiority of Jesus Christ and his New Order to the Levitic order of the Old Testament - "*Iesus, secundum ordinem Melchisedech pontifex factus in aeternum*" (Heb 6, 20). Unlike the Levitical priests, Jesus holds his priesthood permanently. His appointment was based upon divine oath, and his office was neither inherited nor transmitted. So the author of that letter wrote:

"Melchisedech, rex Salem, sacerdos Dei summi [...] rex iustitiae [...] rex pacis, sine patre, sine matre, sine genealogia, neque initium dierum neque finem vitae habens, assimilatus autem Filio Dei, manet sacerdos in perpetuum" (Heb 7, 1-3).

⁶⁷ See Aegidius Romanus, *De ecclesiastica potestate*, II, 5. On Moses as *rector* and *sacerdos*, see also *Somnium Viridarii*, CVI.

⁶⁸ The advance of Islam in the seventh century is part of that history too. We shall leave this topic aside, the ideological developments in the Latin West being the focus of this section.

The unification of *regnum* and *sacerdotium* in Jesus Christ constituted a primal model for further theorisation.⁶⁹ St. Isidore of Seville defined the two domains, arguing that "*reges a regendo vocati, sicut enim sacerdos a sanctificando*".⁷⁰ The powerful idea of bridging the gap between *regere* and *sanctificare* for the sake of peace on earth was revived in the first decades of the twelfth century by a number of intriguing discussions on the adventurous journeys of a legendary sovereign, the so-called 'Presbyter Johannes'. Otto of Freising reported in his *Historia de duabus civitatibus* (1143-45) of a story told by Hugh, Bishop of Jabala, while he was visiting Europe concerning a certain *Johannes rex et sacerdos*, presumably in the year 1145. In Otto's account, the latter is portrayed as the Nestorian sovereign of the Indies, who had broken up and brought under his domination various Muslim populations in the east and was ready to come to the aid of the Crusaders.⁷¹

The contribution of Christian doctrine to the solution of the problem of sovereignty has had a principally moral character. This solution finds its roots in the doctrine of the capital sins as conceived of by the Fathers of the Church. From the beginning, Christianity has had a peculiar way of looking upon the question of super- and subordination in general, and of governmental authority in particular. By the first half of the third century, Christians had become more numerous and more influential, since they began winning a significant number of converts among the more educated classes.⁷² Eusebius of Caesarea reported that originally persecutions of the Christians were local and intermittent, yet characterized by great ferocity, especially due to rumours depicting them as child-eaters and incestuous rapists.⁷³ While Christianity remained an illegal religion, even during the greater part of Diocletian's reign, its followers were to be found in high positions in the imperial hierarchy.⁷⁴ The situation changed dramatically once the Emperors insisted on calling on them to show formal

⁶⁹ See F.R. Erkens, "*Vicarius Christi – sacratissimus legislator – sacra majestas. Religiöse Herrschaftslegitimierung im Mittelalter*" in ZSS (Kan.Abt.) 120 (2003), pp. 1-55; W. Goez, "*Legitimation weltlicher Herrschaft von Geistlichen im Abendland*" in ZSS (Kan.Abt.) 121 (2004), pp. 192-206.

⁷⁰ See Isidorus Hispalensis, *Etymologiarum libri XX*, IX, III, 4.

⁷¹ See Otto Frisingensis, *Chronica sive Historia de duabus civitatibus*, VII, XXXIII.

⁷² The impact of this religion was to be of extraordinary importance if we only think of the peculiar and, to some extent, revolutionary idea of equality it bore. The words of St. Paul fully express this point: "*omnes enim filii Dei estis per fidem in Christo Iesu. Quicumque enim in Christo baptizati estis, Christum induistis; non est Iudaeus neque Graecus, non est servus neque liber, non est masculus et femina: omnes enim vos unus estis in Christo Iesu*" (Gal 3, 26-8).

⁷³ See Eusebius, *Ecclesiastical History*, V, I, 11-16.

⁷⁴ The Church then enjoyed a rather high degree of freedom and honour. The Bishop of Caesarea did not pass over in silence the corrupting effects of that condition. See Eusebius, *Ecclesiastical History*, VIII, I, 1-9.

recognition of the gods protecting the empire by, for example, ritual sacrifices.⁷⁵ Since the days of Augustus, the supreme power of the Emperor had become irresistible. The principle of imperial deification, which had become constant in the history of the late Empire, contradicted the Christian doctrine that God had risen up Emperors to repel the wicked and bloodthirsty tyrants. Lactantius, for instance, spoke of Diocletian as *"scelerum inventor et malorum machinator"*. On the contrary, he greatly admired Constantine – *"dissimilis ceterorum fuit dignusque [...] solus orbem teneret"*.⁷⁶ Aegidius Romanus, later, referring to imperial idolatry, reaffirmed on the ground of St. Augustine and various biblical and apologetic sources that the Roman State lacked true justice due to its exaltation of mundane glory.⁷⁷

Henry Chadwick emphasised the "Christian sense of ambivalence" towards issues like slavery, private property, and sovereignty.⁷⁸ In this respect, two passages from the Gospel of St. John come to mind. In the first passage, the answer that Jesus gave to the dramatic and provocative question of Pilate is reported. Pilate asked Jesus whether he was the king of the Jews. And Jesus replied: *"regnum meum non est de mundo hoc [...] nunc autem regnum meum non est hinc"* (Jo 18, 33-36).⁷⁹ The second passage portrays Pilate as irritated by, and scared of, the reticence of Jesus. After Pilate warned Jesus that he had the authority to release or to crucify him, Jesus answered: *"non haberes potestatem"*

⁷⁵ See Eusebius, *Ecclesiastical History*, VII, XI, 9-12.

⁷⁶ See Lactantius, *De mortibus persecutorum*, VII, 1-2, VIII, 7. See also I, 3: *"excitavit enim deus principes qui tyrannorum nefaria et cruenta imperia resciderunt, humano generi providerunt, ut iam quasi discusso tristissimi temporis nubilo mentes omnium pax iucunda et serena laetificet"*. This work, written around 320 AD, sets out to reveal to all men how god's enemies, the persecutors of his people, have been overthrown. It gives an account of the relevant vicissitudes from 303 to 313 AD. Let us recall that another celebrated champion of Christianity, the Emperor Justinianus, was heavily discredited by Procopius of Caesarea in his *Anecdota*. Referring to the Emperor and his wife, Theodora, Procopius even affirmed that *"assuming human form and becoming man-demons, they harassed [...] the whole world"*. Procopius calls Justinianus *"Lord of the Demons"*. See Procopius of Caesarea, *The Anecdota or Secret History*, XII, 14, 27.

⁷⁷ See Aegidius Romanus, *De ecclesiastica potestate*, II, 7: *"Romani mutaverunt gloriam incorruptibilis Dei in in similitudinem imaginis corruptibilis hominis et volucrum et quadrupedum et serpentum, ideo dicentes se esse sapientes, stulti facti sunt, nec vera iusticia in eorum republica esse poterat, ubi non colebatur verus Deus"*.

⁷⁸ See H. Chadwick, *The Church in Ancient Society: from Galilee to Gregory the Great*, p. 12. Oxford, 2001.

⁷⁹ See Augustine's commentary on this passage: *"audite, omnia regna terrena. Non impedio dominationem vestram in hoc mundo; regnum meum non est de hoc mundo [...] Dicit quidem in prophetia de Deo Patre: Ego autem constitutus sum rex ab eo super Sion montem sanctum eius; sed Sion illa et mons ille non est de hoc mundo [...] hic non ait: Regnum meum non est in hoc mundo, sed non est de hoc mundo [...] non ait nunc autem regnum meum non est hic, sed non est hinc"*. See Aurelius Augustinus, *In Ioannis Evangelium Tractatus*, 115, 2.

adversum me ullam, nisi tibi esset datum desuper" (Io 19, 10-11). Quoting this passage of John and using Augustine's *De trinitate* (III, 8, 13) as a second authority, Aegidius Romanus argued that "*eciam iniqui non nisi a Deo potestatem accipiant*".⁸⁰

The institutions in question, including secular sovereignty, were originally understood as conventional, not natural. Sovereignty especially was seen as divinely based and devised to correct the vices of human nature once it lost its first innocence. In *Expositio Evangelii secundum Lucam*, St. Ambrose had referred to the Pauline teaching to assert that, since all powers are good in themselves, because descended from God, "*non ergo potestas mala, sed ambitio*".⁸¹ In *Exameron*, a collection of nine sermons on the six days of Creation, he portrayed the original and ideal egalitarian state of mankind - "*pulcherrimus rerum status*" - wherein men lived free as birds, and the laws were common and observed by all with common devotion. The one in question is a state in which there is no need of human super-ordination, and labour is shared in common. Only due to the lust of power, the mark of sinfulness, did the need of government and coercion emerge and was the original egalitarian condition lost.⁸² Finally, in *De apologia prophetae David*, St. Ambrose came to the statement that although the Emperor is not legally bound to obey the laws, nor subject to legal penalties, he has the moral duty to keep them.⁸³ Elaborating on the idea of the original order, St. Augustine then asserted that God did not wish a rational creature, made in his own image, to have dominion save over irrational creatures; not man over man, but man over the beasts.⁸⁴

⁸⁰ See Aegidius Romanus, *De ecclesiastica potestate*, II, 9. On the basis of the principle that Jesus Christ's kingdom does not belong to this world, the *miles* protagonist of the *Somnium Viridarii* argued that the exercise of secular powers on the side of the papacy contradicts the apostolic *caritas*. See *Somnium Viridarii*, LXIII and LXV.

⁸¹ See Ambrosius Mediolanensis, *Expositio Evangelii secundum Lucam*, IV, 28-30. For a recent profile of Ambrose, see I. Davidson, "Ambrose" in P.F. Esler (2000), pp. 1175-1204.

⁸² See Ambrosius Mediolanensis, *Exameron*, V, 21, 66-67: "*sic a principio acceptam a natura exemplo avium politiam homines exercere coeperant, ut communis esset labor, communis dignitas, per vices singuli partivi curas discerent, obsequia imperiaque dividerent, nemo esset honoris exsors, nullus immunis laboris. Hic erat pulcherrimus rerum status [...] sed postquam dominandi libido vindicare coepit indeptas et susceptas nolle deponere potestates, posteaquam militiae non ius commune coepit esse, sed servitus, posteaquam non ordo factus est suscipiendae potentiae [...]*".

⁸³ See Ambrosius Mediolanensis, *De apologia prophetae David*, I, 16, 77.

⁸⁴ See Aurelius Augustinus, *De civitate Dei*, XIX, XV: "*ita Deus hominem condidit [...] rationalem factum ad imaginem suam noluit nisi irrationalibus dominari; non hominem homini, sed hominem pecori*".

On the one hand, power was an instrument in the hands of persons taken by an almost irresistible *"libido principandi"*.⁸⁵ In this sense, power as such was interpreted as corrupting to the extent it lacked restraint. It coincided with the sphere of idolatry and worldliness under the temporary control of Satan. Babylon and Rome epitomized such worldliness. So the prophet Jeremiah (Jer 51, 6-7) compared Babylon with a golden cup in the hands of God whose wine made all nations drunken.⁸⁶ In St. John's Apocalypse (Apc 17, 1-6), a horrific scarlet beast symbolized the Roman Empire, the arch-persecutor of the saints. John referred to a disgusting woman, the mother of all harlots arrayed in purple and scarlet, sitting on the beast and holding in her hand a golden cup full of abominations and impurities, drunken with the blood of the saints and martyrs.⁸⁷ On the other hand, sovereignty was seen as a beneficial provision of order and justice. As Augustine pointed out, *"turpis enim omnis pars universo suo non congruens [...] generale quippe pactum est societatis humanae oboedire regibus suis"*.⁸⁸ This side, that is the other side of the dualistic Christian attitude towards government and law, found its roots in the Evangelic principle of *"reddite ergo, quae sunt Caesaris, Caesari, et, quae sunt Dei, Deo"* (Mt 22, 21).⁸⁹

The primacy of morality was intended by the Christians to produce pervasive effects in all fields of human experience, including law and politics. The latter weren't independent fields in the sense of being indifferent or neutral towards the content of Christian moral teaching. Instead, law and politics ought

⁸⁵ See Aurelius Augustinus, *Confessionum libri tredecim*, III, VIII. St. Augustine also used the expression *libido dominandi*. See, for example, *De civitate Dei*, XIX, XV.

⁸⁶ *"Fugite de medio Babylonis, et salvet unusquisque animum suum [...] Calix aureus Babylon in manu Domini inebrians omnem terram; de vino eius biberunt gentes, et ideo insaniunt"*.

⁸⁷ *"Veni, ostendum tibi damnationem meretricis magnae, quae sedet super aquas multas, cum quas fornicati sunt reges terrae, et inebriati sunt, qui inhabitant terram, de vino prostitutionis eius [...] Et vidi mulierem sedentem super bestiam coccineam, plenam nominibus blasphemiae, habentem capita septem et cornua decem. Et mulier erat circumdata purpura et coccino et inaurata auro et lapide pretioso et margaritis, habens poculum aureum in manu sua plenum abominationibus et immunditiis fornicationis eius, et in fronte eius nomen scriptum, mysterium: Babylon magna, mater fornicationum et abominationum terrae. Et vidit mulierem ebriam de sanguine sanctorum et de sanguine martyrum Iesu"*. See also Tertullianus's *Adversus Marcionem*, III, 13, 10: *"sic et Babylon etiam apud Iohannem nostrum Romanae urbis figura est, proinde magnae et regno superbae et sanctorum Dei debellatricis"*.

⁸⁸ See Aurelius Augustinus, *Confessionum libri tredecim*, III, VIII.

⁸⁹ According to St. Paul: *"non est enim potestas nisi a Deo; quae autem sunt, a Deo ordinatae sunt. Itaque qui resistit potestati, Dei ordinationi resistit [...] [principes] non enim sine causa gladium portat. Ideo necesse est subditos esse, non solum propter iram sed et propter conscientiam"* (Rom 13, 1-5). See also St. Peter: *"subiecti estote omni humanae creaturae propter Dominum: sive regi quasi praecellenti sive ducibus tamquam ab eo missis ad vindictam malefactorum, laudem vero bonorum; qui sic est voluntas Dei, ut beneficientes obmutescere faciatis imprudentium hominum ignorantiam, quasi liberi, et non quasi velamen habentes militiae libertatem, sed sicut servi Dei"* (1 Pe 2, 13-14).

to be guided and enlightened by morality. In the reflections of the Fathers of the Church, we find that the constitutional order of the earthly political community is at stake any time the *libido principandi* takes over in the form of the exercise of power without *auctoritas*. The Augustinian *libido principandi* or *dominandi* is, in the words of St. Thomas Aquinas, "*inordinatus appetitus excellentiae*".⁹⁰ Inevitably, the mind goes to *superbia* or *cupiditas* here, that is, one of the seven cardinal sins. In the *Liber Ecclesiasticus*, it is said that "*quoniam initium omnis peccati est superbia, qui tenuerit illam, ebulliet maledictum et subvertet eum in finem*". The author of the book asserted that "*rex insipiens perdet populum suum*" and that "*in manu Dei potestas terrae [est], et utilem rectorem suscitabit in tempus super illam*". He then asserted that "*odiabilis coram Deo est et hominibus superbia*". Especially hateful is thus the pride of the rulers. Finally, the writer warns the king of today, that since he will be dust and ashes tomorrow, all his pride is vain: "*quid superbit terra et cinis? [...] omnis potentatus brevis vita, sic et rex hodie est et cras morietur*".⁹¹ The idea of pride as the root of all evil is thus to be considered as the centre of the Christian moral teaching in its effects on law and politics. We find it also in the first *Epistula ad Timotheum* attributed to St. Paul. The apostle says that "*radix enim omnium malorum est cupiditas*".⁹² St. Gregory the Great, quoted by Aquinas in the passage previously examined, while treating the seven deadly sins, defined *superbia* as "*vitiorum regina*" and "*exercitus diaboli dux*" in his *Moralium libri*.⁹³ Charlemagne's teacher, Alcuin of York, restated the idea in *De virtutibus et vitiis liber*, where pride is portrayed as "*regina [...] omnium malorum, per quam angeli ceciderunt de coelo*". He argued that "*maximum diaboli peccatum fuit superbia [...] omni vitio deterior [...] nihil magis Christiano vitandum est quam superbia*".⁹⁴

Such wisdom is reflected in the speculations of Aquinas who, summing up a long-standing tradition, emphasised not just the importance of the constitutional problem, but its ontological status as an unavoidable question posed to humankind. He emphasised the impossibility of solving it without recourse to the principle of sovereignty, namely without recourse to a proper controlling force in a position of super-ordination. In *De regno ad regem Cypri*, he reckoned that although man is naturally endowed with reason ("*rationis lumen*"), in trying appropriately to direct his actions towards his ends, two basic circumstances frustrate all his efforts. The first circumstance is constituted by his natural deficiencies. Man is given none of the defensive means that nature has given to the animals. He has been given the use of reason to secure all he needs by the work of his hands instead: "*homo autem institutus est nullo horum sibi a natura preparato, sed loco omnium data est ei ratio per quam sibi haec omnia officio manuum posset preparare*". In the pursuit of what he needs, man is thus forced to

⁹⁰ See Thoma Aquinatis, *Quaestiones disputatae de malo*, qu. 8, art. 1, 16.

⁹¹ See *Liber Ecclesiasticus*, 10, 3-16.

⁹² See St. Paulus, *Epistula ad Timotheum* I, 6, 10.

⁹³ See Gregorius Magnus, *Moralium libri*, XXXI, c. 45, 87-88.

⁹⁴ See Alcuinus, *De virtutibus et vitiis liber ad Widoni comiti*, XVII, XXIII.

live in groups and depend on the cooperation of others: “*ad quae omnia preparanda unus homo non sufficit [...] per se sufficienter vitam transigere non posset; est igitur homini naturale ut in societate multorum vivat*”. The second frustrating circumstance is constituted by the fact that, due to the diversity of men’s pursuits and activities, they tend to accomplish their goals in different ways. Man lives in groups, and each has its own common concern. It is often the case that different goals, combined with different ways to achieve them, causes conflicts among men. The common concern of the community must be thus distinguished from the particular concern of each member.⁹⁵

Throughout the Middle Ages, the whole sphere of law and government is the concern with *gubernare et regere cum aequitate at iustitia*. The medieval vision of justice is said to be ‘juridical’ in the sense that it was a vision that aimed at the limitation of the arbitrary consequences of any established relationship of super- and subordination. It was a vision that attempted to provide an answer to the unequal distribution of powers among the members of the *corpus Christianorum*. To maintain and preserve ‘justice and equity’ was throughout the whole period in question the only condition that justified asymmetrical power positions, namely an ordered system of hierarchies.⁹⁶ The space occupied by the law in society, the diameter of its sphere, so to speak, differs from the diameter of the sphere of law today - comparatively smaller, but more pervasive from certain points of view. Grossi observed that if there is any element that medieval and modern European civilisations share at all, it is the concern with the law. Modernity has abandoned the idea of law as *iudicium*, or *inventio*,⁹⁷ namely as act

⁹⁵ Aquinas wrote: “*oportet [...] esse in omni multitudine aliquid regitivum [...] Si igitur naturale est homini quod in societate multorum vivat, necesse est in omnibus esse aliquid per quod multitudo regatur [...] multitudo in diversa dispergeretur nisi etiam esset aliquid de eo quod ad bonum multitudinis pertinet curam habens, sicut et corpus hominis et cuiuslibet animalis deflueret nisi esset aliqua vis regitiva communis in corpore, quae ad bonum commune omnium membrorum intenderet [...] in uno etiam homine anima regit corpus, atque inter animae partes irascibilis et concupiscibilis ratione reguntur [...] inter membra corporis unum est principale quod omnia movet, aut cor aut caput*”. See Thoma Aquinatis, *De regno ad regem Cypri*, I, I. In 1265 Thomas Aquinas was asked to write a treatise on kingship for the king of Cyprus. He left it unfinished in 1267, probably because of the king’s death. Polemy of Lucca completed the work later.

⁹⁶ See P. Grossi (1999), p. 94; D. Quaglioni (2004), pp. 21-41.

⁹⁷ John of Salisbury spoke of law as “*omnis inventio quidem [...] et donum Dei, dogma sapientum, correctio voluntariorum excessum, civitatis compositio, et totius criminis fuga*”. He defined equity as “*rerum convenientia [...] quae cuncta coaequiparat ratione et in paribus rebus paria iura desiderat, in omnes aequabilis, tribuens unicuique quod suum est*”, and law as “*[...] eius interpretes [...] utpote cui aequitas et iustitiae voluntas innotuit*”. He added that “*publicae ergo utilitatis minister et aequitatis servus est princeps, et in eo personam publicam gerit, quod omnium iniurias et dampna sed et crimina omnia aequitate media punit [...] quia de iuris auctoritate principis pendet auctoritas; et [...] maius imperio est, summittere legibus principatum; ut nichil sibi princeps licere opinetur, quod a iustitiae aequitate discordet*”. In

of knowledge based on *interpretatio*, and devoted itself to the vision of the law as procedure instead. The meaning of the latter is incommensurably distant from the meaning associated to the theory and practice of *condere leges* in the Middle Ages.⁹⁸ Parallel to the constant definitional effort of the jurists was the general intellectual need to justify the validity of the law against an objective standard of rationality. Thomas Aquinas's fourfold concept of law can be taken as an epitome of the mentality of his generation.⁹⁹ He argued that man can make law only in respect of those matters on he is able to judge.¹⁰⁰ He not only meant that there are matters beyond his ability to judge, but also indicated that the problem of the legitimacy of the law transcended the boundaries of the mere validity of any law-making process. Aquinas argued that it is impossible for human reason to participate in the dictate of the Divine reason fully, but only partially and imperfectly. Although the Eternal law contains the totality of all possible provisions applicable to the totality of all possible cases, man has partial and uncertain knowledge of the provisions, which function as models. So, he necessarily establishes laws that apply in particular cases, always aware of the fact that there are some fundamental and unbridgeable gaps. Human law, as intended by Aquinas, is fallible.¹⁰¹ In modernity, there are no situations impossible to judge about, because social consensus and the contractual principle are seen to be functioning as the ultimate criteria, and any impossibility of them doing so is only a temporary impossibility, just as any fallibility is contingent. Hence, the content of law is virtually infinite.¹⁰² Modern law in the purely positivistic sense takes into scant consideration any substantive idea of justice, and knows no Reason objectively and divinely founded, as portrayed by

Ioannes Saresberiensis, *Policraticus sive De nugis curialium et vestigiis philosophorum libri VIII*, IV, II.

⁹⁸ As far as medieval *interpretatio legum* is concerned, the Accursian gloss gave a picture of it whereby its nature is not merely exegetical, or explanatory, but creative: "*interpretor, idest corrigo [...] Item verbum apertius exprimo [...] item arrego, item prorogo, sed econtra corrigo id est addo [...]*". See Glo. ad l. *Sive ingenua I, ad senatusconsultum Tertullianum* [Dig. 38, 18, 1] glo. Interpretatione. The passage is quoted in P. Grossi (1999), p. 165.

⁹⁹ See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, qu. 91, art. 1-4.

¹⁰⁰ Aquinas wrote: "*de his potest homo legem ferre de quibus potest iudicare [...]*". See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, qu. 91, art. 5.

¹⁰¹ Aquinas explained: "*ratio humana non potest participare ad plenum dictamen rationis divinae, sed suo modo et imperfecte [...]* Et ideo necesse est ulterius quod ratio humana procedat ad particulares quasdam legum sanctiones". Introducing the distinction between 'practical' and 'speculative' reason, he established the extent to which law is effectively measurement: "*ratio practica est circa operabilia, quae sunt singularia et contingentia non autem circa necessaria, sicut ratio speculativa. Et ideo leges humanae non possunt illam infallibilitatem habere quam habent conclusiones demonstrativae scientiarum. Nec oportet quod omnis mensura sit omni modo infallibilis et certa, sed secundum quod est possibile in genere suo*". See *Prima Secundae Summae Theologiae*, qu. 91, art. 3.

¹⁰² See P. Grossi (1999), pp. 135-44.

Aquinas, whose answer to the question *utrum lex sit aliquid rationis* is like an epitome of the mentality of his generation. He took up two opposite views on the nature of the law. One, based upon the Roman law principle that 'what pleases the prince has the force of law' (Dig. 1, 4, 1), asserted that the law is a matter of will alone. The other, based upon the functional argument that the law prescribes and prohibits, asserted that *imperare* by means of prescriptions and prohibitions is proper to reason alone. Aquinas provided a picture of law in which reason and will appear necessarily connected to each other. In fact, if the will of the sovereign were not in accordance with reason, the law so produced would have more the character of iniquity than of true law. On the other hand, reason necessarily derives its power of producing significant effects from the will.¹⁰³ On these bases, he concluded that proper law is a certain ordinance of reason for the common good. To order something for the common good, he said, is the business of the whole community, or of someone acting on behalf of the whole community. Accordingly, to make the law is either the business of the latter, or of the 'public person' who is in charge of taking care of the community.¹⁰⁴ The law ought to serve the purpose of blessedness, which is the final end of human life: "*est autem ultimus finis humanae vitae felicitas vel beatitudo [...] Unde oportet quod lex maxime rescipiat ordinem qui est in beatitudinem*".¹⁰⁵

The Middle Ages received and further developed an idea of law (*ius*) based upon the fundamental threefold division between *ius naturale*, *ius gentium*, and *ius civile*,¹⁰⁶ and related to the *ius divinum*.¹⁰⁷ In Canon law, it is said of *ius*

¹⁰³ To Aquinas "*lex est in sola ratione*". He wrote: "*praeterea [...] lex non pertinet ad rationem, sed magis ad voluntatem, secundum quod etiam iurisperitus dicit: Quod placuit principi, legis habet vigorem. Sed contra est quod ad legem pertinet praecipere et prohibere [...] imperare est rationis [...] ergo lex est aliquid rationis. Respondeo [...] quod lex quaedam regula est et mensura actuum [...] Regula autem et mensura humanorum actuum est ratio [...] ratio habet vim movendi a voluntate [...] voluntas de his quae imperantur [...] oportet sit aliqua ratione regulata. Et hoc modo intelligitur quod voluntas principis habet vigorem legis: alioquin voluntas principis magis esset iniquitas quam lex*". See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, qu. 90, art. 1. On *ratio/veritas* and *ratio/auctoritas*, see E. Cortese (1962-64), I, pp. 293-96.

¹⁰⁴ Aquinas wrote: "*ordinare autem aliquid in bonum commune est vel totius multitudinis, vel alicuius gerentis vicem totius multitudinis. Et ideo condere legem vel pertinet ad totam multitudinem, vel pertinet ad personam publicam quae totius multitudinis curam habet [...]*". He confirmed: "*nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata [...]*". See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, qu. 90, art. 3-4.

¹⁰⁵ See Thoma Aquinatis, *Prima Secundae Summae Theologiae*, qu. 90, art. 2.

¹⁰⁶ See Dig. 1, 1, 1; Dig. 1, 1, 9; Dig. 1, 1, 11. To Ulpianus "*ius civile [...] neque in totum a naturali vel gentium recedit nec per omnia ei servit [...] itaque cum aliquid addimus vel detrahimus iuri communi, ius proprium, id est civile efficitur. Hoc igitur ius nostrum constat aut ex scripto aut sine scripto [...]*" (Dig. 1, 1, 6).

naturale: “numquam iniustum, sed [...] aequum”.¹⁰⁸ This definition finds its roots in an early statement by St. Isidore of Seville, according to whom equity coincides with what “*secundum naturam iustus dictus*”.¹⁰⁹ Civilian lawyers continued this tradition. In his *Summa*, for example, Azo saw in the ability to translate equity into concrete precepts the most genuine end of the activity of *ius dicere* as a whole.¹¹⁰ Accursius, for example, accepted this principle as one of the most fundamental of the juridical visions of human affairs and, moreover, argued that refusing to adhere to the prescription of *ius naturale* by no means jeopardises the validity and foundation of the latter. *Ius naturale* remains “*bonum et aequum*”. In fact, he continued, “*ius naturale dicitur quod in lege Mosaica, vel in evangelio continetur [...] natura, id est, Deus*”.¹¹¹ In his famed *Dictionarium*, Albericus de Rosciate affirmed that human law must be a ‘manifestation of equity’: “*lex humana aequitatis interpret est*”.¹¹² Medieval legal discourse depended on a divinely founded idea of justice. *Ius a iustitia*, Ulpianus proclaimed, and *ius* is said to be “*quia iustum est*”, Gratianus confirmed.¹¹³ In the *Fragmentum Pragense*, we find it noted that “*iustitiae fons et origo est aequitas*” and that “*nihil autem est aequitas quam Deus*”.¹¹⁴ After having specified that the definition of justice provided by Ulpianus “*potest intelligi de divina iustitia*” because “*cum scriptum sit, [...] septies in die cadit iustus [Pv 24, 16]*”, explicitly referring to Cicero, Accursius argued that “*iustitia est animi congrua dispositio in singulis rebus recte diiudicans*”.¹¹⁵ Moreover, the jurist explained that “*iustitia est virtus, ius est eius virtutis*

¹⁰⁷ See Inst. 1, 2, § 11: “*Sed naturalia quidem iura, quae apud omnes gentes pereaue servantur, divina quadam providentia constituta semper firma atque immutabilia permanent: ea vero, quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege data*”.

¹⁰⁸ See *Decretum magistri Gratiani*, D. 1 c. 7.

¹⁰⁹ See Isidorus Hispalensis, *Etymologiarum*, X, 7.

¹¹⁰ See P. Grossi (1999), p. 143.

¹¹¹ See respectively Glo. “*sed naturalia*”, ad Inst. 1, 2, § 11 and Glo. “*ius naturale est, quod natura*”, ad Inst. 1, 2.

¹¹² See Albericus de Rodsate, *Dictionarium iuris*, fol. 175. Venetiis, 1656.

¹¹³ See Dig. 1, 1, 1: “*Iuri operam daturum prius nosse oportet, unde nomen iuris descendat; est autem a iustitia appellatum: nam, ut eleganter Celsius definit, ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profiteamur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes [...]*”. See *Decretum magistri Gratiani*, D. I, c. 2 [= *Etymol.*, V, III, 1].

¹¹⁴ See H. Fitting, *Juristische Schriften des früheren Mittelalters*, p. 216. Halle, 1876: “*si talis aequitas in voluntate hominis est perpetuo, iustitia dicitur. Quae talis voluntas redacta in praeceptionem, sive scripta, sive consuetudinaria, ius dicitur*”.

¹¹⁵ The passage appears in D. Quaglioni (2004), p. 39. See also Dig. 1, 1, 10: “*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*”; Cicero, *De inventione*, II, 53, 160; *De finibus bonorum et malorum*, V, 23, 65.

executivum, iuris prudentia est scientia illius iuris".¹¹⁶ In the *Sermo*, Bartolus affirmed that "*Christus, hoc est veritas, occiditur, quinimo perit semper, cum iustitia non servatur*". Following Accursius, he maintained that "*iustitia est virtus*" and "*ius est executio ipsius virtutis*".¹¹⁷ On the same topic, again referring to Augustine, Aegidius Romanus affirmed that "*respublica Romanorum non fuit vera república, quia numquam fuit ibi vera iusticia*". Given that justice is the virtue by which "*sua distribuit unicuique*", he said, "*nisi ergo reddatur unicuique quod suum est vera iusticia non est*". In fact, he continued in colloquial form, "*cum ergo tu debeas sub Deo et sub Christo, nisi sis sub eo, iniustus es, et quia iniuste es subtractus a Christo domino tuo, iuste quelibet res subtrahitur a domino tuo*". Hence, "*qui enim non vult esse sub domino suo, nullius rei cum iusticia potest habere dominium*".¹¹⁸

We should like to conclude this section by mentioning two different approaches to one of the main consequences of the lust for power, tyrannical sovereignty. In *Polycraticus* John of Salisbury introduced the distinction between the true sovereign and the tyrant. The former strives to achieve obedience to the laws and to preserve the liberty of the people, therefore is a true 'image of the divine'. The latter promotes servitude and is the image of devilish depravation.¹¹⁹ Bartolus of Saxoferrato's *De tyranno* was the work in which legal science and methodology received special attention. It constituted an attempt to demonstrate the intrinsic illegality of tyranny.¹²⁰ In it, the political horizon is that of the *civitas*, and Bartolus first distinguished between "*tyrannus apertus et manifestus*" and "*tyrannus velatus et tacitus*" (qu. V). Then, within open tyranny, he distinguished the case of the tyrant "*ex defectu tituli*" (qu. VI), that is, the usurper of sovereign prerogatives, from the case of the tyrant "*ex parte exercitii*" (qu. VIII), that is, the abuser of legitimately assumed sovereign prerogatives. Finally, he defined concealed tyranny as that of "*ille, qui sub quodam velamine non iure principatur*". He specified that there are two ways by which one man can

¹¹⁶ See Glo. "*notitia*", ad Inst. 1, 1, § 1, in D. Quaglioni (2004), p. 42.

¹¹⁷ See Bartolus de Saxoferrato, *Sermo domini Bartoli in doctoratu domini Bonaccursii fratris sui in Consilia, Quaestiones et Tractatus*, fol. 182. Venetiis, 1575.

¹¹⁸ See Aegidius Romanus, *De ecclesiastica potestate*, II, 7.

¹¹⁹ "*Est ergo tyrannus, ut eum philosophi depinxerunt, qui violenta dominatione populum permit, sicut qui legibus regit princeps est [...] Princeps pugnat pro legibus et populi libertate; tyrannus nil actum putat nisi leges evacuet et populum devocet in servitutem. Imago divinitatis est princeps et tyrannus est [...] Luciferinae pravitatis imago [...] Imago deitatis princeps amandus venerandus est et colendus; tyrannus, pravitatis imago, plenumque etiam occidendus*". See Ioannes Saresberiensis, *Polycraticus sive De nugis curialium et vestigiis philosophorum libri VIII, VIII, XVII*. In various passages of the work, the true sovereignty is said to be 'image of divinity' or 'image of justice': "*divinae maiestatis imago*" See Ioannes Saresberiensis, *Polycraticus sive De nugis curialium et vestigiis philosophorum libri VIII, IV, I*.

¹²⁰ Calasso credited Bartolus with the merit of having given to the problem of tyranny "*una impostazione strettamente giuridica*". See F. Calasso (1965), p. 262. See also D. Quaglioni, "*Intorno al testo del Tractatus de tyrannia di Bartolo da Sassoferrato*", in *Il pensiero politico II*, (1977), pp. 268-84.

manage to establish concealed tyranny: "*primo per titulum quem sibi facit concedi; secundo per titulum quem sibi concedi non patitur*" (qu. XII).¹²¹ To conclude, it is perhaps worth considering a comment by Skinner, who claimed that Bartolus was among those who scarcely paid any attention to the rather common idea that "the growth of private wealth may have served as corrupting political force".¹²²

¹²¹ Unless otherwise indicated, the quotes from Bartolus' treatise are taken from D. Quaglioni (1983), pp. 175-213. See also Bartolus de Saxoferrato, *Consilia, Quaestiones et Tractatus*, fol. 117-20. Venetiis, 1575.

¹²² See Q. Skinner (1978), I, p. 56.

CHAPTER FIVE

SOVEREIGNTY AND JURISDICTION

- 5.1) *Iurisdictio* and legal history
- 5.2) *Iurisdictio* and *potestas*
- 5.3) *Iurisdictio* and *imperium*
- 5.4) *Iurisdictio* and *dominium*

5.1) *Iurisdictio* and legal history

In this chapter, we shall deal with the intellectual presuppositions and implications of the medieval notion of *iurisdictio*. Jurisdiction is a notion of capital importance in European legal cultures, and is traditionally associated with the necessity of administering justice, "one of the main ties" keeping "society together".¹ In relation to Roman law, jurisdiction has been also defined as the "power of setting out the legal principles upon which legal disputes were decided".² Due to the classificatory concerns of contemporary legal science, the question of the private or public law configuration of legal institutes and ideas is an inescapable one. Even if it is commonly acknowledged that Roman law sources did not say what jurisdiction was as genus, but only what pertained to it, and *ius dicere* and *iurisdictio* have been used in several senses, the notion of jurisdiction is usually ascribed to the domain of procedural law. Legal historian Max Kaser, for example, argued that due to the close relationship existing in Roman law between private law and the procedure that served its enforcement, a presentation of jurisdiction could be adequate only if accompanied by a discussion of the law of civil procedure. Wieacker, a scholar particularly interested in questions of methodology, saw it as synonymous with "zivilrechtliche Jurisdiktion" as well.³ This interpretation, we believe, is valid but not exhaustive, for it is based upon isolationist reasoning. On the one hand, jurisdiction is the sphere of power that the law attributes to each judge. Azo, for example, treated jurisdiction as "*legitima potestas*" attributed to each judge "*per*

¹ See F. Pollock and F.W. Maitland, *The History of English Law before the time of Edward I*, I, p. 526. Cambridge, 1968.

² See G. Mousourakis, *The Historical and Institutional Context of Roman Law*, p. 79. Aldershot, 2003. See also A. Steinwenter, "Iurisdictio", in *Paulys Realencyclopädie der classischen Altertumswissenschaft*, 19, pp. 1155-58. Stuttgart, 1918; A. Berger, "Iurisdictio", in *Encyclopedic Dictionary of Roman Law*. Philadelphia (Penn), 1953.

³ See F. Wieacker, *Römische Rechtsgeschichte*, p. 431. München, 1988.

legem".⁴ Jurisdiction, Accursius wrote, "*est omne id quod competit iure magistratus*".⁵ On the other hand, had *iudex* and *magistratus* not been used as very general terms, and had *iurisdictio* not been defined *officium latissimum* or *genus generalissimum*, we would probably have more difficulties in taking a distance from our habit of thinking of jurisdiction in the procedural sense only.⁶

The controversies about the nature and extension of imperial sovereignty were actually controversies about the nature and the extension of jurisdiction.⁷ The echo of the first controversies has found notable space in popular literature. Otto Morena's account of the life and deeds of the Emperor Frederick I, for example, portrayed Martinus, "*copia legum*", and Bulgarus, "*os aureum*", disputing as to whether the Emperor was *dominus mundi* in the possessive or in the protective sense.⁸ Odofredus (d. 1265) reported a similar dispute which occurred between Azo and Lotharius of Cremona when they were asked by the Emperor Henry VI to whom the *potestas gladii* belonged. Azo is said to have

⁴ See Azo, *Summa super Codicem instituta extraordinaria*, III, de *iurisditione*, omnium *iudicum et de foro competenti*, fol. 67, apud Bernardinum et Ambrosium fraters de Rovellis, Papiae, 1484.

⁵ See Accursius, glossa *Mistum est*, de *iurisditione*, ad *imperium*, in *Accursii Glossa in Digestum vetus*, fol. 22, apud Baptistam de Tortis, Venetiis, 1488. According to Fitting, presumably the definition that sees *ius dicentis* as "*jus vel iam constitutum vel ipsa sententia constituendum*" dates from the end of the eleventh century dates. See the Cod. Haenel (IV, 67) first published in H. Fitting, *Juristische Schriften des früheren Mittelalters: aus Handschriften, meist zum ersten Mal*, p. 140. Halle, 1876. See also P. Costa (2002), p. 113. Two of the three main passages usually quoted in this respect by the medieval jurists are ascribed to Ulpianus, and one to Paulus: "*Jus dicentis officium latissimum est: nam et bonorum possessionem dare potest et in possessionem mittere, pupillis non habentibus tutores constituere, iudices litigantibus dare*" (Dig. 2, 1, 1); "*Imperium aut merum aut mixtum est. merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines, quod etiam potestas appellatur. mixtum est imperium, cui etiam iurisdictio inest, quod in danda bonorum possessione consistit. iurisdictio est etiam iudicis dandi licentia*" (Dig. 2, 1, 3); "*Mandata iurisditione privato etiam imperium quod non est merum videtur mandari, quia iurisdictio sine modica coercitione nulla est*" (Dig. 1, 21, 5, 1).

⁶ Ullmann recalled that when in the second half of the twelfth century the Bolognese master Bernard of Pavia collected the decretals and conciliar material issued since Gratian in the *Compilatio Prima* (ca. 1190), the first of the five books, the one concerning constitutional and administrative law, was published under the heading *iudex*, and the second, concerning procedural law and tribunals, was published under the heading *iudicium*. See W. Ullmann, *A Short History of the papacy in the Middle Ages* (1974), p. 242. London-New York, 2003.

⁷ See F. Calasso, "*Jurisdictio nel diritto comune classico*", in *Studi in onore di Vincenzo Arangio-Ruiz nel XLV anno del suo insegnamento*, IV, pp. 423-43. Napoli, 1953. See also J. Vallejo, "Power hierarchies in medieval juridical thought", in *Ius Commune* 19 (1992), pp. 1-29.

⁸ See Otto Morena, *Historia Frederici I*, 10, p. 158: "*dominus Bulgarus respondit, quod non erat dominus quantum ad proprietatem. Dominus vero Martinus respondit, quod erat dominus*".

reminded the Emperor of the fact that there existed a plurality of *iudices*, hierarchically ordained, whose apex was the Emperor himself who had the supreme 'power of the sword'.⁹ According to David Johnston, we should not restrict our analysis to the procedural aspects and configuration of jurisdiction in detecting its public law aspects.¹⁰ It is true that the Roman jurists did not hand over any comprehensive account of notions like *imperium*, *potestas*, *iurisdictio*, and *dominium*, and that they were careful with providing general definitions.¹¹ This fact does not necessarily mean that there was no connection between jurisdiction and sovereignty. Johnston warned against the risk of reading and interpreting the Digest in particular as if it were a legal code in the modern sense. The observation seems *a fortiori* valid in relation to medieval legal sources. What we may now consider as a dogmatic inconvenience, namely the fluctuation of that notion between private and public law, is one of its major features. Before proceeding, we must introduce a few other words of caution. The meaning of *iurisdictio*, *dominium*, *potestas*, and *imperium* represent a problem rather difficult to solve in the Roman law texts, aside from the problem of understanding them posed for medieval jurists. A widely accepted hypothesis is that in medieval sources, the term *iurisdictio* appeared as synonymous with *dominium*, as well as *imperium*, and that in both cases it denoted *potestas*. These heterogeneous terms are gathered in the semantic area of legal and political discourse that today is occupied by the idea of sovereignty.¹² This fact should not surprise us, because, as Woolf noted, medieval jurists used legal terms and categories with a view to the pressing needs of the day, namely "in a manner that a mere reference to Roman law will not explain" entirely.¹³ They approached their work "as dialecticians", namely finding definitions that suited both "the apparent main thrust of the texts" and the purpose "to create a harmonious or nearly harmonious whole of the cacophony of texts they found in the *Corpus Iuris Civilis*".¹⁴

⁹ See Odofredus, *Lectura super Digesto veteri, de iurisdictione, imperium*, § 8-9, fol. 38, Lugduni, 1550. On this point, see G.M. Gilmore, *Argument from Roman Law in Political Thought, 1200-1600*, pp. 15-20. Cambridge (Mass), 1941; F. Calasso (1953), p. 101.

¹⁰ See D. Johnston, "The general influence of Roman institutions of state and public law", in D.L. Carey Miller and R. Zimmermann (eds.), *The Civilian Tradition and Scots Law*, pp. 87-101. Berlin-Aberdeen, 1997.

¹¹ To the jurist Paulus is attributed the maxim "*non ut ex regula ius sumatur, sed ex iure quod est, regula fiat*" (Dig. 50, 17, 1), and to Javolenus the warning that "*omnis definitio in iure civili periculosa est: parum est enim ut non subverti possit*" (Dig. 50, 17, 202).

¹² Gilmore, however, emphasised the modifications in the notion of *merum imperium* that reflected "the transition from *dominium* to sovereignty". See M.P. Gilmore (1941), p. 26.

¹³ See C.N.S. Woolf (1913), p. 127. .

¹⁴ See J.W. Perrin, "Azo, Roman law, and sovereign European states", in J.R. Strayer and D.E. Queller (eds.), *Post Scripta. Essays on Medieval Law and the Emergence of the European State in Honor of Gaines Post* (*Studia Gratiana*, XV), pp. 88-101, 94. Roma, 1972.

5.2) Jurisdiction as *potestas*

In the Middle Ages, jurisdiction played the role of 'synthesis of powers',¹⁵ and, given the needs of feudal society, was one of the most versatile legal tools to exploit. This notion somehow reflected more general concerns, like the concern about the problem of hierarchies of power and their normative foundation. In this perspective, George Sabine noted, the notion of jurisdiction was essential in two directions. On the one hand, it was used as to support "the theory of an independent political power invested with the imperial attribute of sovereignty" but other than the empire. This is the direction along which Bartolus of Saxoferrato moved. On the other hand, it was used to justify a mainly secular power, and this is the direction along which Marsilius of Padua moved.¹⁶

To say that jurisdiction was *potestas* introduces the problem of its foundation. To properly deal with this problem, it is unadvisable to examine legal sources only. Although the two terms were frequently used interchangeably in the Middle Ages, the distinction between *auctoritas* and *potestas* - the former being regulative of the latter - was known by a series of papal restatements too, including the already mentioned the one contained in one of the letters of Gelasius I to the Emperor Anastasius, in which the pope distinguished between the *auctoritas sacrata pontificum* and the *regalis potestas*. In some relevant cases the two terms were used interchangeably. Let us think, for example, of three important bulls issued by pope Boniface VIII. When in the bull *Clericis laicos* (25 February 1296) the pope restated the principles that laymen have no jurisdiction over the clergy and its possessions, and that no secular authority could levy taxes on Church property, nor was the clergy permitted to pay without authorization of the Holy See, he provided a list of sovereign powers all subject to the *magisterium* of the Holy See, which included "*imperatores, reges seu principes, duces, comites vel barones, potestates, capitanei, vel officiales vel rectores*". In the bull *Apostolica sedes* (13 May 1300), the pope reaffirmed that the Holy See is divinely superior to all earthly powers ("*divinitus constituta super reges*"). When finally, first in his *Ausculda fili* (5 December 1301) and then in *Unam sanctam* (19 November 1302), he defended papal supremacy, restating the principle that the secular power must be subject to the spiritual authority ("*oportet autem gladium esse sub gladio, et temporalem auctoritatem spirituali subiici potestati*") the association of jurisdiction with justice appeared one more time, linked to the necessity to preserve law and order - not any order though, but the rational and divine type of order, the only one guaranteed by the pope as vicar of Christ.¹⁷ Even if, as in the case of the above-mentioned three papal bulls, power and authority may be

¹⁵ See P. Costa (2002), p. 101.

¹⁶ See G.H. Sabine (1973), p. 262-3.

¹⁷ See C. Mirbt and K. Aland (eds.), *Quellen zur Geschichte des Papsttums und des römischen Katholizismus*, I, pp. 457-60. Tübingen, 1967.

used interchangeably, the meaning of a superior status of the latter in comparison with the former does not disappear. As Antony Black recalled, the hierocratic position held by Boniface VIII gave rise to a number of important theoretical writings such as *De regimine Christiano* (1301-2) by James of Viterbo (c. 1260-1307/8), *De ecclesiastica potestate* (1302) by Aegiudius Romanus (c. 1243-1316), *Summa de potestate ecclesiastica potestate* (1328) by Augustinus Triumphus (1270/3-1328), and *De planctu ecclesiae* (1330-40) by Alvarus Pelagius (c. 1275-1349). According to these authors, Christ had given to Peter and his successors the *plenitudo potestatis*. Consequently, the pope had no superior on earth, and since the Church possesses both 'swords', all secular rulers, to whom the exercise of the 'material sword' was delegated, derive their power from the Church and are subject to papal legitimation and jurisdiction. A clear distinction thus underlay Boniface VIII's discourse, one that recognized the *auctoritas* that the Church held in both spiritual and temporal matters on the one hand, and the *exercitium* or *executio*, namely the mere *potestas*, which secular rulers had in temporal affairs. The principle was that "the spiritual power stands to the temporal as [Aristotelian] form to matter".¹⁸ Given the peculiar characteristics of the debate on *imperium* and *sacerdotium*, it seems difficult to imagine a merely rhetorical use of that distinction and to conclude that in any case *auctoritas* was used interchangeably with *potestas*. Let us begin by examining the equivalence between *iurisdictio* and *potestas*.

The first medieval definition of jurisdiction is ascribed to Irnerius and is based upon a passage of the Digest (Dig. 2, 1, 3). Irnerius saw jurisdiction as the power introduced with a view to the necessity of pronouncing judgment and establishing equity: "*potestas cum necessitate iuris scilicet reddendi aequitatisque statuendae*".¹⁹ Rogerius defined it "*munus iniunctum publica auctoritate, cum necessitate dicendi, tuendi iuris vel statuendae aequitatis*".²⁰ In Placentinus' *Summa Codicis*, the terms "*licentia*" and "*facultas*" replaced the term "*necessitas*": "*iurisdictio est potestas alicui a publico indulta cum licentia reddendi iuris, et facultate statuendae aequitatis*".²¹ In the thirteenth century, Azo, as well as Accursius, elaborated on the current definition, specifying that the power in question had a public law character, and they spoke of "*potestas de publico introducta cum necessitate iuris dicendi, et aequitatis statuendae*".²² Azo, Perrin recalled, introduced a fourfold division of it as genus. He distinguished first between "*plenissima iurisdictio*", which belongs to the Emperor alone, and "*minus plena*", which is shared among inferior magistrates proportionally to their rank. Then he distinguished between "*voluntaria iurisdictio*", exercised when judgment is

¹⁸ See A. Black (1992), pp. 50-1.

¹⁹ See E. Besta, *L'opera d'Irnerio. Contributo alla storia del diritto italiano - II - Glosse inedite d'Irnerio al Digestum Vetus*, p. 20. Torino, 1896.

²⁰ See G.B. Palmieri (ed.), *Bibliotheca iuridica medii aevi*, I, p. 84. Bologna, 1914.

²¹ This passage is quoted in P. Costa (2002), p. 100.

²² See F. Calasso (1953), pp. 423-43.

granted in cases introduced by willing parties alone, for instance emancipation, or adoption, and "*contentiosa*", when judgment is granted on an unwilling party petitioned by another. Third, he emphasised the distinction between "*ordinaria iurisdictio*" and "*delegata*". The Emperor gives the former to a magistrate in all matters occurring in the territory under his control. The case of the Emperor, or of other inferior magistrates, entrusting jurisdiction to a magistrate in a single type of case, constituted "*delegata iurisdictio*". The fourth type of jurisdiction was derived from further elaborating on the "*ordinaria*", and concerned the situation in which the source of jurisdiction is not the Emperor, or another magistrate, but the consensus of the entire body of citizens.²³

Bartolus must have found the traditional definitions somewhat incomplete. His thoughts on *iurisdictio* are spread over a number of passages that can only be said to form a theory of jurisdiction in the current sense of the term 'theory' through the effort of modern readers. In this case too, as Cecil Sidney Woolf observed, Bartolus' writings only "provide us with the disjecta membra of a system".²⁴ In several editions of his works, at the beginning of the second book of the *Digestum Vetus*, we find the so-called *arbor iurisdictionum*, an attempt in pictorial form to bring the Roman law texts into line with actual circumstances.²⁵ Bartolus dealt with jurisdiction in the procedural sense. It was precisely this kind of technical concern that inspired his treatise *De iurisdictione*, where the jurist reaffirmed that to judge is to decide on cases of litigation between private citizens.²⁶ In accordance with Ulpianus' definition that "*ius dicentis officium latissimum est*" (Dig. 2, 1, 1), Bartolus affirmed that the prerogatives of a *iudex* are wide: "*officium iudicis est genus generalissimum*" that "*nullus genus habet supra se*".²⁷ Most likely concerned about the constitutional importance of jurisdiction, he completed the common definition.²⁸ He stated that *iurisdictio* is a genus whose prerogatives only a 'public person', through its officers, could legitimately exercise: "*est autem iurisdictio in genere sumpta, potestas de iure publico introducta*

²³ According to Perrin, for Azo "likewise the consensus of those in some business or profession makes an ordinary judge, that is one having ordinary jurisdiction". See J.W. Perrin (1972), p. 97.

²⁴ See C.N.S. Woolf (1913), p. 208.

²⁵ See, for instance, Bartolus de Saxoferrato, *In Primam Digesti Veteris partem, de iurisdictione omnium iudicium*, fol. 45. Lugduni, 1581. A diagram of Bartolus' representation can be found in C.N.S. Woolf (1913), p. 407; and in J. Vellejo (1992), p. 29.

²⁶ See Bartolus de Saxoferrato, BSC, IX, foll. 141-45.

²⁷ See Bartolus de Saxoferrato, *In primam Digesti Veteris partem, de iurisdictione omnium iudicium, ius dicentis*, fol. 49, in BSC, I.

²⁸ Cynus de Pistoia too reported the standard definition: "*iurisdictio est potestas legitima, de publico introducta, cum necessitate iuris dicendi et aequitatis statuendae*". See Cynus de Pistorio, *In Digesti veteris libros commentaria, de iurisdictione, imperium*. Francofurti ad Moenum, 1575.

cum necessitate ius dicendi et aequitatis statuendae tamquam a persona publica".²⁹ This definition is of special importance because it links up the notion of jurisdiction to that of *persona publica*. However, many were the powers configured in public law terms. Of this kind, for instance, was the power that the husband exercised over his wife, or of the father over his sons and daughters, or that of the master over his slaves and of the tutor over his pupils. Had jurisdiction been just *potestas de iure publico*, Calasso observed, there would not be much difference between the power of the husband, or of the owner, and that of the political community as such. That is why Bartolus emphasised that although the power of administering justice is essentially similar in all cases, some decisions are the expression of prerogatives proper to particular authorities, others to the public authority.³⁰ The *persona publica* Bartolus had in mind was the *civitas sibi princeps* that recognised no superior, and which he also defined "*homo artificialis et imaginarius*".³¹ On the division of territories and jurisdiction, Bartolus recalled that the existence of provinces is legitimised by the law of nations.³² Commenting on the constitution *Omnes populi* (Dig. 1, 1, 9), he restated the idea that each community had the right to arrange a proper set of legal norms necessary to secure its safety and ordered internal coexistence. He specified that the right of the free cities to make their *statuta* is the clearest manifestation of jurisdiction broadly understood. The free cities, he claimed, are given the right to make their own laws, which as a whole are called 'civil law': "*omni populo iurisdictionem habens ius proprium statuere permittitur quod ius civile vocatur [...] facere statuta est iurdictio in genere sumpta*".³³

In the next paragraphs we shall focus on the configuration of jurisdiction as a genus, but first it is important to stress that the jurist also explained that jurisdiction pertains to public personality, not to territory. He argued that the free cities as legal persons have proper jurisdictional powers: "*sunt personae representatae quae habent iurisdictionem [...] faciunt potestates et similia*".³⁴ Jurisdiction, he said, is a quality that pertains to office and to the persons that hold that office, not to territory. On the basis of this principle, Bartolus manages to fix both the identity of *iurdictio* and *dominium*, and the superiority of the Emperor as the bearer of all jurisdictions and consequently as *dominus mundi*: "*et*

²⁹ See Bartolus de Saxoferrato, *In primam Digesti Veteris partem, de iurisdictione omnium iudicum, ius dicentis*, § 3, fol. 48. In BSC, I.

³⁰ See F. Calasso (1953), p. 432.

³¹ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 125.

³² On this point, Bartolus is not particularly innovative. Even a writer such as Cassiodorus had reaffirmed this principle. See Cassiodorus, *Variorum libri XII*, V.

³³ See Bartolus de Saxoferrato, *In primam Digesti Veteris partem, de iustitia et iure, omnes populi*, fol. 9, in BSC, I.

³⁴ See Bartolus de Saxoferrato, *In primam Digesti Veteris partem, de iurisdictione omnium iudicum, ius dicentis*, § 16, fol. 49, in BSC, I.

ista equiparatio de iurisdictione ad dominium probatur sic [...] princeps habet omnem iurisdictionem [...] ex hoc dicitur dominus totius mundi".³⁵

Although generally Bartolus' legal vision is influenced by Christian doctrine, some traces of the Aristotelian concept of order survived in it. It is difficult to ascertain whether the jurist was fully aware of the Aristotelian origin of that concept. However, he accepted that all existing powers – of the father over wife and children, of the owner over his slaves, of the teacher over his pupils, etc. – are justified by the necessity of preserving righteousness. The jurist saw the political community as the highest of all and as that aiming at good in the greatest degree. If all holders of *potestas* ought to act with a view to law and order, the political community, which is the highest of all powers, aims at establishing and preserving law and order to a greater degree than any other. Yet, in various passages, Bartolus asserted that Empire and Church, and their respective jurisdictions, descended from God.³⁶ Consequently, in order to properly interpret Bartolus' thought and to shed light on the normative foundation of jurisdiction as *potestas*, we have to turn to the links established within Christian doctrine between *instituere*, *regere*, *corregere*, and *iudicare*. These links indicate how the latter was closely related to justice, without which, as Augustine said, earthly rule is nothing but mere robbery.³⁷ At the beginning of the fourteenth century, in *De ecclesiastica potestate*, Aegidius Romanus restated the equivalence of justice with submission to God's will, as we already pointed out. There he affirmed that just dominion over persons and goods is legitimate only if comes from the Church, and is subject to the Church: "*nullum est dominium cum iusticia, sive sit dominium super res temporales sive super personas laicas [...] nisi sit sub ecclesia et per ecclesiam institutum*". According to Aegidius, in Augustinian fashion, Christ must be the true sovereign and law-maker: "*vera iustitia non est, nisi in ea republica cuius est conditor rectorque Christus [...] post passionem Christi nulla respublica potest esse vera, ubi non coleretur sancta mater ecclesia, et ubi non est conditor et rector Christus*".³⁸

The identification between *regere rem publicam* and *iudicare* had a long history already. Justice, due to its divine foundation, was seen as the most effective remedy against "*libido principandi*".³⁹ In *Etymologiae*, St. Isidore of Seville restated three principles of great importance. First, he declared that the major purpose of legislative activity has moral character, for it consists in preventing and punish wrongdoing: "*factae sunt leges ut earum metu humana coerceatur*

³⁵ See Bartolus de Saxoferrato, *In primam Digesti Veteris partem, de iurisdictione omnium iudicium, ius dicentis*, § 14-15, fol. 50, in BSC, I. On the personal character of jurisdiction in Bartolus, see P. Vaccari, "Utrum iurisdictio cohaereat territorio. La dottrina di Bartolo", in BSCD, II, pp. 736-53.

³⁶ See F. Calasso (1965), p. 219.

³⁷ See Aurelius Augustinus, *De civitate Dei*, IV, IV. See also II, XXI; XIX, XXI; XXI, I.

³⁸ See Aegidius Romanus, *De ecclesiastica potestate*, II, 7.

³⁹ See Aurelius Augustinus, *Confessionum libri tredecim*, III, VIII.

audacia, tutaque sit inter improbos innocentia, et in ipsis improbis, formitudo supplicio, refrenetur nocendi facultas". Then, he fixed the moral conditions for issuing the law. The content of the law must be honest, just, possible, in accordance with nature and with the local customs though not in contradiction to natural and divine law, convenient from the point of view of the temporal and geographical circumstances, necessary, useful, clear, and aimed at the public utility: "*erit autem lex honesta, justa, possibilis, secundum naturam, secundum patriae consuetudinem, loco temporisque conveniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem in captionem contineat, nullo privato commodo, sed pro communi civium utilitate conscripta*". Finally, he focused on the special task proper to sovereigns. To confirm that ruling presupposes the ability of judging about good and evil by the grace of God, he reemphasized that only the ruler who makes his corrections in a true spirit of justice is the proper sovereign: "*non autem regit, qui non corrigit [...] et apud veteres tale erat proverbium: Rex eris si recte facies, si non facias, non eris*". He added that the major sovereign virtues are two: "*iustitia et pietas*". He specified that since justice might require strictness, a true sovereign will be always honoured for his piety: "*plus autem in regibus laudatur pietas; nam justitia per se severa est*". Exercising proper jurisdiction was thus a matter of possessing the "*regiae virtutes*", in the first place "*iustitia et pietas*".⁴⁰

In Theology, as well as in Canon law, the idea of *duplex ordo iurisdictionis*, or *divisa iurisdictio* - one being the authority of the pope and the other the power of the prince - functioned as a heuristic foundation to all jurisdictions.⁴¹ Many the examples can be given in this respect. In *De sacramentis Christianae fidei* (II, 4), Hugh of Saint Victor restated the supremacy of the spiritual authority over all temporal powers.⁴² In his *Summa*, Paucapalea restated the indissoluble tie between jurisdiction and justice by asserting that "*non est enim iudex, si non est in eo iustitia*".⁴³ Stephanus Tornacensis developed the notion of jurisdiction in the direction of founding the *de iure* autonomy of *regna* and *civitates* within the context of the *ecclesia*. He insisted on the idea of a double order of jurisdiction (*duplex ordo iurisdictionis*), one of which is constituted by divine law and the other by human law. These two types of law denote two distinguishable types of life, the spiritual life and the carnal life. But both descend from the one *civitas*, which is the kingdom of Heaven under the rule of Christ.⁴⁴

⁴⁰ See Isidorus Hispalensis, *Etymologiarum libri XX*, V, XX-XXI; IX, III, 4-5. See also *Decretum magistri Gratiani*, D. 4 c. 1-2.

⁴¹ See M. van de Kerckhove, "La notion de jurisdiction chez les Décrétistes et les premiers Décrétalistes, 1140-1250", in *Etudes Franciscaines* 49 (1937), pp. 420-40.

⁴² This passage is quoted in P. Costa (2002), pp. 101-2.

⁴³ See J.F. von Schulte (ed.), *Die Summa des Paucapalea über das Decretum Gratiani*, p. 57. Giessen, 1890.

⁴⁴ See F.J. von Schulte (ed.), *Die Summa des Stephanus Tornacensis über das Decretum Gratiani*, p. 1. Giessen, 1891.

Rufinus restated the principle that the spiritual power can never be subject to the jurisdiction of the secular power. On the contrary, the latter must be always subject to the jurisdiction of the latter: "*apostolicus, cum sit maior augusto, non ab eo iudicari, sed eum iudicare debet*".⁴⁵ He also introduced a subtle distinction between jurisdiction *quoad administrationem* and *quoad dignitatis auctoritatem*. With respect to the latter, jurisdiction ought to be "*plena ex sola consecratione*", he argued. With respect to the former, jurisdiction is full, yet to a lesser extent, the dignity of the pope being higher than that of any secular ruler provided with *ius administrationis*.⁴⁶ In his commentary on D. 96 c. 6., Huguccio (d. 1210) elaborated on the 'double order of jurisdiction', asserting that the two universal powers were independent of each other, both having been established by God. But the principle of the direct dependence on God on the empire did not hold true in spiritual matters. Up until the advent of Jesus Christ, he claimed, the imperial and pontifical prerogatives were not separated and the same man was Emperor and pope. With the advent of Jesus Christ, the distinction between the two offices was finally introduced for the sake of preserving humility and avoiding pride. Temporal affairs were thus assigned to the Emperor, and spiritual affairs to the pope. And since the Emperors would need the pope for attaining eternal salvation and the pope needed imperial laws in the conduct of temporal affairs, harmony was established. The Emperor no longer pretended to seize the rights of the pontificate, nor did the pope usurp the title and the dignity of the Emperor. Huguccio contended that the Emperor receives his dignity and the power of the sword from the pope and that the latter can make the former and depose him. As a matter of fact, he argued, there was an Emperor before the papacy was established and the Emperor was always elected either by the people or by the princes. He concluded that God instituted each power and that neither was derived from the other.⁴⁷ By contrast, Alanus Anglicus claimed that the Emperor receives his *gladium* from the pope, not from God directly, the empire as such being a matter of divine institution. The right of both swords belongs to the pope alone. Each earthly ruler, he maintained, has as much jurisdiction in his kingdom as the Emperor has in the empire. The division of *regna* based upon *jus gentium* was therefore compatible with Christian revelation of which *ius gentium* is a manifestation.⁴⁸

From the point of view of European constitutional history, there is general agreement that the pontificate of Innocent III and Innocent IV marked a radical

⁴⁵ See H. Singer (ed.), *Summa decretorum des Magister Rufinus*, p. 192. Paderborn, 1902.

⁴⁶ See S. Mochy Onory (1951), p. 99.

⁴⁷ The passage in question appears in S. Mochy Onory (1951), pp. 148-51. See also G. Catalano (a cura di), *Impero, regni e sacerdozio nel pensiero di Uguccio da Pisa*, pp. 64-67. Milano, 1957; B. Tierney (1999), pp. 121-2.

⁴⁸ See B. Tierney (1999), p. 123. See also A.M. Stickler, "Alanus Anglicus als Verteidiger des Monarchischen Papstums", in *Salesianum*, 21 (1959), pp. 361-63; R.W. Carlyle and A.J. Carlyle (1928), V, p. 325.

turn, between the thirteenth and fourteenth centuries, on the question of the relationship between the two jurisdictions. Innocent III, "a man of vision and yet always concentrated on what was feasible and practicable", was, if ever there was one, a true prince who attempted to transform the papacy into "the focal point of Europe".⁴⁹ Towards the end of the thirteenth century, he endorsed French territorial sovereignty by distinguishing Philip Augustus as *seperiozem non recognoscens in temporalibus*.⁵⁰ In relation to the latter principle, historians have turned to the decretal *Per venerabilem* (1202). This document is considered as one of the most important medieval statements on the relationship between *regnum et sacerdotium*, and it constituted the basis for numerous canonist discussions on several types of authority: of the pope, of the Emperor, of cardinals, of national kings, of bishops.⁵¹ The papal decretals "embodied developing tradition" and the basis of this practice was "plenitude of jurisdictional power".⁵² *Per venerabilem* dealt with a request of Count William of Montpellier to have his bastard children legitimised so they might inherit their father's possessions and title. The pope had previously legitimised the two children born of the second union of Philip Augustus and Agnes of Meran on the ground that the king of France knew no temporal superior to whom recourse might be had in such a civil law matter. Innocent III rejected the new plea. In the second section of the decretal letter, the pope explained that William's situation differed from that of the French king, Philip Augustus, whose case William had cited as precedent to support his own case. The pope said that in his kingdom "*rex ipse superiorem in temporalibus minime recognoscat*", but William did recognise such a superior. In legitimising his children, the pope would have violated the royal prerogatives of Philip Augustus. But, anticipating Hostiensis' idea that only the pope could legitimise children since marriage was a matter of ecclesiastical jurisdiction exclusively, he also asserted that he could generally grant such a request if the circumstances demanded such action. This power of intervention was based on the fact that the pope saw himself as 'priest in the order of Melchisedech' - "*constitutus a Deo iudex vivorum et mortuorum*".⁵³ Kenneth Pennington explained that the pope "connected the symbol of Melchisedech with the vicariate of Christ", and since the former prefigured Christ, the pope, as the vicar of Christ, had both royal and spiritual power

⁴⁹ See W. Ullmann (2003), pp. 207-8.

⁵⁰ See W. Ullmann (2003), pp. 272-3.

⁵¹ See J.A. Watt, "Hostiensis on *Per Venerabilem*: the role of the college of cardinals", in B. Tierney and P. Linehan (eds.), *Authority and Power. Studies on Medieval Law and Government Presented to Walter Ullmann on his Seventieth Birthday*, pp. 99-113. Cambridge, 1980.

⁵² See W. Ullmann (2003), p. 235.

⁵³ See X, 4, 17, 12-13.

inherent in his office.⁵⁴ Innocent IV made a radical use of the principles set out by Innocent III and by the late thirteenth century canonists such as Durandus. In particular, Innocent IV restated the principle that "*papa iudex ordinarius est omnium*", and that such jurisdiction extended not only to Christians but also to pagans. Christ, the true Lord, he claimed, could have deposed kings and Emperors, and so could his vicar Peter and his successors. Although temporal jurisdictions exist, men can always appeal to the pope whenever the earthly judges were unable to rule on a case, or no superior judge was available, or justice needed to be re-established.⁵⁵ Finally, in *Summa*, commenting on *Per venerabilem*, Henrico de Segusio systematised the whole issue. He first reported the opposite judgements of Huguccio on the one hand, and Alanus and Tancredus on the other. He maintained that *imperium* and *sacerdotium* were the supreme distinct jurisdictions proceeding from God. Yet, *quoad maiestatem*, the spiritual power is greater than the temporal, and (again) there is only one head of the 'body of Christ', the pope. The difference between the two was illustrated by the restated allegory of the moon and the sun. As the former receives its light from the latter, so the empire receives its recognition from the church. Moreover, as the sun illuminates the whole world by means of the moon at night, which reflects its light, so the Church illuminates the world by means of secular rulers in those matters that it cannot deal with directly. He concluded that between *imperium* and *sacerdotium* there is as much difference as between steel and gold. The Church alone had providentially transferred the imperial prerogatives to the Germans. So the Emperor ought to be subject to the pope as his vicar. On the ground of the commission received by Peter directly from Jesus Christ, the pope

⁵⁴ K. Pennington, "Pope Innocent III's views on church and state", in K. Pennington and R. Somerville (eds.), *Law, Church, and Society. Essays in Honor of Stephan Kuttner*, pp. 49-67. Philadelphia (Penn), 1977. Pennington said that St. Bernard had been the first to use Melchisedech to symbolize the pope's priestly office in *De consideratione* (III). The reference to such a mysterious figure of priest/king to found the pope's right to act *in temporalibus*, the author noted, is not common among canonists and theologians after Innocent. Although they employed Innocent's assertion that the pope was the vicar of Christ, and exercised *plenitudo potestatis* as the successor of Christ's first vicar, Peter, their position raised problems that Innocent's use of the *figura* of Melchisedech evaded. "How could the vicar of Christ claim royal power when Christ himself said that his kingdom was not of this world, and that his followers ought to render unto Caesar those things which are Caesar's?" The usual answer, Pennington wrote, was one aimed at demonstrating the superiority of the spiritual to the temporal and to cite Matthew 16:18. Marsilius, the author also noted, claimed that Melchisedech's royalty prefigured only Christ, not his vicar. He "argued his case well, but he was tilting with windmills" for "almost no contemporary theologian was making such an argument" (p. 57).

⁵⁵ See R.W. Carlyle and A.J. Carlyle (1928), V, pp. 318-23. See also Guilelmus Durandus, *Speculum iuris*, pars prima, *De legato* §§ 17, 41-43, 50-52, apud haeredes Vincentii Valgrisi, Venetiis, 1576.

could confirm, anoint, and crown the Emperor and he could also censure him, or even depose him, if necessary. The pope can take his place, and the place of any other secular ruler, in the case of vacancy. As far as *maiestas* is concerned, there is only one head of the body of Christ, that is, the pope.⁵⁶

Referring to the Roman law principle of 'rendering to each his own' (Inst. 1. 1. 4; Dig. 1, 1, 10), as well as to the Aristotelian ethical categories, St. Thomas Aquinas argued that a judge renders to each his own by giving commands and directions. The judge is in fact 'animate justice' and the prince, the highest of all judges, "*custos iusti*".⁵⁷ To give to each his own was a principle of justice that must be adhered to. Whether "*suum cuique tribuere*" was rather to be seen in terms of property, strictly speaking, or of *dignitas*, certainly an attribution of this kind could be made only on the ground of *auctoritas* normatively understood, not of mere *potestas*. In *Policraticus*, John of Salisbury had already pictured the sovereign as "*servus aequitatis*",⁵⁸ and in another famed *Summa Theologica*, Alexander of Hales had emphasised the asymmetry between superior and inferior and found the domain of judgement generally understood to be the most appropriate for measuring the magnitude and the limits of *ius dicere*.⁵⁹ The order which refers to the relationship between authority and power is divinely founded, not one based upon mere might. This kind of order denotes a state of justice, not of mere law, one based upon St. Paul's teachings that all powers come from God: "*non est enim potestas nisi a Deo*" (Rom 13: 1-7).⁶⁰

Fourteenth century theories represent a crucial point in the development of medieval jurisdiction. On the one hand, we find authors such as Aegidius Romanus, to whom Bartolus often referred in his work, who held that only the pope has full jurisdiction, being in a position of divinely ordained superiority.⁶¹ On the other hand, authors such as William of Ockham and Marsilius of Padua attempted to disconnect jurisdiction from its traditional normative framework and to base it almost exclusively upon human deliberation. Marsilius of Padua, who usually did not make any technical distinction between *potestas*, *auctoritas*,

⁵⁶ See Henrico de Segusio cardinal Hostiensis, *Summa Aurea, Qui filii sunt legitimi, Qualiter*, §§ 10-11, foll. 1386-7. Venetiis, 1574.

⁵⁷ See Thoma Aquinatis, *Secunda Secundae Summae theologiae*, Q. 58, art. 2, ad 5: "*iudex reddit quod suum est per modum imperantis et dirigentis: quia iudex est iustum animatum et princeps est custos iusti*". Compare with Nov. 105, 2, 4.

⁵⁸ See Ioannes Saresberiensis, *Policraticus sive De nugis curialium et vestigiis philosophorum libri VIII*, IV, II.

⁵⁹ See P. Costa (2002), p. 104.

⁶⁰ See also 1 Pe 2, 13-14. On this problem, see R. Deniel, "Omnis potestas a Deo: l'origine du pouvoir civil et sa relation à l'Eglise", in *Recherches de science religieuse* 56 (1968), pp. 43-85.

⁶¹ See Aegidius Romanus, *De ecclesiastica potestate*, I, 2.

and *iurisdictio*,⁶² dealt with the different meanings of 'judge' and 'judging'. In the Aristotelian sense, he said, judging is men's knowledge or discernment in general. Every expert is called a judge, and he judges about things that can be known or done in accordance with some theoretical or practical skill. So, the physician judges the healthy and the sick, the prudent man what should be done and what should be avoided, and so forth. In the legal sense, the judge is the man expert in law. Finally, the judge is the sovereign, and judgement is both his decision on the just and expedient according to law and custom, and his command to execute his decisions through coercive measures.⁶³ William of Ockham, among the most important opponents of the papal theory of *plenitudo potestatis*, kept on referring to the sovereign as "*caput primum et supremus iudex cunctorum mortalium*".⁶⁴ The first of his *Octo quaestiones de potestate papae* (1340-42) deals with the problem of whether one man can rightly hold both the supreme spiritual and the supreme lay power. He claimed that the two supreme jurisdictions are so different that they cannot be vested in one single person. In fact, he challenged the view of 'one body, one head'. There are, he said, "*duo capita corporum diversorum*".⁶⁵ Christ Himself did not intervene in the secular

⁶² To distinguish right from mere might Marsilius used *auctoritas* rather than *potestas*. This does not mean that the latter is used as synonymous with might. Indeed, the latter is always indicated by the terms *violentia* and *potentia*.

⁶³ See Marsilius de Padua, *Defensor pacis*, II, II, 8. In the first sense, "*omnis sciens aut expertus dictum iudex et iudicat de scilicibus aut operabilibus suis*". In the second sense, *iudex* is "*habente scienciam iuris politici seu civilis*". In the third, judge is "*principans*", and *iudicium* is "*de principantis sententia, cuius siquidem auctoritas est iudicare de iustis et conferentibus secundum leges aut consuetudines latasque per ipsum sentencias precipiendi et exequendi per potenciam coactivam*".

⁶⁴ See Gulielmus de Ockham, *Octo quaestiones de potestate papae*, II, VIII. It is one of Ockham's most important political treatises. It enjoyed considerable popularity at the time of the Great Schism. It has been supposed that the book was written at the request of Ludwig of Bavaria, whom the author addressed with deference but without mentioning his name. See J. Miethke, "Die Legitimität der politischen Ordnung im Spätmittelalter, Theorien des frühen 14. Jahrhunderts: Aegidius Romanus, Johannes Quidort, Willhelm van Ockham", in O. Plua et alia (eds.), *Historia philosophiae medii aevi. Studien zur Geschichte der Philosophie des Mittelalters. Festschrift für Kurt Flasch zum 60. Geburtstag*, pp. 643-74. Amsterdam-Philadelphia, 1991.

⁶⁵ See Gulielmus de Ockham, *Octo quaestiones de potestate papae*, I, I: "*potestas enim humana coercendi primo dividitur in potestatem spiritualem et laicalem; ergo potestas spiritualis et laicalis contenta sub eis, scilicet potestas spiritualis suprema et laicalis suprema, in tantum distinguuntur ex natura rei quod in eodem esse non possunt. Amplius, potestates illae quae duo capita corporum diversorum constituunt, simul in eodem esse non possunt, sicut nec idem homo potest simul esse duo capita corporum diversorum. Potestas enim spiritualis suprema et laicalis suprema constituunt duo capita diversorum corporum, scilicet imperatorem et summum pontificem, qui sunt duo capita diversorum corporum, clericorum scilicet et laicorum, qui distincti debent esse [...] Rursus, potestas laicalis suprema ex natura rei includit dominationem, unde et imperator est dominus mundi et iure imperatorum ac regum unusquisque possidet quod*

affairs of the world directly, His kingdom being spiritual and eternal.⁶⁶ He concluded that the Gospel itself was the fundamental law of liberty prohibiting the *plenitudo potestatis*.⁶⁷ In the *Breviloquium* (1340-41), Ockham argued that God alone is the basis of any temporal jurisdiction, the latter being one of the things necessary and useful for living well and politically.⁶⁸ In this work he introduced the distinction between *dominium commune* and *dominium proprium*, the former, as we shall see, being equivalent to *regere rem publicam*, and the latter consisting in the power to appropriate temporal things. God gave these two powers directly not only to believers but also to unbelievers.⁶⁹ As far as temporal jurisdiction is concerned, Ockham said that in its general meaning the latter denotes any power of ruling and coercing others as subjects. To establish temporal jurisdiction, divine ordinance alone is not always sufficient. There are many jurisdictions,

possidet [...] sed suprema potestas spiritualis, scilicet papatus, dominationem excludit, sicut et omnis praelatio ecclesiastica, teste Petrus, qui [...] ait universis praelatis ecclesiae: 'Pascite qui est in vobis gregem Dei', et post: 'Neque dominantes in clero, sed forma facti gregis ex animo'; ergo illae duae potestates in eundem cadere non possunt" .

⁶⁶ See Gulielmus de Ockham, *Octo quaestiones de potestate papae*, II, VI: "*suprema potestas laicalis [est] immediate a Deo [...] Christus non venit tollere nec etiam impedire dominium regum seu imperatorum, teste beato Augustino qui super Ioannem ait, loquens regibus mundi in persona Christi: 'Regnum meum non est de hoc mundo', id est, 'Non impedio dominationem vestram in mundo, ut vane timeatis et serviatis'; cui concordat Leo papa, dicens: Dominus mundi non quaerit temporale regnum, quia praestat aeternum; quod etiam ecclesia testari videtur, cum canit de christo: 'Non eripit mortalia qui regna dat coelestia'; tum quia religio Christiana nulli infideli tollit ius suum, teste beato Ambrosio qui super Epistolam ad titum ait: 'Admone illos principibus et potentibus subditos esse', quasi dicat, 'Si tu habes imperium spirituale, tamen admone illos subditos esse principibus, scilicet regibus et ducibus et potestatibus minoribus' quia Christiana religio neminem privat iure suo [...] Unde si aliquis imperator subiiceret se papae recognoscendo tanquam vasallus papam superiorem in temporalibus, eo ipso renuntiaret imperio et potestati supremae laicali, nec ex eo posset dici successor primi imperatoris nec Augustus vocari deberet, quia non auget imperium, sed quantum est in eo, destrueret" .*

⁶⁷ See Gulielmus de Ockham, *Octo quaestiones de potestate papae*, I, VI: "*si papa haberet talem plenitudinem potestatis a Christo et ab evangelica lege, lex evangelica esset intolerabilis servitutis [...] Omnes enim essent per ipsam effecti servi papae, ita quod papa tantam haberet potestatem super omnes Christianos quantam unquam habuit vel habere potuit quicumque dominus temporalis super servos suos, et sic papa posset quoscunque reges et alios dare et vendere et quorumcunque subdere servitutibus [...] quod nonnullis apparet haereticum. Relinquitur ergo quod papa non habet talem plenitudinem potestatis [...] non restat aliud probare nisi quod lex evangelica est lex libertatis [...] 'Regnum meum non est de hoc mundo' [...] Quod papa non habet talem plenitudinem potestatis per iura civilia videtur posse probari; nam, si papa haberet talem plenitudinem potestatis, imperium et omnia regna mundi essent a papa; quod civilibus legibus obviare videtur, cum dicant imperium esse a Deo, Authentica, 'Quomodo oporteat episcopos etc [...] ubi sic legitur: Maxima quidem in omnibus omnibus sunt dona dei a superna collata clementia sacerdotium et imperium'". See also II, VIII.*

⁶⁸ See Gulielmus de Ockham, *Breviloquium de principatu tyrannico*, III, 7. In H.S. Offler (ed.), *Guillelmi de Ockham Opera Politica*, IV, pp. 178-80. Oxford, 1997.

⁶⁹ See Gulielmus de Ockham, *Breviloquium de principatu tyrannico*, III, 8.

some of which are founded on divine and natural law – like the power of the husband over his wife, or over his children. Other jurisdictions, like the power of a *iudex* to rule over his province, or of a king to rule his people, do not derive in any way from divine or natural law but from human law. In fact, although God gave men the power to set up a judge and a ruler with power to coerce those subject to him, it is not always by divine law that someone enjoys that power over them.⁷⁰

5.3) Jurisdiction and *imperium*.

From Irnerius to Baldus and beyond, *iurisdictio* is *summa potestas de publico introducta*. The latter, as the Bolognese *magister* Odofredus put it, is coincident with *merum imperium*: “*merum imperium est [...] summa potestas de publico introducta*”.⁷¹ The medieval jurists based their understanding of the association of *iurisdictio* and *imperium* on one passage of the *Digesta* (Dig. 2, 1, 3), where *imperium* is divided up into “*merum*”, consisting in the power to punish and coerce for the sake of public order, and “*mixtum*”, consisting in the power to settle private quarrels. In the case of the term *imperium* too, the problem of its meaning in the original texts is difficult, aside from the problem of how it is understood on the side of the medieval jurists. Irnerius, however, made jurisdiction dependent on *imperium*. In particular, he saw the latter as the element without which no jurisdiction can exist: “*imperium; sine quo nulla esset iurisdictio*”.⁷²

In Odofredus’ account of the dispute between Azo and Lotharius of Cremona, which we have already mentioned, a reference is made to who ought to be the holder of *merum imperium*, that is, *potestas gladii*. The jurist attributed to Azo the view that *plenissima iurisdictio*, including the power to make laws, belongs to the *princeps* alone, who originally received all powers from the Roman

⁷⁰ See Gulielmus de Ockham, *Breviloquium de principatu tyrannico*, III, 11. He wrote: “*de iurisdictione autem temporali, si accipiatur generalissime [...] pro omni potestate regendi et coercendi alios tanquam subiectos, videtur dicendum, quod aliqua introducta est ex iure divino et naturali et aliqua ex iure humano [...] Ex quo patet quod non tantum iudex habet potestatem regendi et coercendi sibi subiectos, sed etiam maritus habet potestatem regendi et coercendi uxorem suam, et pater habet potestatem regendi et coercendi prolem suam [...] potestas autem iudicis in civitate vel regno aut regione [...] non est universaliter ex iure divino seu naturali, sed est interdum ex iure humano. Licet enim sit data hominibus a iure divino et naturali potestas instituendi iudicem et rectorem, qui potestatem habeat coercendi sibi subiectos, tamen quod aliquis super illos talem habeat potestatem non est semper a iure divino [...] ceteri vero per electionem et constitutionem hominum vel alio modo obtinuerunt iurisdictionem super alios*”. On the point, see also W. Stürner, “Die Begründung der *Iurisdictio temporalis* bei Wilhelm von Ockham”, in *Franciscan Studies* 46 (1986), pp. 243-51.

⁷¹ See Odofredus, *Lectura super Digesto veteri, de iurisdictione, imperium*, § 2, fol. 38, Lugduni, 1550.

⁷² The passage is quoted in E. Besta (1896), vol. II, p. 19.

people by the old *lex Hortensia*. Inferior magistrates like municipal magistrates, although holding *minus plena iurisdictio*, retained an inferior degree of *merum imperium*, so they could make laws.⁷³ Retaining 'pure' *imperium* amounted to use coercive measures like deprivation of freedom or civic rights, and even death and mutilation. The idea was then to make *iurisdictio* a genus and *imperium* a species. Azo presented four types of *iurisdictio*: *merum imperium*, *mixtum imperium*, *modica coercitio*, and *iurisdictio simplex*. This fourfold division entered the Accursian Glossa.⁷⁴ Elaborating on Dig. 2, 1, 3, which presents *merum imperium* as *potestas gladii* and *mixtum imperium* as something "*cui etiam iurisdictio inest, quod in danda bonorum possessione consistit*", Azo said that the function of "*habere gladii potestatem*", namely *merum imperium*, is "*animadvertendi in facinorosos homines*". The notion of *merum imperium* thus has to do with a series of punishments – death, mutilation, deprivation of freedom or civic rights whose function is to preserve law and order. In this sense, *imperium* is called *merum* because "*separatum [est] ab omni pecuniaria controversia*".⁷⁵ "It is *iurisdictio* as *imperium*", Perrin wrote, "that gives force to a magistrate and keeps *iurisdictio* from being nothing". Therefore, "*iurisdictio* and *imperium* cohere to one another".⁷⁶ The *Speculum iuris* of Gulielmus Durandus, it has been noted, contains an early exposition of the *merum imperium* as it was applied to the Canon law and the supremacy of the papacy. In Canon law, the *merum imperium* covered a spectrum that went from the rights of the deposition or suspension of clerics and excommunication to the anointment with the chrism and reconciliation to the Church.⁷⁷ In *Quaestiones aureae* (qu. 85), Pierre de Belleperche refuted the fourfold representation of *iurisdictio* and provided a new classificatory model based upon the division of *iurisdictio in genere* into *imperium* and *iurisdictio stricte sumpta*. He observed that *merum* and *mixtum imperium* are distinctions of *imperium* generally understood, not of *iurisdictio*. Moreover, he distinguished *imperium* into *magnum* and *modicum*. The former was seen as held by magistrates of noble rank and was subdivided into *merum imperium* – to be exercised "*nihil parti applicando*" – and *mixtum* – to be exercised "*aliquid parti applicando*". Finally, *iurisdictio stricte sumpta* could be *maior* or *minima* depending on the monetary amount at stake in the cases concerned.⁷⁸

Bartolus of Saxoferrato adopted the classificatory model defended by Pierre de Bellaperche. As we previously recalled, at the beginning of the second

⁷³ On the point, see F. Calasso (1953), p. 101.

⁷⁴ See J.W. Perrin (1972), pp. 95-7.

⁷⁵ "Despite the [criminal law] characteristics of *merum imperium*", recalled Vallejo, the latter "was not distinguished from *mixtum imperium* according to the simple distinction between civil and criminal cases". Moreover, inferior magistrates had competence in respect to a number of criminal offences. See J. Vallejo (1992), p. 12.

⁷⁶ See J.W. Perrin (1972), p. 98.

⁷⁷ See M.P. Gilmore (1941), pp. 32-6.

⁷⁸ See J. Vallejo (1992), p. 13.

book of the *Digestum Vetus*, various editions of Bartolus' *Commentaria* contain the 'tree of jurisdictions'. It is a complex diagram in which Bartolus sketched the branches of "*iurisdictio in genere sumpta*". Most historians of law agree that the main motivation for developing that hierarchical scheme was to bring Roman law into line with the problems and the needs of the day, in particular to accommodate the sovereignty of the *civitates*. In fact *merum imperium* was not exercised solely by the Emperor, but also by the *civitates*. Yet, that which the latter exercised was not the same as that of the Emperor. The hierarchy of degrees of *imperium* was most likely the solution to this problem. Wolff pointed out that Bartolus reposed the highly debated question of the links existing between 'pure' and 'mixed' *imperium* and *iurisdictio* as a genus. Against the opinion of the *Glossa* and in accordance with Belleperche and Cynus, he conceived of 'pure' and 'mixed' *imperium* as species of "*imperium simpliciter sumptum*", not of jurisdiction generally understood.⁷⁹ Thanks to Bartolus' contribution, Gilmore said, "confusion gave place to certainty and a definite theory on the *merum imperium* was established that became dogma" although "the greater certainty was at first reflected in an attitude towards the texts rather than in an understanding of the texts".⁸⁰ Bartolus wrote:

"iurisdictio in genere sumpta dividitur in duas species, scilicet in imperium simpliciter sumptum et in speciem quae est iurisdicti". [...] merum et mixtum imperium non sunt species iurisdictionis immediate. Non enim iurisdictio dividitur in merum et mixtum imperium, sed imperium simpliciter sumptum dividitur in merum et mixtum. Dic ergo, secundum Petrum, quod iurisdictio in genere sumpta dividitur in duas species, scilicet in imperium simpliciter sumptum et in speciem quae est iurisdictio [...] item imperium subdividitur in merum et mixtum".

In the same context, Bartolus held that jurisdiction in the form of 'pure' *imperium* was exercised by magistrates of the highest rank for the sake of public utility, whereas 'mixed' *imperium* was exercised by magistrates of inferior ranks for the sake of private utility.⁸¹ Having divided up *iurisdictio* into *iurisdictio simplex* and *imperium*, Bartolus constructed a hierarchy in six degrees – *maximum*, *maius*, *magnum*, *parvum*, *minus*, *minimum* – for each of these three figures and so he conceived eighteen degrees of sovereignty in all. In the following decades, great attention was given to the further clarification of the species of jurisdiction, even

⁷⁹ See C.N.S. Woolf (1913), p. 405-6.

⁸⁰ See M.P. Gilmore (1941), p. 36.

⁸¹ See Bartolus de Saxoferrato, *In primam Digestum Vetus partem, de iurisdictione omnium iudicum, imperium*, § 6, fol. 50, in BSC, I. The jurist wrote that "*imperium est iurisdictio quae officio iudicis nobili exercetur*", and "*merum imperium est iurisdictio quae officio iudicis nobilis, vel per actiones publica utilitatem rescipiens principaliter*", whereas *mixtum imperium* is "*quod principaliter rescipit privatam utilitatem*". On this point, see F. Calasso (1953), pp. 433-34.

if the problem of the attribution of cases to the proper and competent *iudex* continued to be hotly debated.⁸² The association of *iurisdictio* and *imperium* extended its fortune beyond the Middle Ages. In the sixteenth century, for example, as Guus van Nifterik pointed out, Fernando Vázquez de Menchaca (1512-1569) spoke of "*potestas ecclesiastica*" and "*profana*" as expression of "*suprema iurisdictio*" in the *Controversiae illustres* (1563). The jurist explicitly asserted that "*imperium nihil aliud [est] quam summ[a] iurisdicti[o]*" (I, 1, 17).⁸³

5.4) Jurisdiction and *dominium*.

Usually the term *dominium* is taken as the equivalent for 'property' in the private law sense.⁸⁴ Yet, in the Middle Ages and beyond, it was also used as synonymous with *iurisdictio* and *imperium* in the public law sense. As we already pointed out, Bartolus spoke of an "*equiparatio de iurisdictione ad dominium*" embracing the patrimonial concept of political authority.⁸⁵ In the constitution *Deo auctore*, Justinianus proclaimed his *dominium mundi* received from God directly. Against the *Glossa*, which received Bulgarus' idea of the Emperor as 'universal lord' *quoad protectionem*, Bartolus argued that the Emperor is "*dominus totius mundi vere [...] quia mundus est universitas*".⁸⁶ Now it is interesting to compare Bartolus' position with that of Aegidius Romanus, who portrayed the Pope as *dominus temporalium*.

On the ground of the traditional distinction between secular and spiritual affairs, Aegidius used the term *dominium* to denote both the material appropriation and use of temporal goods and the power to lead a political community, which he saw as a spiritual task in which the salvation of each member of the community was at stake. True *dominium*, concerning both persons and temporal goods, is just, he said, only in so far as it is established "*sub ecclesia et per ecclesiam*".⁸⁷ Aegidius used the terms *dominium* and *potestas* interchangeably

⁸² See J. Vallejo (1992), p. 11.

⁸³ See G.P. van Nifterik (1999), p. 85.

⁸⁴ See among others T. G. Watkin, *An Historical Introduction to Modern Civil Law*, pp. 219-27. Aldershot, 1999. On the distinction *dominium directum* and *utile*, see R. Feenstra, "Les origines du *dominium utile* chez les Glossateurs" (now in R. Feenstra, *Fata iuris romani*, pp. 215-59. Leiden, 1974). See also R. Feenstra, *Legal Scholarship and Doctrines of Private Law, 13th-18th Centuries*, pp. 111-22. Aldershot, 1996.

⁸⁵ See Bartolus de Saxoferrato, *In primam Digesti Veteris partem, de iurisdictione omnium iudicium, ius dicentis*, § 15, fol. 50, in BSC, I.

⁸⁶ See Bartolus de Saxoferrato, *In primam Digesti Veteris partem, de rei vindicatione, per hanc* § 2, fol. 181. In BSC, II. This fact as we shall see illustrated in more detail in the chapter concerned with Bartolus' conception of sovereignty, is compatible with the fact that "*singulae res*" like kingdoms and cities were not his own. On the point, see F. Calasso, (1965), p. 234.

⁸⁷ See Aegidius Romanus, *De ecclesiastica potestate*, II, 7.

as synonymous with sovereignty, in accordance with the Pauline precept that all powers descend from God. In particular, he claimed that "*omnia temporalia sub dominio et potestate ecclesie et potissime summi pontificis collocantur*" and that "*potestatem summi pontificis non contractam, non diminutam, sed universaliter super omnes [est]*". Aegidius explained that this circumstance does not constitute a deprivation of the proper prerogatives on the side of the secular rulers but rather their normative regulation and delimitation. Aegidius used four syllogistic arguments. First, he reaffirmed that temporal goods "*sunt bona in se, quia omne quod est, in quantum est, bonum est*", but they must be subject to the "*spiritualia*". Second, he argued that temporal goods are given in support of our earthly condition. Considering that the spiritual governs the material, "*sacerdotalis potestas et potissime potestas summi pontificis que super nostris animabus noscitur habere dominium, corporibus nostris et temporalibus rebus que ordinantur ad corpora, principetur et dominetur*". Third, he continued by observing that according to the universal order, less perfect things are subject to the more perfect: "*totum universum sic connexum, sic ordinatum, quod semper imperfecciora subsunt perfeccioribus et sunt in amminiculum ipsorum*". Consequently, the spiritual power is destined to govern over the material or secular: "*potestas ergo sacerdotalis tamquam perfeccior ordinata est ut dominetur potestati regie*". As a fourth argument, Aegidius referred to the practice of paying tribute to the Church, which confirmed the righteousness of the subjection of the corporeal to the spiritual.⁸⁸ Finally, he explained in what sense the use of *dominium* might be evil: "*sed quamvis potestas sit bonum et a Deo data, usus tamen potestatis potest esse non bonus*". Hence, he said, the necessity to submit all powers to the supreme power of God through the successors of Peter: "*omnes ergo sunt sub potestate tam boni quam mali, et ipsa potestas est sub potestate, et a Deo est, quod sit potestas sub potestate*".⁸⁹

The theory expounded by William of Ockham is relevant on the question of *dominium*. In *Opus nonaginta dierum* (c. 1332), one of his earlier political writings, the author distinguished three periods in mankind's history. In the first period, before the fall, God established lordship common to the whole human race. This kind of lordship, existing in the state of innocence, would have continued if man had not sinned. By natural law, it comprised the power to manage and use temporal things to the advantage of all. It was not common property though, for property strictly speaking implies exclusion and in the state of innocence neither the human race as a whole, nor any individual or group had any power to exclude. The dominion (*dominium*) common to mankind also implied the power to control things as people pleased without suffering resistance or harm. The second period was that immediately following on sin, and before the division of temporal things. It is a time in which people started to appropriate things and the principle of exclusion started to emerge. Common

⁸⁸ See Aegidius Romanus, *De ecclesiastica potestate*, II, 4.

⁸⁹ See Aegidius Romanus, *De ecclesiastica potestate*, II, 9.

property was then introduced. The third period coincides with that in which people started to appropriate things in an increasingly more exclusive way and started to suffer resistance and harm. It is the epoch in which, as a consequence of sin, *dominium proprium* arose.⁹⁰ Later on, in the *Breviloquium*, Ockham spoke of a right on the ground of which lordship over temporal things ("*dominium rerum temporalium*") and temporal jurisdiction ("*iurisdictio temporalis*") were introduced. Lordship over temporal things, he said, is partly divine and partly human. The latter is twofold: common to the whole human race ("*commune toti generi humano*") and exclusive, or one's own, when it belongs to one or some and not to another or others ("*proprium*"). Jurists, he said, call exclusive lordship ownership, which consists in the principal power of managing temporal things by exclusive appropriation. The latter, he claimed, emerged following on sin, because among men avarice grew up and the desire to possess and enjoy temporal things to the exclusion of others. In order to restrain the immoderate appetite of the wicked, God established as legitimate the power of appropriating things by special grant and a useful and expedient remedy. In fact, he said, the power to appropriate temporal things – or even rational beings, such as a wife and children, and other things – was something necessary and useful to the human race for living well after sin because of the many who are negligent. Following Aristotle, and against Plato, he says that common things are less loved and cared for by most people than things that are their own. Likewise, God directly gave the power to set up rulers with temporal jurisdiction, because temporal jurisdiction is one of the things necessary and useful for living well and politically.⁹¹ God gave this

⁹⁰ This work was written to defend Michael of Ceseana, whose two *Appellationes* in favour of the Franciscan doctrine of Evangelical Poverty, had been censured by John XXII in his bull *Quia vir reprobus*. In this work, Ockham discussed the bull and pointed out what he thought to be errors. His treatment of evangelical poverty led him "to discuss the origin of private property, and from private property it was an easy step to turn to the investigation of the origin and character of political dominion". See J.G. Sikes (ed.), *Guillelmi de Ockham opera politica*, I, p. 290. Manchester, 1940.

⁹¹ See Gulielmus de Ockham, *Breviloquium de principatu tyrannico*, III, 7: "*dominium commune toti generi humano est illud, quod Deus dedit Adae et uxori suae pro se et omnibus posteris suis: quod fuit potestas disponendi et utendi temporalibus rebus ad utilitatem suam. Et ista potestas fuisset in statu innocentiae absque potestate appropriandi rem aliquam temporalem alicui uni personae vel alicui collegio speciali aut aliquibus certis personis; sed post lapsum est cum tali potestate appropriandi res temporales. Aliud est dominium proprium, quod in scientiis legalibus [...] vocatur proprietas: quod dominium est potestas principalis disponendi de rebus temporalibus appropriata uni personae vel certis personis aut alicui collegio speciali. Et variatur talis potestas secundum quod potest esse maior vel minor. Primum dominium, scilicet commune toti generi humano, fuit et permanisset in statu innocentiae, si homo non peccasset [...] Post peccatum autem, quia in hominibus pullulavit avaritia et cupiditas possidendi et utendi non recte temporalibus rebus, utile fuit et expediens propter pravorum immoderatum appetitum habendi temporalia refrenandum et excutiendam negligentiam circa debitam dispositionem et procuracionem temporalium rerum [...] ut res temporales appropriarentur et non essent omnes*

twofold power, namely to appropriate temporal things and to set up rulers with jurisdiction, directly, not only to believers but also to unbelievers.⁹²

Mainly because of his own commitment towards apostolic poverty, Ockham's intellectual activity inevitably concerned the question of the very nature of the authority of pope and clergy, on the one hand, and Emperor and lay powers, on the other.⁹³ A situation of rivalry between France and England was, however, gradually entering the scene and occupied the minds of a number of writers. In the works of one of these writers, the eminent Oxford theologian John Wyclif (d. 1384), we perhaps find some traces of it, although the direct focus remained achieving autonomy for the English crown in Church affairs. This author dealt extensively with the question of divine and civil authority, both presented under the heading *dominium*. In *De dominio divino* (1374), Lahey wrote, "Wyclif characterises the relation of God to creation in terms of *dominium*, a portmanteau word which incorporates the concepts of ownership and jurisdiction".⁹⁴ In opposition to the hierocratic position, Wyclif contended that the existing Church is full *dominium* in the spiritual and material sense, for only God, not the Church, knows who are the members of the 'true Church', those pre-destined to salvation. Wycliff too, Black observed, made a connection between authority and property, but in order to "discredit clerical titles to wealth and land-ownership, except as a voluntary recompense for their services granted by lay people and subject to re-possession if abused". In both *De statu innocencie* (1376) and *De civili dominio* (1376-77), Wyclif asserted that the only basis of all forms of *dominium* is God-given *caritas*. Given our ignorance about "who has an absolutely valid title to property and jurisdiction", Black wrote, "dominion in all its forms is under the disposition of [...] the civil authorities".⁹⁵ So, Church affairs

communes [...] Istud autem dominium commune toti generi humano cum potestate tali appropriandi temporalia fuit introductum ex iure divino, quia ex speciali collatione Dei, cuius erant et sunt omnia tam iure creationis quam iure conservationis, sine cuius mantenentia omnia in nichilum v[er]terentur [...] ideo enim aristoteles [...] reprobavit politiam seu ordinationem Platonis ponentis civitatem esse melius ordinatam, in qua omnia essent communia, quam illam, in qua essent propria [...] et ideo a pluribus communia minus diliguntur et per consequens minus curantur quam propria, propter quod inter tales melior est appropriatio rerum quam communio [...] Potestas ergo appropriandi res temporales personae et personis aut collegio data est a Deo humano generi. Et propter rationem consimilem data est a Deo, absque ministerio et cooperatione humana, potestas instituendi rectores habentes iurisdictionem temporalem; quia iurisdictio temporalis est de numero illorum, quae sunt necessaria et utilia ad bene et politice vivere".

⁹² See Gulielmus de Ockham, *Breviloquium de principatu tyrannico*, III, 8.

⁹³ See J. Coleman, "Medieval discussions of property: ratio and *dominium* in thirteenth and fourteenth century political thought and its seventeenth century heirs", in *Political Studies* 33 (1985), pp. 73-100; A. Black (1992), pp. 71-8.

⁹⁴ See S.E. Lahey (1997), p. 6.

⁹⁵ See A. Black (1992), p. 80-81.

and secular affairs came to be coincident in the hands of monarchs, who alone were thought of as holder of *dominium*.⁹⁶

The identification between *iurisdictio* and *dominium* is controversial, but it has been a fortunate one beyond medieval law and government. In the fifteenth and sixteenth centuries, *dominium* and *imperium* continued to be used interchangeably as synonymous with *iurisdictio*, broadly understood as *ius gubernandi* or *summa potestas*. In relation to the forms and limits of monarchical government and on account of the theories expounded by St. Thomas Aquinas and Aegidius Romanus in their *De regimine principum* respectively, John William Fortescue (1394-1476) distinguished between "*dominium regale*" and "*dominium politicum*". In his *Opusculum de natura legis naturae et eius censura in successione regnorum suprema* (1461-63), he argued that in the first case, kings issue laws as an expression of their sovereign will and accede to the throne on a hereditary basis. In the second case, the members of the community elect their kings and retain the monopoly of the legislative power, which is open to the kings' intervention.⁹⁷ A third, intermediate, form of *dominium* is the one portrayed in *De laudibus legum Anglie*. It is the English monarchy, whereby "*non potest rex Anglie ad libitum suum leges mutare regni sui*".⁹⁸ Later on, in *De iustitia et iure* (1605), Leonardus Lessius (1554-1625) affirmed that "*dominium dividi potest in dominium iurisdictionis et proprietatis*". The former is "*potestas gubernandi suos subditos*", whereas the latter is "*ius disponendi de re aliqua tanquam sua in suum commodum*".⁹⁹ Grotius himself, referring to things that may become property, said that a country may be taken possession of either as a whole or in parts, and that the former is usually done by a whole people, or by him who is their sovereign. In a country possessed as a whole, he said, any thing which remains unassigned to private individuals

⁹⁶ See M. Wilks, "*Reformatio regni: Wyclif and Hus as leaders of religious protest movements*", in D. Baker (ed.), *Schism, Heresy and Religious Protest. Studies in Church History* 9, pp. 109-30. Cambridge, 1972.

⁹⁷ See J.W. Fortescue, *Opusculum de natura legis naturae et eius censura in successione regnorum suprema*, I, XVI: "*preest dominio regali qui preest secundum leges quas ipsemet statuit, et secundum arbitrium suum, sed dominio politico preest qui secundum leges quas cives instituerant eis dominatur*". In T. Clermont (ed.), *The Works of John Fortescue*, pp. 63-333. London, 1869. On the topic, see J.H. Burns, "Fortescue and the political theory of *dominium*", in *Historical Journal*, 28 (1985), pp. 781-85.

⁹⁸ The author adds: "*principatu namque nedum regali, sed et politico ipse suo populo dominatur*" (IX). See S.B. Chrimes (ed.), *De laudibus legum Angliae*, IX. Cambridge, 1942. In the *Opusculum*, Fortescue mentioned this kind of limited monarchy, one in which the king rules "*non tantum regaliter set etiam politice*". "In regno namque Anglie", the author wrote, "*reges sine trium statum regni illius consensu leges non condunt, nec subsidia imponunt subditis suis, sed et iudices regni illius ne ipsi contra leges terrae quamvis mandata principis ad contrarium audierent, iudicia reddant omnes suis astringuntur sacramentis*" (I, XVI).

⁹⁹ See L. Lessius, *De iustitia et iure*, II, 3, dubitatio 1 (21). The passage is quoted in G.C.J.J. van den Bergh, *Eigendom. Grepen uit de geschiedenis van een omstreden begrip*, pp. 69-70. Deventer, 1988.

belongs to whoever first took possession of that country, whether king or people.¹⁰⁰ Finally, in his *Commentaries on the Laws of England* (1765-69), William Blackstone (1723-1780) spoke of the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe".¹⁰¹ These few examples are intended to show that, in spite of the distinction between the domains of public and private law, a rather clear-cut distinction to us at least, the fluctuation of *dominium* between the two domains remained a major feature in European law and government for a long time.

¹⁰⁰ See Hugo Grotius, *De iure belli ac pacis*, II, II, IV: "duplicem esse occupationem, unam per universitatem, alteram per fundos. Prior solet fieri per populum, aut eum qui populo imperat: altera deinde per singulos [...] manet enim in dominio primi occupationis, puta populi aut regis".

¹⁰¹ See W. Blackstone, *Commentaries*, II, 2.

CHAPTER SIX

LIFE, WORKS, AND FORTUNE OF MARSILIUS OF PADUA (1275/80-1342/43).

Marsilius' early life and education are for the most part obscure.¹ He was born to a wealthy Paduan family, the Mainardini. Some scholars, like the eighteenth century historian of Italian literature Abbot Girolamo Tiraboschi, who is said to follow the opinion of the learned Albertino Mussato (1261-1328/9), one of the best friends of Marsilius, claimed that the latter belonged to the Raimondini family.² Most contemporary scholars, however, have opted for the Mainardini family. Marsilius' father, Bonmatteo, and his uncle, Corrado, were notaries, and his brother Giovanni was a judge. The exact date of birth of Marsilius is uncertain. It is placed between 1275 and 1280. That was a time in which the process of transformation that led several northern Italian communes to turn into *Signorie* was at an advanced stage.

Medieval Padua was generally a prosperous trading city, seat of a renowned university, and a free commune since the treaty of Constance in 1183. The Padua of Marsilius was probably as much Ghibelline as the Perugia of Bartolus was Guelf. It was a city still proud of its autonomy. When in 1311 the Paduan ambassadors met Henry VII, they explicitly asked for respect of certain *libertates*. In the Paduan mentality of the epoch, any *dominium* of one man, being a tyrant or not, was unacceptable and contrary to the ideology and institutional setting of the *status comunis et tranquillus*.³ In a pioneering article, Charles William Previt-Orton focused on a detail of great importance for reconstructing one of the major features of Marsilius' personality, his anti-clericalism. The scholar noted that towards the end of the thirteenth century, probably in no other Italian town of the time "was the immunity of the clergy a more bitter grievance than at Padua". The habits of a number of local priests were notoriously wicked and "the odium in which they lived on that account was shared by the monastic and lay orders and by all clerics". A considerable part of the local clergy declined to be taxed with other citizens and to pay their quota as landowners for the all-important public viability. The commune soon took rigorous measures, including making it impossible for clerics to

¹ On Marsilius' life, besides the 1928 Cambridge edition of the *Defensor pacis* by Charles William Previt-Orton, and the 1932-33 edition by Richard Scholz, see also G. Tiraboschi, *Storia della letteratura italiana*, V/1, pp. 176-81. Modena, 1789; C.K. Brampton, "Marsiglio of Padua - Life" in *English Historical Review* 37 (1922), pp. 501-15; J. Haller, "Lebensgeschichte des Marsilius von Padua" in *Zeitschrift fr Kirchengeschichte* 48 (1929), pp. 166-99 (republished in J. Haller, *Abhandlungen zur Geschichte des Mittelalters*, pp. 335-68. Stuttgart, 1944). Among the most recent sources, see C. Pincin, *Marsilio*, pp. 21-54. Torino, 1967; J. Miethke, "Marsilius von Padua" in *Theologische Realenzyklopdia* 12 (1992), pp. 183-90; C. Dolcini, *Introduzione a Marsilio da Padova*, pp. 3-23. Roma-Bari, 1995.

² See G. Tiraboschi (1789), V-1, p. 176.

³ See P. Marangon, "Principi di teoria politica nella Marca Trevigiana. Clero e comune a Padova al tempo di Marsilio" in *Medioevo* 6 (1980), pp. 317-36.

prosecute claims against laymen, and a considerable reduction in the fine for killing a cleric. Such laws met interdict and excommunication and Padua appeared as “an early champion of the rights of the laity against ecclesiastical jurisdiction” and resolute in preventing ecclesiastical courts “from infringing the civil rights of Paduan subjects”.⁴ This set of facts, paralleled by the general antagonism between the Papacy and the Spiritual Franciscans, led Laski to conclude that Marsilius’ main work, the *Defensor pacis*, “is in essence a plea for the Spiritual Franciscans”.⁵

Marsilius did not serve as civic officer, as was family tradition, nor did he study law, although his interest in it was remarkable. Instead, he went to Paris, then the centre of Latin learning. His sojourns in Paris are of crucial importance in the attempt to reconstruct the intellectual biography of the young Marsilius. In fact, the time spent in Paris offered modern scholars the chance to portray the *Defensor pacis* as a sort of manifesto of so-called ‘political Averroism’.⁶ Before briefly touching upon this question, we should recall that from a *Chartularium* of the Faculty of Arts we know that in March 1313, as a young *magister artium*, Marsilius was rector.⁷ According to the local statutes, a candidate for that position had to be at least twenty-five years old, *clericus* according to the regulations for students ordained *in sacris*, well-off, and of outstanding moral integrity. In any case, we may be sure that Marsilius was not born later than the year 1287/88. Most likely, the friendship with Jean de Jandun (1285-1328) dates back to that time. About this friendship we have scarce information. That was the time when, in Paris, a number of scholars were eager to interpret the Aristotelian texts available in Latin as well as the commentaries by Ibn Rushd, otherwise known as Averroes (d. 1198), in a manner that was perceived as challenging Christian doctrine.⁸ Beginning in

⁴ See C.W. Previté-Orton, “Marsiglio of Padua – Doctrines”, in *The English Historical Review* 38 (1923), pp. 1-18, 3-4.

⁵ See H.J. Laski, “Political Theory in the later Middle Ages”, in C.W. Previté-Orton and Z.N. Brooke (eds.), *The Cambridge Medieval History – VIII – The Close of the Middle Ages*, pp. 620-45, 631. Cambridge, 1936. The role of evangelical poverty in Marsilian thought is also examined in M. Damia, “Funzione e concetto della povertà evangelica in Marsilio da Padova”, in *Medioevo* 6 (1980), pp. 411-30. See also J. Canning (1996), pp. 156-7.

⁶ Gregorio Piaia spoke of political Averroism as a myth in historiography. See in particular his “Averroisme politique: anatomie d’un mythe historiographique” in A. Zimmermann und I. Craemer-Ruegenberg (eds.), *Orientalische Kultur und europäisches Mittelalter*, pp. 288-300. Berlin-New York, 1985.

⁷ See H. Denifle et A. Chatelain (eds.), *Chartularium universitatis Parisiensis*, II, p. 158. Paris, 1891. Here we find it mentioned that the representatives of four faculties had been “*ad congregationem vocati per mag. Marcilium de Padua tum nostre universitatis rectorem*”. From 1249 onwards, the authority to elect the rector was reserved to a special body comprising the Masters of Arts alone. See J. Verger, “Patterns”, in H. de Ridder-Symoens and W. Rüegg (eds.), *A History of the University in Europe*, I, pp. 51-72. Cambridge, 1996.

⁸ See M. Fakhry, *Islamic Philosophy, Theology and Mysticism. A Short Introduction* (1997), pp. 90-103, 139-40. Oxford, 2000.

the second quarter of the twelfth century, the so-called *libri naturales* of Aristotle and some of his Arabic commentaries were being translated into Latin, first in Toledo.⁹ Some of these works then began to circulate in Paris and were first used by scholars devoted to theology. Their interest also derived from the fact that the definition of science and the logical tools that they bore could, at least to some extent, be applied to theology. Up to then, the *scientia de divinis* rested on the traditional teaching of St. Ambrose, St. Augustine, St. Jerome and St. Gregorius Magnus, and the exposition of the Christian dogmas on Peter Lombard's *Liber sententiarum*. Aristotelian natural philosophy constituted a threat especially to the doctrine of creation. In Statutes of 1215 of the *Universitas magistrorum et scholarium Parisiis studentium*, the ecclesiastical authority banned Aristotle's books on natural philosophy and metaphysics, as well as the related *summae*.¹⁰ Historians of medieval learning distinguished three major currents of thought at the Parisian theological schools of the rue du Fouarre, and at the arts faculty, in the late thirteenth century. Franciscan scholars like Alexander of Hales (d. 1245) and Bonaventure (d. 1274), finding the growing use of Aristotle damaging to both faith and philosophy, represented the traditional Augustinian stream that, in political terms, subjected all secular prerogatives to the higher dignity of the *sacerdotium*. There were moderate Aristotelians mainly represented by members of the Dominican order like St. Albertus Magnus (d. 1280) and Aquinas, who approved some Aristotelian doctrines in philosophy and appropriated them for theological purposes. They approached Aristotle in a spirit of intellectual reconciliation. In political terms, they recognised the autonomy of human reason in matters of societal relevance and yet anchored it to the vision of a superior Celestial Jerusalem, the only guarantor and foundation of peace and justice on earth. To a third rather small group, the radical Aristotelians or *Averroistae*, belonged a variety of scholars, including the *magister artium* Siger of Brabant (1226-1283/84) and Boethius of Dacia (d. 1284). They were inclined firmly to separate the conditional truths of reason from the absolute truths of faith.¹¹

⁹ See G. Endress, "L'Aristote arabe: réception, autorité et transformation du Premier Maître", in *Medioevo* 23 (1977), pp. 1-42.

¹⁰ See J. Verger, "L'exégèse de l'université", in P. Riché et G. Lobrichon (eds.), *Le Moyen Age et la Bible*, pp. 199-232. Paris, 1984; A. Conti, "Paradigma aristotelico e teologia cristiana nel secolo XIV. Fede e ragione a Oxford e Parigi sul finire del Medioevo", in *Medioevo* 22 (1996), pp. 137-223; M. Asztalos, "The faculty of theology", in H. de Ridder-Simoens and W. Rüegg (1996), I, pp. 409-41; R.W. Southern, *Scholastic Humanism and the Unification of Europe - I - Foundations* (1995), pp. 102-33. Oxford, 1997; J.S. McClelland (1998), p. 135.

¹¹ They also advocated the eternity of the world, astrological determinism in contrast to free will, the unity of the intellect and claimed that the soul is destroyed with the body and therefore unable to suffer eternal punishment, and that happiness is attainable in earthly life. See B. Nardi, *Studi di filosofia medievale*, pp. 58-68. Roma, 1979. Establishing an ideal reconciliation with Aquinas, however, Dante placed Siger of Brabant in his *Paradiso* (X 136-38): "è la luce eterna di Sigieri, che, leggendo nel Vico de li Strami, sillogizzò invidiosi veri". On Siger and Boethius of Dacia, see S. Ebbesen, "The

The term *Averroistae* began to be employed in a rather generic form at the University of Paris in the 1270s, whereas 'Averroism' is a nineteenth century invention often used generically, mainly to denote a way of thinking adopted in the Latin west based upon the postulate of the inconsistency between philosophy and faith.¹² In this sense, the Averroist position has been seen as a precursor of modern agnosticism and even atheism. The separation of the truths of reason from those of faith can also be seen as a factor that facilitated the adoption of the Aristotelian idea of the political community as a product of man's political nature. In 1272, by a decision of the masters of logical and natural science of the arts faculty, it was established that no member of the faculty could dispute questions of theology. If a problem touched both reason and faith, the masters were bound by oath to solve it in a way always favourable to faith, or at least not contrary to it. If anyone lectured on controversial questions with arguments that seemed to be contrary to faith, he was obliged to declare them erroneous or abstain from reading the text.¹³ Finally, on 7 March 1277, the Bishop of Paris, Etienne Tempier, accused a number of unnamed Masters of Arts to have undermined Christian revelation and resolutely condemned 219 theses, including those upheld by the *Averroistae*.¹⁴ In Canning's view, Marsilius is perhaps the only protagonist in the process of the adaptation of an Averroist, namely "purely naturalistic approach" to politics, as the first discourse of his major work testifies.¹⁵ McClelland too suggested that Marsilius adhered to this movement,

Paris arts faculty: Siger of Brabant, Boethius of Dacia, Radulphus Brito", in J. Marenbon (ed.), *Medieval Philosophy* (1998), pp. 269-90. London-New York, 2003.

¹² See E. Gilson (1947), pp. 550-70; R. Imbach, "L'averroïsme latin au XIII siècle", in R. Imbach e A. Maierù (eds.) *Gli studi di filosofia medievale fra otto e novecento. Contributo a un bilancio storiografico* (Atti del convegno internazionale, 21-23 settembre 1989), pp. 121-32. Roma, 1991.

¹³ The masters of the arts faculty had to swear obedience to this regulation until the fifteenth century. In a statute of 1276, the masters decided to prohibit private lectures except in grammar or logic. In the fourteenth century, John Buridan (d. 1358), accused of treating theological matters, argued that he could not possibly resolve the arguments contrary to faith in a question unless he was allowed to produce them. See E. Grant, *A Source Book in Medieval Science*, pp. 50-1. Cambridge (Mass.), 1974.

¹⁴ See J.F. Wippel, "The condemnations of 1270 and 1277 at Paris", in *Journal of Medieval and Renaissance Studies* 7 (1977), 195-6; E. Grant, "The condemnation of 1277, God's absolute power and physical thought in the late Middle Ages", in *Viator* 10 (1979), pp. 211-44.

¹⁵ See J. Canning, "Introduction: politics, institution and ideas", in *CHMPT*, I, pp. 341-66, 361. See also E. Troilo, "L'averroismo di Marsilio da Padova" in A. Checchini e N. Bobbio (a cura di), *Marsilio da Padova. Studi raccolti nel VI centenario della morte*, pp. 66-7. Padova, 1942; A. Gewirth (1964), pp. 23-31. Jeanine Quillet argued against this thesis that Marsilius' adherence to political Averroism was apparent. See J. Quillet, *La philosophie politique de Marsile de Padoue*, p. 66. Paris, 1970. On the same author, see also "L'aristotélisme de Marsile de Padoue et ses rapports avec l'averroïsme" in *Medioevo* 5 (1979), pp. 81-142. Along the same interpretative line, see M. Grignaschi, "L'ideologia marsiliana si spiega con l'adesione dell'Autore all'uno o all'altro dei grandi sistemi filosofici dell'inizio del Trecento?" in *Medioevo* 5/1 (1979), pp. 201-22;

although this scholar connected the Paduan thinker to the Aristotelian stream generically. "The thrust of Marsilius's argument for the superiority of secular over ecclesiastical power in lay matters", McClelland wrote, "can be seen as an attempt to rescue Aristotle from the Thomists". Yet, according to this author, Marsilius was not fully an Aristotelian. In fact, the ends of the Marsilian conception of statehood "are not really Aristotelian ends at all, but means". For Aristotle, "the *polis* exists to serve the highest ends, and, for Thomas, the virtue of a Christian state has its part to play in the process by which souls are ultimately reconciled to God". Marsilius "does not deny that these ends are good and godly, but he thinks that they cannot intrinsically be the state's ends".¹⁶ According to Janet Coleman, Marsilius "reinterprets Aristotle in order to mirror practice in north Italian city-states of the fourteenth century".¹⁷

Whatever may have been the political significance, consistency, and coherence of the Averroist trends at Paris, it was after his Parisian experience that Marsilius shaped his political ideas. Basing ourselves on the charges advanced against him later on, he had certainly adhered to the view that happiness is achievable in earthly life, that political life has its own independent rationale, and that there exist gaps between the truths of reasons and those of faith. The question of Marsilius' adherence to Averroism is controversial. We shall see in the next chapter how much the Marsilian doctrine of the origin of political life differed from the Aristotelian and the Averroist.

"Indagine sui passi del 'Commento' suscettibili di aver promosso la formazione di un averroismo politico in *Atti dei Convegni dei Lincei*, 40: *L'Averroismo in Italia* (Roma, 18-20 aprile 1977), pp. 237-78. Roma: 1979 (now in C. Dolcini [a cura di], *Il pensiero politico del basso medioevo*, pp. 273-312. Bologna, 1983). See also G. Piaia, "L'averroismo politico e Marsiglio da Padova", in C. Giacon (a cura di), *Saggi e ricerche*, pp. 33-54. Padova, 1971; C. Dolcini (1995), p. 18. On the relationship between Marsilian thought and Aristotelism in general, see P. Marangon, "Marsilio tra preumanesimo e cultura delle arti. Ricerca sulle fonti padovane del I Discorso del *Defensor pacis*", in *Medioevo* 3 (1977), pp. 89-119; C. Vasoli, "La Politica di Aristotele e la sua attualizzazione da parte di Marsilio da Padova", in *Medioevo* 5 (1979), pp. 237-57; G. Wieland, "Die Rezeption der aristotelischen Politik und die Entwicklung des Staatsgedankens im späten Mittelalter am Beispiel des Thomas von Aquino und des Marsilius von Padua", in E. Mock und G. Wieland (eds.), *Rechts- und Sozialphilosophie des Mittelalters*, pp. 67-81. Frankfurt am Main, 1990.

¹⁶ See J.S. McClelland (1998), p. 135-9. This author argued that what makes Marsilius different from Augustine is that "he does not cry politics down just because political ends are far inferior to the real salvationist ends of life". Marsilius "draws the opposite conclusion from the inferiority of political ends: it is precisely the inferiority of political ends which makes them achievable by the state". In this sense, "the state has ends of its own". This writer saw Marsilius also as a forerunner of Humanistic trends, to the extent that he referred to Aristotelian teaching as a "source of anti-papal arguments".

¹⁷ See J. Coleman, "The individual and the medieval state", in J. Coleman (ed.), *The Individual in Political Theory and Practice*, pp. 1-34, 31. Oxford, 1996.

There is scattered information available on his activities in the decade between 1313 and 1324. We know that on 14 October 1316, pope John XXII (1316-1334) promised him for the first time ecclesiastical preferment in Padua, and on 15 April 1318, he reserved the first vacant benefice available for him. It is possible that around 1318 he visited the court of Lewis of Bavaria. However, he is mentioned in a letter of John XXII, dated 29 April 1319, as having been engaged in a diplomatic mission on behalf of the *Signori* of Verona and Milan to Count Charles of La Marche, offering the latter the captaincy of the Ghibelline League.¹⁸ It has been conjectured that after the failure of his mission he resumed scholarly pursuits, spending some time in Paris again, where he gave lectures on natural philosophy and engaged in medical research and practice. It was probably at this time that he became acquainted with Ubertino of Casale, Michele of Cesena, whom Marsilius was to encounter later on at Ludwig's Court, and other Spiritual Franciscans who upheld evangelical poverty.

One of the most reliable sources of information remains an epistle written in metric style, possibly around 1324, which Albertino Mussato addressed to him to reproach him for his inconstancy – “*Ad magistrum Marsilium physicum Paduanum Arguens eum de inconstantia*”.¹⁹ The poem provides a key for interpreting Marsilius' personality and his enterprising disposition. The writer speaks of his friend as a particularly talented mind, impatient to become rich and renowned, unable to resist the temptation to join the political struggles of the day. It was rather common at that time for the graduates at the Faculties of Arts to continue their studies in the field of theology or medicine. Asked for advice on whether to study law, most likely in accordance with his family tradition, or medicine, Mussato recounts that he warmly recommended him to choose medicine. He also recommended Marsilius not to give up his future chances of academic success, and to make if possible the best use of his “*fertile tempus*” and “*pulcra florente iuventa*”. The writer lamented that his friend, after a period of devotion to medicine, had stayed in Milan with Matteo Visconti and joined the forces of Can Grande della Scala of Verona. This circumstance worried Mussato to the extent that he asked his friends whether there was truth in the rumour. It has been conjectured that after this interruption, he returned to the study of medicine, possibly under the supervision of an outstanding teacher who has been variously identified as William of Brescia, Jean de Jandun or Peter of Abano. Musatto's poem suggests that he left again to wander around Europe, attracted as he was by the ‘German helm, armour, and sword’. This circumstance leads to the problem of Marsilius' Ghibelline militancy in the camp of Lewis of Bavaria and of his firm ‘anti-papalism’. Tiraboschi described him as a man of great intellect, and added that he would have been very

¹⁸ See C.W. Previté-Orton, “Marsilius of Padua and the Visconti”, in *The English Historical Review* 44 (1929), pp. 278-9.

¹⁹ See J.G. Graevius, *Thesaurus historiae italicae*, VI, II, col. 48. Venetiis, 1636. On the friendship between Marsilius and Mussato, see C. Pincin, *Marsilio*, pp. 37-40. Torino, 1967.

helpful to the papal cause if only he had not turned into a harsh opponent.²⁰ On 23 June 1324, Marsilius had finished writing the *Defensor pacis*, of which the first manuscript circulated anonymously. At that time, he was supposedly preparing a course of lectures on theology to be held at the university. At least, this is what he apparently let some fellowmen believe in order to receive a loan enabling him to travel to Germany. The creditors, Tiraboschi recalled, were quite unhappy. Presumably, Tiraboschi continues, Marsilius did not teach theology at Paris University but rather read it simply to provide Lewis of Bavaria with theological arguments to be used in his controversy with John XXII.²¹ This fact is inferred from the proceedings of the Inquisition at Avignon on May 1328 against Francesco della Giovanna, a former Italian student of Marsilius, accused of having helped him in writing his subversive work.²²

Marsilius' major work is divided up into three *dictiones*. The third is a brief summary of conclusions. Alan Gewirth noted that the first two discourses are concerned with the causes of civil peace and strife. But, while the first deals with the usual and general causes, the second deals with the unusual and singular causes, especially "the acts and pretensions of the papacy deriving from its claim to plenitude of power". Treating the usual operations of human reason in the context of community life, the first discourse is thus concerned with "the general structure and functioning of any state as such". The second is concerned with the impediments to those normal operations deriving from the papacy's claim to universal political sovereignty. In the first discourse, moreover, the demonstrations presented are based on human reasoning, appealing to the authority of Aristotle, Cicero, and others. In the second discourse, the Holy Scriptures, and the New Testament in particular, are used to confirm the rational conclusions reached in the preceding one.²³ In 1326, Marsilius' authorship was finally established and revealed to the public. Papal condemnation forced him and Jean de Jandun, considered to be the co-author, finally to flee to the court of Lewis of Bavaria in Nuremberg.

The question of the alleged co-authorship is relevant to the problem of the affiliation of Marsilius to 'political Averroism'. The period of most intensive contact between Marsilius and Jean de Jandun spans roughly from 1310 to 1324, which were the apogee of the Averroist trends at Paris University. This fact certainly contributed to the edification of the image of Marsilius as an Averroist thinker and of the *Defensor pacis* as a masterpiece of political Averroism. As far as the problem of the co-authorship is concerned, Gewirth - in an article published in 1948, following the indications provided by Previt-Orton in his 1928 edition of the *Defensor pacis* and by Scholz in his 1932 edition - attempted to demonstrate that Jean de Jandun wrote no part of

²⁰ See G. Tiraboschi (1789), V-1, p. 176.

²¹ See G. Tiraboschi (1789), V-1, p. 179.

²² Francesco della Giovanna is reported to have admitted only to have poured wine at Marsilius' table. See C. Pincin (1967), p. 163.

²³ See A. Gewirth (ed.), *Defensor pacis* (1956), ix-xxii. New York, 2001.

the *Defensor pacis*.²⁴ The co-authorship has been conjectured on the basis of John XII's condemnation of the work.²⁵ Gewirth concentrated his attention on the latter claim and refuted it on the basis of nine major differences in thought that emerged through a comparative examination of de Jandun's writings and the *Defensor pacis*. The differences which he points to make the thesis of joint authorship untenable. Let us summarise Gewirth's analysis as follows. He notes that Jandun's major writings, the *Quaestiones in duodecim libros metaphysicae* (QM) presumably written during the first decade of the fourteenth century, and *Tractatus de laudibus parisiis* (TL), written at the very beginning of the second decade, contained ideas not easily reconcilable with the ideas of the *Defensor pacis* (DP). In both scholastic and Averroistic fashion, they gave priority to the "*felicitas speculativa*" over the "*felicitas politica*". By contrast to Marsilius who, as we shall see, emphasised the autonomy of political reason and action, Jandun defined the former as "*nobilior*". Marsilius based the legitimacy of government upon its efficient cause, upholding the distinction between two types of government, "*bene temperata*" and "*vitiata*", and making this distinction depend upon whether or not the government derives its legitimacy from the consent of the subjects (DP, I, VIII, 2). He thus called polity the community in which every citizen participates in ruling (DP, I, VIII, 3) and in which the ruler applies a merely coercive jurisdiction whose only purpose is preserving proper government (DP, I, V, 7). He was in fact convinced that most people are sane in their mind and balanced in their passions (DP, I, XIII, 3) in spite of the fact that men often appear perverted and ignorant (DP, I, XIII, 1). Jandun based his political conception on the traditional teaching that attributed paramount importance to the final cause of law and government. He asserted that a proper political community is one in which the ruler acts to foster the common good, while the perverted or unbalanced political community is one in which the ruler acts to secure his own interests alone (QM, I, 18). He defined the polity as the government form in which only the best and most virtuous rule for the sake of the common good (QM I, 18). He saw on the side of the sovereign a moral duty to make the people good by commanding them to obey God through the laws: "*legislator imponit leges, ut faciat suos subditos virtuosos*" (QM, II, 11). He also affirmed that

²⁴ See A. Gewirth, "John of Jandun and the *Defensor pacis*", in *Speculum* 23 (1948), pp. 267-72. On Jandun see A. Llinarès, "Un averroïste déclaré: Jean de Jandun", in *Anuario de estudios medievales* 4 (1967), pp. 393-402; R. Lambertini e A. Tabarroni, "Le *Quaestiones super metaphysicam* attribuite a Giovanni di Jandun, Osservazioni e problemi", in *Medioevo* 10 (1984), pp. 41-104.

²⁵ See Iohannes XXII, *Declaratio haereseos Ludewici* (Oct. 23, 1327), § 361, p. 266. See also N. Valois, "Jean de Jandun et Marsile de Padoue auteurs du *Defensor pacis*", in *Histoire littéraire de la France* 33 (1906), pp. 528-623; J.W. Allen, "Marsiglio of Padua and medieval secularism", in F.C. Hearnshaw (ed.), *The Social and Political Ideas of Some Great Medieval Thinkers*, p. 170. London, 1923; M.J. Tooley, "The authorship of the *Defensor pacis*", in *Transactions of the Royal Historical Society* 9 (1926), pp. 85-106; C.H. McIlwain (1932), pp. 297-99; E. Gilson (1947), p. 692. Previté-Orton too spoke of a composition in partnership with John of Jandun. See C.W. Previté-Orton (1923), p. 4. The same opinion is found in H.J. Laski (1936), p. 626.

it is most proper to the ruler to prescribe: "*proprius actus principis est praecipere*" (QM, I, 18). Jandun was in fact convinced that men are bound to do evil and suffer from disordered appetites: "*homines [...] sunt proni ad malum [...] habent appetitum inordinatum*" (QM, II, 4). While Marsilius now and then appears sceptical towards the possibility of imposing a universal monarchy (DP, I, XVII, 10 and II, XXVIII, 15), Jandun affirmed that one ruler must hold the entire political universe (QM, XII, 22) and that this ruler is the king of France: "*Franciae regibus monarchicum totius orbis dominium [...] debetur*" (TL, II, 8).²⁶ On the question of *ius naturale*, another relevant difference marks the distance between Jandun and Marsilius. The former remained loyal to the spirit of the Aristotelian conception asserting that ordinary law must conform to the common law of nature (QM, II, 11). Marsilius took a certain distance from this concept by arguing that unjust laws are proper laws, as long as they are backed up by coercive sanctions (DP, I, X, 5) and that laws often disagree with the dictates of natural law (DP, II, XII, 8).²⁷ The importance of this issue is derived from the fact that on the question of the relationship between human and natural law, by emphasising the former, Marsilius seemed to have taken a distance from Aristotelian naturalism, which most contemporary scholars have indicated as one of the chief features of Marsilius' legal and political thought. Finally, while Jandun treated the canon lawyers with great respect, arguing that their efforts are to be regarded as precious for the maintenance of peace in Christendom (LP, I, 3), Marsilius saw them as ambitious figures prone to seeking private benefit (DP, I, XIII, 5). Only a short time separated Jandun's writings and Marsilius' *Defensor pacis*. According to Gewirth, it is very difficult to imagine that Jandun could have changed his political ideas so drastically from his own writings to the *Defensor pacis*.²⁸

²⁶ Laski found this idea in Pierre du Bois' *De recuperatione Sanctae Terrae* (ca. 1300). To enable the king of France to avoid the need to make war, du Bois proposed his universal domination. This royal advocate acknowledged that the Pope had the right to all the lands granted to him by the Emperor Constantine the Great, but, since he could not properly enforce his rights, he suggested letting him surrender his temporal power and hand it over to the king of France. Du Bois stressed the superiority of the French nation, asserting that the French people acted as right reason would dictate. See H.J. Laski (1936), pp. 624-5.

²⁷ For Carlo Dolcini Marsilius' ambiguous position on natural law is a sign of the modest influence of 'political Averroism' on him. He also referred to the possibility that Marsilius may have given his contribution to the compilation of the first six books of Jean de Jandun's *Quaestiones super metaphysicam*. See C. Dolcini (1995), pp. 13-20. On the latter issue, see L. Schmugge (1966), pp. 95-119; J. Quillet, "Brèves remarques sur les *Quaestiones super Metaphysicam libros I-VI* (codex fesusano 161, fol. 1ra-41va) et leurs relations avec l'aristotélisme hétérodoxe", in A. Zimmermann (ed.), *Die Auseinandersetzungen an der Pariser Universität im XIII Jhd.*, pp. 361-85. Berlin, 1976; P. Di Vona, "L'ontologia di Marsilio da Padova nelle *Quaestiones I-II super IV librum Metaphysicae*", in *Atti dell'Accademia di scienze morali e politiche*, 89, pp. 251-81. Napoli, 1979.

²⁸ See A. Gewirth (1948), p. 271.

Even if a sudden change of the kind cannot be completely ruled out, it is not likely to have occurred. That is why the co-authorship is highly improbable.

As far as the problem of Marsilius' militancy on the side of the so-called political Averroists is concerned, it must be recalled that for some scholars the ambiguous position assumed by Marsilius on the question of natural law does not fit Averroist's insistence on its validity, and that the *Defensor pacis* managed to take Marsilius beyond 'political Averroism'. Another fragment needs to be added to the picture of the friendship between Marsilius and Jean de Jandun. Once they arrived at the imperial court in 1326, Marsilius and Jandun managed to gain some degree of influence thanks to the efforts of former colleagues at the University of Paris. The environment there was particularly inspiring. "Hardly ever had a royal court counted such a galaxy of talent amongst refugees from papal attack", wrote Ullmann.²⁹ There is a *Citatio Ludewici super haeresis* by John XXII dating from April 1327 in which we find a reference to some "eruditi" who expounded "*doctrinam illam hereticam*" to Lewis and were admitted "*ad familiaritatem suam*", including Marsilius. As we already recalled, the papal condemnation of Marsilius and Jean de Jandun as heretics dates from October 23.³⁰ From this moment onwards, leaving aside the confutation of pro-papacy authors like Alvaro Pelayo or Guglielmo Amidani, the fortunes of Marsilius, as well as that of Jandun, followed that of his protector, the Emperor.³¹

When Lewis came to Italy in 1327, they accompanied him. In Milan, Marsilius was with the Emperor, professing his anti-papal doctrines and busying himself with the study of astrology.³² On 11 January 1328, he accompanied the Emperor in his solemn entry into Rome. A few days later, on 17 January, Sciarra Colonna as representative of the *populus Romanus* crowned the Emperor in St. Peter's. The Emperor appointed him spiritual vicar of the city of Rome, continuing his activity of political and ecclesiastical adviser to the Emperor. Jandun was there too as *secretarius sive conciliarius*. Marsilius certainly gave a contribution to the editing of the imperial decree issued in April through which the deposition of Jacques of Chaors, John XXII, was attempted. In his place, the Emperor favoured a Franciscan schismatic, Petrus Rainalducci, who in May was elected Pope by the representatives of the Roman clergy under the name of Nicholas V. This was nothing more than a short-lived charade. In fact, to anticipate the rebellion of the Roman people

²⁹ See W. Ullmann (2003), p. 285.

³⁰ See Iohannes XXII, *Citatio Ludewici super crimine heresies* (Apr. 3, 1327), § 274, pp. 185-6.

³¹ See C. Pincin (1967), pp. 157-8; R. Scholz, "Politische und weltanschauliche Kämpfe um den Reichsgedanken am Hofe Ludwigs des Bayern", in *Zeitschrift für deutsche Geisteswissenschaft*, 1 (1938), pp. 298-316; J. Miethke, "Wirkungen politischer Theorie auf die Praxis der Politik im Römischen Reich des 14. Jahrhunderts. Gelehrte Politikberatung am Hofe Ludwigs des Bayern", in J. Canning and O.G. Oexle (1998), pp. 173-210.

³² See L. Thorndike, *A History of Magic and Experimental Science*, III, p. 260. New York, 1934.

and the possible attack by Robert of Anjou, king of Naples, the Emperor left Rome at the beginning of August 1328 to reach the Alpine city of Trent in slow stages. Meanwhile, probably at Montalto, Jandun died in mid-September 1328. According to Jeudy and Quillet, Marsilius' *De translatione imperii* belongs to the period between 1324 and 1326. It was probably begun after the *Defensor pacis* was finished and before the imperial expedition to Italy was ended.³³ Cary Nederman has restated the conjecture that this work was written while Marsilius was still in Paris or before the death of John XXII in 1334. In fact, the Pope "had encouraged the view that the papacy enjoyed an historical authority to transfer the imperial seat, and hence to appoint and depose Emperors". Nederman argued that the purpose of the treatise is polemical. First, it seeks to prove that the Roman Emperor holds his office as a result of a series of valid transfers of power and in accordance with valid electoral procedures. Second, it seeks to prove that the role the Papacy played in facilitating the transfer of the imperial seat to the Franks and later to the Germans was purely honorific and that the papal *approbatio* has neither political, nor eschatological significance.³⁴ Due to this fact too, it has been thought that Marsilius might have made a direct contribution to the preparation of the Declaration of Rhens, to the constitution *Licet iuris* approved in 1338, and the Diet of Frankfurt. We do not possess enough evidence to accept this as an historical fact.

Marsilius, who had launched a persecutory campaign against the members of the clergy who continued to show loyalty towards the pope, followed the Emperor back to Germany in December 1329. Once at his Court, he met William of Ockham and other dissident Franciscans. Lewis concentrated his energies on the search for a diplomatic solution to his conflict with the pope. He began negotiating with John XII and with his successors Benedict XII (1334-1342). But while the Bavarian took his stand on pragmatism and flexibility, Marsilius continued in his vehement, principled opposition to the Papacy. Apparently, Marsilius' intransigence paved the way for the increased popularity of William of Ockham at Lewis's Court. The *Defensor pacis* had been subject to notable attacks and criticism, and William of Ockham too is to be found among its critics. In particular, the latter attacked the Marsilian doctrine of the infallibility of the General Council of the Church. Marsilius maintained that the Council's duty is to discover and articulate the everlasting truths of the Holy Scriptures, and that it is infallible in a way that individual priests or their groups cannot be. Ockham criticised this view by claiming that since individual members of the Council were not capable of

³³ See Marsilius de Padua, *Defensor minor*, p. 30.

³⁴ See C.J. Nederman (ed.), *Writings on the Empire. Defensor minor and De translatione Imperii*, xi-xiii. Cambridge, 1993. In relation to this work, Billanovich observed that Marsilius produced it by transforming the pro-papal *Tractatus de statu et mutatione imperii* by Landolfo Colonna in a Ghibelline fashion during the Emperor's military campaign in Italy. See G. Billanovich, "Giovanni XII, Ludovico il Bavaro e i testi classici", in *Medioevo* 5/1 (1979), pp. 7-22.

grasping God's will and wisdom, then neither could the Council as a whole.³⁵ Whatever his fortunes during the 1330s might have been, certainly the Emperor did not forget him. In the early 1340s, Marsilius took up his pen once again. In the period between 1340 and the very beginning of 1342, he wrote three short tracts. The Emperor, who had in mind to wed his son Ludwig of Brandenburg to Margaret Maultasch, Countess of Tyrol and Carinthia, thereby bringing Tyrol under his direct control, consulted both Marsilius and Ockham. The union was problematic because she had already been married in 1330, at the age of twelve, to the ten-year-old prince John Henry of Bohemia. Moreover, Margeret's grandmother and Ludwig's grandfather had been siblings. According to the standard procedure, permission by the Pope for the annulment of the allegedly unconsummated marriage and a dispensation based on consanguinity should have been invoked. The Emperor was not in a position to do so and asked the two scholars whether the Pope or any other clergyman could alone approve the dissolution of a marriage and the betrothal of persons related by blood. William of Ockham produced *Consultatio de causa matrimoniali* (ca. 1341). Marsilius, as already noted, produced three tracts. The first was titled *Forma divorcii matrimonialis* and was an exemplar for Ludwig's proclamation of Margaret's divorce. The second, *De matrimonio*, constituted a digression on the secular nature of the marital bond. The third, *Forma dispensationis super affinitatem consanguinitatis*, was a model for the declaration of the legitimacy of marriage between relatives. Between 1339 and 1340, he wrote a compendium of his original doctrines modifying the latter in the direction of the needs of a more pronounced imperial affiliation – the *Defensor minor*. According to Nederman, while in the *Defensor pacis* he adopted a general approach to the political community, the *Defensor minor* “operates at a level of greater specificity”. In it, the author attempted to translate the general principles of secular politics “into the coherent terms of an imperial regime, in contrast to a city or ‘national’ kingdom”.³⁶ We know little about the circumstances of his death. It must have occurred between the end of 1342 and the beginning of 1343, given that on 10 April 1343 pope Clement VI (1342-1352) referred to him as being already dead.³⁷

The judgements on the significance of Marsilius' thought varied considerably, as we shall see in the next chapter at greater length. His major work was first translated into French and then, in 1363, into Florentine vernacular. The bases of his fame were thus laid down. A few years later, pope Gregory XI (1370-1378) attributed some of the heretic theses of Wyclif to Marsilius. At the time of the Great Schism (1378-1417), the latter became the reference point for the supporters of the Conciliarist theory up to the time of

³⁵ See R. Lombertini, “Ockham and Marsilius on Ecclesiological fallacy”, in *Franciscan Studies* 46 (1986), pp. 301-15; G. de Lagarde, “Marsile de Padoue et Guillaume d'Ockham”, in *Revue de sciences religieuses* 17 (1937), pp. 168-85. See also M. Curtis, *The Great Political Theories* (1961), I, pp. 176. New York, 1981.

³⁶ See C.J. Nederman (1993), xvii, xix-xx. See also Marsilius de Padua, *Defensor minor*, p. 158.

³⁷ See J.B. Morrall, *Political Thought in Medieval Times* (1958), p. 105. Toronto, 1980.

Pierre d'Ailly (1350-1420) and Jean Gerson (1363-1429).³⁸ Jan Hus (c. 1372-1415) and his followers used to refer to the *Defensor pacis*.³⁹ Wyclif and Luther knew Marsilius' main work, which was printed during the Reformation, and Cromwell is said to have had a hand in publishing it in England.⁴⁰ The notoriety and prestige gained at an early stage among the Parisian *Averroistae*, at the Court of Lewis of Bavaria and in the Conciliarist circles, was countered by the discredit in which he irremediably fell on account of the firm initiatives of the Roman *Curia*. The latter could certainly function as the subject matter for a history of 'Marsilius in Hell'. Because of the alleged Averroist presuppositions of his thought, his contemporaries accused Marsilius of playing with a double standard of truth - that of the Gospel, and that of reason. The examples of authors caught between opposite radical value-judgements are virtually countless. Referring to the opinion of Alberto Pighius (1520-1604), Tiraboschi, as already noted, concluded that no author of eloquence, intellect, and persistence equalled Marsilius in the fight against the Papacy. Tiraboschi attributed to Marsilius even the demerit of having pushed Ludwig of Bavaria along the schismatic path.⁴¹ In the twentieth century, some scholars presented him as one of the most original thinkers of the Middle Ages, as the prophet of modern times and political theory. Laski, for instance, claimed that Marsilius was "far in advance of what his own age would attempt".⁴² Other scholars such as Pitirim Sorokin saw in Marsilius a precursor of the Marxian theory of ideology.⁴³ Georges de Lagarde and Alessandro Passerin d'Entrèves portrayed him as a theorist of the divorce between morals and politics.⁴⁴ Otto von Gierke listed him among the precursors of the Reformation,⁴⁵ others of Bodin's theory of sovereignty,⁴⁶ of

³⁸ See W. Ullmann (1966), pp. 219-22; B. Tierney and S. Painter (1999), pp. 575-88.

³⁹ See G. de Lagarde, *La naissance de l'esprit laïque au déclin du moyen âge - III - Le Defensor pacis*, pp. 364-71. Paris-Bruxelles, 1970. See also P.E. Sigmund, "The influence of Marsilius of Padua on fifteenth century Conciliarism", in *JHI* 23 (1962), pp. 392-402; J. Quillet, "Le *Defensor pacis* de Marsile de Padoue et le *Concordantia catholica* de Nicholas de Cues", in *Niccolò Cusano agli inizi del mondo moderno. Atti del Congresso internazionale in occasione del V centenario della morte di Niccolò Cusano* (Bressanone, 6-10 settembre 1966), pp. 485-506. Firenze, 1970.

⁴⁰ See A. Passerin Entrèves, "La fortuna di Marsilio da Padova in Inghilterra", in *Giornale degli economisti e annali di economia* 2 (1940), pp. 135-52. See also J. Heckel, "Marsilius von Padua und Martin Luther. Ein Vergleich ihrer Rechts- und Soziallehre" in *ZSS (Kan.Abt.)* 44/75 (1958), p. 268-336.

⁴¹ See G. Tiraboschi (1789), V/1, p. 180.

⁴² See H.J. Laski (1936), p. 630. See also R.L. Poole, *Illustrations of the History of Medieval Thought*, p. 240. London, 1920.

⁴³ See P. Sorokin, *Contemporary Sociological Theories*, p. 544. New York, 1928. For a restatement of this interpretation, see F. Gentile, "Marsilio e l'origine dell'ideologia" in *Medioevo* 5/1 (1979), pp. 293-301.

⁴⁴ See G. de Lagarde (1934), 91-2; A. Passerin d'Entrèves, *The Medieval Contribution to Political Thought*, p. 18. Oxford, 1939.

⁴⁵ See O. von Gierke (1900), p. 5.

modern religious toleration,⁴⁷ of the omnipotent state of Hobbes,⁴⁸ of Rousseau's concept of 'General Will',⁴⁹ of modern democracy,⁵⁰ and, as in the case of Wilks, of modern totalitarianism.⁵¹ According to Ewart Lewis, Marsilius "was still enmeshed in the rationalist traditions of medieval scholarship". Of all medieval writers, he argued, Marsilius "perhaps came closest to a theory of sovereignty". The Paduan thinker "asserted the primacy of law-making over all other expressions of state power", insisted on "the indivisibility of ultimate legislative authority", and claimed that his legislator "was restrained by no laws". "One might say" that Marsilius provided "the essential elements of a theory of sovereignty". Yet, "only the theory itself was lacking".⁵² According to Janet Coleman, Marsilius formulated "a doctrine of *raison d'état*".⁵³ Sabine held that Marsilius' object was "to define and limit in the most drastic manner the pretensions of the spiritual authority to control, either directly or indirectly, the action of secular governments". He "went farther than any other medieval writer in placing the church under the power of the state".⁵⁴ In the view of Ullmann, Marsilius "performed a surgical operation in which he excised from political doctrine Christian elements as irrelevant".⁵⁵ According to Murray, Marsilius attacked "not current abuses in the church, but its essence as normally understood".⁵⁶ Hence, the anti-ecclesiastical standpoint and the emphasis on the immanent and transient nature of human acts, the sole matter of concern to true government, made Marsilius the *enfant terrible* of late medieval political thought. Canning noted

⁴⁶ See F. Battaglia, *Marsilio da Padova e la filosofia politica del medioevo*, p. 96. Firenze, 1928; C.E. Osborne, *Christian Ideas in Political History*, pp. 157-8. London, 1929.

⁴⁷ See J. MacKinnon, *A History of Modern Liberty*, I, p. 383. London, 1906; A.S. Turberville, *Medieval Heresy and the Inquisition*, p. 83. London, 1920. See also J. Coleman (1996), p. 31.

⁴⁸ See J.S. McClelland (1998), p. 139; K. Pennigton (1993), p. 45; A. Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, p. 55. London, 1984.

⁴⁹ See A. Passerin d'Entrèves, *Natural Law. An Introduction to Legal Philosophy* (1951), p. 75. London, 1999.

⁵⁰ See F. von Bezold, "Die Lehre von der Volksouveranität während des Mittelalters", in *Historische Zeitschrift* 36 (1876), pp. 346. For a refutation of this interpretation, see C.H. McIlwain (1934), p. 307; R.W. Carlyle and A.J. Carlyle (1936), VI, p. 9.

⁵¹ See M. Wilks (1972), p. 269.

⁵² See E. Lewis (1954), I, p. 30.

⁵³ See J. Coleman (2000), II, p. 135.

⁵⁴ See G.H. Sabine (1974), pp. 273-4. In the view of this scholar, Marsilius' writings and actions were "not to defend the empire". More recently, Coleman argued that Marsilius defended the empire from the standpoint of an Italian "familiar not only with self-governing communes but also with the quasi-autonomous rule of the *signori*". This scholar explained that "it is not to the *imperium germanicum* [...] that he accords his belief, but to his notion of Roman Empire", namely to the institution "where the Roman people constituted the human legislator". See J. Coleman (2000), II, p. 165.

⁵⁵ W. Ullmann (1966), p. 213.

⁵⁶ See A. Murray (1978), p. 296.

that although "Marsilius' crusade against papal plenitude of power was his driving obsession and prime motivation", modern historians have been divided "about a secondary aspect of his thought", namely the question of whether he was a republican or a pro-imperial apologist.⁵⁷ There have been scholars, however, arguing that the Marsilian theory of sovereignty was destined to play a major role in shaping early modern Constitutionalism.⁵⁸ We shall examine these theses in the next chapter at greater length. Here it suffices to stress one point, namely Marsilius' modernity.

A large number of the studies so far produced on Marsilius have treated him as one of the forerunners of the modern State, provided with the capacity "to decide the limits of its own competence" and claiming "competence over the whole reach of human existence".⁵⁹ On the modernity of Marsilian thought McClelland noted that his arguments are so modern-sounding "that we keep having to remind ourselves that [he] is a medieval thinker speaking to us out of a profoundly different context". It is easy, he said, to read his main work from a modern secular angle and to imagine that in his own day truly sovereign states in the modern sense already existed. "Marsilius's own direct transposition of key political terms from the ancient to the medieval world compounds the likelihood of an anachronistically modern reading of the work". The emphasis on his idea of statehood "does not mean that in certain circumstances secular rulers could not find his political thought potentially subversive". In fact, McClelland recalled, "when the government of Henry VIII, for instance, was looking round for propaganda arguments against papal jurisdiction in England during the Reformation, Marsilius' *Defensor pacis* was an obvious choice". Yet, his idea of popular sovereignty "caused Henry's advisers to pause for thought". It occurred to Henry's advisers that "the House of Commons might begin to get ideas about popular sovereignty from Marsilius which did not sit well with Henry VIII's far from modest views about the extent of royal power". Consequently, this author concluded, "when Marsilius hit the Tudor bookstalls, most of the bits about popular sovereignty had already been edited out".⁶⁰ We shall examine the presuppositions of these different judgements and try to determine whether the Marsilian theory of popular sovereignty does lie at the origin of modern popular sovereignty. Moreover, we shall try to demonstrate that these aspects, even when confronted by the pre-eminence of the critique against papal plenitude of power, are anything but secondary. Like Machiavelli or Marx, Marsilius is certainly one of those

⁵⁷ See J. Canning (1996), p. 157.

⁵⁸ See G. Gewirth (1964), pp. 167-225; W. Ullmann (1966), pp. 268-79; Q. Skinner (1978), I, p. 65. For a critical revision of this thesis, see J. Coleman (2000), II, pp. 166-68.

⁵⁹ See W. Reinhard, "Power elites, State servants, ruling classes, and the growth of State power", in W. Reinhard (ed.), *Power Elites and State Building*, pp. 1-18, 1. Oxford, 1996.

⁶⁰ See J.S. McClelland (1998), p. 147.

thinkers who mercilessly fell 'under the hammer of critical history'.⁶¹ Whenever popes, cardinals, secular rulers, and writers were pursuing definitive condemnation for heretics, Gewirth wrote, they charged the latter with having got their ideas "from the accursed Marsilius". Hence, "to be a Marsilian was regarded as subversive in a way similar to that which, centuries later, attached to being a Marxist".⁶²

⁶¹ On this idea, see G. Lock and F. Maiolo, "Machiavelli en Savonarola tegenover het saeculum" in *Wijsgerig perspectief - "Machiavelli"*, 1 (2003), pp. 17-32.

⁶² See A. Gewirth (2001), xviii.

CHAPTER SEVEN

THE THEORY OF SOVEREIGNTY OF MARSILIUS OF PADUA

- 7.1) The complexity of Marsilian thought.
- 7.2) The problem of the *plenitudo potestatis*.
- 7.3) The foundation of the *civitas*: nature, reason, consent, and temporality.
- 7.4) Statehood and law.

7.1) The complexity of Marsilian thought.

In this chapter, we shall try to shed some light on the major characteristics of Marsilius' approach to, and elaboration on sovereignty, with the purpose of verifying the consistency of the scholarly interpretation that attributes to him the merit of being one of the initiators of the modern and lay theory of popular sovereignty. We shall not dwell on Marsilian ecclesiology at length, but we shall refer to it any time that, by so doing, we shall better be able to emphasise the normative aspects of Marsilius' conception of law and government. We shall also examine the assumptions of naturalism, voluntarism, and legal positivism as the predominant components in Marsilius' thought. Naturalism, voluntarism, and legal positivism are not medieval, but modern terms that a number of scholars have employed to denote the modernity of the Paduan thinker. After all, it is the modernity of Marsilius that we wish to put into question in this section of this study.

Marsilian thought gave rise to several problems of interpretation and divergent judgments in modern scholarship, and in fact the historical significance of the Paduan thinker is to be sought within a "Literatur-Labyrinth".¹ All this is most likely the consequence of the radical ideas expressed in the *Defensor pacis*, and of the complex personality of its author, as de Lagarde argued, listing Marsilius' major work among the capital products of medieval political literature.² In Gewirth's opinion, however, Marsilius has been acclaimed as the most important and original political thinker of the Middle Ages "for reasons not medieval but modern".³ Marino Damiana argued that a certain obscurity inherent to the Marsilian text constitutes the basis for the proliferation of debates on the significance of his work.⁴ Undoubtedly, some aspects of Marsilius' thought are characterised by ambiguity, and in some

¹ See H. Segall, *Der Defensor pacis des Marsilius von Padua. Grundfragen der Interpretation*, p. 1. Wiesbaden, 1959.

² See G. de Lagarde, *La naissance de l'esprit laïque au déclin du moyen âge – II – Marsile de Padoue ou le premier théoricien de l'État laïque*, pp. 17, 41. Saint-Paul-Trois-Châteaux, 1934. E. Emerton had already celebrated the treatise as "the most remarkable literary product of the Middle Ages". See E. Emerton, *The Defensor pacis of Marsiglio of Padua*, p. 1. Cambridge (Mass.), 1920.

³ See A. Gewirth (1964), p. 3. C. Pincin ascribed to Marsilius, as well as to other *magistri artium* the merit of having laid down the conditions for the 'ancient-modern way of life'. See C. Pincin (1967), p. 112.

⁴ See M. Damiana, *Plenitudo potestatis e universitas civium in Marsilio da Padova*, p. 1. Firenze, 1983.

cases, we believe, ambiguity explains obscurity. However understood or explained, obscurity lurks even in the *Defensor pacis*, the title of his most important treatise.⁵ Who is the 'defender of peace' that he invoked? This question introduces us to the question of the political purpose of Marsilius' activity as publicist. For the Paduan thinker, as for Bartolus of Saxoferrato, the 'defender of peace' is the Emperor in the first instance, more particularly Lewis of Bavaria. After the death of Henry VII of Luxemburg in 1313, both Lewis and Frederick of Austria claimed the imperial crown. In accordance with a principle followed by his predecessor, on 14 March 1314 pope Clement V declared the imperial seat vacant and retained for himself the title of imperial vicar. Ludwig was elected 'king of the Germans' by only five of the eight great electors at Frankfurt on 23 October 1314. He was then crowned at Aachen on 15 November 1314. Only a few years later, on 28 September 1322, the sovereign prevailed militarily over Frederick of Austria at the battle of Mühldorf upon the Inn. Pope John XXII, who favoured the candidate of the House of Austria, refused to recognise the legitimacy of Lewis' assumption of power and claimed full jurisdiction over the empire, as the imperial seat was considered vacant.⁶ In one of the opening chapters of the first discourse, Marsilius says, presenting himself as the son of Antenor, the legendary founder of Padua, that after a period of diligent and intense study, he resolved to busy himself with the composition of three *dictiones*. He did so heeding and obeying Christ's admonition as well as that of saints and philosophers. He was also moved by the desire to understand the actual political problems of the day. Referring to the Bible (Iac I, 17), he explained that this desire to know, like any gift, has been sent from above. He resolved to set out his thoughts in a spirit of reverence for God, from love of spreading the truth, from affection for the country and his fellow-men, from piety for the oppressed and the desire to save them, from the desire to recall the oppressors from error, and to arouse the resistance and combative spirit of those who suffer such occurrences. He finally notes that he will attend to his tasks in the hope of being of some help to the vigilant majesty of Lewis of Bavaria. Only the Emperor, Marsilius says, can give effective fulfilment to his tasks in the manners he will see fit.⁷

The imperial cause played a central role in Marsilius' political formation. At an early age, as the letter of Mussatto mentioned in the previous chapter shows, Marsilius took a favourable position towards that cause. It is reasonable to assume that Marsilius took the Emperor to be the most important ruler in terms of *dignitas*, namely of his special ancient birthright.⁸ Moreover, from a strict *de iure* point of view, the Emperor was the most obviously supreme reference as far as the issues pertaining to the *Regnum italicum* were concerned. Being aware of the danger inherent in attacking the Avignonese papacy, a formidable political and financial power at that time, he must have been persuaded that the Emperor was the most

⁵ H. Segall insisted on the 'neutrality' of the title. See H. Segall (1959), p. 19. For a critique of this judgment, see C. Pincin (1967), p. 62.

⁶ See P. Herde, "From Adolf of Nassau to Lewis of Bavaria, 1292-1347" in M. Jones (ed.), *The New Cambridge Medieval History*, VI, pp. 515-50. Cambridge, 2000.

⁷ See *Defensor pacis*, I, I, 6.

⁸ See *Defensor pacis*, I, I, 6.

suitable candidate to engage in combat with the papacy.⁹ Yet, Marsilius felt no need to mention Lewis of Bavaria again at the very end of the treatise, in the third chapter of the third short discourse, where he summarised the goals he wished to achieve with his work. Is this omission significant in any sense? There, Marsilius connects the reason for having chosen *Defensor pacis* as the title for his work to its theoretical purpose, which lies in the examination of the major causes whereby civil peace or tranquillity emerges and is consolidated, discord arises, and possible remedies appear. Marsilius then reformulates his pedagogical purpose.¹⁰ He makes clear he had conceived the treatise as a set of prudent instructions by which both rulers and subjects - the constitutive elements of every political community - can grasp what ought to be done in order to preserve internal peace and liberty on the side of the political community as a whole. Having acknowledged the necessity of the division between rulers and subjects, and having attributed executive tasks to the former and legislative to the people as a whole, through the exposition of both human and divine truths - in the first and second discourse respectively - he then set forth what he thought to be the most adequate criteria for the selection of the rulers. He reaffirmed that unity in legislating and governing is the primary condition for internal peace and liberty. Only by securing both, Marsilius said, might the optimal condition of mundane 'sufficiency of life' be attained, the latter being one of the most effective bases for the attainment of eternal salvation. Finally, he said that he was aware of the fact that inevitably some of the theses advanced in his work would attract criticism and opposition in clerical circles. In this respect, he declared that he would rely on the authority of the Church, or of the Council of the Faithful, for the possible correction of his mistakes.¹¹ One possible reason why Marsilius omitted mentioning the Emperor in the last discourse could be that he considered such an omission to be expedient from the point of view of style. This one is not an entirely convincing hypothesis. Perhaps, we should consider, as Black and Nederman pointed out, that Marsilius adopted an ambiguous standpoint with the intention of guaranteeing that his work would have a 'generic' status.¹² Marsilius fashioned his theory of law and government with a view to what he took to be the fundamental danger that all political actors in the Latin west were called on to face: papal plenitude of power. In his mind the plurality of regimes was a clear matter of fact. Was the avenger ruler the Emperor or rather each ruler in his own kingdom? Both options seem valid. In fact, he referred to all cities and kingdoms ("*omnes civitates et regna*") when in one of the opening chapters of the *Defensor pacis* he addressed the question of the one singular and obscure cause of strife and discord, which Aristotle and the other philosophers of his time ignored and which lately took the form of the utterly "*perversa*" and

⁹ See C. Pincin (1967), p. 111.

¹⁰ C.J. Nederman spoke of a "pedagogical" purpose in the article that appears at the end of the 2001 edition of Gewirth's 1956 translation of the *Defensor pacis*. See A. Gewirth (2001), pp. 443-54, 450.

¹¹ See Marsilius de Padua, *Defensor pacis*, III, III.

¹² See A. Black (1992), pp. 60-7; C.J. Nederman, *Community and Consent: The Secular Political Theory of Marsiglio of Padua's Defensor pacis*, p. 14. Lanham (Md), 1995. See also his "Marsiglio of Padua" in D. Boucher and P. Kelly (eds.), *Political Thinkers: from Socrates to the Present*, pp. 124-37. Oxford, 2003.

"*sophistica*" doctrine of papal plenitude of power, by which the Roman empire had long been troubled, and still was. That perverted doctrine, he said, is "*contagiosa*" like an illness and ready to spread vigorously at any moment.¹³ On the basis of this special concern, it is possible to argue that Marsilius called for the widest possible response on the side of the secular rulers of the Latin west, each acting like an Emperor in his own kingdom, and chiefly from the Emperor himself. For Nederman in particular, Marsilius' refusal to take a clear stand on the issue of universal imperial rule in the first *dictio* indicates that he viewed Lewis' cause "as a means to the more laudable end of opposing papal pretensions to earthly jurisdiction". This scholar concludes that for Marsilius the empire was not "the embodiment of some grand imperial ideal but [...] a useful ally in the struggle to rein-in the papacy, indeed [...] the only major European leader of the 1320s prepared to stand up to Avignon".¹⁴ In our opinion, this view is reductive, for it rules out the possibility that Marsilius was in fact attached to the imperial ideal. After all, in his experience of Italian politics, communal law and government could prosper to some extent and for a relatively long period of time thanks to imperial protection. Perhaps the obscurity about the political purpose of Marsilius' major work can partially be dispelled if we observe with E.H. Kantorowicz that what interested him most, beyond his actual political engagement, must have been the continuity in the right of the Roman people "to confer the *imperium* and all power on the Prince" as expressed by the *lex regia*. If Rome and the empire were eternal, it followed that the Roman people likewise was eternal, "no matter who may have been substituted for the original *populus Romanus* or played its part at a given moment". Arguably, for Marsilius "the perpetuity of the *maiestas populi Romani* was not restricted to Rome alone, although the Romans served as the prototype of the perpetuity of a people". By transferring that claim from the Romans to others, any *regnum* and every *civitas*, including the German grand electors, could be legally granted "the continuity of the Roman people and the perpetuity of its *maiestas*". The popular paradigm was thus saved and made "universally applicable to the conditions of any *regnum* and every people".¹⁵ Yet, having saved the popular paradigm does not imply that in practice the human legislator had to be 'popular' everywhere and under all circumstances. As we shall see, a lot in this respect would depend in particular on the nature and characteristics of the whole body of citizens, or its 'weightier part', whose meaning according to Nederman "ought to be construed neither as an early statement of the principle of majoritarian democracy nor as a version of the aristocratic doctrine that the views of the 'better' citizens should be given more weight in public decision making".¹⁶

¹³ See *Defensor pacis*, I, I, 3.

¹⁴ See C.J. Nederman, "From *Defensor pacis* to *Defensor minor*: the problem of empire in Marsiglio of Padua" in *HPT* 16/3 (1995), pp. 313-29, 319.

¹⁵ See E.H. Kantorowicz (1997), pp. 294, 298. We may recognise here, Kantorowicz wrote, the "cascading" from the empire to both *regna* and *civitates*, "epitomized precisely and powerfully by the slogans *Rex imperator in regno suo* and *Civitas sibi princeps*" (p. 298). For a similar account with an emphasis on the universality of the empire, see M. Wilks (1964), p. 112.

¹⁶ C.J. Nederman (1995), p. 317. For an account of *valentior pars* as a shifting and unstable idea, see C. Condren, "Democracy and the *Defensor pacis*: on the English language tradition of Marsilian interpretation" in *Il Pensiero politico* 13 (1980), pp. 305-9.

Next to the political, scientific, and pedagogical purposes, there is a distinct, though coordinated, moralistic purpose inherent to this major work. This purpose should be taken into proper consideration despite the fact that Marsilius was what in modern language would be called a politically engaged writer. Focusing on this circumstance only, or primarily, might lead us misleadingly to conclude that his position was alien to traditional normative concerns, or that he was keen on using any means to the attainment of his goals. Coleman claimed that Marsilius formulated “a doctrine of *raison d'état*”.¹⁷ According to Gewirth, Marsilius propounded “a revolutionary solution” to the conflict between the temporal and spiritual powers. Where hierocratic arguments were advanced asserting full control of the latter over the former, “and where the moderates on both sides argued for a parallelism of the two powers, Marsilius set up a thoroughgoing control of the temporal power over the spiritual”.¹⁸ In the view of Nederman, Gewirth’s investigation marked a shift in focus in the way scholars approached the *Defensor pacis*. Thanks to Gewirth, Marsilius’ work is seen primarily, if not exclusively, “as a contribution to the political theory of the secular community”. Nederman is convinced that this set of related interpretations managed to supplant the one centred upon the idea that Marsilius’ theory of the Church constitutes the chief topic of the *Defensor pacis*, a view which also has a long history.¹⁹ Yet, the thesis expounded by Jeanine Quillet, that Marsilius intended to promote a Christian vision of politics, even if in the attempt to reach this goal the Church was to be subordinated to the secular authorities, deserves attention.²⁰ At the core of this thesis lies a paradox, one according to which, in order to prevent dangerous deviations, reformed Christian politics ends up fully subordinating priesthood to secular political authority. For example, disputing in the second *dictio* the matter of whether it is appropriate for heretics or infidels to be coerced, Marsilius says that such coercive power does not belong to any priest or bishop but only to the human legislator.²¹ Again, in the second *dictio*, while discussing the division of human acts and their relation to human law and secular jurisdiction, Marsilius repeats that there exist particular standards for a sufficiency of life in this world, the established human laws, which command and coerce transgressors by means of pain or punishment. At the same time, he maintained that there exist laws that dictate what can be done or omitted rightly or wrongly in this world with a view to the eternal life promised by Christ. These laws are coercive too,

¹⁷ See J. Coleman (2000), II, p. 135.

¹⁸ See A. Gewirth (1964), p. 9.

¹⁹ See A. Gewirth (2001), p. 444. See also D. Quaglioni, “Aux origins de l’état laïque. Empire et Papauté chez Marsile de Padoue” in G.M. Cazzaniga and Y.C. Zarka (eds.), *Penser la souveraineté à l’époque moderne et contemporaine*, I, pp. 1-25. Paris, 2001. For an account of the interpretations that insist on the ecclesiological character of Marsilius’ treatise, see W.A. Dunning, *A History of Political Theories: Ancient and Medieval*, p. 241. New York, 1902. Caristia interpreted the *Defensor pacis* as ‘a treatise of ecclesiastic policy’. See C. Caristia (1955), II, p. 213.

²⁰ She referred to the elaboration of “une Politique chrétienne”. See J. Quillet (1970), p. 164.

²¹ See *Defensor pacis*, II, V, 7: “nec tamen ex his dicere volumus inconueniens esse coerceri hereticos aut aliter infidels, sed auctoritatem hanc si liceat hoc fieri esse solius legislatoris humani. Non igitur conuenit sacerdoti vel episcopo cuiquam coactiva potestas, sed debent tam ipsi quam alii secularibus iudicibus in hac subesse, quemadmodum dictum est”.

although in a different sense, for they distribute punishments or rewards that are going to be inflicted in the future world in accordance with the merits and demerits of those who observe or transgress against them in the present life.²² For Marsilius, Christ's teaching is the truth, so that love of Christ is love of truth, the supreme guide in fighting the 'pestilence' of papal plenitude of power. Marsilius suggests that unmasking a false doctrine makes man free in respect of both his eternal salvation and the salvation of civil life.²³ One suggestive, not often quoted, passage towards the end of the second discourse, in which Marsilius describes the Roman curia at Avignon, which he says he visited, as a horrible house of hagglers in both spiritual and temporal affairs, should reveal the normative aspects of his political engagement. There one finds, he says, a mob of simoniacs and hears the shouts of shysters and insulting slanders of all sorts. There, justice for the innocent is either denied or offered on sale for an open price and while human laws are loudly proclaimed, divine teaching is silent. Evil plans are laid for the invasion and violent seizure of Christian provinces while the salvation of the soul keeps on being neglected. Citing Job, Marsilius calls the papal court a land of gloom and disorder, 'where light is darkness' (Job 10, 22).²⁴ Successively, Marsilius compares the Roman pontiff and his curia with the frightening statue that king Nabuchadnezzar is said to have seen in his sleep according to the prophet Daniel. Its head was of fine gold, its breast and arms of silver, its belly and thighs of bronze, its legs of iron, its feet partly of iron and partly of clay, each component standing for the most powerful laws which had ever appeared on earth. Suddenly, a massive stone was cut from the mountain, though by no human hand, falling upon the statue ("*abscissus est lapis sine manibus et percussit statuam*") and breaking it in pieces, which became like the chaff of the summer threshing floors; and all were carried away from the wind, so that no trace of them could be found. In the king's dream that stone finally became a great mountain that filled the whole earth (Dn 2, 34-5). In accordance with the *prophetia Danielis*, Marsilius invokes the appearance of the massive force able to crash down on the horrible statue, namely of a power sent by God able to put an end to the corruption of the papacy. While the prophet Daniel was most likely referring to the coming of the universal and celestial kingdom of God, replacing the earthly Babylonian, Median, Persian, and Greek kingdoms, Marsilius takes the chance to identify the *lapis abscissus* with a universal king elected by the whole body of men and whom God by his grace will raise up - respectively *causa proxima* and *causa remota* in the terminology of a number of medieval jurists, as we have seen already - who

²² See *Defensor pacis*, II, VIII, 5: "*est igitur pro vita seu vivere sufficienti huius seculi posita regula humanorum actuum imperatorum transeuncium fieri possibilium ad commodum vel incommodum, ius aut iniuriam alterius a faciente, preceptiva et transgressorum coactiva supplicio sive pena pro statu presentis seculi tantum. Quam legem humanam communi nomine diximus [...] Pro vita vero seu vivere in hoc seculo, pro statu tamen futuri seculi tradita et posita est lex per Christum [...] secundum quod fieri possunt vel omitti, debite aut indebite in hoc seculo, pro statu tamen sive fine futuri seculi, coactiva et distributiva pene vel premii, et horum illativa in futuro seculo, non in isto, secundum merita vel demerita observatorum aut transgressorum illius in vita presenti*".

²³ See *Defensor pacis*, I, I, 5: "*ipsius ergo instar, docende veritati, qua civilium regiminum iam dicta pestis cessari valeat, ab humano maxime Christicolarum genere, veritati inquam ad salutem civilis vite ducenti, ad eternam quoque proficenti non parum*".

²⁴ See *Defensor pacis*, II, XXIV, 16: "*domus negociacionis et [...] latronum horribilioris spelunce*".

will finally wipe out all vices, excesses, and usurpation of jurisdiction, with the related controversies and afflictions. Marsilius, however, concludes by saying that what is so contrary to nature, to human and divine law, as well as to reason, cannot last long.²⁵ This statement is of paramount importance in determining whether Marsilius rejected natural law, a topic that we will deal with in the following paragraphs. It suffices to stress one point here. A similar moralistic anti-papal virulence is to be found in the invectives of Girolamo Savonarola (1452-1498) against Rodrigo de Borja y Borja, pope Alexander VI (1492-1503). On several occasions, from 1492 onwards, the Dominican monk, who led religious and constitutional reforms in Florence during the last decade of the fifteenth century and is seen by many as a precursor of Martin Luther, foretold the coming of the *gladius Dei*, a mighty avenger, a 'new Cyrus' - the French king Charles VIII in this case - who, like the old Cyrus, liberated the elected people from the Babylonian captivity, gave himself the task of liberating all Christians from the sinful burden imposed on them by the new Babylon, Florence and Rome alike.²⁶ Let us now examine a number of judgements on Marsilian thought to further illustrate its complexity. We will briefly touch upon some of the most relevant among them, given that a comprehensive treatment of all problems and interpretations concerning his thought is beyond the limits set here.

A first problem, as already pointed out, concerns the attribution of the authorship of the *Defensor pacis* and the relationship between the first two discourses. With the division between the first and the second discourse between matters of secular and of Church law and government respectively, with an eye to the two ends of human existence, namely the temporal and the spiritual, Marsilius somehow encouraged a dichotomous reading. The organisation and presentation of these themes led various scholars to speak of a significant distance between the two discourses and to think of John of Jandun as co-author of the work. As we have seen in the previous chapter, modern scholarship demonstrated that the treatise was the work of a single author, Marsilius, and that the opposition between the two *dictiones* was the result of his personal approach to matters of law and government.²⁷ In the first *dictio*, Marsilius in particular provides conclusions arrived at by 'sure methods' discovered by the human intellect and presented in the form of statements that any rational person 'not corrupted by nature, custom, or perverted emotion' would find convincing. The second discourse is larger than the first, and in it, the author seeks to confirm, by scriptural testimonies, the works of the Church Fathers, Canon law, and various other heterogeneous sources, the things that he believed to have previously demonstrated in order to criticise the papal claims concerning temporal jurisdiction. In it, Marsilius provides a *sui generis* interpretation of the role and function of the church, rejecting the doctrines of papal monarchy and fostering conciliar ecclesiology.²⁸ Gewirth argued that the second discourse seems to mark a passage from republicanism to absolutism, and from popular sovereignty to imperial

²⁵ See *Defensor pacis*, II, XXIV, 17: "*quod enim tam contra naturam, legem humanam atque divinam et omnem rationem est, diu permanere non potest*".

²⁶ See G. Savonarola, *Prediche sopra Aggeo*, de' Bindoni, Venetiae, 1544. See also M. Ferrara (ed.), *Savonarola. Prediche e scritti commentati*, I, pp. 114-31. Firenze, 1952.

²⁷ See R. Scholz (1933), li-lxi; A. Gewirth (1948), pp. 267-72.

²⁸ See Marsilius de Padua, *Defensor Pacis*, I, I, 8.

sovereignty as well as from limited to unlimited sovereignty.²⁹ Georges de Lagarde argued that is an anachronistic error to consider Marsilius as the theorist of republicanism.³⁰ Quillet, along the same lines, often referred to Marsilius' mere appearances of republicanism.³¹ Both these authors were convinced that the doctrine of popular sovereignty developed in the first discourse is an artifice aimed at laying the theoretical foundations of the political power of the Empire.³² According to Pincin, Marsilius had simply emphasised the differences between two diverse methodologies, one of which is based upon reason, and the other derived from Revelation.³³ Nederman, however, argued that we must resist the impression that each of the discourses is a separate, self-subsistent, and internally coherent treatise.³⁴ Of the same opinion is Coleman, who argues that the *fil rouge* uniting both discourses is the notion of the 'people', first as *universitas civium*, then as *congregatio fidelium*. This author also warned against the risk, run by most modern interpreters, of focusing on the themes that they thought fitted possible genealogical explanations of modern legal and political phenomena and tendencies. Coleman warned against the risk of putting a 'democratic gloss' on Marsilian ideas or to attribute to this author "an early-modern republican aversion to monarchy". Marsilius' work, she says, derives from a fourteenth century type of experience of communal government, accompanied by a certain degree of hope in imperial interventionism as a possible resolution of all the problems of the *Regnum Italicum*, and chiefly the papal proclivity towards usurping secular jurisdiction.³⁵ His work is also the result of an attempt to accommodate his scarce and elementary knowledge of Roman and Canon law, and his knowledge of Aristotelian and Ciceronian political wisdom, to his purposes.³⁶ A second major interpretative problem is constituted by the question of the political ideology underlying the two discourses. "The second discourse", Gewirth claimed, seems to effect a passage from republicanism to absolutism, from popular

²⁹ See A. Gewirth (1951), pp. 236-56.

³⁰ See G. de Lagarde, *La naissance de l'esprit laïque au déclin du Moyen Age - III - Le Defensor pacis*, pp. 93; 128; 140-1; 154-5; 279. Paris, 1970.

³¹ See J. Quillet, *La philosophie politique de Marsile de Padoue*, pp. 18; 84-9; 122-24. Paris, 1970.

³² See J. Quillet (1970), pp. 85-9; G. de Lagarde (1970), III, pp. 147-55.

³³ See C. Pincin (1967), p. 111.

³⁴ See C.J. Nederman (1995), p. 14. See also his "Marsiglio of Padua" in D. Boucher and P. Kelly (eds.), *Political Thinkers: from Socrates to the Present*, pp. 124-37. Oxford, 2003.

³⁵ See J. Coleman (2000), II, p. 140; C. Pincin (1967), pp. 110-1; A. Gewirth (1951), pp. 16, 33-44. For an account of the influence of Augustinian teaching on Marsilius, see D.G. Mulcahy, "The hands of Augustine and the voice of Marsilius" in *Augustiniana* 21 (1971), pp. 457-66; and "Marsilius of Padua's use of St. Augustine" in *Revue des études augustiniennes* 18 (1972), pp. 180-90.

³⁶ Lewis recalled that "in theology, civil law, and canon law his knowledge was elementary and piece-meal; he knew what was currently 'in the air' and what he had worked up for his own purposes". Although Marsilius knew Aristotle's *Politics* and *Ethics*, and Cicero's *De officiis*, apparently he did not know "the commentaries and publicistic treatises of the Parisian Aristotelians". See E. Lewis, "The positivism of Marsiglio of Padua" in *Speculum* 38 (1963), pp. 541-82, 545.

sovereignty to ruler's sovereignty, from limited to virtually unlimited government".³⁷

Scholars like de Lagarde, Wilks, and Quillet insisted on Marsilius' dedication to the imperial cause and ideology. In slightly different terms, all of them argued that it is an anachronism to regard Marsilius as a theorist of republicanism, and disguised the republican appearances of the Marsilian doctrine by stressing that the doctrine of popular sovereignty of the first discourse is a mere artifice adopted to preserve the theoretical foundation of the Emperor's power.³⁸ Consequently, there would be no real contradiction between the two discourses, the first being an attempt surreptitiously to introduce 'imperial absolutism', the theme openly expounded in the second discourse.³⁹ If frozen, the dichotomy between the 'republican' and 'imperialist' interpretations is irresolvable. There is though one way to overcome this impasse. That way is to consider the unitary purpose of the treatise, which is to make the ruler and the ruled aware that the major cause of quarrel in the Italian territories and elsewhere, namely the papal claims of *plenitudo potestatis*, ought to be eliminated and freedom and 'sufficiency of life' maintained.⁴⁰ The unitary purpose of the treatise and his generic vocation have been insisted on by Black and Nederman. In the view of these scholars, in order to defeat papal hierocratic pretensions, Marsilius designed a political doctrine that, even though it was in part inspired by the actual circumstances of the *civitates* in the *Regnum italicum*, would fit virtually all regimes, regardless of scale and constitutional configuration.⁴¹ Canning argued that the "basic consistency" between the republican and imperial aspects of Marsilius' thought could be explained by taking the constitutional situation of the *Regnum italicum* as a reference. "In this area", Canning wrote, "there existed a hierarchy of sovereignty, with the Emperor being the ultimate superior and the remaining city-republics enjoying a range of freedom varying from autonomy to *de facto* territorial sovereignty". This interpretation, the scholar observed, would fit Marsilius' view that "the human legislator was the source of authority".⁴² Coleman warned against the temptation of attributing to the Paduan thinker "an early-modern republican aversion to monarchy".⁴³ The *Defensor pacis* may certainly be regarded as the expression of the thirteenth and fourteenth centuries' experience of communal life in

³⁷ See A. Gewirth, "Republicanism and absolutism in the thought of Marsilius of Padua" in *Medioevo* 5 (1979), pp. 23-48, p. 23; A. Gewirth (1964), pp. 236-56. For the republican interpretation, see also W. Ullmann (1966), pp. 268-79; Q. Skinner (1978), I, pp. 61-5. Skinner restated his position in *Visions of Politics - II - Renaissance Virtues*, pp. 30-8. Cambridge, 2002.

³⁸ See G. de Lagarde (1970), pp. 93, 128, 140-1, 154-5, 268, 279; M. Wilks (1963), pp. 109-17, 186; J. Quillet (1970), pp. 18-9, 84-9, 122-4.

³⁹ See G. de Lagarde (1970), pp. 147, 155, 268; J. Quillet (1970), pp. 48, 85-9, 272. J. Quillet and C. Jeudy argued backwards from the *Defensor minor* to elucidate the imperialist character of the *Defensor pacis*. See C. Jeudy and J. Quillet (eds.), *Marsile de Padoue. Œuvres mineures: Defensor minor - De translatione imperii*, pp. 141-65. Paris, 1979.

⁴⁰ See C. Pincin (1967), p. 111.

⁴¹ See A. Black (1992), pp. 60-7; C.J. Nederman (1995), p. 14 and (2003), pp. 124-37.

⁴² See J. Canning (1996), p. 158.

⁴³ See J. Coleman (2000), II, p. 140. See also N. Rubinstein, "Marsilius and Italian political thought" in J.R. Hale, J.R.L. Highfield, and B. Smalley (eds.), *Europe in the Later Middle Ages*, pp. 44-75, 44-5. Evanstone (Ill.), 1965.

northern Italy, precisely on account of the fact that the *civitates* of the *Regnum Italicum* were nominally part of the empire, as Quaglioni noted. Then Marsilius' major work can also be considered a testimony, as its very title would suggest, of a certain hope placed in imperial interventionism, seen in turn as a possible solution to the problem of the papal proclivity towards exercising coercive jurisdiction.⁴⁴ The ways of explaining the consistency between republican and imperialist motives that we have just presented lead us to treat a third related problem, one concerning the constitutional background for his theory of sovereignty. Previt-Orton, who contrasted his "singular modernity" to "the dead political thinking of his own day", saw the Italian city-states, and Padua chiefly, as the constitutional background for Marsilius' political and legal theory.⁴⁵ This interpretation was followed by scholars like de Lagarde, Gewirth, Rubinstein, Pincin, Hyde, Skinner, and Canning, who stressed that Marsilius' account of consensual government in the first discourse reflected the struggles for liberty against internal and external threats in which several central and northern Italian *civitates* were engaged in his own day.⁴⁶

A fourth problem is constituted by the degree of Marsilius' comprehension of, and adherence to, the Aristotelian texts and his relationship to the so-called Averroist movement. Besides what has already been said on the latter issue in the previous chapter, the only point that we would like to stress here is that the fact that Marsilius had Averroists as friends does not require thinking of him as an Averroist, and that the view portraying Marsilius as a disciple of Aristotle, or, in the words of his sixteenth century adversary Pighius, "*homo magis Aristotelicus quam Christianus*", has been subject to revision and criticism.⁴⁷ Skinner's account of the *Defensor pacis* as "the greatest work of political Aristotelianism" in the Middle Ages has been critically revised too.⁴⁸ Nederman is convinced that the citations from *Politics*, *Nicomachean Ethics*, *Rhetoric*, and *Physics* "ought not to be confused with philosophical influence". On the one hand, Marsilius omitted some of the most conventional ideas associated with the medieval Aristotle, such as the teaching that man is a 'political animal', and sometimes claimed the authority of the Philosopher in support of theories such as that of political consensus that are alien to Aristotle. Finally, in the *Defensor minor* he

⁴⁴ See D. Quaglioni (2004), p. 18.

⁴⁵ See C.W. Previt-Orton (1923), pp. 1-18, 15. In this article, the author attributed to Marsilius "a greater sense of reality than almost any of his contemporaries" (p. 15). Marsilius' passionate political engagement was stressed by C. Carestia in "Marsilio da Padova e il *Defensor pacis*" now in *Scritti giuridici, storici e politici*, II, pp. 177-213, 178. Milano, 1955.

⁴⁶ G. de Lagarde spoke of Marsilius' love for "*la cite laque*". See G. de Lagarde (1934), II, pp. 40-55. A. Gewirth emphasised the importance of both Padua and Paris, and affirmed that in Marsilius "the bourgeois state finds its first thorough spokesman". See A. Gewirth (1951), pp. 23-31, 310. See also N. Rubinstein (1965), pp. 44-75; C. Pincin (1967), p. 57; J.K. Hyde (1973), pp. 187-95; Q. Skinner (1978), I, pp. 19, 52-65; J. Canning (1996), pp. 154-8.

⁴⁷ See A. Pighius, *Hierarchiae ecclesiasticae assertio*, V, 288. Colonia, 1572. On this author, see G. Piaia, "Alberto Pighius e la confutazione del *Defensor pacis* di Marsilio da Padova" in *Medioevo* 1 (1975), pp. 173-202. Previt-Orton spoke of him as a "discerning and independent pupil of Aristotle". See C.W. Previt-Orton (1923), pp. 1-18, 7. G. de Lagarde called Marsilius "disciple d'Aristote". See G. de Lagarde (1934), II, pp. 45-7. In Segall's view, Marsilius "ist er [...] mehr Christ als Aristoteliker". See H. Segall (1951), p. 51.

⁴⁸ See Q. Skinner (2002), II, p. 31.

omitted almost entirely to refer to his favourite philosopher.⁴⁹ On the other hand, the references to Aristotle in the *Defensor pacis* are too numerous to allow us to conclude that Marsilius was not somehow committed to general Aristotelian principles. The question of Marsilius' attachment to Aristotelianism cannot be set aside simply on the basis of his eclectic and fragmentary use of Aristotelian sources.⁵⁰ Again, we should emphasise that Marsilius' eclectic approach to matters of law and government was mainly justified by the ardent desire to hit his target hard, and eclecticism proved to be a formidable instrument for keeping his militancy particularly flexible. This kind of flexibility is probably what makes it difficult for us to give a straight answer to the question of whether his main historical and institutional reference was the old republican communes of northern Italy or the empire as the model of universal monarchy. Finally, a special cluster of issues is constituted by the questions of the *paupertas evangelica*, of the reform of the Church, and of religious tolerance, in respect of which some modernizing interpretations have emphasised how Marsilius anticipated some themes of the Reformation.⁵¹

7.2) The problem of the *plenitudo potestatis*.

In what sense can Marsilius be said to have proposed a new version of Christian politics while his main target was the Church of John XXII? When Marsilius says that 'the good life', which is appropriate to man, is of two kinds, one earthly and the other heavenly, and that philosophers do not concern themselves with the means to attain eternal salvation, since they cannot prove it by demonstration, he does not deny the reality of the heavenly life in its own right, one open to the Church's intervention.⁵² Beside the material goods necessary to the present life, says Marsilius, there is something else that peoples associated in political

⁴⁹ See A. Gewirth (2001), p. 446. On this issue, see also C.J. Nederman, "Character and community in the *Defensor pacis*: Marsiglio of Padua's adaptation of Aristotelian moral psychology" in *HPT* 13/3 (1992), pp. 377-90; and "The meaning of Aristotelianism in medieval moral and political thought" in *JHIdeas* 57 (1996), pp. 563-85.

⁵⁰ On this topic, the scholarly work is abundant. Among others, see M. Grignaschi, "La rôle de l'aristotélisme dans le *Defensor pacis* de Marsile de Padoue" in *Revue d'Histoire et de Philosophie Religieuse* 35 (1955), pp. 310-40; J. Quillet, "L'Aristotélisme de Marsile de Padoue" in *Miscellanea Medievalia* 2 (1963), pp. 696-706; C. Condren, "Marsilius of Padua's argument from authority: a study of its significance in the *Defensor pacis*" in *Political Theory* 5 (1977), pp. 205-18; C. Vasoli, "La *Politica* di Aristotele e la utilizzazione da parte di Marsilio da Padova" in *Medioevo* 5 (1979), pp. 237-52.

⁵¹ See F. Battaglia (1928), pp. 122-3; S. Ozment, *The Age of Reform, 1250-1550: An Intellectual History of Late Medieval and Reformation Europe*, pp. 149-55. New Haven, 1980; C. Dolcini (1995), p. 54. On the question of the *paupertas evangelica*, see M. Damiata (1983), pp. 51-77; J. Coleman, "Property and poverty" in *CHMPT*, I, pp. 607-48.

⁵² See *Defensor pacis*, I, IV, 3: "*vivere autem ipsum et bene vivere conveniens hominibus est in duplici modo, quoddam temporale sive mundanum, aliud vero eternum sive celeste vocari solitum. Quodque istud secundum vivere, sempiternum scilicet, non potuit philosophorum universitas per demonstracionem convincere, nec fuit de rebus manifestis per se, idcirco de tradicionem ipsorum que propter ipsum sint, non fuerunt solliciti. De vivere autem et bene vivere seu bona vita secundum primum modum, mundanum scilicet, ac de hiis, que propter ipsum necessaria sunt, comprehenderunt per demonstracionem philosophi gloriosi rem quasi completam*".

communities need for their eternal life, promised to mankind by God's supernatural revelation, and which is also useful for the purposes of present life: the worship and honouring of God, and the giving of thanks for the benefits received in this life and for those to be received in the future one.⁵³ He also recalled that Adam, created in God's image and likeness, was originally supposed to be able to participate in eternal beatitude and justice, knowing no punishment nor suffering. Had Adam not transgressed the divine commandment, the establishment of government with all its functions would not have been necessary. Nature would have produced sufficiency of life in an earthly paradise.⁵⁴ The passage implies that the priesthood is concerned only with preparing for eternal life. On the basis of these premises too, Marsilius justified the establishment of the priesthood in the civil community. The elements of Christian doctrine inherent to Marsilius' anthropological views have not prevented us from developing a radical opposition to the papal *plenitudo potestatis*, namely to what he came to picture as the quintessence of the pope's earthly pretensions, a theme which is indeed of enormous importance in Marsilius' political thought. Canning suggested interpreting Marsilius' position on the papal plenitude of power from the standpoint of his ideas of power as such, and coercion more particularly.⁵⁵ In the *Defensor pacis* the problem of the papacy's interference in government and law was "tackled with unparalleled virulence",⁵⁶ and "with a boldness that won him instant excommunication and lasting notoriety".⁵⁷ This virulence and boldness, especially striking in many passages of the second discourse, would be incomprehensible without considering the basis of Marsilius' indignation, namely the papal plenitude of power.⁵⁸ This indignation is at the core of a single central theme binding together the first and the second discourse: demonstrating the perverse causes and disastrous effects of the papacy's attempts to control temporal affairs. The desire "to destroy intellectually" papal claims *in temporalibus* was inherent to the synoptic *Defensor minor* too. According to Canning, the fourteenth century witnessed a rather sophisticated treatment of the nature, function, structure and importance of power in public affairs. The fact that power became one of the most heated themes of debate marked, according to this scholar, "a movement away from a more idealized and schematic political thought concerned with the purpose of the ruler's authority and its origins, towards a preoccupation with processes of authority and control in church and state". More particularly, three clusters of ideas constituted the focus of the current debates. The first was the further elaboration of the distinction between the ruler's absolute and ordinary power, which was mainly built on the account by Hostiensis of the papal *potestas absoluta* and *potestas ordinaria* in the mid-thirteenth century. The second was the notion that the ruler's *voluntas*

⁵³ See *Defensor pacis*, I, IV, 4.

⁵⁴ See *Defensor pacis*, I, VI, 1. See also I, VI, 2.

⁵⁵ See J. Canning, "The role of power in the political thought of Marsilius of Padua" in *HPT* 20/1 (1999), pp. 21-34, 23.

⁵⁶ See J. Coleman (2000), II, p. 134.

⁵⁷ See Q. Skinner (2002), II, p. 37.

⁵⁸ See M. Damiano (1983), pp. 20-1. See also C. Pincin (1967), p. 55; O. O'Donovan and J. Lockwood O'Donovan (eds.), *From Ireneus to Grotius. A Sourcebook in Christian Political Thought: 100-1625*, p. 423. Grand Rapids (Mi.)-Cambridge, 1999.

could be seen as *ratio*, which is what the principle *pro ratione voluntas*, adopted by both civil and canon lawyers from the end of the twelfth century, exemplifies. The canonists in particular assumed that law ought to be just and reasonable, but since in some cases reason and law were not congruent, they also thought that the prince's will substitutes for reason. A substitution of the kind was made acceptable precisely by the fact that law was contrary to reason or even to logic.⁵⁹

Finally, the third cluster concerned papal plenitude of power.⁶⁰ The latter had been an issue since the time of Innocent III, who employed the expression *plenitudo potestatis* mainly to justify papal primacy in the Church.⁶¹ Although in thirteenth century canonist writings this expression appeared in a sheer variety of contexts, it gradually came to be used in two contexts in particular: that of supreme appellate jurisdiction and that of the supreme legislative authority.⁶² As we have already seen, at the very beginning of the twelfth century, Alanus Anglicus, in disagreement with Huguccio of Pisa, compared the papal bestowal of the 'material sword' on the Emperor with the granting of Episcopal jurisdiction to the bishops.⁶³ Yet, the decretal *Quanto personam* (1198) of Pope Innocent III's, as Pennington pointed out, contains one of the earliest formulations of the papal plenitude of power with a view to distinguishing the papal office from the Episcopal. The pope sent the letter to five German bishops asking them to excommunicate Conrad of Querfurt if he refused to obey the papal orders within twenty days. Conrad was the bishop of Hildesheim, which he left for Würzburg without papal permission, after having been elected by

⁵⁹ In this sense Post has argued that when the canonists maintained that the ruler's will is held to be reason they did not assume that the ruler could legislate arbitrarily. See G. Post, "Vincentius Hispanus, *pro ratione voluntas*, and medieval and early modern theories of sovereignty" in *Traditio* 28 (1972), pp. 159-84. See also B. Tierney, *Origins of Papal Infallibility, 1150-1350. A Study on the Concepts of Infallibility, Sovereignty and Tradition in the Middle Ages*, pp. 26-8. Leiden, 1972.

⁶⁰ See J. Canning (1999), p. 21-2.

⁶¹ This pope, wrote Pennington, elevated papal office "beyond the confines of human understanding and law". See K. Pennington (1984), p. 41.

⁶² Pope Leo I used the expression 'fullness of power' to distinguish between the delegated authority of a legate, a bishop for instance, and the authority of the Pope. Pope Gregory IV used it to denote the position of superiority of the Church in respect of the partial and shared responsibility of the bishops. The use of the expression to denote the asymmetry existing between the Pope, who retains fullness of power, and the bishops, who retained a share of it (*pars sollicitudinis*) became common in twelfth century canonist writings. Yet, the expression and its equivalent *plenitudo pontificalis officii* continued to denote the priestly and jurisdictional authority that a bishop received with his *pallium*. Borrowing the expressions from Roman private law, the canonists used *plena potestas* or *libera potestas* to define the unrestricted grant of authority, within the terms of the mandate, to a legate or procurator. In this case, the plenitude of power denoted delegated authority or the jurisdictional power conferred on a representative. Later publicists came to use the expression also to denote the supreme power of the Emperor and of the other secular rulers. See A. Watt (1965), pp. 75-105; R.L. Benson, "Plenitudo potestatis: evolution of a formula from Gregory IV to Gratian" in *Collectanea Stephan Kuttner – Studia Gratiana* 14 (1967), pp. 195-217; W.D. McCready, "Papal plenitudo potestatis and the source of temporal authority in late medieval hierocratic theory" in *Speculum* 48 (1973), pp. 654-74; K. Pennington (1984), p. 59.

⁶³ See A.M. Stickler, *Sacerdotium et Regnum nei decretisti e primi decretalisti*, p. 23. Torino, 1953.

the canons at Würzburg to their episcopal see. The pope contended that a bishop is married to his church, comparing the bond of marriage to a bishop's tie to his church. In such matters, Innocent argued, only the pope as the supreme legal representative of God has full authority. The latter is a special privilege that Christ had bestowed on St. Peter "*vicario suo*" and on his successors. Innocent established the principle that in certain matters the pope alone has the right to exercise divine authority on earth, namely of conducting certain affairs not as a man but as the representative of God on earth.⁶⁴ At the beginning of the thirteenth century, while glossing *Quanto personam* about twelve years after Innocent had sent the letter to the German bishops, Laurentius Hispanus elaborated on the idea that the pope had acted in the office 'not of man, but of the true God on earth'. In this way, Pennington said, he inaugurated "a tradition of high-flown and exaggerated language" - for the pope, Laurentius said, employing an expression taken from the *Codex*, has "*celeste arbitrium*" (Cod. 1, 1, 1, 1) and like a true lord his *potestas* is so great that he may 'change the nature of things by applying the essence of one thing to another'. He can even make iniquity from justice by the mere correction of any canon or law, he said, and, probably quoting Juvenal's *Satires* (VI, 223), 'in the things that he wishes, his will is held to be reason'. The pope is held, nevertheless, to make use of his power for the public good.⁶⁵ That is presumably the main reason why, even conceding that Laurentius "was the first canonist to envelope papal authority in the grandeur of hyperbole", Pennington is convinced that his hyperbolic statement "did not contain within it the substance of papal absolutism". Rather, he defined papal authority by accurately separating the sources of law from the morality of law.⁶⁶ But how are we supposed to understand Johannes Teutonicus' assertion that the pope can even 'make something out of nothing'?⁶⁷ "This is a conundrum", Pennington argued, "that seems to exalt the power of the pope to the level of the Creator", an idea "tainted with heterodoxy and

⁶⁴ See *Innocentii III Romani pontificis Opera Omnia*, I, 335, PL 214: "*quod Deus conjunxit, homo non separet. Potestatem enim transferendi pontifices ita sibi retinuit Dominus et Magister, quod soli beato Petro vicario suo et per ipsum successoribus suis et nobis ipsis qui locum eius, licet indigni, tenemus in terries, speciali privilegio praebeuit et concessit, sicut testator antiquitas, cui decreta Patrum sanxerunt sacrorum canonum sanctiones. Non enim homo, sed Deus separate, quos Romanus pontifex, qui non puri hominis, sed veri Dei vicem gerit in terries, ecclesiarum necessitate vel utilitate pensata, non humana, sed divina potius auctoritate dissolvit*". See also X, 1, 7, 3. The passage is quoted in K. Pennington (1984), pp. 16, 61-2.

⁶⁵ See Laurentius Hispanus, *Compilatio tertia*, 1, 5, 3 v. *puri hominis*, Admont 55, fol. 110r [Karlsruhe Aug. XL, fol. 128v]: "*Unde et dicitur habere celeste arbitrium [...] et de iustitia potest facere iniquitatem corrigendo canonem aliquem vel legem, immo in his que vult, est pro ratione voluntas [...] Hanc tamen potestatem tenetur ipse utilitati publice conformare*". This passage is quoted in K. Pennington (1984), p. 18.

⁶⁶ See K. Pennington (1984), pp. 24. For G. Post, who concentrated on canonists such as Tancred, Bernardus Parmensis, and Vincentius Hispanus, the principle "*pro ratione voluntas*" was not a plea for papal unrestrained legislative power. Had those canonists not been aware of the contrast between the Pope's position as supreme judge in the Church, and his pastoral duty to care for the Christian flock and to be faithful to the fundamental principles of the Church, the risk of arbitrary rule would be effective. See G. Post (1972), pp. 159-84.

⁶⁷ See Johannes Teutonicus, *Compilatio tertia* 1, 5, 3 v. *set veri Dei*: "*In hoc gerit vicem Dei, quia de nichilo facit aliquid [...]*". This passage is quoted from K. Pennington (ed.), *Apparatus glossarum in Compilationem tertiam*, series A, 3, p. 43. Città del Vaticano, 1981.

certainly with hubris".⁶⁸ Yet, Pennington remains convinced that although the "extravagant language" of some canonists might lead us to think that they were in fact aiming at the edification of autocratic power, this idea was "far from their original intent". Their purpose was just "to define the prince's will as the source of legislation".

To Hostiensis is finally given the credit of having provided for the preceeding elaboration on the matter a proper, authoritative, and advanced legal configuration. In fact, in the late production of the cardinal Henry of Susa we find defined, by use of the concept of *suppletio defectuum*, the prerogatives of the pope in respect of correcting or remedying any judicial problem. Hostiensis, wrote Pennington, "characterized *plenitudo potestatis* as the pope's right to transcend positive law and sometimes even natural and divine law". So, the pope "exercised this transcendental authority when he gave dispensations for vows, particularly vows of marriage and religion, and for impediments to marriage and ecclesiastical promotion". According to Hostiensis, when the pope acted 'above the law' (*supra ius*) intended as positive law, and the decretals and canons of the Church, he exercised human authority, and therefore *potestas ordinata*. When he acted above natural or divine law, he acted as the Vicar of Christ exercising divine authority, and therefore *potestas absoluta*, but always *ex causa, pro necessitate, or pro utilitate*.⁶⁹ Since Hostiensis, *potestas absoluta* and *plenitudo potestatis* came to be understood and used in controversial writings as synonyms. Besides Hostiensis' contribution to the definition of how the Pope's human and divine powers could be used and within which limits, Pennington added, to clarify the significance of the canonist statements about plenitude of power, that those statements were no more than the sign of a typically juristic "infatuation with language".⁷⁰ Certainly, the formulations of papal prerogatives by canonists such as Huguccio of Pisa, as already noted, escape this kind of infatuation with language and do not cause us to doubt that the canonists were in fact interested in edifying papal absolutism. While discussing the question of the relationship between law and reason in a gloss to Gratian's *Tractatus de legibus* in the *Decretum*, Huguccio affirmed that the pope had no power to abrogate the canons concerning the faith and the general state of the Church. He could promulgate something without or contrary to the will of his cardinals in the cases in which their assent is not required. Yet, the Pope must find the ultimate limit in reason and the Holy Scriptures. Huguccio insisted on *ratio* as linked to justice and applied the same line of thought to the supreme earthly ruler, the Emperor, who, just like the pope within the Church, has fullness of power in respect of making the law. These ideas are examples

⁶⁸ See K. Pennington (1984), pp. 26-7. On the glosses on *Quanto personam*, see E. Kantorowicz, "The sovereignty of the artist: a note on legal maxims and Renaissance theories of art" in M. Meiss (ed.), *Essays in Honor of Erwin Panofsky*, pp. 267-79. New York: 1961; B. Tierney (1972), pp. 25-8.

⁶⁹ See K. Pennington (1984), pp. 64-9. See also the important A. Watt, "The use of the term *plenitudo potestatis* by Hostiensis" in S. Kuttner and J.J. Ryan (eds.), *Proceedings of the Second International Congress of Medieval Canon Law*, I, pp. 161-87. Vatican City, 1965.

⁷⁰ See K. Pennington (1984), pp. 28-9. The author argued that the canonists and the Roman lawyers "enjoyed writing descriptions that were paradoxical and, to us today, challenging" (p. 30).

of what we call 'medieval constitutionalism'.⁷¹ Can we reduce the ambiguity of some among the most important Canon law pronouncements to mere hyperbolic language? Can we simply say that various medieval jurists, including some of the most distinguished Canonists, have thought and written their texts with total disregard of the world they lived in?

Most scholars are convinced that Marsilius misinterpreted the current meaning of the expression *plenitudo potestatis* due to his ignorance of theology and Canon law, and ended up attributing claims to the papacy that had been never made.⁷² We do not know whether, had Marsilius known more Civil and Canon law, as Canning contended, he could have formulated his arguments on papal plenitude of power "with even greater force".⁷³ In this way, said Canning, Marsilius "created a Leviathan, a monster, which had little correspondence with reality". Only his personal "obsessive ruminations about the papacy and the threat it posed to the correct order of political society" could lead him "to enunciate a notion of coercive power which he projected onto the papacy".⁷⁴ It might well be the case that Marsilius was indeed politically obsessed with papal power. Yet, a circumstance of this kind, along with the fact that Marsilius did not study law, does not necessarily lead to the conclusion that he had no proper understanding of papal fullness of power. It could also be reasonably argued that the point is not whether Marsilius' understanding of *plenitudo potestatis* was correct from the point of view of legal science, but rather whether, given the character of his understanding of it, we are correct in considering *plenitudo potestatis* as the central concern of Marsilius' political thought. However, due to his stay at Paris University, Marsilius had the chance of becoming acquainted with the general terms of the dispute between Boniface VIII and Philip IV, sanctioned with the issuing of the bull *Clericis laicos* (1296) by which the pope forbade the clergy of any land to pay taxes to the secular rulers without papal consent. Marsilius had knowledge, direct or indirect, of some literature related to that controversy, including the *Disputatio inter clericum et militem* (1296), a treatise which he often referred to in his work without explicitly citing it, and the papal bull *Unam sanctam* (1302), whose central thesis was the restatement of the idea that the spiritual power excels any earthly one in dignity and nobility. Precisely this is the normative basis for Hostiensis' justification of the papal right to legislate *super ius* (*potestas absoluta*), and it was precisely around these arguments that Aegidius Romanus constructed his *De ecclesiastica potestate* where he restated that the Pope had transferred the empire from the East to the West, that the only possible right order is that by which the temporal is subordinated to the spiritual, and consequently that the Church is above all kingdoms and peoples in conformity with the order of the universe, which is the natural and rational order established by God through divine wisdom, and that the pope exercises universal jurisdiction and retains universal *dominium*.⁷⁵ It should be

⁷¹ See Huguccio, D. 4 p.c. 3, v. *abrogate*, Admont 7, fol. 6vb [Klosterneuburg 89, fol. 6va]. This passage is quoted in K. Pennigton (1984), p. 22.

⁷² See, among others, G. de Lagarde (1970), pp. 73-4, 78; P. Di Vona, *I principi del Defensor pacis*, p. 207. Napoli: 1974.

⁷³ See J. Canning (1999), p. 34.

⁷⁴ See J. Canning (1999), p. 26. See also J. Canning (1996), p. 157.

⁷⁵ See Aegidius Romanus, *De ecclesiastica potestate*, I, IV. See also II, IV.

clear then that when Marsilius refutes the idea that papal authority is given by God immediately, and asserts that it is rather given by men, he objects to papal interventionism *super ius*, namely against the elaboration offered by such canonist as Hostiensis, and theologians such as Aegidius Romanus.⁷⁶ That is the main reason why some scholars are sceptical about the argument that seeks to demonstrate that Marsilius had no proper understanding of papal fullness of power. This argument is based upon Marsilius' ignorance in matters of law. The "*perniciosa pestis*" and "*sophisma*" that Marsilius intended to fight was not a ghost.⁷⁷

In the second *dictio*, Marsilius enumerated eight senses in which the notion of *plenitudo potestatis* was currently employed. He first stated that in all the seizures of secular power and rulership that the Roman bishops had perpetrated in the past, and still perpetrated in his days, the sophistic argument of the plenitude of power is prominent. This sophistry is the source of a related misleading argument that all earthly rulers and individuals are subject to the coercive jurisdiction of the Roman bishops.⁷⁸ In one sense, he explains, plenitude of power can be understood to mean the unrestrained power to perform any act whatsoever and make anything at will. This power, he says, belong only to Christ and he quotes Matthew when he says that all powers belong to Christ in heaven and earth (Mt 28, 18). In a second sense, plenitude of power denotes a variety of circumstances in which, by a number of voluntary acts, either limited or unlimited, one agent can exercise total or partial control over something which is not subject to human power, or over something which is subject to human power, such as any or some other men, and any or some external things. In the third sense, plenitude of power denotes the power of supreme coercive jurisdiction voluntarily exercised over all or some of the governments, peoples, communities, groups, and individuals. In the fourth sense, it denotes supreme coercive jurisdiction voluntarily exercised over all priests only, including the power to appoint them to Church offices, to deprive them of office or depose them, and to distribute temporal ecclesiastical goods or benefices. In the fifth sense, it can be understood as the power through which priests can bind and free men from guilt and punishment, excommunicate them, lay them under interdict, or reconcile them with the Church. In the sixth sense, it refers to the power of the priests to lay their hands on all men so as to receive them into the religious orders, and the power to bestow or prohibit the access to sacraments. In the seventh sense, it denotes the power to interpret the meaning of the Scriptures, especially on matters that are necessary for salvation, and the power to distinguish the authentic from the non authentic, sound from the unsound meanings, and the power to regulate all the rituals of the Church, which includes the possibility to introduce penalties for any deviation or non-observance of the established rules on those matters. In the eighth sense, plenitude of power can be understood to mean a general pastoral cure of souls, extending to all the peoples and provinces in the world. Marsilius explained that in the first two senses, plenitude of power belongs to God alone. As to the third

⁷⁶ See *Defensor pacis*, I, XIX, 6: "*non fit hoc per Deum immediate, sed per hominum voluntatem et mentem, quemadmodum officia cetera civitatis*". See also II, XV, 4 and II, XXIII, 2.

⁷⁷ See M. Damiani (1983), pp. 23-7.

⁷⁸ See *Defensor pacis*, II, XXIII, 2. This idea we find stated for example in Aegidius Romanus, *De ecclesiastica potestate*, III, 9-10.

and fourth modes of plenitude of power, he says that if there is any such power, it can only be granted by the human legislator and within the limits approved by him. As to the fifth, sixth, seventh, and eighth modes of plenitude of power, here, says Marsilius, there is no fullness of power properly speaking. The power to bind and loosen from guilt and punishment, for instance, cannot be full for it finds in divine law its limit. That is why no priest, including the pope, can damn the innocent or loose the tie between the guilty and God. Next to divine law, however, human law could have a role to play in determining the limits on excommunication - of rulers in particular - on the power to appoint ministers of the Church, on that of administering the sacraments in the community, on that of teaching and preaching.⁷⁹ Finally, the core of the articulated Marsilian argument is the following. Jesus Christ, blessed Son of God, at once God and man in the same person, began to teach the truth of what man must believe, do, and avoid doing in order to attain eternal salvation. While he was still living, he ordained his apostles for the ministry of teaching the truth throughout the world and that of administering the sacraments accordingly, bestowing on them through the Holy Spirit the authority of this ministry, which the faithful Christians call 'priestly authority' (*auctoritas sacerdotalis*). Through this authority, he bestowed on them and their successors in their mission the power of transubstantiating bread and wine into his true body and blood. Moreover, he granted them the power to bind and loose men from their sins, which is usually called 'the power of the keys' (*auctoritas clavium*), as well as the power of appointing other men in their place with the same authority.⁸⁰ But besides this authority, there is another one given to priests by man in order to avoid scandal after the number of priests increased. This authority consists in the pre-eminence of one priest over the others in directing them in the proper performance of divine worship, and in ordering or distributing certain temporal things that were established for the use of the ministers. This authority was not given immediately by God, but through the will and mind of men.⁸¹

Having stated that due to discord, the worst fruits and troubles may befall any civil regime or State, as the case of the Italian peninsula shows, Marsilius recalls that discord and strife in civil matters are, like illness in the animal, the diseased condition of the civil regime. Although this condition has many causes - the most common of which Aristotle described in the fifth book of *Politics* - there is one special and very obscure cause, very contagious and apt to creep up on all other political organisms, of which neither Aristotle nor any other ancient philosopher could have discerned the origin and type, but which needs to be dealt with - for it is dreadfully troubling the body of the empire. The illness in question consists in a 'perverted' and 'sophistic' opinion advanced as honourable and beneficial, but one that in fact is utterly "*perniciosa*" to political and social life - for, if not restrained, it will bring unbearable harm to every city and country.⁸² Marsilius explains that the very obscure

⁷⁹ See *Defensor pacis*, II, XXIII, 3-4.

⁸⁰ See *Defensor pacis*, I, XIX, 4-5.

⁸¹ See *Defensor pacis*, I, XIX, 6.

⁸² See *Defensor pacis*, I, I, 2: "*ex opposita tranquillitati discordia provenient civili regimini seu regno cuilibet fructus et incommoda pessima: ut videre sat est, etiam quasi omnibus innocultum, ab Italyco*

cause of discord that he is talking about has for a long time impeded the due action of the ruler in the Italian state, and, in doing so even more now, it has deprived that state of peace or tranquillity, and of all related good things.⁸³ Referring to St. Peter, who received the keys of the kingdom of heaven directly from Christ (Matth XVI, 19),⁸⁴ Marsilius says that some of the bishops who succeeded him in the apostolic or seat at Rome, especially after the time of Constantine, declared that they were superior to all other bishops and priests in the world, with respect to every kind of jurisdictional authority. In recent times, Marsilius continues, the Roman bishops made this claim not only with regard to bishops and priests, but even with regard to all the secular rulers, communities, and individuals in the world, although they did not apply it equally or express this point explicitly with regard to all the others, as they did with regard to the ruler called Emperor of the Romans and of all the provinces, cities, and individual persons subject to his jurisdiction. The only support for the dominion and coercive jurisdiction of the Papacy over the Emperor, Marsilius says, is a particular edict, which certain people claim that the Emperor Constantine made to pope Sylvester.⁸⁵ Marsilius does not attack the validity of the Donation of Constantine. In fact, he says that because that edict did not state the point openly, or due to the fact that it expired on account of later events, or even because, while being valid with regard to the other governments of the world, the force of that privilege did not extent to the government of the Romans in all their provinces, later bishops assumed for themselves the universal coercive jurisdiction over the whole world under the heading of the plenitude of power, which they assert was granted by Christ to St. Peter and his successors as vicars of Christ. They truly meant, therefore, that just as Christ had plenitude of power and jurisdiction over all kings, princes, communities, groups, and individuals, so too do those who call themselves vicars of Christ and of St. Peter have this plenitude of coercive jurisdiction, limited by no human law.⁸⁶

regno"; I, I, 3: "in has ergo miseri precipites feruntur tenebras propter discordiam seu litem ipsorum invicem, que velut animalis egritudo, sic prava civilis regiminis dispositio fore dignoscitur".

⁸³ See *Defensor pacis*, I, XIX, 4: *"hec autem dudum hactenus et nunc amplius continuo accionem debitam principantis impediens in Ytalico regno, ipsum pace seu tranquillitate ceterisque ipsam consequentibus et iam dictis commodis privavit et privat, omnique incommodo vexavit et vexat, et quasi omnis generis miseria et iniquitate replevit".*

⁸⁴ See *Defensor pacis*, I, XXIX, 7.

⁸⁵ See *Defensor pacis*, I, XIX, 8: *"episcoporum aliqui post [Petrum] in apostolica seu episcopali sede Romana, maxime citra tempora Constantini Romanorum imperatoris, se dicunt et asserunt preesse, quantum ad omnimodam iurisdictionis auctoritatem, reliquis omnibus episcopis et presbyteris mundi; et ipsorum moderniores aliqui non solum hiis, verum etiam omnibus mundi principibus, communitatibus et singulis personarum; licet hoc non equaliter de omnibus exprimant nec explicite dicant, ut de principe Romanorum imperatore vocato et cunctis provinciis ac civitatibus et personis subiectis eidem; huius quamvis secundum veritatem dominii seu coactive iurisdictionis in hunc principem expressio singularis faciem et exordium primum sumpsisse videatur ex quodam edicto et dono, quod quidam dicunt per Constantinum fuisse factum beato Silvestro Romano pontifici".*

⁸⁶ *Defensor pacis*, I, XIX, 9: *"quod quia donum seu privilegium illud non habet hoc clare, aut quoniam ex post factis expiravit fortasse, vel etiam quia validum existens ad reliquos mundi principatus, nec ad eum qui Romanorum in omnibus provinciis illius privilegii seu concessionis se virtus extendit, ideoque postmodum iurisdictionem hanc coactivam orbi universalem sibi alio quodam omnes comprehendente titulo moderniores Romanorum assumpserunt episcopi, plenitudine potestatis*

At some point of the second *dictio*, Marsilius deals with the most striking political problems of that day and, again, he attacks the theory of the papal plenitude of power. Chapter XXVI starts by recalling that the Roman bishops used and were still using the plenitude of power especially against the Emperor and his empire: "*versus principem et principatum Romanum*". Without any particular elaboration on the possible various causes of political discord and strife in the Italian peninsula, Marsilius says that the so-called 'pastors' and 'most holy fathers' were continually stirring up and nourishing "*nequiciam*" and "*discordiam*" among the Roman subjects themselves and "*adversus eorum principem*", as they had done in the past. Marsilius is persuaded that the Papacy is seeking to accomplish the most ambiguous plan that could ever be thought of, namely substituting the Empire in the exercise of the universal prerogatives of government and subjecting to its control all political communities that owe allegiance to the Emperor for the benefits that they received.⁸⁷ How does the Papacy strive to radically change imperial government? Marsilius first says that the Roman bishops are patently moved "*cupiditate seu avaricia, superbia et ambicione*" and that 'they are made worse than bad by their ingratitude', and then specifies that one of the most efficient instrument in their hands was preventing the election and inauguration of the Roman Emperor. Marsilius' indignation reaches one of its highest peaks when he says that, in spite of the obvious political reasons, the bishops of Rome still claimed that their actions were motivated by the holy desire to defend 'the rights of Christ's bride'. Such a justification, Marsilius says, is "*sophistica pietas*". The bride of Christ, namely the Church, has nothing to do with temporal goods, the desire for them, or the striving after governmental jurisdiction, nor has Christ ever married such things. On the contrary, Christ repudiated them as alien to Him. Marsilius' argument becomes even more vehement when he continues by saying that it is not Christ's bride that is defended by fighting over temporal goods and jurisdiction. The "*moderni Romanorum pontifices*", Marsilius argues, offend rather than defend the true bride of Christ, that is, the Catholic faith and all believers. By stirring up feuds and schism, they wound her and tear her members apart. In this way, the beauty of Christ's bride, that is, the unity of the Church, is jeopardised. Finally, they outrageously set aside Christ's true companions, namely poverty and humility. By so doing, the modern Roman pontiffs prove not to be good ministers of faith but rather the enemies of the bridegroom.⁸⁸ On the basis of scriptural evidence,

videlicet, quam concessam asserunt per Christum beato Petro eiusque successoribus in Romana episcopali sede, tamquam Christi vicariis. Christus enim, ut aiunt et vere, fuit rex regum et dominus dominantium [Apc. 19, 16] universorum omnium personarum et rerum. Quamvis ex hoc minime sequatur, quod volunt inferre, ut in sequentibus certitudinaliter apparebit. Est igitur huius tituli sensus apud Romanos episcopos, quod sicut Christus plenitudinem potestatis et iurisdiccioniis habuit supra reges omnes, principes, communitates, collegia et singulas personas, sic et ipsi, qui Christi et beati Petri se dicunt vicarios, hanc habeant plenitudinem coactive iurisdiccioniis, humana lege nulla determinatam".

⁸⁷ See *Defensor pacis*, II, XXVI, 1: "*Et rursum, quoniam hoc sibi principatu submisso ipsis facile credunt ad subiuganda reliqua regna pateret ingressus, quamvis principi et principatui Romanorum ex susceptis beneficiis amplius et singulariter, ut notum est omnibus, obligentur*".

⁸⁸ See *Defensor pacis*, II, XXVI, 2: "*temporalia vel eorum cupiditas iurisdiccioniis aut ambicio principatus sponsa Christi non est neque hanc Christus sibi matrimonio copulavit, sed tamquam alienam repudiavit expresse, quemadmodum ex divinis scripturas ostensum est [...]* Sic igitur propter

Marsilius claimed that Christ distinguished the condition of all priests, which is a condition of evangelic poverty, from the condition of the men of power. Only Christ and a few others have been so perfect as to wish to possess only such a quantity of temporal goods as is sufficient for their own present needs. As it is said in the Gospel of Matthew, Marsilius recalls, 'strait is the gate, and narrow is the way' and 'few there be that find it' (Matth 7, 14).⁸⁹ Finally, for the Paduan thinker, no priest is inferior to a bishop as far as his ministry is concerned, precisely like the Apostles among themselves; so all priests share the same degree of authority, which consists in the faculty of administering the sacraments, teaching the doctrine, and admonishing, even without direct control over coercion and jurisdiction. To Marsilius, the Petrine primacy could not constitute the content of true faith. The primacy of the pope only had a customary and conventional character. As for the question of who is supposed to have the authority to establish any kind of primacy, the answer must be that this authority belongs to the general council or the faithful human legislator lacking a superior, to whom it pertains to designate the clerical college or group which shall hold the primacy, save that the city of Rome, so long as it endures and its people do not object, will lawfully and rightfully continue to hold the Episcopal and ecclesiastic leadership, because of men's reverence for Saints Peter and Paul.⁹⁰

7.3) The foundation of the *civitas*: nature, reason, consent, and temporality.

Among historians of medieval legal and political theory, a great deal of attention has been paid to what has been described as the 'secular' characteristics of Marsilius' conception of sovereignty, and of political society more generally. This view finds its basis in the distinctions that the Paduan thinker is said to have emphasised between reason and faith, politics and theology, and between the earthly and heavenly purposes of man's conduct. Nederman insisted on the crucial importance of "temporal existence" in several pages of Marsilius.⁹¹ Coleman warns against the risk of too easily adhering to the commonplace view which portrays Marsilius as the champion of "a minimalist politics based on what appears to be material self-sufficiency and not on the good life of active virtue among citizens".⁹² The major aim of the secularist interpretations is demonstrating that Marsilius' thought was radical in respect of the traditional doctrine that submitted reason to revelation. One limit of this interpretative paradigm is that it ends up obscuring the ambivalent nature of the Marsilian approach. One could argue instead, as we do

temporalia contendendo, non vere defenditur sponsa Christi. Eam etenim que vere Christi sponsa est, catholicam fidem et fidelium multitudinem, non defendunt moderni Romanorum pontifices, sed offendunt illiusque pulchritudinem, unitatem videlicet, non servant, sed fedant, dum zizanias et scismata seminando ipsius membra lacerant et ab invicem separant, Christi quoque versa comites, paupertatem et humilitatem, dum non admittunt, sed excludunt penitus, sed sponsi ministros non ostendunt, sed potius inimicos".

⁸⁹ See Marsilius de Padua, *Defensor pacis*, II, XIII, 39.

⁹⁰ See Marsilius de Padua, *Defensor pacis*, II, XXII, 9.

⁹¹ See C.J. Nederman (2003), p. 130.

⁹² See J. Coleman (2000), II, p. 144.

here, that drawing attention to the ambivalent position of Marsilius in respect of the scholastic tradition and Christian doctrine more generally is an indispensable passage on the way to any accurate assessment of his position in medieval law and government, and even of his modernity, if we take this specific issue to be a worthwhile consideration. What did Marsilius intend to achieve by his distinction between the earthly purposes of man and the heavenly, and what is the nature of this very distinction? We believe it is useful to look at the distinction between the earthly and the heavenly purposes of man's conduct in a less rigid, and more articulated manner. The set of reflections that follows has the purpose of shedding some light on the normative character of Marsilius' approach to the foundation of human society. We shall begin with an examination of Marsilian theory of societal evolution before concentrating on his conception of the natural order.

Marsilius provided a theory of the origins of human association, and of government and law in particular, which accounts for the purpose of civil life. Coleman observed that Marsilius worked within the Moerbekeian notion of civil life as *communicatio*, whose aim it is to attain what is beneficial through the exercise of diverse arts and functions which tranquillity and peace permit to flourish, reconciling the Latin translation of Aristotle's *Politics* with Cicero's attempt to align utility with rightness.⁹³ Marsilius maintained that human beings come together in the civil community to pursue the advantages of a sufficiency of life; and the tranquillity, the basic component of the self-sufficient community, consists precisely in the proper functioning of its *partes*.⁹⁴ Borrowing from Aristotle, Marsilius too held the view of the *civitas* as "*perfecta communitas*" and claimed that human aggregates progress from the less to the more perfect, for this is always the path of nature and art, its imitator.⁹⁵ The *civitas* emerges along with the differentiation of the functions necessary for a sufficiency of life, namely with the division of labour, as the modern reader would call it. These functions are constantly defined by the various arts and skills developed as a remedy against human deficiencies. The first and smallest community, the family, was constituted by male and female, based upon procreation, and led by the quasi-arbitrary rule of man, namely apart from customs and proper laws. Often, he explained, villages, the first political communities consisting in collections of households, were led by one prudent man leaving aside customs and laws. The most 'perfect' of the earliest communities, however, were not ruled arbitrarily. In these, the ruling elders were not guided just by their own will, as they might be in their households, but rather by a more general natural sentiment of duty and affection towards the welfare of the village itself. Marsilius says that those men felt compelled to regulate matters of justice and utility in accordance with a commonly and spontaneously held dictate of natural reason, a quasi-natural law, that equity must be applied to all for the sake of the general welfare.⁹⁶ He recalled that not all such

⁹³ See J. Coleman (2000), II, p. 145.

⁹⁴ See Marsilius de Padua, *Defensor pacis*, I, III, 1.

⁹⁵ See Marsilius de Padua, *Defensor pacis*, I, III, 2.

⁹⁶ See Marsilius de Padua, *Defensor pacis*, I, III, 4. On the question of natural law, that no one should be injured, or that injuries must be lawfully condemned, are principles which, as we shall see while dealing with the controversial role of natural law in Marsilius, even though

communities present any significant differentiation of parts, if compared with the most advanced, due to the modesty of experience, of the arts, and of articulated rules of conduct, which are to be found in the 'perfect' communities. At the primary stage of social development, people perform several tasks in different capacities at the same time. As soon as those communities grew, the 'perfection' of the *civitates* increased along with the development of man's reason and experience.⁹⁷

We should mention at this point that there are some important elements marking the transition from the less to the most 'perfect' communities, such as prudence, justice, equity, and love for the community and its members. We should consider this fact in order to properly assess Marsilius' normative orientation towards law and government. Marsilius recalled that from the imperfect and most simple ones, men have advanced to perfect and more complex communities, regimes, and ways of life - for the path of nature, and art, which is its imitator, is always from the less to the more perfect and complex.⁹⁸ Man, Marsilius, affirmed, is a compound of contrary elements, whose operation almost continually results in the destruction of some of his substance. His position in the natural environment, moreover, exposes him to suffering of all sorts. To avoid those forms of harm he needed arts of diverse sorts, which could only be acquired and refined in association with other men.⁹⁹ Observing that the disputes and quarrels that inevitably arise among men who live in association would bring about the destruction of that very association, he too acknowledged the need for a certain standard of justice to be established with guardians in charge of restraining internal and external wrongdoers.¹⁰⁰ Having affirmed that a ruling part (*pars principans*) has been established in every community with a view to moderating the excesses of human behaviour,¹⁰¹ Marsilius first stated in relation to the *civitas* that the 'perfect' ruling part should possess two habits, which cannot exist separately, namely prudence and the moral virtue of justice, in respect of which the ruler is her highest bearer - *princeps custos iusti*. Prudence must guide the intellect of the ruler while deciding about practical affairs, whereas justice must guide his sentiments and emotions.¹⁰² In those matters, or in respect of some aspects of the latter, those which have been determined by law, the ruler has the duty to follow the pre-established legal determinations. Where there are no precise legal determinations, it is necessary for the ruling part to act according to discretion instead.¹⁰³ In fact, it is impossible for the

they still depend on a proper legislative enactment, are believed to be universally valid. See Marsilius de Padua, *Defensor pacis*, II, XII, 7.

⁹⁷ See Marsilius de Padua, *Defensor pacis*, I, III, 3-5.

⁹⁸ See Marsilius de Padua, *Defensor pacis*, I, III, 2.

⁹⁹ See Marsilius de Padua, *Defensor pacis*, I, IV, 3.

¹⁰⁰ See Marsilius de Padua, *Defensor pacis*, I, IV, 4. It is perhaps interesting to notice that the distinction made by Marsilius between 'intrinsic' and 'extrinsic' actual danger we find as the core of the modern conception of internal and external sovereignty.

¹⁰¹ See Marsilius de Padua, *Defensor pacis*, I, V, 7. See also I, X, 2, in which Marsilius repeated that the function of the ruling part is to regulate the civil acts of men according to the law.

¹⁰² See Marsilius de Padua, *Defensor pacis*, I, XIV, 2. As far as prudence is concerned, see Aristotle, *Politics*, III, 4, 1277b; *Nicomachean Ethics*, VI, 5, 1140b. As far as justice is concerned, see Aristotle, *Nicomachean Ethics*, V, 6, 1134b.

¹⁰³ See Marsilius de Padua, *Defensor pacis*, I, XIV, 5.

law to cover all possible occurrences and precisely to determine what kind of affairs are to be given political priority. Likewise, law does not precisely determine the manners or the circumstances in which those decisions are to be taken, because they vary and differ with time and place. In similar cases, Marsilius said, nothing but prudence must guide decisions about what is expedient and advantageous for the community.¹⁰⁴

The necessity of discretion goes hand in hand with the risk of acting in a manner detrimental to the community, for there is always the chance of being led by a perverse sentiment while exercising power discretionally. To face such a risk, Marsilius continued, the ruler must possess moral goodness primarily in the form of justice. If his moral character proves to be perverted, the *civitas* will be greatly harmed, however good its laws are. That is why it is convenient – if we may call ‘convenient’ what is necessary, he acutely added – that no ruler lacks the moral virtue of justice.¹⁰⁵ Marsilius also includes the virtue of equity among those that the ruling part is requested to possess in carrying out its tasks, and which was unanimously considered, from Aristotle to the *doctores legum*, as a rectification of the asperity of the law, as a benevolent interpretation and moderation of it in those cases in which its rigorous application would harm the sense of justice. Along with equity, Marsilius recommended the presence of love and benevolence for the *civitas* as such and for all its components.¹⁰⁶ Finally, having treated the moral characteristics necessary to the welfare of the political community, Marsilius turns to considering the necessity for the ruling part to have at its disposal an “*armata potentia*”, namely a sufficient number of armed men, the ‘external organ’ through which to execute the civil sentences handed down according to the law upon the rebellious and disobedient by coercive force, for even the best laws and judgements would be vain unless they could be enforced. Like the other civil functions, this one is to be determined by, and subject to the legislator.¹⁰⁷

This set of considerations is of paramount importance in the economy of any assessment of the modernity of Marsilius. It is precisely against these passages that ideas such as that of Marsilius as forerunner of the modern theory of the reason of state, and the idea that underneath the surface of his political thought we find ‘absoluteness’ of power, can be properly evaluated. In Marsilius we find that if prudence is necessary to compensate for the inadequacy of law, which is often the case, prudence itself ought never to exceed the borders of justice in the moral sense. Here Marsilius is not defending the supremacy of positive law considered as the only limitation to arbitrary rule, as Gewirth suggested. This scholar claimed that in contrast to the entire scholastic antecedent tradition, Marsilius’ list of the virtues of the ‘perfect’ ruler is “specifically political”, and “fits precisely into the legally limited power he has prescribed for government”. Gewirth was especially concerned with emphasising the republican and ‘positivistic’ attachment of Marsilius to the theory and practice of limited government. “Marsilius”, he wrote, “conceives the legal limitation of the ruler as so thorough that his need for virtue is of secondary rather

¹⁰⁴ See Marsilius de Padua, *Defensor pacis*, I, XIV, 3. See also I, XIV, 4.

¹⁰⁵ See Marsilius de Padua, *Defensor pacis*, I, XIV, 6.

¹⁰⁶ See Marsilius de Padua, *Defensor pacis*, I, XIV, 7.

¹⁰⁷ See Marsilius de Padua, *Defensor pacis*, I, XIV, 8. See also I, XIV, 9.

than primary importance". But, we want to argue, to prove that he was firmly advocating limited government by law narrowly understood does not necessarily imply that limited government as such evaporated in Marsilius' mind when the limits at stake were thought, as Marsilius himself seems to have suggested, not only in juridical but also in ethical terms. As we understand it, from the fact that prudence, justice, and equity "are required only for those relatively few cases which are impossible to determine by law", Gewirth concluded that "if, *per impossibile*, complete determination by the laws were possible, the ruler would not require any virtues at all".¹⁰⁸ First, it is improbable that Marsilius thought that the cases difficult to define by law were relatively few. Medieval society was highly litigious. It thus seems reasonable to assume, by indirect inference, that Marsilius in fact thought that the cases not regulated by the law might have been relatively many, if not the majority. Marsilius thought of lawmaking as a process of discovery – *legum inventio*. Even conceding that the multitude could not discover the most expedient legislative measures by itself, he affirmed that it could judge of what had been discovered and proposed by the few, and could discern what must be added, adjusted, or eliminated, precisely in the sense in which a great number of men can rightly judge about the quality of a picture, a house, a ship, and other works of art, even though they would have been unable to discover or produce them. Now, if the increasingly high degree of division of labour internal to the community, which is the driving force towards the 'perfect' community, inevitably produces complexity, and if only a few are able to meet the requirements of such an increasing complexity by thinking up adequate solutions, due to the gap between the growing demands of the many and the small number of those able to provide adequate solutions, then the total number of cases still to be regulated should exceed the total number of cases already subject to legal determination. How to bridge this possible gap?

As far as we know, Marsilius did not postulate the existence of any super intelligent party capable of bridging it. On the contrary, he insisted that the largest number is neither vicious nor undiscerning most of the time. To say that most of them are of sound mind and reason means, in my opinion, that what Marsilius praised was average intelligence.¹⁰⁹ Finally, the attempt to reduce the significance of the appeal to justice in the moral sense appears inadequate if we recall that the self-sufficiency of the community is the Marsilian polar star; the Paduan thinker did not hesitate to restate, as we already pointed out, that the *civitas* is harmed by the absence of justice on the side of the ruling part even when it is established and functions on the basis of excellent positive laws.¹¹⁰ What might it have meant to remind us that even the best laws can be detrimental to the political community, justice being taken away, if not that justice itself is the foundation of the self-sufficient community? Here justice seems to be in conformity with natural reason, which in turn makes it possible to discover and properly interpret the fundamental difference between earthly and eternal purposes, between the expedient and the non expedient, between the lawful and unlawful, and finally properly to grasp the meaning of all this. If this kind of conformity to the just and natural order is realised,

¹⁰⁸ See A. Gewirth (1964), pp. 243-4.

¹⁰⁹ See Marsilius de Padua, *Defensor pacis*, I, XIII, 3. See also I, XIII, 7-8.

¹¹⁰ See Marsilius de Padua, *Defensor pacis*, I, XIV, 6.

Marsilius seemed to suggest, then the bases for consent in the public arena of the 'perfect' communities are established too. In this way, we see that Marsilius had in mind something like a set of objective conditions and limits to the human will rather than the far too modern idea of basing consent upon will. This seems to me the best basis for a slight critically revision of the thesis by Nederman that consent, and in particular popular consent, is "at the centre of his theoretical framework".¹¹¹ Actually, the centre of Marsilius' theoretical framework could also be nature, as Nederman himself seems to have suggested in one of his less recent articles, more precisely in the one on Marsilius' adaptation of Aristotelian moral psychology. There, this distinguished scholar convincingly drew the conclusion that "the foundation for the requisite functions within the community is outside the bounds of public determination" – and thus beyond consent – for "nature has already determined what human beings require in order to live a sufficiency of life". But given that according to Marsilius nature itself is not sufficient to qualify individuals and groups as members of any part of the *civitas*, there rests with the *universitas civium* "the primary authority to differentiate necessary functions within the community and to assign citizens to carry out [their] tasks".¹¹² From this point of view, Marsilius does not seem to have departed significantly from traditional teaching in favour of the pre-modern laity, or even the mere will to power.

Let us now turn to the question of the significance of natural order in Marsilius' writing. According to Gewirth, Marsilius postulated the existence of a merely biological basis for his concept of the political community. Gewirth pointed out that while other medieval authors, from the Fathers of the Church onwards, usually looked at biology through the lenses of Christian morality, producing a 'moralised biology', Marsilius disclosed the biological substratum of morality and politics. "The biological", this scholar wrote, "is not merely the initial mainspring of the political realm, soon surmounted by ethical and theological values", but rather "the sufficient context which sets all the problems to whose solution politics is directly addressed", and which "also provides the essential criteria for the

¹¹¹ See C.J. Nederman (2003), pp. 130-1. This scholar is convinced that popular consent in Marsilius "arises directly from the functional character of the community". He also sees Marsilius' references to the functional characteristics of the parts of that whole called *civitas* as an indication of the contractual basis of his theory of law and government, for "people must individually as well as collectively submit to the terms of their cooperation", after which they can be held accountable for all acts detrimental to the welfare of the community. While discussing the fact that according to Marsilius the ruler is supposed to be controlled by the people, while the people are supposed to be kept under control by the ruler, Gewirth claimed that in the former respect he anticipated Locke's social contract theory, and in the latter that of Hobbes. These two aspects, Gewirth assumed, are heavily reminiscent of the status of the *podestà* and of the 'greater council' respectively in several Italian communes. See A. Gewirth (1964), p. 124.

¹¹² See C.J. Nederman, "Character and community in the *Defensor pacis*: Marsiglio of Padua's adaptation of Aristotelian moral psychology" in *HPT* XIII/3 (1992), pp. 377-90, 384-5. Marsilius, the author recalls, compares the power of the legislator to that of nature itself: just as nature distinguishes the parts of the animal, so the communal will determines the parts of the civil body. See Marsilius de Padua, *Defensor pacis*, I, 8, 1.

functioning and evaluation of political institutions".¹¹³ Marsilius' method of assimilation of politics to biology would prevent the occurrence of "any danger that moral standards of political evaluation will be forced upward into the theological sphere for their ultimate validation". In Gewirth's view, Marsilius sought a type of "all-inclusive unity, a naturalistic biological-economic-political context, whose requirements are such that it comes to assimilate to itself and to control even moral and theological concerns". This method, of which the core practical implication is subjecting priesthood to secular government, also "involves a unification of all phases of human life, spiritual as well as temporal, through their coming together under the control of a naturalistic politics". We find these arguments behind Gewirth's opinion that Marsilius had in fact departed "completely" from Aristotelian moral naturalism, based upon the concepts of the political community as natural, of man as having a natural impulse towards it, and as being by nature a political animal in the teleological sense. Gewirth concluded that Marsilius viewed nature in a "non-rational sense".

For Aristotle, one of the central authorities in the *Defensor pacis*, nature is an end, for nature corresponds to that which each thing is when its growth is completed.¹¹⁴ In Marsilius, the natural "is always the primitive, not the perfected", and "it consists in man's material endowment, physical and biological, not in his rational powers or virtues".¹¹⁵ The naturalistic order in Marsilius' writing, said Gewirth, would have the same status and function as the divine order would have in the doctrines of the most extreme supporters of what he understood to be papal monarchy.¹¹⁶ And yet, the major features of natural order in Marsilius remain obscure. Undoubtedly, as we have seen, Marsilius' position on the papal *plenitudo potestatis* was definitely critical. But Gewirth's interpretation of Marsilius' departure from morally oriented naturalism raises some doubts. This distinguished scholar strove to demonstrate that Marsilius confined the traditional arguments of natural law to legal and political irrelevance. What is puzzling here is not so much biological reductionism, but rather the eluding of the fundamental question as to whether Marsilius' allegedly controversial position on nature may exclude any political and legal relevance for faith, morality, and even any reference to Aristotelian morally-oriented naturalism. One first indication that in Marsilius' writing nature is not a non-rational compound of biological elements might be provided by the following arguments. In the second chapter of the first *dictio*, abstracting from Aristotle and following authors such as Aquinas, Ptolemy of Lucca, and Aegidius Romanus, Marsilius took a familiar path, equating peace in society to health in man and

¹¹³ See A. Gewirth (1964), pp. 51-2.

¹¹⁴ See Aristotle, *Politics*, I, I, 8 (1252b).

¹¹⁵ Gewirth argued that man's natural desire for the sufficiency of life is a desire which man shares with every species of animals. See A. Gewirth (1964), p. 55. On the basis of the same principle, one could conclude that Ulpianus looked upon nature in merely biological terms: "*ius naturale est quod natura omnia animalia docuit; nam ius istud non humani generis proprium, sed omnium animalium*" (Dig. 1, 1, 1, 3). Would a view of this kind necessarily imply a rejection of faith? We argue that this is not necessarily the case.

¹¹⁶ See A. Gewirth (1964), p. 53.

comparing the political community with an animate being or animal nature.¹¹⁷ Here Marsilius draws more upon commonplace organic views of society than on the juristic corporation theory, even though he must have been aware of the significance for his own theory of law and government of such an important legal construct. After all, he was born to a family whose members engaged in the practice of the law.¹¹⁸ It is also reasonable to assume, on the basis of his Parisian background, that he knew the workings of the model of the *universitas*.¹¹⁹ That he was referring to societal organic views might be proved by the circumstance that in the passage in question he was addressing the question of the physiological and pathological elements pertaining to the life of any political community. Just as the optimal condition of an animal as a whole is given by the ordered functioning of all its parts in accordance with nature, so too the optimal condition of a political community as a whole is given by the ordered functioning of all its parts in accordance with reason, he says. Just as health (*"sanitas"*) is the optimal disposition of the living individual body in accordance with nature, so tranquillity (*"tranquillitas"*) is the optimal disposition of a political community in accordance with reason. As the physicists describe it, Marsilius said, health consists in the proper functioning of the parts of the animal being according to its nature. On the basis of this analogy, tranquillity consists in the proper functioning of the parts of the political community in accordance with reason. Lack of tranquillity or unrest (*"intranquillitas"*) in the political community corresponds to the condition of illness (*"infirmetas"*) in the animal, which is one whereby all or some of its parts are impeded from operating in the proper way and in accordance with its nature, either entirely or partially.¹²⁰

On a parallel level of analysis, Gewirth's view that Marsilius might have confined natural law to the primitive, excluding its permanence in the most 'perfect' stage of human association, is puzzling too. It is true that Marsilius was quite cautious about giving to natural law the status we find in other authors. But it is also true that he had to be cautious, given the character of his political intentions. In fact, as we have seen, the superiority of the spiritual over the material, and therefore of priestly jurisdiction over the temporal, often had been justified on the basis of natural law. We will treat this issue at greater length in the next paragraph. At this moment we can just add that Gewirth's recognition that "the state is a product of reason and

¹¹⁷ See Marsilius de Padua, *Defensor pacis*: I, II, 3. Gewirth acknowledged continuity between Marsilius and his predecessors in this respect. See A. Gewirth (1951), p. 95. In *De bono pacis*, Remigio Girolami, a Florentine Dominican pupil of Aquinas and teacher of Dante, stated that the highest good of the multitude is peace, precisely in the same sense in which health is the highest good for the body: "[s]ummum bonum multitudinis et finis eius est pax [...] sicut sanitas est summum bonum totius corporis". The fragment appears in C.T. Davis, "De bono pacis" in *Studi Danteschi* 36 (1959), pp. 105-36, 124. See also C.T. Davis, "An early Florentine political theorist: Fra Remigio de' Girolami" in *Proceedings of the American Philosophical Society* 104 (1960), pp. 662-76; E.H. Kantorowicz (1997), pp. 478-80, and N. Rubinstein (1965), pp. 54-5.

¹¹⁸ See C. Pincin (1967), pp. 21-2, 136, 241. See J. Canning, "The corporation in the political thought of the Italian jurists of the thirteenth and fourteenth centuries" in *HPT* 1/1 (1980), pp. 9-31.

¹¹⁹ See also G. Post, "Parisian masters as a corporation, 1200-1246" in *Speculum* 9 (1934), pp. 421-45.

¹²⁰ See Marsilius de Padua, *Defensor pacis*, I, II, 3.

art which advance beyond nature" significantly undermines the assumption that the basis of Marsilius' political and legal theory is biological, let alone that such a recognition tells us not so much about the major features of both reason and art, as about their respective relation towards nature.¹²¹ At any rate, when dealing with the question of the final cause of the *civitas*, Marsilius evoked the Aristotelian principle that it came into existence for the sake of living, but that it exists for the sake of living well, and specified that the latter consists in the full actualisation of all human practical and intellectual dispositions. In my opinion he shows that he regarded it a biological organism in such a broad sense as to link reason and art to nature.¹²²

Aristotle went on to show that men not only aim at biological ends but also act from considerations of the just and the expedient, which have to do with habit and deliberation.¹²³ To infer, as Marsilius did, that there could be no sufficiency of life without deployment of all human capabilities, including the intellectual and spiritual ones, means that Marsilius too viewed nature in a rational and teleological sense. This case might be confirmed by two important considerations. First, all men not deformed or otherwise impeded naturally desire a sufficiency of life, he argued, and avoid what is harmful. This is, as he put it, not only a natural but a generally accepted principle, which everyone can clearly grasp through induction from the senses, the very basis of his construction.¹²⁴ To be sure, at this point Marsilius refers to a passage from Cicero's *De officiis* in which the author acknowledged this principle not only with regard to man but also with regard to every species of living beings - save the fundamental difference between man and beast, consisting in man's participation in reason.¹²⁵ Even if in Marsilius' writing the biological substratum of the sufficiency of life receives overwhelming attention, we should be cautious in turning the Paduan thinker into a sort of forerunner of modern commonsensical materialism. In fact, saying that the basis of all intellectual and spiritual endeavours

¹²¹ See A. Gewirth (1964), p. 51. Moving beyond nature does not necessarily annihilate nature, whatever we may take nature to be.

¹²² See Marsilius de Padua, *Defensor pacis*, I, IV, 1: "*viventes civiliter non solum vivunt, quomodo faciunt bestie aut servi, sed bene vivunt, vacantes scilicet operibus liberalibus, qualia sunt virtutum tam practice, quam speculative anime*".

¹²³ See Aristotle, *Politics*, I, I, 8-12 (1252b-1253a).

¹²⁴ See Marsilius de Padua, *Defensor pacis*, I, IV, 2: "*hoc ergo statuamus tamquam demonstrandorum omnium principium naturaliter habitum, creditum et ab omnibus sponte concessum: omnes scilicet homines non orbatos aut aliter impeditos naturaliter sufficientem vitam appetere, huic quoque nociva refugere et declinare [...] Quod etiam ex induccione sensate palam quilibet accipere potest*". On the importance of this principle, see A. Gewirth (1964), pp. 54-63; G. de Lagarde (1970), p. 81.

¹²⁵ In Stoic fashion, Cicero maintained that nature has endowed every species of living creature with the instinct of self-preservation, of avoiding what seems likely to cause injury to life, and of providing everything needed for life. Beyond this common property, another one, the reproductive instinct - the purpose of which is the continuity of the species - and the related concern for offspring are common to all creatures. Yet, the most distinguished feature of man is reason, by which he is able to comprehend the chain of causal relations, draw analogies, and connect past, present and future by making the necessary preparations for his conduct. See Cicero, *De officiis*, I, IV, 11. See also Ulpianus' definition: "*ius naturale est quod natura omnia animalia docuit; nam ius istud non humani generis proprium, sed omnium animalium*" (Dig. 1, 1, 1, 3).

in Marsilius' writing are biological does not entail the conclusion that he was a thinker who in fact departed from the Aristotelian and Ciceronian doctrines, however eclectic and superficial his knowledge of these sources might have been, or a secularist in the modern sense, notwithstanding his profound distaste for papal monarchism.¹²⁶ To affirm, on the basis of Aristotle again, that in fact there is a difference between "*vivere*" and "*bene vivere*", amounts to stressing the importance of reason as a natural faculty, a teaching that was not in itself opposed to the scholastic tradition. Second, Marsilius asserted that human ends are of two sorts.¹²⁷ What is the basis for this assertion? If the answer is 'reason' should we not assume that reason does what it is appropriate for her to do in a teleological sense? What kind of reason would it be which fails to draw the dividing line separating the worldly from the eternal dimension, without doing justice to both domains? In the Marsilian perspective, the reason that does not fail to grasp this fundamental distinction can only be a morally charged reason. A merely biological configuration of reason in Marsilius would render the division between the secular and the spiritual and its meaning entirely unintelligible and irrelevant from the point of view of peace and tranquillity, the basic conditions for the edification of the proper sufficiency of life, which is in turn one oriented towards the eternal life. In Gewirth's reading, Marsilius is seen as the herald of reason beyond nature, but this is to impose an idea on the Paduan thinker that does not fit him. Given that, according to Gewirth, reason places man beyond nature, and given that reason ought not to be scholastic reason, what kind of reason can there be? Gewirth's reading has not convincingly proved, in my opinion, that Marsilius departed from the tradition of biology in the teleological sense, even from that of 'moralised biology'.

In the Marsilian perspective, the natural faculty of reason also has the task of revealing the intrinsic features of the most relevant categories of human acts in their respective domains, namely the spiritual and the temporal, and it constitutes the fundamental instrument for the comprehension of the meaning of such a distinction. How can a merely biological *quid* guarantee all this? It retains the same ordering or classificatory function it has in scholastic writings. The term 'spiritual', Marsilius said, generally denotes every class of immanent acts. Immanent acts are the actions or passions producing effects that do not pass over into a subject other than the doer. To this class belong a variety of states of mind: thoughts, desires, and affections.¹²⁸ The self-regarding essence of those acts, to put the point in modern terms, is what saves them from public scrutiny and control, according to Marsilius. They are usually unintelligible to human observation, so only God knows them. He thus turned to the term 'temporal', which in a first sense denotes the external physical world, whose objects are ordained for satisfying human needs and desires, with a view to the necessities of worldly life. Note that here Marsilius implies that there is a universal order of things according to which worldly life is effectively what it is. In a second sense, however, the term denotes every habit, action or passion, either

¹²⁶ For a recent account of this view, see C.J. Nederman (2003), pp. 129-30.

¹²⁷ See Marsilius de Padua, *Defensor pacis*, I, IV, 3: "*Vivere autem ipsum et bene vivere conveniens hominibus est in duplici modo, quoddam temporale sive mundanum, aliud vero eternum sive celeste vocari solitum*".

¹²⁸ See Marsilius de Padua, *Defensor pacis*, II, II, 5 and I, V, 4.

directed towards oneself or others, existing for the sake of worldly concerns. In a third, more specific, sense, the term denotes actions and passions that are voluntary and transient, namely those resulting in an advantage or disadvantage to someone other than the agent. Only this particular class of temporal acts, called 'transient acts', those having an impact on the outside world, can constitute a matter of concern in law and society. In this way, Marsilius delimited the domain of the application of secular law: only the 'transient acts', which are other-regarding acts, can be subject to legal regulations.¹²⁹ Within this class of acts, we may distinguish those performed in due proportion, which result in benefits to oneself as well as to others, from those excessive, which are detrimental to others, for they result at least in some disadvantage to others. Material advantages constitute a legitimate aim of human conduct. This is what we may infer from Marsilius' famous contention that all human beings not deformed or otherwise impeded naturally desire a sufficiency of life, and avoid what is harmful not only by instinct but also by reason.¹³⁰ At this point, as we have seen, Marsilius quotes Cicero's *De officiis* to reaffirm that this principle is common to all living creatures. But since all human beings not deformed or otherwise impeded in their rational ability prefer justice over injustice, it follows that opting for justice is, or might be, advantageous from a utilitarian point of view, that is, the point of view of self-sufficient life that in turn is not about mere living, but about 'living well'. All this could be seen as part of the natural order of things, an order not entirely deprived of moral teleology. In conclusion, Marsilius could be said to have attempted to reconcile the principle and sphere of the *honestum* with those of the *utile*.

7.4) Statehood and law.

Given that *tranquillitas* and *intranquillitas* denote the physiological and pathological ways of being of the *civitas* or *regnum* respectively, we have to determine in what sense Marsilius employed the terms *civitas* and *regnum*. Marsilius himself explained that the term *regnum* has several meanings, but chiefly four. There are four ways in which *regnum* may be defined. In a first, purely geographical sense, a *regnum* is a collection of cities or provinces under a single government. In this first sense, there exists a quantitative difference between *regnum* and *civitas*, the former being in the position of the larger unit of political organisation comprising a number of the former type. In a second sense, namely in a traditional constitutional perspective, a *regnum* is a certain species of temperate regime characterised by the rule of one man over the citizens, which Aristotle called *monarchia temperata* and which can concern either one single *civitas* or more *civitates*. In the third, most familiar, sense, *regnum* is used to denote a political reality presenting elements embodied by both of the first two meanings examined. So, a *regnum* is that particular single government - a *monarchia temperata* - exercising its powers over a collection of cities and provinces. In the fourth sense, *regnum* denotes the set of distinctive elements and features common to every species of temperate government, namely of government in which the

¹²⁹ See Marsilius de Padua, *Defensor pacis*, II, II, 4 and I, V, 7.

¹³⁰ See Marsilius de Padua, *Defensor pacis*, I, IV, 2: "*omnes scilicet homines non orbatos aut aliter impeditos naturaliter sufficientem vitam appetere, huic quoque nociva refugere et declinare*".

common good, not the particular interests of its parts, is given priority.¹³¹ Marsilius also says that this fourth sense is the one that Cassiodorus had in mind when, as Marsilius recalled in the opening of the first discourse, he affirmed that tranquility, a state in which peoples prosper and the welfare of all nations is preserved, is the first condition for attaining the greatest good of man, that is sufficiency of life.¹³² The term *regnum* is employed as synonym for *civitas* in a generic sense, regardless of either the size of the territory it rules or the specific elements of its institutional configuration.¹³³ By the expression *civilitas*, which we encounter in numerous passages of his work, Marsilius meant government regulated by the law. In the *Defensor pacis* there exists an equation whose terms are *civitas*, *regnum*, and *civilitas*.¹³⁴

For Marsilius, establishing which of the temperate governments is best, or which of the perverted ones is worst, is not part of his actual concern in the *Defensor pacis*, although in his *Defensor minor* he translated the general terms of approach into the concrete terms of the imperial regime in contrast to city-states and kingdoms.¹³⁵ In his view, as expressed in the first *dictio* of his main works, there was no single mode of political life, no single configuration of sovereignty, which best suited the ends of political association. He thought that diverse forms of political arrangements could equally promote the purposes of sufficiency of life. How to explain such a deviation from the well established standards of medieval law and government? Political authors usually assumed or defended the superiority of one form of government over the others. One answer to this question might be that Marsilius, more than others as far as we know, felt particularly pressed by pragmatic considerations of a political character.¹³⁶ He accepted that there were various forms of government whose existence was not a deviation from any abstract or ideal model. Such a position was an extraordinarily powerful political and rhetorical instrument in his hands. From this point of view, we should consider Marsilius' laity as being of a particular type, namely laity of a type to be assessed against the predominant political theories based upon the concept of the best possible type of sovereignty.

¹³¹ See Marsilius de Padua, *Defensor pacis*, I, II, 1.

¹³² See Marsilius de Padua, *Defensor pacis*, I, I, 1. See also Cassiodorus, *Variae*, I, 1.

¹³³ According to M. Wilks, Marsilius "was propounding general rules of government which were intended to be valid for all communities". See M. Wilks, "Corporation and representation in the *Defensor pacis*" in *Studia Gratiana* 15 (1972), pp. 251-92, 290.

¹³⁴ On this point, see A. Gewirth (1951-56), II, lxxvi and lxxxv. See also E. Berti, "Il *regnum* di Marsilio tra la *polis* aristotelica e lo Stato moderno" in *Medioevo* 5 (1979), pp. 165-81.

¹³⁵ In the *Defensor minor*, Nederman wrote, Marsilius contended that "the Roman Empire, just like any other earthly polity, has an independent foundation stemming from the consent of its corporate community", and the papacy "enjoys no greater right to interfere in the affairs of the Empire than in any other form of political association". See C.J. Nederman (ed.), *Marsiglio of Padua. Writings on the Empire: Defensor minor and De translatione imperii*, xix. Cambridge, 1993.

¹³⁶ In his Italian translation of the *Defensor pacis*, C. Vasoli emphasised that Marsilius' attitude towards the question of how to regard the plurality of forms of government was pragmatic. The presuppositions of his evaluation of civic life were naturalistic and practical at the same time. This character, according to Vasoli, distinguishing the position of Marsilius from that of the so-called Averroists, usually concentrated on more genuinely theoretical aspects. See C. Vasoli (a cura di), *Il difensore della pace di Marsilio da Padova*, p. 20. Torino, 1975.

We find another significant assertion of the 'generic' character of the *Defensor pacis* in another passage, where Marsilius discusses the unity of government. There he argued that one characteristic of a well-ordered *regnum* is that a single, supreme ruler must govern all its components. Any duplication or division in the ruling function will pose a threat to sufficiency of life. He claims that in a single city or kingdom there must be only a single government. If there is more than one government in number and species, as seems to be expedient in kingdoms geographically understood, then there must be among them one in number which is supreme, to which all the others are reduced, and which corrects any errors arising in them.¹³⁷ The unity of government that Marsilius is talking about is a precondition of good order. In another passage of the first discourse, he affirmed that the question of whether it is advantageous to have one supreme government in number for all those throughout the world living a civil life deserves special study.¹³⁸ If it is true, as Niederman suggested, that Marsilius' refusal to take a stand on this question "reinforces the impression that his political tenets are intended to apply equally and without exception to all manner of governments", we cannot rule out the possibility that behind his refusal Marsilius maintained his imperial sympathy intact.¹³⁹ A. Gewirth came to emphasise the 'republican' tone of the first discourse in contrast to the 'absolutist' tone of the second. "The second discourse", he said, "seems to effect a passage from republicanism to absolutism, from popular sovereignty to ruler's sovereignty, from limited to virtually unlimited government".¹⁴⁰ The second *dictio* shows the ruler or governing agent as the legislator and puts him in a position of *absolutio legibus* by implying that he can govern otherwise than in accordance with the laws made by the people. The people must obey this executive power in all things as long as he does not violate divine law. He derives his authority from God directly, or from the grand electors. In the first discourse, the human legislator is the efficient cause of the laws. The human legislator in this case is the whole body of citizens ("*universitas civium*") or its weightier part ("*valentior pars*"), through its election or will explicitly expressed by words in the general assembly of the citizens, commanding or determining what ought to be done or omitted with regard to all human civil acts, under threat of punishment. As far as the question is concerned of whether it is better to appoint the governing agent by means of successive new elections or by one election establishing the hereditary principle, Marsilius preferred the electoral system: 'I believe, he said, that for the sufficiency of civil life it is absolutely better for the commonwealth that each monarch be named by a new election rather than by hereditary succession'. This method, he said, will always operate to yield the best possible ruler. In fact, he concluded, hereditary succession, which depends upon birth and is often fortuitous, cannot provide such a best possible ruler with such certainty.¹⁴¹

¹³⁷ See Marsilius de Padua, *Defensor pacis*, I, XVII, 1. This view may remind us of the core of the modern notion of internal sovereignty.

¹³⁸ See Marsilius de Padua, *Defensor pacis*, I, XVII, 10.

¹³⁹ See C.J. Nederman (2003), p. 129.

¹⁴⁰ See A. Gewirth, "Republicanism and absolutism in the thought of Marsilius of Padua" in *Medioevo* 5 (1979), pp. 23-48, p. 23. See also A. Gewirth (1964), pp. 236-56.

¹⁴¹ See Marsilius de Padua, *Defensor pacis*, I, XVI, 11. See also I, XIV and I, XV.

In order to determine the weightier part, Marsilius suggested taking into consideration the quantity and the quality of the persons in that community over which the law is made. Actually, the whole body of citizens or the weightier part is the legislator, regardless of whether they make the laws directly by themselves or entrust the making of the laws to some person or persons who are not the legislator in the absolute sense, but only in a relative sense and for a limited time, and at any rate in accordance with the authority of the primary legislator. The laws must be promulgated or proclaimed after their enactment by such authority, so that no one who is not observing them may be excused because of ignorance.¹⁴² As this passage shows, the possibility of distinguishing between the absolute and the relative legislator was an instrument in the hands of Marsilius for continuing to appeal to a variety of earthly rulers in the light of his personal political goal. He also says that the human arrangements within the *civitas* are an imitation of nature. In fact, the *civitas* and its parts established according to reason are similar to the animal and its parts, formed according to nature. Referring to Aristotle and Galen, Marsilius affirms that, just as the ordering organ established by nature in the animal is the heart, so the ordering part in the *civitas* is the government, the *pars principans*, in which the legislator has instilled a certain virtue, with the power to establish the other parts of the community.¹⁴³ In this context, the government is a secondary efficient cause, whereas the primary efficient cause that establishes the other parts of the *civitas* remains the *universitas civium* or its *valentior pars*. As secondary or executive cause, the governing part acts through the authority granted to it by the legislator and in accordance with the form and limits established by the latter. The ruler must always, as far as possible, perform and regulate civil acts in accordance with the laws issued by the legislator. Marsilius here is firmly convinced that for functional reasons the ruler effects the execution of the legal provisions more conveniently than the entire body of citizens.¹⁴⁴ Recently, Nederman argued that Marsilius insisted that citizenship is “conferred on a strictly functional basis” and “judged according to the usefulness of various human activities for the meeting of material human needs”.¹⁴⁵ This point seems to be confirmed by what Marsilius says on the matter of citizenship. Again following Aristotle, though not entirely, Marsilius called citizen anyone participating in the government, in the deliberative, or in the judicial function, according to his rank.¹⁴⁶

¹⁴² See Marsilius de Padua, *Defensor pacis*, I, XII, 3. On the sources and meaning of the expression ‘weightier part’, used first by C.W. Previt-Orton, see A. Gewirth (1964), pp. 182-99; C.W. Previt-Orton (1923), pp. 1-21;

¹⁴³ See Marsilius de Padua, *Defensor pacis*, I, XV, 5. See also I, XV, 6.

¹⁴⁴ See Marsilius de Padua, *Defensor pacis*, I, XV, 4.

¹⁴⁵ See C.J. Nederman (2003), p. 130.

¹⁴⁶ See Marsilius de Padua, *Defensor pacis*, I, XII, 4. At this point, Marsilius distinguishes children on the one hand, and women, slaves, and foreigners on the other hand, from citizens, although this kind of distinction, he admits, occurs in different ways. In fact, he says, the ‘weightier part of the citizens should be determined in accordance with the ‘honourable’ customs of each community, save the criteria that Aristotle provided in his *Politics*’. See Aristotle, *Politics*, III, 1, 1275a; III, 3, 1277b; III, 13, 1283b; VI, 3-4, 1318a. By contrast to Aristotle, who did not consider artisans and peasants to be citizens, Marsilius did

On the basis of this division of labour principle, Marsilius is thus said to have located “popular consent at the centre of his theoretical framework”.¹⁴⁷ All those bearers of interests that are affected by the very existence of the political community should have full membership in it, and must agree on the fundamental conditions of their association. It is to this issue that Marsilius referred in a well-known maxim: ‘matters due to affect all ought to be known and heard by all’ in order to attain what is beneficial for the sufficiency of life and to avoid the opposite.¹⁴⁸ This set of considerations has led various scholars, including Alan Gewirth, to the conclusion that “the popular sovereignty of Marsilius thus has a fixity, an absoluteness [...] unparalleled in antecedent political philosophy”.¹⁴⁹ Following Aristotle, Marsilius then defines the citizen as a man who participates in the government or in any of the deliberative or judicial functions of the community according to his rank. The weightier part of the citizens, Marsilius adds, should be viewed in accordance with the honourable customs of the various communities, or alternatively on the basis of Aristotelian criteria.¹⁵⁰ Taking one passage in which the author restates the principle that ‘every whole is greater than its part’, and that it necessarily follows that the whole body of citizens, or its weightier part, which must be taken for the same thing, can better discern what must be chosen and what rejected than any part of it taken separately, it has been argued that the *universitas civium* and the *valentior pars* tend to coincide, and this whole would include the *vulgus*.¹⁵¹ On the other hand, in the Marsilian configuration even the multitude or the *vulgus* might be coherently seen as one part. Consequently, it has been argued that the most important characteristic of the *valentior pars* is a certain degree of vagueness inherent in it. This notion may in fact denote a numerical majority or minority, the people as well as the Emperor.¹⁵²

include these two groups in his concept of citizenry. See Marsilius de Padua, *Defensor pacis*, I, XIII, 3-4. See also Aristotle, *Politics*, VII, 9, 1329a.

¹⁴⁷ See C.J. Nederman (2003), pp. 130.

¹⁴⁸ See Marsilius de Padua, *Defensor pacis*, I, XII, 7: “*que igitur omnium possunt tangere commodum et incommodum, ab omnibus sciri debent et audiri, ut commodum assequi et oppositum repellere possint*”. On this point, as A. Gewirth argued, “many uses of the maxim are far from the democratic or republican orientation which it might initially appear to entail”. See A. Gewirth (1964), pp. 223-4. This principle appeared in reg. 29 of the *Liber sextus*. Originally, this statement was part of a ruling in which Justinian explained that, where there were several guardians of the same ward, their joint administration of the ward’s property could not be ended without the consent of all (*Cod.* 5, 59, 5, 2). The canonists saw nothing strange about transferring the maxim from the private law context to procedure and then to public law. See P. Stein, *Roman Law in European History* (1999), p. 51. Cambridge: 2002.

¹⁴⁹ See A. Gewirth (1964), p. 206.

¹⁵⁰ See Marsilius de Padua, *Defensor pacis*, I, XII, 4.

¹⁵¹ See Marsilius de Padua, *Defensor pacis*, I, XIII, 2: “*totum maius esse sua parte [...] Unde satis evidenter per necessitatem infertur, universitatem civium aut ipsius valenciolem multitudinem, que pro eodem accipienda sunt, magis posse quid eligendum et quid spernendum discernere, quacumque sui parte seorsum*”. On this point, see F. Battaglia (1928), p. 83; A. Gewirth (1964), p. 185; C. Dolcini (1995), p. 31.

¹⁵² See G. Capograssi, “Intorno a Marsiglio da Padova” in *Rivista internazionale di filosofia del diritto* 10 (1930), pp. 578-90, now in *Opere*, IV, pp. 71-88, 77. Milano, 1959. See also A. Passerin d’Entrèves, “Rileggendo il *Defensor pacis*” in *Rivista storica italiana* 51 (1934), pp. 1-37, 5-6. A

Probably, this riddle has no clear solution. On the one hand, Marsilius insisted that both quantity and quality ought to be taken into consideration in order to determine the *valentior pars*.¹⁵³ He clearly said, moreover, that the authority to make laws cannot belong to one man alone because, due to ignorance or malice or both, this one man could make a bad law, looking more to his own private benefit than to that of the community, so that the law would be tyrannical. For the same reason, he added, the authority to make laws cannot belong to a few.¹⁵⁴ On the other hand, he explicitly said that in any case it is necessary to consider the customs of a given community. This latter statement – perhaps a sort of tribute paid by vice to virtue – seems to leave room for solutions differing from popular legislative sovereignty. Georges de Lagarde was convinced that it is an anachronism to regard Marsilius as a theorist of republicanism.¹⁵⁵ Quillet insisted on the republican appearances of Marsilian doctrine.¹⁵⁶ These authors believed that the doctrine of popular sovereignty developed in the first section is merely an artifice aimed at laying the theoretic foundations of the political power of the Emperor, and consequently there are no real contradictions between the two discourses, the first being, far from a republican doctrine, an attempt to lay down the basis for imperial absolutism subsequently expounded in the second discourse. In this way, the coherence of the whole work can be saved.¹⁵⁷

Now we have to treat Marsilius' conception of the law. Those practical matters the establishment of which is of greatest importance for the common sufficiency of the citizens in this life, and the lack of which harms the community, must be established only by the whole body of the citizens ("*per universitatem civium*"). Such a matter is the law. Therefore the establishment of the law pertains only to the whole body of the citizens. Since men come together in the civil community in order to attain what was beneficial for sufficiency of life, and to avoid the opposite, those matters that can affect the benefit and harm of all ought to be known and heard by all in order to permit the attainment of the beneficial and to avoid the opposite.¹⁵⁸ Marsilius referred to both *lex* and *ius*. He intended *lex* in four senses. In the first sense, law is a natural and sensitive inclination towards some action or passion. In the second sense, it means any productive habit and in general every form, existing in the mind, of a producible thing, from which, as from an exemplar or measure, there emerge the forms of things made by art. In the third sense, law is the standard containing admonitions for voluntary human acts as these are ordered toward glory or punishment in the future world. In this sense, Marsilius explained, even the Mosaic Law was in part called law, just as the evangelical law in its entirety is called law. Finally, in the fourth and more familiar sense, law is the science or doctrine or

restrictive interpretation is to be found in G. de Lagarde (1970), pp. 144-5; J. Quillet (1970), p. 94.

¹⁵³ See Marsilius de Padua, *Defensor pacis*, I, XII, 3.

¹⁵⁴ See Marsilius de Padua, *Defensor pacis*, I, XII, 8.

¹⁵⁵ See G. de Lagarde (1970), pp. 93, 128, 140-1, 154-5, 279.

¹⁵⁶ See J. Quillet (1970), pp. 18, 84-9, 122-4.

¹⁵⁷ See G. de Lagarde (1970), pp. 147, 155, 268; J. Quillet (1970), pp. 48, 85-9, 272.

¹⁵⁸ See Marsilius de Padua, *Defensor pacis*, I, XII, 8.

universal judgement of matters of civil justice and benefit, and of their opposites.¹⁵⁹ In the second *dictio*, he treated the meanings of "*ius*". In one of its senses *ius* means *lex* as both a law containing admonitions for voluntary human acts and the science of matters of civil justice and benefit, and their opposites. Here Marsilius uses the terms "*preceptum*" and "*permissio*" which are usually rendered by the English 'command' and 'permission'. In this respect, a distinction between human and divine law is made again on the basis of the fact that the former is coercive in this world over those who transgress it, and the latter is coercive in the future world only.¹⁶⁰ Then Marsilius says that the term "*licitum*" denotes that which is done in accordance with the "*preceptum*" or "*permissio*" of the law, or which is omitted in accordance with the prohibition or permission of the law. On a parallel basis, the term "*fas*", translated into English as 'equitable', can be employed as a synonym for "*licitum*" or, in another sense, Marsilius says, it denotes that which the legislator is reasonably presumed to have permitted in some cases, although the act in question is generally or regularly prohibited.¹⁶¹ Finally, "*ius*" can be employed to mark the difference between "*ius naturale*" and "*ius civile*". As far as Natural law is concerned, Marsilius cites Aristotle's *Nicomachean Ethics*, where the philosopher speaks of 'natural justice', defining it as the contents which have the same validity everywhere, and do not depend upon man's opinion. Examples are that God must be worshiped, parents must be honoured, children must be reared up to a certain age, no one should be injured, that injuries must be lawfully resisted and the like.

It is interesting that Marsilius considers those principles that almost all men regard as valid as the content of the legislator's statutes. This specification is worth noting. The fact that such principles are commonly regarded as valid and lawful constitutes a type of regularity similar to that occurring in the domain of natural phenomena. In this sense only, namely metaphorically, Marsilius explains, they are called 'natural'. In fact, they depend on the legislator's enactment in order to be seen as law in the narrow sense.¹⁶² He seems to have deprived Natural law of its axiological value when he says that there are people who define *ius naturale* as the dictate of right reason in practical matters, and they usually place it under divine law. Here Marsilius refers to Stoic and Christian doctrine. Everything done in accordance with divine law and right reason is lawful in an absolute sense, he recalls. This is not the case with respect to *ius civile* whenever the latter diverge, partially or entirely, from right reason and divine law. The word 'natural', Marsilius warns, is used here equivocally because there are many things in accordance with right reason which are not regularly and universally agreed upon as being honourable. Likewise,

¹⁵⁹ See Marsilius de Padua, *Defensor pacis*, I, X, 3. On the point, see A. Gewirth (1964), p. 133.

¹⁶⁰ See Marsilius de Padua, *Defensor pacis*, II, XII, 3. Here Marsilius specified that the word 'command' ("*preceptum*") denotes in general the legislator's ordinance or statute, both affirmative and negative, requiring the transgressor to be punished. In another sense, it refers to the content of the legislator's statute. See also Marsilius de Padua, *Defensor minor*, XIII, 3.

¹⁶¹ See Marsilius de Padua, *Defensor pacis*, II, XII, 5-6. See on the equitable I, XIV, 7.

¹⁶² See Marsilius de Padua, *Defensor pacis*, II, XII, 7. See Aristotle, *Nicomachean Ethics*, V, 7 (1134b).

there are commands, prohibitions, or permissions in accordance with divine law that are ignored by human law.¹⁶³

Marsilius referred to other situations in which the term "*ius*" is employed. Thus, the individual and collective prerogative guaranteed by the law in respect of handling something in conformity with it is called "*ius*", or the judgment made by judges in accordance with the law, and finally the adherence to what is due and proportional according to the law in exchanges or distributions is also given this name.¹⁶⁴ On the *vexata quaestio* of the value of Natural law in Marsilius' writing, considering also that cognitions and statements on matters of civil justice and utility in Marsilius' writing are laws only if a coercive command has been issued by the legislator in regard to their observance, the conclusion that Marsilius of Padua anticipated modern legal positivism seems obvious. Richard Scholz too acknowledged that Marsilius departed significantly from traditional Natural law teaching in so far that he took a distance from a transcendent and absolute basis of source of the law. So in this radical rejection consists the novelty of the Marsilian doctrine, more particularly, Scholz argued, in the insistence on the centrality and autonomy of the human and definitely secular legislator.¹⁶⁵ De Lagarde argued that Marsilius was considering two options. Either law is the expression of an objective and superior order – the order of the *immutabilia* – and in this case the law has a value of its own, independently of the command it applies; or it is to be identified with a command, one which always needs to be supported by the threat of punishment. In this case, law is the mere will of the *princeps*, whether the latter is individual or collective.¹⁶⁶ Even Passerin d'Entreves, agreeing with de Lagarde that the essence of legality in Marsilius appears to lie in the imperative and coercive character of law-making, did not hesitate to call the Marsilian doctrine "voluntarist" rather than "positivist". He argued that, although divine law remains a reference point in the system of laws, finally "human law has the might of this world on its side, and is therefore the only law worthy of the name".¹⁶⁷ Gewirth remarked that the unwritten Natural law of the tradition in the hands of Marsilius becomes a statute enacted by the legislator, namely mere positive law. The scholar added that

¹⁶³ See Marsilius de Padua, *Defensor pacis*, II, XII, 8: "*sunt tamen quidam, qui ius naturale vocant recte rationis agibulum dictamen, quod sub iure divino collocant, propterea quod omne factum secundum legem divinam et secundum recte rationis consilium simpliciter est licitum; non tamen omne factum secundum leges humanas, quoniam in quibusdam a recta ratione deficient. Verum naturale hic et supra equivoce dicitur. Multa enim sunt secundum [recte] rationis dictamen, ut que videlicet non omnibus sunt per se nota et per consequens neque confessa, que non ab omnibus nationibus conceduntur tamquam honesta. Sic etiam secundum legem divinam sunt quedam precepta, prohibita vel permissa, que [non] se habent in hoc conformiter humane legi, quod quia notum est in pluribus, exempla pretermisi propter abbreviacionem sermonis*". The tradition to which Marsilius referred goes back to Cicero (*De re publica*, III, xxii), to the Justinian compilation (*Inst.* 1, 2, 2), to St. Isidore of Sevilla (*Etymologiae*, V, II, 1), and to the *Decretum Gratiani* (pars I, dist. I).

¹⁶⁴ See Marsilius de Padua, *Defensor pacis*, II, XII, 10-12.

¹⁶⁵ See R. Scholz, "Marsilius von Padua und die Genesis des modernen Staatsbewusstseins" in *Historische Zeitschrift* 156 (1937), pp. 88-103, p. 99.

¹⁶⁶ See G. de Lagarde (1970), pp. 171.

¹⁶⁷ See A. Passerin d'Entreves, *The Medieval Contribution to Political Thought*, pp. 61-4. Oxford, 1934.

Marsilian legal positivism does not constitute a denial of the fact that "there are objective norms of justice", but rather a plea in favour of "not confusing these norms with the precepts which effectively function as laws in the state".¹⁶⁸ According to these interpretations, the Marsilian concept of law demarcates a domain no longer prior to human legislative authority. Yet such a conclusion is questionable. It could still be argued that in Marsilius' writing proper law is that which wills and issues the *iustum et civilem*. As Coleman pointed out, law remains a "discourse or statement emerging from prudence and political understanding".¹⁶⁹ Morrall critically commented that to portray Marsilius' concept of law as voluntarist or positivist would be as false as to claim that Thomas Aquinas' concept was entirely rationalist. He doubted that Marsilius represented an authentic departure from the medieval precedents.¹⁷⁰ Lewis contended that Marsilius' definition of law did not anticipate modern legal positivism, being just "a condensed paraphrase of a traditional civilian exposition, modified only by a special emphasis on the earthly location of its sanctions in contrast to the otherworldly location of the sanctions of divine law". Lewis has, in our view convincingly, demonstrated that it would be misleading to assume that Marsilius in fact suggested that "coercive force alone is essential to law, or that the content of law is simply a matter of will".¹⁷¹ In fact, Marsilius himself, in normative fashion, affirmed that false cognitions of the just, the useful, and the beneficial too might become properly enacted and coercive laws; but although they possess due form, they fail to ensure a proper and true ordering of justice. They are 'imperfect' laws.¹⁷² Recently, Nederman and Canning reinforced this interpretation by censuring the thesis that Marsilius was a legal positivist *ante litteram*. The latter in particular argued, very cogently in our opinion, that "the question of whether or not he was a legal positivist is not correctly posed and is the product of modern jurisprudential concerns". As a matter of fact, in the first part of this book we tried to demonstrate that the thesis assuming that medieval law and government knew no proper idea of sovereignty is a distortion produced by the inappropriate application of the interpretative paradigm of modern legal positivism beyond its due borders. Canning is convinced that on the one hand Marsilius had great and perhaps naïve confidence that the *universitas civium*, more than any individual wise man or small group of men, would will the most useful laws for the self-sufficient life of the entire community and in conformity with the higher principles of justice and righteousness.

On the other hand, Marsilius was prepared, reluctantly perhaps, to accept as a necessity the validity of laws infringing the common good, justice, and righteousness, in other words infringing divine law.¹⁷³ Then, treating the relationships between human and divine law, given that some things that are not lawful according to divine law are lawful according to human law, and conversely, he explicitly affirmed that we ought to look at what is lawful and unlawful in the absolute sense, which is the sense imposed by divine, not human law when these

¹⁶⁸ See A. Gewirth (1964), pp. 135, 147-9.

¹⁶⁹ See J. Coleman (2000), II, p. 151.

¹⁷⁰ See J.B. Morrall, *Political Thought in Medieval Times*, p. 111. London: 1958.

¹⁷¹ See E. Lewis (1963), p. 548.

¹⁷² See Marsilius de Padua, *Defensor Pacis*, I, X, 5.

¹⁷³ See J. Canning (1999), p. 31. See also C.J. Nederman (1995), pp. 79-83.

disagree in their commands, prohibitions, and permissions.¹⁷⁴ He added that divine law was handed down for the betterment of men, both in this world and in the world to come. The Evangelical law has a twofold function, which has been conceived by Christ himself. As far as man's earthly life is concerned, it has the force of a moral doctrine to be followed or not, in any case without the intrusion of any ecclesiastical judge. Only in the life to come will there be a supreme judge. The point of special interest is that, although human and divine law are not identical, most of the time those who infringe human law infringe divine law too. Those who transgress human law usually sin against divine law, although not conversely. In fact, divine law issues commands on certain matters constituted by a particular type of acts and omissions – immanent acts and omissions – on which human law would command in vain. These immanent acts, as already pointed out, though yet cannot be proved to be present or absent to anyone, cannot be concealed from God.¹⁷⁵ But the *Defensor minor* too contains the important principle of the superiority of divine over human law as confirming the proper hierarchy between *ordo ordinans* and *ordo ordinatus*. In it, Marsilius says that the divine law commands obedience to human rulers and laws that are not contrary to divine law as established by Christ and the Apostles.¹⁷⁶ The apex of the Marsilian attempt to prevent gaps between human and divine law is the idea that the *universitas civium* and the *universitas fidelium* tendentially coincide. In order to achieve eternal salvation, it is necessary to believe in the message conveyed by the Holy Scriptures, along with the interpretations discussed and approved in the General Council, the *universitas fidelium*. In the case of doubtful expressions of the divine law and of the articles of faith, only the General Council, the multitude, or the weightier part, can intervene to resolve the doubts.¹⁷⁷

¹⁷⁴ See Marsilius de Padua, *Defensor pacis*, II, XII, 9.

¹⁷⁵ See Marsilius de Padua, *Defensor pacis*, II, XII, 11. Elsewhere, Marsilius argued that the secular authority does not punish a person for sinning against divine law only. There are many mortal sins even against divine law, such as fornication, which the human legislator knowingly permits, and which the bishop or priest does not, cannot, and should not prohibit by coercive force. But if the heretic's sin against divine law is such as human law also prohibits, then he is punished in this world as a sinner against human law. See Marsilius de Padua, *Defensor pacis*, II, X, 7.

¹⁷⁶ See Marsilius de Padua, *Defensor minor*, VIII, 3: "nam lex divina praecipit obedire principibus et humanis legibus non contraries legi divinae, sicut per Christum et apostolos ostensum est prius".

¹⁷⁷ See Marsilius de Padua, *Defensor pacis*, II, XIX, 1.

CHAPTER EIGHT

LIFE, WORKS AND FORTUNE OF BARTOLUS OF SAXOFERRATO (1313/14-1357).

The limited information we possess on Bartolus of Saxoferrato's life is derived from personal notes and some passages by Baldus de Ubaldis, drawn from the official records of the city of Perugia, from his will, and from the accounts of Caccialupi (ca. 1420-1496),¹ Diplovatatus (1468-1541),²

¹ Giovanni Battista Caccialupi (or de Gazalupi), studied law at Perugia and exercised the profession of judge and professor at Siena between 1451 and 1483. In 1467, he wrote *De modo studendi et vita doctorum*, one of the first works on medieval law and lawyers. This text can be found as *appendix* in several editions of the *Vocabularius utriusque iuris*. In this paragraph, we shall refer to a short version of Caccialupi's work titled *Succinta historia interpretum et glossatorum iuris* and included in G. Panzirolus, *De claris legum interpretibus libri quatuor* (cura C.G. Hartmanni), pp. 501-11. Leipzig: 1721. On Caccialupi, see G. D'Amelio, "Giovanni Battista Caccialupi" in *Dizionario Biografico degli Italiani* (from now onwards DBI) 15 (1972), pp. 790-7. Some information on this author can be found also in E. Cortese, *Il diritto nella storia medievale*, II, p. 429. Roma: 1995; and *Le grandi linee della storia giuridica medievale*, p. 387. Roma: 2001.

² Diplovatatus is the author of the unfinished *Tractatus de praestantia doctorum*, an encyclopedic work originally planned to comprise twelve books, belonging to the then fashionable literary genre *de viris illustribus*. Its first eight books are lost. The ninth, unfinished, book was composed and revised in the period between the very end of the fifteenth century and 1511. The last three books were never edited. The part of this work that interests us is the ninth unfinished book titled *De claris iuris consultis*, containing important biographical information about Bartolus. We have knowledge of the book through a manuscript of the Oliveriana Library at Pesaro (Cod. Oliv. 203). The studies on Diplovatatus and his works conducted by H. Kantorowicz are still of fundamental importance. See his "Lebensgeschichtliche Einleitung" in F. Schulz und H. Kantorowicz (hgs.), *Thomas Diplovatatus, De claris iuris consultis*, I (pars prior), pp. 1-142. Berlin-Leipzig: 1919. See also his 1931 *Praestantia doctorum*, reprinted in H. Coing und G. Immel (hgs.), *Rechtshistorische Schriften*, pp. 377-96. Karlsruhe: 1970. The "Lebensgeschichtliche Einleitung" has been translated into Italian by G. Rabotti and added at the beginning of his critical edition of Diplovatatus' *De claris iuris consultis*. See F. Schulz, H. Kantorowicz, G. Ribotti (a cura di), "Thomae Diplovatatii Liber de claris iuris consultis" (pars posterior), *Studia Gratiana* 10 (1968), pp. 141-421. From the latter edition are derived the passages of Diplovatatus' biography of Bartolus (*Vita Bartoli*) cited in this paragraph. It has been argued that Diplovatatus' project was inspired by *De commemoratione famosissimorum doctorum in utroque iure*, a lost work attributed to Baldus de Ubaldis. See R. Orestano, *Introduzione allo studio del diritto romano*, p.192. Bologna: 1987. In 1520, during his sojourn at Venice, Diplovatatus edited by Battista de Tortis Bartolus' *commentaria* on the Digest and the Code in eight volumes, and in 1530, in the ninth volume, Bartolus' *consilia, quaestiones, tractatus, Tres libri*, and *Authenticum*. In 1521, Diplovatatus added eight *tractatus*, including *De exbannitis* or *Tractatus exbannitorum*, one which apparently Bartolus had mentioned in his short tract on the constitution "*qui sint rebelles*", to the 1472 edition of the twenty-eight

Lancellotus (1511-1591),³ and Panzirolus (1523-1599).⁴ Bartolus' life and work constitute a field of research of their own. Besides the philological and exegetical difficulties with which generations of scholars have been confronted, the attempts made to provide the most exhaustive possible portrait of this jurist presupposed a dichotomy between a 'real' and a 'mythical' Bartolus, or between the historical Bartolus and the history of 'Bartolism'. Savigny's account remained a classical reference in legal history for a long time.⁵ Already in his 1913 study on the significance of Bartolus' political thought, however, Woolf warned that Savigny's findings were in

tractatus, including *Super constitutione "ad reprimendum"*, *Super constitutione "qui sint rebelles"* – both issued by Henry VII – *De guelfis et ghibellinis*, *De regimine civitatis*, and *De repraesaliis*. See F. Calasso (1964), p. 652. R. Feenstra advanced serious doubts on the attribution of the tract on banishment to Bartolus. See his "Bartolus dans les Pays-Bas (Anciens et Modernes) – avec additions bibliographiques à l'ouvrage de J.L.J. van de Kamp", in *BSDC*, I, p. 213-4. However, all this material, the very opening of which is constituted by Diplovatatus' *Vita Bartoli*, has been recently reprinted in *Bartolus de Saxoferrato Commentaria* (IX vols.) G. Polara curavit. Roma, 1996-98. The *Vita Bartoli* also appeared in Bartolus' *Opera Omnia* (XI vols.) published by Junta in Venice between 1590 and 1602. See in particular, vol. I, pp. 8-9. On Diplovatatus and his work, see also E. Besta, "Una parola ancora sulla raccolta e la trascrizione di antichi documenti veneziani per opera di Tommaso Diplovataccio" in *Nuovo Archivio Veneto* 14 (1914) 27, pp. 425-44; G. Rossi, "La *Bartoli vita* di Tommaso Diplovataccio secondo il codice Oliveriano 203", *BSDC*, II, pp. 442-502; R. Feenstra, "Bartolus dans les Pays-Bas (Anciens et Modernes) – avec additions bibliographiques à l'ouvrage de J.L.J. van de Kamp", in *BSDC*, I, pp. 175-281 (see in particular p. 258 ff.); *idem* "La *Vita Thomae Diplovatatii* de Baptiste Egnatius (1520)" in *Studi in onore di Edoardo Volterra*, IV, pp. 775-85. Milano, 1971; I. Zicari, "Sulla edizione del *De claris iuris consultis* di Tommaso Diplovataccio dal cod. Oliv. 203" in *Studia Oliveriana* 18 (1970), pp. 3-45; M. Ascheri, *Saggi sul Diplovatazio*. Milano, 1971; A. Mazzacane, "Lo Stato e il Dominio nei giuristi veneti durante il secolo della Terraferma" in G. Arnaldi e M. Pastore Stocchi (a cura di), *Storia della cultura veneta*, III-I, pp. 622-50. Vicenza, 1980; *idem* "Diplovatazio" in *DBI* 40 (1991), pp. 249-54.

³ See G.P. Lancellotus, *Vita clari jurisconsulti Bartoli de Saxoferrato* in J.G. Meuschen (hg.), *Vitae summorum dignitate et eruditione virorum ex rarissimis monumentis literato orbi restitutae*, I, pp. 78-122. Coburg, 1735-36.

⁴ See G. Panzirolus, *De claris legum interpretibus libri quatuor* (cura C.G. Hartmanni), pp. 412-14. Leipzig, 1721. As already pointed out, the volume contains Caccialupi's *Succinta historia interpretum et glossatorum iuris*, pp. 501-11.

⁵ See F.C. von Savigny, *Geschichte des römischen Rechts im Mittelalter* (2nd ed., 1834-51), VI, pp. 137-84. Aalen, 1986. Among the sources consulted by Savigny, see G.B. Vermiglioli, *Biografie di scrittori perugini e notizie delle loro opere*, I, pp. 17-36 (*sub voce* "Alfani"). Perugia, 1829. Among the late nineteenth century sources on Bartolus' life and work, see also A. Lattes, "Un punto controverso nella biografia di Bartolo" in *Studii giuridici dedicati e offerti a Francesco Schupfer nella ricorrenza del XXXV anno del suo insegnamento*, II, pp. 19-30. Torino, 1898. To be consulted cautiously is F. Buonamici, "Bartolo da Sassoferrato in Pisa" in *Annali delle Università toscane* 33 (1915), pp. 1-28.

need of additions and corrections.⁶ The latter may therefore be considered as of antiquarian importance today. Research from 1936 by J.L.J van de Kamp constitutes the first systematic twentieth century account of Bartolus's life and work. In spite of its limits, it is a unique investigation in its genre.⁷ Also the study of the position of Bartolus on the fourteenth century social conditions in Italy, conducted at the beginning of the 1940s by Toole Sheedy is of some importance for the understanding of his personality and formation.⁸ Lately, the investigations by Coing,⁹ Feenstra,¹⁰ Paradisi,¹¹ Ascheri,¹² and Brizio¹³

⁶ See C.N.S. Woolf (1913), pp. 1-20 and pp. 395-402. Besides the more recent works cited in previous sections of our study, other works of interest in respect to the evaluation of Bartolus' political conceptions are C. Bernabei, *Bartolo da Sassoferrato e la scienza delle leggi*. Firenze, 1881; L. Chiappelli, "Le idee politiche del Bartolo" in *Archivio giuridico* 27 (1881), pp.387-439; G. Salvemini, "La teoria di Bartolo da Sassoferrato sulle Costituzioni politiche" in *Studi storici* 4 (1901), pp. 151-67; J.N. Figgis, "Bartolus and European political ideas" in *Transactions of Royal Historical Society* (New Series) 19 (1905), pp. 147-68; F. Ercole, "Studii sulla dottrina politica e sul diritto pubblico di Bartolo" in *Rivista italiana per le scienze giuridiche* 58 (1916), pp. 177-276 reprinted with additions in F. Ercole (1932), pp. 54-156; L. Rossi, *Bartolo da Sassoferrato nel diritto del suo tempo*. Bologna, 1917; C. Curcio, "L'eredità di Roma nel pensiero politico del Medio Evo" in *Rivista internazionale di filosofia del diritto* 8-2 (1828), pp. 179-224.

⁷ See J.L.J van de Kamp, *Bartolus de Saxoferrato: 1313-1357. Leven-Werken-Invloed-Beteekenis*. Amsterdam, 1936. There exists a partial Italian version of it entitled "Bartolo da Sassoferrato" in *Studi Urbinati* 9 (1935), pp. 1-165. For some critical remarks on this study see the *compte rendu* by E.M. Meijers in *TvRG* 16 (1939), pp. 114-21, reprinted in his *Études d'histoire du droit*, III, pp. 283-90. Leiden, 1959.

⁸ See A. T. Sheedy, *Bartolus on Social Conditions in the Fourteenth Century*, pp. New York, 1942.

⁹ See H. Coing, "Die Anwendung des *Corpus Iuris* in den Consilien des Bartolus" in *L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker*, I, pp. 71-97. Milano, 1954.

¹⁰ See R. Feenstra, "Bartolus dans les Pays-Bas (Anciens et Modernes) - avec additions bibliographiques à l'ouvrage de J.L.J. van de Kamp", in *BSDC*, I, pp. 175-281; "Bartole et la science du droit romain" in *Atti del seminario romanistico internazionale* (Perugia-Spoleto-Todi, 11-14 ottobre 1971), pp. 7-17. Perugia, 1972.

¹¹ See B. Paradisi, "Le glosse di Bartolo da Sassoferrato" in *La critica del testo. Atti del II Congresso internazionale della Società italiana di storia del diritto* (Venezia, 18-22 settembre 1967), II, pp. 575-618. Firenze, 1971, reprinted in B. Paradisi, *Studi sul medioevo giuridico*, I, pp. 263-433. Roma, 1987. See also his "La diffusione europea del pensiero di Bartolo e le esigenze attuali della sua conoscenza" in *BSDC* I, pp. 397-472.

¹² See M. Ascheri, "The formation of the *Consilia* collection of Bartolus of Saxoferrato and some of his autographs" in L. Mayali and S.A.J. Tibbetts (eds.), *The Two Laws. Studies in Medieval Legal History Dedicated to Stephan Kuttner*, pp. 188-201. Washington (DC), 1990; "Streghe e 'devianti': alcuni *consilia* apocriefi di Bartolo da Sassoferrato?" in M. Ascheri (ed.), *Scritti di storia del diritto offerti dagli allievi a Domenico Maffei*, pp. 203-34. Padova, 1991; *Diritto medievale e moderno. Problemi del processo, della cultura e delle fonti giuridiche*, pp. 217-8. Rimini, 1991.

¹³ See E. Brizio, "Una indicizzazione automatica dei *consilia* di Bartolo" in *Studi Senesi* 40 (1991), pp. 103-349; "I *consilia* di Bartolo da Sassoferrato nel ms. Seo de Urgel

greatly contributed to our understanding of Bartolus' treatment of Roman law, of the formation of the Bartolist manuscript tradition, and of the problem of authorship in respect to writings previously attributed to him. However, we have to turn our attention to the researches of Calasso,¹⁴ Cortese,¹⁵ Condorelli,¹⁶ and Bellomo,¹⁷ to gain the fullest possible picture of Bartolus' life.

Bartolus or Bartolo - "*civis Perusinus, patria et origine Saxoferratus, natione Picenus*" as Diplovatatus recalled¹⁸ - was born in Venatura, a village of the *contado* of Sassoferrato in the province of Ancona, territory of the future duchy of Urbino.¹⁹ His precise date of birth is unknown, but must be between 10 November 1313 and 10 November 1314. This hypothesis is based on one certain date in Bartolus' life, that is, the date of his doctorate at Bologna, in the church of St. Peter, on 10 November 1334, when the jurist was twenty-one years old.²⁰ Bartolus himself mentioned the event in his commentary on Dig. 45, 1, 132: "*taliter continue studendo profeci, quod in XX anno Bononie repetendo et disputando, publice de iure respondi et demum in XXI anno doctoratus fui*".²¹ Although in the primary sources his surname never appears, something not unusual in those days and that led van de Kampe to maintain that Bartolus had no surname,²² three have been listed as the most probable: Bentivogli; Severi; Alfani.²³ The latter was the name of a branch of Bartolus' descendants,

2109" in I. Baumgärtner (ed.), *Consilia im späten Mittelalter. Zum historischen Aussagewert einer Quellengattung*, pp. 237-42. Sigmaringen, 1995.

¹⁴ See F. Calasso, "Bartolo da Sassoferrato", in *DBI* 6 (1964), pp. 640-69. Roma, 1964. For an analytic account of Bartolus' works and the related editions, see in particular pp. 644-65. Cortese noted that Caprioli made a remarkable contribution to the formation of this latter section. See E. Cortese (1995), II, p. 424n. See also F. Calasso, "L'eredità di Bartolo" in *Annali di storia del diritto*, III-IV (1959-60), pp. 65-82, reprinted in *BSDC*, I, pp. 1-21 and lately in *La storicità del diritto*, pp. 316-37. Milano, 1966.

¹⁵ See E. Cortese (1995), II, pp. 425-36; E. Cortese (2001), pp. 385-89.

¹⁶ See O. Condorelli, "*Homo parve stature et coloris turgidi et gibbosus*" - Bartolo da Sassoferrato nell'anonima descrizione del ms. Napoli, Biblioteca Nazionale, VIII.D.77", in *Rivista internazionale di diritto comune* 6 (1995), pp. 357-64.

¹⁷ See M. Bellomo, "Bartolo da Sassoferrato", in *Medioevo edito e inedito - III - Profili di giuristi*, pp. 181-93. Roma, 1998.

¹⁸ See F. Schulz, H. Kantorowicz, G. Ribotti (1968), p. 274.

¹⁹ On the formation of the duchy of Urbino and its relationship with the Church, see P.L. Falaschi, "Intorno al vicariato apostolico in *temporalibus*", in *A Ennio Cortese*, II, pp. 1-26. Roma, 2001.

²⁰ The event is recalled in P. Lancelotti (1735-36), I, pp. 84-7. See also F. Calasso (1964), pp. 640 and E. Cortese (1995), II, pp. 426-7.

²¹ See Bartolus de Saxoferrato, *In secundam Digesti novi partem, De verborum obligationibus*, l. *Quidam cum filium*, § 81, Venetiis, 1590.

²² See J.L.J. van de Kampe (1936), p. 5.

²³ The eighteenth century encyclopedic historian of Italian literature, the Abbot Girolamo Tiraboschi, conjectured that Severi was Bartolus' father's family name, and Alfani his mother's. See G. Tiraboschi, *Storia della letteratura italiana*, V-1, p. 321. Modena, 1789. Savigny, following a different tradition to be traced back to the

a branch of importance that in the fifteenth century supplied the Perugian *Studium* with distinguished jurists.²⁴ Moreover, the chapel in the church of St. Francis 'al Prato' in Perugia where Bartolus' sepulchral monument was erected, presumably in 1511 or shortly before, belonged to the Alfani family.²⁵ His father, Ceccus or Ciccus – from Franciscus – of Bonacursius must have been a man of modest means, most likely a small landowner engaged in agriculture. Of his mother, whether she belonged to the Severi or to the Alfani, we only know that she was called Santa. A malevolent anti-Bartolist voice, echoed by later generations of jurists, portrayed Bartolus as of illegitimate birth, or, at least, as a man who had been abandoned by his mother at the very moment of his birth. This conclusion was based on the fact that Bartolus hardly referred to his parents and his childhood, and, when he did so, as in the case of his commentary on Dig. 45, 1, 132, as we shall shortly see in greater detail, instead of turning his affectionate memory to his parents, he referred to the friar Peter of Assisi, who played a fundamental role in Bartolus' youth. This fact seems part of a legend of discredit that came to dominate the figure of the jurist at an early stage.²⁶ Lancellotus already mentions such a tale, concluding that it was an injurious fable.²⁷ Whatever his exact date of birth might be, Bartolus was born roughly at the time of the

Historia di Perugia (1664) by P. Pellini, accepted that the family of Bartolus had originally been called Severi, the name being afterwards changed to Alfani. See F.C. von Savigny (1986), VI, pp. 137-9. According to A. Rossi, the family name was originally Bentivogli. It was the mother of Bartolus who belonged to the Severi, and whose family changed its name to Alfani in the fifteenth century. See A. Rossi, "Documenti per la storia dell'Università di Perugia", in *Giornale di erudizione artistica* 6 (1877), in particular pp. 239-40.

²⁴ On 8 September 1308, while already in France and about to establish the Apostolic Seat at Avignon, Clement V granted to the city of Perugia the privilege of opening a *Studium generale* with the bull *Super specula*. A few years later, John XXII granted to the local university the privilege of awarding doctorates with the bulls *Inter ceteras cura* (1 August 1318) and *Dum sollicite considerationis* (18 February 1321). See G. Ermini, *Storia dell'Università di Perugia* (1947), I, p. 25. Firenze, 1971; M. Bellomo, *I fatti e il diritto. Tra le certezze e i dubbi dei giuristi medievali (secoli XIII-XIV)*, pp. 481-92. Roma, 2000; E. Cortese (2001), p. 385.

²⁵ See G. Ermini (1971), I, p. 145. See also F. Bonaini (a cura di), "Memorie perugine di Teseo Alfani dall'anno 1502 al 1527", in *Archivio storico italiano* 16, II (1851), p. 267; R. Cecchetelli-Ippoliti, "Il sepolcro di Bartolo da Sassoferrato" in *Atti e memorie della reale deputazione di storia patria per le Marche*, 4-5, pp. 155-57. Ancona, 1928; J.L.J. van de Kamp (1936), pp. 148-54; F. Calasso (1964), pp. 640-69; E. Cortese (1995), II, p. 425. It is perhaps useful to recall that the history of Bartolus' sepulchral monument has been rather troubled. In fact, it has been built, rebuilt, and relocated several times over the centuries. This fact, as well as the absence of any coat of arms engraved or depicted on it, as we shall see, makes it extremely difficult to determine whether or not the imperial bestowal of certain privileges in favor of the jurist actually occurred.

²⁶ See J.L.J. van de Kamp (1936), pp. 4-10 and pp. 134-47. See also F. Calasso (1964), pp. 640-1. Among the jurists who echoed such a rumour, Calasso mentioned the Spanish Covarrubias (1512-77).

²⁷ See P. Lancellotus (1735-36), I, pp. 81-4.

death of Henry VII of Luxembourg (1275-ca. 1313). In 1312, the sovereign had been crowned Emperor in Rome, and had invested all his energies in the attempt to revive the imperial majesty against the ambitions and policies of the papacy and the Guelf powers. In so doing, the Emperor had inflamed the spirits of the Italian Ghibellines, including Dante, whose position on the relationship between Empire and Church, as we shall see, Bartolus criticised.²⁸

As we noted, Peter of Assisi, most likely a Franciscan friar, was a figure of decisive importance in Bartolus' formation. Guido Pancirolus portrayed him as "*virum doctum et eximie pium*".²⁹ In one commentary, already referred to (on Dig. 45, 1, 132), Bartolus mentioned with great affection *Petrus de Assisio*.³⁰ Manlio Bellomo explained Bartolus' affectionate attachment to 'Peter of the Mercy' by conjecturing that the friar might have provided the financial means enabling him to follow the expensive study of law. This conjecture would allow us to advance the hypothesis not that Bartolus was of illegitimate birth, but rather that his parents were, for a while at least, of relatively modest means.³¹

Between 1327 and 1328, when Bartolus was fourteen years old, the Italian campaign of Lewis of Bayern took place. On 11 January 1328, accompanied by Marsilius of Padua, he solemnly entered Rome to receive the imperial crown from Sciarra Colonna, the representative of the *populus Romanus*. In that period, Bartolus was at the Perugian *studium* under the guidance of Cynus de Pistoia, "*famosissimus legum doctor*" according to Diplovatatus,³² who had tried to employ the Orléans method and was very open towards the possible contribution of the *artes liberales*.³³ Cynus' proximity constituted a second important stage in the human and legal education of the young Bartolus, for Cynus attempted to blend the Roman law of the Accursian *glossa* with local statutes, and with Canon and customary law. Much later, Baldus reported on the great admiration that his own teacher had shown for Cynus: "*dicebat autem mihi Bartolus quod illud quod suum fabricabat ingenium erat lectura Cyni*".³⁴ This admiration did not prevent

²⁸ Among those inflamed by the Emperor, Cola di Rienzo (1313-1354), 'the last Tribune', contemporary of Bartolus, who heavily opposed baronial power in the *Urbs* and attempted to bring it back to her glorious past, must also be mentioned. See T. Carpegna Falconieri (2002), pp. 35-65.

²⁹ See G. Pancirolus (1721), p. 412.

³⁰ See Bartolus de Saxoferrato, *In secundam Digesti novi partem, De verborum obligationibus*, l. *Quidam cum filium*, § 81, Venetiis 1590. On the friar, see A. Fortini, "Frate Pietro da Assisi primo maestro di bartolo da Sassoferrato" in *BSDC*, II, 251-60.

³¹ See M. Bellomo (1998), III, p. 182-5.

³² See F. Schulz, H. Kantorowicz, G. Ribotti (1968), p. 248.

³³ On Cynus, see L. Chiappelli, *Cino da Pistoia giurista. Gli scritti del 1881 e del 1910-1911*. Pistoia, 1999; M. Bellomo, *L'Europa del diritto comune* (1988), pp. 200-03. Roma, 1994; V. Piano Mortari, *Dogmatica e interpretazione. I giuristi medievali*, pp. 39-43. Napoli, 1976.

³⁴ See Baldus de Ubaldis, *Super usibus feudorum*, II, 26 § *Vasallus*. The passage is quoted in E. Cortese (1995), II, p. 425.

Bartolus from departing from the presuppositions of the *Lectura Cyni*. In fact, being inclined to preserve what we may call the 'purity' of *civilis sapientia*, Bartolus did not seem to be in favour of certain dialectical *subtilitates* in use at the Orléans School. In one of his commentaries (on Dig. 1, 3, 32), he stigmatised the 'Ultramontane' jurists by saying that they were generally "*inhaerent fantasiis [...] magis quam rationi*".³⁵ Yet, as Diplovatatus recalled, among the early interpreters of Bartolus some emphatically saw him as "*omnium subtilitatum inventor*".³⁶ Moreover, the pleasure of logical abstraction was not at all alien to him. On the interesting question of the employment of the notion of *causa* in civil law and of the relationship between *causa* and *ratio*, for example, he argued in favour of the principle that "*causa est de praeterito et ratio de futuro*".³⁷ With the French jurists he seemed to have shared the need for limiting the authority of the Gloss when necessary or convenient.³⁸ He often used expressions like "*glossa [...] male loquitur*" or "*de glossa non curo*". He did not hesitate in taking a distance from the doctors' opinions too.³⁹

According to a famous description by Baldus, Bartolus was "*homo multum inhaerens practicae*".⁴⁰ He was a devout believer too. On the exact meaning of Woolf's judgement that Bartolus was a "shy thinker" whenever ecclesiastical matters were in question, and on the evaluation of the impact that Franciscan teaching had on him, there is still disagreement.⁴¹ Certainly,

³⁵ See Bartolus de Saxoferrato, *In primam Digesti Veteri partem, De legibus, l. de quibus*, § 21, Venetiis, 1575.

³⁶ See F. Schulz, H. Kantorowicz, G. Ribotti (1968), p. 277.

³⁷ See Bartolus de Saxoferrato, *In secundam Infortiati partem, De conditionibus et demonstrationibus*, § *quod autem*, § 18, fol. 112, Venetiis 1575: "*aliud est causa legati, aliud causa legis [...] Et longa est differentia inter causam prout hic sumitur et rationem, quia causa est de praeterito et ratio de futuro [...] Sed si ratio legis non est de praeterito, sed de futuro, tunc viget legis observantia cum viget ratio*". On the point, see M.G. Fantini (1998), p. 99.

³⁸ Bartolus, Woolf wrote, "was no slavish dependent on the Gloss". See C.N.S. Woolf (1913), pp. 5-6. The author reported various passages that reveal Bartolus' attitude towards the authority of the Gloss, including a fragment (on Dig. 39, 1, 1) in which the jurist used the expression "*glossa potest cantare quantum vellet*".

³⁹ See respectively Bartolus de Saxoferrato, *In secundam Digesti Infortiati partem, De legatis et fideicommissis*, l. 22, § 5; *In secundam Digesti novi partem, De solutionibus et liberationibus*, l. 95, § 1, Venetiis, 1575. On the point, see also D. Segoloni, "Bartolo e la civitas Perusina", *BSDC II*, pp. 513-671, pp. 548-9.

⁴⁰ See Baldus de Ubaldis, *In nonum Codicis librum Commentaria, De iis qui accusare non possunt*, l. prima § 29, Venetiis, apud Iuntas, 1599. This passage contains further information on Bartolus' career as assessor at Todi and Pisa: "*et fuit adsector primo Tuderti; postea Pisis, et ibi palam legere incepit, et deinde venit ad civitate Perusii, unde legendo optimus factus est*". The passage is quoted in several secondary sources. See, for example, E. Cortese (1995), II, p. 434.

⁴¹ See C.N.S. Woolf (1913), p. 31. On the influence of Franciscan teaching on Bartolus, see A.C. Jemolo, "Il Liber Minoritanum di Bartolo e la povertà minoritica nei giuristi del XIII e XIV secolo" in *Studi Sassaresi* 2 (1922), pp. 1-54; G. Sabatini, "Frammento del *Tractatus Minoricarum* di Bartolo da Saxoferrato" in *L'Archiginnasio* 21 (1926), pp. 229-40. See also D. Segoloni, "Bartolo e la civitas Perugina" in *BSDC II*, pp. 550-3.

the jurist emphasised his *favor Ecclesiae* whenever he had the chance to do so. Some of the passages that reveal Bartolus' position on the relationships between Civil law and Canon law *in temporalibus*, for instance, seem to confirm the latter circumstance. As Piero Bellini observed, according to Bartolus, the two laws ought to be applied each "*in foro suo*" with the relevant exception of matters "*in quibus vertitur periculum animae*". If "*loquimur in spiritualibus et pertinentibus ad fidem*", Bartolus explained, "*stamus canonibus*". If "*loquimur in temporalibus et tunc in terris subiectis ecclesiae*", he continued, "*sine dubio stamus decretalibus*". Finally, two possibilities are given: if "*in terris subiectis imperio [...] servare legem est inducere peccatum*", the solution must be "*stamus canonibus*"; if "*non inducit peccatum*", only then "*stamus legi*".⁴² As we shall see in more detail in the next chapter, Bartolus' devotion was also clearly manifested in his opposition to the position held by Dante in his *Monarchia*. In one of his commentaries on the *Digestum Novum* (Dig. 48, 17, 1), Bartolus affirmed: "*et hoc prout tenemus illam opinionem quam tenuit Dantes [...] in uno libro quem fecit, qui vocatur Monarchia [...] imperium dependeat ab ecclesia pulcherrimis rationibus*".⁴³ These sketches concerning Bartolus' personality cannot end without mentioning another important aspect of the jurist's personality, namely his attitude towards law broadly understood. We have already dealt with this topic in the preceding chapters. It may be enough here to recall that Bartolus placed *civilis sapientia* on the highest level of medieval learning. In his *Tractatus Testimoniarum*, the jurist praised the perfection of law as *sapientia*, *scientia*, and *ars*. The first was described as "*habitus speculationis considerans causas altissimas*"; the second as "*habitus speculationis demonstrativus ratione vera considerans causas inferiores*"; the third as "*habitus ratione naturae factivus*". Woolf concluded that from these premises it also followed that *civilis sapientia* constituted a tool "for the solution of problems that to us would seem entirely foreign to law".⁴⁴

⁴² See Bartolus de Saxoferrato, *In primam Codicis partem*, l. *privilegia, de sacrosanctis ecclesiis*. The passage appears in P. Bellini, *L'obbligazione da promessa con oggetto temporale nel sistema canonistico classico*, p. 352. Milano, 1964. Bellini also underlined the firm conviction of the jurist that the *denunciatio evangelica* could well serve the purpose of settling quarrels among Christians whenever civil law was unable to provide any means on the presupposition that the *cives Imperii* were *fideles Christi*. See P. Bellini, "*Denunciatio evangelica*" e "*denunciatio judicialis privata*". *Un capitolo di storia disciplinare della Chiesa*, p. 208. Milano, 1986. See, on the matter of this institute in the context of the *potestas indirecta in temporalibus*, by the same author: "Sui caratteri essenziali della *potestas indirecta in temporalibus*" in his *Saggi di storia della esperienza canonistica*, pp. 199-205. Torino, 1991. On the important topic of the relationship of the jurist to Canon law, see G. Forchielli, "Bartolo canonista?" in *BSDC*, II, pp. 235-50 and G. Le Bras, "Bartole et le droit canon" in *BSDC*, II, pp. 295-308.

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⁴³ See Bartolus de Saxoferrato, *In secundam Digesti novi partem*, *De requirendis reis*, l. *prima, Praesides*, § 4, Venetiis, 1575.

⁴⁴ See C.N.S. Woolf (1913), pp. 12-18.

Possibly due to the transfer of Cynus from Perugia to Florence, Bartolus moved to Bologna, the *alma mater*, where on 15 December 1333 he successfully discussed a *quaestio* with his teacher Jacobus Butrigarius (1274-1348) and gained the title of *bacalaurius*. On 17 September 1334, presented by his teacher, he defended his doctorate before a commission presided over by the Canon lawyer Johannes Calderinus (ca. 1300-65), the vicar of the archdeaconry of Bologna, then chancellor of the *Studium*. Among the ten members who sat in the examining commission were Jacobus de Belviso and Raynerius de Forlì. Finally on 10 November in the Cathedral of St Peter he received the doctoral diploma.⁴⁵

Great uncertainty concerns the period that extends from the date of the doctorate to that of his stay at Pisa dating from 1339. Baldus tells us that Bartolus was assessor both at Todi and Pisa before he began teaching at the local university.⁴⁶ It has been conjectured that in the middle of May 1336 Bartolus moved to Cagli, where he remained in office for a short period, again as assessor. On 23 August 1338, he was at Macerata as *advocatus* of the Marca Anconetana. There, he was involved in the case that saw the commune and the citizens of San Ginesio relaxed from the penalties consequent on the charge of having hosted and helped in various ways "*fraticellos de paupere vita*".⁴⁷ All modern biographers have insisted on the legendary character of the story that saw Bartolus retreating, or even being banished, to a villa at St. Victor to escape popular hatred. According to a story of this kind reported by Diplovatatus and others, this hatred had been aroused by the death of a young man, whom he had sentenced to be tortured while he held the office of judge, or assistant judge, at Todi or Bologna.⁴⁸ Most likely, before moving to Pisa, where he first served as assessor of the local *podestà*, Bartolus married Pellina Bovarelli, who belonged to a wealthy family and gave birth to six children, two sons and four daughters. Bartolus' teaching career at Pisa, begun when he was twenty-six, was in total of relative short duration. He presumably held his academic post until the end of 1342. However, he was generously rewarded for his lecturing and the commune paid the rent for the castle of the Famigliati, where he resided and lectured according to the custom of the day. There he had Raynerius de Forlì as his senior colleague.

⁴⁵ See F. Calasso (1964), pp. 640-1. The author recalls that for the examination Bartolus was given two texts to discuss, one from the Digest (Dig. 4, 2, 10), and one from the Code (Cod. 6, 32, 1). On the doctorate, see also E. Cortese (1995), II, pp. 425-6. Toole Sheedy listed Oldradus da Ponte among the ten members of the commission. The author did not provide any indication of the sources she consulted. That Oldradus was a member of the commission that examined Bartolus is definitely doubtful. See A.T. Sheedy (1942), p. 15. Bartolus' doctoral diploma is included in P. Lancellotus (1735-36), I, pp. 84-7.

⁴⁶ See the already mentioned Baldus de Ubaldis, *In nonum Codicis librum Commentaria, De iis qui accusare non possunt*, l. prima § 29, Venetiis, apud Iuntas, 1599.

⁴⁷ See D. Segoloni, "Bartolo e la civitas Perusina" in *BSDC*, II, p. 557; The text of this document can be found in G. Ermini, "Bartolo da Sassoferrato avvocato nel 1338 della Curia generale provinciale della Marca Anconetana", in *BSDC*, II, pp. 230-33.

⁴⁸ See F. Calasso (1964), p. 641-2.

His return to Perugia dates from 29 March 1343, where he stayed, almost without interruption, until the last days of his life.⁴⁹ In fact, in 1348, the outbreak of the Black Death caused an interruption of teaching activities at the university, and the dramatic consequences of it greatly impressed the jurist. "To Bartolus", Toole Sheedy wrote, "the plague appeared as a direct act of war or enmity on the part of God against the human race". It had the striking power of signifying that "the hostility of God is stronger than the hostility of man".⁵⁰ Normal life, including legal practices, were disrupted as Bartolus himself reported in one of his commentaries on the *Digestum Novum* (Dig. 41, 3, 5): "*prout scitis, erat tanta pestilentia quod iura non reddebantur in civitatibus et moriebantur infiniti homines [...] et fuit illa hostilitas Dei fortior quam hostilitas hominum*".⁵¹ The rigidity of legal procedure was temporarily forgotten and improvisation took over. The need for notarial assistance increased to a limit. Bare life seemed then to have taken revenge against learning and certainty in law. By the autumn of 1348, the disastrous effects of the plague were nearly over, after having caused the death of approximately 100,000 people in the area of Perugia and its surroundings. In October, so as to reward him for his services, and probably to persuade him to stay, full citizenship was conferred upon him, his two brothers, and their descendents. As an additional privilege, he was exempted from the provisions of the statute of the university which forbade citizens from holding a salaried chair. The episode confirms, if that is necessary, that Bartolus' life was deeply rooted in current developments in the commune of Perugia. The commune, nominally part of the Papal territories since the end of the twelfth century, had by that time extended its power beyond Umbria into areas of Tuscany and of the *contado* of Spoleto. The Papacy, having opposed the assumption of the imperial title by Lewis of Bavaria, the city remained largely loyal to the former. Explaining this loyalty by a reference to the division between Guelfs and Ghibellines would be misleading, for, as Bartolus pointed out in his tract on these two factions, the latter had no clear and direct connection with Church and Empire. On the ground of local circumstances, and not of an abstract allegiance, Perugia was said to be subject neither to the Pope nor to the Emperor.⁵² However, as Cortese observed, there is continuity between Bartolus' as an exegete and commentator on Roman law, as well as on Canon and customary law, and Bartolus' expression of the decline of the communal

⁴⁹ See J.L.J. van de Kamp (1936), p. 10 and p. 134. See also E. Cortese (2001), p. 386.

⁵⁰ See A. T. Sheedy (1942), p. 25.

⁵¹ The passage appears in D. Segoloni, "Bartolo e la *civitas perusina*", *BSDC*, II, p. 516.

⁵² See M. Caravale (1994), p. 486. See also A.T. Sheedy (1942), p. 20; D. Quaglioni (1983), pp. 29-32; G. Tabacco (2000), pp. 275-92, 316-330; H. Baron, *The Crisis of the Early Italian Renaissance*, II, p. 445. Princeton (NJ), 1955; A. Marongiu, "Il regime bipartitico nel trattato sui Guelfi e i Ghibellini" in *BSDC*, II, pp. 333-42; J.K. Hyde, "Contemporary views on faction and civil strife in thirteenth and fourteenth century Italy" in L. Martines (ed.), *Violence and Civil Disorder in Italian Cities, 1200-1500*, pp. 273-307. Berkeley-London, 1972.

world.⁵³ In particular, what strikes the interpreters who are sensitive towards the public law and political aspects of Bartolus' thought is his production of short tracts that manifest his concerns at a time when both the Empire and the communal institutions were at their zenith. A remarkable episode in respect to the complex manner in which the jurist conceived of the relationships between *sacerdotium*, *imperium*, and *civitates* concerns his participation as a member of an embassy representing Perugia to the Emperor Charles IV at Pisa in 1355 during his expedition to receive the imperial crown.⁵⁴ For a long time, on the ground of some notes by Bartolus himself, it has been maintained that the Emperor received him with great honours and made him *consiliarius* and *familiaris domesticus commensalis*.⁵⁵ The Emperor is also said to have given him and any of his heirs who attained the title of doctor of law, the privilege of admitting students at the University of Perugia with the exception of the offspring of high-ranking families, as well as the privilege of granting the *venia aetatis*.⁵⁶ Finally, he is said to have granted to the jurist a coat of arms consisting of the image of a red lion with a twofold tail on a golden field. The main source of evidence in this respect is Bartolus' unfinished heraldry tract *De insigniis et armis*, presumably written in 1355 and published posthumously in 1358 by his son-in-law, Nicola Alessandri, who succeeded Bartolus at Perugia University. Recent investigation tells us that this story is not supported by contemporary corroborating documents. Vanecek already noted that although the lion represented in the coat of arms of the Bohemian kings was two-tailed, the latter was silver on a red field and there was no "*leonem rubeum cum caudio duabus in campo aureo*".⁵⁷ In their study on the jurist's heraldic treatise, Cavallar, Degenring and Krishner came to the conclusion that "the imperial grant never actually occurred". They argued, however, that this disproof does not minimise the historical significance of the legend, which is possibly to be interpreted as a "sign of Bartolo's political allegiance to the empire".⁵⁸ The latter, as we shall see in the next chapter, is confirmed by the view he expressed when commenting on the *Digna vox* (Cod. 1, 14, 4) that the Emperor "*submittit se legibus de voluntate non de necessitate*".⁵⁹

⁵³ See E. Cortese (2001), pp. 388-9.

⁵⁴ See C.N.S. Woolf (1913), pp. 3-4.

⁵⁵ Bartolus referred to this episode in the *proemium* of his short tract on the constitution, *Ad reprimendum*, issued by Henry VII.

⁵⁶ See Bartolus de Saxoferrato, *In primam Infortiati partem, de liberis et posthumis*, l. *Gallus § forsitan*. The passage is quoted in E. Cortese (2001), p. 387.

⁵⁷ See V. Vanecek, "La leggenda di Bartolo in Boemia", in *BSDC*, I, pp. 369-93.

⁵⁸ See O. Cavallar, S. Degenring, J. Kirshner, *A Grammar of Signs. Bartolo da Sassoferrato's Tract on Insigna and Coats of Arms*, p. 24. Berkeley (Cal), 1994.

⁵⁹ See Bartolus de Saxoferrato, *In primam Codicis partem*, l. *Digna vox, de legibus et constitutionibus*, fol. 26, Venetiis, 1615. In this commentary, Bartolus fixed an important *clausulam veritatis*: "[...] Quaero quod si imperator facit pactum cum aliqua civitate utrum teneatur illud pactum servare? Videtur quod non, quia solutus legibus [...] contrarium est veritatis. Nam pacta sunt de iure gentium [...] et iure gentium sunt immutabilia". The passage appears in M. Caravale (1994), p. 534.

According to the best credited tradition, Bartolus died on 10 July 1357. Nothing in particular is known of the circumstances of his death.⁶⁰

As far as Bartolus' later fortune is concerned, he has been commonly considered one of the greatest jurists ever for his mastery of law and his contribution to different fields of law.⁶¹ The fact that he was an extraordinarily prolific writer as well as his premature death contributed to his elevation to the sphere of legend or myth. Caccialupi called him, emphatically, "*lucerna iuris civilis*". According to this author, Bartolus' judgements contained the "*clausulam veritatis*". He noted that some of his Iberian students told him that in Spain and Portugal it was established by royal decree that, in case of divergent opinions, the *opinio Bartoli* ought to receive priority "*tanquam principalior*". Caccialupi concluded that the special task for the Italian jurists was "*curare*" and "*imitare*" the Perugian master for "*bonus bartholista optimus iurista censendus est*".⁶² Diplovatatus called him

⁶⁰ Already edited by Lancellotus, Bartolus' will has been re-edited by A. Rossi in "Documenti per la storia dell'Università di Perugia", *Giornale di erudizione artistica* 6 (1877), p. 49.

⁶¹ For an account of Bartolus' contribution to International law, see G.L. Barni, "Bartolo da Sassoferrato ed il problema del limite della giurisdizione sul mare" in *Rivista di storia del diritto italiano* 24 (1951), pp. 185-95. See also the contributions included in vol. II of the *BSDC*: in particular, A. Checchini, "Presupposti giuridici dell'evoluzione storica dalla 'bartoliana' teoria degli statuti al moderno diritto internazionale privato", pp. 61-104; H. Lange, "Bartolus' Einfluss auf die Entwicklung des Schadensersatzrechts", pp. 281-94; B. Luther, "Der Einfluss van Bartolus auf das Deutsche internationale Privat- und Strafrecht", pp. 309-31; W. Onclin, "La doctrine de Bartole sur les conflits de lois et son influence en Belgique", pp. 373-98; F. Schwind, "L'influsso di Bartolo sulla evoluzione del diritto internazionale privato", pp. 503-12; S.E. Thorne, "Sovereignty and the conflict of laws", pp. 673-89. Calasso wrongly attributed to Bartolus the merit of having defined for the first time in the Middle Ages the legal status of the foreigner. See F. Calasso (1954), p. 576-7. *Contra*, see the investigations by E.M. Meijers in *Études d'histoire du droit international privé*, pp. 95-106, 152-55 in particular (with texts by Revigny, Belleperche, Guillaume de Cunch, Pierre Jacobi, and Jean Faure at pp. 124-43, 166-76). Paris, 1967.

⁶² See J.B. de Gazalupi, *Succinta historia interpretum et glossatorum iuris* in G. Panzirolus, *De claris legum interpretibus libri quatuor* (cura C.G. Hartmanni), pp. 506, 511. Let us recall that King John II promulgated the royal decrees in 1427 for León, and in 1433 for Castile. King Alfonso V of Portugal legally sanctioned the supremacy of the *opinio Bartoli* in 1446. King Philip II, who had associated the throne of Portugal to that of Spain in 1580, continued this tradition of favour by sanctioning the same principle in the *Ordenações Filipinas* published in 1603, after his death. In book III (tit. LXIV) it is said that in the absence of Roman or Canon law provisions, and of certain statements by the *Glossa ordinaria*, the *opinio Bartoli* had to be followed as the "*mais conforme á razão*". See F. Calasso (1954), p. 574n. The legislative sanction of the supremacy of the *opinio Bartoli* concerned Brazil due to the application of the *Ordenações Filipinas*. Formally, this legislation remained into force even after the end of Portuguese domination in 1822, up to the promulgation of the 1916 Civil Code. See

"*iuris monarcha*".⁶³ Since that time, *nemo iurista nisi bartolista*, or *nullus bonus iurista nisi bartolista*, became maxims of common usage, which for a long time exemplified the prestige that the jurist achieved.⁶⁴ Abbot Tiraboschi gathered together a number of epithets referring to the jurist, including "guida dei ciechi" and "maestro di verità".⁶⁵ *Bartolus in heaven* might thus be a good title for a history of his fortune.

The jurist has been subject to sharp criticism and mockery too, and in this respect we might speak of *Bartolus in hell* as the evocative title for a history of his discredit. As soon as the voice of the Legal humanists was raised in Europe, together with other Italian jurists – the masters of the so-called *Mos italicus* – he fell under the hammer of criticism and negative evaluation. Guillaume Budé (1467/68-1540), Ulrich Zäsi (1461-1536), and Andrea Alciato (1492-1550) are commonly seen as the initiators of Legal humanism, which is traditionally said to have defended this principle of critique against Bartolus and 'Bartolism'. Yet, the evaluation of the *auctoritas Bartoli* and of the Roman law tradition in general among the French *culti* was not univocal. On the one hand, there were expressions of aversion ranging from François Baudouin (1520-73) – who in *Iustinianus sive de iure novo commentariorum libri tres* (1560) called Roman law "*fatua superstitio*" – to François Hotman (1524-1590), author of *Antitribonian* (1567). On the other hand, in jurists like Jacques Cujas (1522-1590) and Hugues Doneau (1527-1591) we find a more positive attitude. Jean Bodin (1530-1596), who in his *République* rejected Bartolus' Roman law-based universalism, and expressed his abhorrence of the idea that the King of France was subject to the Emperor, expressed appreciation for Bartolus as a civil lawyer.⁶⁶ In *De iuris interpretibus dialogi sex* (1582), Alberico Gentili (1552-1608) reported a series of insults and

M.J. De Almeida Costa, "Romanisme et Bartolisme dans le droit portugais" in *BSDC*, I, pp. 315-34. See also E. Cortese (1995), II, pp. 429, 459; E. Cortese (2001), p. 388.

⁶³ See F. Schulz, H. Kantorowicz, G. Ribotti (1968), p. 274.

⁶⁴ In the sixteenth century at the University of Padua, a specific *lectura textus, Glossae et Bartoli* had been established, and at Bologna a number of courses of *repetitiones* were designed. Other universities took similar initiatives in the course of the seventeenth century. See E. Cortese (1995), II, pp. 429-30.

⁶⁵ See G. Tiraboschi (1789), V-1, p. 320.

⁶⁶ See D. Maffei, *Gli inizi dell'umanesimo giuridico*, pp. 38-41, 126-39. Milano, 1956; M. Gilmore, *Humanists and Jurists. Six Studies in the Renaissance*, pp. 31-6. Cambridge, 1963; D.R. Kelley, *Foundations of Modern Historical Scholarship. Language, Law and History in the French Renaissance*, pp. 73, 98. New York-London, 1970; H.E. Troje, "Die europäische Rechtsliteratur unter dem Einfluss des Humanismus" in *Ius Commune* 3 (1970), pp. 33-60; H.E. Troje, "Arbeitshypothesen zum Thema Humanistische Jurisprudenz" in *TvRG* 38 (1970), pp. 519-63; P. Stein, "Legal humanism and legal science" in *TvRG* 54 (1986), pp. 297-306; R. Orestano (1987), pp. 193-219, 151-71; E. Cortese, "Tra glossa, commento e umanesimo" in *Studi Senesi* 104 (1992), pp. 458-503, reprinted in *Miscellanea Domenico maffei dicta: Historia-Ius-Studium*, III, pp. 29-74. Goldbach, 1995; M.L. Monheit, "Guillaume Budé, Andrea Alciato, Pierre de l'Estoile: Renaissance interpreters of Roman law", in *JHI* 58 (1997), pp. 21-40.

contumelies addressed against Bartolus and his followers: 'ass';⁶⁷ 'barbarian';⁶⁸ 'plague of the intellect'; 'assassin of erudition'; 'born to farming'; 'idiot'.⁶⁹ Among others, Lorenzo Valla (1407-1475) is known for his attack on Bartolus as guilty of having jeopardised the *ordo litterarum* by employing a Latin that differed from that of Labeo and Scevolas.⁷⁰ In a letter of March 1433, originally directed to his friend Catone Sacco, law professor at Pavia, but subsequently addressed to Pier Candido Decembrio, Valla treated, or better, mistreated Bartolus' *De insigniis et armis*. He violently attacked its author for his gross ignorance of history, which inevitably led to misinterpreting Roman law.⁷¹ Humanist criticism was given brilliant literary form thanks to François Rabelais (1494-1553). In *Pantagruel* (1532), for instance, he ridiculed Bartolus, as well as Accursius and Baldus, for their gross ignorance of Latin, Greek, and moral philosophy, roughly everything that the Humanists considered

⁶⁷ The association of the epithet 'ass' to the forensic class might constitute the subject of a separate history. In the *Moriae encomium*, Erasmus (1467-1536) sarcastically portrayed the behavior of the traditional, as well as of the newly established professional groups. Next to medical doctors, the most closely related to Folly, there are "the petty lawyers": "these asses can settle matters large and small if they give the word, and their estates multiply". All that the lawyers do, Folly outrageously claims, is "piling up opinion on opinion, and gloss on gloss to make their profession seem the most difficult of all". Folly's verdict is particularly harsh: "Anything which causes trouble has special meaning in their eyes". See A.H.T. Levi (ed.), *Collected Works of Erasmus*, 27, pp. 107-125. Toronto-Buffalo-London, 1986.

⁶⁸ The association of the terms 'barbarism' and 'superstition' to the *auctoritas Bartoli* and the *Mos italicus* in general has been discussed by Pierre Legendre in an article on the Bartolist influence in France. The author wrote that "le Bartolisme fut le sous-produit de la suprématie politique du Droit romain en Occident", whereas French legal humanism "fut l'une des formes de l'aspiration à l'autonomie nationale". The rise of the Humanist school in France - on the ground of a twofold standpoint, rationalist and nationalist - managed finally to marginalize the influence of the "bartholistes et barbares" in order to "libérer le Droit français des superstitions du Bartolisme". See P. Legendre, "La France et Bartole" in *BSDC*, I, pp. 133-72.

⁶⁹ See R. Orestano (1987), p. 93 and p. 157 respectively.

⁷⁰ See F. Calasso, "L'eredità di Bartolo" in *BSDC*, II, pp. 3-21.

⁷¹ See A. Valla, *In Bartoli "De insigniis et armis libellum" ad C. Decembrem epistola* in L. Valla, *Epistulae et documenta*, in E. Garin (ed.) *Opera Omnia* (1540), I, pp. 633-43. Torino, 1962. For an English translation of the letter, see O. Cavallar, S. Degenring, J. Kirshner (1994), pp. 179-200. It is interesting to recall that Valla's vehement criticism caused Alciato, Budé, and various other jurists of the University of Basel to intervene in defense of Bartolus. See G. Kisch, "Bartolo e Basilea", in *BSDC*, I, pp. 349-68. Moreover, on account of the jurists' reaction, Valla had to leave Padua to go to Milan. See O. Besomi e M. Regoliosi (a cura di), *Laurentii Valle Epistole*, pp. 123-4. Padova, 1984. Bartolus and the jurists are negatively evaluated in Valla's epistle of 13 August 1440 to Giovanni Serra too. See *ibidem* pp. 193-204. On Valla's attack, see also M. Speroni, "Lorenzo Valla a Pavia: il libellus contro Bartolo" in *Quellen und Forschungen aus italienischen Archiven und Bibliotheken* 59 (1979), pp. 453-67.

necessary for the understanding of the laws.⁷² The writer took Bartholomaeus Caepolla or Cepola (1420-1475) as the prototype of the cunning lawyer, follower of Bartolus. His *Cautelae*, written between 1459 and 1466, and first published in 1473-74 in Perugia, were a collection of 320 pieces of advice on how to twist justice for private benefit. Twisting the law was to Rabelais one of the ways in which the Devil works in the world.⁷³ Particularly critical of the Bartolist idea of *dominium mundi* – an idea influential far beyond the fourteenth century – were both Jean Bodin and Hugo Grotius. In fact, the anti-Bartolism of the *culti* was partially absorbed by the seventeenth and eighteenth century Natural Law Schools, and was in that way received by the Historical School.

In the Latin dedication to the 1593 French edition of *République*, Bodin confessed his youthful superficiality and admitted to having underestimated the Perugian jurist, as well as other Roman law masters, as he had come duly to appreciate their legacy through legal practice:

*"Fuit enim tempus illud, cum populi Romani jura publice apud Tolosates docerem, ac valde sapiens mihi ipsi viderer in adulescentium corona: illos autem juris scientiae principes, Bartolum [etc.], quos viros, ac universum prope judicum et advocatorum ordinem, nihil aut parum admodum sapere arbitrare; postea vero quam in foro jurisprudentiae sacris initiatus, ac diuturno rerum agendarum usu confirmatus sum, tandem aliquando intellexi non in scholastico pulvere, sed in acie forensi; non in syllabarum momentis, sed in aequitatis ac justitiae ponderibus veram ac solidam juris sapientiam positam esse; eos autem qui forenses literas nesciunt, in maxima Romani juris ignoratione versari".*⁷⁴

Yet, in one passage from the work, the French jurist sarcastically accused Bartolus of opportunism, referring to the episode of his encounter with Charles IV at Pisa in 1355.⁷⁵

⁷² See F. Rabelais, *Pantagruel*, X, 86 (ed. G. Defaux). Paris: 1994. The author wrote: "ignorants de tout ce qu'est nécessaire à l'intelligence des loix [...] ils n'avaient connaissance de langue ni Gracque, ni Latine, mais seulement de Gothique et Barbare [...] Davantage, vu que les loix sont extirpées du milieu de philosophie morale et naturelle, comment l'entendront ces fols, qui ont par dieu moins étudié en philosophie que ma male?"

⁷³ See F. Rabelais (1994), X, 80. He inherited from Budé – who had spoken of *Accursiana ignorantia* – an admiration for Ulpianus instead, taken as the best example of a learned jurist. See E. Nardi, *Rabelais e il diritto romano*, pp. 160-1. Milano, 1962. See also M.A. Screech, *Rabelais*, pp. 24-5, 74-7. London, 1979.

⁷⁴ See J. Bodin, *Le Six Livres de la République* (1593), vol. I, pp.17-9. Paris, 1986.

⁷⁵ Bodin wrote: "l'Empereur Charles IIII qui annobilit Bartol, et luy donna le lyon de guelles en champ d'argent, et puissance d'ottroyer benefice d'aage, pour luy et pour les siens, qui feroient profession d'enseigner le droit; et en recognoissance d'un tel bien-faict, Bartol a laissé par escrit, que tous ceux la sont heretiques, qui ne croient pas que l'Empereur soit seigneur de tout le monde; ce qui ne merite point de response; veu que les Empereurs de Rome ne furent jamais seigneurs de la trentieme partie de la terre; et que l'Empire d'Allemagne n'est

In *De jure belli ac pacis* (1625), Grotius rejected Bartolus' view as anachronistic and intrinsically violent. He argued that the reduction to the state of servitude of any people, both on the ground of the imperial idea of *dominium mundi* and of the assumption of a condition of this kind being the one for which certain people are best fit by nature, is fundamentally unjust. Every reasonable creature, he said, ought to be left free in the choice of what may be deemed to be useful or prejudicial to him. He added that it would have been unnecessary to refute the 'foolish' opinion which ascribed to the Roman Emperors dominion over the most remote and unknown nations, if Bartolus, "*princeps iurisconsultorum*", had not labelled the opposite view as heretical. Consequently, he rejected the traditional argument favourable to universal dominion based on its being so beneficial to humankind, for all its advantages are counterbalanced by greater disadvantages. Grotius had recourse to the metaphor of the ship: as a ship may be built too large to be conveniently controlled, so an empire may be too extensive in population and territory to be directed and governed by one head.⁷⁶

pas la dixieme partie de l'empire des Romains". See J. Bodin, *Le Six Livres de la République* (1593), I, 9, vol. I, p. 266. Paris, 1986.

⁷⁶ See Hugo Grotius, *De jure belli ac pacis libri tres*, II, XXII, XII-XIII: "*neque minus iniquum armis subigere aliquos velle, quasi dignos qui serviant, quos et naturaliter servos interdum Philosophi vocant. Non enim siquid alicui est utile, id statim mihi licet ei per vim imponere: Nam his qui rationis habent usum libera esse debet utilium et inutilium electio, nisi alteri ius quoddam in eos quaesitum sit [...]* Vix adderem stultum esse titulum quem quidam tribuunt Imperatori Romano, quasi ipse etiam in remotissimos et incognitos hactenus populos ius imperandi habeat, nisi Iurisconsultorum diu princeps habitus Bartolus haereticum ausus esset pronuntiare qui id negat; nimirum quia et Imperator interdum se mundi dominum voce".

CHAPTER NINE

THE PROBLEM OF SOVEREIGNTY IN BARTOLUS OF SAXOFERRATO

- 9.1) Bartolus' contribution to the theory of sovereignty in modern scholarly work.
- 9.2) The problem of the *right* constitutional order.
- 9.3) The concept of statehood and the problem of the *persona iuridica*
- 9.4) The problem of the Empire
- 9.5) The *civitas sibi princeps* and *De regimine civitatis*

9.1) Bartolus' contribution to the theory of sovereignty in modern scholarly work.

In dealing with the question of the significance of Bartolus of Saxoferrato's contribution to medieval sovereignty in particular, and to constitutional law and political thought in general, there is a cluster of views centred upon both the ideas that the jurist provided an early account of popular sovereignty and theorised political pluralism, which constitutes a starting point for any further investigation. This cluster of evaluations, the core of which we are going to summarize in this paragraph, aims at emphasising the modernity of Bartolus in general. As a preliminary remark, we should say that although Bartolus was a jurist, various passages of his writings have important political implications. What Bruno Paradisi said in general for medieval jurisprudence applies to Bartolus in particular: we can speak of political thought in a jurist as long as he draws a set of politically relevant arguments out of the exegesis and interpretation of law narrowly understood.¹

Francesco Ercole considered Bartolus' contribution to public law of secondary importance if compared with his achievements in the private law field.² However, this scholar conceded that Bartolus' most notable achievement in the field of public law consists in the attempt to provide a *de iure* justification for the *de facto* political independence of a number of central and northern Italian communes in respect of imperial authority especially.³ In the active lifetime of Bartolus, in

¹ In the view of Paradisi, bending legal reasoning to satisfy political and social needs constituted an important element of the medieval jurists' political thought. See B. Paradisi, "Il pensiero politico dei giuristi medievali" in L. Firpo (ed.), *Storia delle idee politiche, economiche e sociali* (1983), II/2, pp. 211-342, 211. Torino, 1997.

² See F. Ercole (1932), p. 584. Mario d'Addio rejected the view of the secondary importance of Bartolus' public law thinking emphasizing that most notably his *De tyrannia* constituted one of the most relevant antecedents for further debates on tyrannicide in Europe. See M. d'Addio, "Il Tirannicidio" in L. Firpo (ed.), *Storia delle idee politiche, economiche e sociali*, III, pp. 511-609, 513. Torino, 1987.

³ See F. Ercole (1932), pp. 70-104. For a similar approach in recent times, see J. Canning (1996), 168-9.

northern and central Italy, the emperor was seen as the ruler of part of Germany rather than the bearer of the universal authority that Roman law tailored upon him. Yet, in juristic circles especially, the emperor "remained the ultimate source of legal legitimacy" in spite of the fact that he "did not possess the capability to be an active political power".⁴ Actually, emperors and popes continued to underpin feudal titles so important to a number of ambitious groups and individuals in both Italian signorial and republican regimes who depended on their respective jurisdictions. At the same time, the fact that certain rights and privileges, including the right to make the law, belonged to the emperor alone was an expression of the imperial ideology derived from the Roman law teaching to which a number of jurists adhered in the attempt to turn the ruler into a *legum conditor*.⁵ In fact, the political unity of the empire, which would imply the movement towards royal centralisation commonly associated to English and French thirteenth century political history, had been at stake since the time of the *renovatio imperii*.⁶ In Roman law, moreover, cities had the status of *municipia*, namely of licit corporations depending on imperial confirmation. Most medieval jurists maintained that since the time of Barbarossa, some of the Lombard communes had based their autonomy on imperial consent through acquiescence, although some of them *de facto* recognised no superior.

In his remarkable account of the significance of Bartolus' legal and political theory, Cecil Sidney Woolf pointed out that how to accommodate the political power inherent to the independent cities within the basic framework offered by Roman law, constituted the core of Bartolus' Public law thinking. Although the problem presented by the *civitates* was in many ways identical with that presented by the *regna*, the former were Bartolus' principal concern. The jurist acknowledged the importance of the kingdoms by discussing some aspects of kingship in *De regimine civitatis*. He argued, as we shall see, that different types of sovereignty were suited to political communities of different size, with monarchy being suited to one of the largest size. Yet, he neglected the subject of kingship in his commentaries.⁷ The circumstance constitutes one of the bases for the 'republican' interpretation of Bartolus' thought. In this perspective, for instance, Skinner insisted on Bartolus' modernity considering him and Marsilius "champions of Republican ideology". This scholar claimed that Bartolus fostered the idea of popular sovereignty and took a crucial step towards the establishment of "the distinctively modern concept of a plurality of sovereign political authorities, each separated

⁴ See J. Canning, *The Political Thought of Baldus de Ubaldis*, pp. 18-9. Cambridge, 1987.

⁵ On the impact of ideology, Ullmann held that "pure ideology determined the path of historical events, and that ideology stemmed from the notion of the Emperor of the Romans as the one Lord of the world". See W. Ullmann, *A History of Political Thought: The Middle Ages*, p. 97. Harmondsworth, 1965.

⁶ See B. Arnold, *Princes and Territories in Medieval Germany*, pp. 61-73, 152-233. Cambridge, 1991. See also his "Emperor Frederick II (1194-1250) and the political particularism of the German princes" in *JMH* 26/3 (2000), pp. 239-52.

⁷ See C.N.S. Woolf (1913), pp. 44, 107-12.

from one another as well as independent from the Empire".⁸ Mario Ascheri defended this view in his recent study on the medieval origin of Italian municipalism and republicanism.⁹ For Woolf, however, Bartolus' major purpose was assuring to some cities the rights originally considered proper to the empire alone. The rights in question, this scholar recalled, can be grouped under four heads: 1) the right to be considered a *res publica*, which included autonomy in deciding on peace and war; 2) the rights connected with the *fiscus*; 3) the right to exercise *merum et mixtum imperium*; 4) the right to legislate.¹⁰ On the matter of the *fiscus* in particular, Woolf credited Bartolus with the merit of having established the principle *civitas est fiscus* (the city itself is the *fiscus*) in respect of those cities that did not recognise a superior *de iure* or *de facto*.¹¹ Canning recalled that in the writings of jurists such as de Révigny, Jacobus Butrigarius, and Albericus de Rosciate, the *fiscus* was considered to belong only to the emperor, or to have belonged to the *respublica Romana* before it transferred its powers to the emperor by means of the *lex regia*, so that any cities claiming fiscal rights otherwise than through imperial concession did so by mere usurpation. By contrast, Bartolus unambiguously accorded fiscal rights to those cities that did not recognise a superior *de iure* or *de facto*.¹² Otto von Gierke previously emphasized that in Bartolus, as well as in his pupil Baldus, we find the traces of a "theoretical process which distinguished those rights of superiority which belonged to the very essence of the state from fiscal rights casually acquired by the state and held by it in the same manner as that in which a private man might hold them".¹³ In the view of Felix Gilbert, the city-republics of medieval Italy represented "the first appearance since antiquity of the self-sufficient autonomous state", and the Bartolist formula of the *civitas sibi princeps*, "derived from the attempt to legalize the new state of affairs", one in which the city-republics "had become the decisive political and economical factors in Italy".¹⁴ Among the early accounts of the significance of Bartolus' contribution to public law, emphasising the jurist's practical attitude, McIlwain argued that the question of the actual relations between

⁸ See Q. Skinner (1978), I, pp. 9, 63-5, 144. For a recent account of the meaning of pluralism in the context of late medieval law and government, see M. Ascheri, *Istituzioni medievali*, pp. 371-4. Bologna, 1994.

⁹ See M. Ascheri, *La città-stato. Le radici del municipalismo e del repubblicanesimo italiani*, pp. 116, 157. Bologna, 2006.

¹⁰ See C.N.S. Woolf (1913), p. 115. On this matter, see also E. Coleman, "The Italian communes. Recent work and current trends" in *JMH* 25/4 (1999), pp. 373-97; M. Ascheri, "Beyond the *Comune*: the Italian city-state and its inheritance", in P. Lineham and J.L. Nelson (eds.), *The Medieval World*, pp. 451-68. London-New York, 2001.

¹¹ See C.N.S. Woolf (1913), p. 119-22; F. Ercole (1932), pp. 77-8; E. Lewis (1954), II, p. 456.

¹² See J. Canning (1987), p. 120. Let us recall, however, that Bartolus also affirmed that "*respublica et fiscus non sunt idem*". See Bartolus de Saxoferrato, *In tres Codicis libros, De iure fisci*, rubrica, § 3, fol. 2. Venetiis, 1575.

¹³ See O. von Gierke (1900), pp. 69, 83, 171, 183.

¹⁴ See F. Gilbert, "The humanist concept of the prince and *The prince* of Machiavelli" in *JMH* 11/4 (1939), pp. 449-83, 455. The same opinion is in F. Ercole (1932), p. 119-20.

the empire and the other powers was one for "practical jurists" rather than one for political theorists.¹⁵

Ullmann, as we have already pointed out, maintained that the Bartolist formula *civitas sibi princeps* marked an 'ascending' and 'populist' interpretation of the foundation of political authority.¹⁶ On this point, Woolf appeared to be very prudent, for he pointed out that Bartolus took every precaution in restraining the popular implications of his view of the *civitas sibi princeps*.¹⁷ In the opinion of Giorgio Fassò, Bartolus derived the *de iure* legitimacy of the *civitates* from their *de facto* autonomy without providing any foundation for the latter. Yet, he added, Bartolus based the law-making power (*potestas condendi leges*) of the cities not upon imperial permission, as his predecessors did, but on the notion of *iurisdictio*. Even if he never repudiated the idea of 'one empire, one law' (*unum imperium, unum ius*), Bartolus paved the way for the modern conception of territorial sovereignty.¹⁸ For Canning, the jurist sought a justification within the framework of Roman law, which he regarded as *ius commune* applicable to cities and to the *signori* whether they obeyed the emperor or not.¹⁹ In the view of this scholar, Bartolus' most significant contribution to fourteenth century public law remains the elaboration of a doctrine in which the commune recognising no superior constitutes a *populus liber*. Such an achievement is notable because in Roman law sources the expression *populus liber* denoted an independent community placed outside the empire, although possibly in alliance with it, whereas in Bartolus' view the *civitates* were formally part of the empire.²⁰ In this perspective, Black spoke of "a Copernican revolution in public law jurisprudence" for Bartolus "ascribed to the *civitas* not just special privileges but the totality of powers hitherto reserved for the emperor".²¹ While for Magnus Ryan Bartolus derived the *de iure* legitimacy of the *civitates* from a *de facto* autonomy, Jonas Cesar saw the possibility to relate Bartolus' *de facto*

¹⁵ See C.H. Mc Ilwain (1932), p. 239.

¹⁶ See W. Ullmann (1966), p. 282. See also W. Ullmann (1965), pp. 214-9. For a similar account, see Q. Skinner (1978), II, pp. 130-1.

¹⁷ See C.N.S. Woolf (1913), p. 177.

¹⁸ See G. Fassò (2001), I, pp. 227-8. This scholar credited Baldus de Ubaldis with the merit of having grounded the legal legitimacy of the cities on *ius gentium*. In this chapter, we shall try to demonstrate that prior to Baldus, Bartolus explicitly referred to the *ius gentium* as the legal basis for the sovereignty of the *civitates*. See also J. Canning (1987), pp. 93-7.

¹⁹ See J. Canning (1987), pp. 64-5.

²⁰ See J. Canning (1996), pp. 168-9.

²¹ The basis of self-government "was sought in custom, consent (by both emperor and people) and simple 'fact' as opposed to law". Bartolus "completed the process by which the ancient law of Rome became a living instrument and legal and political language for Europeans as [...] *ius commune* [...] upon which the laws of municipalities and states drew". See A. Black (1992), pp. 115-6, 127. Black refuted Skinner's interpretation arguing that "given the ambiguity in the meaning of *populus*, it is difficult to conclude, as Skinner does, that Bartolus had a theory of popular sovereignty" (p. 128).

reasoning to a general *de iure* basis.²² Finally, Ascheri followed the 'ascending' thesis of Ullmann emphasising the 'innovative' and 'democratic' character of Bartolus' contribution.²³

Taking this cluster of views and opinions as our background, we shall try to assess Bartolus' significance in respect of the theory of sovereignty. More particularly, we shall try to assess his alleged modernity by determining in what sense we can speak of a *de iure* justification of *de facto* situations, in what sense we can speak of constitutional pluralism, and in what sense the ideal-type of the *civitas sibi princeps* denotes popular sovereignty. We shall first treat the problem of Bartolus' approach to the right constitutional order, then his concept of statehood and sovereignty, and the problem of the empire in relation to the *sacerdotium*. Finally, we shall examine Bartolus' theory of sovereignty as he expounded it in *De regimine civitatis*.

9.2) Bartolus' approach to the problem of the *right* constitutional order.

As we pointed out in the previous chapters, in the Middle Ages the problem of the constitutional order had a very specific nature for it was mainly the problem of the transcendental foundation of it. Thus, it was the problem of the search of the ethically right social and political order. In the jurisprudential perspective, the image presenting justice as virtue, law broadly understood as execution of justice, and jurisprudence as knowledge of all laws, as codified by Accursius in the *Glossa*, constituted the basic conceptual framework for a search of that kind.²⁴ The particular question of the approach to the problem of the right constitutional order in Bartolus is also the question of how he conceived and experienced transcendence. In this perspective, there is a particular interpretative problem that the historian of legal and political ideas has to face. In fact, in scholarly work, the name of Bartolus is associated to "absolute adherence to fact".²⁵ This interpretative tradition goes back to Baldus de Ubaldis who, as we have already pointed out, portrayed his teacher as a man devoted to practice more than to theory: "*homo*

²² See M. Ryan, "Bartolus of Sassoferrato and free cities" in *Transactions of the Royal Historical Society* (Sixth Series), 10 (2000), pp. 65-89, 88-9; F. Jonas Cesar, "Popular autonomy and imperial power in Bartolus of Saxoferrato: an intrinsic connection" in *JHI* 65/1 (2004), pp. 369-81, 376-7.

²³ See M. Ascheri (2006), pp. 116-17.

²⁴ In one of his glosses to Inst. 1, 1, 1 Accursius posed the question of the difference between justice, law, and jurisprudence: "*iustitia est virtus, ius est eius virtutis executivum, iuris prudentia est scientia illius iuris. Item iustitia vult tribuere unicuique ius suum, ius vero coadiuvat, iuris prudentia docet qualiter illud fiat*". See Accursius, *Glossa in volumen*, gl. noticia, fol. 3.

²⁵ See C.N.S. Woolf (1913), p. 136; D. Segoloni, "Chiesa e Impero al tempo e nella dottrina di Bartolo" in *BSDC*, II, pp. 516-63, 516; G. Ermini, *Storia dell' Università di Perugia*, pp. 113-21. Bologna, 1947; B. Paradisi, "La diffusione europea del pensiero di Bartolo e le esigenze attuali della sua conoscenza" in *BSDC*, I, p. 421; E. Cortese (1995), II, p. 434.

multum inhaerens practicae".²⁶ In what sense was Bartolus practically oriented? Is there any connection between his practical disposition and the view of the right constitutional order he held? In spite of the long-standing tradition seeing him as an eminently practically oriented figure, and in order to avoid transforming this feature into a myth or a misunderstanding, we should first try to shed some light on the meaning of 'realism' in respect of Bartolus' personality, and on the nature of the relationship between his adherence to fact and his vision of transcendence, something which has been often emphasised by the reference to Bartolus' devotion and religious zeal. Then we should determine to what extent these elements have influenced his approach to the problem of the right constitutional order.

Let us focus on the alleged realism of the jurist. Bartolus' fame for having being a 'man of practice' is partially derived from the fact that he managed to modify the puzzling and even contradictory terminology of the Justinian codification in order to create a coherent and useful vocabulary in support of the interest of the *civitas Perusina*. In spite of the fact that many emphasise that the solutions contained in his *commentaria* and *consilia* are a monument to practice, and even a treasury of legal wisdom, Bartolus put a set of well-defined legal notions and categories to the service of the city of Perugia.²⁷ It is undeniable that Bartolus devoted most of his energies to the solution of legal problems, and it could be argued that such an activity had important political implications, the kind of implications that a number of modern jurists would regard detrimental to the integrity of the legal profession. Yet, his attitude towards law and government was not devoid of those normative concerns that again a number of modern jurists would regard as irrelevant from the point of view of legal professionalism.²⁸ However we assess this peculiarity of Bartolus' personality, we should be prepared to accept that both political pragmatism and normative concerns were an essential part of Bartolus' approach to law and government. To have an idea of Bartolus' complex attitude, we could think of the jurist's quasi-metaphysical conception of jurisprudence and of the task of the jurist. As both Woolf and Segoloni recalled, in the *Sermo* dedicated to his brother Bonaccursius in occasion of his doctorate, Bartolus portrayed the *civilis sapientia* as the only 'perfect' science, namely as the only science in need of no external support, and the only one capable to provide the solution for all practical and theoretical problems. Moreover, in the *Tractatus Testimoniorum* the jurist argued that the *ius nostrum* is *sapientia*, *scientia*, and *ars*.

²⁶ See Baldi de Ubaldi, *In IX Codicis librum Commentaria, De iis qui accusare non possunt, prius*, § 29. Venetiis, apud Iuntas, 1599. See also F. Ercole (1934), p. 575. For this aspect of Bartolus' personality, see F. Ercole, "Bartolo da Sassoferrato" in *Celebrazioni Marchigiane*, I, pp. 560-85, 575.

²⁷ See M. Ascheri (2006), pp. 116-17. See also P. Costa (2002), p. 99.

²⁸ According to a considerable number of modern jurists, the more a jurist takes distance from all possible extra-legal elements while dealing with legal problems and cases, the more he deserves the title of 'practically oriented mind'. We believe that this stereotype image cannot be imposed upon medieval jurists.

Echoing Ulpianus (Dig. 1, 1, 10), Bartolus claimed that jurisprudence as wisdom of human and divine affairs was sacred, and consisted in the theoretical study and apprehension of the first causes, precisely as theology and metaphysics – and that is why both the *bonus iudex* and the *bonus iuris peritus* were to be properly called *sapientes*. As science, jurisprudence consisted in the habit of demonstrative reasoning applied to causes regulating changeable human affairs. Finally, jurisprudence is an art in that it denotes the ability to establish the good and the equitable as the definition of Celsus reported by Ulpianus suggested (Dig. 1, 1, 1).²⁹ In terms of commonsense, Bartolus' exaltation of jurisprudence is far from having a practical character and even contradicts Christian doctrine, which was contrary to the overestimation of any earthly discipline. This fact appears particularly odd if we think of how zealous the jurist was in matters concerning Christian faith.³⁰ On the other hand, this kind of exaltation is probably a discourse aimed at securing the position of pre-eminence of the jurists in public affairs. In this sense, Bartolus managed to hide a number of political concerns under the mantel of juristic rhetoric.

If by the term 'realism' we intend to denote a philosophical position according to which all that exists and counts is matter alone, certainly Bartolus was not a realist. Bartolus was a devoted Christian in spite of the fact that his concept of jurisprudence and of the task of the jurist contradict Christian doctrine. According to Danilo Segoloni, the jurist's adherence to fact was in part the result of his religious commitment, which made him conceive the legal profession as a mission bestowed from above with a view to the triumph of justice, the basic pillar of society.³¹ We can use the adjective 'realist' to denote the approach of somebody who is willing to leave behind certain normative concerns and to act according to the principle of prudence, namely adjusting his behaviour to the circumstances. As we have already pointed out, Bartolus was far from leaving ethical concerns behind. This does not mean that he gave up acting according to the principle of

²⁹ See C.N.S. Woolf (1913), pp. 12-20; D. Quaglioni (2004), pp. 85-6. Woolf pointed out that at the time of Bartolus the expression *ius nostrum* denoted a complex compound including late additions, feudal and customary law, the *Glossa* of Accursius, Canon law, and the statutes and customs of the Italian communes (p. 147). See also J.L.J. van de Kamp (1936), pp. 137-45. Quaglioni observed that in defining jurisprudence as wisdom, science, and art, Bartolus made use of Aristotelian categories as elaborated by St. Thomas Aquinas (p. 89). On the significance of law, besides the references already provided, see S. Reynolds, "Medieval law" in P. Lineham and J.L. Nelson (2001), pp. 485-502.

³⁰ This characteristic, Quaglioni remarked, is witnessed by Diplovatatus' assertion that among the sixty-four volumes that were part of Bartolus private collection, there were more than thirty volumes of theology. See D. Quaglioni (2004), p. 84.

³¹ See D. Segoloni in *BSDC*, II, p. 516. Segoloni suggested that Bartolus' practical attitude depended on his temperament, of which, however, we know too little. Probably, the political desires of the city of Perugia and the imperatives of the legal profession played a notable role in the development of Bartolus' pragmatic attitude.

prudence. The medieval men of learning, as well as ordinary people, were familiar to the general meaning of *prudentia*. Was Bartolus a prudent man in this sense? As we already pointed out, the political sensibility of Bartolus indicates that he was indeed very 'prudent'. We should specify that any comparison between the jurist and the prudent ruler as described by Machiavelli would be misleading, although a number of scholars recalled that in some occasions Bartolus was opportunistic, at least as far as his acquiescence towards the papal claims of fullness of power were concerned.³² Finally, if by the term 'realism' we intend to denote the particular philosophical position that postulates the existence of substances or essences for any term, we could say that although Bartolus was not interested in the philosophical discussions on the universals, his religiosity presupposed relevant elements of those discussions, namely it presupposed philosophical realism. In the eyes of Bartolus, God is real, namely substance, precisely in the same sense in which the wisdom of Roman law is substance, not a mere convention. From the point of view of this definition too, Bartolus' adherence to fact, which according to various historians has to do with his sense of religiosity, appears as something complex and even controversial.

We can now relate the question of Bartolus' realism to the question of the nature of his approach to the problem of the right constitutional order. A number of scholars maintain that Bartolus did not treat the latter problem in a systematic manner because such a problem has philosophical nature and Bartolus was a jurist, not a philosopher. To support this point of view, Bartolus' practical attitude is evoked. Woolf in particular claimed that the jurist's adherence to fact would consist in a marked lack of interest for any comprehensive account of Public law. Woolf insisted that Bartolus was not a political philosopher, and affirmed that his commentaries "provide us with the *disjecta membra* of a system", namely with fragments that only modern exegesis can recombine into a coherent and broader picture. Woolf did not provide any working-definition of what a systematic public law theory is, or ought to be. He only repeated that Bartolus was a lawyer "concerned to evolve a law practically effective for the Italy of his day".³³ Along this line, McIlwain remarked that although no one can expect to find in Bartolus' writings many significant contributions to political thought, yet we find "some invaluable indications of the nature and the practical effects of some of the political ideas generally held in the fourteenth century".³⁴ Due to the absence in medieval learning of a sharp distinction between law and government, and consequently between law and political philosophy, it is difficult to assess Bartolus' contribution to the elaboration of the right constitutional order. In general, we may agree that

³² See C.N.S. Woolf (1913), p. 98; F. Ercole (1932), p. 60. Segoloni disagreed with Woolf and Ercole on this point. See D. Segoloni, in *BSDC*, II, p. 516.

³³ See C.N.S. Woolf (1913), pp. viii, 4, 9, 208.

³⁴ McIlwain mentioned *De tyrannia* as the only one work that "attempts to deal at all systematically with any political problems". In it, "his purpose is as always that of the practical lawyer only". See C.H. McIlwain (1932), p. 345.

Bartolus did not contribute greatly to development of medieval political thought for he made use of the political concepts and ideas already available. From this point of view, his rather passive attitude towards those concepts and ideas makes Bartolus look like the type of 'politically idiotic' jurist of which Aegidius Romanus, whose teaching Bartolus declared to have appreciated, spoke.³⁵ Yet, as Ascheri suggested, we should not undermine the relevance of the jurist's contribution to medieval political thought. The emphasis Bartolus put on the *civitas sibi princeps* can be seen as an important doctrinal and political compensation for the increasing influence of the *signori*.³⁶

According to Woolf, however, the attention given to the problem of the Italian communes constitutes the key to comprehend Bartolus' adherence to fact. Municipal statutes, this scholar wrote, played a major role in the elaboration of a law that, "while Roman in basis, was to be practically effectual for the Italy of his day". He was "always ready to illustrate a legal point by appealing to his own experience, to cases he has known or to opinions he has given both at Pisa and Perugia, the two cities most closely connected with his name", and elsewhere.³⁷ Bartolus' way to the constitutional order was thus the way of the *civitates*, the only forces that in the *Regnum Italicum* were able to counter and even challenge the claims of both Empire and Church, and that the *ratio* and the *utilitates* of the local customs had let emerge.³⁸ In this perspective, Bartolus' adherence to fact appears in an ambivalent light. This ambiguity, we believe, constitutes one of the keys to decipher Bartolus' contribution to the theory of medieval sovereignty. In this context, the adjective 'right' may denote both the *ordo ordinatus*, the *status quo*, existing in the *Regnum Italicum*, and the *ordo ordinans* constituted by the one established and preserved in accordance with the *immutabilia* of law and government. These two meanings and dimensions coexist, and Bartolus' enchantment with law looks like a compound of different ingredients. His approach to the problem of the 'right' constitutional order could be qualified, as we already pointed out, as one in which political prudence and normative inspiration are inextricably linked to each other. This approach, so eclectic, may be called juristic in the most genuine medieval sense, and it may constitute what we may call the formal dimension of a problem the substance of which is the configuration of statehood.³⁹ In the next paragraph, we shall see how, through *iurisdictio* and *persona*

³⁵ See Aegidius Romanus, *De regimine principum*, II, 2, 8: "sic legiste quia ea de quibus est politica dicunt narrative et sine ratione, appellari possunt ydiote politici".

³⁶ See M. Ascheri (2006), p. 157.

³⁷ See C.N.S. Woolf (1913), pp. 136, 10.

³⁸ See M.G. Fantini (1998), p. 117.

³⁹ The adjective 'juristic' is in our view to be preferred over 'legal', which denotes the condition of something being established by law, therefore allowed, or having legal efficacy or force. Moreover, it is to be preferred over 'legalistic'. In Christian theology, for example, the latter adjective is often used in a pejorative sense, being referred to a kind of fixation on written law, usually implying an allegation of pride and the neglect of mercy.

iuridica especially, the jurist came to treat what in modern terminology we would call statehood.

9.3) Bartolus' concept of statehood.

9.3.1) The problem of the *persona iuridica*

In this paragraph, we shall address the question of Bartolus' concept of statehood, which many regard as one of the major products of modern politics, and associate to legal personality. From the late sixteenth century onwards, the theory of the territorial state as *persona civilis*, *persona artificialis*, or *corpus fictitium* played an increasingly important role in the debates on the nature and function of law and government.⁴⁰ In the eighteenth century, let us say at the time of Rousseau's *Du contrat social*, the legal personality of the State was considered achieved. Elaborating on the important distinction between sovereign, State, and government, Rousseau affirmed that the executive power is on a small scale what the body politic, which contains it, is on a large scale, namely "*une personne morale*".⁴¹ On a parallel basis, the distinction between *personae publicae* and *personae privatae* gained a probably unprecedented attention.

Canning observed that in the writings of the thirteenth and fourteenth century jurists too we find evidence of legal personality, even if "there is no term for this abstraction". What we appreciate of them is "a major advance in corporation theory through the opening up of a wide expanse of juristic possibilities associated with the application of the word *persona*, to the corporation".⁴² Corporation theory, as we have seen, is presupposed in Marsilius'

The term is usually part of the debate on the two aspects of Christian salvation, the legal one, presupposing the notions of justification and guilt, and the moral, presupposing the notions of pollution and sanctification. In law, the term came to denote strict adherence to law, especially to its letter. In this field too, the term bears a negative connotation and the suffix *-ism* somehow emphasises it. McIlwain used the expression "spirit of legalism" in a positive sense saying that it has "never ceased to mould the political institutions and thought of the West since Roman times". See C.H. McIlwain (1932), p. 135. To most fourteenth century men of learning, however, the adjective *civilis* in the locution *civilis sapientia* denoted political life *tout court*, and the expression in question was associated to what has been called 'model of government by law'. See L. Mayali, "*Ius civile et ius commune dans la tradition juridique médiévale*", in J. Krynen (ed.), *Droit romain, Jus civile et droit français*, pp. 201-17. Paris, 1999.

⁴⁰ See the interesting remarks in N. Matteucci (1993), pp. 15-25.

⁴¹ See J.-J. Rousseau, *Du contrat social*, III, I, p. 398. Rousseau specified that the essential difference between these two bodies is that the State exists by itself, and the government exists only by virtue of the sovereign people.

⁴² See J. Canning, "The corporation in the thought of the Italian jurists" in *HTP* 1/1 (1980), pp. 9-31, 15.

approach to the *universitas civium*, and the same is inherent to both the notions of *populus* and *congregatio fidelium*.⁴³ According to Pennington, medieval corporate theories had importance in two senses. On the one hand, they generally served the purpose of facilitating the carrying out of the relationships between the head and members of a group, inwardly and outwardly. On the other hand, they provided the basis for the contractual theories of political representation. The canonistic doctrine of the *corpora* in particular, this scholar said, was an important tool for the justification of constitutional or limited government.⁴⁴

To detect the presence of statehood in Bartolus' writings is to examine his views on the status and significance of the *corpora*. The very presence of statehood in the Middle Ages, as we know, constitutes a *vexata quaestio*. The term *status* in expressions like *status regni*, *status republicae*, *status coronae*, *status ecclesiae* denoted then a condition, a way of being, and no word yet existed for 'State' as we know it in modern legal and political discourse. Historians of modern politics and law, as well as a number of medievalists, Post observed, have been reluctant to recognize "a conscious theory of the State and public law" in the Middle Ages.⁴⁵ During the fourteenth century, the territorial consolidation of the *regna* consisted primarily in an increased centralisation of administrative functions and tasks. Such a phenomenon constitutes a crucial step in the long process culminating in the edification of a 'modern' State, properly speaking, namely a State that is able to fix the extension and boundaries of its own competence and claiming competence over the whole sphere of human existence.⁴⁶ Whether one prefers to see Bartolus as a practically oriented jurist concerned with the *commoditas* and *utilitas* of communal life, or as a normative theorist concerned with 'good life', we must address the question of whether Bartolus conceived territorial statehood, and if so, how. It is to be doubted that in the writings of any fourteenth century jurist we find a concept of statehood similar to ours, whereby the notion of 'statehood' is indistinguishable from 'sovereignty', whereby the latter coincides with 'reason of state', and the close links to the 'nation' are obvious. Enrico Besta noted that if by sovereignty we mean 'absolute independence' of the State in respect of any other power, internal or external, we should conclude that in the Middle Ages no State was definitely sovereign.⁴⁷ The hypothesis here advanced is that although Bartolus did not speak of 'State' in the sense in which a modern jurist or political thinker would and could

⁴³ See B. Paradisi (1997), p. 326.

⁴⁴ See K. Pennington, "Law, legislative authority, and theories of government: 1150-1300", in CHMPT (1988), I, pp. 424-53.

⁴⁵ See G. Post (1964)[B], p. 245. The author noted that "if there was no state, there was no *ragione di stato* before the sixteenth century", although some elements and attributes of it appeared in the thirteenth and fourteenth centuries (p. 242).

⁴⁶ See W. Reinhard, "Power Elites, State Servants, Ruling Classes, and the Growth of State Power", in W. Reinhard (ed.), *Power Elites and State Building*, pp. 1-18. Oxford, 1996.

⁴⁷ See E. Besta, *Il diritto pubblico italiano dagli inizi del secolo XI alla fine del secolo XV*, p. 50. Padova, 1929.

do, he treated its core features by means of two important legal notions: *iurisdictio* and *persona iuridica*.

Previously, we referred to Bartolus' *arbor iurisdictionum*, the image of the jurist's elaboration of the notion of jurisdiction, which functioned as one of the pillars in the construction of the sovereignty of the *civitates*.⁴⁸ As we pointed out, he referred to jurisdiction in the narrow technical or procedural sense. We then argued that his vision of jurisdiction constituted an important moment of synthesis, based as it was upon the traditional teaching that the office of judging is of the widest sort: "*officium iudicis est genus generalissimum*".⁴⁹ As we recalled, in his commentary to the constitution *Omnes populi*, Bartolus stated that the division of the provinces derives its validity from the law of nations, that every people has the right and power to establish its own particular laws, and that to make laws is a jurisdictional power generally understood.⁵⁰ We argued that defining jurisdiction as "*potestas de iure publico introducta cum necessitate ius dicendi et aequitatis statuendae tamquam a persona publica*" meant emphasising that the necessity to establish *iurisdictio* expressed prerogatives to be ascribed to the *persona publica*. We also recalled Bartolus' conviction that jurisdiction was inherent to persons, not to territory, and that *iurisdictio* and *dominium* were essentially the same. Due to the vision of jurisdiction as genus, against the *Glossa* but following Belleperche and Cynus, the jurist could argue that the two existing types of *imperium* – *merum* and *mixtum* – were species of *iurisdictio* generally understood.⁵¹ Now, we have to turn our attention to the notion of *persona iuridica*.

There is a large amount of studies on the doctrines of the medieval jurists concerning the legal personality of corporations, namely the notion of *persona ficta*, but the problem of its historical formation is a complex one, and its exploration presents difficulties. First, it is difficult to locate the notion of *persona ficta* within private or public law exclusively. The dividing line between the private and public law discourses, as far as the development and employment of the concepts at stake are concerned, appears blurred. If, on the one hand, within the *Regnum Italicum*, one of the major forms of corporation that the jurists considered was the independent city-republics, on the other hand, as Robert Feenstra observed, the term *persona* appears as keyword in several medieval discussions of the juridical character of

⁴⁸ See Bartolus a Saxoferrato, *In primam Digesti Veteris partem*, fol. 45. Lugduni, 1581.

⁴⁹ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, de iurisdictione omnium iudicum*, l. *ius dicentis*, § 1, in BSC, I, fol. 49.

⁵⁰ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, De iustitia et iure*, l. *de hoc iure*, § 4, and l. *Omnes populi*, in BSC, I, foll. 7, 9, 10.

⁵¹ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, De iurisdictione omnium iudicum*, l. *ius dicentis* and *imperium*, in BSC, I, foll. 48-50. See also C.N.S. Woolf (1913), pp. 405-6.

what we now call foundations and trusts.⁵² Second, the question of the origin of the the notion of *persona* – being it ecclesiastic or lay – is still debated. Finally, although usually the problem of the legal personality of corporations is treated within the context of the realist and fiction theories, it remains questionable, as Canning pointed out, whether this approach helps us in properly addressing the question of the meaning of the medieval corporation theories.⁵³

It is often argued that not all human affairs can be satisfactorily handled in terms of the rights and duties of individual human beings. That is why the law creates legal personality, namely it recognises that there are entities other than individual human beings endowed with the legal capacity of human beings and thus able to bear legal rights and duties. A legal person, Feenstra recalled, is the antithesis of a natural person, defined as a human being having capacity to bear rights and duties.⁵⁴ Medieval jurists employed a large number of terms to designate forms of corporation, including the generic term *universitas* and others like *corpus*, *communitas*, *respublica*, *populus*, *civitas*, *collegium*, and *societas*. Among historians of Roman law, it is maintained that the Romans did not know the abstract concept of legal person, although they knew several kinds of what we call legal persons, and they allowed them to bear rights and duties that in fact make up what we call legal personality. What does it mean that the Romans did not know legal personality but they knew entities bearing rights and duties similar to those that modern legal persons bear? In general, as Patrick Duff put it, the Roman jurists “never theorised about them”, and “they never discussed the nature and origin of a right-and-duty bearing unit”.⁵⁵ This, obviously, does not mean that the Roman jurists were incapable of abstraction. In various passages of the Justinian codification, we find a general distinction between *persona singularis* and *collegia*, *corpora*, *consortia*, *coetus*, *curiae*, and *populus*. In a famous passage, Ulpianus argued that what is owed to the corporation is not to be owed to its members, and what the corporation owes to others is not owed by its members directly: “*si quid universitati debetur, singuli non*

⁵² See R. Feenstra, “Foundations in continental law since the 12th century: the legal person concept and trust-like devices” in R. Helmholz and R. Zimmermann (eds.), *Itinera fiduciae. Trust and Treuhand in Historical Perspective*, pp. 305-26. Berlin, 1998.

⁵³ See J. Canning (1980), p. 17. The application of these modern interpretative paradigms to medieval law and government, Canning suggested, must be cautious. Otto von Gierke, for example, was concerned with the problem of the legal personality of medieval corporations arguing in terms of the realist and fiction theories primarily.

⁵⁴ See R. Feenstra (1998), p. 306.

⁵⁵ See P. Duff, *Personality in Roman Law*, p. 203. Cambridge, 1938. In this apparently neutral statement, we may detect the traces of anachronism consisting in evaluating the lack of theoretical discussion on certain legally relevant topics by Roman jurists as the sign of lack of interest in legal theory. It could well be the case that later developments in legal professorship do not necessarily constitute a solid ground for evaluating retrospectively the nature of the attitude of the Roman jurists towards certain legal concepts and categories.

debetur: nec quod debet universitas singuli debent" (Dig. 3, 4, 7 § 1).⁵⁶ On this matter, Accursius argued that the *universitas* is a collection of men: "*universitas nihil aliud est, nisi singuli homines qui ibi sunt*".⁵⁷ On the other hand, he also said that corporations and individuals are conceptually distinct. In fact, the death of the actual inhabitants of a community does not determine the death of the latter for new inhabitants replace the old ones. Accursius compared this situation with that of someone who does not lose his voice only because he stops talking.⁵⁸ The views expressed by the *Glossa* appear contradictory somehow, but this does not mean that the early generations of medieval jurists as well gave up abstraction and accuracy. Following Calasso, we could say that as soon as the needs of the day pressed the jurists to do so, abstraction and coherence made the way for accommodating to fact, but this circumstance alone by no means indicates that the first jurists abandoned abstraction and accuracy.⁵⁹ For example, in the anonymous treatise titled *Quaestiones de iuris subtilitatibus*, presumably written between the end of the twelfth and the beginning of the thirteenth century,⁶⁰ the equations between *communitas* and *corpus humanitatis*, and between *romana civitas* and *universitas* were established. They can be taken as an example of abstraction safely. For the anonymous author of the *Quaestiones* the whole *corpus humanitatis* was *communitas* and *universitas* par excellence, and even if abstractly defined such a whole had as a concrete purpose that of providing the people with the sufficient conditions for their well being.⁶¹ Gradually and not without doctrinal uncertainties, the abstract notion of *persona* was developed in the hands of the jurists. In Rogerius, for example, we find stated the principle of equivalence between *universitas* and *populus*.⁶² The development

⁵⁶ In another passage, appears the private law notion of *corpus habere*: "*quibus autem permissum est corpus habere collegii societatis sive cuiusque alterius eorum nomine, proprium est ad exemplum rei publicae habere res communes*" (Dig. 3, 4, 1 § 1).

⁵⁷ See Accursius, *Glossa in Digestum Vetus*, gl. *si quid non debet*, *Quod cuiuscumque universitatis nomine vel contra eam agatur*, l. *sicut municipum*, fol. 61.

⁵⁸ See Accursius, *Glossa in Digestum Novum*, gl. *competit*, *De collegiis et corporibus*, l. *mandatis*, fol. 219. For a discussion of the relationship of the corporation and individual members of it, see A. Black, "The individual and society" in CHMPT (1988), I, pp. 588-606, 598-604.

⁵⁹ See F. Calasso (1949), p. 221.

⁶⁰ A number of distinguished German, French, and Italian historians debated on the origin and the authorship of this treatise towards the end of the nineteenth century. Fitting's initial attribution of the authorship to Irnerius was soon rejected. See H.H. Fitting (ed.), *Quaestiones de iuris subtilitatibus des Irnerius*, pp. 1-9. Berlin, 1894. See also E. Kantorowicz, *Glossators of the Roman Law*, pp. 1-13, 181-205. Cambridge, 1938.

⁶¹ See G. Zanetti (a cura di), *Quaestiones de iuris subtilitatibus*, V, § 7-8, p. 23. Firenze, 1958. See also F. Calasso (1949), pp. 220, 272-5.

⁶² See Rogerius, gl. *ad Cod. 1, 14, 12, 3/4, de legibus et consuetudinibus*, l. *si imperialis*, § *definimus* or *cur autem*, in *v. soli imperatori* or *cui soli*. The passage appears in E. Cortese (1962-64), II, p. 174. If Rome and the Empire were forever, Kantorowicz argued, it followed that the Roman *populus* too was forever, "no matter who may have been substituted for the original *populus Romanus* or played its part at a given moment". The medieval jurists

here in question was related to the philosophical debates on the universals. One of the initial sources of the discussion on the universals was Boethius' commentary on the *Isagoge* of Porphyry. The former quoted the latter as asking whether species and genres actually subsist or whether they were just a creation of the intellect ("*in solis nudis intellectibus posita [sunt]*") and, if they actually subsist, whether they subsist in connection with the human senses ("*separata a sensibilibus an in sensibilibus*").⁶³ In his *Epistula de nihilo et tenebris*, Fredegisius of Tours (d. 834), a pupil of Alcuin of York, maintained that there must be even something that precisely correspond to the word 'nothing'.⁶⁴

A number of scholars traced the constitutive elements of the modern concept of the legal person back to Canon law. Sinibaldus Fliscus, pope Innocent IV (1243-1254), is said to have laid down the equivalence between *universitas* and *persona*.⁶⁵ In one of his commentaries on the Decretals, he fixed the principle that in matters concerning the *universitas*, a *collegium* is treated as one person ("*cum collegium in causa universitatis fingatur una persona*") for the first time.⁶⁶ Commenting on the *Liber Extra* (1232) of Gregory IX, he also opposed that crime and excommunication can be ascribed to collectivities, specifying that each collectivity is *persona ficta et repraesentata*, a mere *nomen iuris* or *nomen intellectuale*.⁶⁷ On the basis of von Gierke's study, some scholars have seen in these statements an adumbration of the fiction theory, but others doubted that Innocent IV is to be indicated as the father of the

"specifically recognised the principle of identity despite change or within changes". See E.H. Kantorowicz (1997), p. 294.

⁶³ See Boethius, *Commentaria in Porphyrium*, I.

⁶⁴ See Fredegisius Abbas S. Martini Turonensis, *Epistula de nihilo et tenebris*, col. 751-6: "*omnis significatio est quod est. Nihil autem aliquid significat. Igitur nihil ejus significatio est quid est, id est, rei existentis*". The anti-realist position had found in Roscelin (d. 1120) one of the most famed voices. On the matter of voices, St. Anselm opposed him as the champion of those those "*qui non nisi flatum vocis putant esse universales substantias*". See Anselmus, *Liber de fide trinitatis et de incarnatione verbi. Contra blasphemias Ruzelini sive Roscelini*, II.

⁶⁵ For an early account of this view, see F. Ruffini, "La classificazione delle persone giuridiche in Sinibaldo dei Fieschi (Innocenzo IV) ed in Federico Carlo di Savigny" in *Scritti in onore di F. Schupfer*, II, pp. 313-93. Torino, 1898. For an account of the Canon law reflection on the legal person, see P. Gillet, *La personnalité juridique en droit canonique*. Malines, 1927; A.M.T. Vermeersch, "De personae moralis origine seu constitutione" in *Jus Pontificium* 10 (1930), pp. 288-91; P. Grossi, "Unanimitas - Alle origini del concetto di persona giuridica nel diritto canonico" in *Annali di storia del diritto* 2 (1958), pp. 1-103; P. Todescan, "Dalla *persona ficta* alla *persona moralis*" in *Quaderni fiorentini* 11/12 (1982/83), I, pp. 59-93.

⁶⁶ See Innocent IV on X, 2, 20, 57. The passage appears in R. Feenstra, "L'Histoire des fondations. A propos de quelques études récentes", in *TvRG* 24 (1956), pp. 381-448, 415.

⁶⁷ See Innocent on X, 5, 39, 53. The passage appears in R. Feenstra (1956), p. 417. See also Innocent on Sext 5, 11, 5 as quoted in R. Orestano, *Il problema delle persone giuridiche in diritto romano*, p. 11. Torino, 1968.

modern fiction theory.⁶⁸ Robert Feenstra maintained that in spite of the contribution by Innocent IV, the French jurists of the School of Orléans took the decisive step for the exhaustive configuration of the *persona ficta* or *rapraesentata*. In his commentary on the *Digestum vetus*, Feenstra explained, Jacques de Révigny treated a *collegium* as a proper *persona repraesentata* to assert that certain bodies could exist independently from the individuals who are part of them, for the first time. Jean de Monchy, the teacher of Révigny, Feenstra argued, probably influenced his pupil with this regard. Pierre de Belleperche and the Canonist Jean Lemoine (Johannes Monachus) followed this teaching, and through the latter it came down to Johannes Andreae. Focusing on the private law aspects of the question, the Dutch scholar concluded that Cynus and Bartolus have been erroneously considered the progenitors of the doctrine of the *persona ficta*. Rather they had taken the essence of the doctrine from the French jurists, whom they referred to often, not always mentioning it. Feenstra, however, conceded that although the concept of the legal person was born to the French jurists, this does not mean that the concept of statehood was then given definitive form.⁶⁹

Searching for the oldest sources of the concept of the legal person remains intriguing, although it is not entirely clear why the Canonists too must have necessarily taken the idea of *persona repraesentata* from the jurists of the School of Orléans, when in the theological vocabulary of the Church with which they were familiar the notion of *corpus* already existed and could serve as the basis of further elaboration. Feenstra, following Eliachevitz, eluded the question of the possible external – theological – influence on the elaboration of the French jurists by arguing that the expression *corpus Christianorum* as employed for example in the Edict of Milan of 313 by Constantine and Licinius on the restoration of the Church was legally vague and obscure.⁷⁰ It might be argued that the concept of *corpus* as *unitas*

⁶⁸ In support of the first view, see O. von Gierke (1881), III, pp. 279-80; M.J. Rodriguez, "Innocent IV and the element of fiction in juristic personalities" in *The Jurist* 22 (1962), pp.287-318; F. Todescan, *Diritto e realtà. Storia e teoria della fictio iuris*, pp. 89-102. Padova, 1979. See also A. Campitelli, "*Cum collegium in causa universitatis fingatur una persona*" in *Apollinaris* 63 (1990), pp. 125-31. In support of the second view, see R. Feenstra (1998), pp. 312-14; J. Canning (1980), pp. 16-8. For an account of the fiction theory, see P. Michaud-Quantin, *Universitas. Expressions du mouvement communautaire dans le moyen-âge latin*, pp. 206-11. Paris, 1970. On the realist theory, see also Maitland's remarks in his introduction to O. von Gierke (1900), xxvi.

⁶⁹ See R. Feenstra (1998), pp. 315-7. This view is restated in K. Bezemer, "The Law School of Orleans as school of public administration", in *TvRG* 66 (1998), pp. 247-77. Thielen credited Bartolus with the merit of having laid down the foundation for the modern theory of juridical personality exaggerating the novelty of his contribution. See J.E.D.M. Thielen, "*Universitas vice personae fungitur*". *Een verhandeling over het ontstaan van de privaatrechtelijke rechtspersoon en de omgang daarmee in de tijd van zijn ontstaan*, p. 119. Lelystad, 1999.

⁷⁰ See R. Feenstra (1998), p. 309; B. Eliachevitz, *La personnalité juridique en droit privé romain*, p. 339. Paris, 1942. The Latin version of the Edict to which we refer in the text is taken from Lactantius' *De mortibus persecutorum*, 48, in S. Brandt et G. Laubmann (eds.), *L. Caeli*

distinguished from the totality of its members is a logical construct applicable in diverse fields of expertise. There is no evidence suggesting that law deserves a special right of primacy in respect of the notion of *corpus*. Moreover, text of the Edict of Milan presupposed a doctrine whose general terms had been expounded in a number of sources of theological nature. The Edict presents elements that we find in St. Paul's doctrine of the Church as *corpus Christianorum* as expounded in some of his letters, where the apostle fixed the configuration of the proper relationship between the members of the Church and the latter as a whole.⁷¹ It may be maintained, with E.H. Kantorowicz, that the doctrine of the Church as *corpus mysticum*, the head of which is Christ, "has been transferred by the jurists from the theological sphere to that of the state the head of which is the king".⁷² In the Edict of Milan, the emperors also reminded their provincial governor that everybody ought to be granted the right of adhering to any religious group.⁷³ Then, as Lactantius reported, they made an appeal to his solicit intervention by ordering all the property once at the disposal of the Church as a body, not as collection of individuals, to be given back.⁷⁴

Michael Wilks, who was of the opinion that the expression *corpus Christi mysticum* was directly applied to the *Ecclesia* not before the twelfth century, recalled that even the sacraments were primarily associated with the notion of *corpus* for

Firmiani Lactanti Opera Omnia, II, I, CSEL 27, pp. 228-33. Prague, 1893. The English translation of it appears in P.R. Coleman-Norton, *Roman State and Christian Church. A Collection of Legal Documents to A.D. 535*, I, pp. 30-5. London, 1966.

⁷¹ See I Cor 12, 12-27: "*sicut enim corpus unum est et membra habet multa, omnia autem membra corporis, cum sint multa, unum corpus sunt, ita et Christus; etenim in uno Spiritu omnes nos in unum corpus baptizati sumus, sive Iudaei sive Graeci sive servi sive liberi, et omnes unum Spiritum potati sumus. Nam et corpus non est unum membrum sed multa [...] Et sive patitur unum membrum, compatiuntur omnia membra; sive glorificatur unum membrum, congaudent omnia membra. Vos autem estis corpus Christi et membra ex parte*". See also Rom 12, 4-5: "*Sicut enim in uno corpore multa membra habemus, omnia autem membra non eundem actum habent, ita multi unum corpus sumus in Christo singuli autem alter alterius membra*". For an elucidation of this interpretation, see M. Roberti, "Il *corpus mysticum* di S. Paolo nella storia della persona giuridica" in *Studi di storia e diritto in onore di Enrico Besta*, IV, pp. 37-82. Milano, 1932. See also E. Dublanchy, "Église", in A. Vacant, E. Maugenet, É. Amman, *Dictionnaire de Théologie Catholique*, IV-2, coll. 2108-224. Paris, 1939.

⁷² See E.H. Kantorowicz (1997), pp. 15-6. Kantorowicz affirmed that the "hallowing of the *status regis et regni*, of state institutions and utilities, necessities and emergencies, would have remained incomplete had not that new state itself been equated with the Church also in its corporational aspects as a secular *corpus mysticum*" (p. 192).

⁷³ The statement, a rather vague petition of principle from the point of view of the Christian doctrine and yet embodying important practical implications for the Christians of the time, is in accordance with the provisions of the so-called Edict of Toleration issued jointly by Galerius, Constantine, Licinius, and Maximin in April 311 at Nicomedia. See P.R. Coleman-Norton (1966), I, pp. 18-22.

⁷⁴ See Lactantius, *De mortibus persecutorum*, 48.

they were held “to symbolize the organic unity between head and members of the *Ecclesia*”.⁷⁵ To be sure, twelfth century theologians such as Hugh of St. Victor (1096-1141) widely employed the notion of *corpus*. In *De sacramentis Christianae fidei*, after having restated that the Holy Church is the body of Christ animated and sanctified by the Holy Spirit and one faith,⁷⁶ he fixed the definition of *universitas* and *universa Ecclesia*, which comprise *laici* and *clerici*.⁷⁷

We can finally turn to Bartolus’ position on the problem of the *persona repraesentata*. Two statements can be cross-examined first. As far as private law is concerned, and in opposition to the Accursian gloss, in his commentary to Dig. 47, 22, 1, § 2, Bartolus stated what pertains to the whole does not pertain to its parts, and that a *universitas* is *persona repraesentata*: “*quod est universitatis non est singulorum [...] universitas est persona representata per se*”.⁷⁸ Then, while commenting on Dig. 47, 22, 3, § 2, by analogy, Bartolus suggested that the *civitates* constitute a particular category of *collegia licita*. In it he spoke of the *civitates-collegia* as *populi* on the basis of *ius gentium*: “*collegia quod appellat populus unius civitatis*”.⁷⁹ As this definition shows, the *ius gentium* is the direct source of legitimacy for the cities that are *collegia licita*. In another relevant passage, Bartolus gave an interesting account of what is the status of truth in juristic reasoning. Indeed, he offered a double standard of truth, whereby common sense, expediency, abstraction, and fiction are inextricably linked. Commenting on Dig. 48, 19, 16 (10), Bartolus emphasised that legal reasoning differs from both common sense and philosophical or theological reasoning. By the means of an inaccurate generalization, Bartolus recalls that for philosophers and Canon lawyers an association is nothing other than the people in it. Jurists differ from both philosophers and Canon lawyers in that they find it expedient to substitute ordinary truth for fiction under certain circumstances. Bartolus gives the example of an association of scholars, which retains its unity or individuality regardless of the scholars who constitute it, and that of the *populus*, which is a permanent and stable entity as such even when all its members die and

⁷⁵ See M.J. Wilks (1963), p. 23.

⁷⁶ See Hugo de Sancto Victore, *De sacramentis Christianae fidei*, II, II, II, in *Hugonis de S. Victore Opera Omnia*, II, PL 176. Paris: 1880.

⁷⁷ See Hugo de Sancto Victore, *De sacramentis Christianae fidei*, III: “*universitas autem haec duos ordines complectitur, laicos et clericos, quasi duo latera corporis unius. Quasi enim ad sinistram sunt laici qui vitae praesentis necessitati inserviunt [...] Laici ergo Christiani [...] terrenae vitae necessaria tractant [...] Clerici vero quoniam ea quae ad spiritualem vitam pertinent dispensant [...] sed constat his duabus partibus totum corpus Christi quod est universa Ecclesia*”.

⁷⁸ See Bartolus de Saxoferrato, *Super secundam Digesti Novi, de collegiis illicitis*, l. *non liceat*, in BSC, VI, fol. 157. Here the jurist uses the term *universitas* as synonymous with *collegium*, and introduces the distinction between *collegia licita* and *illicita* in the domain of private law.

⁷⁹ See Bartolus de Saxoferrato, *Super secundam Digesti Novi, de collegiis illicitis*, l. *servos*, § 5, in BSC, VI, fol. 158. Bartolus recalled that “*divisio provinciarum est de iure gentium*”. See *Super primam Digesti Veteris, de iustitia et iure*, l. *ex hoc iure*, § 4, in BSC, I, fol. 7.

others replace them. This is how Bartolus expressed his view in his commentary to Dig. 48, 19, 16, § 10:

"debemus videre primo an universitas sit aliud quam homines universitatis. Quidam dicunt quod non [...] et hoc tenent omnes philosophi et canonistae qui tenent quod totum non differt realiter a suis partibus. Veritas est quod, siquidem loquamur realiter, vere et proprie, ipsi dicunt verum; nam nil aliud est universitas scholarium quam scholares. Sed secundum fictionem iuris ipsi non dicunt verum. Nam universitas rapraesentat unam personam, quae est aliud a scholaribus [...] quia mortuis omnibus de populo, et aliis subrogatis, idem est populus [...] et sic aliud est universitas quam personae quae faciunt universitatem, secundum iuris fictionem, quia est quaedam persona rapraesentata [...] proprie [universitas] non est persona [...] tamen hoc est fictum positum pro vero, sicut ponimus nos iuristae".⁸⁰

The first part of this fragment, the one confronting us with the position of philosophers and Canon lawyers, is about a first-order or first-level truth. The second part is about the second-order or second-level truth, which alone is relevant to the jurists according to Bartolus. The logic of the statement suggests that as far as the concept of legal person is concerned, Canon lawyers are not, or better, do not reason as proper jurists. It is difficult to resist the temptation here to emphasise that the passage, as it is expressed, implies that legal reasoning is somehow superior to philosophical, theological, and common sensical reasoning precisely due to its extraordinary capacity to edify a distinct level of truth. What is perhaps the most relevant aspect of this kind of treatment of the concept of legal person is that in opposition to Accursius Bartolus stresses that the whole has a status differing from that of its members by virtue of juristic fiction ("*secundum iuris fictionem*"). At this point, one could easily conclude that Bartolus expounded the fiction theory. Such a conclusion, as held by Black and more recently by Thielen, does not seem entirely sound.⁸¹ The passage in question contains an ontological type of argument, expression of a 'one noun-one thing' theory. In fact, to say that a certain organised group of people constitutes a *populus* is to say that such a group has a certain peculiar quality manifested in some kind of existence. The same can be predicated of similar groups. As the meaning of *populus* is, or can be, the same in each case, we may be led to ask whether these groups all participate in a certain reality or substance called *populus*. The latter aspect would thus make us think that Bartolus was still attached to the realist theory by assuming that a real entity corresponded to the noun *populus*. Yet, even this second conclusion would not be entirely convincing. It is to be doubted, we believe, that Bartolus advocated logic realism.

⁸⁰ See Bartolus de Saxoferrato, *Super secundam Digesti Novi, de poenis, nonnunquam*, § 3, in BSC VI, fol. 219. Black emphasised that for Bartolus certain acts like treason and heresy can be ascribed to groups. See A. Black, "The individual and society", in CHMPT (1988), I, pp. 588-606, 603.

⁸¹ See A. Black (1988), p. 602; J.E.D.M. Thielen (1999), pp. 119, 165.

He did not address the philosophical question of whether the universals are mental constructions of human reason, or extra-mental entities at all. We cannot make Bartolus answer a question he did not pose. The jurist was just concerned with making legally possible for the *civitas* to recognise no superior even if ontologically the *civitas* was certainly not that of which no superior could be thought. The passage we have examined indicates that he did not reject common sense: "*persona rapraesentata [...] proprie [...] non est persona*". That is why in *De regimine civitatis*, as we shall see, he compared the *civitas* with "*homo artificialis et imaginatus*". In this respect, Bartolus was neither concerned with the ontological status of certain entities, nor with the epistemological status of a fiction. As far as his technical solutions are concerned, we could say that Bartolus was far from philosophical realism as well as from the nominalism of Roscelin, who in the account of Abelard is said to believe that when we speak of a substance consisting of parts the latter are mere words.⁸² Rather, and more simply, it seems correct to assume that Bartolus intended to emphasise the utility of the *positio fictum pro vero*. His eclectic reference to some elements of both logical realism and nominalism was functional to the satisfaction of the demands of legal reasoning. The latter were probably functional to the political demands of the *civitas* in turn. The argument of utility or expediency, which we just introduced, would thus make the question of whether Bartolus advocated the fiction theory as we know it in modern legal science an anachronistic one. Both the realist and fiction theories can be misleading models if applied to the ideas of the medieval jurists. Although support for fiction or realist theories can be found "by selective reading" of some of their passages, Canning argued, "any attempt to fit the jurists' doctrines into either theory results only in the discovery of so-called inconsistencies", which are inevitably deplored.⁸³ Bartolus' statement that it is proper to the logic of legal reasoning to replace truth with fiction (*fictum ponere pro vero*) is to be seen as a witness of the creative ways in which the jurists formed thought and reasoning, even against the constraints of basic logic. In a certain sense, we face here what we may call the miracle - and the tragedy at the same time - of the juristic mentality: bypassing logic in the name and for the sake of a 'superior' logic, namely the logic of law. The tragic element consists in the fact that precisely when the medieval jurist appears firmly convinced that law has an ethical and stable foundation, he becomes the victim of the infantile enthusiasm for the enormous creative force which legal reasoning discloses to him. It is difficult to assess whether Bartolus was aware of this paradox. What we can say is that this paradox is latent in his position. In the light of what has just been argued, we might better understand the sense in which Bartolus portrayed jurisprudence as needing no aid from logic.

Bartolus deliberately bent abstractness to juristic usefulness without abandoning the former. That is why we may assume that this kind of disposition

⁸² See F.C. Copleston, *A History of Medieval Philosophy*, pp. 70-1. London-Notre Dame, 1972.

⁸³ See J. Canning (1980), pp. 17-8.

towards a certain legally expedient replacement of truth for fiction was expression of both juristic virtuosity and political prudence. The latter, felt as a pressing demand, might explain why Bartolus finally came to terms with the kind of dialectic *subtilitas* that he otherwise abhorred. The goal he had in mind was constructing the *de iure* autonomy of the *civitas*. Accordingly, juristic fiction has, or might have, important political implications. For Bartolus the foundation of *persona ficta* lies in the will of the jurists, or, in more objective terms, in the logic of legal reasoning. The 'queen of the sciences' can bring entities into existence out of nothing – this seems to be Bartolus' message even beyond his intentions.

To complete our account, we should like to stress a couple of points of interest. The theory of *persona rapraesentata* appears as the connecting link between law and politics. In this respect the logic of legal reasoning meets the concrete political interests. Bartolus' position on truth and knowledge can be finally seen as an eclectic mixture of two different approaches. On the one hand, he seemed to favour what we would now call the 'coherence theory' of truth, one claiming that "a statement is true if and only if it stands in an appropriate relation to some system of other statements". At the same time, he relied on "the pragmatic definition", one asserting that "a statement is true if and only if it is useful in a certain way".⁸⁴ Yet, as far as we know, Bartolus managed to remain loyal to religious zeal.

9.4) The problem of the Empire

In this paragraph, we shall examine another controversial aspect of Bartolus' vision of sovereignty, namely the problem of the Empire. This is not one single problem, but, in this case too, a cluster of problems having political implications. As Woolf has shown, the so-called 'problem of the Empire' in Bartolus' work covers three sensitive areas: the relationship between *imperium* and *sacerdotium*; the relationship between *imperium* and *civitates*; the relationship between *civitates* and *sacerdotium*.⁸⁵ As we already pointed out, several scholars think that Bartolus' public law doctrines bear no particular originality. They are typically medieval doctrines, based upon the idea that both Empire and Church, each according to its proper task though in a situation of competition, have the providential function to lead the Christian people towards salvation.⁸⁶ Other scholars emphasised Bartolus' ambiguity. Ryan even argued that Bartolus's ideas on the nature and purpose of *imperium* are "plainly a mess", especially if seen in the light of his justification of

⁸⁴ See P.K. Moser, D.H. Mulder, J.D. Trout, *The Theory of Knowledge. A Thematic Introduction*, pp. 69-72. Oxford-New York, 1998.

⁸⁵ See C.N.S. Woolf (1913), pp. 208-383. See also F. Ercole (1932), pp. pp. 54-156; P. Leupen (1998), pp. 27-33.

⁸⁶ See F. Ercole (1932), pp. 49-69; M. David, "Le contenu de l'hégémonie impériale dans la doctrine de Bartole" in *BSDC* (1962), II, pp. 199-216, 215. See also F. Ercole, "Bartolo da Sassoferrato" in *Celebrazioni Marchigiane*, I, pp. 560-85, 584-5.

papal enjoyment of the temporal lord status within the Empire.⁸⁷ Keeping these different judgments in mind, once again we should consider that public law is per definition the most political area of law. Thus, it is not surprising that jurists of the past as well as of the present manifest uncertainties of different sorts once they concern themselves with matters of public law.

Notable problems affected the unity of the Empire since the days of its *renovatio*. The emperors constantly faced difficulties while attempting to exercise effective leadership and act according to the idea of *unum imperium, unum ius* in the territorial parts of the three original components of the Holy Roman Empire – the Germanic kingdom, Burgundy, and the *regnum Italicum*. The hope of restoring its unity, including even the Byzantines, had been a dream, and large and important sections of the *populus Romanus* such as the *regnum Franciae* and the *regnum Anglorum* had been independent political entities for a long time. The same used to be said in relation to a number of northern and central Italian *civitates*. This is one of the main reasons why, as we have already pointed out, the employment of the term ‘crisis’ in relation to the status of the imperial institution throughout the Middle Ages is misleading, or not entirely adequate. It is true though that the further deterioration of the ability of the emperors to impose their dominion over the Christianised *populus Romanus* constituted a matter of concern for a number of authors throughout the fourteenth century. Bartolus himself, as we shall see, acknowledged that some *civitates* had as much power on a small scale as the Emperor had on a large scale.

Ercole portrayed Bartolus as a man of intellectual integrity and spiritual tranquillity, totally devoted to jurisprudence and alien to any form of political extremism.⁸⁸ Baszkiewicz said that Bartolus was rather reluctant in taking a clear position in respect of the most controversial political problems of the day. In fact, if on the one hand, on some occasions at least, the jurist seemed to adhere to the dualistic doctrine of the equal dignity of Empire and Church, on the other hand he did not hesitate to praise the subordination of the former to the latter on many other occasions. As far as the question of the relationship between the Empire and the *regna* is concerned, Baszkiewicz too thought that Bartolus was rather vague asserting that the political autonomy of the French and the English kingdoms was just ‘facts accomplished’. Finally, on the matter of the relationship of the Empire with the *civitates* the Polish scholar claimed that Bartolus manifested patriotic concerns.⁸⁹ We ought to speak cautiously of ‘patriotism’ in the context at hand though. It is one thing to attribute to Bartolus a desire for a political pacification of the Italian peninsula seen as the *hortus imperii*, and to acknowledge his anti-despotic tendencies, and another to interpret this desire in the light of nineteenth and twentieth centuries’ ideological categories. We may agree with Baszkiewicz’s

⁸⁷ See M. Ryan (2000), p. 76.

⁸⁸ See F. Ercole (1934), p. 563.

⁸⁹ See J. Baszkiewicz, “Quelques remarques sur la conception de *dominium mundi* dans l’œuvre de Bartolus” in *BSDC* (1962), II, pp. 8-25, 10-11, 17-19, 21-22.

judgment that Bartolus devoted a great deal of attention to the best possible configuration of the relationship between the Empire and the *civitates* to reconcile fact with juridical doctrine. Also we may agree that in doing so he elaborated the outlines of a political theory on the basis of principles extrapolated *corpore iuris*, from customary and Canon law, and from scholastic political thought.⁹⁰

The nature and the purpose of the imperial institution had been widely debated before Bartolus, and modern scholarly work considered the solutions offered to this problem in a number of cases to be anachronistic and nostalgic. Perhaps one of the best known cases in this respect is that of Dante Alighieri, which we are going to examine before dealing with the properly juristic elaboration on the topic and with Bartolus' position on the matter.⁹¹ Dante, as it is known, put his hopes in the imperial institution as the *unicus principatus super omnes*.⁹² A number of scholars viewed such a position as a sign of nostalgia. Ullmann, for example, regarded Dante's vindication of the Empire as "the vision of an idealist".⁹³ Sabine labeled the poet's preference for imperial ideology as "idealization of universal peace". Although he acknowledged that probably in Dante's eyes there was no other hope for peace in the *Regnum Italicum* but "under the all-embracing authority of the emperor", Sabine remained convinced that the empire which Dante defended "never existed outside the realms of imagination".⁹⁴ Copleston restated that Dante appealed to an institution "which had never been a universal monarchy", even within was becoming "less and less of an effective reality".⁹⁵ This interpretative paradigm is not entirely convincing due to its internal logic, one that certainly does not clearly separate the normative from the utopian, and perhaps undermines Dante's concrete and contingent political preoccupations and preferences. Woolf argued that Dante's *Monarchia* it was not "the swan-song of the Empire", nor a "lament"; it was "an answer" – a normative answer, we could say – "to the problem

⁹⁰ See J. Baszkiewicz, "Quelques remarques sur la conception de *dominium mundi* dans l'œuvre de Bartolus" in *BSDC* (1962), II, p. 10. Baszkiewicz argued that the jurist attempted to reconcile the doctrine that *quod principi placuit legis habet vigorem* (Dig. 1, 4, 1) with the doctrine that the emperor must subject himself to the law under the influence of Thomistic teaching. To seek a reconciliation of that type was an end deemed the greatest esteem in every corner of Christian doctrine, not just in Thomistic thought.

⁹¹ For a comparison between Dante and Bartolus, see F. Corsara, "Dante e Bartolo da Sassoferrato. Politica e diritto nell'Italia del Trecento", in *BSDC*, II, pp. 107-98.

⁹² In *Paradiso* (XXX, 133-38) Dante celebrated the emperor Henry VII.

⁹³ See W. Ullmann, "The development of the medieval idea of sovereignty", in *The English Historical Review* 64 (1949), pp. 1-33, 33. Later on, this scholar suggested that Dante's view was "more than a merely Italian answer, and less than an idealized universal monarchy in poetic transfiguration". Dante's *Monarchia*, he said, was "both retrospective and prospective". See W. Ullmann (1965), p. 189.

⁹⁴ See G.H. Sabine (1973), pp. 243-4.

⁹⁵ F.C. Copleston (1990), p. 302. For a restatement of this thesis, see A. Rigaudière, "The theory and practice of government in western Europe in the fourteenth century", in M. Jones (ed.), *The New Cambridge Medieval History*, VI, pp. 17-41. Cambridge, 2000.

of the Empire and its future".⁹⁶ With a view to some relevant normative aspects of Dante's thought, Gilson emphasised the Averroist presuppositions of Dante's concept of the 'universal monarchy'.⁹⁷ Eventually, Skinner argued that although it is true that the emperors never succeeded in re-gaining control over the *Regnum Italicum*, it is not to be inferred that Dante merely held nostalgic views. Due to the exile which he was forced to as a consequence of the political maneuvers of the 'Blacks' - the pro-Boniface VIII Florentine aristocrats - Dante was in search of a powerful political agent able to change the situation. It is not surprising that when Henry VII marched into Italy, Dante put his hopes on the emperor whom he saw as the main factor of security and stability against the domination of the Papacy. There is no doubt, Skinner said, that from the point of view of the Lombard and Tuscan communes, "jealous as ever of their liberties", Dante's proposal could hardly have seemed a solution to their difficulties. While it allowed them "to deny the right of the Pope to interfere in their affairs, it did so at the expense of branding them once again as vassals of the Holy Roman Empire". What they needed, Skinner concluded, was "a political argument capable of vindicating their liberty against the Church without involving them in ceding it to anyone else".⁹⁸ Canning finally pointed out that "it is beside the point to describe his ideas as unrealistic" given the fact that he saw the emperor as "the only person who could bring to the peninsula that peace which the warring republics, lordships, and the papacy had destroyed".⁹⁹

In *De monarchia* (1312-13), Dante posed three questions. He asked: was the empire still useful to the well being of the *humana civilitas*? Were the Roman people legitimate in the exercise of the right to govern over all nations? Did the imperial authority come directly from God, or from some other vicar of God?¹⁰⁰ He claimed that the world ought to be placed under the government of the Roman emperor, and that the Christianised Roman people had the right to govern over all nations. To him the independence acquired by the *regna* was a *de facto* independence, and not *de iure*. Moreover, he maintained that the *temporalis monarchia* was subordinate to God directly. The emperor was thus released from any dependence on the pope. The author argued that from the fact of Christ being the lord of both spiritual and temporal matters, it did not follow that his vicar was so as well.¹⁰¹ The author attempted to confute the validity of the allegory which by the identification of the *duo luminaria* - the sun and the moon - with the spiritual and the temporal powers respectively led to the hierocratic claim of superiority of the former over the

⁹⁶ See C.N.S. Woolf (1913), p. 306.

⁹⁷ See É. Gilson (1947), pp. 577-80.

⁹⁸ See Q. Skinner (1978), I, p. 18.

⁹⁹ See J. Canning (1996), p. 150.

¹⁰⁰ See Dante Alighieri, *Monarchia*, I, I-II.

¹⁰¹ See Dante Alighieri, *Monarchia*, III, VII: "*sillogizant enim sic: 'Deus est dominus spiritualium et temporalium; summus Pontifex est vicarius Dei: ergo est dominus spiritualium et temporalium [...] nam aliud est 'Deus' [...] et aliud 'vicarius Dei'.*"

latter.¹⁰² Examining the allegory and keeping the levels of *esse*, *operari*, and *virtus* separated, Dante suggested, one should not fail to realize that the moon did not depend for its existence on the sun, that it moved under its own power, and that shone by its own light, in spite of the fact that it did receive light from the sun.¹⁰³ In a passage concerned with the conflict of jurisdictions (Dig. 48, 17, 1, § 2), Bartolus referred to Dante and said that authors like him assumed that Empire and Church had distinct and separate jurisdictions: "*sunt habentes jurisdictiones separatas et distinctas, ita quod una ab alia non dependet, nec sunt sub eodem domino*". This view, he added, is heretic! The jurist recalled that after his death, Dante himself was considered *damnatus* almost exclusively on the account of his assertion of the imperial autonomy.¹⁰⁴

In the early phases of medieval political and legal thought, it was often said that before the advent of Christ fortune was seen as the remote cause for the establishment of the Empire, and people as its proximate cause.¹⁰⁵ The beginning of the 'history of salvation' (*historia salutis*) was commonly said to have marked a radical change in the interpretation of the origin of the Empire, for God's providence, not fortune, was taken as its remote cause whereas the Roman people as the proximate cause by the means of the *lex regia*. Precisely the reference to this kind of joint causality might enable us to address the question of the validity of Ullmann's theory that the ascending or popular foundation of political authority and the descending foundation constitute an insuperable dichotomy. As an interpretative paradigm, we believe, the latter is not entirely adequate to shed light on the medieval juristic position on the question of the origin of political authority. In the constitution *Deo auctore*, for example, the emperor Justinian declared that *imperium* was granted by the heavenly majesty ("*a caelesti maiestate*") – this would be the core of the descending foundation. At the same time, he mentioned the ancient *lex regia* by means of which all powers had been transferred from the Roman people to the emperor.¹⁰⁶ The latter point would constitute the core of the ascending foundation, which we find sketched in the *Institutiones*. The *lex de imperio*

¹⁰² See Dante Alighieri, *Monarchia*, III, IV: "*dicunt [...] quod Deus fecit duo magna luminaria – luminare maius et luminare minus – ut alterum preesset diei et alterum preesset nocti: que allegorice dicta esse intelligebant ista duo regimina: scilicet spirituale et temporale. Deinde arguunt quod, quemadmodum luna, que est luminare minus, non habet lucem nisi prout recipit a sole, sic nec regnum temporale auctoritatem habet nisi prout recipit a spirituali regimine*".

¹⁰³ See Dante Alighieri, *Monarchia*, III, IV.

¹⁰⁴ See Bartolus de Saxoferrato, *Super secundam Digesti Novi, de requirendis absentibus damnandis*, l. *praesides*, § 3, BSC VI, fol. 204.

¹⁰⁵ Medieval jurists did not neglect fortune though. In Azo, for example, fortune had a role to play but only as an element concerning the occasional character of the imperial election: "*imperium autem est a fortuna, unde, si fortuna volet, fiet de rhetore consul, si volet haec eadem fiat de consule rhetor*". See Azo, *Lectura super Codicem, de legibus et constitutionibus principum et edictis*, l. *digna vox* (Cod. 1, 14, 4) § 15-16, fol. 40. The same view we find in Accursius, *Glossa in Codicem*, gl. *principatum, de legibus et constitutionibus*, l. *digna vox*, fol. 24.

¹⁰⁶ See *Constitutio Deo Auctore*, tit. *De conceptione Digestorum*.

is said to have been the instrument by which the Roman people "*concessit*" the *imperium* and the powers that originally possessed to the *princeps* (Inst. 1, 2, 6). In the *Digesta*, it is said to be the instrument by which the Roman people "*conferat*" all powers (Dig. 1, 4, 1).¹⁰⁷ The exact meaning of these two terms has been, and still is, debated. The solution of the latter problem, it has been repeatedly suggested, would help us clarify whether that particular transfer of powers was an irrevocable alienation or rather a delegation of powers. Rogerius and Placentinus, for instance, are among the authors who were convinced that the emperor alone fully retained all powers once in disposal of the people. As Cortese emphasised, a certain degree of ambiguity is not alien to both jurists for they insisted on the image of *princeps vicarius populi*, and thus somehow suggested that the people might have retained some of their original power to some extent at least.¹⁰⁸ The same kind of ambiguity we may find in Azo. In his *Lectura super Codicem*, the jurist affirmed that once the people transferred sovereign power to the *princeps*, the latter must obey the law "*de virtute animi*". Here, the fact that the *princeps* has only a moral obligation to obey the law might suggest that the people gave up their original power. In the *Summa*, Azo affirmed that on the basis of the original concession the people have not lost their power completely.¹⁰⁹ One of the reasons why this issue found no univocal solution yet is that its implications were essentially political. In fact, the complexity of politics in the Italian cities of the fourteenth century was a circle impossible to square even for the most sophisticated jurists. Politics, Ryan wrote, was "an unforgiving business", and "outside government there was often only exile, dispossession or a strictly limited right of domicile". The law was used "to remove people from the city", and the lawyers were "frequently employed by those left out" by "the vicissitudes of zero-sum politics".¹¹⁰ At any rate, the *Codex* suggested that there is nothing greater and more sacrosanct than the imperial majesty (Cod. 1, 14, 2), and in the *Novella* 6, where the people are not mentioned, it is said that the greatest gifts of God - "*dona Dei*" - to mankind are *imperium* and *sacerdotium*.¹¹¹ Is the dichotomy

¹⁰⁷ For an account of the medieval debates on the meaning of *translatio* and *concessio*, see G.P. van Nifterik (1999), pp. 115-24.

¹⁰⁸ See Rogerius, gl. ad Cod. 1, 14, 12, 3 or 4, *de legibus et constitutionibus*, l. si imperialis, § *definimus* or *cur autem*, in v. *solī imperatori* or *cui soli*. See also Rogerius, *Summa Codicis*, 12 *de legibus et constitutionibus*, § 5; Placentinus, *Summa Institutionum*, 1, 2 *de iure nat. gent. et civ.*, post me. These passages are quoted in E. Cortese (1962-64), II, pp. 174-5.

¹⁰⁹ See Azo, *Summa super Codicem*, *de legibus et constitutionibus principum et edictis*, rubrica, fol. 9: "*licet dicatur potestas translata in principem [...] dicitur enim translata, id est concessa, non quod populus omnino a se abdicaverit eam*". Compare it with the already mentioned Azo, *Lectura super Codicem*, *de legibus et constitutionibus principum et edictis*, l. *digna vox* § 15-16, fol. 40.

¹¹⁰ See M. Ryan (2000), pp. 79-81.

¹¹¹ See *Novella* 6 (Coll. I, tit. 6), *Quomodo oportet episcopos, praefatio*. Calasso noted that in his commentary to *Novella* 6, Bartolus affirmed that both they descended from God simultaneously. See F. Calasso (1965), p. 219.

between the will of the *princeps* and that of the *populus* a proper or an apparent one? Following Ullmann's interpretative paradigm of an unbridgeable gap existing between the ascending and descending theory of law and government, Jonas Cesar treated the dichotomy in question as a proper one. In particular, he argued that Bartolus' concept of the autonomous *civitas* is based upon "human premises".¹¹² What is the meaning of such an expression? Did Jonas Cesar seek to emphasise the immanent character of Bartolus' concept of the cities' autonomy? As we hope to demonstrate, the validity of Ullmann's interpretative paradigm is questionable. To consider that paradigm valid is to run the risk of attributing to Bartolus an intention that in fact he never expressed, namely the intention to prove that the political autonomy of the *civitates* had a purely immanent foundation. We believe that in Bartolus' concept of the *populus liber* there is no room for the kind of autonomy that Ullmann saw as the prototype of modern democracy, and Jonas Cesar ascribed to the jurist.¹¹³ Let us now see in what sense Ullmann's paradigm is not entirely tenable.

Due to Constantine's conversion and 'miraculous' recovery from leprosy, the Roman empire had ceased to be a mere *congregatio hominum* – or even the 'whore of Babylon' – to become *congregatio fidelium*. The transition to the *saeculum christianum*, it is often said, marked a significant turn by the establishment of the *Respublica gentium christianarum*.¹¹⁴ Otto of Freising vividly described this turn in his own account of the condition of mankind from creation to the mid-twelfth century. The original opposition between the *civitas carnalis*, which is contingent and devilish, and the *civitas spiritualis*, which is eternal and Christocentric, finally transcended into the unitary experience of the *historia salutis*. This led Otto himself to explain that he had written a history not of two cities but virtually of one only, composite as the grain is mixed with the chaff, which is the Church.¹¹⁵ Having posed the question of the legitimacy of secular authority, Otto then answered that it proceeded by both divine ordination and popular election: "*ex ordinatione Dei et electione populi*".¹¹⁶ This idea seems to go hand in hand with that developed by the subsequent generations of jurists who defined God as the Empire's *causa remota*, and the people as the *causa proxima*. After the advent of Christ, the *princeps* and the *populus* were generally seen as parts of a dialectical relationship willed by God. If it may be accepted, as Ullmann put it, that the descending theory greatly contributed to the strengthening of the imperial, papal, and royal ideology of power, it may be doubted instead that

¹¹² See F. Jonas Cesar (2004), p. 370.

¹¹³ M. David already pointed out that Bartolus was concerned with 'simple' political autonomy as distinct from the typically modern 'exclusive' political autonomy. See M. David in *BSDC* (1962), II, p. 216.

¹¹⁴ The principle *unum ius, unum imperium* was transfigured in its empowered version of the *unus populus Dei unumque regnum*.

¹¹⁵ See Otto Frisingensis, *Chronica sive historia de duabus civitatibus*, prologue to V. See also prologue to I.

¹¹⁶ See Otto Frisingensis, *Chronica sive historia de duabus civitatibus*, prologue to IV.

holding a doctrine of the kind generally "suppressed the people as law-creating agency".¹¹⁷ It is important to stress, we believe, that by making the people ministers of the divine will, a number of jurists, including Accursius, had already dialectically linked the descending to the ascending theory in Ullmann's terminology. Departing from the expression "*imperium Deus de coelo constituit*" contained in the Novella 73, Accursius reaffirmed that God established the Empire from heaven, and the Roman people *de terra*. More particularly, the people acted on the basis of divine permission and authority: "*Deus constituit permittendo, et populus Dei dispositione*".¹¹⁸ The presence of this principle of double causality in various juristic sources suggests that the ascending and descending foundation of political authority were not terms denoting a radical opposition. We may thus accept Ullmann's terminology - the *littera* - but not the *ratio* underlying that distinction.

Signs of the view that God is the Empire's *causa remota*, and the people the *causa proxima* are to be found in John of Paris' *De potestate regia et papali*, as well as in Cynus' *Lectura* on the *Digestum Vetus*.¹¹⁹ According to Domenico Maffei, this work was composed in the period between 1320/30 and 1336, and the *proemium* of two important manuscripts of the *Lectura* - the MSS Savigny 22 and the Urbinate Latino 172 - show how the jurist looked at the relationship between Empire and Church towards the end of his life. Then he seemed to have embraced a view favourable to papal monarchy for he argued in favour of the thesis that the false Donation of Constantine was legally valid as an act of liberality, which had no negative impact on the integrity of the imperial *dignitas*.¹²⁰ Presumably following the opinion of Dinus of Mugello, he had already claimed that, due to the 'nobility' of her origin, the Church retains a superior degree of dignity in respect of the

¹¹⁷ In the view of Ullmann, however, this tendency did not affect the growth of customs observed by the people, given the fact that Roman law recognised the force of customs as a basis of the law. See W. Ullmann, "De Bartoli sententia: Concilium repraesentat mentem populi", in BSDC (1962), II, pp. 707-33, 711. See Bartolus de Saxoferrato, *In primam Digesti veteris partem, De legibus senatusque consultis et longa consuetudine*, l. *de quibus* [1], § 18, fol. 18. Venetiis, 1575: "*quaero in quod differt consuetudo ab usu et moribus [...] usus et mores non sunt causa proxima consuetudinis, sed tacitus consensus populi*". In this commentary, we find that "*concilium representat populum*" (§ 10).

¹¹⁸ See Accursius, *Glossa in Volumen, Liber constitutionum novellarum authenticorum*, gl. *de coelo, de instrumentorum cautela*, l. *Quia igitur*, fol. 57. See also Novella 73 (Auth. LXXVI, Coll. VI, tit. 3), *de instrumentorum cautela et fide, praefatio*.

¹¹⁹ On John of Paris and the matter treated here, see the remarks by E.H. Kantorowicz (1997), pp. 296-7.

¹²⁰ Maffei emphasised that following the teaching of Revigny partially, and that of Bellapertica, in the *Lectura Codicis* (ad Cod. 7, 39, 6) Cynus reaffirmed that certain imperial prerogatives such as the goods in public use pertaining to the *fiscus*, and all *signa subiectionis*, which referred to the jurisdiction of the Empire, were not subject to legal prescription. This, however, did not exclude the possibility for the Church of having possibly gained a certain *patrimonium* or *emolumentum* according to the law. See D. Maffei, *La donazione di Costantino nei giuristi medievali*, pp. 140-1. Milano, 1964.

Empire (*"quod autem ecclesia sit maior imperio probatur propter nobilitatem originis, secundo propter prerogativam predominantis dispositionis"*). He finally added that, as far as the dignity of the origin is concerned, the *ecclesia* derived it from God immediately, whereas the *imperium* from the people. The former remains concerned with spiritual matters, whereas the latter with corporeal matters.¹²¹ Elsewhere in the *Lectura*, it is said that the *imperium* too is derived from God immediately. Cynus distinguished the latter from *imperator* to argue that it is not absurd to think of a joint establishment of the *imperium* by God and the people in the sense that the latter establishes the *imperator*, whereas the former the *imperium*.¹²² A certain degree of ambiguity, which we may find in Cynus' view, is not related to any true opposition between the *princeps* and the *populus*, but is significant in the sense that it might help us to properly address the question of Bartolus' position on the nature and purpose of *imperium*, Cynus being the person who shaped, or contributed to shape, Bartolus' ideas probably more than any other.

We may assume that, as a Christian jurist, Bartolus sought to harmonise the Roman law passages concerning the nature of the imperial institution with the Pauline doctrine that all powers come from God, and Christian doctrine more generally.¹²³ A harmonisation of this sort presented theoretical and practical difficulties of which Bartolus must have been aware. Obviously, the relevant

¹²¹ In relation to the temporal jurisdiction of the Church, Cynus wrote: *"ergo hec iurisdictio in dominio papa est, cum sit Christi vicarius. Non obstat quia augustus dicitur et non debet diminueri, sic donando et dotando ecclesiam ut dictum est, et quia plura remanserunt non videtur alienasse. Item non obstat quia est administrator, quia ymo est dominus et, posito quod esset administrator, potuit propter casus predictos alienare, nec diminuit honorem suum, ymo auxit augendo honorem ecclesie divine et prelate sibi ut supra dixit. Preterea non donavit nec alienavit quod simili modo reassignavit ecclesie quod tenebat ab ea cum et quicquid remanserit eius sit"*. The latter passage is preceded by the following one: *"propter nobilitatem originis[...] ecclesia originem habet a Deo, imperium vero non immediate a Deo set a populo [...] quia preest anime que est immortalis incorruptibilis; imperium preest corpori quod est mortale"*. The first passage is quoted in D. Maffei, *La "lectura super digesti veteri" di Cino da Pistoia. Studio sui MSS Savigny 22 e Urb. Lat. 172*, p. 51. Milano, 1963. The second one, and the one reported in the body of the text are quoted in D. Maffei (1964), pp. 142-3. All these fragments appear in the *Proemium* to the *Lectura super Digesti Veteri* (Rub. const. *Omnem*) as contained in the MSS Savigny 22, fol. 2 and in the MSS Urb. Lat. 172, fol. 2, not in the *Proemium* of the 1578 Feyerabend edition.

¹²² Cynus wrote: *"imperium est a Deo [...] ab ispo Deo immediate processit, unde inter imperatorem et Deum non est ponere medium [...] dicitur princeps creatus: quia hoc est permissione divina, sicut dicimus, non est malum in civitate quod non facit dominus; nec absurdum est quod sit a populo et a Deo, tanquam ab agente universali, sicut aliter dicitur, homo hominem generat [...] vel melius dico quod imperator a populo est, sed imperium, cuius praesidatu imperatur dicitur divinus, a Deo"*. See Cynus de Pistorio, *Lectura Super Digesto Veteri, de constitutionibus principum*, I. Beneficium, § 1. In the *Proemium*, Cynus portrayed the Roman people as an organ of God: *"causa vero efficiens ipse Deus, cuius Romanus populus in hoc fuit organum"* (§ 8).

¹²³ According to Costa, this doctrine was so rooted in the mind of medieval men of learning that most of the times the explicit reference to it was omitted. See P. Costa (2002), pp. 383-5

question here is what kind of harmonisation, what kind of *ordo*, Bartolus conceived. Woolf conjectured that Bartolus was reluctant in handling the question of the superiority of the Church directly, the evidence of it being that "he was significantly silent about the great struggle between John XXII and Lewis of Bavaria". Woolf found that silence "intentional", and wrote that on the relations between the Church and the Empire "no one could be more shy of speaking out than Bartolus".¹²⁴ Are we sure that Bartolus was so shy a thinker in asserting the superiority of *sacerdotium*? What is particularly striking in Woolf's conjecture is that in his study he indicated several times how Bartolus managed to openly stress that kind of superiority. That Bartolus might have adhered to the Gelasian doctrine, in our opinion, is to be excluded.¹²⁵ The view that Bartolus adhered to the Gelasian doctrine is based upon a small number of indications abstracted from various passages. Commenting on *Novella* 6, Woolf noted, Bartolus affirmed that Empire and Church descended from God simultaneously.¹²⁶ In a passage of his commentary to the constitution *Omnem*, where he contrasted *imperator* and *ecclesia*, not *imperium* and *ecclesia*, Bartolus stated that God was the 'efficient cause' of both Empire and Church ("*imperator et ecclesia processerunt a Deo tamquam a causa efficienti*").¹²⁷ There is another relevant passage, however, which at first sight might suggest that Bartolus adopted a dualistic point of view to the question of the nature and function of the two universal authorities. A close scrutiny of it reveals the opposite. When he discussed the capacity of a superior to summon individuals to his court, the jurist distinguished the case of those territories that are distinct, such as the provinces of the Roman empire, and yet under the same judge, from the case of those territories that are distinct and separate, but not under the same judge. This is the case with the lands under the direct jurisdiction of the emperor and the lands under the direct jurisdiction of the pope.¹²⁸ The very fact that Bartolus called the territories and the jurisdictions of the Church and Empire *separata* might suggest that he was reasoning in dualistic terms. The solution given to the question shows that he was not doing so. It has been explained that while making such a distinction, Bartolus had in mind the conflict of jurisdictions which occurred

¹²⁴ See C.N.S. Woolf (1913), p. 86.

¹²⁵ Authors like Figgis and Ercole suggested that a large number of jurists, including Bartolus, adhered to the Gelasian doctrine. See J.N. Figgis (1907), pp. 10-1, 49-50; F. Ercole (1932), p. 67.

¹²⁶ See C.N.S. Woolf (1913), pp. 72-3.

¹²⁷ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, prima constitutio, rubrica*, § 13-15 in BSC I, fol. 2.

¹²⁸ See Bartolus de Saxoferrato, *In primam Codicis partem, De episcopis et clericis, omnes*, § 2, fol. 24. Venetiis, 1575: "*Quaedam territoria sunt distincta, sub uno tantum domino sunt omnia, ut imperium romanum est divisum per praesidatus. Tunc unus praeses potest citare in provinciam alterius, quae tamen est sub eodem domino [...] Quaedam sunt territoria que sunt separata, nec tamen sub eodem domino, ut territoria imperii et papae, et tunc non potest fieri citatio de uno territorio ad aliud. Ita sustineo istud decretalem*".

between the emperor Henry VII and pope Clement V about king Robert of Naples, and the solution that the decretal *Pastoralis cura* offered to that dispute.¹²⁹ The emperor had declared war on Robert, and Clement V intervened by ordering the suspension of any hostilities on the ground that the emperor was bound by his oath of fealty to respect the vassals of the Church such as Robert. Henry VII refused to recognise himself as bound by any oath of that kind and summoned king Robert, one of the political leaders of the Guelph opposition, to answer the charge of treason at Pisa. On the account of his refusal to appear, Henry VII declared Robert guilty of treason, sentenced him to be deprived of his crown, and banned him from the Empire. The emperor then issued the constitution *Ad Reprimendum*, shortly after which he died, and the pope replied by his *Pastoralis cura*. The pope, who in fact ruled a portion of central Italy directly – the Patrimony of St. Peter – claimed to rule the two Sicilies as feudal overlord of the Aragonese and Angevin dynasties. Therefore, he argued, as long as king Robert stayed in Sicily he was under papal jurisdiction, not imperial. Cynus and the lawyers on the side of the emperor insisted that the latter's citation *extra territorium* was valid given that king Robert was direct vassal of the emperor in regard to certain lands held in the north-west of Italy. This fact suggests that they at least partially acknowledged the pope's claim over Naples. Bartolus adhered to the solution established by the *Pastoralis cura*. By his time, that decretal was part of Canon law, inserted in a collection of decretals, the Clementines, published in 1317 and taught at the universities.

According to Ryan, Bartolus made Canon law prevailing over Roman law in adhering to the principles stated in that decretal, without openly recognising that the former superseded the latter. Such an omission would reveal a certain embarrassment on the side of the jurist. One of the distinctive characteristics of the emperor's office, Ryan recalled, is to have jurisdiction over everyone and everything. If this had to be the kind of order willed by God, then the type of order described in *Pastoralis cura* is one that Bartolus might have perceived as "challenging the disposition of God".¹³⁰ We are persuaded that from the fact that Bartolus omitted to say on that particular occasion that Canon law superseded Roman does not follow that he might have found the content of *Pastoralis cura* embarrassing in any way. In various passages of his commentaries Bartolus plainly illustrated his position on the relationship between Roman and Canon law. In his commentary to the constitution *Cunctos populos* (Cod. 1, 1, 1), he generally stated that faith in the Holy Trinity ought to be preserved above all, and only those who engage in such a defense deserve to be called Christians: "*fides trinitatis [...] est servanda et servantes vocant Christiani*".¹³¹ In a subsequent passage, after having recommended to fully follow and love God – "*Deum tuum ex toto corde tuo et ex tota anima tua et ex omnibus viribus tuis et ex toto spiritu tuo et ex tota mente tua*" – he

¹²⁹ See C.N.S. Woolf (1913), pp. 75-8.

¹³⁰ See M. Ryan (2000), p. 72.

¹³¹ See Bartolus de Saxoferrato, *Super primam Codicis, de summa trinitate*, l. *cunctos populos*, BSC VII, fol. 4.

asserted that in matters of faith and spiritual matters in general, Canon law is to prevail over Roman law: "*in his quae spiritualia sunt vel in quorum observatione emergunt peccata, iura canonica prevalent legibus*".¹³² The principle is confirmed in another passage of the commentary to the *Codex*, when the jurist asserts that in the case of contrast between Civil and Canon law in spiritual matters, Canon law always prevails. As far as secular matters are concerned, Bartolus says that if a problem occurs within the territory of the Church, Canon law prevails. If the problem occurs within the territory subject to the emperor, Roman law applies until its application is detrimental to the spiritual interests of the persons concerned. If this application leads to sinfulness, it is to be avoided and Canon law applies.¹³³ Finally, it is clear that the superiority of Canon over Roman law, also as defended in *Pastoralis cura*, could never imply an infringement of God's will. The pope's intervention in *temporalibus* is always justified *ratione peccati*. This means that in Bartolus' view, the emperor has no jurisdiction in *spiritualibus*, and his jurisdiction in *temporalibus* can never go beyond the borders of the territories nominally subject to his authority. The pope has universal jurisdiction in *spiritualibus*, and a jurisdiction in *temporalibus* that is valid only in the territories subject to his direct control. As Woolf put it, "the exact balance between the two powers is destroyed in favour of the Papacy by the fact that the universal spiritual jurisdiction of the pope and the Canons, unlike the universal temporal jurisdiction of the Emperor and the Civil Law, is never restricted to one territory".¹³⁴ The order conveyed by that decretal might have been seen as a challenge to God's will only if God willed the temporal and the spiritual swords to be perfectly equal. But this cannot be the case. The scriptural and jurisprudential tradition on which Bartolus relied affirmed the superiority of the spiritual over the temporal. He could not see the order conveyed by the *Pastoralis cura* as against God's will because the *Pastoralis cura* confirmed that *spiritualia* are superior to the *temporalia*. As we have already seen, Bartolus called Dante a heretic precisely because the latter had assumed that Empire and Church had distinct but co-ordinate jurisdictions. Bartolus concluded that there are even 'beautiful reasons' in favour of the subjection of the imperial jurisdiction to that of the Church. Undoubtedly, those reasons were Scriptural and can be found in Canon law.¹³⁵ This position was sanctioned in Roman law itself when it says that dignity

¹³² See Bartolus de Saxoferrato, *Super primam Codicis, de sacrosanctis ecclesiis*, l. *habeat unusquisque*, § 10, 81, BSC VII, foll. 9, 13.

¹³³ See Bartolus de Saxoferrato, *In primam Codicis partem, De sacrosanctis ecclesiis, privilegia*, § 2, fol. 14. Venetiis, 1575: "*quaero ergo quando lex contradicit canoni [...] aut loquimur in spiritualibus et pertinentibus ad fidem, et stamus canoni [...] aut loquimur in temporalibus, et tunc aut in terris subiectis Ecclesiae; et sine dubio stamus decretalibus. Aut in terris subiectis imperio, et tunc servare legem est inducere peccatum, ut quod praescribit possessor malae fidei; et tunc stamus canonibus [...] Aut non inducit peccatum, et tunc stamus legibus*".

¹³⁴ See C.N.S. Woolf (1913), p. 83

¹³⁵ Bartolus spoke of "*illam opinionem quam tenuit Dantes [...] in uno libro quem fecit qui vocatur monarchia in quo[...] disputavit tres questiones quarum unam fuit an imperium dependeat*

descends, not ascends: "*dignitas non transit de inferioribus ad superiores [...] dignitas non ascendit sed descendit*" (Dig. 1, 9, 1).¹³⁶ This position underlies Bartolus' commentary to the constitution *Ad reprimendum*. This work was written as an incentive for the emperor to protect the Italian territories from the despotic rule of the up and coming *signorie*, and provides an answer to the question of how the papacy came to enjoy the status of temporal ruler within the Empire. This answer was clearly influenced by Canon law. Bartolus too referred to the sequence of the four Empires: first, came the Babylonian empire, then the Persian, thirdly the Greek, and finally the Roman. What happened under the Romans was extraordinary, for with the advent of Christ the Roman empire was transformed into Christ's empire, whereafter the pope, Christ's vicar, assumed it, possessed both swords, and had the right to transfer the exercise of political authority to the secular ruler. The conclusion according to Bartolus is that after the transfer, the pope reserved for himself the major aspects of sovereignty. Since God established the Empire *de coelo*, to say that the Empire was dependent on heavenly mercy was to say that the emperor depended on the pope, Christ's vicar on earth. With the exception of the territory subject to the direct political and administrative control of the Church, after the advent of Christ the emperor was universal lord in the sense that he held the temporal sword by papal concession.¹³⁷ The emperor has the duty to preserve universal order ("*servare orbis regularitas*") and this duty is the content of an absolute natural obligation - "*obligatio naturalis [...] cui nulla obstat exceptio*".¹³⁸ These assertions are not necessarily in contrast with the assertion that the two powers are heavenly gifts. Bartolus looked upon the *imperium* as one of the two *dona Dei* without implying equality in dignity between the two 'gifts' - the spiritual 'gift' remains superior to the temporal. Rather, the statements that we examined might be seen in contrast with the assertion that *imperium* and *sacerdotium*

ab ecclesia et tenuit quod non. Sed post mortem suam quasi propter hoc fuit danatus de heresia [...] imperium dependeat ab ecclesia pulcherrimis rationibus quas omitto". See *Super secundam Digesti Novi, de requirendis absentibus damnandis, l. praesides, § 3, BSC VI, fol. 204*.

¹³⁶ See *Super primam Digestum Vetus, de senatoribus, l. consulari, § 1, in BSC I, fol. 33*. In this passage, Bartolus also affirms that "*in masculo est maior dignitas quam in femina*".

¹³⁷ Bartolus wrote: "*vel tertio inherendo opinioni sanctae ecclesiae primo fuit imperio babylonis, secundo fuit imperium Persarum et Medorum. Tertio fuit imperium Graecorum. Quarto fuit imperium Romanorum. Ultimo adveniente Christo istud Romanum imperium incipit esse Christi imperium: ideo apud Christi vicarium est utraque gladius spiritualis et temporalis [...] ante Christum, Imperium Romanorum dependebat ab eo solo, et Imperator recte dicebatur, quod dominus mundi esset, et quod omnia sua sunt. Post Christum vero imperium est apud eius vicarium, et transfertur per papam in principem saecularem; ut extra, de electione, cap. Venerabilem. Unde si dicimus, omnia sunt Imperii Romani, quia nunc est Christi, verum est si referamus ad personam Christi. Si vero referamus ad personam Imperatoris saecularis, non proprie dicitur, quod omnia sunt sua, vel sub sua iurisdictione, quia non sunt terrae Ecclesiae: illas enim sibi reservat papa, in quo principaliter est imperium*". See Bartolus de Saxoferrato, *Tractatus ad reprimendum*, in BSC IX, fol. 93.

¹³⁸ See Bartolus de Saxoferrato, *Tractatus ad reprimendum*, in BSC IX, fol. 94.

descended from God *eodem tempore*. How to make sense of this contradiction? We have no definite answer to this question. Certainly, the scholars who emphasise Bartolus' ambiguity have a point in this respect. We may conclude that in general Bartolus is not reluctant in stating the superiority of *sacerdotium*.¹³⁹

According to Ercole, Bartolus' preference for the Papacy had an opportunistic character.¹⁴⁰ Segoloni questioned this charge and interpreted the jurist's position as an expression of pure faith. On the basis of faith alone, Segoloni claimed, Bartolus supported the thesis of papal plenitude of power *in temporalibus*, and the related one of the dependence of the Empire on the Church.¹⁴¹ The fact that to Bartolus faith was of paramount importance does not exclude, however, the possibility of some degree of opportunism on his side. We may see it operating in the way in which Bartolus addressed the question of the false Donation of Constantine. The false Donation of Constantine consists of an original core, presumably written in France, at St. Denis, in the second half of the eighth century, integrated by three additional texts presumably produced in Rome during the first half of the subsequent century.¹⁴² In the intention of its authors, this document had the purpose of somehow compensating for the absence of an authentic imperial constitution sanctioning the superior jurisdiction of the Church *in temporalibus*. Once Constantine survived his severe illness, he resolved to deliver the palace Lateranense, the entire city of Rome, and "*omnes Italiae seu occidentalium regionum provintias, loca et civitates*" in the hands of the pope, the main reason being that it would be unjust for the emperor to exercise his powers over the holy place where God decided to found His Church: "*ubi principatus sacerdotum et christianae religionis caput ab imperatore caelesti constitutum est, iustum non est, ut illic imperator terrenus habeat potestatem*".¹⁴³ The theory expounded in the *Constitutum Constantini* received new attention at the beginning of the fourteenth century, especially as a consequence of the controversy first between Boniface VIII and Philip IV, then between Clement V and Henry VII, and finally between John XXII and Lewis of Bavaria.¹⁴⁴ Bartolus confessed that as a Christian in the territories of the Church, he had no other choice than conceding that the Donation of Constantine was valid.

¹³⁹ See P. Prodi (2000), p. 119.

¹⁴⁰ See F. Ercole (1932), pp. 60-2. See also C.N.S. Woolf (1913), p. 98.

¹⁴¹ See D. Segoloni, *BSDC*, II, p. 517.

¹⁴² See D. Maffei (1964), pp. 10-1. See also G.M. Vian (2004), pp. 61-89.

¹⁴³ See H. Fuhrmann (ed.), *Das Constitutum Constantini (Konstantinische Schenkung Text)*, X, pp. 78, 17, 93; XVIII, pp. 94-5. In *MGH – Fontes Iuris Germanici Antiqui*, X. Hannover, 1968.

¹⁴⁴ The theory gained special attention when the papacy moved to Avignon in 1309 also in the light of the Canon law view that *ubi papa, ibi Roma*. On the matter, see M. Maccarrone, "Ubi est papa ibi est Roma" in H. Mordek (hg.), *Aus Kirche und Reich. Studien zu Theologie, Politik und Recht in Mittelalter. Festschrift für Friedrich Kempf*, pp. 371-82. Sigmaringen, 1983; J. Gaudemet, "Ubi papa, ibi Roma?" in P. Catalano e P. Siniscalco (eds.), *Roma fuori di Roma: istituzioni e immagini. Atti del V seminario internazionale di studi storici "Da Roma alla Terza Roma"* (21-22 Aprile 1985), pp. 69-80. Roma, 1985.

After having reasserted the principle that the successors to the imperial throne were bound by Constantine's decision, he specified that the one in question "*non est donatio*" but "*signum remunerationis*", a mere sign of gratitude consequence of the fact that the emperor "*liberatus fuit a lepra*" by pope Sylvester. At this point Bartolus gives the impression that he eludes the problematic character of that assertion by emphasising that Empire and Church, like children in the family, have the duty to "*fraternizare*". Constantine's gift was nothing but "*dotare ecclesia tamquam sorore*". What is the meaning of such a statement? Was Constantine's granting an act of liberality, or rather an act to which he was bound due to the brotherly position of the Empire towards the Church? According to current private law standards, a brother is bound to provide his sister with the necessary goods and emoluments. The inadequacy of the construction of private law is obvious here – against the duty of the brother to *dotare* the sister stands the superiority in *dignitas* of the former over the latter. Can we reasonably suspect that Bartolus intended to hiddenly assert the superiority of the Empire? The answer to this question should be negative on the basis of the position of favour towards the Church that Bartolus expressed in a large number of passages. We may thus conclude that the ambiguity here is rendered by the very odd use of the private law vocabulary. The case is confirmed by the fact that the jurist asserts that *dotare* in the case concerned means handing something over in the hands of a superior. Moreover, the jurist affirmed that God is the efficient cause to both the emperor and the Church, and that to donate a piece of imperial territory to the pope is handing it over to God and consequently to the pope, God's vicar on earth:

*"videte nos sumus in terris amicis ecclesiae et ideo dico: ista donatio valeat [...] respondeo quod Imperator et Ecclesia processerunt a Deo tamquam a causa efficiente [...] Ergo donando Ecclesiae abdicat a se et dat in manibus superioris, sicut est ipse Deus. Sed Papa est vicarius eius, et sic quasi ipsi Deo donare videtur".*¹⁴⁵

This passage is interesting for at least three reasons. First, it suggests that Bartolus' position has something to do with opportunism: "*videte nos sumus in terris amicis ecclesiae et ideo dico: ista donatio valeat*". Second, to say that Empire and Church descended from the same efficient cause, namely God, is not the same as saying that they descended from God simultaneously, and that they are of equal importance in the face of salvation. Third, as Woolf observed, the only situation in which the alienation of jurisdiction by the emperor is legal is one requiring the pope to be Christ's vicar. If this was not the case, the Donation could never be renunciation in the hands of a superior.¹⁴⁶ This also means, as Ryan put it, that "if

¹⁴⁵ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, prima constitutio, rubrica*, § 13-15 in *BSCI*, fol. 2.

¹⁴⁶ According to Woolf, "the only admirable thing in such a discussion is the honest avowal of so dishonest a method of arriving at a conclusion". See C.N.S. Woolf (1913), pp. 97-8. See also J. Canning (1986), p. 48.

Christ owned the world then it followed that His vicar did in his place, and no distinction between *dominium* as ownership and *dominium quoad iurisdictionem* or *quoad protectionem* could alter that".¹⁴⁷ No one fails to see here again the distorting effects that the employment of the private law vocabulary might produce. The jurist, and obviously this was not the case of Bartolus alone, seems in certain cases unable to even conceive a vocabulary for public law issues alternative to that of private law.

The definition of the *regimen commune*, namely of the imperial jurisdiction is an important element to help the understanding of Bartolus' concept of sovereignty. As we have seen, Bartolus believed that Church and Empire were *dona Dei*, that Rome had a civilising mission to accomplish, and that *Romanitas* was *Christianitas*. As a consequence of the Christianization of the Empire, almost all people who obey the Holy Church, including the inhabitants of the papal territories originally subject to the imperial jurisdiction, Bartolus said, constituted the *populus Romanus*: "*quasi omnes gentes qui obediunt sanctae matri Ecclesiae sunt de populo Romano*" (Dig. 49, 15, 24). Christianity was thus divided between these two territories. What was not in the territory of the Church was in the territory of the Empire, except a few cities like Perugia, which are freed from both by privilege.¹⁴⁸ The whole *populus Romanus* was *de iure* subject to the imperial jurisdiction although *de facto* this was not always the case. But who are the peoples within the Empire then? The jurist explained in standard, and yet controversial, terms that to be within the jurisdiction of the Empire meant to be ruled directly by the emperor. The peoples of the cities that either had prescribed rights no longer exercised by the emperor, or ruled themselves by imperial grants, like some Lombard cities after the 1183 Peace of Constance, were also subject *de iure* to the imperial jurisdiction. Finally, those peoples who ruled themselves on the basis of custom and even by mere rejection of the emperor's authority were also part of the *populus Romanus*.¹⁴⁹ In all these cases, Canning pointed out, Bartolus was probably trying to demonstrate that several forms in the exercise of power are to be considered legitimate, at least as long as they can directly or indirectly be related to the framework offered by Roman law.¹⁵⁰ Yet, the *de iure* framework that Bartolus defended appears to us as a weak framework.

Another relevant and controversial aspect of the problem of the Empire concerns the character of Bartolus' concept of the *dominium mundi*. It has been

¹⁴⁷ See M. Ryan (2000), p. 76.

¹⁴⁸ See Bartolus de Saxoferrato, *In tres Codicis libros, De decurionibus et filii eorum, neque*, § 1, fol. 19. Venetiis, 1575: "*civitas Perusina non subsit Ecclesiae nec Imperio. Et si dicas, quidquid non subest Imperio, est sub Ecclesia, concedo, nisi civitas aliquanone subsit Ecclesiae ex privilegio concessio. Sed civitas Perusina est huiusmodi: nam imperator donavit eam Ecclesiae, seu permutavit cum ea; et ex privilegio ecclesiae liberavit eam*".

¹⁴⁹ See Bartolus de Saxoferrato, *Super primam Digesti Novum, de captivis et de postliminio et redemptis ab hostibus*, l. hostes, § 6, in BSC VI, fol. 246.

¹⁵⁰ See J. Canning (1986), p. 47.

assumed that the peculiarity of his position is given by the fact that he viewed the emperor as 'universal lord': "*ego dico quod imperator est dominus totius mundi vere. Nec obstat quod alii sunt domini particulariter, quia mundus est universitas quaemam; unde potest quis habere dictam universitatem, licet singulae res non sint suae*".¹⁵¹ Did Bartolus mean that the emperor was 'universal lord' *quoad protectionem* or *quoad proprietatem*? According to Calasso, the jurist held a patrimonialistic concept of *imperium*.¹⁵² It is true that Bartolus stated that to deny the *dominium mundi* was to fall into heresy on the basis of Christian doctrine.¹⁵³ But this does not necessarily mean that he conceived of the *dominium mundi* in the patrimonialistic sense. As we already pointed out, Bartolus proposed the "*equiparatio de iurisdictione ad dominium*", and *iurisdictio* had patrimonial character only partially and indirectly, not fully and directly.¹⁵⁴ He stated that the emperor is the bearer of all jurisdictional power, and that is why the latter is said to be 'lord of the whole world': "*princeps habet omnem iurisdictionem [...] ex hoc dicitur dominus totius mundi*".¹⁵⁵ Eventually, if we consider his commentary to the constitution *Omnes populi*, we see that the jurist connected the power to make the laws (*potestas condendi leges*) of the emperor to the notion of jurisdiction affirming that "*facere statuta est iurisdictio in genere sumpta*" and that "*qui est dominus totius facit legem universales*", whereas "*qui sunt domini in parte faciunt statuta in parte*".¹⁵⁶ Then, as he said commenting on the constitution *Digna vox*, it is proper to the emperor to live in accordance with the laws, which in fact are the basis of his *imperium*. But this adherence must be voluntary, not necessary:

¹⁵¹ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, de rei vendicatione*, l. *per hanc actionem* § 2, I, p. 181.

¹⁵² See F. Calasso (1965), p. 234.

¹⁵³ Bartolus wrote: "*si quis diceret dominum imperatorem non esse dominum et monarcham totius orbis, esse hereticus, quia diceret contra determinationem ecclesiae, contra textum sancti evangelii*". See Bartolus de Saxoferrato, *Super secundam Digestum Novus, de captivis et de postliminio et redemptis ab hostibus*, l. *hostes*, § 7, in BSC VI, fol. 246.

¹⁵⁴ This point is of paramount importance in spite of the ambiguity determined by the fluctuation of the meaning of the concept of *dominium* between private and public law. Moreover, while Bartolus is producing his commentaries, the political circumstances of the day, at least as far as the government of the *civitates* is concerned, denote the relative success of a variety of models based upon the practice of 'impersonal ruling'. See M. Ascheri (2006), pp. 158-65.

¹⁵⁵ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, de iurisdictione omnium iudicum*, l. *ius dicentis* § 15, in BSC I, fol. 50.

¹⁵⁶ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, Omnes populi* § 3 and 8, in BSC, I, fol. 10. The jurist recalled that it has been questioned whether the emperor alone can make the laws - "*quod soli principi sit licitum condere legem [...] fuit revocatum in dubium*". See Bartolus de Saxoferrato, *Super primam Digestum Vetus, Omnes populi*, l. *non ambigitur*, § 1, in BSC, I, fol. 16.

*"equus et dignus est principi legibus vivere ex quibus habet imperium [...] in veritate princeps est solutus legibus [...] equus et dignum est quod legibus vivat [...] ipsi submittit se legibus de voluntate non de necessitate".*¹⁵⁷

Elsewhere, however, Bartolus explained that to live according to the law is a moral necessity for the emperor: *"habet necessitatem honestatis: quia princeps profitetur se legibus alligatus"*.¹⁵⁸ Precisely on the ground of these principles, Bartolus affirmed that supporting the view of the emperor freed from the obligation of *servare pacta* in respect to the *civitates* contradicts Christian truth (*"contrarium veritatis"*). The *pacta* are of *ius gentium*, but since the faculty of making and keeping promises is an institute of the *ius naturae*, Bartolus can say that the latter is unchangeable: *"iura naturalia sunt immutabilia"*.¹⁵⁹ Treating the question of the imperial election, commenting on Cod. 1, 14, 12, Bartolus acknowledged that then the German princes had the right to elect the emperor (*"ius enim eligendi habent principes de alamania"*).¹⁶⁰ Before papal coronation, he argued on the basis of Canon law, the ruler is not yet to be properly considered emperor: *"ante coronationem non est Imperator, sed rex Romanorum ut est [...] in c. venerabilem [...] sed post coronationem Imperator sive Princeps probatur"*.¹⁶¹ Finally, as a consequence of the present political situation, he acknowledged that the people and the senate of Rome can no longer make the laws, and that the pope alone has the power to legitimize the imperial election by the German princes:

"ego credo quod populus romanus et senatus non possunt facere legem. Ratio est [postquam] populus romanus transtulit potestate in principe ad hoc apud eos remasit potestas eligendi et privandi [...] hodie omnis potestas imperii est abdicatas ab eis. Ius enim eligendi habent principes de alamania et ius privandi solus papa".¹⁶²

The passage that we just examined reveals the ideological content of Bartolus' general concept of sovereignty. Given the fact that we may seriously doubt that Bartolus held a fully patrimonialistic concept of the universal sovereignty of the emperor, we should avoid thinking of the patrimonialistic concept of sovereignty as something typically medieval, and alien to modern law

¹⁵⁷ See Bartolus de Saxoferrato, *Super primam Codicis, De summa trinitate, Digna vox*, § 1, in BSC, VII, fol. 31.

¹⁵⁸ See Bartolus de Saxoferrato, *Super primam Digestum Vetus, imperium* § 6, in BSC, I, f. 50.

¹⁵⁹ See Bartolus de Saxoferrato, *Super primam Codicis, De summa trinitate, Digna vox*, § 2, in BSC, VII, fol. 32.

¹⁶⁰ See Bartolus de Saxoferrato, *Super primam Codicis, De mandatis principum, Si imperialis*, § 4, in BSC, VII, fol. 33.

¹⁶¹ See Bartolus de Saxoferrato, *Super primam Digesti Veteris, Prima constitutio, Rubrica*, § 13-15, in BSC, I, fol. 2.

¹⁶² See Bartolus de Saxoferrato, *Super primam Codicis, de mandatis principum, l. si imperialis* § 2-4, in BSC VII, fol. 33.

and government. Still in the middle of the eighteenth century, for example, while dealing with the question of how the right of sovereignty, extending from the subjects to the land they occupy, becomes at once patrimonial and personal, Rousseau said that this particular advantage seems not to have been fully appreciated by ancient monarchs who, only calling themselves Kings of the Persians, of the Scythians, of the Macedonians, seem to have looked upon themselves as chiefs of men rather than as masters of the country. And in fact, Rousseau said, present-day monarchs call themselves Kings of France, of Spain, of England – by holding the land, they are quite sure of holding its inhabitants.¹⁶³

In finally dealing with the question of the legal foundation of the civic *statuta*, we must recall that generally, fourteenth century Italian jurists were part of the economically prominent groups in urban life. Many of them held offices at various levels of the local administration. Some of them served as *iudices* by the municipal courts, or as *statutarii*, whose task was that of drafting the models for the production, interpretation, adaptation and revision of municipal legislation. This phenomenon of osmosis between school, legal practice, and government concerning the jurists as a social group occurred in other geographical areas too. In southern Italy, France, and England, the jurists' integration into the mechanisms of politics found the courts as background. As far as municipal life was concerned, the special contribution the jurists gave as office-holders consisted in putting their knowledge of Roman law, Canon law, and Customary law to the service of municipal social and political needs. By doing so, they shaped municipal legislation. The insertion of the *statuta* among the sources of law constituted not only a matter of political relevance, but also an interpretative puzzle. Since the end of the twelfth century, the need to provide an *expositio verborum* able to go beyond the *littera* of the law and reach its *sensum* was felt among the jurists. The jurists could not count on the *littera* of the Justinian codification, whose limited number of sources of law did not comprise anything similar to the *statuta* of medieval Italian city-states. They referred to *consuetudo* as the most obvious basis for the justification of municipal legislation. They constantly attempted to make sense of the complex binding relations that *consuetudo* had brought about by the means of Roman and Canon law categories and concepts.

Roughly, there existed three types of cities, each with its own particular legal status. The so-called 'imperial' cities were located in areas under the patrimonial *dominium* of the emperor, the so-called *Reichsgut*. This phenomenon was common to the German as well as the Italian territories, especially in the north of the peninsula. The *liberae civitates*, like Perugia, were usually situated in areas that had been delimited on the ground of the bishops' *beneficia*. They enjoyed the largest possible degree of autonomy, but they were nominally subjects of the Empire. Finally, the so-called 'seigniorial' cities, forming an intermediate category, were situated within areas subject to the control of local feudal lords. Especially in the peninsula,

¹⁶³ See J-J. Rousseau, I, IX, p. 367.

attempts to reconnect the *statuta* to Roman law were usually made on the ground of a passage by Gaius in which it is said that each 'free people' has the right to make its own laws: "*quisque populus ipse sibi ius constituit, id ipsum proprium civitatis est*" (Dig. 1, 1, 9). Problems of co-ordination between *statuta* and *consuetudo*, the most obvious source then of the local *ius proprium*, often arose given that the statutes were written, whereas customs were usually largely unwritten. According to Caravale, in the second half of the thirteenth century there were two prominent theories concerned with the legal foundation of the *statuta* as specific sources of law: the theory of *permissio* and the theory of *iurisdictio*.¹⁶⁴ Albertus Gandinus (ca. 1245-ca. 1310), who also served as a judge in a number of Italian communes, is seen as one of the main representatives of the first theory. In his *Quaestiones statutorum*, the jurist claimed that Friedrik I originally granted the *potestas statuendi* to the victorious communes of the Lombard League after the Peace of Constance (1183).¹⁶⁵ It was highly controversial that the emperor could validly grant that kind of *potestas*, given that the Justinian codification had attributed to the emperor the *potestas leges condere* but not the *potestas statuendi* strictly speaking. Could the emperor delegate a power he himself had not? In order to bypass this kind of obstacle, legal historians usually presume that the medieval supporters of the theory of *permissio* based their arguments on the patrimonial links existing between the emperor as *dominus* and the Lombard cities as part of the *Reichsgut*. Against this interpretation it has been argued that making the *potestas statuendi* depend on the emperor's will alone might have caused instability, that the emperor retained a number of prerogatives so that the *potestas statuendi* was never full and the Lombard cities never had the chance to become legally *superiorem non recognoscentes*, and that to see the foundation of that *potestas* in a particular peace treaty inevitably led to the exclusion of other cities, the status of which was not regulated by the treaty's provisions. The theory of *iurisdictio* provided different arguments. According to Bartolus, the legal order informing the *imperium* was a multilevel one. There existed a plurality of spheres of competence, including the legislative one, from the minimum pertaining to the local feudal *dominus* to the maximum of the emperor. In Bartolus' view, each *iurisdictio* corresponded to a different level of legislative competence. At the municipal level, as we shall see when we treat Bartolus' *De regimine civitatis*, the *statuta* expressed the *ius proprium*.¹⁶⁶ The condition for this kind of autonomy is to be found in the tendential independence of the *civitas* from any feudal subjection. Bartolus fixed this principle of independence, or external sovereignty in modern terminology, in a famous commentary to Dig. 4, 4, 3, where he argued that the cities that recognise no superior, and whose people are 'free', are 'sovereign unto themselves':

¹⁶⁴ See M. Caravale (1994), pp. 515-18.

¹⁶⁵ See A. Solmi (ed.), *Bibliotheca Iuridica Medii Aevii*, 3, qu. LXXXIII. Bologna, 1901.

¹⁶⁶ See M. Caravale (1994), p. 517.

*"civitates [...] quae principem non recognoscunt in dominium et sic earum populus liber est [...] possent hoc forte statuere quia ipsam et civitas sibi princeps est".*¹⁶⁷

Bartolus thus applied the formula *rex superiorem non recognoscens est imperator in regno suo* to the *libera civitas*, and the *civitas Perusina* first of all.

9.5) The *civitas sibi princeps* and *De regimine civitatis*

The treatise *De regimine civitatis* belongs to Bartolus' late production, to a period in which his own concern about the degeneration of communal life became acute. He wrote it after the coronation of Charles IV of Bohemia (5 April 1355), for in it the jurist mentioned the embassy to the emperor during his campaign in Italy. Presumably, he attended to the composition of *De regimine civitatis* in the same period of time he worked at the *Tractatus de tyrannia* or *De tyranno*. *De regimine civitatis* is a public law investigation, for the problem of the right constitutional order constitutes its core. Woolf regarded this work as the one in which the theoretical interest of Bartolus for politics is "predominant".¹⁶⁸ Yet, the merely theoretical interest does not seem to be the predominant factor in the composition of the work. As various passages of it suggest, Bartolus' interest for politics was not just purely theoretical. This is very likely, as never before politics became a matter of concern for the jurist after the transfer of the papal seat to Avignon in 1309. This fact caused the city of Rome to experience a long period of semi-anarchy, one whose most significant event was probably the government of Cola di Rienzo (1313-1354) in 1347 and 1354.¹⁶⁹ As we shall see, Bartolus himself saw the situation in Rome during the absence of the pope as one of abnormality. He even spoke of a 'monstruous' regime, this type being the seventh form of government to be added to the six forms traditionally treated on the basis of the Aristotelian classification.¹⁷⁰ What made politics in the mid-fourteenth century a special matter of concern to the jurist must have been the quality of the relations between Perugia and Rome in that period. Central Italy was then under the political supervision of cardinal Albornoz, the extraordinarily active papal vicar. Already in 1347, when the tribunate was established in Rome, Perugia had sent mercenary troops and ambassadors to assist Cola di Rienzo, who had formerly met the city's magistracy. In 1353, cardinal Albornoz even asked *Augusta Perusia* to financially support Cola, and the city obeyed, showing again a vivid interest in the political ambition of the latter. By

¹⁶⁷ See Bartolus de Saxoferrato, *In Primam Digesti Veteris partem, De minoribus viginti quinque annis, denique § 1*, Venetiis, 1575. See also Bartolus de Saxoferrato, *Super primam Digesti Novum, de captivis et de postliminio et redemptis ab hostibus*, l. *hostes* in BSC VI, fol. 246.

¹⁶⁸ See C.N.S. Woolf (1913), p. 174. See also J.L.J. van de Kamp (1936), p. 66; A. Toole Sheedy (1942), p. 40.

¹⁶⁹ See T. di Carpegna Falconieri, *Cola di Rienzo*, pp. 3-34, 66-138, 185-216. Roma, 2002. See also M Ascheri (2006), pp. 148, 155.

¹⁷⁰ See A. Toole Sheedy (1942), p. 42.

means of several appeals addressed to both the pope and Albornoz, Perugia herself contributed to the establishment of Cola's rule in the *urbs* in 1354.¹⁷¹ These events must have played some role in the composition of Bartolus' *tractatus*. We do not know whether *De regimine civitatis* was written on request, and if so who requested it. With it, however, the jurist provided what Toole Sheedy called "a digest of the advantages and disadvantages" of all known types of government.¹⁷² The *vexatae quaestiones* of the best ways to rule a political community, the *de iure* legitimacy of political authority and of the legality of its exercise, formed their basis. These are questions that a twenty-first century scholar too would not hesitate to relate to the problem of sovereignty. Moreover, Bartolus saw the up and coming *signorie* as detrimental to the old system of the communal liberties.¹⁷³ Communal sovereignty was about to be ruined and lost forever and something ought to be done, but what? Seigniorial government remained matter of concern far beyond Bartolus' generation. Machiavelli, for example, distinguished 'to live under one prince' from 'being free', and emphasised that in republican regimes of the kind medieval Italy or northern Germany had known people were accustomed to 'live in accordance with their own laws in liberty'.¹⁷⁴ Bartolus' *De tyranno*, however, is said to constitute an important antecedent for the subsequent humanist treatment of the matter, even if not original in inspiration. Bride, for instance, noted that Bartolus' distinction forms the basis of later developments in the treatment of tyranny, and in particular of the conception by Francisco Suárez (1548-1617), who distinguished between tyranny *quoad dominium et potestate* or *in titulo usurpationis* and tyranny *quoad administrationis* (or *quoad gubernationis*) or *de regimine*.¹⁷⁵ D'Addio emphasised the positive influence that this work had on Coluccio Salutati *De Tyranno* (1399-1400).¹⁷⁶ Bartolus' work on tyranny is also one in which legal thought and methodology converge towards a typically political issue in the attempt to demonstrate the intrinsic illegality of tyranny.¹⁷⁷ At the very end of *De regimine civitatis*, Bartolus affirms that the jurist has competence in treating the topic of tyranny is ("*ad iuristas spectantia*" [III, 482]). Within the political horizon of the *civitas*, Bartolus first distinguished between "*tyrannus apertus et manifestus*" and "*tyrannus velatus et tacitus*" (q. V). Then, within open tyranny, he distinguished the case of the tyrant "*ex defectu tituli*" (q. VI), that is, usurpation of sovereign

¹⁷¹ See T. di Carpegna Falconieri (2002), pp. 181-85.

¹⁷² See A. Toole Sheedy (1942), p. 36. See also D. Quaglioni (1983), pp. 9-13. According to A. Toole Sheedy, Bartolus derived his partial knowledge of Aristotle's political theory from Thomas Aquinas and Aegidius Romanus.

¹⁷³ See E. Cortese (1964), II, p. 388; F. Calasso (1965), p. 262.

¹⁷⁴ See N. Machiavelli, *Il Principe*, I and V.

¹⁷⁵ See A. Bride, "Tyran et tyrannie" in *Dictionnaire de théologie catholique*, XV, col. 1949. Paris, 1950.

¹⁷⁶ See M. D'Addio, "Il Tirannicidio" in L. Firpo (1987), III, p. 513.

¹⁷⁷ See F. Calasso (1965), p. 262. See also D. Quaglioni, "Intorno al testo del *Tractatus de tyrannia* di Bartolo da Sassoferrato", in *Il pensiero politico* 2 (1977), pp. 268-84.

prerogatives, from the case of the tyrant "*ex parte exercitii*" (q. VIII), that is, abuse of legitimately assumed sovereign prerogatives. Finally, he defined concealed tyranny as that of "*ille, qui sub quodam velamine non iure principatur*". He specified that there are two ways by which one man can manage to establish concealed tyranny: "*primo per titulum quem sibi facit concedi; secundo per titulum quem sibi concedi non patitur*" (q. XII).

According to Woolf, *De regimine civitatis* is characterised by the application of a "curious method", an eclectic one in which law, rudiments of history, of philosophy, and of theology are all amalgamated into one piece not without ambiguity.¹⁷⁸ How to explain this fact? Perhaps what Dyson said in relation to St. Thomas Aquinas applies to Bartolus too: "his intellectual objectives, and the presuppositions, beliefs and attitudes which he takes for granted in his audience, are of a kind almost wholly foreign to us".¹⁷⁹ In the opening passage, after having mentioned his private law *Tractatus de fluminibus seu Tyberiadis*,¹⁸⁰ Bartolus refers to the *urbs Romana* calling it *caput mundi*. Considering Rome the *civitas* par excellence was common among men of learning and ambitious political leaders. In fact, after the establishment in May 1347 of his rule over the *urbs* torn by the factions in the absence of the pope, even Cola di Rienzo did not hesitate to assume, among other bombastic titles such as *Candidatus Spiritus Sancti* and *Amator Orbis*, that of *Imperator Orbis*.¹⁸¹ How do we have to understand the epithet of *caput mundi* referred to Rome in the period concerned? We may regard that epithet rhetorical and even visionary, the mark of an anachronistic nostalgia for a past lost forever. But we know, due to the influence that the theological vision of history had on a large number of jurists including Bartolus and even beyond the Middle Ages, that what was truly fascinating was not so much the past of the imperial institution in the narrow sense, but rather the eternity of Rome.¹⁸² Her providential mission bestowed from God

¹⁷⁸ See C.N.S. Woolf (1913), p. 175.

¹⁷⁹ See R.W. Dyson (ed.), *St. Thomas Aquinas Political Writings*, xxi. Cambridge, 2002.

¹⁸⁰ In this treatise too Bartolus seems to have employed a curious method. As A. Toole Sheedy noted, in the preface the jurist "indicates that the inclusion of geometric diagrams in a legal work is a novelty". As to emphasize one eccentric aspect of Bartolus' character, she recalled that as a defense "against the ridicule of jurists and readers who may disapprove of this method of clarifying the discussion, he describes his own reluctance until convinced that this was a way of doing good". Whether or not Bartolus possessed a copy of Euclid's works, according to this scholar Bartolus gave "evidence of a competent knowledge of Euclid's geometry". See A. Toole Sheedy (1942), p. 37. In the *proemium* of the treatise, also the jurist praised the beauties of the city of Perugia, and portrayed it as "*bene habitata, aedificiis multis et pulchris ornata et fructifera valde et delectabilia viridaria*". From early October of 1264 until April of 1266, the city even hosted the papal court.

¹⁸¹ See T. di Carpegna Falconieri (2002), pp. 89-108.

¹⁸² On the implications of this idea, see F. Calasso (1965), pp. 260-3. As far as sixteenth century French legal and political thought is concerned, Aldo Garosci explained how Bodin managed to depart from such a tradition. See A. Garosci, *Jean Bodin. Politica e diritto nel rinascimento francese*, pp. 168-81. Milano, 1934.

was a truth of faith, almost a dogma, more than an ideal to strive for. Yet, the belief in the eternity of Rome had important practical implications. Bartolus conceived of Rome in four senses. In the first sense, *Roma* denoted the actual city, suffering from the great *vulnus* caused by the dramatic vacancy on St. Peter's throne. In the second sense, it denoted the Italian peninsula as a whole, once the centre of the Empire. The expression is used as synonymous with *regnum*. Upwardly, the expression denotes the Empire transferred to the Germans by the Church (II, 428-29), the only legitimate superior authority to whom the re-establishment of law and order pertains. *De regimine civitatis* and *De tyranno* - as well as Dante's *De monarchia* - contain an invocation to it as the only legitimate authority to dash away forces and agents of constitutional subversion, and consequently to cure the *vulnus* from which the actual *Roma* is suffering.¹⁸³ Accordingly, in *De tyranno* Bartolus reasserted that it is the proper task of the superior to free the people from servitude: "*ad superiorem pertinet populum de servitute eripere*" and that "*ad superiorem spectat tyrannos deponere*" (q. IX). Last but not least, the expression denoted the invisible and transcendental *Roma*, the one symbolising the quest for perpetual peace and order on earth, the city chosen by the Divine Providence to 'civilise' the world. Bartolus moves on declaring that his investigation is about the ways of ruling a political community. He specifies that this kind of investigation can be carried out in two different ways. The first way is about the "*modum regendi [...] quoad leges*", namely about the modes of ruling as far as the laws are concerned. This approach includes written law as well as non-written law. Having recalled that he had already followed this approach elsewhere, Bartolus manifests the intention to carry out his analysis in a different way now.¹⁸⁴ It is one about the "*modum regendi [...] quoad personas regentium*", namely about the persons who effectively exercise sovereign powers in a community. The treatment of the "*modum regendi quoad personas regentium*", the jurist adds, takes first into consideration the several ways in which a *civitas* may be ruled. Then, it turns to the best and the worst ways to rule over it. Finally, it deals with the major doubts that arise about the principle of sovereignty in the course of daily events.¹⁸⁵ As far as the first point is concerned, Bartolus makes some inaccurate statements. He connects the Aristotelian classification to Roman law by saying that "*ex legibus nostris*" (I, 14) six forms of government are to be taken into consideration. Three of them are good and the others bad. The reference to the *leges nostre* is especially odd given that he mentions that the matter had been plainly discussed in the third book of the *Politics* by

¹⁸³ See D. Quaglioni (1983), p. 13. See also M. Sbriccoli, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna*, p. 19. Milano, 1974.

¹⁸⁴ See Bartolus de Saxoferrato, *De regimine civitatis*, I, 5-7: "*Primo in modo regendi quoad leges, et hoc vel ex jure scripto vel ex non scripto, ut Institutionibus, de jure naturali, §. Constat: quod non prosequor, quia in variis locis hoc varie traditum est*".

¹⁸⁵ See Bartolus de Saxoferrato, *De regimine civitatis*, I, 10: "*Primo videamus quot modis civitas regitur, secundo quis sit melior modus et quis deterior tertio. Circa predicta aliqua cotidiana dubia videamus*".

Aristotle.¹⁸⁶ The question of the influence of Aristotelian philosophy on Bartolus has engaged a number of modern scholars, including Woolf. He viewed the influence of Aristotle's political thought on Bartolus as marginal, even though the jurist considered the Greek philosopher generally authoritative.¹⁸⁷ It can be doubted that Bartolus was a profound reader not only of Aristotle, but also of St. Thomas Aquinas' commentaries on the 'political' Aristotle. Quaglioni claimed that Bartolus' production finds in Thomistic theology one of its fundamental bases and in support of this view he mentioned the fact that according to Diplovatatus Bartolus possessed a rich library of sixty-four volumes, of which thirty-four were of theology.¹⁸⁸ With regards to this, however, we rely entirely on the opinion of Diplovatatus alone. Second, to possess a theological library, whose composition is largely unknown, does not amount to be a profound reader of Aquinas. Last but not least, even if Bartolus had knowledge of Thomistic thought, the fact that he had knowledge of the 'political' Aristotle through Aquinas' commentaries too is not yet demonstrated. Toole Sheedy was convinced that Bartolus derived his partial knowledge of Aristotle's political theory from Aquinas and Aegidius Romanus.¹⁸⁹ At the present stage, there is certainty on the fact that Bartolus had some knowledge of the latter's work in the sense that Bartolus himself mentioned Aegidius. In *De regimine civitatis*, he called him *frater Egidius* (II, 389). Bartolus' acquaintance with Aegidius' work, however, presents problematic aspects, as we shall see. All this suggests that most likely the jurist's reference to Aristotle proves nothing but his desire to appear learned. In fact, the reverence shown to the Aristotelian standpoint and vocabulary is superficial altogether. To be sure, Bartolus said that even having resolved to adopt a terminology fit to the circumstances of the day (I, 19), he felt compelled to keep on using Aristotelian categories. In the city of Rome, after the expulsion of the kings, there appeared three forms of government, denoting respectively three different types of sovereignty. Each of them – *per populum*, *per senatores*, *per unum* (I, 20-60) – corresponds to one of the good forms of government of the Aristotelian scheme, he says: popular government, aristocracy, and monarchy. We cannot be sure that Bartolus derived this classificatory scheme from *De regno ad regem Cypri*, written in part by Aquinas, another of the works in which the Aristotelian classification of the forms of government appears.¹⁹⁰ However, the first type of government, Bartolus

¹⁸⁶ See Aristotle, *Politics*, III, 7, 1279a.

¹⁸⁷ See C.N.S. Woolf (1913), pp. 384-94. Woolf argued that the intellectual task of medieval jurists was "not so much to elaborate ready-made political theories, as to forge and sharpen many of the tools, with which the political philosophy of the modern world was to work" (p. 390). Quaglioni saw Aquinas as one of the main sources of inspiration to Bartolus. See D. Quaglioni (2004), p. 84.

¹⁸⁸ See D. Quaglioni (2004), p. 83-7.

¹⁸⁹ See A. Toole Sheedy (1942), p. 36.

¹⁹⁰ In this treatise, after having conditionally opted for the monarchy (I, 3), most likely inspired by a passage of *De civitate Dei* (V, 12), Aquinas referred to the establishment of

repeats, was one by the people - "*per populum*". Aristotle called it "*politiam*" or "*politicum*", and saw it as a good type. Bartolus agrees that it is a good form of government. He says he prefers to call it 'government for the people' - "*regimen ad populum*" - for it gives priority to the common good in accordance with each person's condition. Here the common good is most likely to be understood as the manifestation of a hierarchically structured social order. This picture is not one of equality in the sense indicated by modern democratic political theory, whereby the notion of fundamental individual rights is predominant. Bartolus adds that if the multitude cares about its own good, and it is hostile to the common good, or even to any particular noble family, this kind of rule is bad and undesirable. Aristotle called the latter *democratia*, Bartolus 'government of populace' - "*populum perversum*" (I, 22-29).

An essential difference between these two types of government is marked by the way in which honours and rewards - "*honores et munera*" - are distributed. The topic, Bartolus emphasises, was treated by several Roman jurists. The fact that honours and rewards have been distributed "*equaliter [...] secundum debitos gradus*" characterises the first good type of government by the people. When they are not distributed proportionally but "*inequaliter, quia aliqui gravantur, aliqui alleviantur*", we can be sure we are moving within the framework of the second bad form of government by the people. Both types of popular government consider differences in rank and reputation but only the first, Bartolus seemed to suggest, is able to preserve them with a view to balance in society whereas the second is subversive of that balance. In fact, he says, so great are the dangers of this perverse government that the political community may even perish. The second form of government that had emerged in the city of Rome was the senatorial - "*per senatores*" - who were few, rich, good, and prudent ("*paucos divites bonos et prudentes*"). They were generally the guardians of the traditions and of the ethos of the community. If the few are positively inclined towards the realisation of the common good, their government is good. Aristotle called it "*aristocratia*", that is, in Bartolus' terms, "*principatus bonorum*". The Venetians, he recalls, have established this kind of government and used to call it "*regimen maiorentium*". If the few are merely eager for their own gain and oppress others, then their government is bad. The latter is "*oligarchia*" in Aristotelian terminology. It is mere 'government of the rich' - "*principatus divitum*" - says the jurist. More often it is commonly indicated as the 'government of the bad' - "*regimen malorum*". The third form of government is that "*per unum*", generally called "*regnum*" by Aristotle. Bartolus explains that if it extends universally and consequently the sovereign is "*dominus universalis*"; this form of government is called "*imperium*". If it does not extend universally, it is called "*aliquando [...] regnum, aliquando ducatus, marchia vel comitatus*". The passage is important because

Roman Republic as an example of communal strategy of survival adopted after the Roman people realized that their kings had turned into tyrants. See Thoma Aquinatis, *De regno ad regem Cypri*, I, 4. On the same point, see also Aegidius Romanus, *De regimine principum*, III, II, 2.

again it shows how deeply rooted the hierarchically structured idea of sovereignty was in medieval law and government. Sovereignty was vested in various entities placed at various levels of the medieval society. Sovereignty was one in essence and yet distributed according to different degrees among a variety of units bearing it. The existence of a plurality of sovereign units was not an obstacle to the understanding of sovereignty as a unitary principle. Jurists like Bartolus, as we have seen, focused on *iurisdictio* and using this as a tool greatly contributed to the configuration of the dialectic of unity and plurality in legal terms relating a variety of species to one genus. *Regnum*, Bartolus continued, is the name that was usually given to the 'natural' supremacy - "*dominium naturale*" - of one man when he works for a good and common purpose.¹⁹¹ If he works for a bad end, and for his own advantage, according to Aristotle his sovereignty is called "*tyrannides*". It is interesting to note that although Bartolus does not question the validity of the Aristotelian six-fold division, he asserts that in truth every bad form of government can be called a tyranny, namely the tyranny of the people, the tyranny of a group, and the tyranny of one person:

"Habemus ergo sex modos regendi, tres bonos et tres malos, unumquemque suis propriis nominibus appellatum. Veruntamen omne malum regimen potest communi nomine appellari tyrannides, scilicet tyrannides populi, tyrannides aliquorum et tyrannides unius" (I, 60-4).

At this point of the digression, Bartolus turns to the seventh form of government, the worst of all, the so-called "*regimen monstruosum*", which is not true government for it lacks the essence of government, namely the orientation towards the common good. The passage in question is particularly interesting for it suggests that Bartolus had in mind not only the situation of anarchy in the city of Rome due to the vacancy on the throne of the apostle Peter, but also the political situation of the entire peninsula. The seventh form of government is in fact a denial of the good inherent in all forms of government. The adverb "*ibi*" in that context indicates that the *civitas romana* is the Italian peninsula in general, rather than the city of Rome in particular. Of course, the city of Rome is the paradigmatic example of that situation. Over there, Bartolus says, many are the tyrants that "*per diversas regiones*" are so strong that none can overcome the others. The jurist laments that although it still exists, the "*regimen commune*", the Empire, is so weak that it can do nothing against the tyrants and their allies. Aristotle has not treated this kind of government and even rightly, Bartolus remarks, for it is a shameful monstrosity. He provocatively asks what one is supposed to think, seeing a single body with a weak head, and many other heads stronger than that one, contesting among themselves. Bartolus concludes that this kind of constitutional abomination comes about by divine

¹⁹¹ The adjective 'natural' denotes that a binding order of things by which the superior stands above the inferior was believed to exist.

permission, as a manifestation of the contingent character of every worldly glory – “*omnis gloria mundi caduca est*”. After having spoken of the peninsula in general, Bartolus goes back to the *civitas Romana*, once head of virtuous customs and laws, but now fallen into disorder. In a language that is allusive to both medicine and political philosophical, Bartolus says that so abnormal is the situation that it is not even possible to speak of ‘government’, nor to indicate what the form is of the rule that actually exists. What Bartolus suggests is that constitutional deformity is equivalent to disorder, and disorder encourages tyranny. The passage also reveals his distaste of factions:

“Est et septimus modus regiminis, qui nunc est in civitate Romana, pessimus. Ibi enim sunt multi tyranni per diversas regiones adeo fortes, quod unus contra alium non prevalet. Est enim regimen commune totius civitatis adeo debile, quod contra nullum ipsorum tyrannorum potest nec contra aliquem adherentem ipsis tyrannis, nisi quatenus ipsi patiuntur. Quod regimen Aristoteles non posuit, et merito: est enim res monstruosa. Quid enim, si quis videret unum corpus habens unum caput commune debile et multa alia capita communia fortiora illo et invicem sibi adversantia? Certe monstrum esset. Appellatur ergo hoc regimen monstruosum. Hoc enim divina permissione factum est, ut ostendat quod omnis gloria mundi caduca est. Civitas enim Romana caput morum, caput politiarum, ad tantam monstruositatem circa sui regimen venit, quod verius dicit potest quod non est regimen nec regiminis formam habet” (I, 65-80).

At the beginning of the second section of *De regimine civitatis*, Bartolus concerns himself again with methodology by introducing the fundamental question of the ‘best way to rule’ (“*melior modus regendi*”). The opening passages of the section are also a further demonstration of Bartolus’ ambivalent attitude towards Aristotelian political theory. (II, 81-94). For Bartolus the knowledge of the best form of government is necessary to the jurists for practical and professional reasons, given the fact that the questions of vital importance to the *civitas* may always be brought before them by the high magistrates. Finally, Bartolus make a statement that might suggest the superficial character of his adherence to political Aristotelism. He says that although Aristotle treated the subject in the third book of *Politics*, Aegidius Romanus had done so more recently as well, and more clearly above all, in *De regimine principum*.¹⁹² He goes on saying that the words of Aristotle are unknown to the jurists.¹⁹³ He will thus refer to the conceptual framework of Roman law and to Aegidius Romanus’ terminology, opinions, and arguments instead. Finally, he will present his own point of view. What did Bartolus mean by saying that Aegidius was clearer than Aristotle with regards to that matter? What kind of quality did Aegidius, who was not a jurist, possess that Aristotle did not?

¹⁹² See Aegidius Romanus, *De regimine principum*, III, II, 3-4.

¹⁹³ If all or most jurists ignored Aristotelian philosophy, was not Bartolus suggesting he had a superior knowledge in comparison with his colleagues?

What Aegidius did Bartolus have in mind, the author of *De regimine principum* or of *De ecclesiastica potestate*? Before trying to answer these questions, we should note that no reference on the point is made to Aquinas. Aegidius wrote *De regimine principum* shortly before 1285. But this is one of the *Doctor fundatissimus*' works in which the Aristotelian influence is remarkable.¹⁹⁴ Equally remarkable is the favour towards the French monarchy expressed in it.¹⁹⁵ If Bartolus intended, as he said, to leave Aristotle behind by the means of Aegidius, a reference to *De ecclesiastica potestate* would have been more appropriate and would have saved Bartolus from the possible charge of cultivating slightly anti-papal feelings, which were the feelings characterising *De regimine principum* to some extent. *De ecclesiastica potestate*, moreover, is centred on the doctrine that *utrumque gladium habet Ecclesia*, a doctrine dear to Bartolus even if, as we have seen, he formerly expressed the opinions that "*imperium et sacerdotium processerunt a Deo et eodem tempore*", and that "*imperator et ecclesia processerunt a Deo tamquam a causa efficienti*".¹⁹⁶ So, how can we explain Bartolus' preference for the early Aegidius' writing? In fact, we do not know if Bartolus knew Aegidius' late production. It might be the case that Bartolus had no knowledge of *De ecclesiastica potestate* also due to the difficulties which occurred

¹⁹⁴ On the influence of Aristotle on Aegidius, see P. Lambertini, "Philosophus videtur tenere tres rationes – Egidio Romano lettore ed interprete della Politica nel terzo libro del *De regimine principum*" in *Aegidiana*, I (1990), pp. 227-326; and "Il filosofo, il principe, la virtù. Note sulla ricezione dell'Etica Nicomachea nel *De regimine principum* di Egidio Romano" in *Aegidiana* II (1991), pp. 239-279.

¹⁹⁵ See R.W. Carlyle and A.J. Carlyle (1970), V, pp. 402-05. *De regimine principum* was dedicated to Philip IV. It passed through many editions and was translated into several languages. The work is divided into three books. The first deals with the conduct of the king, the nature of his true happiness, the acquisition of virtues, and the ruling of passions. The second deals with family life and the relations with wife, children, and servants. The third considers the State, its origin, and matters relevant to sovereignty as the proper mode of governing in times of peace and war. In 1295, Pope Boniface VIII appointed Aegidius archbishop of Bourges. The attitude of Aegidius as far as the struggle between the pope and the French monarch is concerned, has been interpreted as favorable to the latter for a long time, but the theses expounded in *De potestate ecclesiastica* (1300-1), in which the rights of the pope are vindicated and exalted, mark a watershed in the intellectual biography of Aegidius. Notable are also the similarities between this treatise and the papal bull *Unam Sanctam*. See A. Mariani, *Scrittori politici agostiniani del sec. XIV*, pp. 10-56, 148-78. Firenze, 1927; W.D. McCreedy, "Papal plenitudo potestatis and the Source of Temporal Authority in Later Medieval Papal Hierocratic Theory" in *Speculum* 48 (1973), pp. 654-673; J.R. Eastman, "Das Leben des Augustiner-Eremiten Aegidius Romanus (c.1243-1316)" in *Zeitschrift für Kirchengeschichte* 100 (1989), pp. 318-389; M. Damiata, "Ockham ed Egidio Romano" in *Studi francescani* 91 (1994), pp. 343-374.

¹⁹⁶ See Bartolus de Saxoferrato, *Super primam Digesti Veteris, De iustitia et de iure, rubrica*, in *BSC*, I, fol. 4. In *De ecclesiastica potestate*, Aegidius asserted that "*errant [...] dicentes quod eque immediate a Deo sint sacerdotium et imperium*". See Aegidius Romanus, *De ecclesiastica potestate*, II, 5.

concerned with its attribution. On the other hand, it might also be the case that Bartolus had knowledge of it but deliberately chose not to refer to it. If this was the case, we may conjecture that Bartolus decided to refer to the most Aristotelian of Aegidius' works in order not to upset the possible clients who ordered the composition of *De regimine civitatis*, to some extent afraid of the possible consequences of the Aegidius' recent extreme pro-papal position.¹⁹⁷ At the same time, Bartolus might have thought that Aegidius remained a safe reference for the Guelph camp considering the fact that Aegidius' turn must have gained him sympathy and support in that camp. Besides these hypotheses, we should consider the possibility that the early Aegidius in fact constituted one of the major sources of knowledge of the Aristotelian classification to Bartolus. We still need to understand why Bartolus preferred Aegidius to Aquinas. Leaving aside the fundamental question of the access to Thomistic literature on the side of Bartolus, Aegidius was an eminent and influential man in the Church, certainly more into the political games of the day than Aquinas. The former, not the latter, must have better served the political purpose to offer a doctrinal basis to the claim of the Guelph parties and forces in the peninsula. Although all these arguments are conjectural, we may affirm with some certainty that no matter how superficial his knowledge of the Aristotelian political theory might have been, there is no autonomy on the side of Bartolus in respect of political philosophy. Even if for the sake of classificatory purposes alone, the jurist cannot do without political philosophy.

Anyway, Aegidius Romanus, Bartolus says, acknowledged that there are three good forms of government.¹⁹⁸ The first form is government by the people, or for the people ("*modus regendi multitudinis seu ad populum*"). It is good ("*bonus*") only if it tends toward its proper end, that is, the common good. The second form of government, namely the rule of a few ("*regimen paucorum*") is better ("*melior*"), says Bartolus without providing much argument. The third form, namely monarchy, or the government of one king ("*monarchia sive gubernatio unius regis*") is the best ("*optimus*"). The fact that the rule of one person is the best type of government, he

¹⁹⁷ In particular, they might have been afraid of the implications of such a position in respect of private property. In *De ecclesiastica potestate*, Aegidius restated the well-known theocratic principle that "*terrena potestas est per ecclesiasticam et ab ecclesiastica et in opus ecclesiastice constituta*". On the matter of *dominium*, intended as sovereignty over the disposal of temporal goods, the author claims that the Church alone can legitimize such a power: "*ecclesiam omnium possessionum et omnium temporalium esse matrem et dominam, non tamen propter hoc privamus fideles dominiis suis et possessionibus suis, quia [...] et ecclesia habet huiusmodi dominium et etiam fideles huiusmodi dominium habent; sed ecclesia habet tale dominium universale et superius, fideles vero particulare et inferius. Reddimus ergo quae sunt Caesaris Caesari, et quae sunt Dei Deo, quoniam ipsorum temporalium dominium universale et superius ecclesiae tribuimus, dominium autem particulare et inferius fidelibus elargimur*". See Aegidius Romanus, *De ecclesiastica potestate*, II, 7.

¹⁹⁸ See Aegidius Romanus, *De regimen principum*, III, II, 3.

argues, Aegidius Romanus has demonstrated convincingly.¹⁹⁹ The “*pax et unio civium*” ought to be the end the sovereign strives for.²⁰⁰ Peace and unity, in Aegidius’ argument, can be better brought about and observed if there is only one man in the position of super-ordination, than if there were several. In fact, in elitist government, there can be peace and unity only insofar as the several are of one will. Yet, the decisions may be the result of the spirit of competition if, as it is often the case, they are in disagreement.²⁰¹ In order to achieve and maintain peace and unity then, strength is necessary. Through the action of one man, the political community is made stronger. The more strength is gathered in the hands of one man, the stronger sovereignty is in comparison to its being dispersed among many. Besides the idea of the common good, effectiveness constitutes an essential element in Bartolus’ argument: “*si igitur tota civilis potentia congregetur in unum erit efficacior et per illam princeps, propter maiorem potentiam, melius poterit gubernare*” (II, 120). The argument of effectiveness can be found in earlier and later sources of different kinds. So, for example, in the prologue of the *Tractatus de legibus et consuetudinibus regni Angliae*, otherwise known as *Glanvill*, an English early juristic source probably written between 1187 and 1189, and dedicated to Henry II, the function of the monarch as guarantor of peace and unity through strength is explicitly defended.²⁰² Much later, while referring to Cesare Borgia’s cruelty, Machiavelli listed the latter among the extreme remedies against turmoil and violence.²⁰³ Finally, on the account of the principle that society ought to be organised in accordance with nature, the *civitas* being “*una persona et unus homo artificialis et ymaginatus*” (II, 125), it is ruled better if, like in the human body, there is one head over many members.²⁰⁴ In the fourth place, Bartolus reports Aegidius’ opinion that by

¹⁹⁹ See Aegidius Romanus, *De regimen principum*, III, II, 3.

²⁰⁰ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 103: “*pax et unio civium debet esse finalis intentio regentis*”.

²⁰¹ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 106-110.

²⁰² Its unknown author wrote: “*regiam potestatem non solum armis contra rebelles et gentes sibi regnoque insurgentes oportet esse decoratam, sed et legibus ad subditos et populos pacificos regendos decet esse ornatam, ut utraque tempora, pacis scilicet et belli, gloriosus rex noster ita feliciter transigat, ut effrenatorum et indomitorum dextra fortitudinis elidendo superbiam et humilium et mansuetorum equitatis virga moderando iusticiam, tam in hostibus debellandis semper victoriosus existat quam in subditis tractandis equalis iugiter appareat*”. See G.D.G Hall (ed.), *The Treatise on the Laws and Customs of the Realm of England Commonly called Glanvill*, prologue. Oxford, 1993. The authorship of this work has been attributed respectively to Rannulf Glanvill, Hubert Walter, and Geoffrey Fitz Peter. Certainly, it has been written by a man learned in the law and in the practice of the king’s court at the Exchequer, indebted to both civil and canon law. The treatise is concerned with civil litigation by writ before the king’s justices.

²⁰³ See N. Machiavelli, *Il Principe*, XVII.

²⁰⁴ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 123-129: “*ars seu artificium tanto est melius quanto magis imitatur naturam [...] tota civitas est una persona et unus homo artificialis et ymaginatus [...] sed in homine naturali videmus unum caput et multa membra: ergo civitas si sic*

experience we may recognise that provinces which are not governed by one king are in poverty, and do not enjoy peace, but rather are beset by strife and wars. Peoples under a king are seen as not suffering from any war, rejoicing in peace, and flourishing in abundance.²⁰⁵ From these arguments, following Aegidius, the jurist concludes in Aristotelian fashion that if the government of the people may be good as such, the government of a few is better, and monarchy is best because a perfect unity is found therein.²⁰⁶

Bartolus notes that Aegidius had presented some counter-arguments, drawn from Aristotle's treatise on politics against the aforementioned conclusions.²⁰⁷ The discussion here turns around the characteristics necessary to rule. Bartolus says he is eager to test those arguments against Roman law (II, 141). Presumably, what he means is that there is a connexion between such characteristics and justice as defined in Roman law. Preliminarily, he asserts that three things are required in anyone who aims at ruling well. The first is a perfect discerning reason so that he may know how to separate the just from the unjust, the licit from the illicit ("*perfecta ratio ad discernendum, ut sciat iustum ab iniusto, licitum ab illicito separare*"). Secondly, he must have the right intention ("*rectam intentionem*"). Thirdly, he must have a perfect stability ("*perfectam stabilitatem*"). These three qualities constitute the basis for doing justice as a constant and perpetual will, which renders to each one his due (Dig. 1, 1, 10). Also, we may say, they constitute what Marsilius called *sanitas*. The first counter-argument is that the more people there are, the more things they see, and in them there is a more perceptive and discerning reason than in one person. In this respect, it would be better to be ruled by many.²⁰⁸ The second considers that the ruler has the right intention only when he looks more to the public good than to his own. If the people are sovereign, once they have looked at their own good alone, they nevertheless withdraw from the common good no further than if one person were ruling and acting for his own good: therefore it is better to be ruled by many.²⁰⁹ The third counter-argument has its presupposition in that the ruler must have a perfect stability so that, under all circumstances, he may not be corrupt because, as justice requires, the will ought to be constant and perpetual. Given that it is easier to corrupt one single person than a multitude, it is better to be ruled by many people. Responding to these objections, Bartolus says, Aegidius first argued that a single king or prince should have with him many counselors and powerful

regatur melius regitur, quia magis imitatur naturam". At this point Bartolus refers to Gratian's image of the society of bees. See *Decretum Magistri Gratiani*, II, c. 7, q. 1. 41.

²⁰⁵ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 132-135. On the point, see Thomas Aquinas, *De regno ad regem Cypri*, I, II.

²⁰⁶ Aquinas presented the same conclusion. See Thomas Aquinas, *De regno ad regem Cypri*, I, III.

²⁰⁷ See Aristotle, *Politics*, III, X, 1287b; III, XI, 1281a-1281b; III, XV, 1286a; V, I, 1302a; V, IX, 1309a.

²⁰⁸ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 151-152.

²⁰⁹ See Aegidius Romanus, *De regimine principum*, III, II, IV.

men. He will then see things as if he were many, and consequently he won't be easily subject to corruption. In fact, if the king were to follow his own head, he would not be a king, but a tyrant. Aegidius too is of the opinion that it would be dangerous to have such a person as sovereign, recalls Bartolus.²¹⁰ True to the juristic approach, Bartolus argues that one must bear in mind that not every government of one person is the government of a king strictly speaking (II, 176). Sometimes the one who rules is "*iudex*", such as the "*presides provinciarum*" and the "*proconsules*".²¹¹ There are also "*potestates*" and "*rectores civitatum*". In these cases, the persons concerned must always judge according to the law. More specifically, they hold the position that pertains to ministers. The "*regalia*" do not pertain to them though. They either pertain to the *civitas*, on behalf of which they rule, or they pertain to their superior, or to the *fiscus*. The *iura regalia* belong to the *civitas*, or the *fiscus*, as artificial and abstract bodies. Yet, the principle of the personality of sovereignty is not abandoned entirely, for the *regalia* may still be vested in a person superior in rank. Whenever one person effectively rules a political community, that is to say, whenever all things pertain to him, and he makes laws as he wishes, then he is a proper king.²¹² Now Bartolus begins a Biblical digression on the *ius regis* in order to determine whether it is good to be ruled by a king (II, 191). The passage is important because it deals with the problem of the limits to the king's prerogatives. In it, the arbitrary behaviour of the sovereign is seen as a possible cause of servitude. This humiliating condition of subordination is compared with death. Through the prophet Samuel (1 Rg 8, 11-7), God warned against the dangers of autocratic rule (II, 193-205).

Although to be ruled by kings seems worst of all, Bartolus recalls that the words of the prophet Samuel have been "*per sanctos doctores*" properly interpreted.²¹³ They taught that all these things are to be understood as prohibited to the king, since the one who does these things is a tyrant. Samuel had revealed the will of God, a will that does not allow any arbitrary rule. It was displeasing to God that a king should have been made at all, as it is said in the Holy Scriptures.²¹⁴ That

²¹⁰ See Aegidius Romanus, *De regimine principum*, III, II, IV.

²¹¹ Through *iudices*, Bartolus argues, God ruled the Jewish people for a long time, as the 'Jewish Book' shows. See Jd 17, 6; 18, 1; 19, 1; 21, 25. See also Thoma Aquinatis, *De regno ad regem Cypri*, IV, I.

²¹² See Bartolus de Saxoferrato, *De regimine civitatis*, II, 176-190: "*Nam quandoque est unus qui regit et tamen iste est iudex, ut sunt presides provinciarum et proconsules [...] ut sunt potestates et rectores civitatum [...] isti enim habent iudicare secundum leges, nec tenent statum regium sed competentem ministris, nec ad eos competunt regalia sed ad civitates quas regunt, vel ad alium superiorem, vel ad fiscum [...] Quandoque unus regit civitatem [...] qui facit legem prout vult et omnia ad eum pertinent: et istud dicitur regimen regis*".

²¹³ See Hieronimus, *Commentariorum in Osee prophetam Libri III ad Pammachium*, II, VIII, 1-4. In *Opera*. CCSL LXXVI. Turnhout, 1969; Beda Venerabilis, *In primam partem Samuhelis Libri III*, 2. In *Opera*, II, 2. CCSL CXIX. Turnhout, 1962; Thoma Aquinatis, *Prima Secundae Summa theologiae*, Q. CV, a. 5.

²¹⁴ See 1 Rg 8, 6-8.

this is true, Bartolus continues, appears in Deuteronomy,²¹⁵ where it is taught what a good and righteous king ought to do in order to preserve the good of the community and of his own throne. Once his personal sovereignty is established, the king shall copy out for himself Deuteronomy in a book, taking his example from the priests of the Levite tribe. He shall keep it with him and read from it all the days of his life in order to learn how to fear the Lord, to keep His words and ceremonies, and to refrain from *superbia* in particular towards his brothers.²¹⁶ Bartolus says that the words of God need to be carefully considered and examined. By the expression "*cum fuerit constitutus*", he says, we must understand that to become a king one must be made so by another, rather than being made so on one's own authority. In this case would not be a king, but a tyrant.²¹⁷ Yet, a large part of the second section of the treatise is concerned with the further interpretation of the Biblical passage in question.²¹⁸

God's command to the king not to multiply horses means that it is bad to have more than is sufficient for one's needs. The command not to lead his people into Egypt can be taken literally: the king of the Jews ought never to go forth to occupy the land of Egypt. Yet, it can also be taken allegorically: the king must not lead his people into slavery, symbolically represented by Egypt. With these words, God intended to prohibit burdening the people with personal burdens, which are a sort of slavery. God's command not to have many wives means that the king must refrain from luxury, for luxury separates the king's soul from reason, as in the case of Solomon, who fell into idolatry (3 Rg 11, 1-5). By the prohibition to accumulate silver and gold, God warned the king against avarice. A sign of it is the preparation of pompous ceremonies implying a great amount of money at the expenses of the people. The warning against pride is a traditional one in Christian doctrine, whereby pride is seen as 'the root of all vices'. What interests us in particular here is Bartolus' concern for the king's subjects. God's prohibition to the king to display pride "*super fratres suos*" marks the difference between kingship and tyranny and means, according to Bartolus, that those in the position of subordination can never be treated as the king's slaves: "*illi qui sunt subditi regi non sunt servi, sed fratres*" (II, 267). Finally God wants the king's judgment to be inspired neither by love, nor by hatred, but by justice alone: "*rectum sit iudicium, non amore vel odio [...] sit iustus*" (II, 270). The good king must therefore be faithful, Christian, just, neither overweening nor one who burdens his people, no lover of luxury, neither greedy nor proud: "*debet ergo bonus rex esse fidelis, Christianus, iustus, non pomposus, non subditorum gravator, non luxuriosus, non avarus nec superbus*" (II, 270-271). After having

²¹⁵ See Dt 17, 16-20.

²¹⁶ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 215-230.

²¹⁷ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 231-234: "*hec sunt verba Dei, que aliquantulum excutiamus. Ait enim: 'Cum fuerit constitutus'. Ex hoc innuitur quod debet quis ab alio rex constitui, non ipse sua auctoritate sibi regnum assumere: tunc enim non esset rex sed tyrannus*".

²¹⁸ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 235-285.

prohibited certain things from being done, Bartolus says, God has ordered that certain things be done. So for instance, the king ought to write out for himself the book of Deuteronomy. The latter, Bartolus says, St. Isidore of Seville interpreted as a second law, namely as "*figura evangelice legis*".²¹⁹ The king must be faithful and Catholic, constantly inspired by the "*sancta mater Ecclesia*". Bartolus now turns to Canon law to remind his readers of what a sovereign must do in accordance with it, and he says that the king must also do other things described by Gratian.²²⁰ Although Canon law states what the king ought to do and he ought to be, it does not establish what he may exact from his subjects. He attempts to answer this question by first referring to Feudal law, which prescribes that all "*tributa, vectigalia et census publici*" explicitly listed in it pertain to the king. Then he refers to the Digest, in which it is said that the king can impose taxes "*ex causa necessaria [...] quod reges habent omnem potestatem*" (II, 282).²²¹ Having examined the main arguments in favour of kingship, Bartolus turns his attention to the question of whether it is useful for the *civitas*, or for the *populus*, to be ruled by a king. Insofar the king is a good king according to the conditions already discussed, the best rule is the rule of a king: "*optimum regimen est regimen regis*" (II, 286). Bartolus, however, shows that he is aware of the risk that a monarch may easily turn into a tyrant.

It is at this point that the jurist introduces a threefold division of the political communities ("*triplicem divisionem civitatum seu populorum*" [II, 296]). First, he writes that it is not convenient for a "*civitas seu gens magna in primo gradu magnitudinis*" (II, 301) to be ruled either by a king, or by the aristocracy. This fact is proven by Roman constitutional history: the expulsion of the kings from the city of Rome is seen as the result of their tyrannical attitude. As it was commonly said, it is in the nature of kings to be pompous and magnificent in making great expenditures. When the people are not sufficiently rich to provide the kings with the requested financial resources, then the latter extort them from their subjects. So, they turn into tyrants. God displeases kingship somehow.²²² For these kinds of communities, namely the small communities, the rule of the few too would prove unfit, especially when the few are the rich. Because they are a minority, two things might occur: either the populace has resentment against the rule of the few no matter how well the community has been governed or the few in power struggle among themselves, as it is naturally the case. In this second case, rumours, plots, fires, and civil wars devastate the community.²²³ For these kinds of communities popular government is more appropriate: "*expedit autem huic populo, qui est in primo gradu magnitudinis, regi per multitudinem: quod vocatur regimen ad populum*" (II, 328). The history of the city of

²¹⁹ See Isidorus Hispalensis, *Etymologiarum sive Originum Libri XX*, VI, 2, 7.

²²⁰ See *Decretum Magistri Gratiani*, II, C. XXIII, c. 23, q. V, and c. 40, q. V.

²²¹ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 273-283.

²²² See I Sam 8:18.

²²³ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 316-328. Here Bartolus is presumably referring to the riots that occurred in Pisa and Siena during the first two decades of the fourteenth century.

Rome, which grew greatly in its Republican period, and the authority of the Book of Kings, Bartolus said, account for the fact that this is a good form of government. He even argues that this kind of sovereignty is more proper to God than to man: "*videtur enim magis regimen Dei quam hominum*" (II, 334). The city of Perugia, which "*isto modo regitur in pace et unitate, crescit et floret*" (II, 335), constituted his best actual example.

As far as the *civitas Perusina* is concerned, her medieval history is the history of one of the most influential Guelph communes of the peninsula. In most recent scholarship, Grundman wrote, "the baseless fantasies about Perugian democratic government in the early Middle Ages" has been set aside, for proper popular government was a rather late achievement.²²⁴ From the eighth century, Perugia was connected to the Patrimony of St. Peter. The Emperor was yet nominally protector of the local feudal nobility, whose pre-eminent position was based on control of the land and agriculture, and on military ability. This noble group of *milites* began establishing its residence in the urban agglomerate and founded and controlled the *comune*. For a long time, the system of local jurisdictions rested primarily on the bishop.²²⁵ With a papal bull of 1198, Innocent III issued that the city, its *contado*, and any future legitimate acquisition were all taken under the protection of the Holy See. This important document recognised local administration, magistracy and jurisdiction, as well as local customs and laws, provided that they were 'rational' and commonly observed. At the beginning of the thirteenth century, in 1210 precisely, while facing a hostile Otto IV, the Church legitimised communal liberties and Perugia's territorial acquisitions again. Originally, the term *popolo* denoted a faction within the commune the core of which was the "*pars peditum*" namely the infantry comprised of those who were not wealthy enough to have horses and armour. A type of political consciousness had emerged due to the common residence of its members on the periphery of the town, and the similarity of occupations: trade and handicrafts. As early as 1218 the guilds were formed, and between 1220 and 1223 the Armed Societies of the People led by the *bailivi* or *bailitores* were established. So, *popolo* became synonym for guild members. The death of Frederick II in 1250, however, brought force to the Guelph party. This fact led to a period of unprecedented prosperity and success for the popular factions. With the expansion of its influence and control over neighbouring cities and rural areas, Perugia allowed its popular faction to further increase its power. It managed to displace the nobility, but soon the tensions between the *popolo grasso* and the *popolo minuto* became unbearable. Merchants and money-investors belonged to the first group, whereas shopkeepers and artisans belonged to the second.²²⁶ Of the three major constitutional changes that characterised the life of Perugia from the mid-thirteenth century – the introduction of the office of the *capitaneus comunis et*

²²⁴ See J.P. Grundman, *The Popolo at Perugia, 1139-1309*, p. 18. Saint Louis (Miss.), 1974.

²²⁵ See S. Mochi Onory, *Ricerche sui poteri civili dei vescovi delle città umbre durante l'alto medio evo*, p. 156. Roma, 1930.

²²⁶ See J.P. Grundman (1974), pp. 236-7.

populi Perusii, of the *Consilium maius* or *Parliamentum*, and the *Ordinamenta populi* – the latter is especially worth mentioning here.²²⁷ The latter was a set of constitutional norms passed and entered into force in April 1260, which validated the policies and organisation of the popular party. The purpose of this “brilliantly partisan” document, carefully composed with the assistance of legal experts, Grundman wrote, was “simply to destroy the nobility as an organised force in public life”.²²⁸ For the next half-century, the triumphant popular party remained the protagonist of Perugia’s internal affairs while support of the Angevins became a central aspect of foreign politics.²²⁹ The *Ordinamenta Artium*, established in 1308 and revised in 1315, became the fundamental law of the city.²³⁰ During the first decades of the fourteenth century, the *popolo* “remained the city’s dominant force, but its cohesion was lost”.²³¹ The happiest phase of medieval Perugia, however, ended around the mid-century, when Innocent VI (d. 1362) gave the task to regain control over the papal territories lost to the Ghibelline party to cardinal Albornoz. Besides the internal conflicts, Perugia was then caught between the Avignonese papacy and Charles IV. It is symptomatic that, as a member of Perugia’s delegation at Pisa in May 1355, Bartolus reaffirmed that the city was *in temporalibus superiorem non recognoscens*, and constituted *populus liber*. On that occasion, Charles IV is said to have commended the *regimen ad populum* in the presence of the jurist.²³² The harsh confrontation in the city continued for at least a decade after the death of Bartolus and led to the end of communal liberties and the establishment of seigniorial government. In Bartolus’ view, the *Parliamentum* remained the pillar of representation. It had the task of electing the city governing body, the *Concilium civitatis*, which represented the entire *populus* of Perugia.²³³ As he put it otherwise, “*concilium repraesentat mentem populi*”.²³⁴ The persons who are delegated to rule the city according to their offices are guarded by the people, and often decisions are made by the common counsel of the men of the city even though the wiser and

²²⁷ See J.P. Grundman (1974), pp. 124-30.

²²⁸ See J.P. Grundman (1974), p. 140. The author saw it as “radicalism at its best”.

²²⁹ See J.P. Grundman (1974), p. 169.

²³⁰ See J.P. Grundman (1974), pp. 305-6.

²³¹ See J.P. Grundman (1974), p. 453.

²³² See Bartolus de Saxoferrato, *De regimine civitatis*, II, 337-344: “*hoc ideo est, quia magis Dei quam hominum regimen est: hunc regendi modum dictus illustrissimus imperator, cum apud eum essem, maxime commendavit. Istud itaque regimen appellamus regimen ad populum seu regimen multitudinis, ut dictum est*”.

²³³ See W. Ullmann, “De Bartoli sententia: concilium repraesentat mentem populi”, in *BSDC*, II, pp. 706-33, 716-7. Acting in the name of the people, the *concilium civitatis* appoints officers having judicial, administrative, and economic tasks. On the point, Ullmann came to the conclusion that “Marsilius’ and Bartolus’ systems are substantially the same” on the basis of the idea that law and politics were throughout the Middle Ages “tautological expressions for one and the same thing” (p. 730).

²³⁴ See Bartolus de Saxoferrato, *In primam Digesti veteris partem, De legibus senatusque consultis et longa consuetudine*, I. de quibus [1], § 10, fol. 18. Venetiis, 1575.

more prudent may think them to be bad decisions. Woolf noted that Bartolus took every precaution to restrain 'democratic' sovereignty by means of two important reservations. First, "*regimen ad populum* means not that the government is managed directly by the people, but that the *iurisdictio* is with them". The government ought to be committed to different people over time, according to the offices and in a cyclical manner. The second reservation is that "when [Bartolus] says that the *regimen* is in the multitude, he means *exceptis vilissimis*".²³⁵ As we have already seen, this idea is compatible with Bartolus' view of the social order as a whole articulated according to rank and status.²³⁶ On the other hand - this is a consideration of relevance due to its possible implications - Bartolus specifies that the "*magnates*" can be excluded from government when they are so powerful as to oppress others. Such a circumstance, he adds, can frequently occur.²³⁷

Secondly, Bartolus examines the status of the "*civitas seu gens maior [...] in secundo gradu magnitudinis*" (II, 357). In this case, the best form of government is the elitist: "*non expedit regi per unum regem per rationes supra dictas, nec expedit regi per multitudinem: esset enim valde difficile et periculosum tantam multitudinem congregari [...] expedit regi per paucos [...] per divites et bonos homines*" (II, 359-362). Again, Bartolus refers to Roman constitutional history to support his view. Once the city of Rome had grown and extended its dominion, the senatorial class emerged more authoritatively than ever and all power was transferred to it alone. As examples of the day, he takes Venice and Florence, which he ranks "*in numero civitatum maiorum*", namely among the larger ones. In such context, he warns, the expression 'few' ("*pauci*") has to be interpreted comparatively. Their rulers may be said to be few with respect to the size of those cities. In comparison with the situation in other cities, they are "*multi*" indeed. Precisely because they are many comparatively, Bartolus says, the multitude seems to be rather easy about their rule. Since the "*pauci*" are "*multi*" somehow, divisions among themselves and middle-way positions are respectively less likely to occur, and more likely to be taken. Accursius too, Bartolus recalls, referred to such form of government in his *Glossa* (II, 368-375).

Finally, Bartolus takes into consideration the status of the "*civitas seu gens maxima [...] in tertio gradu magnitudinis*". A so large *civitas* is what he defined generally "*regnum*" and it is usually one exercising dominion over other *civitates*.

²³⁵ See C.N.S. Woolf, (1913), p. 177.

²³⁶ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 345-350: "*autem istud regimen sic dictum quoniam iurisdictio est apud populum seu multitudinem, non autem quod tota multitudo simul apta regat; sed regimen aliquibus ad tempus committit secundum vices et secundum circulum [...] Quod autem dico per multitudinem, intelligo exceptis vilissimis*".

²³⁷ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 351-352: "*item ab isto regimine possunt excludi aliqui magnates, qui sunt ita potentes quod alios opprimerent [...] et ita observari videmus*". Bartolus concludes that in political communities of the kind "*si honores et munera secundum gradus debitos distribuuntur, bonum est regimen et ad superiorem spectat reformatio*" (II, 354-355).

Accordingly, for its people the best form of government appears to be monarchy.²³⁸ As already noted, Bartolus reduced several species of sovereignty to the genre 'monarchy'. So, the Empire, the kingdoms, the duchies, the counties, etc. are, in a certain sense, all monarchies.²³⁹ That monarchy is the best genre of sovereignty, Bartolus asserts, is a result derived from the developments in Roman history, in which the turning of the *Romana civitas* into an empire meant that sovereignty was vested into one person. Secondly, *frater Egidius*, Bartolus recalls, has in more recent times argued that monarchic sovereignty fits large-size political communities the best.²⁴⁰ Given the variety and number of people living within its boundaries, there will be many good men whom the king may ask for advice and whom he may entrust with the duties of justice. It is known by common experience, he continues, that the more powerful the king is, the better people are ruled: "*tanto melius gens vel populus regitur, quanto sub maiori vel potentiori rege regitur*" (II, 391). Thirdly, Bartolus makes an appeal to the authority of the Holy Scriptures, in particular Deuteronomy 17. In the passage in question, the idea of divinely ordained kingship is presented as universally known and applicable. Moreover, it is recommended to have as king a member of the community to be ruled, not a man from another people. Bartolus argues that by the very words "*Dominus Deus [...] elegerit [...]*" it is clear that all monarchs are either directly chosen by God or indirectly, by electors who had been inspired by God. The heart of the electors is in the hands of God, and He may turn it according to His will:

"sciendum est quod omnis rex aut immediate a Deo eligitur, aut ab electoribus inspiciente Deo. Cor enim eligentium 'in manu Dei, et ubi voluerit inclinabit illud'" (II, 405-408) .

Sovereignty established by election, he affirms, is more divine than sovereignty established by succession. This is the main reason why succession is avoided in the case in which ecclesiastical goods are concerned. Therefore, the election of a prince as universal sovereign comes about through election by other princes and prelates, and not through succession (II, 409-414). There are cases in which, Bartolus says, it is permitted that the government is passed on through succession. In these cases, the kings are said "*particulares*" (II, 418-419). At this point, Bartolus refers again to

²³⁸ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 383-384: "*si esset civitas que multis aliis civitatibus et provinciis dominaretur, huic genti bonum esset regi per unum*".

²³⁹ See Bartolus de Saxoferrato, *De regimine civitatis*, I, 48-51: "*Tertius regendi modus est per unum [...] et istud secundum Aristotelem appellatur regnum. Nos vero si iste est dominus universalis appellamus imperium [...] si vero particularis aliquando appellatur regnum, aliquando ducatus, marchia vel comitatus*".

²⁴⁰ See Bartolus de Saxoferrato, *De regimine civitatis*, II, 385-389: "*Hoc probatur ff. De origine iuris, l. ii., §. Novissime, ubi aucto multum imperio Romano et captis multis provinciis deventum fuit ad unum, scilicet ad principem. Hoc etiam probant omnes rationes supra facte per dictum fratrem Egidium; hic cessant rationes facte per oppositum*".

Aegidius Romanus according to whom it was better for the sovereign powers of the “*reges particulares*”, like any other right or patrimony, to descend by succession.²⁴¹ In the case of universal sovereignty, such transmission would be against established rules and divine authority instead: “*Egidius [...] determinat quod melius est regnum ire per successionem: debet enim intelligi de regno particulari, quod potest transmitti sicut cetera nostra bona et iura; in universali secus, quia esset contra auctoritatem divinam et contra canones*” (II, 421-425).

Bartolus says that the Biblical idea that it is dangerous to have a sovereign of another nation must be adequately interpreted too, and poses the question of how the Church transferred the *imperium* to the Germans (II, 428-429). He answers the question saying that since all Christians are called brothers, there has been no exception to the validity of the aforementioned principle. Consequently, Christian sovereignty should not be transferred to a Saracen, a pagan, or an infidel, for governing over other peoples is not preserved so faithfully.²⁴² Once the Roman Empire had been separated from the Italian peoples, it grew weaker. This, he says, “*non absque occulto Dei iudicio factum est*” (II, 439-440). In the ending paragraphs, the jurist says that he has not treated “*de populis [...] parvi*” for “*alterius maiestatem venerentur*”. They are either subject to another *civitas*, or they are tied to another community or king by some treaty.²⁴³ These small communities are not able to govern themselves independently. They are like a small and weak human body which cannot govern itself without a caretaker and guardian.

The third part of the treatise is an attempt to determine which of the three bad forms of government is worse. In this matter, Bartolus recalls that all philosophers agree that tyranny is worse: “*omnes philosophi dicunt quod tyrannides est pessimus principatus: tenet enim ultimum gradum malitie*” (III, 451-453).²⁴⁴ Tyranny is the worst type of sovereignty because “*per tyrannum maxime ab intentione boni communis receditur*” (III, 455). To Bartolus the evil of tyranny “*est manifestum*” (III, 466). If the wealthy few, or the multitude pursue their own good while ruling - a practice seen as against God’s will - this situation is still to be preferred over that in which a tyrant rules. Since those in a position of super-ordination are many anyway, they are inevitably keen on considering the nature of the common good. The tyrant inevitably recedes from pursuing the common good. Since virtue united for a good thing is better, virtue united for a bad thing is worse.²⁴⁵ That the rule of several bad men, he says, is not so bad as the rule of one tyrant, is to be maintained

²⁴¹ See also Aegidius Romanus, *De regimine principum*, II, III, V.

²⁴² See Bartolus de Saxoferrato, *De regimine civitatis*, II, 430-433: “*omnes Christiani dicuntur fratres nostri, et sic non est ventum contra dictam auctoritatem. In hominem vero Saracenum, paganum vel infidelem non posset transferri*”.

²⁴³ This is the situation of the communities under the jurisdiction of Perugia. See Bartolus de Saxoferrato, *De regimine civitatis*, II, 444-49: “*Et videmus in civitatibus et castris, que sunt sub protectione huius civitatis Perusine*”.

²⁴⁴ See also Aegidius Romanus, *De regimine principum*, III, II, I.

²⁴⁵ On the point, compare with Thoma Aquinatis *De regno ad regem Cypri*, I, 3.

true when the many tend to one purpose, and can do nothing except together. The jurist says that it is a different matter if each exercises his own tyranny, so that one cares not about the other. Bartolus saw this situation as the actual one in the Italian peninsula of the day.²⁴⁶ The rule of the bad and the populace does not last long. They easily turn into a one-man tyranny though. Bartolus concludes his treatise by quoting Job 34:30 and lamenting that the Italian peninsula of the day was "*tota plena tyrannis*" (III, 481).²⁴⁷

²⁴⁶ Bartolus claims that when in one body there is one corrupt humor predominating it is bad for the body, whereas if all the humors are corrupt they oppose each other: "*si in toto corpore est unus humor corruptus qui predominatur, malum est: si tamen omnes humores essent corrupti et sibi invicem adversarentur, pessimum esset*". See Bartolus de Saxoferrato, *De regimine civitatis*, III, 472-474.

²⁴⁷ See Bartolus de Saxoferrato, *De regimine civitatis*, III, 458-482: "*si dominantur plures, quia divites vel boni creduntur, vel si dominetur multitudo, quamquam illi regentes tendant ad bonum proprium et non ad commune, et sic est regimen malorum vel populi perversi, tamen non tantum receditur ab intentione boni communis: quia ex eo quod plures sunt aliquid sapit de natura boni communis. Sed si unus est tyrannus, in totum recedit a communi bono. Preterea, sicut virtus unita in bonum est melior, ita unita deterius est deterior [...]* Hoc autem quod supra dictum est, quod regimen plurium malorum hominum non est ita malum, sicut regimen unius tyranni, intelligendum est si illi plures tendunt ad unum et non possunt nisi simul; secus si quilibet per se tyrannidem exerceret et unus de alio non curaret, ut supra dixi de regimine monstruoso quod nunc est in urbe Romana [...] Ve ergo illi civitati, que plures habet tyrannos ad unum non tendentes. Item advertendum est, quod regimen plurium malorum vel regimen populi perversi non diu durat, sed de facili in tyrannidem unius deducitur: hoc enim sepius de facto vidimus. Hec etiam permissio divina est, cum scriptum sit: '*Qui regnare facit ypocritam propter peccata populi*' [...] Et quia hodie Ytalia est tota plena tyrannis, ideo de tyranno ad iuristas spectantia videamus".

CHAPTER TEN

CONCLUSION AND ASSESSMENT

As already explained in the very opening pages, the arguments and reflections presented in this book constitute a 'philosophical journey', which has as its purpose the interpretation of the medieval configuration of the idea of sovereignty. In doing so, we have also attempted to demarcate the domain within which its significance could be better sought. This kind of journey has been an intellectual passage through a number of concentric circles successively diminishing in circumference and forming an inverted cone, a funnel in Dantesque fashion, ending in the lowest and central point where we could eventually situate the problem of the significance of sovereignty in Marsilius of Padua and Bartolus of Saxoferrato. We should now advance our conclusions.

Medieval sovereignty is a complex and fascinating topic. In the first part of this study, we have dealt with the complexity of the idea of medieval sovereignty by shedding light on the ways in which modern legal and political scholarly work addressed the question of its existence. In our opinion, in order to preserve the scientific character of legal scholarship, a conspicuous number of authors managed to produce a misleading picture of sovereignty in the Middle Ages, a picture in which the ontological elements constituting the medieval understanding of sovereignty are not adequately considered. In fact, many scholars are still inclined to consider the ontological characters of medieval thought as something unworthy of proper attention. We pointed out that the interpretative paradigm defended by some legal historians and influenced by the legal positivistic tradition could only be edified at the expenses of the most important philosophical and theological contributions to the historical emergence and development of the idea of sovereignty. We believe, by contrast, that a genuine attempt to situate the elaboration on sovereignty in a historical perspective must not neglect any of the important intellectual elements that are part of the historical context considered, and more particularly any of the doctrinal presuppositions and normative characters of the idea of super-ordination in the Middle Ages, even when they do not meet the demands of current interpretative paradigms in legal and political investigation. This study focused primarily on such elements and contributions. We found no better path to follow than one which make us crossing the boundaries of modern specialised legal and political language.

We have pointed out that any super-ordination in the social and political sense is complementary to the idea of order. As soon as we turned to the examination of the presuppositions and implications of the idea of *ordo* in the Middle Ages, we have seen that the latter was a notion constructed and defined on the basis of ontological premises. Given the close ties existing between the idea of *ordo* and Christian doctrine, we thought it convenient to analyse the medieval idea of super-ordination in connexion with its

normative and ontological presuppositions and implications. To safely move along this line, we thus referred to heterogenous textual sources, namely sources that modern jurists, legal historians, as well as political scientists, would consider external to the canonical juridical and political texts as defined according to their own actual standards. Only by doing so, we claimed, we could detect the presence of the notion of sovereignty in the Middle Ages, and address the question of its significance. One specific feature of the medieval idea of order is the normative imperative that any constituted order, namely any exercise of superiority or super-ordination in respect of power, including the power to establish the lawful – *ordo ordinatus* – presupposes a superior constituent order – *ordo ordinans*. Christian apologists, as we recalled, paid enormous attention to this problem and made extraordinary efforts to establish normative boundaries in the light of Christian doctrine to turn *might* into *right*. Their insistence on the distinction between the dimension of the *ordo ordinans* and that of the *ordo ordinatus*, as well as on that between divine *auctoritas* and worldly *potestas*, constituted the basis from which both medieval Civil and Canon lawyers elaborated on the question of the right order and the proper relationship between mundane and spiritual needs and purposes. In this perspective, we believe, we could better assess and appreciate the importance of sovereignty as the fundamental postulate of medieval constitutional order. Often, in modern scholarship the problem of medieval sovereignty has been addressed by making it coincide with the problem of its temporal location. This way of reasoning somehow obscures the significance of the relationship between the dimension of the *ordo ordinans* and that of the *ordo ordinatus*, which was so important to the medieval men of learning. This way of reasoning, which remains one of paramount importance in modern legal and political thought and implies the identification of *auctoritas* with *potestas*, does not produce the degree of clarity that it promises to produce. Last but not least, this mode of thinking is largely alien to the general mentality of the medieval men of learning as the examination of the most relevant sources of the era reveal.

On the basis of a solid tradition of scholarly work, we were able to affirm that terms such as *potestas*, *auctoritas*, *iurisdictio*, *dominium*, and *imperium* occupy the semantic area now occupied by the term 'sovereignty' in current language. Accordingly, we have critically assessed the conclusions of a number of scholars who have denied the existence of sovereignty in the Middle Ages. Some of them did so by the means of a sophisticated prejudice, which is one based upon the modern identification of legislative statehood, nationhood, and reason of state with sovereignty. These scholars investigated the past of sovereignty having in mind what was actually the case for them, namely the case of the nation state retianing the monopoly of coercion and law-making in a situation of codified law. This paradigm finds in the early nineteenth century Codification movement and the Historical School one of its most notable expressions at least as far as continental Europe is concerned. Yet, it is a paradigm that can hardly serve the purpose to clarify the status of sovereignty in the historical perspective, given the fact that historical events

are not necessarily related to the scientific concerns that might engage the mind of future generations. It may sound obvious, but it is yet necessary to repeat that medieval law and government knew no concern about the specific problems of the modern Codification movement and legal positivism, which played such an important role in the formation of a large number of jurists, historians, and political theorists. We attempted to explain that the fact that the medieval jurists did not use the equivalent for the English term *sovereignty* is no evidence of the absence of sovereignty. The jurists employed the vocabulary which they thought would best fit. Their professional attachment to the juristic vocabulary derived from Roman law simply did not allow them to do so. The claim here is that the medieval jurists by no means ignored sovereignty, but rather treated it using their own language. The fact that the equivalent for *sovereignty* appeared in some thirteenth century Customary law sources, and even in twelfth century vernacular literary sources, confirms, in our opinion, that the idea of sovereignty was anyway a central idea in the treatment of civil affairs. The references to the etymological and semantic aspects of the problem of medieval sovereignty provided in this study also confirm how important the way we select the relevant sources to pose and possibly answer the question of whether there exist a medieval notion of sovereignty is in this field. The emergence of *sovereignty* in medieval vocabulary is a complex process of which the fundamental lines suggest that the current division of specialised vocabulary is not a viable tool to be used while attempting to grasp the essence of sovereignty in the historical perspective. In this perspective, we also tried to demonstrate that the problem of the limits to the exercise of political power reveals how and in what sense sovereignty is a problem that cannot be confined to one particular period or society, at least not in the perspective of European history. Finally, the first part of this book can be seen as an attempt to emphasise the autonomy of the idea of sovereignty in respect of the interpretative cage constructed around it by modern legal positivism and by the Codification movement.

The findings of numerous modern historians help us to picture the social and political universe of the medieval Latin West as a whole articulated in a hierarchy of subordinate and super-ordinate relationships, in which everything is virtually subject to something higher than itself, answers to its purpose, and hence achieves its good. Some historians see in the medieval political fragmentation the state of anarchy that modern law, along with the establishment of proper sovereignty, has managed to bypass. In this respect, political fragmentation and the persistence of Customary law at various levels of European life would denote absence of proper sovereignty. We argued that this conclusion can be refuted by recalling that it has been in fact reached on the basis of the application of the paradigm of modern legislative statehood to a context in which the legislative function and its purpose radically differed from the modern ones. Moreover, political and legal fragmentation denote ongoing struggles for sovereignty, and not the absence of the latter. Thus, the fact that sovereignty in the Middle Ages was not configured in accordance

with modern criteria does not mean that there was no idea of sovereignty in the Middle Ages.

In the second part of the book, we examined the contribution to the theory of sovereignty offered by Marsilius of Padua and Bartolus of Saxoferrato. How to possibly assess the validity of the arguments that see in their doctrines respectively an important antecedent of modern popular sovereignty? As we have seen, a number of scholars credited Marsilius with the merit of having promoted the political sovereignty of the people in the perspective of political philosophy, and Bartolus with that of having legally justified the practice of popular government. With a view to assess this interpretation, we addressed the questions of the historical significance of the Marsilian and Bartolist contribution to the theory of sovereignty, of their particular normative concerns, and of some relevant issues that their political and legal ideas gave rise to. As far as Marsilius of Padua is concerned, a number of conclusions can be drawn, although they have a hypothetical character. Marsilius too did not employ the vernacular equivalent in his time for the term *sovereignty*. This fact should not surprise us for, in accordance with the custom of the day, the language of men of learning was Latin, not vernacular. Marsilius and his readers were familiar to the political lexicon derived from Roman law, and there was no general reason to deviate from it. Moreover, there is no reason to charge Marsilius, and others, with the demerit of not having anticipated a dispute around the term *sovereignty* that only much later would emerge. Although he was not a jurist, he had knowledge of the terms of the ongoing public law debates. Indeed, like any medieval jurist, he assumed human law to be a properly issued coercive precept by the legitimate authority. Marsilius emphasised the role played by *ordo ordinatus*, within which the law is an instrument of primary importance, for the sake of the self-sufficient political community. Yet, we could say that he enjoyed a greater intellectual freedom in comparison with the degree of intellectual freedom that a number of jurists contemporary of him, including Bartolus, enjoyed. Apparently, Marsilius had no need to resort to the ingenious mental gymnastics imposed on the jurists by the requirements of juristic discourse. That is why for Marsilius legal science is not, and cannot be, the science of human and divine affairs as the Roman law tradition affirmed. We are convinced that in Marsilius nature herself, not the kind of theoretical Natural law defended by the jurists, played a role in the development of the political community. It is possible to argue, we believe, that rejecting Natural law as a juristic construction is not rejecting natural regularities and tendencies. We see Marsilius busy criticising the former, while at the same time not denying the existence of the latter. Natural law was in his eyes just a juristic artifice adopted to justify particular political arrangements, including the theory that papal plenitude of power was divinely established. By contrast, nature, reason and art were the primary basis for will and consent. In this perspective, the idea of the sovereignty of nature is implicit in Marsilius' doctrine. In the Paduan thinker, will and consent are not the tools that modern philosophy, idealising their significance, conceived to elevate man to

the rank of a god, or semi-god. Will and consent are not autonomous in the same sense in which they are said to be autonomous in law and government from the time of the French revolution, and they had not yet been emancipated from natural constraints, including right reason enabling to distinguish the expedient from the non-expedient, the just from the unjust, the human from the divine.

Probably, the laity of Marsilius has more modest implications than some modern scholars are prepared to concede, for at the core of his thought we may still find the idea of a universal order of things. At the core of his major work, we find a double syllogism. The sane individuals desire by nature the sufficiency of life, and sane are the individuals who are not diminished in their bodily and rational abilities. Thus, the natural desire of the sufficiency of life is rational, and therefore in adherence to God's will. On a parallel basis, sufficient life requires rational decisions and arrangements to properly operate. Given that all sane individuals are rational, all of them have in theory the possibility to express their judgment on the decisions and arrangements that concern their associated life. Popular consent in Roman law fashion is to Marsilius nothing but expression of, and conformity with, the natural and rational dispositions of the individuals living in association with each other. Nature so intended most likely constitutes the *ordo ordinans*. His is an idea of the *ordo ordinans* that might be called democratic or, better, popular only in the sense that it confirms that any sane individual is in theory able to be part of any possible decision-making procedure. In his view, custom and consent are not entirely willed constructions, but in essence the product of the universal order within which men operated in accordance with *sanitas*. Did he have any idea of individual rights based upon nature? It is to be doubted that he went that far. Marsilius' approach might be compared with that of Azo. Like Barbarossa asked Martinus and Bulgarus if he was the lord of the world and Martinus answered affirmatively, so his son Henry VI asked Lotharius and Azo to whom the highest *imperium* belonged. Lotharius said that it belongs to the emperor alone. Azo instead said that one of the principal functions of the *imperium* is *iurisdictio*, namely the power to state what is lawful. The fullest jurisdiction belongs to the emperor alone but any magistrate possesses it and can thus lay down the law. Investigating the sources of the jurisdiction of the higher magistrates, he found it in the consent of the whole community considered as a *universitas*. If the emperor's power came from the people through the *lex regia*, popular consent must be the source of all legitimate authority. Azo drew a distinction between the people as a group of individuals and as a community: only the people as a group of individuals retained legislative power. So the emperor has greater power than any individual but not more than the people as a whole. In this way Azo justified the *de facto* independence of the cities of the *Regnum italicum* subject to the emperor. Similarly, within his kingdom a king held the same power as the emperor. Marsilius articulated the same arguments through philosophical categories, the major difference being that in Marsilius' writing, the people are living human beings charged with needs, passion, and rationality and not a

mere abstract figure such as the *universitas* of the jurists. This concrete perspective is not undermined by the fact that the Paduan thinker calls the people *universitas civium*. That the whole is more important than its parts is no less concrete for a medieval man of learning than the idea that each group is the total sum of the individuals who form it is for a modern neo-liberal man. That is one of the main reasons why we doubt that Marsilius theorised democratic sovereignty and lay statehood in the same sense in which this has been done from the end of the eighteenth century onwards. The medieval sane people Marsilius was talking about are not the citizens of the modern nation states as portrayed by liberal democratic thought, namely a collection of individual bearer of fundamental rights. A separate question is that of whether, and to what extent, the *ordo ordinatus*, as established in time and space, reflected the original condition of universal and popular ability in respect of decision-making. Marsilius was certainly aware of the complexity of every political *status quo*, and therefore he appears to us as a thinker who in fact can do nothing but express a number of political and legal *desiderata*. The attitude the Paduan thinker had towards the political *status quo*, namely the *ordo ordinatus*, is of great importance, for it constitutes another relevant aspect of his laity, which is not at all devoid of normative concern. What might strike the reader is the ease with which he accepted the plurality of regimes and governments. In contrast with a number of medieval authors, Marsilius is quite open about it. The particular attention he paid to the imperial institution does not contradict his realism about the plurality of governments.

In Marsilius' writing, the Empire too has its roots in customary and popular consent. The *de iure* justification of the particular type of *ordo ordinatus* existing in central and northern Italy since the time of Barbarossa was to Marsilius a typically jurist confirmation of something normal in the light of the theory of self-sufficiency as applied to law and government. The importance of the Empire in this context is given at the normative level by the fact that Marsilius still saw it as the guarantor that political history gave to the people of the Latin West in respect of the arrangements dictated by nature and reason. We may think that in as much as Marsilius saw the Empire as an expedient instrument for the sake of plural self-sufficiency, he undermines the emperors' political *desiderata*. In a certain sense this might be the case, but we have to further clarify the sense in which it might be so. Probably, by generally and indirectly undermining the emperors' *desiderata*, Marsilius attempted to fix some limits to the prerogatives of the Empire as an institution. Self-sufficiency, Marsilius seems to suggest, must always receive priority, even over imperial law and government, which he considered of vital importance not without intellectual ambiguity and uncertainty. We think it convenient to emphasise Marsilius' ambiguity. We ought to be careful in drawing certain conclusions when they are based upon the demands of modern democratic political theory. In Marsilius' writing, more than a coherent democratic doctrine of law and government we find a philosophical assumption of extraordinary importance: the natural capacity of each sane human being of taking politically relevant rational decisions. This kind of

anthropological optimism, in Marsilius' eyes, we should find as the basis for all kinds of legal and political arrangements through which the human desire of the sufficient life manifests itself. Who else but the God of the Christians, through nature, can guarantee such a possibility in Marsilius' writing? The 'Defender of Peace', namely the emperor, acting on behalf of the community has the task of securing the sufficiency of life but also in so doing that of preparing for eternal life. From this point of view, we believe, it is difficult to argue that Marsilius' thought presents only the essential elements of a theory of sovereignty, but not a theory itself. We can agree with the scholars who argued that Marsilius sought to reform the Church. Radical reform, not revolution, he had in mind, for the Paduan thinker was not somebody for whom traditional religion had to stay out of any rational plan of political edification. It is true that in Marsilius' writing ecclesiastic jurisdiction is subordinated to political authority. Yet, faith is an important component of civil life even when confined to the private sphere. Eventually, justice is conformity with natural reason, which makes the difference between human and divine purposes intelligible, which gives to this distinction its most appropriate meaning, which distinguishes between the useful and the useless, lawful and unlawful, and which makes us understand the meaning of all of it. If this conformity to the just (natural order) finds actualisation, the bases for proper consensus are established. Consequently, consensus does not depend on the will alone. In this case too, the sense of limits as a best guarantee in respect of the needs and demands of self-sufficiency occupies a central position in Marsilius' thought. In this perspective, he has limits to the will in mind.

Marsilius' major target was papal universal monarchy for which law and authority in the spiritual as well as in the domain of political affairs, in the private as well as in the public sphere, must coincide with the will of one person, the Pope. To evaluate his position on the basis of the fact that he did not study law, and therefore had no understanding of papal plenitude of power, is not convincing. The point is rather to determine whether, given his understanding of the matter, the plenitude of power was indeed the central concern of the *Defensor pacis*. Our conclusion is that this was the case. Marsilius seems naïve when he sees in papal fullness of power the cause of discord, a political evil, on the one hand and on the other hand neglects that the lust for power - the roots of all evils in the view of pope Gregory VII and many others - is part of that nature that he conceived as full of optimal dispositions towards the realization of the self-sufficient life. This position can probably be best explained assuming that for Marsilius corrupt power was *privatio boni* precisely in the same sense in which sickness is lack of health. Marsilius is not entirely ambiguous when he shows to welcome the intervention of any kind of political power, from the Empire to the *podestà*, from the imperial vicar to the monarch. All rulers, precisely like all people, can rationally understand what is right and wrong. Thus, the generic interpretation of the Marsilian political message, if seen in the light of the intention to erase the major cause of discord, appears correct in our view. The

openness of Marsilius did not impede him to remain anchored to the idea that the emperor has a special role - the 'Defender of Peace' in the *Res publica Christiana*, and in particular in the *Regnum Italicum*. From this point of view, he did not depart from the antecedent tradition, but in one particular sense he does though. What counts for Marsilius is not so much that the Empire was established *de coelo*, but that it was entrusted with that special mission by the people. Given the historical circumstances, Marsilius seems to suggest that the people did the right and most rational thing in transferring their powers to a *princeps*. If anything, Marsilius idealised the people - the pillar of the *ordo ordinatus* - not the emperors, and in particular their capacity to take the right decisions. The rationality of people's consent to the transfer of power apparently remains intact in respect of the question of Marsilius' position on the *Signoria*. For Marsilius the self-governing cities were threatened by the papacy, not by the *signori*, who in authors like Bartolus are seen as enemies of communal liberties. For Marsilius this was not the case, and not just because he spent much of his life attached to the Visconti and the Della Scala. On the basis of his anthropological optimism, he could think that what the emperor was supposed to do on a large scale, namely defending peace against his enemies, the imperial vicar or the *signori* could do on a smaller scale. Due to the need to minimize evil, this position was not incompatible with his plea in favour of communal liberty. To be sure, he might be regarded as an eccentric figure in respect of a certain medieval tradition for which the emperor must guarantee peace and tranquillity directly, not the *libertas ecclesiae*. Marsilius' gaze is clinical in that he sought to separate the organic from the spiritual. Guaranteeing temporal peace and tranquillity meant curing the body, which alone allows the spiritual capacity to manifest. Aiming directly at meeting the demands of the *libertas Ecclesiae* meant to Marsilius neglecting that the manifestation of the spiritual capacity depended on the sanity of the body. The underlying distinction is that between *populus* and *ecclesia*. That is why we said that even moving within the boundaries of the medieval tradition Marsilius was eccentric. *Ecclesia* and *populus* denoted the entire Christian commonwealth. In Marsilius they did not coincide. Eternal life makes sense only in so far as the earthly life is led properly. Only peace and tranquillity can offer the chance to construct eternal life. We said that Marsilius too was a dogmatic thinker, and yet eccentric in respect of the medieval tradition. What he had in mind was a plan of radical reform of social and political life, but he was not a revolutionary nor a liberal *ante litteram*. We should finally add that he is not Machiavelli. A statement of the kind is apparently futile, but it serves the purpose of emphasising that Marsilius was not a forerunner of the modern idea of reason of state. In contrast to Machiavelli, Marsilius did not produce his theories on the basis of a disillusioned view of the world, one in which the individual on his own, without grand goals and purposes, focused on those suggested by his virtue, or his own subjectivity, or on the laws established by the legislator. The *Defensor pacis* contains novelties. He wants to reform the Christian commonwealth and Christian political authority on the basis of an effort aimed at destroying the papal plenitude of power, and

the Church as it existed. The only available weapon was political power: *vim vi repellere licet*. Perhaps like Machiavelli he teaches us that separating reason from faith simply means taking difficult politically relevant decisions between alternatives often irreconcilable. In spite of all this, and in spite of the fact that he did not move within the framework constituted by the *specula principum*, which taught moral virtues and Christian faith to the rulers, Marsilius did not cross the borders of the theological conception of law and government.

As far as Bartolus of Saxoferrato is concerned, we have seen to what extent in his public law doctrines Roman law is an instrument to meet the demands of the papacy. Also we have attempted to demonstrate that the *civitas sibi princeps* is more the figure around which Bartolus constructed his pluralist approach to political authority than the paradigmatic antecedent of modern democratic political theory. Among the arguments valid in respect of Marsilius' dependence on medieval mentality one in particular is valid in respect of Bartolus. Sovereignty is popular in the sense that it pertains to the community as such, seen as the whole superior to its parts. Any defined idea of citizenship centred on the idea of fundamental individual rights being too absent in Bartolus' writing, we may conclude that it is inaccurate to credit Bartolus of Saxoferrato with the merit of having laid down the basis of modern democratic theory. In Bartolus' writing, moreover, we do not even find that kind of anthropological optimism that at least in part may push us to think that Marsilius came somehow closer to some of the fundamental elements of modern democratic theory. Bartolus' *De regimine civitatis* remains a work of uneasy interpretation, and is even obscure in some respects. It is of uneasy interpretation due to its high conceptual density, mainly derived from the plurality and heterogeneity of the sources referred to. In it, Bartolus sought to impress his readers by mentioning Aristotle as an authority to consider, but at the same time dismissed the latter as irrelevant altogether especially from the juristic point of view. This aspect contributed to increase the degree of ambiguity pervading the treatise. The latter is important for in it, Bartolus shows to have used with full confidence and mastery the idea of the *civitas* as *persona iuridica* in the background of his view of the plurality of sovereign powers as ultimately based upon divine will. The first interpretative complication that we have dealt with concerns the several meanings of the expression *civitas Romana*. We may list four major meanings. Primarily, it denoted both the city of Rome in the absence of the Popes and the Italian peninsula as a whole, once the centre of the Empire. In the first sense, the *urbs* was the archetype of any other *civitas*, including Perugia. In the second sense, it was synonymous with *regnum*, namely with "*gens maxima [...] in tertio gradu magnitudinis*" (II, 376-78) under the rule of one man. Downwardly, given the different dimensions of the political units existing, the expression *civitas* is to be seen as synonymous with "*aliquando ducatus, marchia vel comitatus*" too (I, 52). In the third sense, upwardly this time, the expression denoted the Empire - "*per Ecclesiam [...] translatus in Germanos*" (II, 428-29) - the only legitimate superior authority able to 'save the people from servitude' and 'depose tyrants', as affirmed in *De tyranno*. Finally, in the

fourth sense, the expression denoted the condition of the earthly city as generally understood, the condition of the *ordo ordinatus* in respect of the *ordo ordinans* to conform to. In this sense, all political communities ought to mirror the splendour of the transcendental Rome, the *civitas* chosen by God to become the paradigm of justice and peace, as well as of law and order. The second interpretative complication that we have dealt with concerns the eclectic methodology adopted, as we have already noted. In spite of the fact that the jurist felt compelled to adhere to legal thinking, and in spite of his efforts to use a terminology fit to satisfy both the demands of juristic professionalism and of the political circumstances of the day, the conceptual framework is one provided by Aristotelian political philosophy. Having resolved to examine the "*modum regendi civitatem quoad personas regentium*" (proemium, 5-7), it was impossible for the jurist to avoid Aristotelian political theory. Nevertheless, incessantly and awkwardly, Bartolus tried to leave Aristotle behind. If he did not manage to erase the traces of political philosophy, he managed instead to pass over Aristotle's modern commentators such as Thomas Aquinas in silence. Special attention is given to Aegidius Romanus' *De regimine principum*, probably the most Aristotelian of this author's works. Why did Bartolus resolve to proceed in this contorted manner? To answer that question we should find out whether Bartolus wrote *De regimine civitatis* for the sake of knowledge or by commission. The second option seems to be the most realistic, although at the present stage we have no knowledge of the circumstances for the production of the treatise. In it, Bartolus appears eager to show the depth of his background of knowledge. It is easy to imagine that such a desire had probably to do with the intention to instruct somebody among his own colleagues, or among the Perugian magistrates in any case. The arguments that the text contains on the matter of the so-called "*regimen monstruosum*" (I, 74) are only apparently innovative. In his continuous use of the organic comparison between the human body and the body politic, we see how Bartolus made the monstrosity of the seventh form of government coincide with what in medical discourse was abnormality, namely lack of form and order, or *sanitas* in the Marsilian sense. This kind of deformity, Bartolus said, was not worth calling 'government' (I, 79). In this case, going beyond the borders of law to find images able to convey that communal liberty in the context of the most appropriate relationship between Empire and Church is at risk was a necessity to the jurist, so jealous of the conceptual and terminological treasury disclosed by jurisprudence. Bartolus was prepared to do so given his urge to present the world of law as the only one firmly anchored to the eternal truth of faith, and able to control destructive might. The idealization of the nature and function of law allowed Bartolus to cultivate the illusion that any adaptation of law to facts if managed by skillful and wise jurists could have always been justifiable from an ethical point of view. The Perugian jurist was so much inspired by the power of this idea that he very often denied to recognise the contribution offered by the other disciplines to the 'queen of the sciences'. In this respect, whether Bartolus was opportunistic or not, he was certainly far from being

realistic. A related complication we encountered concerns the choice to refer to Aegidius Romanus' *De regimine principum* in particular, and not to Thomas Aquinas. Again, we may see Bartolus as caught between Scylla and Charybdis. He strongly wanted to take distance from Aristotelian concepts for they are antique and unfamiliar to his colleagues, he said, but he decided to pay a great deal of attention to the most Aristotelian of Aegidius' works. If Bartolus had had knowledge of Aristotelian philosophy through Aquinas' commentaries, he would have turned to the non-Aristotelian works of Colonna. Apparently Bartolus had some knowledge of *De ecclesiastica potestate*. One possible answer to this question is that in fact Bartolus, who firmly believed that "*imperium Deus de coelo constituit*" (II, 416), had no solid knowledge of Aristotelian philosophy as filtered by Aquinas' elaboration. In this respect, we are inclined to doubt that Bartolus has been influenced by Thomism in his public law theories as authors such as Diego Quaglioni suggested. The third point we wish to make here concerns the jurist's ambivalence on the general question of the best form of sovereignty. On the one hand, he followed the authoritative tradition, expounded by Aegidius too, that the government of the people might be good, that of few better, and that of one man is the best: "*optimum regimen est regimen regis*" (II, 268). On the other hand, he concluded that the "*regimen ad populum*" is the best for communities "*in primo gradu magnitudinis*" (II, 328) such as Perugia. To celebrate sovereignty as the mark of communal liberty he even claimed that such a form of sovereignty "*magis regimen Dei quam hominum [est]*" (II, 334).

Scholars of great talent and erudition have concerned themselves with the subject of sovereignty in the historical perspective producing results without which the present study would have been impossible. In entering into a dialogue with their findings as well as with some medieval canonical texts on the best political order, inevitably we felt like 'dwarfs on the shoulders of giants'. All this constituted an incentive in undertaking the task of exploring the domain and nature of medieval sovereignty. We have done so also aware of the fact that the results achieved in the history of the idea of sovereignty constituted, and will most likely continue to constitute, orthodox interpretations subject to change. Like every history of ideas, this study too, being an episode, presents gaps. Whether we managed to avoid the *superfluitas tediosa* of which Dante spoke in his *Monarchia* is a question to be left to the reader's judgement. As far as we are concerned, we would consider the most rewarding goal of all our efforts achieved and our own intellectual desires fulfilled if the reflections presented here shall contribute filling in even an infinitesimal portion one of those gaps that usually scholars attempt to fill in.

ABBREVIATIONS

BSDC = *Bartolo da Sassoferrato. Studi e documenti per il VI centenario*. Documenti del convegno commemorativo (Perugia, 1-5 aprile 1959) [2 vols.]. Milano, 1962.

BSC = *Bartholus de Saxoferrato Commentaria cum adnotationibus Thomae Diplovatati*...Reprint of ed. Baptista de Tortiis, Venetiis, 1506-29 (ed. G. Polara). Roma, 1996.

CHMPT = *The Cambridge History of Medieval Political Thought*, c. 350-c. 1450 (ed. J.H. Burns). Cambridge-New York, 1988.

CHPT = *The Cambridge History of Political Thought*, 1450-1700 (ed. J.H. Burns and M. Goldie). Cambridge-New York, 1991.

OJLS = *Oxford Journal of Legal Studies*

JLH = *The Journal of Legal History*

HPT = *History of Political Thought*

MJECL = *Maastricht Journal of European and Comparative Law*

ZSS = *Zeitschrift der Savigny Stiftung für Rechtsgeschichte*

TvRG = *Tijdschrift voor Rechtsgeschiedenis* - *Revue d'histoire du droit* - *The Legal History Review*

MHJ = *The Medieval History Journal*

JHI = *Journal of the History of Ideas*

HEI = *History of European Ideas*

JMODH = *The Journal of Modern History*

JMH = *Journal of Medieval History*

JRS = *The Journal of Roman Studies*

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SAMENVATTING

Dit onderzoek betreft de wortels van de idee van soevereiniteit. Onze onderzoeksvraag richt zich op de normatieve vooronderstellingen van de middeleeuwse soevereiniteit. Met onze benadering streven we twee doelen na.

Ten eerste onderzoeken we de belangrijkste aspecten van de middeleeuwse notie van orde. Deze notie omvat twee dimensies: de transcendentale dimensie van *ordo ordinans* en de feitelijke dimensie van *ordo ordinatus*. Binnen de context van de notie van ('constitutionele') orde trachten we vervolgens de begrippen aan te wijzen op basis waarvan we van middeleeuwse soevereiniteit zouden kunnen spreken.

Ten tweede richten we onze aandacht op de geschriften van Marsilius van Padua (1275/80 – 1342/43) en Bartolus van Saxoferrato (1313/14 – 1357) om de validiteit van de stelling te toetsen die in hun theorieën een belangrijke voorloper ziet van de moderne volks- of democratische soevereiniteit. In het bijzonder hebben we onderzocht of er bij Marsilius en Bartolus methodische aanwijzingen c.q. bewijzen te vinden zijn dat zij een theoretische basis hebben getracht te leggen voor hun respectieve theorieën van soevereiniteit. Ons onderzoeksverslag bestaat uit twee delen.

Het eerste gedeelte heeft een algemeen karakter. In de Inleiding beschrijven we de definitie en de reikwijdte van het onderwerp en het onderzoekskader. In hoofdstuk 1 doen we verslag van de status van de middeleeuwse soevereiniteit in de moderne geschiedschrijving. In hoofdstuk 2 over middeleeuwse soevereiniteit en methodologie, trachten we licht te werpen op de wijzen waarop een aantal vooraanstaande wetenschappers de middeleeuwse bronnen over wet en gezag benaderd en begrepen hebben. Daarbij hebben we ons laten leiden door de vraag naar de betekenis van het onderscheid tussen *auctoritas* en *potestas*, welke termen gebruikt worden om te verwijzen naar soevereiniteit in de Middeleeuwen. Daarna wordt in hoofdstuk 3 soevereiniteit onderzocht als linguïstisch probleem en besteden we speciale aandacht aan de belangrijkste etymologische en semantische aspecten van *auctoritas* en *potestas* in het middeleeuwse vocabularium. Hier onderzoeken we soevereiniteit ook als sociologisch en constitutioneel vraagstuk. Het volgende hoofdstuk (4) behandelt het probleem van de grenzen die aan de uitoefening van soevereiniteit verbonden zijn in het licht van een aantal literaire passages ontleend aan Griekse, Romeinse en Christelijke bronnen die gezien worden als de grondslag van de middeleeuwse ideologie van soevereiniteit. Het eerste gedeelte van het onderzoek eindigt met een hoofdstuk dat verslag doet van de correlatie tussen de idee van soevereiniteit en termen zoals *iurisdictio*, *dominium* en *potestas* (hfdst. 5).

Het tweede gedeelte van het boek heeft een bijzonder karakter en begint met een beschrijving van het leven, het werk en de historische betekenis van Marsilius van Padua (hfdst. 6). Hoofdstuk 7 onderzoekt het probleem van soevereiniteit bij Marsilius met een blik op de complexiteit van zijn gedachten. Hier richten we de aandacht op de absolute pauselijke macht en op de canoniekrechtelijke doctrine betreffende soevereiniteit en wet. Daarna beschrijven we in hoofdstuk 8 het leven, het werk en de historische betekenis van Bartolus van Saxoferrato. In hoofdstuk 9 stellen we het probleem van soevereiniteit bij Bartolus aan de orde. In het bijzonder hebben we gekeken naar hoe hij de relatie tussen Kerk, Rijk en de Italiaanse *civitates*

zag en ook naar zijn opvatting van wet en staat. We besluiten met de conclusies die ons onderzoek ons toestaat te trekken.

Wij hebben gezien dat een aantal wetenschappers de verdienste van de bevordering van de politieke soevereiniteit van het volk in het perspectief van de politieke filosofie aan Marsilius van Padua toeschrijven en aan Bartolus van Saxoferrato de verdienste toeschrijven van het verschaffen van een juridische verantwoording van de praktijk van 'volksregering'.

Wat betreft Marsilius brengt dit met zich dat men hem een lekenbenadering toeschrijft. Wij hebben zijn lekenbenadering en zijn moderniteit opnieuw kritisch bekeken. We hebben beweerd dat zijn verwerping van de Natuurwet als juridisch construct – in zijn ogen een artefact, aangenomen om de absolute macht van de paus te rechtvaardigen – niet zo zeer een verwerping was van de Natuur als zodanig en van de belangrijke implicaties ervan of de implicaties die deze zou kunnen hebben voor zaken die de sociale, rechts- en politieke organisatie betreffen. Natuur, rede en kunst – stelden we – vormen de primaire basis voor wilsuiving en instemming. Toch verschilt de manier waarop Marsilius deze concepten begreep en gebruikte van de manier waarop de grondleggers van de moderne volkssoevereiniteit – een aantal 17^e-eeuwse Engelse en Nederlandse radicaal republikeinse schrijvers – deze gebruikten om wet en gezag onafhankelijk te maken van geloof en theologie. Bij Marsilius zien we dat orde, alsmede recht, een goddelijke basis heeft en dat hij geen systematische theorie van fundamentele individuele rechten verschaft. Het vertrouwen van Marsilius in het natuurlijk vermogen van ieder gezond mens om politiek relevante beslissingen te nemen, vormt de basis voor regering en recht waardoor aan de menselijke wens van een volwaardig leven wordt voldaan. Rechtvaardigheid is in overeenstemming met natuurlijk verstand, dat het instrument is waarmee gezonde mensen de menselijke van de goddelijke bedoelingen kunnen onderscheiden, maar ook het nuttige van het onnuttige en het rechtmatige van het onrechtmatige. Uiteindelijk kan alleen God de menselijke geestelijke vermogens garanderen, inclusief het vermogen om onderscheid te maken en beslissingen te nemen. Dit is misschien de belangrijkste reden om het leek-zijn van Marsilius ter discussie te stellen. Een andere belangrijke reden om aan te nemen dat het leek-zijn van Marsilius bescheiden implicaties heeft, is dat de Verdediger van Vrede, namelijk de keizer die handelt ten behoeve van de gemeenschap, niet alleen de taak heeft om de volwaardigheid van het leven veilig te stellen, maar ook de taak om voor te bereiden op het eeuwige leven. Het leek-zijn van Marsilius kunnen we het best op waarde schatten indien we zijn politieke en rechtsgedachten vergelijken met die van een groot aantal andere middeleeuwse schrijvers. Vanuit dit gezichtspunt werkt de lekenbenadering van Marsilius in zijn voordeel aangezien er een veelvoud van regimes en regeringen voorkomt. Voor wat betreft de moderniteit van Marsilius, kunnen we opmerken dat hij gepoogd heeft de Kerk te hervormen en verder dat hij in zijn geschriften de kerkelijke jurisdictie ondergeschikt maakt aan het politieke gezag. Maar dit is, zoals gezegd, niet voldoende om Marsilius' moderniteit te roemen. Wat hij beoogde was radicale hervorming, geen revolutie.

Ook bij Bartolus van Saxoferrato is de vraag naar zijn moderniteit gesteld. Wij bekijken deze vraag opnieuw op kritische wijze. In Bartolus' publiekrechtelijke doctrines is het Romeinse Recht dominant, maar dan wel als instrument om te

voldoen aan de eisen van de pausstaat en een aantal stadstaten. Bartolus komt ons voor als verdediger van wat we zouden kunnen noemen een pluralistische verdeling van juridische machten. Binnen deze context is de *civitas sibi princeps* meer het thema rondom welke Bartolus zijn pluralistische benadering van politiek gezag heeft geconstrueerd, dan de paradigmatische voorloper van moderne democratische politieke theorie. In de visie van Bartolus berust de soevereiniteit bij het volk in zoverre de term verwijst naar *populus liber*, namelijk naar de gemeenschap als zodanig, gezien als geheel dat meer is dan zijn delen. In zijn visie is er geen plaats voor welke opvatting van burgerschap dan ook die uitgaat van fundamentele individuele rechten. Vanuit dit gezichtspunt - menen we - is het niet juist om Bartolus van Saxoferrato de verdienste toe te schrijven de basis gelegd te hebben voor het moderne democratische gedachtegoed. Bovendien zijn we bij Bartolus nergens het soort antropologisch optimisme tegengekomen dat ons tenminste gedeeltelijk in de richting zou kunnen sturen om te denken dat Marsilius toch wat dichter bij enkele fundamentele elementen van het moderne democratische gedachtegoed is gekomen. Bartolus was ambivalent in zijn vraag naar de beste vorm van soevereiniteit. Enerzijds volgde hij een gezaghebbende traditie (onder andere verdedigd door Aegidius Romanus) die zegt dat regering door het volk goed is, regering door enigen beter, en regering door één man het beste. Anderzijds concludeerde hij dat *regimen ad populum* het beste is voor gemeenschappen met een omvang als Perugia. Om soevereiniteit te verheffen tot het kenmerk van plaatselijke vrijheid heeft hij zelfs beweerd dat een dergelijke vorm van soevereiniteit God dierbaar is. Echter, de kloof tussen het menselijke en het goddelijke bleef groot, met de Kerk als enige mogelijke brug tussen de twee. Maar uiteindelijk, ook al bevestigt Bartolus dat de keizer de heer van de hele wereld is, wordt de paus gezien als de enige machthebber die met recht een ieder van waar dan ook voor zich kan roepen.

SUMMARY

Our research concerns the roots of the idea of sovereignty. In particular, it investigates the normative presuppositions and character of medieval sovereignty.

The subject of sovereignty in the historical perspective constitutes a huge field of study. Scholars of incomparable talent and erudition have already concerned themselves with medieval sovereignty. In approaching such a subject, we pursued two principal goals. First, we have tried to detect the presence of the idea of sovereignty in the Middle Ages and possibly determine the sense in which we can speak of it as the fundamental postulate of medieval constitutional order. The medieval concept of order is a relevant reference because the idea of sovereignty and that of order are complementary. The former, at least as far as the medieval period is concerned, presupposes the idea of a superior constituent order – *ordo ordinans* – of which it is a manifestation. At the same time, the existing or constituted order in all its forms – *ordo ordinatus* – presupposes a principle of sovereignty as regulative criterion of which, in turn, it is an expression. Secondly, we focused on Marsilius of Padua (1275/80-1342/43) and Bartolus of Saxoferrato (1314-1357) to assess the validity of the argument that sees in their theories an important antecedent of modern popular sovereignty. We addressed the question of the historical significance of the Marsilian and Bartolist contribution to the theory of sovereignty and in particular of their attempts to give sovereignty a foundation.

The book is divided into two parts. The first part has a general character. After the introductory chapter concerned with the definition of the subject, scope, and context of the research, which also aims at providing an account of the status of medieval sovereignty in modern historiography (chapter 1), a chapter on medieval sovereignty and methodology follows (chapter 2). In it, we tried to shed some light on the ways in which the medieval sources of law and government have been approached and understood, and we discussed the consequences of the identification of *auctoritas* with *potestas*. The treatment of the methodologies employed in the field of medieval law and government should help the reader in properly addressing and delimiting the domain of medieval sovereignty with a view to the question of its significance. Sovereignty is then examined as a linguistic problem and special attention is paid to the major etymological and semantic aspects of its emergence in medieval vocabulary (chapter 3). In this chapter, sovereignty is not only examined from the standpoint of linguistic analysis, but also as a sociological and constitutional problem. The subsequent chapter treats the problem of the limits to the exercise of sovereignty in the light of a number of relevant literary passages abstracted from Greek, Roman, and Christian sources, all seen as forming the background to the medieval ideology of sovereignty (chapter 4). The first part of the research ends with a chapter providing an account of the correlation between sovereignty and *iurisdictio*, *dominium*, and

potestas (chapter 5). The second part of the book has a specific character and begins with a chapter concerned with the life, works, and historical significance of Marsilius of Padua (chapter 6). The chapter that follows examines the problem of sovereignty in Marsilius with a view to the complexity of his thought, to his approach to, and understanding of papal fullness of power, and the presuppositions of his doctrine of statehood and law (chapter 7). Then, the life, works, and historical significance of Bartolus of Saxoferrato are examined (chapter 8). Finally, the problem of sovereignty in Bartolus, with a view to his conception of the relationship between Empire and Church, of statehood, and of law are treated (chapter 9). The final section of the book contains the conclusions that the research allowed us to draw (chapter 10).

A number of scholars credited Marsilius with the merit of having promoted the political sovereignty of the people in the perspective of political philosophy, and Bartolus with that of having legally justified the practice of popular government. As far as Marsilius of Padua is concerned, his rejection of Natural law as a juristic construct was not a rejection of nature as such. Natural law was in his eyes an artifice adopted to justify particular political arrangements, including papal plenitude of power. By contrast, nature, reason, and art were the primary basis for will and consent. The latter were not the tools that seventeenth century English and Dutch radical republican writers, for example, employed to save law and government from faith and theology. In Marsilius, the distinction between reason and faith is still a valuable one. The belief in the natural capacity of each sane human being of taking politically relevant rational decisions constitutes the basis for all kinds of legal and political arrangements through which the human desire of the sufficient life manifests itself. In the end, only God, through nature, can guarantee such a possibility. The 'Defender of Peace', namely the emperor, acting on behalf of the community has the task of securing the sufficiency of life but also in so doing that of preparing for eternal life. In this sense, the laity of Marsilius has more modest implications than some modern scholars are prepared to concede. His idea of order is one divinely founded, and might be said to have 'popular' characteristics only in the sense that it simply shows that any sane individual is in theory able to be part of any possible decision-making procedure. It is to be doubted that he conceived of a specific set of individual rights as has been done in European law and government from the 1660s onwards. Marsilius' laity can be probably seen in the fact that in contrast with a number of medieval authors, he was favourable towards the existence of a plurality of regimes and governments. Certainly, Marsilius sought to reform the Church. But what he had in mind was radical reform, not revolution. It is true that in his writings ecclesiastic jurisdiction is subordinated to political authority. Faith is an important component of civil life even when confined to the private sphere. Eventually, justice is conformity with natural reason, which makes the difference between human and divine purposes intelligible, giving to this distinction its most appropriate meaning, which distinguishes between the useful and the useless, lawful and

unlawful, and which makes us understand the meaning of all of it. If this conformity to the just (natural order) finds actualisation, the bases for proper consensus are established. Consequently, consensus does not depend on the will alone.

As far as Bartolus of Saxoferrato is concerned, in his public law doctrines Roman law is an instrument to meet the demands of the papacy mainly and of communal liberties. In this perspective, we can appreciate the efforts towards a pluralist concept of the distribution of jurisdictional powers. Again in this perspective, we see that the *civitas sibi princeps* is more the figure around which Bartolus constructed his pluralist approach to political authority than the paradigmatic antecedent of modern democratic political theory. In Bartolus, sovereignty is popular in the sense that it pertains to the community as such, seen as the whole, superior to its parts. Any defined idea of citizenship centred on the idea of fundamental individual rights being also absent in Bartolus' writing, we may conclude that it is inaccurate to credit Bartolus of Saxoferrato with the merit of having laid down the basis of modern democratic theory. In Bartolus' writing, moreover, we do not even find that kind of anthropological optimism that at least in part may push us to think that Marsilius came somehow closer to some of the fundamental elements of modern democratic theory. It remains true that the jurist remained ambivalent on the question of the best form of sovereignty. On the one hand, he followed the authoritative tradition, defended by Aegidius Romanus too, that the government of the people might be good, that of a few better, while that of one man is the best. On the other hand, he concluded that the "*regimen ad populum*" is the best for communities of the dimension of Perugia. To celebrate sovereignty as the mark of communal liberty he even claimed that such a form of sovereignty is dear to the Lord. If on the one hand Bartolus reaffirms that the emperor is the 'lord of the whole world', it is only the pope who may lawfully summon anyone from anywhere.

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