

DANTE AND THE LAW: THE INFLUENCE OF LEGAL CATEGORIES ON 14TH CENTURY POLITICAL THOUGHT

ABSTRACT: *The relationships between Church and Empire were intensively discussed in European canon and Civil Law schools from the 12th century onwards. The paper aims at analyzing the political thought of Dante in the light of the great legal debates which took place in these environments. Theological, legal and political dimensions cannot be considered separately in the intellectual perspective of the 14th century. The enduring controversy over whether Dante studied law is thus deliberately overshadowed by the belief that familiarity with legal questions was simply one element of a Trecento intellectual's identity.*

In the following pages I will focus on the influence of late medieval legal debates on Italian political thought. I will start from the use of the Bible in Dante, who often relies on a theological-juridical interpretation of the Scriptures in order to discredit the most radical theses of the ecclesiastical legal thought of his time. I will then try to illustrate the reasons why Dante doesn't condemn canon legal science as a whole, but makes a distinction between the ancient and respected legal thought of Gratian's generation (12th century) – which supported the late-antique principle of non-interference between the two universal powers – and the new, hierocratic direction taken by the canon legal thought after the Gregorian Reform. The superiority of the spiritual world over the secular, claimed at length by the Church from the beginning of the 13th century, is considered by Dante, one century later, as the main source of political – and in his case, also personal – troubles. The last section of the paper is devoted to the concept of Empire in late medieval legal and political thought. I try to demonstrate why supporting the Empire cannot be reduced simply to the backing of one political faction, but it is rather expression of a sentiment of deep appreciation of the public function of imperial government, a sentiment that can be understood better if we take into account the studies on Roman public law undertaken by Italian and French lawyers in the last centuries of the Middle Ages.

* Associate Professor of Legal History, Roma Tre University.

** A shorter version of this paper appeared as: *Law in Dante in Context*, Z. G. BARANSKI – L. PERTILE, Cambridge, 2015, ch. 3, pp. 47-58. For an extensive research on the interpretation of the tale of Uzzah in the Middle Ages, see my *Dante, la Bibbia, il diritto. Sulle tracce di Uzzà nel pensiero teologico-giuridico medievale*, *Dante Studies*, 133 (2015), pp. 122-146.

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1. Political use of the Bible

“There we had yet to let our feet advance
when I discovered that the bordering bank-
less sheer than banks of other terraces
was of white marble and adorned with carvings
so accurate-not only Polycletus
but even Nature, there, would feel defeated.

[...]

There, carved in that same marble, were the cart
and oxen as they drew the sacred ark,
which makes men now fear tasks not in their charge.¹”

Dante and Virgil, after toiling up a hard, rocky slope, arrive at the first of the seven terraces of Purgatory, where the proud are punished for their arrogance. A wall of marble stands before them, with carvings to represent the sin of pride so perfect that their craft seems to surpass not just the sculptor Polyclitus, but Nature herself.² Among the first carvings is one depicting the Levite Uzzah, who, the Bible tells, joined the procession of Israelites behind the cart carrying the Tablets of the Law to Jerusalem under King David’s order. Uzzah held out a hand to steady the cart, which threatened to overturn because the oxen were restless. That gesture, rather than earn Uzzah divine approval, caused his death; God struck him down on the spot to punish him for his arrogance and irreverence.³

Apart from any poetic considerations, Dante would use the story of Uzzah

1 *Purgatory* 10, 28-33, 49-57, in DANTE ALIGHIERI, *The Divine Comedy*, A. MANDELBAUM, Berkeley - Los Angeles - London, 1980-1982.

2 On these verses, see R. HOLLANDER, *Allegory in Dante’s Commedia*, Princeton, 1969, pp. 297-300; T. BAROLINI, *The Undivine Comedy. Dethologizing Dante*, Princeton, 1992, pp. 122-142; N. J. VICKERS, *Seeing is Believing: Gregory, Trajan, and Dante’s Art*, *Dante Studies* 101 (1983), pp. 67-85.

3 2 Sam, 6, 4-8.

again in one of his most militant Epistles, to exonerate himself of accusations from various sides that he was an enemy of the Church. In a polemical dialogue with Italian cardinals he mounted in 1314, Dante accused them in his Epistle of guiding the Church toward the wrong path and pictured himself, come to show them the way, as a second Uzzah abruptly interfering in ecclesiastical affairs. Nevertheless, he said, his intention was not to right the Ark, for that was God's task alone, but to return the oxen to the straight and narrow: that is, to correct the ecclesiastics and especially the cardinals who had distanced the Church from the right path.⁴

It was thus the political significance offered by the Biblical tale that made it appealing to Dante. Writing at the beginning of the 14th century, he could count on a long tradition: so archaic and inscrutable in the telling, the story of Uzzah had long been read as an exemplary case of the relationship between the priesthood and the lay world, and over the long years between Gregory the Great (d. 604) and the theological and juridical texts of the 12th century, it would progressively be interpreted as a reminder of the need for absolute separation between spiritual and temporal power.

At least from the beginning of the 13th century, the tale of Uzzah had started to be evoked in the context of the conflictual relations between popes and lay rulers.

In 1207, in the framework of the conflict between Rome and king John of England over the archbishop of Canterbury, the great pope Innocent III wrote a furious letter to the nobles of England, admonishing them: "to be on guard to save the King... from a policy... in enmity to God – that of persecuting our venerable brother Stephen, archbishop of Canterbury and, through him, the Church committed to his charge... Let him recall how Uzzah was smitten by the Lord for putting out his hands, piously indeed but unworthily, to touch the Ark – and let him not presume rashly to put out his hand against ecclesiastical rights... But

4 Epistola XI, 9-12 (tr. P. J. TOYNBEE, *Dantis Alagherii Epistolae: The Letters of Dante*, Oxford, 1920, p. 144): "Perchance in indignant rebuke you will ask: "And who is this man who, not fearing the sudden punishment of Uzzah, sets himself up to protect the Ark, tottering though it be?" Verily I am one of the least of the sheep of the pasture of Jesus Christ; verily I abuse no pastoral authority, seeing that I possess no riches. By the grace, therefore, not of riches, but of God, I am what I am, and the zeal of His house hath eaten me up ... Nor does the presumption of Uzzah, which some may think should be laid to my charge, infect me, as though I had been rash in my utterance, with the taint of his guilt. For he gave heed to the Ark, I to the unruly oxen that are dragging it away into the wilderness. May He give succour to the Ark, who opened his eyes to bring salvation to the labouring ship!". On the same passage, P.S. HAWKINS, *Dante's Testaments. Essays in Scriptural Imagination*, Stanford, pp. 51-52.

rather let him recount the gifts of God who... has gloriously spread his name and power among the princes of the Earth through the favour of the Roman Church.⁵"

The same tones were adopted short after by Innocent III against the future emperor Frederick II, who refused to choose the candidate of the pope as archbishop of Palermo: the king of Sicily – in the words of Innocent – should be satisfied with temporal powers and not interfere with spiritual matters, remembering that Uzzah was killed by God for having touched the Ark of the Law.⁶

The frequent use of Biblical metaphors in politics as well as the high presence of political ideas in theological and legal texts come not as a surprise. As argued by Brian Tierney, until Aristotle's *Politics* was translated from Greek into Latin by William of Moerbeke in the second half of the 13th century, no thread of specifically political writing had emerged in the medieval Latin West.⁷ Obviously, this does not mean that politics were not the subject of intense reflection until well into the 14th century, but rather that – as Dante testifies – late medieval political ideas tended not to circulate under the auspices of politics, but rather were attached to theological and juridical doctrines.⁸

The use Dante makes of the Biblical exemplum demonstrates that he had direct knowledge of the interpretation circulating in the theological and juridical texts of his time. To understand the use Dante makes of them helps to explain his complex approach to civil and canon law, fundamentally inspired by his political opposition to Pope Boniface the 8th and his uncompromising indictment of the mistaken path that in his view canon legal theory had taken, beginning especially in the mid-*Duecento*. The case of Uzzah is not isolated: Dante often relied on Biblical passages to discredit hierocratic convictions, offering a technical interpretation – a reading of the Scriptures from a theological-juridical perspective – to counter the most radical theses of the canonists.

His refutation of the pope's powers as the Vicar of Christ and thus of the pa-

5 *Selected Letters of Pope Innocent III concerning England* (1198-1216), C. R. CHENEY – W. H. SEMPLE, London, 1953, n. 32.

6 Innocentii III Romani Pontificis, Regestorum sive Epistolarum, lib. XI, n. 208 (*Patrologia Latina* 215.1523–24).

7 B. TIERNEY, *Religion, Law and the Growth of Constitutional Thought. 1150–1650*, Cambridge, 1982, pp. 29–30;

B. TIERNEY, *The Crisis of Church and State. 1050–1300*, Toronto, 1988, pp. 98–99.

8 On the influence of legal categories on Dante, see the work of J. STEINBERG, *Dante and the Limits of the Law*, Chicago, which looks at several juridical macro-concepts (reputation, *arbitrium*, privilege, contract) in Dante's thought.

pal faculty to unseat the emperor, expressed in a well-known passage from *Monarchia* based on an interpretation of the role of Samuel in deposing Saul, is one of the most eloquent examples of this use of Biblical passages, one in which, incidentally, Dante reveals a close familiarity with civil legal doctrine.⁹

2. The tale of Uzzah as metaphor of non-interference between Church and Empire

The biblical tale of Uzzah had always raised a lot of doubts in the minds of medieval readers. The ruthlessness of God's judgment seemed at first sight obscure and cruel: why did He punish Uzzah? The intentions of both David and Uzzah were apparently good. David wanted to bring the symbol of God's presence (the Ark) into his city and Uzzah just wanted to keep the Ark from falling. If we read the story in the narrative context of the Bible, we'd discover however that these two men had transgressed many of God's orders. But what interests us here it is not the genuine meaning of the tale in the biblical context, but rather the metaphorical meaning gradually assumed by the story in the medieval legal and theological commentaries.

As far back as the Early Middle Ages, a complex metaphorical interpretation of Uzzah's punishment began to appear, an interpretation that continued to be enriched up until the 12th century and whose popularity endured well beyond that period.

The fullest statement of that interpretation is to be found in the *Decretum Gratiani*, a fundamental work of canon law written around 1140 that quickly became a reference point for the jurists of Bologna, and then of other Italian and European centers of learning.¹⁰ In that mixture of theology and ecclesiastical rules and principles that typifies Gratian's work, based on an extensive account of the story of Uzzah from 6th and 7th century theological texts, the *Decretum* thus spells out the meaning of the Biblical punishment: the Ark of the Covenant symbolizes the men of the church; the Levite Uzzah stands for the lay subjects; the instability of the cart did not, as some had

⁹ DANTE ALIGHIERI, *Monarchia* 3 6, D. QUAGLIONI, in *Dante Alighieri, Opere*, M. SANTAGATA, vol. II, Milano, 2014, pp. 1286-1297; on the political use of Biblical arguments in the late Middle Ages and "the infiltration of the biblical-latinised ideas into the vocabulary of the acting governments", see W. ULLMANN, *The Bible and Principles of Government in the Middle Ages*, in *La Bibbia nell'Alto Medioevo*, Spoleto, 1963, pp. 181-228.

¹⁰ For a summary of the current historical debate on the composition of the *Decretum* see O. CONDORELLI, *Graziano*, in *Dizionario Biografico dei Giuristi Italiani (XII-XX secolo)*, I, Bologna, 2013, pp. 1058-1061.

erroneously suggested, represent wrongs done by the clergy, but was caused by the weight of those men burdening the shoulders of the fathers and doctors of the church; the unruly oxen were men who had done wrong, putting the Ark in danger by causing it to lean and risk falling.¹¹ No layman could accuse a man of the church or correct actions that were subject to divine judgment alone; that would be to intrude in a sphere that was not his own. Such, in essence, was Gratian's view of why Uzzah was punished.

This interpretation is one of a number of passages in the *Decretum* that after the death of Gratian would remain quite influential in the political and juridical thought of the *Due-* and *Trecento*, because they offered authoritative arguments that dealt with urgent ideological questions. Although the Gratian interpretation seems at first sight to condemn any lay intrusion into the spiritual realm, in reality, it came to stand for the principle of non-interference, a principle that in the two centuries after Gratian was largely upheld by opponents of hierocratic doctrine and of the corpus of canon law supporting it. Thus, to begin with, students of Civil Law, who appreciated the *Decretum's* late-antique notion of a division between the lay and ecclesiastical spheres, a principle formalized by Pope Gelasius (d. 496) at the end of the 5th century in a famous letter addressed to the Byzantine emperor Anastasius I: "There are two things, August emperor, by which this world is ruled: the sacred authority of the pontiffs and the royal power ... Most merciful son, you know well enough that you surpass all mankind in your dignity, yet even so you must bend your head in submission to the ministers of divine things, and from them receive the pledge of your salvation. In receiving the heavenly sacraments, which it is their office to dispense, you must depend on their judgement and not desire to submit them to your will. In matters concerning public life, the ministers of religions understand that the imperial power has been given to you from above and they themselves will obey your laws."¹²

The so-called Gelasian dualism that is here expressed became the ideological framework of the relations between Church and Empire for more than 500 years. As it is shown by the words of the letter, it was founded on the conviction that there were

11 *Decretum Gratiani*, C.2 q.7 c.27.

12 *Epistola Gelasii papae ad Anastasium Augustum*, tr. in G. DAGRON, *Emperor and Priest: The Imperial Office in Byzantium*, Cambridge, 2003, p. 301.

two authorities, each ordained by God and responsible for administering separate spheres through an equal division of tasks. The spiritual realm was entrusted to the Pope, while the secular realm was fundamentally the responsibility of the Emperor.

3. Convergence of views between civilists and first canonists

Around the middle of the 6th century the Gelasian view was firmly endorsed by Justinian, who in the *Novellae* section of the *Corpus iuris civilis* quite clearly expressed the view that priesthood and Empire, both gifts of God (*dona Dei*), must not be obstacles to one another, for the first was charged with administering the divine sphere, while the second was to deal with the human one.¹³ Justinian's texts thus became an important channel for Gelasian ideas in the Early Middle Ages, especially because popularizations of the *Novellae* were quite widespread and well-known compared to other sections of the *Corpus iuris*, many of which were mutilated or simplified and some, like the Digest, utterly forgotten until the 12th century.¹⁴ A perspective, that of Gelasius adopted by the *Novellae*, which will incidentally be embraced by Dante in the *Monarchia*.¹⁵ Gratian's essential endorsement of the early medieval political-juridical equation meant therefore that his *Decretum* was concordant with the views of the Bolognese Civil Law experts (and those beyond Bologna as well) then fiercely examining Justinian legal texts.¹⁶ All the more so because in scientific circles beyond Bologna - where until the middle of the 13th century, sources that did not adhere to Roman law were viewed with suspicion and were thought to risk polluting the philological work done by the school of Irnerius (d. after 1119) on ancient legal texts - legal studies were quite

13 See especially the Novella "*Quomodo oporteat episcopos*" (Nov. 6=Auth. coll. 1.6), praef. (tr. S. P. SCOTT, *The Civil Law*, XVI, Cincinnati, 1932: "The priesthood and the Empire are the two greatest gifts which God, in His infinite clemency, has bestowed upon mortals; the former has reference to Divine matters, the latter presides over and directs human affairs, and both, proceeding from the same principle, adorn the life of mankind").

14 L. LOSCHIAVO, *La Riforma gregoriana e la riemersione dell'Authenticum. Un'ipotesi in cerca di conferma*, in *Proceedings of the Thirteenth International Congress of Medieval Canon Law*, P. ERDŐ – SZ. A. SZURÓMI, Città del Vaticano, 2010, pp. 159-170; L. LOSCHIAVO, *La riscoperta dell'Authenticum e la prima esegesi dei glossatori*, in *Novellae Constitutiones. L'ultima legislazione di Giustiniano tra Oriente e Occidente da Triboniano a Savigny*, L. LOSCHIAVO – G. MANCINI – C. VANO, Napoli, 2011, pp. 111-139.

15 A. K. CASSELL, *The Monarchia Controversy: An Historical Study with Accompanying Translations of Dante Alighieri's Monarchia, Guido Vernani's Refutation of the "Monarchia" Composed by Dante, and Pope John XXII's Bull Si fratrum*, Washington, DC, 2004, pp. 7–8.

16 See the civil Law glosses on the Novella 6 quoted by F. CANCELLI, *Diritto romano in Dante*, in *Enciclopedia Dantesca*, 2, Roma, 1970, pp. 472-479.

eclectic and Gratian was intensely scrutinized by civil legal experts as well as canonists.¹⁷

Gratian's ideological framework was shared by all those canonists who - prior to the publication of *Liber Extra* (1234) by Gregory IX (d. 1241) - made the *Decretum* the focus of their doctrinal analysis, building comments and apparatuses on that text that earned them the title of "*Decretists*". A growing familiarity with the Roman legal texts promoted among others by Huguccio of Pisa (d. 1210), one of the most influential writers of his generation, effectively reinforced the influence of Gelasian ideas on ecclesiastical legal thought, until in many cases it effectively "did not materially differ from the civilian standpoint."¹⁸ Gratian's views remain surprising today to the degree they are impermeable to Gregory VII's (d. 1085) thought, widely circulated in theological texts that made the rounds between the 11th and 12th century in France and Italy.¹⁹

Those new hierocratic theories had almost no effect on Gratian's work which represented, in the 12th century, more of a monument to the past than an outpost of emerging canon theory.

4. The Gregorian Reform and the prevalence of hierocratic ideas

Things were to change radically in canon law beginning in the early *Duecento*, when the pronounced hierocratic positions upheld by Alanus Anglicus and the political-ideological line followed by Innocent III (d. 1216) during his papacy made manifest the distinct change of course that took place in the collections of decretals issued by popes following Gratian (1160-1234 ca.), where a Gregorian theological outlook predominated instead. Innocent III's celebrated metaphor of the two great lights in the firmament, sun and moon, exemplifies the position that canon thought embraced at the beginning of the 13th century, when a largely horizontal vision of relationships

17 Thus, for example, Johannes Bassianus and Rolandus of Lucca: E. CORTESE, *Bassiano, Giovanni*, in *Dizionario Biografico dei Giuristi Italiani*, I, 2013, pp. 191-193, and S. MENZINGER, *Verso la costruzione di un diritto pubblico cittadino*, in E. CONTE - S. MENZINGER, *La Summa Trium Librorum di Rolando da Lucca, Fisco, politica, scientia iuris*, Roma, 2012, pp. cxxv-ccxviii, cxli-cxlii.

18 W. ULLMANN, *Medieval Papalism. The Political Theories of the Medieval Canonists*, London, 1949, p. 142. For the consonance of Huguccio and Dante's ideas, especially in the third book of the *Monarchia*, see A. CASSELL, *Monarchia Controversy*, 2004, pp. 13-16, even if Richard Kay, in the review of the book of Cassell (*The Catholic Historical Review*, 90.4 (2004), pp 772-773), considers Gratian the main reference point for Dante.

19 E. CORTESE, *Il diritto nella storia medievale*, II, Roma, 1995, pp. 217-219

between universal powers was replaced by a strongly hierarchical model, as the claims of the spiritual world outstretched those secular. The degree to which the Empire was subordinate to the Papacy was thus likened to the distance between sun and moon, a distance that during the course of the 13th century would begin to be estimated in exact terms, using mathematical-astrological data from studies of Ptolemaic texts.²⁰

The ideological shift that thus took place within the canon legal thought during the 13th century marked the end of an era: the end of that Gelasian balance born to contain late antique Caesaropapism, softened during the Carolingian age to encompass a near-fusional relationship between Church and Empire, then anachronistically reintroduced in the 12th century by Gratian and his followers. In other words, the end of the balance that, along with rediscovered sources of Roman Civil Law, had been the ideological framework structuring the relationship between Church and Empire between the 5th and the 11th century and the advent of Gregory VII. In a purely juridical sense, the decline of the Gelasian paradigm would bring new theories that posited complex superimpositions between civil and canon law, in response to a need to coordinate the two systems. Against the old idea of separate spheres, the new unitary concept of “*both law*” (*utrumque ius*) held that canon law and Civil Law were addressed to the same subjects, but the first to the faithful (*fideles*), the second, to *cives*. It was a more effective and functional view that however, in an effort to combine the Roman laws with Christian tradition (which tended in effect to mean, following the canonists of the second half of the Duecento, that spiritual thought overwhelmed the lay) evolved into the well-known extremist view of the papacy of Boniface VIII (d. 1303).²¹ The widening category of “*sin*”, which began to swallow up ever more offenses, was, according to civilist opponents from Odofredus (d. 1265) to Cynus of Pistoia (d. 1336), the

20 See D. QUAGLIONI, *Luminaria, Duo*, in *Enciclopedia Federiciana*, Roma, 2005, pp. 320-325. The expression *duo luminaria magna* was used by Innocent III in the decretal *Solitae* addressed to the emperor of Constantinople, which became part of *Compilatio III* (1210) and then of *Liber Extra* (1234); according to Othmar Hageneder the figure of speech was used by the Pope for the first time in 1198, in a letter to a Florentine consul and prior of the Tuscan League: O. HAGENEDER, *Das Sonne-Mond-Gleichnis bei Innocenz III. Versuch einer teilweisen Neuinterpretation*, *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 65 (1957), pp. 340 - 368, now in O. HAGENEDER, *Il sole e la luna. Papato, impero e regni nella teoria e nella prassi dei secoli XII e XIII*, M. P. ALBERZONI, Milano, 2000, pp. 33-68.

21 Cfr. E. CORTESE, *Il diritto nella storia medievale*, II, 1995, pp. 197-245.

pretext that allowed ecclesiastical jurisdiction to expand at the expense of secular law.²²

5. *The principle of non-interference as barrier against hierocracy*

Between the 13th and the 14th centuries, the Gelasian principle of non-interference took on a political cast that previously was alien to it, for in Italy at any rate, it began to be invoked by all those political and learned voices opposing the ever-more ambitious claims of the ecclesiastical sphere. We cannot really understand the role Dante assigns to Gratian in the *Divina Commedia* without being aware of such underlying tensions. There is a direct connection between the glorious place Gratian is assigned in Paradise and the most explicitly political verses of the 16th canto of *Purgatorio*²³ and of *Monarchia* in which Dante, in open opposition to the new canon legal thinking, backs the theory of the two suns as symbols of the Empire and Papacy as separate, independent and equally strong institutions. Suns that shone in Rome, and which were mentioned, not by chance, in that same Epistle to the Cardinals in which Dante uses the Gratian version of the story of Uzzah to absolve himself of any accusation he is an enemy of the Church.²⁴ Although there is no doubt that such views, in particular the so-called principle of non-interference, were part of what we think of as Ghibelline position, belonging to a political ideology that fostered real conflicts taking place daily between rival families and cities, nevertheless it is an oversimplification, from what we know, to classify the convictions of so many *Trecento* intellectuals according to a rigid pro-Imperial, pro-Papal dichotomy. When we look at the interchange between politics and the law during that particular period of communal history, such categories appear inadequate and quite dated. The opposition of Gratian to the canonists of the 13th

22 According to Odofredus (gl. ad C. 1.1.8), the pope *ratione peccati intromittit se de omnibus* (F. CANCELLI, *Diritto romano in Dante*, 1970); for Cynus: *ecclesia sibi usurpavit ratione peccati totam iurisdictionem* (L. CHIAPPELLI, *Vita e opere giuridiche di Cino da Pistoia*, Pistoia, 1881, p. 136).

23 *Purgatory*, 16, 106-114 (tr. The Divine Comedy, A. MANDELBAUM, 1980-1982): "For Rome, which made the world good, used to have / two suns; and they made visible two paths- / the world's path and the pathway that is God's. / Each has eclipsed the other; now the sword / has joined the shepherd's crook; the two together / must of necessity result in evil, / because, so joined, one need not fear the other: / and if you doubt me, watch the fruit and flower, / for every plant is known by what it seeds".

24 Epistola XI, 21 (tr. P. TOYNBEE, *Dantis Alagherii Epistolae*, 1920, p. 146): "And that a glorious patience may foster and maintain this purpose, it behooves you to keep before the eyes of your mind, according to the measure of your imagination, the present condition of the city of Rome, a sight to move the pity even of Hannibal, not to say others, bereft as she now is of the one and the other of her luminaries, and sitting solitary and widowed, as is written above".

century, which Dante saw as the opposition of the ancient and respected canon learning to the new, suggests how important medieval juridical categories were, not merely in his thought, but across the late communal political universe.

6. *The Empire as abstract model of public power*

Public law was one significant area in which politics and the law met, yet historiography has long neglected that branch of medieval juridical thought and indeed, just a few decades ago, public law was thought to have been almost non-existent before well into the *Trecento*. Communal jurists were reputed to be broadly uninterested in political and juridical questions about how the State functions, and that seemed to be a natural corollary to the political fragmentation of northern and central Italy. The belief that there was but weak interest in the functioning of the State seemed to be confirmed by the legal doctrine produced in Italian cities: a doctrine, it has long been argued, entirely concerned with the private sector and passing over, as jurists undertook the massive task of reviving ancient Roman law, those sections dedicated to the State. Thanks to some major studies carried out in recent years, it now appears that public law was a far more central concern than previously thought, not only in Italy but across all schools of Civil Law from the middle of the 12th century onward.²⁵ Thus, while the Bolognese school of Irnerius was largely focused on private law, elsewhere matters were different: in informal circles of study in Piacenza, Modena and in Tuscany, for example, there was an early and lively interest in the last three volumes of the Codex, those in which Justinian, arbitrarily combining past Roman law and contemporary, had outlined a model of an ideal State, in reality quite distant from that of the Byzantine Empire itself in the 6th century.

If the many constitutions governing imperial administration could not but seem remote and exotic during the Roman Barbarian age, they were of great interest in Barbarossa's (d. 1190) time, when the revived figure of the Emperor met and did battle with the widespread ambitions of communal governments to embody a public political

25 An extensive bibliography is found in E. CONTE – S. MENZINGER, *La Summa Trium Librorum di Rolando da Lucca*, 2012, Introduzione, pp. xiii–ccxli; for the European perspective, see *Gli inizi del diritto pubblico*, G. DILCHER – D. QUAGLIONI, 1-3, *Annali dell'Istituto storico italo-germanico in Trento*. Contributi, vol. 19, 21 and 25, Bologna-Berlin, 2006-2011.

power.²⁶ That the conflict inspired civilists to a new militancy for Frederick I seems to have been a legend; what it did inspire was a deep reflection on the Empire as an abstract model and on its public aims and consequences. The Empire was thus not viewed as antithetical to urban freedoms, but as a legitimating framework, the “common homeland” (*communis patria*) uniting these new forms of public power, the Communes, whose institutions in fact drew vital force from contact with the abstract Imperial model. Supporting the Empire thus expressed a sentiment that was not really equivalent to the backing of one political faction: it was instead the result of a deep appreciation of the public function of imperial government, from which the city, irrespective of its concrete reality, could draw both inspiration and legitimation, appropriating a model of civic cohabitation.²⁷

The Empire thus became a legal institution, an archetype on which to build concrete political systems in the late Middle Ages, beginning with those of the city. This was the Empire that communal jurists extrapolated from rediscovered Roman law and projected, seesaw fashion, on those flesh and blood Emperors who appeared on the Italian political scene, without ever completely identifying with them.²⁸ This is evident in the widespread condemnation expressed in civil legal circles, of the notion - it was supported by pro-Imperial teaching beginning with Arnald of Brescia (d. 1155) - that the Emperor could freely dispose of all the goods in this world, even those belonging to his subjects.

What prevailed was a narrow interpretation of those passages of the *Corpus iuris civilis* to which historians have traditionally linked the debate on late medieval sovereignty. If the expression “Lord of the world” (*mundi dominus*) of the Digest (D. 14.2.9) most probably did not even circulate for most of the 12th century, in fact, the statement sentence “everything is understood to belong to the Emperor” (*omnia prin-*

26 G. POST, *Studies in Medieval Legal Theory. Public Law and the State. 1100-1322*, Princeton, 1964, pp. 81-86; on the destiny of *Tres Libri* in the Middle Ages, E. CONTE, *Tres Libri Codicis. La ricomparsa del testo e l'esegesi scolastica prima di Accursio*, Ius commune Sonderhefte. Studien zur Europäischen Rechtsgeschichte, 46, Frankfurt am Main, 1990.

27 C.T. DAVIS (*Dante and the Empire*, in *The Cambridge Companion to Dante*, R. JACOFF, Cambridge 2007, ch. 5, pp. 257-269) traces the significance Dante attributes to the Empire primarily to a theological-philosophical mould, underestimating the extent to which the poet's theories depend on the field of Public Law.

28 See P. COSTA, *Iurisdictio. Semantica del potere politico nella pubblicistica medievale (1100-1433)*, Milano, 1969, p. 196. An entirely philosophical perspective is that of G. SASSO, *Dante, l'Imperatore e Aristotele*, “Roma 2002”, pp. 183-252.

cipis esse intelligatur) transmitted by the Codex (C. 7.37.3.1a), was quickly the object of extensive legal opinions.²⁹

7. *The powers of the Emperor: legal-political thought outside Bologna*

The second half of the 12th century was the founding moment, ideologically, of urban public power: it was then that juridical thought developed the theoretical means to which *Trecento* intellectuals consciously looked back when they sought to arrest the inescapable decline of municipal institutions caused by factional infighting and by the ambitions of the new signorie. It was not in Bologna, however, that such ideas were most vigorously pursued, or to be more precise, they were not part of what is considered mainstream Bolognese thought throughout the *Duecento*. The *Magna Glossa* compiled by Accursius (d. 1262) around mid-century, would be the main source – until the invention of printing and even beyond – through which the manuscripts of the Justinian *Corpus Iuris Civilis* would circulate in the late Middle Ages. The influence of Accursius and his sons (four, of which three were jurists) on the teaching of law, as professors in the Studium of Bologna and many other European cities, and on the production of legal texts, thanks to a prosperous manuscript-selling business in Bologna, meant that Accursius's *Magna Glossa* would become something of an official text.³⁰

If Accursius's text had the virtue of including the thousands of annotations that the Bolognese Glossators, beginning with Irnerius, had produced on Roman law, it was nevertheless vulnerable to two major criticisms. First, that it had arrested an expanding literary genre, the gloss, which had previously been quite fluid and open; second, that the text created an effective monopoly of Accursian thought in Bologna, where it was difficult to express dissent. And while it would be wrong to see, in Dante's assignment to *Inferno* of Accursius's oldest son Franciscus (d. 1293),³¹ a wholesale condemnation

29 E. CONTE, *Rolando e il diritto pubblico nel XII secolo*, in E. CONTE – S. MENZINGER, *La Summa Trium Librorum di Rolando da Lucca*, 2012, pp. lxx-cxxiv, xcix-civ.

30 F. SOETERMEER, *Utrumque ius in peciis. Aspetti della produzione libraria a Bologna tra Due e Trecento*, Milano, 1997, pp.182-194 and *passim*; M. BELLOMO, *The Common Legal Past of Europe. 1000-1800*, Washington, DC, 1995, pp. 173-175.

31 *Hell*, 15, 106-110.

of the *Magna Glossa*,³² it is nevertheless very likely that the poet saw in Franciscus Accursii an example of those Bolognese jurists who relied heavily on their earnings from the legal profession and from usury, an activity that was widely practiced by *doctores legum* in Bologna and elsewhere.³³ At the same time, it is true that in at least two cases, Dante did express opinions that diverged sharply from the line of the *Magna Glossa*, and the matters involved were anything but banal.³⁴

Such factors helped some centers exploring an alternative legal approach to flourish, among which the most distinguished was certainly that of Orléans in north-central France, in open disaccord with Accursius's brand of Bolognese law, seen as stifling and old-fashioned. It was here, to a freer intellectual environment, that between the 13th and 14th centuries part of the Civil Law tradition excluded in Bologna - or considered minor - would migrate. Minor: so the work of all those schools that grew up in the 12th century in northern Italy and southern France, schools that were generally informal in character, has tended to be unjustly defined by historians. The technique of the comment itself, which was born later in the different environment of Orléans, was strongly shaped by the intellectual horizons of the so-called Minor Schools, where, although there had not yet occurred a conscious shift of attention from words (*verba*) to the ratio of the law (as would begin in Orléans mid-*Duecento*), scholars began to reflect deeply on the philosophical-juridical concept of *causa*.³⁵ Greater links with the world of the Liberal Arts and a consequent opening to extra-juridical culture meant that jurists like Johannes Bassianus at Mantua would be interested in the new Aristotelian translations made by Giacomo Veneto (active mid-12th century), including the Latin version of *Physica* II which restored Aristotle's detailed explanation of the four *causae* to Western scholars.³⁶ The transition from an interest in the *causa* of the contract

32 Thus reasons A. PEZARD, *Dante sous la pluie de feu* (Enfer, chant XV), Paris, 1950, pp. 173-200, but the author seems to confuse the son with the father.

33 Bibliography on Franciscus in S. MENZINGER, *Francesco d'Accursio*, in *Dizionario Biografico dei Giuristi Italiani*, I, pp. 900-901; on the diffusion of usury among Law professors, cfr. *ibid.*, II, *Indice delle cose notevoli*, entries "usura" and "prestito a interesse" (pp. 2176, 2188).

34 See below.

35 E. CORTESI, *Il diritto nella storia medievale*, II, 1995, pp 187-195

36 E. CORTESI, *Bassiano, Giovanni*, 2013.

as explored by Johannes Bassianus (d. end of 12th century) to that of the *causa or ratio* of the law, as matured at Orléans in the second half of the 13th century, is one of many signs marking a dialogue that the new French civilists had taken up, a century later, with ideas that emerged in the Italian Minor Schools. Other signs of that dialogue can be found in debates on sovereignty and on the Empire, debates that perhaps were known to Dante himself via Cynus of Pistoia, the Italian jurist who first embraced the ideas and methods of Orléans and who served as a bridge spreading those French ideas in Italy.

If only because the professors of Orléans, despite the fact they were churchmen, had close ties with the French crown, their approach was anything but hierocratic. Nor did the headstrong views of the *Ducento* canonists take hold there. It comes as no surprise that Boniface VIII's extremist thought was rejected by these particular civilists, the first to begin to consider the concept of national sovereignty.³⁷ One of the leading voices in this school, Pierre de Belleperche (d. 1308), joined the court of Philippe le Beau in 1296 and quickly became one of his most trusted advisors.

Belleperche opposed spiritual interference in secular jurisdiction, arguing that the sphere of ecclesiastical justice should not extend beyond matters of faith.³⁸ The views of Jean de Monchy, the first to posit imperial power as an abstract quantity, were transmitted by his better-known pupil Jacques de Revigny (d. 1296), who insisted that the Empire had a jurisdictional function,³⁹ citing a century-old constitution of Frederick I still in circulation in feudal law, and using concepts not unlike those sketched out in the 12th century by those authors in the Minor Schools who had delved into public law. All of it was material that, perhaps via Cynus, made its way into Dante's *Monarchia*, where the Empire, following Frederician law, was defined as "jurisdiction which embraces within its scope every other temporal jurisdiction" (*iurisdictio omnem temporalem iurisdictionem ambitu suo comprehendens*).⁴⁰

37 E. M. MEIJERS, *Etudes d'Histoire du Droit*, III, publiées par R. Feenstra et H.F.W.D. Fischer, Leyde, 1959, pp. 21, 82.

38 K. BEZEMER, *Pierre de Belleperche. Portrait of a legal puritan*, Frankfurt am Main, 2005, pp. 101-105.

39 Cfr. E. CORTESE, *Il diritto nella storia medievale*, II, 1995, pp. 405-408.

40 *Monarchia* (D. QUAGLIONI, 2014), III x 10; D. QUAGLIONI, "Arte di bene e d'equitate". *Ancora sul senso del diritto in Dante* ("Monarchia" II, V, 1), *Studi Danteschi*, 76 (2011), pp. 27-46, 37-38.

Influenced by the French thinkers, Cynus of Pistoia firmly denounced as erroneous a gloss that was part of Accursius's text, in which the Empire was said to have come forth from fate (*fortuna*), rather than from God.⁴¹ It was one of the most controversial ideological issues of the early *Trecento*, when the *anti-Guelph* intellectual side strongly opposed the notion that the Empire derived from the Church, an idea that the canonists sought at length to impose in place of the older conception that both of the highest powers were of divine origin. It may well have been that particular gloss that aroused Dante's ire against jurists in *Monarchia*, a fury that, far from being generic, was most likely an attack on the mistaken interpretation of the Bolognese Glossators.⁴²

In the juridical thinking of *Trecento* Italy, ideas from Orléans were sometimes accepted together with a simultaneous recovery of the earlier civilist tradition flourished mainly outside the Accursian Glossa. An interesting expression of this intellectual current came at the end of the 12th century, with the assertion of an abstract imperial power - inspired both by the newly recovered texts of Roman law, and by the historical vicissitudes of the house of Hohenstaufen - that however had not yet taken on truly anti-papal colors.

It was within this perspective that the Peace of Constance (1183) took on a new significance in *Trecento* legal thought, when a jurist as highly involved in Lombard politics as Albericus de Rosciate (d. 1360) began to reflect on the concessions made by Frederick I to Italian cities and to study Rolandus of Lucca's *Summa Trium Librorum*, the most extensive commentary on Roman public law written between the 12th and 13th centuries, and in an environment far from Bologna.⁴³ The ease with which Albericus combines citations from these materials with passages from Cynus, from French jurists and the authors of late-*Duecento* Bolognese quaestiones, invites us to view in a far more unified light chapters of a European political-legal culture that have mostly been

41 Cfr. E. CORTESE, *Il problema della sovranità nel pensiero giuridico medioevale*, Roma, 1966, pp. 105-106

42 According to D. QUAGLIONI (*Monarchia*, II ix 19-21, pp. 1188-1191, and D. QUAGLIONI, "Arte di bene e d'equitate", 2011, pp. 34-36) in fact, the order to be silent (*silencium*) that Dante directs to the jurists in *Monarchia* appears just after a long explanation intended to show that the Empire was a gift of Providence.

43 See D. QUAGLIONI, "Arte di bene e d'equitate", 2011, p. 45; S. MENZINGER, *Diritti di cittadinanza nelle quaestiones giuridiche duecentesche e inizio-trecentesche*, in *Cittadinanza e disuguaglianze economiche. Le origini storiche di un problema europeo (XIII-XVI secolo)*, C. LENOBLE - G. TODESCHINI, *Rome, École française de Rome, Mélanges de l'École française de Rome - Moyen Âge*, 125-2 | 2013, pp. 9-11.

considered separately. Albericus's frequent citations of Dante suggest we would do well to tear down the walls that have traditionally surrounded medieval juridical culture, for its high level of technical expertise did not preclude communications beyond the universe of the legal thought. Albericus's admiration for Dante led him to translate in Latin Jacopus de Lana's comment on the *Commedia*; Bartolo de Sassoferrato consulted *Monarchia* at length, and from a certain time onward, also shared its basic political message. He even found its literary arguments worthy of doctrinal consideration, and went so far as to include, in a comment on the Justinian Codex, a learned refutation of the idea of nobility expressed by Dante in *Le dolci rime*.⁴⁴ And the intellectual curiosity was fully mutual, for if Dante's convictions grew out of an intense dialogue with the most advanced currents of cultivated legal thought, the jurists of the Trecento also read and commented on Dante's work with great intelligence.

⁴⁴ Cfr. P. BORSA, "Sub nomine nobilitatis": Dante e Bartolo da Sassoferrato, in *Studi dedicati a Gennaro Barbarisi*, C. BERRA M. MARI, Milano, 2007, pp. 59-121, e M. ASCHERI, *La nobiltà dell'Università medievale: nella Glossa e in Bartolo da Sassoferrato, in Sapere e il potere. (Dalle discipline ai ruoli sociali)*, L. AVELLINI – A. CRISTIANI – A. DE BENEDICTIS, Bologna, Istituto per la storia di Bologna, 1990 pp. 239-268.