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# Yale Legal History Forum



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*Public Law before the State:  
Evidence from the Age of the  
Glossators of the Roman Law*

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Yale Law School Faculty Lounge, Second Floor

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Public Law before the State: Evidence from the Age of the  
Glossators of the Roman Law

*A paper presented to the Yale Legal History Forum*

*February 7, 2006*

Today I will propose a survey on the early science of public law in the 12<sup>th</sup> century, focusing primarily on Italy, which was at that time in the middle of a deep institutional change.

I will begin with some observations on the legal historiography and on some old fashioned attitudes of legal historians. Although more than a century old, these attitudes still affect our historical judgements. Going to the core of my paper, I will then briefly demonstrate that Italians' renewal of Roman public law was central to this period of political transformation. I shall particularly insist on the importance of this Roman model for Tuscany, in particular for the city of Pisa.

Through Pisa, I will introduce my main source: a Tuscan judge from Lucca (some miles from Pisa) named Rolandus, who wrote the most important treaty on Roman public law of his age: the twelfth and thirteenth centuries.

Basing my remarks on Rolandus's important work, I will develop several aspects of medieval Italy's early theory of public law: the public personality of the cities, the distinction between public power and private property, the right to impose taxes, the role of the Emperor, and the autonomy of the free cities.

*1. The European Tradition of Legal History and the Medieval Public Law.*

The history of public law in the Middle Ages has always been problematic for professional legal historians. Since the German foundation of modern legal history, Savigny's historical school tended to exclude public law and its very subject, the state. For the Romanists, this exclusion lasted until the end of the nineteenth century, when Theodor Mommsen wrote his *Römisches Staatsrecht* in 1887. By that time, however, the German historical school was already well founded, and a sort of implicit agreement had restricted Roman legal historians' attentions to private law. The state, and primarily the medieval state, was considered a creation of native German law. Albrecht and Beseler's school first investigated and described medieval public law, focusing on the common use of the fief. The great Otto von Gierke took this study to its pinnacle.

But the precedence of historians of German law in research on medieval public law led to a strange attitude towards the sources, one which needs some explanation.

The European tradition of studying and teaching medieval legal history is largely indebted to the experience of the German professors of "Deutsche Rechtsgeschichte," the History of German Law. The German professors of Roman law emphasized private law, and developed a dogmatic method almost completely innocent of historical and

philological technique. In contrast, those who studied and taught German (or Italian or French) legal history focused on the history of the sources of law, its administration, and procedure. They were much more interested in social, political and economic history and less sensible to so-called *Dogmengeschichte*.

The history of medieval "non Roman" private law was a curious construction based on the search for original German institutions. It could be studied only by avoiding carefully every "contamination" by the learned law, that is those medieval sources that acknowledged in some measure or other the authority of Roman Law.

In the beginning of the twelfth century, in fact, a new legal culture was founded in Bologna and elsewhere which grew quickly. These jurists produced a number of glosses and commentaries on the recovered books of Justinian and on the collection of canon law compiled by Gratian. Legal historians did not consider this phenomenon as a whole: they tended to separate learned law in two: canon law and civil (Roman) law.

While the medieval, learned canon law was left to specialists of canon law, commentaries and glosses on Roman law were considered evidence of a kind of second life of the ancient Roman law, which continued, in the ideas of the German Pandectists, until the nineteenth century.

The third current of legal history in the eighteenth century, the history of German law, proudly dealt only with institutions that the Nation felt were deeply its own. The historiography of Germanic law was in fact in search of the real *Folksgeist* of the German Nation. This reconstruction prompted the historians of Germanic law to leave aside every production of the medieval schools, looking instead for ancient, customary institutions only in the documents of practice, such as court decisions, writs, and customs.

If these historians acknowledged the Roman lawyers' influence upon court life and court judgments, they described it as merely external. Since the medieval institutions were considered profoundly Germanic, the use of a Roman vocabulary by jurists was interpreted as a cover, an artificial allure given to roughly German content.

This historiographic approach is particularly evident in studies on medieval property. From Meynial to Grossi, scholars have considered the concept of *dominium utile*, drawn from the works of academic medieval lawyers, as merely a learned dressing of the very German concept of the mysterious *Gewere*.

But if the medieval jurists could influence the juridical vocabulary of private law, historians considered them totally ineffective in giving shape to public institutions such as government, administration, and jurisdiction. As an example, one can take the major work of Julius von Ficker on *Reichs- und Rechtsgeschichte Italiens*, published at Innsbruck between 1868 and 1870 (the fourth volume, an appendix of documents, appeared in 1874). He did not use any commentary, gloss, or treaty written by any medieval jurist, even though more than half of the work is devoted to courts and judicial procedure, a topic on which the first learned jurists of the 12<sup>th</sup> century had written surprisingly quickly and luxuriantly in only a few decades.

The attitude of traditional legal history towards public law changed sensibly at the end of 19<sup>th</sup> century, as the extremely influential Germanist Otto von Gierke published the third volume of his monumental history of corporations, devoted to the theories of State in the late Middle Age (which remained for a long time the only part of this massive work to be translated into English – see Maitland). Even whilst maintaining the “German” origins of public law, Gierke did at least use medieval learned literature. He published an immense selection of quotations from medieval glosses and treatises of Roman and canon law, opening the way to a wide range of successive studies on the doctrines of public law. The eighteenth-century division between a Roman private law and a German public one had been apparently overcome.

In many cases, however, this is only a superficial impression. Gierke, in fact, made use of learned legal sources only on a peculiar premise. Medieval interpretation of ancient Roman law – he said – did not consist of a fair exegesis of the text. On the contrary, it expressed the “German spirit” that lived in the hearts of the jurists, who could not avoid expressing the rules of German institutions when interpreting Roman texts<sup>1</sup>.

## 2. *Renewal of Law and Cultural Renaissance in the 12<sup>th</sup> century.*

This preface has perhaps been too long; but it is important to understand legal historians’ curious lack of interest in evaluating the influence of the Roman model in the construction of medieval forms of public power. Even recently, someone proposed an interpretation of the building of the modern State as a process of relegating the “despotic” Roman law in favour of the “German” principles of a corporate sovereignty.<sup>2</sup> Following this interpretation, the very core of the modern legal state (*état de droit*) lies far from the Roman *Res Publica*. The escape from the Roman law is then considered as a condition for the establishment of the rule of law in England and France during the centuries of the modern era. These are the long lasting effects of the interpretations of the Germanists expressed more than a century ago. Savigny himself affirmed that modern States had preserved “much of Roman private law, less of Roman criminal law, nothing of Roman constitutional law.”<sup>3</sup> Throughout these decades, however, historians of many disciplines have studied the fascinating renewal of the twelfth century, the age of the renaissance of classics in every aspect of culture, highlighting the influence of the Roman model on many facets of public

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<sup>1</sup> Gierke, *Das deutsche Genossenschaftsrecht*, III, Berlin 1881: “Hier wie überall wurde die Reception nur dadurch möglich, daß nicht das römische Recht, sondern die in langer Arbeit den Zeitverhältnissen angepasste italienische Doktrin Aufnahme fand. Die italienische Doktrin aber war, wie sich gezeigt hat, von mittelalterlich-germanischen Elementen durchsetzt. Sie konnte daher zu einer Zeit, in welcher die Anwendung des reinen römischen Rechts auf die deutschen Verhältnisse schlechthin undenkbar gewesen wäre, langsam ein- und vordringen” (Gierke, III, 646). This germanisation facilitated the expansion of Roman Law: this way “wurde... der Sieg des Fremden erleichtert”. “Unfreiwillige, (the learned jurists accepted in their works) die Anschauungsweise des früheren, in seinem Kern germanischen Mittelalters, dessen Kinder auch sie waren” (Gierke III 191).

<sup>2</sup> Cf. the many essays of B. Kriegel, whose *The State and the Rule of Law*, Princeton 1995, is translated into English.

<sup>3</sup> Introduction to his *Geschichte*, 1815.

life. Let me insist on this point. Legal historiography has presented its very subject, the law, as detached from the great changes of history. The renewal of a scholastic interpretation of Roman law texts has been presented as a purely academic event, without connections to the broader, impressive renaissance of art, literature and politics, which wholly pervade the same twelfth century.

Let me recall some evident connections between artistic, political and legal renaissance, and let me begin with the renewal of the spirit of Rome inside the city of Rome itself.

2.1. *The Mirabilia Urbis Romae*. – Since its edition by Schramm in 1929<sup>4</sup>, the compilation of *Mirabilia* (that is, a kind of guide and description of the city), has also been appreciated for its political meaning. The majesty of the city of Rome, expressed through its still magnificent if ruined buildings, was the best demonstration of the power of the popes. In the 1155 version of the *Mirabilia*, this magnificent power was intended to be shared between the pope and Frederick Barbarossa, the German emperor who began by presenting himself as the very successor of the powerful but devoted Roman emperors. As Rome welcomed her new emperor, the latest version of the guide to her monuments was followed by a description of the Byzantine magistrates, whose majesty was, for the pilgrims, as admirable as were the great ruins of the ancient imperial Rome.

2.2. *Justitia in Rome*. – This appendix to the *Mirabilia* is called *Libellus de ceremoniis aulae*, because it describes the magnificence of the Byzantine ceremonies and dignitaries. It ends with a formula of investiture of the judge, who receives a copy of Justinian's Code as a symbol of justice. In Rome, the court judged in the Lateran, under a statue of the Roman wolf<sup>5</sup>: so the renewal of the Roman law was connected every day with the recollection of ancient magnificence.

The majesty of the city was also evoked by a famous heretical preacher, Arnald of Brescia, who criticised the papal power and asked the Roman people to revolt in the name of its ancient dignity. Some years before 1155, shortly after the election of Frederick, a German partisan of Arnald named Wezel writes a letter to the new emperor. Sent from Rome, the letter exalts the city's glorious story, cites the beginning of the Institutes of Justinian, and affirms the need of an Emperor learned in the laws. He pushes his pretensions to say that sovereignty pertains to the

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4 Ed. P.E. Schramm, *Kaiser, Rom und Renovatio*, II, Leipzig-Berlin 1929, 68-104, and, with additions and corrections, in Id., *Kaiser, Könige und Päpste. Gesammelte Aufsätze zur Geschichte des Mittelalters*, III, Stuttgart 1969, 313-359.

<sup>5</sup> Chiara Frugoni, *L'antichità: dai "Mirabilia" alla propaganda politica*, in *Memoria dell'antico nell'arte italiana*, a c. di S. Settis, I, Torino 1984, 3-72, 66: writing in the second half of the 12<sup>th</sup> century, Master Gregorius tells that legal disputes were settled in front of the Lateran. There was a statue of the Roman wolf, with a bronze inscription: "ubi pociora legis praecepta scripta sunt, quae tabula 'prohibens peccatum' dicitur". This place had probably been dedicated to judicial purposes for centuries: in a text dated 950, *De imperatoria potestate in urbe Roma libellus* (PL 139, 53) a "iudicialis locus ad Lateranis" is mentioned.

Romans as does the emperor himself, and that the Roman Senate has the power to create the emperor<sup>6</sup>.

2.3. *Renewing the Roman Senate.* – Wezel refers primarily to the classic Roman senate, the central institution of the ancient Roman Empire, but he wanted also to refer to the new Senate of Rome, which functioned as a civic assembly in his own age. The revival of the Roman senate is, in fact, one of the most impressive mid-twelfth century episodes of renewal, and it was considered as such by many historians, thanks to whom we have now a rich dossier of documents and studies on this topic.

Shortly after the death of Innocent II, in 1143, the venerable assembly was restored by the citizens of medieval Rome who were in search of independence from papal power. The allusion to the ancient constitution was explicit, and so were the pretensions of universality that characterized the Roman *commune* as different from every other flourishing Italian city-state in the same years. Even if Rome was ruled by the same political system adopted by all the central and northern Italian city-states, its confrontation with universal powers, the Roman Papacy, and the Empire, which also claimed Roman roots, made Rome atypical, not just another example of the Italian situation. However, Rome's intensive use of Roman models had, for sure, an influence on other Italian cities. To be part of Roman history was a powerful argument in defence of the autonomy of important cities such as Pisa, on which we will focus in a few moments, Florence and Siena. Also, ancient monuments seem to play a role in this search for the authority of the antique. The renewal of Rome's ancient monuments paralleled the renewal of its ancient institutions such as the Senate. So, the Roman Senate rebuilds the *Capitolium* with its signs of public power; restores the ruined walls, signing off the works with the glorious inscription SPQR; and mints coins with the legend "Roma caput mundi." For the first time in history, an ancient monument is protected against damage by the Senate's new statute declaring Trajan's column a symbol of the honour of the city and forbidding every inappropriate use of it.

But at the same time, northern Italian cities were also exalting the symbolic value of their ancient monuments, often considered often evidence of an ancient liberty. Remains of Roman public theatres,

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<sup>6</sup> Ed. Ph. Jaffé, *Monumenta Corbeiensia (Bibliotheca rerum germanicarum tomus primus)*, Berlin 1864 (rist. Aalen 1964), 542-43: "... Quae loquor attendite. ... Imperatorem non silvestrem, set legum peritum debere esse, testatur Iulianus (sic pro Iustinianus) imperator in primo omnium legum dicto, dicens: Imperatoriam maiestatem non solum armis decoratam set etiam legibus oportet esse armatam, ut utrumque tempus, et bellorum et pacis, recte possit gubernari. Idem etiam, unde princeps Romanus imperare et leges condere habeat, paulo post ostendit; set et, quod principi placuit legis habet vigorem et quare, subinfert, cum populus ei et in eum omne suum imperium et potestatem concessit. Set cum imperium et omnis rei publicae dignitas sit Romanorum, et dum imperator sit Romanorum, non Romani imperatoris, quod sequatur considerantibus ....

Quae lex, quae ratio senatum populumque prohibet creare imperatorem? Comitem Rodulfum de Ramesberch et comitem Ouldericum de Lencenburch et alios idoneos, scilicet Eberhardum de Bodemen, qui, assumptis peritis legum qui de iure imperii sciant et audeant tractare, Romam quantocius poteritis mittere non dubitetis."

existing in many Italian cities, were considered ancient public parliaments, the *arenghi*, testaments to the original autonomy of the city<sup>7</sup>.

2.4. *Roman Church and Roman Procedure*. – But it is not only as an alternative to pontifical power that Rome was recalled to a new life. On the contrary, the idea of renewing the Senate was probably a consequence of the exaltation of antiquity already proposed during the reign of Innocent II, between 1130 and 1143. His chancellor was Aymericus, one of the most learned men of his age, and a friend of the Bolognese jurist Bulgarus, the most influential of the famous four pupils of Irnerius, the so-called Four Doctors. Even in this early period, the demand for the authority which Antiquity bestowed was tied with the claim for a deeper knowledge of the laws of Justinian and the legal institutions they created. It was Aymericus who asked Bulgarus to take a survey of the procedure adopted by the Roman law and regulated in the *Corpus Iuris* of Justinian. This task was then realized by Bulgarus, who compiled one of the first treatises on legal procedure, in fact a succession of the different remedies (*actiones*)<sup>8</sup>.

In the substantial bulk of texts on Roman procedure of the 12<sup>th</sup> century, the work of Bulgarus has been considered as peculiar. It shows no evident practical purposes, but resumes in a strict succession the different procedures described by the *Institutes* of Justinian. But the text enjoyed a certain circulation in different circles: from the six surviving manuscripts, one includes a collection of Lombard law and a copy of the *Institutes* of Justinian glossed by Lombard jurists<sup>9</sup> - evidence of a circulation in feudal milieu -; a second copy of Bulgarus' text is in company of a *catalogus senatusconsultorum*, published in the 16<sup>th</sup> century under the name of Placentinus, which is a curious example of medieval legal history, containing a collection of all the mentions of senatorial laws in the *Corpus Iuris*<sup>10</sup>. A beautiful Vatican manuscript<sup>11</sup> contains, after Bulgarus' treaty, a false exchange of letters between Seneca and Saint Paul, whose purpose seems to be the inclusion of the ancient pagan philosopher in the Christian heritage. This manuscript witnesses the attempt to join a genuine renewal of the Roman institutions with the revival of ancient culture, all of which was in the programme of the powerful chancellor Aymericus.

By asking Bulgarus to write a short portrait of Roman procedure, he was in search of a stronger regulation of ecclesiastical procedure, but he also wanted to secure the good relationship between the Holy See and the rising legal culture. The schools of law were flourishing in many different cities of northern Italy and southern France, and all the signs revealed that this success was going to be no ephemeral one. The Pope Innocent II, on the other hand, faced a difficult state of affairs in his church, chiefly because of a powerful antipope, Anacletus II. The authority of ancient Roman law could help the Pope and his chancellor in

<sup>7</sup> Chiara Frugoni, *L'antichità: dai "Mirabilia" alla propaganda politica*, in *Memoria dell'antico nell'arte italiana*, a c. di S. Settis, I, Torino 1984, 3-72.

<sup>8</sup> Ed. by Wahrmund, *Quellen...*, IV, doppelheft 1-2, Innsbruck 1925.

<sup>9</sup> Ms. Vat. lat. 8782.

<sup>10</sup> Ms. Grenoble BP 391.2

<sup>11</sup> Vat. lat. 8100.

their struggle: they were forced to flee Rome and moved to Pisa in September 1133, after a short stay in the City under the protection of the imperial troops. But the party of the antipope Anacletus was very strong in the City, and Innocent was forced to escape once again. Pisa, on the contrary, was flattered to receive the Pope and his court, who chose as their provisional seat the maritime city, whose power was increasing dramatically.

It was in Pisa that, in 1135, a council was celebrated. Among the canons it produced, there is an early version of the well known canon 9 of the Second Lateran Council of 1139, prohibiting clerics from studying Roman law and medicine<sup>12</sup>. Considered by some as a manifestation of papal opposition to Roman law, the canon revealed in fact a high regard for Justinian's Code, whose very words are simply repeated<sup>13</sup>. Roman law was considered, by the ancient emperor as by the medieval pope, as a matter for secular persons, while the clerks should devote themselves to the Holy Scripture and to theology.

### 3. Pisa.

Is it only a coincidence, that Pisa is the first medieval city to lay down a municipal code introducing many rules of Roman procedure in local trials? Is it a pure accident that the most famous pupil of Bulgarus, Johannes Bassianus, mentions the city as "prudentissima Pisana civitas" for having introduced the rule that the plaintiff must mention the name of the action (*nomen actionis*) in the document by which he initiates litigation?

The model of ancient Rome was indeed very present in the construction of the political independence of Pisa. The Tuscan city claimed native, autonomous political and judicial institutions since the second half of the 11<sup>th</sup> century, basing them on a privilege of Henry IV from 1081, on the support of the Church for the maritime wars against the Muslims, which began in 1087 and ended with the victory of the Balearic Islands in 1115. Every step towards self government of the city was celebrated by the civic culture through allusion to the glory of Rome: civic poetry comparing the Muslims with the ancient Carthaginian and – of course – depicting Pisa as the "other Rome"; the new civic rulers named after the Roman *consules*, electing judges and deciding over important cases; the building of the new cathedral recalling ancient magnificence through the many inlays of ancient marbles; the consolidation of the leading families of the city expressed through the search for ancient sculpted sarcophagi, bought everywhere in Italy and brought to the Pisan *Campo santo*.

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<sup>12</sup> On which see Robert Sommerville, *Pope Innocent II and the Study of Roman Law* (in *Révue des études islamiques* 44, 1976), ora in Id., *Papacy, Councils and Canon Law in the 11th-12th Centuries*, London (Variorum) 1990, XIV

<sup>13</sup> Text edited by R. Sommerville, *The Council of Pisa, 1135: a Re-examination of the evidence for the canons*, in *Speculum*, 45 (1970), 98-114, 106: "... Attestantur vero imperiales constitutiones *absurdum immo etiam obproprium esse clericis si peritos se velint disceptationum esse forensium*". The words printed in italics are taken from C. 1.3.40, a constitution of Justinian.



The long residence of the pope in Pisa, in the thirties of the 12<sup>th</sup> century, confirmed the pretensions of the city to be a new Rome. Pisa looked confidently to a future of independence and prosperity<sup>14</sup>.

Shortly after, in 1152, the election of Frederick Barbarossa as the new Emperor threatened a halt to this trend, given Barbarossa's ambitions and pretensions of controlling the power and wealth of Italian cities.

Where could Pisa find authority for defending her liberty, autonomy of jurisdiction, fiscal and commercial independence? It was natural to look once more to the authority of ancient Rome, to her laws and institutions, as did the Romans in these very same years. So, the codification of the customs of Pisa was called "nostrum ius civile", quickly compiled and published in 1160. The oldest manuscript of this compilation, preserving the text as it was in 1186, is today preserved in the library of this University, and was edited in its entirety in 2003.

Focusing on different aspects, recent studies have stressed the ideological character of the Pisan codification. Chris Wickham considers that the Romanization of the local institutions was a clearly ideological operation – and a very well executed one, as it changed quickly not only the law, but also legal practice. Claudia Storti Storchi suggests that both constitutions – of the customs and of the law – were published by the city to prevent the danger of an imperial imposition by Frederick Barbarossa. The authority of Roman antiquity could be opposed to the authority of the German emperor.

So the "Roman" Pisa, with her *consules* and her legal codes, began to apply in court some of the most important rules of Justinian's procedure: Roman *actiones* and *interdicta* took the place of traditional methods, so that the effective balance of personal rights was modified by the new system of proof introduced with the Roman procedure.

One can think that this deep change had begun with the presence of Innocent the II in Pisa, and the small treaty on procedure addressed by Bulgarus to his chancellor Aymericus. Everything had begun with small signs, as Rome was a myth, and her law a simple recollection of an intangible perfection. But these signs implicitly demanded a new balance of public powers: in the text of Bulgarus, to cite just one example, at the very opening of the treatise, the problem of the public power of the judge was approached. "Iudicem dat potestas publica, ut Princeps, et qui sub eo militant", reads the modern edition of Wahrmund, meaning that judicial power is a function of the imperial authority. But three manuscripts, considered by the critics as Italian, give a slightly different reading: "Iudicem dat potestas publica **aut** princeps". The small change in the text reveals a profound difference in the conception of public power: *potestas publica* is something different from the prince, such that not only the prince can use it<sup>15</sup>.

The function of a new knowledge and use of Roman texts could be, in some Italian cities, particularly in the central years of the 12<sup>th</sup> century, to justify a public power which was not justified by the

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<sup>14</sup> On the "romanity" of Pisa in law and institutions see last Ch. Wickham, *Courts and conflict in twelfth-century Tuscany*, Oxford 2003.

<sup>15</sup> Cfr. L. Fowler, *Ordo iudiciorum vel ordo iudiciarius. Begriff und Literaturgattung*, Ffm 1984 (Ius commune SH 19), 39.

Emperor<sup>16</sup>. This justification gained in plausibility as the new legal culture spread everywhere in Northern Italy and the free cities adopted a procedure largely influenced by Roman law. This new procedure was very technical, which is why it called for an analytical knowledge of the internal mechanisms of Roman law. And this deep, technical knowledge could be applied in practice relatively quickly, because a new society, ready to apply new rules, was coming into being.

#### 4. *A Theory of Public Law by the Early Glossators.*

If we look more closely at the legal culture of the Italian cities, we can stress some important aspects of these legal technicalities. The sources are different, as are the specific points on which the jurists make an important contribution to the legal shape of cities, citizenship and the rights and duties of citizens. Today I would like to show some contributions given to the legal definition of the medieval *res publica* by some glossators of the late 12<sup>th</sup> and early 13<sup>th</sup> century, the golden age of the last consuls and the first podestà, after the peace of Constance and before the crisis of the middle of the 13<sup>th</sup> century.

This golden age of the Italian free communes is also the golden age of the glossators in Bologna and elsewhere. I will deal with some important glossators, whose activity was strictly tied with local government, in each case outside of Bologna, in two cases in Tuscany.

In fact, theoretical works on the law of independent cities were written, in that age, as commentaries to the last part of Justinian's Code, the so called *Tres Libri*, which contained – among others – a title *De iure rei publicae*, some titles on tax law, a title on municipal citizens<sup>17</sup>. An example of this kind of works is the *Summa Trium Librorum* written by a peculiar man, Roland of Lucca, a Tuscan judge and advocate the first draft of whose work is dateable to between 1195 and 1197, with revisions being written until the 1220's. Roland was not a professor, even if his wide legal knowledge seems to connect him to a university, maybe even to Bologna. But many documents prove that he was at work in Lucca for all his life. Being judge in many disputes, he also gave his help to his city for diplomatic affairs.

He didn't like his job all that much. By writing his *Summa*, he hoped to receive some gifts from the Emperor, thanks to which he could finally free himself from the stress of being a judge. So he writes dedicating his book to the young Emperor:

<36.> Quod ideo mihi venit in animo, quia in civitate mea curtem illam incolo que vocatur regia, et inde originem duco<sup>18</sup>; <37.> et sic in regalibus

<sup>16</sup> See, on this point, the sources listed by Gierke, *Genossenschaftsrecht*, III, 217-218, note 96; but the most important book on the importance of legal thought in medieval politics is G. Post, *Studies in Medieval Legal Thought. Public Law and the State*, Princeton 1964.

<sup>17</sup> These are not the only *sedes materiae* for public law of free cities: one can find more, for example, in the late treatises on Roman and vulgar *actiones*, particularly in the works of Roffredus Beneventanus and Jean de Blanot.

<sup>18</sup> There had in fact been a *Curtis regia* in Lucca since 754. In 1081 Henry IV exonerated Lucca from the duty to build a "regale palatium": Cfr. F. Schneider, *L'ordinamento pubblico nella Toscana medievale* (tr. it. di *Die Reichsverwaltung in*

operam dedi merito, potius autem ut circa hec devotionem meam ostendam  
Cesari nostro Henrico <38.> et quod semper optavi plenam eius habeam  
gratiam, ut eius sacra largitione repletus a privatorum causis iam meus cesset  
strepitus, <39.> et ad sola regalia, post divina, meus intendat animus et, ut miles  
veteranus, et deinceps cum meis posteris gaudeam securus<sup>19</sup>.

But why did a judge of the XIIIth century, who had a local professional experience, go so far as to study Roman public law texts written more than six centuries before?

The first glossator who wrote important works on the *Tres Libri* was the great Placentinus (d. 1182 or 1192). He composed the first complete set of glosses, also preserved in a beautiful manuscript here at Yale. His pupil, Pillius, compiled additions to this apparatus and to the *Summa* that Placentinus began on the same *Tres Libri*. Like Placentinus, however, Pillius, never finished the *Summa*.

Unlike Placentinus, who attacked Frederick Barbarossa in his *apparatus* and in his *summa*, Rolandus was surely a Ghibelline, a partisan of the Emperor Henry VI. Associated to the throne by his father, Frederick Barbarossa, Henry became the only emperor in 1190, as his father died on his way to Jerusalem and the Holy Land. In a few years, the young Henry seemed set to realize many of the political goals his father had not achieved: once married to Constance de Altavilla, heiress to the throne of Sicily, he could realize the dream of every German emperor since Charlemagne, i.e. unify northern and southern Italy. The political constellation was auspicious: the cities, which had revolted against Frederick, were more or less pacified; the relationship with the Holy See was not as bad as it had been in the previous decades. Shortly before 1197, a neutral observer could think that a new emperorship was establishing itself in Europe, and that Italy would be the centre of its power.

To the lucky and successful Henry, Lucca – the Tuscan city Roland came from – had shown homage and fidelity since 1186, as the young prince was associated to the throne by his father; Goffredo da Viterbo, the teacher of Henry and an ideologist of imperial power, had been a canon of the cathedral of Lucca since 1177; the city of Lucca did not join the Lombard League – that is, the defensive military alliance formed by the cities of northern Italy to defend their independence against the Emperor – and received back from the emperor some important privileges, assuring autonomy of rule for the city, and jurisdiction over the surrounding region.

One can understand why Roland wanted to dedicate his work to Henry, and why his treaty on Roman public institutions regulated in the last three books of the Code was intended as a system centred on the function of the prince.

But at the same time, Roland wanted to affirm the independence of the cities, and of his city in particular. Describing the features of the Roman emperor, he depicts a legal institution more than a despotic ruler.

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*Toscana, von der Gründung des Langobardenreiches bis zum Ausgang der Staufer* (568-1268), 1914), Firenze 1975, 224 nt. 25 (=221 ed. orig.).

<sup>19</sup> Quotations from Roland's *Summa* are taken from a work in progress by myself and Sara Menzinger. Here *Prooemium*.

To be short, in the thought of Roland, the Prince is made by law much more than being a lawmaker.

This is a peculiar way to be a ghibelline. Roland sees the emperor much more as a superior authority assuring the fair respect of the law than as a supreme, uncontrolled power; sometimes, breaking the technical tone of his treaty, he urges Henry to be generous with Italian cities, and describes the autonomy of the free cities as a condition for the wealth and progress of society.

##### 5. *Cities as Res Publicae in Rolandus de Luca.*

That is one of the reasons for paying attention to this work (and why I have been working for almost ten years on a complete critical edition). In its last version, enriched with new additions into the 1220's, Roland's *Summa* includes an almost complete transcription of the *Summa* of Placentinus, continued by Pillius and left unfinished at title 11.39. Reading Roland, we therefore also read these two important works, also written outside Bologna, as their authors were teaching in the small, economically and politically vibrant cities of Montpellier (Placentinus) and Modena (Pillius).

I can't give a complete account of the contents of these works. Let me present only two or three interesting suggestions.

Priority must be given to the basic problem of the legal personality of the city. Now, there is a certain difference between the positions of Placentinus and Pillius and of Rolandus on this very important point. This difference relates primarily to the private or public nature of this peculiar subject that was a city.

As it is well known, the ancient Roman law had not worked out the legal concept of a "corporation" as an "artificial person" (*persona ficta*), fully developed only during the Middle Ages. Therefore, according to Roman law, a city (*municipium*) was not really considered as a subject of legal rights and duties. Even if it was explicitly considered as a subject of obligation by the Digest (D. 12.1.27), and assimilated to a person of minor age by the Code (C. 1.30.3), this did not mean that Justinian's law considered a city as a possible subject of *public* law: that is, basically, as a ruler of itself, as a source of jurisdiction, and as a tax collecting power. Two explicit legal rules listed in the Digest, on the contrary, affirmed the private nature of the cities and reserved the status of *res publica* only to Rome:

Digest 50.16.15 says that goods of a city should not be called "public", because only the patrimony of the Roman people deserves this adjective. D. 50.16.16 says the same, adding that every city outside Rome has to be considered as a private person.

D. 50.16.15: Bona civitatis abusive "publica" dicta sunt: sola enim ea publica sunt, quae populi Romani sunt.

D. 50.16.16: Eum qui vectigal populi romani conductum habet, "publicanum" appellamus. Nam "publica" appellatio in compluribus causis ad populum romanum respicit: civitates enim privatorum loco habentur.

Facing the problem of the subjectivity of the *res publica*, Roland can refer also to the norms he finds in the *Tres Libri* (C. 11.30 *de iure rei*

*publicae*), clearly gracing every free city with the name of *res publica*, but he also wants to flag the analogy with an important matter of fact of his times. As churches are institutions of public law, so also cities can enjoy the benefits reserved by the legal order to churches and to other religious buildings. This interpretation stretches Justinian's text a bit: a rule contained in the Digest says, in fact, that only Rome and Constantinople can be considered as true *Res publicae*. Other cities, says a fragment of Gaius, must be considered as private persons. Pillius<sup>20</sup> accepted, maybe with reluctance, this difference between the *Civitas Romana*, the *res publica* which gave birth to the Empire, and which gave its immortality to the emperor<sup>21</sup>, and the many *municipia*. Rolandus argued, on the contrary, that the status of *res publica* could be attributed to every city, despite the statement of the Digest<sup>22</sup>. We cannot help thinking of the struggle of Pisa, as the city claimed to be a second Rome, or of the efforts of many free cities in Italy and southern France to collect material signs of the magnificence of Rome, importing marbles and exhuming ancient statues, and of the legends recounting the Roman origins of many Tuscan cities.

An institutional side of this search for antiquity is evident in the claim of the **public** character of the city as a corporation. This public character is enough, for Roland, to suggest a parallel between city and church, which is rich in consequences: speaking of election of magistrates, for example, Roland refers openly to the election of canons and bishops, given the fact that *res ecclesiastica* is a *res publica*, as is the city<sup>23</sup>.

A major analogy between a church and a city was, in Justinian's law, that both were considered, by means of a legal fiction, as a person of minor age under the guardianship of a tutor<sup>24</sup>. As such, a city enjoys the many privileges given to the under-age ward: the delay in prescription against a city is very long, as against a church; the donation given to the citizens is intended as given to the city itself, the city can ask to be restored to its property if it was sold with an economic damage (*restitutio*

<sup>20</sup> See his *Summa* in C. 10.65: "Item cum rei publice causa peregrinentur omnia privilegi rei publice causa absentium sortiuntur. Refert tamen utrum pro civitate romana, an pro civitate alia legatione fungantur: si pro civitate romana rei publice causa sunt absentes ut ff. de acquir. hr. Cum quidam in princ. (D. 29.2.30 in princ.), C. ex quibus causis maio. In int. re. l. i. i. (C. 2.53.1). Porro si pro alia civitate legati sunt cum ceteris civitates illius respectu privatorum loco habeantur, ut ff. de v. si. l. Bona et l. Cum (D. 50.16.15 et 16). py."

<sup>21</sup> See a gloss of Pillius published in Conte, *Tres Libri Codicis*, Frankfurt am Main, 1990, 156 num. A10.

<sup>22</sup> Roland opens his commentary on the title C. 11.30 *de iure rei publicae* as follows: "De quibusdam civitatibus supra tractavit nunc de iure rei publice; et quidem tractatur hic non de iure rei publice romane, sed de iure rei publice cuiuslibet civitatis nisi per excellentiam hoc subaudiatur ut si de qualibet civitate multo magis de iure rei publice romane vel constantinopolitane que pene equis passibus ambulant; sic ergo tractatur de qualibet re publica, licet civitates privatorum loco habeantur (D. 50.16.16). R."

<sup>23</sup> So the *Summa* in C. 12.4: "cum tractatur de ordinatione rei publice et ecclesiastice, que publica est ut ff. de inst. et iure l. i. § Public. ius (D. 1.1.1.2), cum omni privato commodo utilitas publica preferatur ut i. de primipilo l. Utilitas (C. 12.62.3), i. de re militari l. Nemo miles (C. 12.35.13), Extra. de postul. p. Bone i. (X. 1.5.3 = 3 Comp. 1.4.3)"

<sup>24</sup> Cfr. also Gierke, *Genossenschaftsrecht*, III, 226, citing Roffredus and Azo.

*in integrum*). The administrators of the city were naturally compared to the tutor.

This is what Pillius had already suggested, and Roland developed in his *summa*. But he goes farther. He notes that Justinian had divided the law into private and public, and put both, cities and churches, on the side of public law; it is intended that a church and a city are similar, they enjoy similar legal statutes and are protected by similar privileges.

This is a very interesting passage. We all know how important the mid-thirteenth-century canon law doctrine on the personality of churches was in the masterpieces by Otto von Gierke, F.W. Maitland, Ernst Kantorowicz; since then, we have discovered a lot on the efforts to construct a theory of corporation, and on the major role played in this effort by both the jurists of the Church and the jurists of the most important European kingdoms: Sicily, France, England, Spain.

Now, we discover that the ball had begun to roll a bit earlier, and that it happened in a very different milieu: the free cities of northern Italy, where a major effort to construct a personality for the city was based also on the parallel between city and church, both particular kinds of legal subjects, ruled by public law.

<52.> Precipue autem ut ecclesia iuuetur ut res publica inde aperte sumitur quia Iustinianus posuit in una parte ius diuinum cum publico pertinente ad civitates, et in alia parte ius privatum cum dixit in diuinum publicum quia ius et privata commoda competens discretio fiat etc. ( C. 1.2.23); si ergo pariter ea posuit paria sortiantur auxilia, sicut supra dicitur ubi similis militia simile privilegium ut i. de palatinis l. iubemus (C. 12.23.14), et ubi simile delictum similis est pena ut C. de ep. et cl. l. Si quemquam in fine (C. 1.3.30.6), et in aut. ut fr. filii § ult. (Auth. coll. 9.7 =Nov. 127.4), et in aut. de ma. princ. § titulos (Auth. coll. 3.4 =Nov. 17.15), ff. ad l. acquil. Illud. (D. 9.2.32).

ut] quod Md iuuetur] iuuetur Md in una parte posuit tr. Mc Md diuino] diuinum P Mc Md cum dixit – etc.] et priv<at>a commoda discretio sit etc. Mc in3] ut inter P Md publicum] et praem. Md quia2 om. Md competens om. Md si] sic Mc dicitur] dixit Md ubi ... ubi] ibi ... ibi P ut i. – Iubemus om. Mc Md est] et Mc ut C. – Illud om. Mc Md

Roland moves from the simple premise of the division between public and private law to connect the particular status of churches with the status of the cities. Now, one of the privileges given by Constantine to the Catholic Church had allowed different religious institutions to receive different sorts of grants – a reform that did not define the legal status of the churches and monasteries, as the emperor seemed hardly to care about legal subjectivity and the problem of corporations. Nevertheless, already in the famous Edict of Toleration, in the text given by Lactantius, the Emperor Constantine acknowledges to Christian churches a right of ownership<sup>25</sup>, which he confirmed in 321, as he permitted the donation of goods to churches *mortis causa* (C.J. 1.2.1 = C.Th. 16.2.4).

This possibility, created by late Roman law, of being owner and of receiving grants was enlarged during the Middle Ages, as churches

<sup>25</sup> Lactantius, *De morte persecutorum*, in *Opera*, ed. O. F. Fritzsche, 1842-44, t. II, pp. 288-289: “idem Christiani non [in] ea loca tantum ad quae convenire consuerunt, sed alia etiam habuisse noscuntur ad ius corporis eorum id est ecclesiarum, non hominum singulorum, pertinenti”.

became not only subjects of rights, but the richest and wealthiest of all subjects of rights. The way to incorporation was then opened by a substantial economic need, and the first response to this need was to consider the relics, the altar, or the whole building as owner of goods and rights<sup>26</sup>.

#### 6. *Subjectivity of Cities and Churches.*

Let us briefly follow this interesting parallelism. With the analogy between city and church established, Roland can present the city as a subject of rights to both persons and things; he can argue on the will of the city, on the representation of her personality.

Speaking of the administration of the goods of a city, Roland finds a strong argument for his contention that every city should be considered as a *res publica* in the very words of Justinian's Code, whose title 11.31 reads *de administratione rerum publicarum*, seeming with its plural to refer to more than just the city of Rome. Despite this fact, Pillius had summarised the title without stressing the public character of the city, and the Gloss of Accursius, some years later, had also interpreted this passage as referring to Rome. On the contrary, Pillius likened the administrator of the cities to a kind of *negotiorum gestor*, someone who, in Roman law, took care of the business of someone else<sup>27</sup>. The administration of a city is not considered by Pillius as a **public** one: it is treated in the same category as the management of the wealth of any private subject.

Rolandus treats the topic in a very different way. He starts by confirming that the goods of a *civitas* have to be considered as public goods, because they belong to the *universitas*, which gives to those goods a particular legal status, close to that of the church's goods:

<54.> Item et illud : « sacre res a publicis non multum differunt », ut in aut. de no. al. aut. permut. (Auth. coll. 2.1 =Nov. 7) R. (so in the *Summa* to 11.30)

Such goods can be sold only in a few particular cases, when the public interest justifies an alienation, and just as the bishop swears to protect the wealth of his church, so must the public administrator swear, touching the holy gospel, not to alienate goods of the city without the consent of the *res publica* (so Roland in C. 11.32).

Now, Ernst Kantorowicz, who based his study on royal practice, has masterfully shown the influence of the tradition of the episcopal oath

<sup>26</sup> Intorno a Mosè. *Appunti sulla proprietà ecclesiastica prima e dopo l'età del diritto comune*, in *A Ennio Cortese*, Roma 2001, vol. I, 345-367.

<sup>27</sup> So Pillius in C. 11.31: "Alia forte causa est tutorum vel magistratuum qui pro tutoribus conveniuntur ut ff. de ammi. tu. l. Tutor qui repertorium § penult (D. 26.7.7.14), ff. de magistr. conve. l. ult. (D. 27.8.9), quia actione conveniantur vel experiantur reipublice amministratoros a republica vel qua contrarium me legisse non memini; sed forsitan conveniuntur et experiantur in factum actione ut ff. de magistr. conven. l. i. circa princ. (D. 27.8.1 in princ.); vel, quod puto verius, conveniuntur et agent utili actione negotiis gestis directa et contraria cum ex necessitate amministrent ut ff. de neg. g. l. Ait pretor § hac actione (D. 3.5.3.10), quales ergo sint et in quantum competant huius actiones ex hiis que dicta sunt supra de neg. g. in summa P<lacentini> advertere licet (*Placentinus, Summa Codicis in tit. C. 2.18* [controllare])

on the inalienability of the public domain<sup>28</sup>. If we look at the Italian sources from the end of 12<sup>th</sup> century, we find a broader use of the parallelism between public and ecclesiastical goods, which is probably at the root of the late opinions of Lucas de Penna, by the middle of the 14<sup>th</sup> century.

The notion of *consilium rei publice* is also of considerable importance. Pillius and Roland make some of the first use of the famous maxim "Quod omnes tangit ab omnibus approbari debet", only some years later than the first known quotation by the canonist Bernardus de Pavia<sup>29</sup>. It is interesting to note that Pillius refers the maxim to the turnover in the members of a council (*collegium*) (*Summa* in C. 11.18), while Roland treats openly of the need of the assembly's consent to validate a decision involving everyone, stressing the parallelism between the government of a church and of a city<sup>30</sup>.

The big *summa* of Roland offers many other interesting points on the parallel between city and church. Let me cite a last impressive passage on the position of the municipal officers, which are considered as important as imperial functionaries and, what is particularly interesting, as clerks of a kind:

Predictorum autem ministerium puto valde commendandum eo quod serviant civitatibus et Imperio, et sic faciendo relevant cives ab honore magno; ideoque figurative et miro ordine duos gladios quasi equis passibus credimus ambulare, ut sicut ecclesia canonicos regulares, sic et civitates suos habeant conversos qui dicuntur proprie curiales, ut illi deserviant ecclesie in laudibus divinis, isti vero in temporalibus civitatum obsequiis obscendent et utrique tanta sint condicione astricti ut discedendi nulla insit eis facultas, secundum quod supra notavi<sup>31</sup>.

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<sup>28</sup> E. Kantorowicz, *Inalienability. A Note on Canonical Practice and the English Coronation Oath in the Thirteenth Century*, in *Speculum* 29 (1954), 488-502, ora in Id., *Selected Studies*, Locust Valley 1965, 138-150.

<sup>29</sup> Y. Congar, *Quod omnes tangit ab omnibus tractari et approbari debet* (1958), ora in Id., *Droit ancien et structures ecclésiastiques*, London (Variorum), 1982, III, refers (note 15) to ancient glossators quoted by Gierke, *Genossenschaftsrecht*, III, 202-214.

<sup>30</sup> In C. 12.4: "<9.> Immo, plus puto, ut cum tractatur de ordinatione rei publice et ecclesiastice, que publica est ut ff. de inst. et iure l. i. § Public. ius (D. 1.1.1.2), cum omni privato commodo utilitas publica preferatur ut i. de primipilo l. Utilitas (C. 12.62.3), i. de re militari l. Nemo miles (C. 12.35.13), Extra. de postul. p. Bone i. (X. 1.5.3 = 3 Comp. 1.4.3), quod non consideretur persona que vel qualis sit, antiqua vel iuvenis, digna vel indigna, sed consilium quod impartitur spectetur, ut semper quod sanius et equius consilium pro re publica esse videbitur id servetur; <10.> quia alias rem publicam contingerit vacillare quod esse non debet, ut s. de of. magistri officiorum l. ult. (C. 1.31.5), s. de susceptoribus l. Humilioribus (C. 10.72.14), i. de privil. scol. l. ii. in fine (C. 12.29.2.1)".

<11.> Quandoque enim unius et forsitan deterioris sententia potest multos maiores in parte aliqua superare ut C. de veteri. iur. l. i. § Sed neque ex multitudine (C. 1.17.1.6).

<12.> Cum enim uterque sit cardinalis, uterque canonicus, utrumque tangit negotium ecclesie, et ideo ab omnibus est attirandum, alias non valeat nisi consilio maioris et sanioris partis sit corroboratum, quia quod omnes tangit ab omnibus comprobetur ad quod est inst. de sat. tu. § Si non fuerit (Inst. 1.24.1) et quod ibi notatur, et Extra. de hiis qui fiunt a maiore parte capituli similiter notatur (X. 3.11.1 = 1 Comp. 3.10.1).

<sup>31</sup> *Summa* in C. 10.32 *de decurionibus*, § 133.



Civil officers are tied to the city as monks are tied to their monastery, so strictly tied that neither can leave the city or the church where they have to serve.

#### 7. *Private Property and Public Power.*

It is evident, from these sources, that a medieval city is constructed as a corporation in practice and in theory, even if we don't find, before Innocent IV, the mention of the famous *fictio* of the *persona*. The personality of a city is not only a matter of fact, but also an achievement of legal theory, as it developed in the framework of the new urban civilization. Considered as a subject of rights, a city could deal with other subjects; but to raise taxes and tie citizens to their duties, it wasn't sufficient to construct the city as a subject: it had to be described as a subject in **public law**. This is what Roland does in a very explicit way.

I want to stress this point: the **public** character of the government is a peculiarity of Roland's theory, which we can't find so clearly even in a later, great jurist such as Jacques de Revigny. Let us compare one particular point of their theories: the commentary on the so-called *dominium mundi* of the Emperor, which Jacques – writing in France between 1263 and 1280 – clearly refers to as the French king.

As every American legal historian knows thanks to the works of Ken Pennington<sup>32</sup>, the discussion about the ownership of all the world by the Emperor had its mythic origins in the story of Bulgarus and Martinus disputing on a passage of the Digest as they rode on horseback in the company of none other than Frederick Barbarossa. The story is, in my opinion, false. But the problem was real, and it was a problem of legal interpretation. Some unclear passages of Justinian's law, in fact, could be interpreted as attributing to the prince a private ownership of all the goods in the world. During the 12<sup>th</sup> century, when the very passage of the Digest calling the Prince "*dominus mundi*" had not yet been translated from Greek into Latin by Burgundio of Pisa, the discussion concerned the interpretation of the law *Bene a Zenone*, which established a particular procedure for the sale of goods by fiscal officers. As goods of the Emperor and of the Queen were also regulated by the same procedure, the law justifies this saying that "everything belongs to the Prince" (*omnia Principis esse intelliguntur*).

The legendary account tells that Bulgarus answered to his lord by distinguishing a public authority (*iurisdictio* and *protectio*) from a private ownership (*proprietas*). Only in the first sense could one attribute to the Emperor an authority over the whole world. Bulgarus attempted, then, to separate the private from the public sphere. Looking at the glosses attributed to him, Pennington has shown that probably even Martinus, as a glossator, did not interpret this passage exaggeratedly, by extending the meaning of the phrase to every good in the world<sup>33</sup>. But it is surprising to note that even Roland, the only jurist of the 12<sup>th</sup> century who declared

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<sup>32</sup> K. Pennington, *The Prince and the Law, 1200-1600. Sovereignty and Rights in the Western Legal Tradition*, Berkeley-Los Angeles-Oxford 1993, 8-37.

<sup>33</sup> Pennington, *The Prince*, cit., 17, ntt. 36 e 37.

himself openly for the imperial side, did not accept the idea of a private ownership of the Emperor over the world<sup>34</sup>.

For many technical reasons, even a ghibelline like Roland could not accept such a distortion of the legal system described in the Roman law. But one point touched by Roland is particularly interesting, because it marks the difference with the later account by Jacques de Revigny. Among other reasons, Roland says that it would be impossible to attribute to the Emperor an eminent property-right on the things of private persons, because the Roman law (an imperial law) reserves a particular remedy precisely to the owner for restoring his right: the *rei vindicatio* is in fact a very important action and is given only to the *dominus*, the only person having a full right of property in a thing. If everything were the property of the prince, nobody would be in a position to use this action, which would be absurd<sup>35</sup>.

The point is: as the Roman Law foresees a particular action given only to the full-right owner (*dominus*), it cannot range the *dominium* of the prince in the field of private law. Sovereignty is then sharply separate from private property; subjects have a personal private power over their things and goods. Consequently, taxes cannot be considered as given in recognition of an eminent ownership over private things, but must be justified by an overarching public power and a justification grounded in public utility.

In short: the glossators want to stress the difference between a public power, given to the Emperor as to the small *res publicae*, and a private one, given to private subjects over their goods. In this sense, one cannot identify the *dominium* of the Emperor with a private ownership over the persons and goods of his subjects. The relationship between Empire and citizens could be based on the rights of both sides, as Rolandus states already in the introduction of his *Summa*:

“valde expediat scire iura fiscalia que debeantur Cesari nostro, ut eum in suis non offendamus, sicut eundem nostra nolumus invadere, precipiente nobis Domino ut Cesari sua reddamus”<sup>36</sup>.

It is useful to know the fiscal rights given to our Emperor, so that we do not offend against his rights and ownership, just as we do not want him to lay hands on our things...

Now, this separation between public and private, as a contrast between the rights of the king and those of his subjects seems to be forgotten some decades later, by the time of Jacques de Revigny. Let us

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<sup>34</sup> For more details see Conte, *De iure fisci. Il modello statale giustiniano come programma dell'Impero svevo nell'opera di Rolando da Lucca (1191-1217)*, in *Tijdschr. voor Rechtsgeschiedenis* 69 (2001), 221-244 (French version in *Mélanges de l'École Française de Rome – Moyen Age*, 113 (2001), 913-943); Id., “*Ego quidem mundi dominus*”. *Ancora su Federico Barbarossa e il diritto giustiniano*, in *Studi sulle società e le culture del Medioevo per Girolamo Arnaldi*, a c. di L. Gatto e P. Supino Martini, Firenze 2002, 135-148.

<sup>35</sup> So the *Summa* at C. 10.1: “<284.> Sic ergo sane he sunt intelligenda et non subvertenda. Si enim omnia essent Principis, iam rei vindicatio directa nulli subiectorum competeret”.

<sup>36</sup> See Roland's *Prooemium*, §§ 17-18.

look at one passage of the *Lectura Institutionum* by Jacques de Revigny, written in Orléans in the second half of the 13<sup>th</sup> century. The eminent ownership and the *rei vindicatio* are recalled again, but with a completely opposite conclusion.

The French jurist's argument starts with the statement that for every good in the Kingdom of France a tribute must be paid to a lord or to the king himself. This obligation reveals that this good is subject to an eminent ownership, a *dominium directum*, and that every lower property right is only a *dominium utile*<sup>37</sup>. This means that every tax imposition is not a sign of public power, being on the contrary the recognition of a real property right enjoyed by the private person of the king. And in France, says Jacques, there is no place which is not submitted to taxes, which means that an eminent property of the king affects all the valuable goods of the realm.

#### 8. Imperial taxes and Italian cities.

Taxation is in fact a major feature of public power. The fight between imperial power and the Italian cities between 1162 (destruction of Milan by Frederic), 1167 (constitution of the league of the Lombard cities), 1176 (battle of Legnano and military victory of the Lombard League), and 1183 (Peace of Constance) turned largely on the right of the cities to tax their citizens and the right of the Emperor to tax the cities themselves.

This contrast was weakly reflected in an academic discussion on the exemption of Italy from taxes. In fact, Justinian's law was contradictory on a very important point. While in the Institutes Justinian had said that every difference between Italian and Provincial territories had been abolished, in many other passages of the Digest or Code the ancient privilege which excluded Italy from taxation was considered as still in force. This privilege reflected the genesis of imperial taxation, owed to the conqueror by conquered territories, but it was abolished by the later emperors (Diocletian and Justinian), who reformed the fiscal system by putting all land in the Empire on the same footing. The Digest, however, reflected the state of Roman doctrine as it was long before the age of Diocletian, and that is why it often appears in contradiction with the Code or the Institutions.

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<sup>37</sup> *Lectura* in Inst. 2.1.39 (partially printed under the name of Bartolus in editions from 1506: cfr. E.M. Meijers, *Études d'histoire du droit*, ed. Feenstra e Fischer, III, Leyde 1959, 68-69), ed. crit. R. Feenstra, *Les origines du dominium utile*, ora in Id., *Fata iuris romani*, Leyde 1974, 255 note 237): "... Quia locuti sumus de dominio directo et utili, scias quod soli Italici, quia non solvunt tributa rerum suarum, dicuntur habere directum dominium et soli dicuntur domini rerum suarum, C. de usuc. transfor., l. unica (C. 7.31.un.), et ita habes per legem illam quod quicumque solvit tributum vel census non est directo dominus sed utiliter. Ex hoc dicit dominus meus quod quicumque agit contra aliquem et proponat rei vindicationem (quia pauci sunt, hic modo paucissimi, qui aliquid non solvant de re sua immobili), permittat actorem agere donec sit prope sententiam diffinitivam, et tunc dicat: "Domine iudex, non procedatis ulterius, quia ineptam actionem proposuit quia egit rei vindicatione et sic dixit se directo dominum et tamen non est sed utiliter; unde ex quo simpliciter intentavit rei vindicationem dixit directo se dominum et non est directo dominus ex quo res est tributaria vel censualis", et hoc per ista iura, C. de usuc. transfor., l. unica (C. 7.31.un.) ff. si ager vect. pe. l. unica (D. 6.3.1), ff. si agrimens. fal. mo. di. l. i (D. 11.6.1)". See also the similar passage of the *Lectura Institutionum* cited by Feenstra, *cit.*, a p. 256, nota 239.

Now, as the Roman law was recalled as a high source of legitimation for the imperial power as for the public powers claimed by the cities, the interpretation of the contradictory laws on taxes was particularly important. Placentinus, whose *Summa* is rather older than Roland's, interrupts here his dry, exegetic style for a strong attack against the Bolognese jurists, who encouraged Frédéric in imposing taxes on Italy. His passage is famous, as he calls the great jurists "miseri Bononienses" arguing that they had interpreted Roman law against their own conscience<sup>38</sup>.

In dealing with the same passage of the Code on which Placentinus had written his invective, Roland is less violent, but no less effective. He affirms that the very text of Justinian does not abolish the ancient privilege of Italy. Roland is a supporter of the Emperor, to whom this work is dedicated, so he doesn't affirm that the Empire should not tax Italian cities. He gives, however, some advice to his Emperor Henry:

As the Roman law does not tax explicitly Italians, it is a good chance for the Emperor, the source and the head of justice, for respecting the ancient honour of the Italic immunity. In fact, Italy protests (against the emperors) only because of the taxes. By giving them an exemption from taxes, the Emperor would gain a wonderful ally and a very true people to help him against his enemies.

«26.» Cum ergo non dicat de Ytalicis, bona est occasio ut Cesar noster, caput et fons iustitie, antiquuum Ytalicis immunitatis servet honorem. «27.» Nam Ytalia privilegiata propter sola murmurant tributa, ne provinciarum domina efficiatur tributaria; si vero conferenda esset ei fiducia, nulla quidem gens contra Imperii rebelles sic esset prudentissima et audacissima.

Taxes, says the Tuscan judge, have to be raised only in cases of urgent need, as Cicero said: that is why the Italians can accept the taxes demanded by Frédéric and by his son Henry during the wars against the southern rebels (i.e. the Norman aristocracy refusing to acknowledge the right of Henry to the Sicilian kingdom). After the coronation in Palermo, no more reasons justify asking for new taxes. That's why the victory of the Emperor is also in the interest of the Italians, as it means peace and freedom from the need to contribute to wars.

Verumtamen princeps noster H«enricus» et eius genitor F«ridericus» potentissimus iam ab Ytalicis exegisse dicantur propter nimias expensas et honera imperialis exercitus, que declinare non poterant; «37.» sic factum esse credamus talem omisurum exactionem cum aspera erunt ei plana, cum rebelles meridiani eius profitebuntur iugum et ideo non cessemus adiuvare eum cuius victoria nobis parabit requiem et sic antiquum nobis conservabit honorem, quia propter solas imminentes necessitates honera debeant iniungi

<sup>38</sup> *In summa illud tenendum est quia Ytalia utpote privilegiata non debet tributa. ... Sed nec illud obstat, quod impie et falsissime et contra proprias conscientias a miseris Bononiensibus Frederico Imperatori Placentie suasum est, Ytaliam factam esse tributariam pro id quod legitur inst. de rerum divisione "inter que nec non Ytalica predia nulla est differentia" (Inst. 2.1.40): illa enim verba, si sano sensu intelliguntur inspiciantur et considerantur precedencia et consequencia intelligi debent, quo ad alienationem, non quo ad tributorum prestationem.*

### 9. Conclusions.

This is what we learn from this closer look at the works of the civilian glossators of the late 12<sup>th</sup> century: in their theory there was no opposition between a powerful Empire and many prosperous and independent cities. The political attitude of Roland is the same as the one of his city: to defend the autonomy of the commune through a careful policy of alliance with the Emperor. The fidelity towards the Emperor, however, did not mean an unconditioned acquiescence to his power. Reading Roland, one can say that the Tuscan jurist tries to shape the role of the Emperor so as to leave enough space for the independence of the cities. As he limits the right to raise taxes, as he describes a right of the subjects to resist unjust taxation, as he denies the Emperor a universal private property right, as he describes the government of cities as *res publicae*: in all these cases our judge uses his expert legal training, based on the *Corpus Iuris* of Justinian, to sketch a limited role for the imperial power. A role with as many duties as rights: being "common father" and "source of justice" he may not use his power irrationally.

To be clearer: the role played by the Emperor in the system is shaped by the law. The Emperor himself is then an institution of the Roman law, and his first duty is to protect the rights of his subjects. But the interpretation of this Roman law was entirely in the hands of a number of learned jurists working in the many free cities of northern Italy or southern France.