The turning point in half a century. The legal revolution of Gregory VII, Irnerius, and his followers

by Emanuele Conte, Luca Loschiavo

The authors aim to challenge the prevailing view among legal historians that the medieval legal tradition was characterized by fundamental uniformity. Instead, we argue that the medieval millennium witnessed at least one moment of profound rupture – one that decisively shaped the trajectory of European legal history. This critical moment can be located in the century spanning from the mid-eleventh to the mid-12th century. The first section (Loschiavo) examines how this historiographical perspective has evolved over recent decades. The second section (Conte), likewise beginning with a reassessment of both older and more recent interpretations, focuses on the field of canon law. The Gregorian Reform introduced decisive innovations, particularly a renewed emphasis on the authority and reliability of texts – especially normative texts, which were now placed above, rather than alongside, the many and often highly diverse customary laws. These developments significantly affected both the compilation and systematic organization of the Church's vast body of norms, as well as the techniques of legal interpretation. To illustrate the practical repercussions of this new intellectual approach, two exemplary cases will be analyzed: the debate at Gerstungen (1085) and the recently rediscovered mosaic in the Church of San Savino in Piacenza, datable to the early decades of the twelfth century. Attention will also be devoted to the famous case of Marturi (1076), which represents the first practical application of the *Digest* after centuries of absence from the courts. The third and final part of the essay (Loschiavo) elucidate the pivotal role played by Irnerius at the turn of the twelfth century. His work was characterized, first and foremost, by the decision to focus his teaching exclusively on the rediscovered texts of Justinian's law, setting aside particularistic legal traditions. More importantly, as both a philologist and a jurist, Irnerius proposed a new approach to ancient legal texts, introducing a conception of legal order based on the autonomy of juridical knowledge – an

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unprecedented innovation compared to the theological and wisdom-based legal framework that had dominated up to that point.

Gli autori intendono mettere in discussione l'opinione prevalente nella storiografia giuridica, secondo cui la tradizione giuridica medievale sarebbe stata caratterizzata da una sostanziale uniformità. Essi sostengono invece che il millennio medievale conobbe almeno un momento di profonda cesura, destinato a orientare in modo decisivo la traiettoria della storia giuridica europea. Tale momento critico può essere collocato nel secolo compreso tra la metà del secolo XI e la metà del XII. Il primo paragrafo (Lo Schiavo) analizza l'evoluzione di questa prospettiva storiografica nel corso degli ultimi decenni. Il secondo paragrafo (Conte), che prende anch'esso avvio da una rilettura delle interpretazioni più risalenti e di quelle più recenti, è dedicato al diritto canonico. La riforma gregoriana introdusse innovazioni decisive, in particolare un rinnovato accento sull'autorità e sull'affidabilità dei testi – soprattutto dei testi normativi – che vennero ormai collocati al di sopra, e non più accanto, delle molteplici e spesso assai eterogenee consuetudini giuridiche. Tali sviluppi ebbero effetti rilevanti sia sulla compilazione e sull'organizzazione sistematica dell'ingente patrimonio normativo della Chiesa, sia sulle tecniche dell'interpretazione giuridica. Per illustrare le ricadute concrete di questo nuovo atteggiamento intellettuale, vengono analizzati due casi esemplari: il dibattito di Gerstungen (1085) e il mosaico recentemente riscoperto nella chiesa di San Savino a Piacenza, databile ai primi decenni del XII secolo. Particolare attenzione è inoltre riservata al celebre caso di Marturi (1076), che rappresenta la prima applicazione pratica del *Digesto* dopo secoli di assenza dalle aule giudiziarie. I paragrafi terzo e quarto (Lo Schiavo) chiariscono il ruolo cruciale svolto da Irnerio tra la fine del secolo XI e l'inizio del XII. La sua attività si caratterizzò anzitutto per la scelta di concentrare l'insegnamento esclusivamente sui testi riscoperti del diritto giustinianeo, accantonando le tradizioni giuridiche particolaristiche. Ancora più rilevante fu il fatto che Irnerio, in quanto al tempo stesso filologo e giurista, propose un nuovo modo di accostarsi ai testi giuridici antichi, introducendo una concezione dell'ordine giuridico fondata sull'autonomia del sapere giuridico: un'innovazione senza precedenti rispetto al quadro giuridico di matrice teologica e sapienziale che aveva sino ad allora prevalso.

Middle Ages, 11th-12th centuries, legal history, Irnerius, Justinian's law.

Medioevo, secoli XI-XII, storia del diritto, Irnerio, diritto giustinianeo.

1. *On the periodization of medieval legal history*

As one might expect, the issue of periodization has long been debated among legal historians. The discussion was particularly lively during the 19th century, when the discipline itself was taking shape. At that time, the central question concerned the precise moment when, following the decline of Roman legal experience in the West and its imperial order, a new historical phase began. Under the influence of Friedrich Carl von Savigny, European scholars were especially concerned with identifying the origins of what the founder of the historical school had termed "legal literature".

These matters are, however, familiar even to non-legal historians. At the beginning of this millennium (2002), Patrick Geary analyzed them with great insight and effectiveness.[1] The issue received particular attention in Germany and Italy, where, as is well known, the modern nation-state took shape much later than in other European countries.

[1] Geary, *Il mito delle nazioni*, especially 31 ff.

At a time when even the humanities were pervaded by the 'spirit of positivism', it was argued that the ancient origins of Germanic and Italian law had to be acknowledged, as the Germanic and Roman-Italian elements were pitted against one another in a kind of 'final duel'. These interpretations – or, if you prefer, 'narratives' – were, as is easy to understand, strongly conditioned by their respective nationalisms. Only after the Second World War did scholars begin to see matters differently.[2] At the same time, the historiographical category of 'Late Antiquity' was emerging with striking force in the field of ancient history, to the point of inspiring Andrea Giardina to speak of a veritable 'explosion of Late Antiquity'.[3] Much credit in this regard goes to the now-classic work of Arnold Hugh Jones,[4] without overlooking the valuable contributions of André Piganiol (1883-1968), Franz Dölger (1891-1968), Arnaldo Momigliano (1908-87), Hans Georg Beck (1910-99), Santo Mazzarino (1916-87), and Peter Brown (1935-).

On the other side, it was largely through the initiative of medievalists – especially Anglo-Saxon scholars – that, in the 1980s, the 'continuationist' theory of *transformation* came to be set against the *clash* or *crash* theory traditionally used to characterize the end of the ancient world.[5] This shift in perspective – this new approach to the study of the period from the end of the third to the late 6th century – is now well established, albeit with different nuances, among medievalists. There is, however, one striking exception: legal historians, and especially Italian legal historians, have generally remained impermeable to this new vision.

Italian legal historians – who, for the most part, have long since abandoned the study of the early Middle Ages – do not seem willing to acknowledge the importance of the period that I propose to call the 'Age of Passage'.[6] Yet, this was precisely the era in which the established structures on which the old Roman empire had rested wavered dramatically, and first the Roman emperors and then the new Romano-Barbaric *reges* sought to replace them with new foundations. In this context, new legal figures were tested in the search for solutions more functional to a social, economic, and geopolitical reality that had definitively changed. It was also the moment when Christianity moved beyond its earlier phase of primarily contesting and replacing the old values of Roman-Hellenic civilization, ceasing to exist only as a spiritual movement and taking its first important steps toward a more fully developed

[2] See, e.g., in Italy, Sestan, *Stato e nazione* and, more recently, Gasparri, *Prima delle nazioni*.
[3] In his insightful and widely read essay, Giardina, "Esplosione di tardoantico" also addresses the difficult problem of periodization. Other important contributions can be found in the volumes Lanata, *Il tardoantico*, and Criscuolo, e De Giovanni, *Trent'anni di studi*.
[4] Reference is to the three volumes of Jones, *The Later Roman Empire*.
[5] See the pioneering essays collected in the volumes edited respectively by Bossy, *Disputes and Settlements* (especially James, "*Beati pacifici*") and Davies, and Fouracre, *The Settlement of Disputes*. The historiographical debate on this topic is now summarized in Murray, "The Law," especially at 73-87.
[6] Loschiavo, *L'età del passaggio*.

institutional configuration. Precisely in these same centuries, Christians also began to devote increasing attention to the legal dimension. along this path of the new faith's decisive social penetration and the introduction of a new ethic into civil life – with progressive occupation of political spaces and decision-making centers – the Church Fathers resolved, though not without tensions and difficulties, to adopt Roman law and make it their own. This process of appropriation unfolded gradually and was accompanied by a careful intrinsic evaluation of all positive law, from which Roman law emerged heavily transformed and almost stripped of its original character.

Nevertheless, legal historians have not only forgotten Late Antiquity and the wealth of innovations it brought to the world of law. They may have done something even worse by effectively denying the richness of the Middle Ages – its fruitful variety and even the value of its study for future jurists. Perhaps not yet in words, but certainly in practice, they have deserted the study of the Middle Ages, and in doing so have made it a desert.[7] I shall try to explain.

With some exceptions, the interpretation that Paolo Grossi advanced in 1994 in his highly successful book *L'ordine giuridico medievale* with regard to the mediaeval age and its divisions, appears to be the dominant view among legal historians today.[8] Already in the opening pages of the volume, Grossi clearly signals his intention to present a vision of "perfect compactness" (*perfetta compattezza*) of the medieval legal experience, explicitly declaring his opposition to dividing the Middle Ages into 'early' and 'late' phases.[9] Such a partition, he argues, should be rejected first because it creates confusion – particularly for non-Italian scholars) – and above all because it implies "the erroneous idea that these are two autonomous moments that can be separated and evaluated independently". This is not to say that Grossi denies the existence of a change between the beginning and the end of the medieval age. To characterize this change more precisely – such is his invitation and suggestion – he proposes to distinguish a moment of 'foundation' from a moment of 'construction'. In still more evocative language, Grossi also speaks of an *officina della prassi* ("workshop of practice"), which took shape in the first centuries of the Middle Ages, and of a *laboratorio sapienziale* ("laboratory of wisdom"), which characterized the centuries leading up to the modern age. Incidentally, Grossi seems to have little appreciation for the modern era, at least insofar

[7] It will suffice here to compare the introductions of two works that – almost a century apart – address essentially the same theme. De Ruggiero, *Storia del liberalismo europeo* (1-94) frequently returns to the Middle Ages and its many laws and legal systems, partly in order to highlight more clearly the novelties of the subsequent era. By contrast, the recent Fioravanti, *Lezioni di storia costituzionale* – an authoritative legal historian – dismisses the entire continental Middle Ages with a single reference, associating it with the idea of 'immovability' (here 15).

[8] Grossi, *L'ordine giuridico medievale*. Critical reactions to Grossi's 'reading' of the legal Middle Ages in Ascheri, *Un ordine giuridico medievale*; Conte, *Un débat historiograhique* and Conte, *Storicità del diritto*. A multi-voiced reconsideration – unsurprisingly laudatory terms – of the Middle Ages according to Paolo Grossi is offered in *Il diritto come forma*, 299-423 (with contributions by C. Storti, F. Migliorino, G. Pace Gravina, C. Petit, and M. Pifferi).

[9] Grossi, *L'ordine giuridico medievale*, 27-8.

as it produced the much-deplored legal absolutism and secularism that ultimately destroyed the pluralistic legal paradigm of the Middle Ages.

Specifically referring to the second part of the Middle Ages, Grossi then invites us to avoid using the widespread expression 'juristic revival' since it risks suggesting "an overly sharp qualitative separation between the two moments before and after the eleventh century". For Grossi, what is often labeled a "juridical renaissance" was nothing more than "a moment of more intense social, economic, and cultural circulation". Hence, as already mentioned, the late Florentine legal historian maintained that the legal Middle Ages should be understood as an "unified legal experience, highly compact in its unity".[10]

To the illustrious jurist – and to the many who readily embraced his interpretation – one might immediately object that a 'compactness' that remains absolutely 'unitary' over the course of ten centuries is a very strange thing for anyone concerned with studying and understanding human affairs. For this reason, it would need not only to be elegantly affirmed but also, more prosaically, demonstrated.

Emanuele Conte and I – like our common teacher, Ennio Cortese – find it difficult to accept this interpretation. In these pages, we seek once more to show that, on the contrary, between the 11th and 12th centuries the world of law underwent a new and genuine change of register – a change so evident and significant as to suggest the idea of a 'revolution'. This is, for instance, the case of Harold Berman, the American jurist and legal historian, who tellingly entitled his most important book, published in 1983 and devoted to the birth of the Western legal tradition, *Law and Revolution*.[11]

Here too, in essence, we may speak of a 'passage', a genuine 'turning point',[12] one that makes it possible to distinguish quite clearly the world that came before from that which followed. This passage can aptly be described as a 'renaissance' or 'revival', especially if this term is understood not as the revival of a corpse, but as a new birth: the birth of a new *scientia*, such as medieval *iuris prudentia*. In other words, it is the birth of something that, while drawing upon antiquity, was nonetheless essentially original and capable of profoundly shaping the social and political realities of its time.

Nobody, of course, believes that such a transition – this epochal change – occurred suddenly, in the blink of an eye. It unfolded over several generations of scholars and practitioners who, in the first phase, can hardly be called 'ju-

[10] Grossi, 29. It is striking – to give just two examples – to contrast Grossi's perspective with that of Kuttner, *The Revival of Jurisprudence*, and Cortese, *Il rinascimento*.

[11] Berman, *Law and Revolution*. Like Grossi, Berman also raised the problem of periodization and sought to suggest one more fitting for legal history. Whereas Grossi contested the conventional partition within the Middle Ages, Berman instead targeted the even more general one that traditionally distinguishes antiquity, the Middle Ages, and the modern age. According to the Harvard professor, modern legal history begins in the West precisely with the reform of the Church championed by Gregory – what Berman terms the 'Papal Revolution'. The image of a 'revolution' is also taken up by Errera, *Lineamenti di epistemologia giuridica*.

[12] The reference here is to the classic essay by Fournier, "Un tournant." See § 2 and note 13.

rists' in the proper sense. The phenomenon, especially in the beginning, had the Italian peninsula as its epicenter and was fully realized within a century, roughly between 1050 and 1150. With some caution, it may even be possible to circumscribe the transition more narrowly to the decades straddling the 11th and 12th centuries (say, between 1075 and 1125).

It was, in any case, a long process. Nevertheless, certain nodal moments can be identified, linked to particular figures and occasions. One could say, in short, that even this story has its eponymous 'heroes'. And eponymous heroes – as is well known – are very useful when one wishes to exemplify the emergence of a novelty worth noting. Among these 'heroes of change' are certainly Hildebrand of Soana (d. 1085), i.e. Pope Gregory VII, and Wernerius/Irnerius (d. 1125?), whom an ancient tradition describes as the *primus illuminator* of medieval juristic *scientia*.

2. *Recent criticism of Fournier and Berman: is a history without heroes a history without events?*

It is clear that Harold Berman was greatly influenced by the interpretation boldly proposed by Paul Fournier in 1917.[13] In his classic article on the Gregorian Reform as a turning point (*un tournant*) in the history of law, Fournier highlighted certain key developments in the intellectual history of the late 11th century – developments that would also form the backbone of Berman's 'revolution'. Let us briefly recall some of these key points.

The first point concerns the history of canonical collections, a subject to which Fournier devoted his most important book, *Histoire des collections canoniques en Occident*, published in collaboration with Gabriel Le Bras. To emphasize the innovative character of the Gregorian age, Fournier begins by noting that the earlier collections – particularly the *Decretum* of Burchard of Worms – were ill-suited to the needs of the new vision promoted by the Gregorian Reformation. Burchard did not accord sufficient importance to the primacy of the Holy See, and he continued to allow the use of divine judgment, the ordalic procedure that the new reformers fiercely opposed.

The second point is the new awareness of the purity of textual tradition and the connection between normative texts with the authority of their authors. Fournier cites particularly telling passages from the *Liber Gomorrhanus* of Pier Damiani and from the *Capitulare* of Atto da Vercelli: both declare that texts whose origin cannot be attributed with certainty to ecumenical councils or popes are utterly useless. Both likewise call for a thorough revision of the existing canonical collections, which were filled with erroneous or doubtful texts that could not be regarded as canonical norms.

[13] Fournier.

The third point is an explicit critique of customs and, more generally, of the normative power of custom. For the Gregorian reformers, the mere antiquity of a custom was not sufficient to establish a legal norm. Gregory's position is made clear in a famous passage: *<Dominus> non dixit: ego sum consuetudo*.[14] What determines the force of a binding norm – what distinguishes it from any other expression of wisdom or even truth – is the authority of the lawgiver, the force impressed upon the normative text by its author.

As a result of these three points, extensive research was undertaken by scholars in search of genuine normative texts issued by canonical legislators and long forgotten in ecclesiastical libraries and archives. This activity led, on the one hand, to the compilation of new and innovative collections of canon law and, on the other, to the rediscovery of Justinian's Digest.

The fourth major innovation introduced during the pontificate of Urban II, according to Fournier, was the development of a new method of interpreting normative sources. In examining the writings of Ivo of Chartres and Bernold of Constance, Fournier traced the origins of a dialectical method that would shape legal doctrine from the early 12th century onward. The establishment of 'harmony from dissonance', as Stephan Kuttner famously described the monumental achievement of medieval canon law scholarship,[15] thus had its roots in the writings of the mature champions of the Gregorian Reform on the eve of Gratian's *Concordia discordantium canonum*.

Paul Fournier's clear historical vision anticipated by a few years the publication of Augustin Fliche's major study, which established once and for all the term "Gregorian Reform" as a key historical concept.[16] As a legal historian, Fournier's chief concern was to highlight the main novelties introduced by the Gregorian party in the fields of law, the definition of legal norms, and their interpretation. Fliche's scope was much broader, encompassing all aspects of ecclesiastical history. Both Fournier and Fliche stood as heirs to an important historiographical tradition, which has been thoroughly described in a recent and valuable article by Charles de Miramont.[17]

This tradition had its roots in French liberal and German Romantic historiography.[18] Breaking with the conventions of earlier ecclesiastical history, 19th-century European historians developed a more complex understanding of historical turning points. They valued upheavals and revolutions as fundamental moments of evolution and tended to exalt the role of towering individuals – great men, heroes, intellectual innovators, and leaders who bore the responsibility of guiding European societies toward a new and better world.

[14] Gouron, "Non dixit: ego sum consuetudo."
[15] Kuttner, "Harmony from Dissonance."
[16] Fliche, *La réforme grégorienne*. A shorter one-volume version was published in Fliche, et Martin, *La réforme grégorienne et la reconquête*.
[17] De Miramon, "L'invention de la Réforme grégorienne."
[18] Even though significant divergences between French and German historiography have been highlighted in Martin, and Winandy, *La réforme grégorienne*.

In recent years, both historians and legal historians have expressed dissatisfaction with the historiographical category of the Gregorian Reform. Let us consider briefly only the technical criticisms advanced by legal historians.

Luca Loschiavo recalls the powerful image offered by Paolo Grossi in his *Ordine giuridico medievale* and elsewhere – an image that has been particularly influential in Italy, Spain, and Latin America. It is a vision in which continuity largely prevails over rupture. French neo-Catholic thought[19] and the German tendency to emphasize the popular character of national law both contributed to constructing this denial of the creative role of the late 11th-century turning point in the formation of modern European law.[20]

In recent years, however, independent critiques have been developed by scholars based on the contemporary need to renew historiographical categories.

In an essay published in 2019,[21] Greta Austin explicitly challenges the key assumptions underlying the model of renewal and change proposed by Fournier and Berman. Long before the age of Gregory VII, Austin argues, canon law already occupied a vital place in the life of the Church. Recent scholarship has examined the origins and development of canon law collections in far greater detail than Fournier and Le Bras's classic 1931 study, and the results point to a reassessment of the role played by canon law already in the Carolingian era. This scholarship reveals a genuine systematization of canon law long before the fateful period of the Gregorian reformers.

The rediscovery of Roman law, particularly the *Digest*, was not clearly linked to the shift in outlook introduced by the Reform. Recent research has drastically downgraded the role of Roman law in the creation of new canon law collections in the early 12th century, including the first recensions of Gratian's *Decretum*.

Thus, the 'new narrative' proposed by Austin depicts a shift during the age of Gregory that emphasizes existing tendencies:

> The reformers might have capitalized on a general demand for law, which the Church, as one of the dominant institutions in the social field of the period, could carry out. But I do not think the papal reformers (nor Roman law) invented that legal interest, nor jurisprudential methods in the West. That interest and those methods pre-dated the Reforming period of the eleventh century. This narrative of horizontal to vertical differs from Berman or Fournier, because the Gregoriar Reform plays a relatively minor role. The story is that of continuity, rather than of sharp disjunctures (Fournier) or beginnings (Berman).[22]

One reason for this shift in general historiographical interpretations of how perceptions of law changed may be growing impatience with histories based on great men and fundamental texts. This kind of 'historiographical

[19] On Grossi's Catholic ideological background, see now Fantappié, "Le influenze."
[20] To the references cited *supra*, note 8, add Conte, "The Order and the Volk."
[21] Austin, "New Narratives."
[22] Austin, 56.

heroism' characterized the history of law in Europe during the 19th and 20th centuries and has become quite annoying in the 21th century.

John Wei has gone even further.[23] He questions the role of 'great theologians' such as Abelard, whose *Sic et Non* may have been completely unknown to the author of the first version of Gratian's *Decretum*. Similarly, for Wei, the emphasis on 'great jurists' and 'great ideas' appears to be a weary repetition of outdated interpretative paradigms.

While it is clear that Grossi's image of the Middle Ages – one in which the principles of law were anchored in unchanging stability – must finally be set aside, the more nuanced observations of current historiography on canon law deserve to be taken seriously. Recent scholarship has brought new perspectives to the debate, describing the juridification of the European Church as a multifaceted phenomenon that extends far beyond the simple rediscovery of Roman law and the compilation of new canon laws. Charles de Miramon's excellent book, published in 2025,[24] merits serious attention from historians of medieval law.

All in all, then, even while taking into account the many features of stability and continuity highlighted by recent studies, I continue to regard the transition from the eleventh to the 12th century as a genuine turning point: the ideas expressed and practiced during these crucial years placed a new stamp on what Europe understood as law. I would like to recall two episodes whose significance for our subject has only recently been fully recognized. Together with a number of similar sources, they provide a picture of the new legal principles in action. These principles were, in fact, at the heart of a profound change in mentality, promoted by the strong and determined efforts of the so-called Gregorian party.

The first episode provides evidence confirming at least three of the four points of Fournier mentioned earlier. I am referring to the debate held at Gerstungen, Germany, in January 1085,[25] during the crisis triggered by Henry IV's second excommunication in 1080, which would continue until after the pope's death on 25 May 1085.[26]

The Gerstungen debate is documented by two sources from opposing sides, offering a vivid insight into the controversy. On the imperial side, we have the *Liber de unitate Ecclesiae conservanda*, written in Germany, probably in the early 1090s,[27] by an unknown author. This source reports that during the debate Henry's defenders argued that the excommunication pronounced by Gregory VII against Henry IV was null and void because it violated the prohibition against taking action against those deprived of social status or

[23] Wei, "Of Scholasticism and Canon Law."
[24] De Miramon, *La juridicisation*.
[25] I have already suggested an interpretation of this set of sources in Conte, "Gewere, vestitura, spolium."
[26] Fuhrmann, "Pseudoisidor."
[27] Schmale-Ott, *Quellen zum Investiturstreit*, 28-39.

property, a principle established in the Pseudo-Isidorian Decretals. The scene described in the *Liber* is striking: Conrad of the Church of Utrecht (*Traiectensis*) claimed that Henry had not been condemned or excommunicated, for even if the privileges enjoyed by the imperial sovereign did not apply to him, he should at least receive the kind of protection that canon law granted even to the lowest ecclesiastics. At this point, the prelate asked Wezelinus of Mainz to stand and read a chapter *ex decretis Romanorum pontificum*. Wezelinus then read the words of the pseudo-Isidorian introduction:

> *legit quomodo rebus suis aliquis spoliatus aut a sede propria vi aut terrore pulsus non potest accusari, vocari, iudicari aut damnari antequam omnia sibi ablata ex integro*[28] *restituantur.*[29]

Wezelinus continued by noting the positive effect of his words on the pope's defenders, adding that the principle even applied to women, as attested in Isidore's collection.[30] The imperial source concludes that the argument was so effective that Gregory's supporters could oppose it only by force: the debate degenerated, and a couple of German nobles were killed.

The account of the debate offered by this pro-imperial source must be set against another, remarkable for its polemical sharpness and the depth of its argumentation: the account of Eudes de Châtillon – then Cardinal Otto of Ostia,[31] soon to be elevated to the papal throne as Urban II, the pope who, according to Paul Fournier's narrative, made a decisive contribution to the legal turn imposed on the European Church by the Gregorian Reform.

Although he does not address the falsity of the texts collected by pseudo-Isidore, Eudes-Otto nevertheless reveals his concern for the integrity of legal sources when he accuses Henry's defenders of betraying even the authentic text of the forgery (pardon the contradiction), since in reading it they disregarded its context and unduly summarized it:

> *Isidorus in prefatione libri, quem ipse collegit ex decretis pontificum, tractans de oppressione episcoporum, capitulum de quo agitur his verbis depromit: "Nullus, qui suis est rebus expoliatus aut a sede propria vi aut terrore pulsus, antequam omnia sibi ablata legibus ei restituantur et ipse pacifice diu suis fruatur honoribus sedique proprie regulariter restitutus eius multo tempore libere potiatur honore, iuxta cano-*

[28] Hinschius, *Decretales Pseudo-Isidorianae*, 18 presents an interesting variant: *ex integro] legibus*. He also reads *legibus* in the epistle of Otto of Ostia (Erdmann, und Fickermann, *Briefsammlungen*, 375-80); but the variant attests to a very early connection with *restitutio in integrum* and reinforces the impression of a Roman derivation of the remedy.

[29] Schwenkenbecher, *Liber de unitate Ecclesiae*, 234-5.

[30] Schwenkenbecher, 234-5: *Ad haec cum obmutuisset Gebehardus Salzburgensis ecclesiae archiepiscopus, qui causam adversae partis erat acturus, utpote apud suos maxime vel ipsa senectute sua vel scientia scripturarum sive eloquentia reverendus, tum quidem intulit Werhinerius Merseburgensis ecclesiae episcopus, ubi in canonibus scriptum esset aliquid eiusmodi de mulieribus? Et Wezelinus archiepiscopus porrigens eis librum: 'ecce, inquit, ipsi legite consequens huius rei testimonium, quomodo huis quoque sexui oporteat iustum iudicium fieri, et quomodo ne mulier quidem debeat obiectis respondere, donec permittatur ei rem familiarem libere diutius ordinare'.*

[31] Erdmann, und Fickermann, *Briefsammlungen*, 375-80.

nicam accusari, vocari, iudicari aut dampnari institutionem potest". Quam laudabilem scripturam scripturarum subversores pro sui negotii qualitate viciatam atque precipuis et honestioribus membris suis inhoneste mutilatam hoc modo protulerunt: "Nullus, qui suis rebus expoliatus est, vocari, accusari, iudicari, dampnari potest". Sperabant autem illud furtum eorum ideo ad presens non posse deprehendi, quod illa Isidori dicta non de excellentioribus illis auctoritatibus sunt ac proinde minus usitata et magis ignota.[32]

The future pope Urban II thus displays a thoroughly Gregorian sensibility: on the one hand, a commitment to interpretation that respects the integrity of the norms and their context; on the other, a strict distinction between lay and ecclesiastical jurisdiction; and finally, the recognition of the clerical state as enjoying privileged status over the lay state.

The second source I wish to highlight, in order to show that the early 12th century was indeed an age of radical change for the European legal experience, is an image.[33]

It is a bichromatic mosaic discovered in 1902 on the floor under the high altar of the church of San Savino in Piacenza. Similar in style to the larger mosaic preserved in the church's crypt, it bears no date. Art historians have proposed various dates, ranging from 1107, when the church was consecrated, to the middle or end of the same century.[34]

The mosaic centers on the figure of Atlas, who is seated at the fulcrum of a wheel of fortune. On either side of the central wheel are four panels depicting contrasting scenes.

The two upper panels contrast a trial by combat, a violent process, with a higher justice, a reasonable process delegated by a ruler to a judge. The judge kneels before the king and looks at the book containing the law. The lower panels contrast two games. The dice game corresponds to the trial by combat, while the chess game parallels the king's justice.

The viewer of this mosaic might therefore conclude that the rational, predictable outcome of a chess game stands in contrast to the unpredictable and uncertain outcome of a dice game.

This contrast between the two games was presented by 12th-century theologians as a metaphor for two different approaches to social life: chess was described as a noble game, while dice was regarded as a source of corruption, sin, and ruin for the players.

Some decades later, in the 13th century, chess emerged as a powerful metaphor for an orderly political society, in contrast to the perceived randomness of dice games, which were condemned as mere gambling. The chess pieces, embodying a well-ordered society, served as an allegory for the structured roles within medieval social systems.

[32] Erdmann, und Fickermann, 378.
[33] The following lines summarize what has already been published in Conte, and Mayali, "Introduction."
[34] Vaccaro, "La scacchiera."

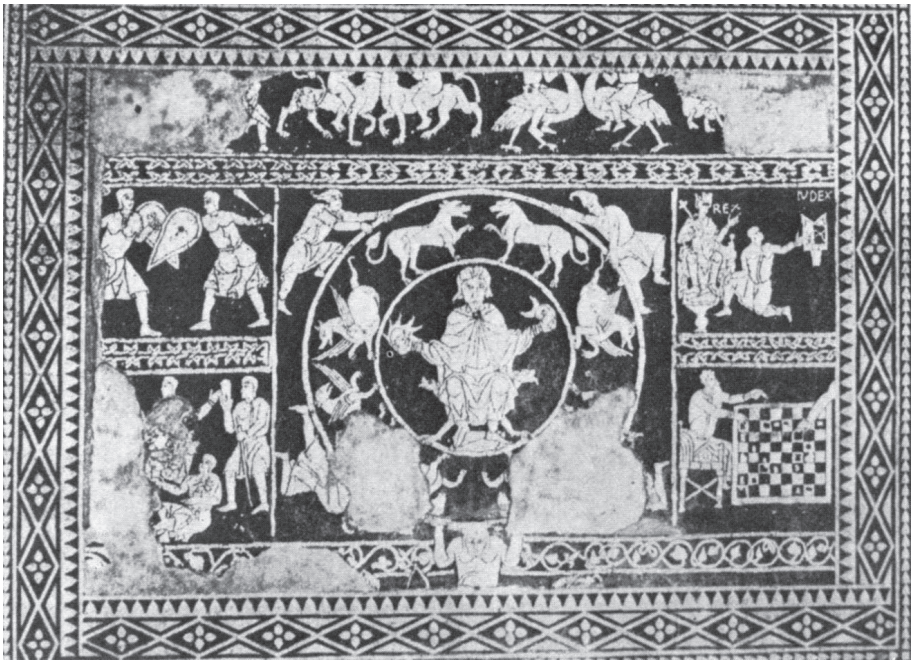

Fig. 1. Mosaic in the presbytery of the church of S. Savino, Piacenza (12th century). Licence: wikimedia commons https://commons.wikimedia.org/wiki/File:Mosaico_del_presbiterio_di_san_Savino_(Piacenza).jpg

But the game of chess also carried important symbolic meaning. It was considered to be a highly rational exercise that required the combination of a clear understanding of the rules with sound strategy and effective action. Accordingly, in the eyes of jurists, chess differed markedly from dice and gambling: it relied on intelligence rather than luck, as noted in Accursius' *glossa ordinaria* on the Justinian's *Codex* around the middle of the 13th century.

As noted above, the dating of the Piacenza mosaic remains uncertain. Art historians generally consider its style compatible with other 12th-century artworks, while the literary sources on chess and dice games date from the 13th century. However, if the juxtaposition of the two upper panels indeed represents a choice between chaos and violence on the one hand and rationality and justice on the other, as the panels of the two games would suggest, then a 12th-century dating accords well with the overall meaning conveyed by the composition.

The panels do not merely contrast violence and order; they also parallel this opposition with the juridical alternatives of trial by combat – an ordeal particularly common in Lombardy – and the rational trial based on procedure and legal actions. In the 12th century, the reformed Church promoted a new attitude toward customary procedures that had entrusted God with the task of determining innocence or guilt in uncertain disputes. Robert Bartlett connects this shift in ecclesiastical thought to changes in the theology of the

sacraments, particularly to the reinvigoration of the practice of lay confession.[35] After several centuries of ambiguity – during which the official prohibitions of the duel (*monomachia*)[36] failed to eradicate its widespread use[37] – things began to change significantly. 12th-century canonists and theologians consistently emphasized the illegitimacy of any judicial practice not based on the careful review and evaluation of proofs. This principle gained increasing acceptance within the Church, culminating in the famous canon of the Fourth Lateran Council (1215) that prohibited clerics from participating in ordeals.[38] Peter the Chanter, for example, observed that in a trial by combat each champion relies either on his force or skill, or – if innocent – on God's intervention to prevent injustice. In the first case, he added, the decision rests on force rather than justice; in the second, it constitutes a *diabolica temptacio*, a temptation of the Devil intended to compel God to intervene supernaturally.

There are good reasons to believe that the mosaic on the floor of the Basilica of San Savino in Piacenza reflected the campaign for the abolition of the judicial duel. It supported the introduction of a radically different judicial process – one based on the wisdom and knowledge of the judge, who exercised power delegated by the sovereign in accordance with the law. Removed from the violence of the battlefield, the rational and learned procedure of this new form of trial was symbolized by reference to the game of chess and to the book of law, which should constitute the proper focus of the judge's attention.

Let us observe, however, that within a period of fifty years – from the Assize of Clarendon (1166) to the Fourth Lateran Council (1215) – the significance of the reforms in the judicial process extended beyond the strictly legal field. These legal developments reflected broader cultural changes that influenced political practices, religious beliefs, and social attitudes toward justice and its role in the formation of a well-ordered Christian society. The deliberate opposition, in our mosaic, between trial by combat and a learned decision-making process also underscored the contrast between force and legal reason – a contrast that was redefining the legitimacy of political authority within the feudal system.

The two episodes I have mentioned are only examples among many. Let me add another, in which a further essential element of the legal transformation of the 12th century comes to the fore: the rediscovery of the *Digest*, invoked as the primary authority in support of a new, rationally grounded conception of justice.

Among the documents that bear witnesses to this great legal renewal is the famous *Placitum* of Marturi (1076), the first document in which the *Digest* is quoted in a court of law.[39]

35 Bartlett, *Trial by Fire and Water*.
36 Fiori, "La prima condanna."
37 Bougard, "Rationalité et irrationalité."
38 Baldwin, "The Intellectual Preparation."
39 The Marturi case report is probably the most frequently quoted and commented-on document in medieval legal historiography. The interpretation of its legal significance has been con-

Legal historians and diplomatists are still debating the case of Marturi. It may be noted here that the plaintiff, the Monastery of Marturi, sued the holder of a piece of land that it claimed had been unlawfully taken from it some sixty years earlier. The defendant responded by invoking the lapse of forty years, using the expression *quadraginta annorum curricula*, taken from Justinian's *Novel* 111 (Auth. 106; Jul. Ep. 119,6),[40] a formulation adopted in both canon law collections and certain Carolingian lawbooks.[41]

The defendant's argument was possible because of the straightforward automatisms of the Lombard law in force in Tuscany. Had the court not admitted the argument taken from the *Digest*, the monks' action would have been hopeless. After thirty years, the defendant could refuse the plaintiff's request. The formula to be used by the defendant was very clear in the *Expositio ad librum Papiensem*, a commentary on Lombard law from around the same period: *non tibi respondeo, quia eam possedi per 30 annos*.[42] However, in 1076, a reaction to the oversimplified Lombard law was applied in practice for the first time by quoting a short passage from the *Digest* (D. 4.6.26.4), which was difficult to find but absolutely appropriate for the case. Indeed, the monastery's advocate argued that if a magistrate to receive the plaintiff's request was absent, *praescriptio* could not be invoked and the disputed item should be returned to its owner.[43]

The practical use of the *Digest* in a Tuscan context confirms the Lombard jurists' interest in Roman law,[44] particularly in procedural matters. The Roman Church also recognised the need for a more developed and complex form of trial, and around 1135, its chancellor Aymericus asked Bulgarus, the famous glossator of Bologna, to write a short tract on the Roman trial. Some years later, the revived Roman Senate delivered a judgment that already considered the highly sophisticated interplay between *possessio* (with its Roman features) and acquisitive prescription.[45]

siderably enhanced by the publication of the complete roll prepared for the trial, which allows us to reconstruct the unfolding of the events: see Kurze, "Die «Gründung»." The case has been reinterpreted in light of these new findings by Padoa Schioppa, "Il ruolo della cultura giuridica." On the use of *praescriptio* by the defendant, Cortese, *Il rinascimento giuridico*, 10-13; Birr, "Die Urkunde von Marturi (1076)," who cites Cortese only through the summaries in his handbooks: Cortese, *Il diritto nella storia medievale*, 382-4, and Cortese, *Le grandi linee*, 218-9. The documents have now been edited in Cambi Schmitter, *Carte della Badia di Marturi*, and have been interpreted from a historical perspective by Ronzani, "Un monastero valdelsano."

[40] On the rediscovery of the *Authenticum*, see Loschiavo, "La riscoperta dell'Authenticum."

[41] Boretius, *Capitularia Regum Francorum*, 219. This text is also included in the *Decretum Gratiani*, C.16 q.4 c.3.

[42] Boretius, *Liber legis Langobardorum*, 456.

[43] Cortese, *Il diritto nella storia medievale*, 383-5; Radding, and Ciaralli, *The Corpus Iuris Civilis*, 183-4.

[44] Radding, *The Origins of Medieval Jurisprudence*.

[45] Conte, *Diritto comune*, 106-7: case of 1151.

3. *Matilda of Canossa, the 'woman of government', and Irnerius, 'the philologist'*

The *placitum* of Marturi provides the earliest evidence of a 'return' to the *Digest* in practice, offering clear confirmation that an effective and intense search for Justinian texts was underway in Italy in the last decades of the 11th century.[46] However, the same *placitum* tell us other things, too.

One of these concerns Beatrice, the Marquise of Canossa, in whose name the judges administer justice in Marturi. It should not be forgotten that Beatrice was a woman alone in government for a long time. It was certainly the awareness of the precariousness of her power that made her realize that if she wanted to maintain her position, she would have to rely on 'good governance' rather than force. This would require her to administer justice well, as only by doing so could she gain the recognition of her authority from her vassals – and in Marturi, she was seeking to redress an injustice committed long ago by her late husband, the tyrannical Marquis Boniface. This was precisely the teaching and example that Beatrice left to her only surviving daughter, Matilda, who was likewise destined to rule alone (from 1076) and to play a decisive role in the conflict between papacy and empire. Matilda would not forget that lesson; indeed, she adhered to it throughout the nearly forty years during which she governed a strategically vital territory on the continent's chessboard amid the tumultuous years of the so-called 'Investiture Controversy'.

In light of this last consideration, we can better understand the meaning of the account found in a well-known passage of the *Chronicon*, written around 1220 by Burchard, prior of the important monastery of Ursperg in Bavaria. In that passage, Burchard mentions a request (*petitio*) allegedly made by Countess Matilda of Canossa to *dominus Wernerius*, inviting him to "renew the books of laws" (*renovare libros legum*).[47] This is the only source that provides us with this significant piece of information, which links Countess Matilda to the revival of *scientia iuris*. Even if we cannot, in any sense, speak of an 'official assignment' that Matilda might have given to Irnerius – let alone of the founding act of the University of Bologna – Burchard's words certainly merit close attention. To lend greater credibility to his account, it should be noted that in 1113, at Baviana near Ferrara, Matilda did in fact meet with the *causidicus* 'Varnerio of Bologna'. It is also quite plausible that two of the most eminent judges in Matilda's circle[48] – Ubaldo di Carpineti and Bono di Nonantola, both present at Baviana – acted as intermediaries.

Ennio Cortese has explained the probable content of Matilda's request to Irnerius: it likely concerned what we would today describe as a 'critical edi-

[46] On the timing and uncertain circumstances of the arrival of the Justinian texts in Italy see Loschiavo, "Le leggi di Giustiniano."
[47] Padovani, "Matilde e Irnerio."
[48] See Roversi Monaco, "Il 'circolo' giuridico di Matilde," with an extensive bibliography from which, surprisingly, Cortese, "Intorno agli antichi *iudices*" is missing.

tion' of the Justinian legal text.[49] It is easy to understand why Matilda would have turned to Irnerius himself, since the learned Bolognese was already renowned for skills we would now associated with a 'philologist' – and it is, of course, to the philologist that one turns for a textual reconstruction (I will return to this point later).

One question remains open: what interest prompted the 'Grand Countess' to address such a request to Irnerius and to sponsor that major effort of textual reconstruction? The first answer that springs to mind is that Matilda held Roman law in great regard. However, an episode fifteen years earlier demonstrates that this is not the explanation. We are in Garfagnolo, in the Apennines near Reggio Emilia, and the year is 1098. Matilda, responding to a petition from the losing party in an earlier trial, ordered her judges to repeat the proceedings, since the case had been decided according to Roman law rather than by the Lombard rite of proof by duel. The Countess' firm and precise directive puzzled those who – precisely on the basis of the passage from Burchard mentioned earlier – had regarded Matilda as a champion of the revival of *ius romanum*. However, an objective reading makes it is clear that the Grand Countess was fully aware that Justinian's rules could not be applied directly and immediately. Above all, she was well aware that the law in force in her territory was Lombard-Frankish law.[50] Thus, the Garfagnolo episode shows that just like Beatrice, Matilda was not primarily concerned with the mere re-proposal of Roman law as a law endowed with superior authority. Rather, she was interested in concretely administering justice in her territories. While a secure and reliable text of Justinian's law was certainly important, it was only valuable insofar as it could guarantee legal certainty, which is the true cornerstone of 'just' justice.

The uncertainty of the law – that is, the difficulty of determining which rule should be applied to a concrete case – had become, in those turbulent decades, the paramount problem. To grasp the urgency of this issue, it is useful to recall another, equally famous episode that preceded the *petitio* by a few years and took place, one might say, just beyond Matilda's jurisdiction. In this instance, our source is not a practical document, but the rather circumstantial account of the English moralist and theologian Radulfus Niger:

> *Cum enim coram imperatore in Lombardia convenissent iudices tocius regni, occiso servo a quodam quesitum est iudicium de homicida.* […] *Cum igitur multiplici allegatione iuris sui inebriarentur* […] *pravi iudices dictaverunt sententiam in homicidam solam mulctam pecuniariam. Surrexit autem magister Peppo in medium tantum Codicis Iustiniani et Institutionum baiulus, utpote Pandecte nullam habens*

[49] Different reading by Spagnesi, "Irnerio," and Spagnesi, *Libros legum renovavit*, especially 57 ff.

[50] In particular, the norms of Otto I, in Boretius, *Liber legis Langobardorum*, 570 [1.3.(2)] and 580 [1.9(10)] were to be applied here: the former imposes the duel as the means of providing evidence in cases *de investitura predii*; the latter stipulates that the Romans should also be subject to the same procedure in similar cases. See Nicolaj, *Cultura e prassi dei notai*, 73-4; Cortese, *Il rinascimento*, 15; Santoni, "Tra 'lex' e 'pugna'," 21.

noticiam, [...] enervans sententiam priorum iudicum. Quippe allegavit eum, qui exemisset hominem de grege hominum, universitati fore iniurium adeo, ut qui hominem ademisset universitati hominum, quia violasset naturale communionis consorcium, ipse pariter de medio tolleretur et homicida occideretur. Sive enim servus sive liber foret, idem ait esse iudicium, quoniam addictio servitutis delere non poterat communionem nature humane conditionis. Legibus igitur et sacris constitutionibus imperatorum firmato iudicio optinuit magister Peppo coram imperatore aliis iudicibus in confusione recedentibus.

With enthusiasm and equal admiration, Radulfus recountes how, on the occasion of a judgment held – presumably around 1090 – in the presence of Emperor Henry IV, somewhere in the Lombard Kingdom, the learned Pepo, an expert 'Romanist', fiercely opposed the other judges present, who had agreed on monetary compensation as the punishment for the slayer of a servant (a case, moreover, amply regulated in the *Edict of Rothari*, which was certainly the law in force in those regions at the time). It is possible, though not demonstrable, that this Pepo is the same individual mentioned in Marturi as *legis doctor*, and perhaps also the one whose name – though nothing more than the name – was recalled by the Bolognese masters a century later as that of their ancient predecessor. According to Radulfus, Pepo lashed out at the other judges, invoking capital punishment instead. He did so on the basis of an argument that rather loosely combined principles drawn from divine law – particularly from the Old Testament, which, however, had been superseded on this point by the New – along with perhaps a few passages from Isidore of Seville and some unspecified Roman norms (difficult, in any case, to identify). On this basis, Pepo argued that the order upon which natural society is founded had been violated. Therefore, the murderer should be punished with the penalty proscribed by the divine order itself – the *talion* – overriding any human law to the contrary. This line of reasoning closely reflected certain Gregorian positions of the period, and it is thus somewhat surprising to learn that it apparently convinced the emperor himself.

Our sensibility certainly allows us to understand Pepo's and Radulfus' aversion to the idea that murder – even the murder of a servant – could be punished by the mere payment of a sum. Our sense of justice – though not an inner disposition, but rather the product of the education and traditions within which we are raised – would incline us to agree with at least part of Pepo's arguments. Nevertheless, we cannot help but be struck – and struck in a negative sense – by the fact that in this case the sentence is not reached through the usual syllogism, whereby the comparison between the facts and an applicable rule of law leads to judgment. Here, the penalty imposed – indeed, the supreme penalty – rests on a construct with rather uncertain legal contours and one largely inspired by moral principles. In other words, it is as if someone were to park their car in a second row, fully aware that it is prohibited, but also that the sanction is merely administrative, and were nonetheless subjected to a severe custodial or even afflictive punishment. Rather than the work of those 'artisans' in that famous *workshop of praxis* of which Grossi speaks, what we see here, it seems to me, is the affirmation of a genuine ideological stance.

Indeed, beyond his possible immediate sources, Pepo was evidently operating within a tradition – or, rather, an ideology – whose origins can be traced back to the 4th century, and most notably to the writings of Ambrose of Milan. This orientation was, to a certain extent, taken up by Justinian,[51] and within theologian and canonical circles it continued to endure for a long time (as Radulfus, writing at the beginning of the 13th century, attests). This is the tradition of the *utraque lex*,[52] founded on the conviction that the Christian's actions must be guided by both human and divine law, and that where a conflict arises, the latter must always prevail over the former – whether the latter be Lombard-Frankish or Roman law.

The functioning of this system is described very clearly, and in nostalgic tones, at the end of the 9th century (882) by Hincmar of Reims in his *De ordine palatii*, where he explicitly defines the role of a sovereign who wishes to be just – that is, respectful of God's will – and that of the priests who stand beside him and must advise him.[53] As late as the mid-11th century, that system was still clearly present to Emperor Henry III, who was called upon by the judges of the *Regnum Italiae* to resolve a doubt concerning the interpretation of a constitution in Justinian's *Code*. It was revived again not only by Gratian in his *Decretum*,[54] but also by the anonymous authors of those remarkable legal compilations known as the *Liber Tubingensis* and the *Brachylogus iuris civilis*: works that are difficult to date or locate, but certainly of extra-Bolognese origin, and perhaps belonging to the Irnerian age or slightly later.[55] The former in particular (in its prologue, later taken up in the *Exceptiones legum romanarum Petri*) employs vivid language that leaves no doubt as to whether they belong to the same ideological strand: if in collecting the ancient norms – says the anonymous author – we find something useless, outdated, or con-

[51] Calasso, *Medioevo del diritto*, 332-3, who recalls Paul's "certainly interpolated" passage inserted as D. 39.3.2.5, as well as D. 1.1.11, where *ius naturale* is described as "the purest and most immediate implementation of *aequitas*" and, therefore, as the law *quod semper aequum ac bonum est*, which, precisely for this reason, presents itself as "a normative system that goes beyond both *ius civile* and *ius gentium*". No less important is the content of *Nov.* 6.1.8, which states that ecclesiastical canons have at least equal authority to *leges*.

[52] According to the name that Calasso, *Medioevo del diritto*, 332-3, drew from medieval documentation.

[53] See already Calasso, 335. Hincmarus Remensis, *De ordine palatii*, 70-2: *Comites autem palatii inter caetera paene innumerabilia in hoc maxime sollicitudo erat, ut omnes contentiones legales, quae alibi ortae propter aequitatis iudicium palatium aggrediebantur, iuste ac rationabiliter determinaret seu perverse iudicata ad aequitatis tramitem reduceret, ut et coram Deo propter iustitiam et coram hominibus propter legum observationem cunctis placeret. Si quid vero tale esset, quod leges mundanae hoc in suis diffinitionibus statutum non haberent aut secundum gentilium consuetudinem crudelius sancitum esset quam christianitatis rectitudo vel sancta auctoritas merito non consentiret, hoc ad regis moderationem perduceretur, ut ipse cum his qui utramque legem nossent et Dei magis quam humanarum legum statuta metuerent, ita decerneret, ita statueret, ut, ubi utrumque servari posset, utrumque servaretur, sin autem, lex saeculi merito comprimeretur, iustitia Dei conservaretur.*

[54] In the *Dictum* to part II of dist. IV where is told that the laws which *naturali iuri fuerint adversa, vana et irrita sunt habenda.*

[55] Gouron, "L'auteur du 'Brachylogus'" and Gouron, "Sur la patrie et la datation."

trary to *aequitas*, we will put it 'under our feet' (*si quid inutile, ruptum equitative contrarium in legibus reperitur nostri pedibus subcalcamus*).[56]

Returning now to the problem from which we began, we can understand how Matilda felt the pressing difficulty of administering justice within a regulatory framework whose boundaries were so uncertain. This was all the more true in a socio-economic context that was rapidly changing with the revival of manufacturing and commercial activities and the emergence of demands that would soon culminate in the rise of the communes. While the Countess – unlike Henry IV, who had been persuaded by Pepo's arguments – had succeeded in compelling her judges to respect the law fully, despite their tendency to favor Roman law, much greater difficulties arose when the applicable law itself was Roman law. This was particularly the case when the litigants, or even just the resisting party, lived according to Roman law, as was the case with ecclesiastical bodies.

It had long been clear that the old collection known as *Lex romana canonice compta*, which had served its purpose until then, had now become inadequate. Recourse to compilations – even to more up-to-date and better-structured collections such as the *Liber* of Tübingen and the *Brachylogus* mentioned above – was no longer sustainable.[57] What moved the Countess, therefore, was the desire to attain, and to guarantee her people, fuller legal certainty.

And Wernerius/Irnerius did not shirk. It is, in truth, difficult to determine – beyond what Bolognese tradition suggests – what his actual contribution was to the enterprise of recovering Justinian's authentic text. Much had already been accomplished in the preceding decades. The reconstruction of the *Codex Iustinianus* had certainly advanced considerably, and the *Digest* had probably already been 'rediscovered', if not in its entirety, at least to a significant extent, as both the Marturi episode and, even more clearly, the canonical collection known as Britannica demonstrate.[58] There is, however, definite evidence of Irnerius' 'philological' engagement with Justinian's texts. As I have noted in a previous work, the glosses documenting the recovery of the proemial constitutions to the *Codex* and the treatment of the *Novellae constitutiones* in the collection of the *Authenticum* certainly confirm his commitment and his philological expertise.[59]

Even regarding the idea that Justinian's laws constituted not merely a collection of norms but a harmonious corpus – what we would today call a 'legal system', in which the individual parts complemented and interacted with one another – it is difficult to determine whether this was Irnerius' original in-

[56] This passage is included in the prologue, which Mor edits as an integral element of the *Exceptiones legum rom. Petri* (Mor, *Scritti giuridici*, II, 47). See, however, Cortese, *Il diritto nella storia*, II, 51, fn. 113.
[57] See Ascheri, "Spunti sulla certezza," 4-6 and Conte, "Il Digesto," especially 282.
[58] On the whole issue, see now Conte, *Diritto comune*, 43-84.
[59] Loschiavo, "Irnerius," 375-82. See also Pennington, "Per un *corpus*," 33-40.

sight or whether he merely continued some predecessor's theory. What really matters, in any case, is that the so-called 'four doctors' – i.e. those pupils of Irnerius who continued his *magisterium* in Bologna – already by the 1130s and 1140s possessed a textual 'canon' endowed with *auctoritas* and organized into several books, conceived as parts of a coherent whole. On this basis, in the schools that quickly sprang up in Bologna and beyond, it became possible to refer rapidly and precisely to parallel passages, and thus to apply refined hermeneutic techniques such as the *coniunctio similium* and *oppositio contrariorum*.[60] It was precisely these schools that became the driving force behind a form of scientific progress that was both remarkably rapid and remained a lasting achievement for centuries.

4. *Irnerius 'the jurist'*

Irnerius, however, was not only a master of the *artes liberales* and 'an excellent philologist'. He was also – and above all – a jurist, and one quite different from those *legum doctores* or *legum periti* of Pepo's kind, who, without too much thought, mixed legal arguments (perhaps drawn from different legal systems) with rhetorical-grammatical rules and religious and moral principles taken from the Scriptures and patristic writings, as we have seen in the Lombard *placitum*.

To better understand how Irnerius differed from his predecessors and from the world of the *utraque lex* – to discern the line that clearly separates the pre-Irnerian world from the world that which followed, and to appreciate the 'revolution', to use Berman's expression, of which he was the bearer – the best approach is undoubtedly to consider the content of his teaching. One need only read the glosses in which are condensed the teachings that Irnerius delivered to students beginning the study of Justinian's *Codex*.

Commenting on the three proemial constitutions – those constitutions that, as mentioned above, Irnerius sought to recover and include in the textual canon of Justinian's law-books – the Bolognese master first explains how and why Justinian's *Codex* and the constitutions collected within it (and only those) merit the titles of 'code' and 'constitutions', respectively. For this reason, he adds, they also deserve to be studied (*inspectionem*): they are, in fact, endowed with full legal validity, both in the formal sense (*quantum ad auctoritatem*) and in the substantive sense (*ad materiam*). All the rules collected in the *Code* – once the reconstruction of the text has been completed – thus possess the full force of law and, as such – this is the sense of the comment – can and must be considered and applied in legal practice.[61] In Irnerius' teach-

[60] See Errera, *Forme letterarie e metodologie didattiche*, 55-60 and 77-90; Loschiavo, *Lo studio e l'insegnamento*, especially 106-15.

[61] Edition of the glosses in Loschiavo, "Irnerius," 377-8: *'De novo codice componendo'* (*ad rubricam*): § *Sicut iste liber nomen, aliis commune, sibi per excellentiam vendicat proprium, ita*

ing, we may conclude, the reconstruction and 'canonization' of the text went hand in hand with a strong reaffirmation of the authority of that ancient imperial corpus. But there is more.

When beginning to read the *Codex* itself, and in accordance with a well-established scholastic custom, Irnerius takes care to clarify for the students the nature of the work they are about to study. This sort of introduction was called the *materia* and followed a very precise rhetorical scheme: it was to explain the meaning of the title, the division of the work, its objective content – i.e. the *materia* in the proper sense – the *intentio* and the *causa finalis*, i.e. the author's motive and the purpose he had set for himself, and finally the sphere of knowledge to which the work belonged.

In Irnerius' introduction to the *Codex,* particular attention should be given to the passage in which Irnerius clarifies the subject of the work – that is, the *materia Codicis* itself.[62]

> *Huius operis materia est negotiorum gestorum equitas et iustitia sive nondum sit constituta, sive constituta sit set contempta; alias ipsum ius; alias id quod pro iure habetur, ut hominum voluntas: sive viventium, ut contractus, sive morientium, ut testamenta. Et ita materia est tripertita. Intentio quoque trifaria est. Intendunt enim iustitiam ipsam rudem et informem constituere et sic ius efficere. Intendit etiam imperator ipsum ius simpliciter exponere vel, si obscurum est, interpretari* [...] *Finalis causa ex occasione constituendi potest perspici. Si enim videris quare hoc opus sit constitutum, poteris videre quis sit eius finis.* [...] *Ius erat constituendum ut eo astringerentur et ut illi qui erant ignorantes vel errantes deinceps docti essent. Et hoc fecit imperator iiii^{or} modis: imperando, permittendo, vetando, puniendo* [...].

et constitutiones. Cum enim omne ius vocetur constitutio, sola imperialis constitutio hoc sibi proprium nomen vendicat. Set in hac prima loquitur Iustinianus 'de codice novo componendo', imperando scilicet suis satellitibus ut ex tribus illis codicibus – Hermogenianus scilicet Theodosianus, Gregorianus – ad quorum differentiam iste vocatur novus, ut quod melius (in) eis videretur acciperent. Et si quid ibi minus videret adesse, hoc supplerent. Si quid superfluum detrahere conarentur et si quid male fuerit dictum, hoc emendare festinarent. Et ita novum addendo, mutando vel detrahendo componerent Codicem. § *Ex constitutionibus id quod optimum est Iustinianus opere sue diligentia decerpit; hoc quoque emendatum et ex suo proprio suppletum in unum redegit sub ordine congruo volumen. Harum omnium constitutionum tenor et principalis censura quantum ad auctoritatem potest pars iuris dici. Quod autem ad materiam, cum de omni pene iuris articulo disserat, tocius iuris meretur vel nomen vel inspectionem.* The manuscript tradition allows both of these glosses to be attributed to Irnerius' *magisterium*. A third gloss, although without the siglum, in commenting on the rubrics of the other two proemial constitutions, repeats and confirms Irnerius' thought: § *Post compositionem vero libri, fecit Iustinianus aliam compositionem (sed constitutionem) que loquitur 'de iustiniano codice confirmando'. In qua constitutione huic codici suam attribuit auctoritatem suum quoque ei nomen accommodavit et eum confirmavit. Set quia postea multe emerserant constitutiones, fecit suas decisiones quibus deciduntur veterum altercationes. Cumque iste decisiones extra predictum vagabantur volumen, istud resolvit easque sub competentibus titulis ordinavit et in secundo eum emendavit. Et hoc est quod dicit 'de emendatione Iustiniani Codicis et de secunda eius editione'. ... iste liber his constitutionibus prebet materiam qui aliunde sua propria indiget natura.*

[62] Continuing the work begun by Kantorowicz (*Studies*, 37-50 and 233-9), I have argued (Loschiavo, *Summa Codicis*, 26-32) that the true *Materia Codicis* of Irnerius is to be recognized in this gloss, preserved in two manuscripts datable to the early 12th century (Stuttgart, WLB, jur. fol. 71 and Paris, BN, lat. 4517). I reproduce here the text, which corresponds to parts 3-5 (*operis materia*, *intentio* and *causa finalis*) of the scheme reconstructed by the German scholar.

Departing from earlier teachings, Irnerius explains that the *Code* contains three fundamental elements (*materia est tripertita*). The first is the *ipsum ius*, that is, the law in the strict sense. The second is *id quod pro iure habetur*, i.e. all those obligations that individuals undertake and to which the legal order grants protection, imposing compliance as if they were rules (referring primarily to contracts and wills). Preceding these two, however, on an ideal scale, the *Code* also contains a third element, expressed by the hendiadys *aequitas* and *iustitia*. By this expression, Irnerius refers to the creative process of law itself – anticipating, in brief, what he will later explain in greater detail.

By way of example, the process of setting norms may be compared to the extraction, refining, and working of gold. In nature, gold has no shape of its own and is often found mixed with ore (as a nugget). Once refined, it appears in its pure essence, as an ingot (or bar), but still requires the goldsmith's craftsmanship to give it a distinctive shape – i.e. to transform it into objects such as jewelry or coins, thereby giving it a function and making it usable. Similarly, *aequitas*, as long as it remains *rudis* – as it belongs to the objectivity of the created world – can only be intuited by the human mind, but not yet fully expressed. *Iustitia*, by contrast, is the transposition into subjective terms of an equitable principle that *quiescit in mentibus iustorum*. Finally, *iustitia* is converted into a norm in the proper sense (and thus becomes *ius*) when that subjectively determined principle is given form and sanction by the legislator, who invests it with the *auctoritas* of which it is the bearer.[63]

The most interesting passage of the gloss, however, is the reference to that particular *aequitas constituta* yet *contempta* which – continuing the example of gold – corresponds to a product that has come from the goldsmith's hands imperfectly (e.g. a bracelet with a clasp that does not close) and must therefore be returned to the goldsmith (i.e. the legislator) so that he may make the necessary alterations or corrections. This is by no means a secondary issue, if we consider that Irnerius and his disciples upheld the idea of treating as valid and operative rules that had been written down six centuries earlier and often referred to things that had long since ceased to exist or had been replaced by others.

It is here, in recognizing the presence of *aequitas* within the *Corpus iuris*, that Irnerius enacts his 'revolution'.[64] For Pepo and the supporters of the *utraque lex*, *aequitas* belonged to a higher, meta-legal dimension and thus served

[63] In a further gloss, Irnerius explains that while *aequitas* merely proposes a datum of justice, the law (*ius*) reproposes that same principle by enriching it through an authoritative act (Cortese, *La norma*, II, 30). The same teaching recurs in the proem to the *Summa Trecensis* (c. 1135) and in the *Exordium Institutionum Iuris operam daturum* (edition in Fitting, *Juristische Schriften*, 146 § 3), where we read that *aequitas* […] *redacta in voluntatem dicitur iustitia*, while *iustitia redacta in preceptionem dicitur ius*.

[64] On the revolutionary role of Irnerius' teaching, see Padovani, "Abelardo e Irnerio", 61 ff.; see also 64 for the different solution proposed by Irnerius to the same case discussed in the Lombard *placitum* (the ill-treatment of servants) considered above.

as an instrument through which ecclesiastical authority could intervene and prevail over human law whenever necessary.[65] Thanks to Irnerius, however, the sovereign-legislator regained the right not only to issue new norms, but also to correct the old ones – and, even more importantly, to interpret them. It is therefore the task of the sovereign – assisted, it must be remembered, by jurists who are acquainted with the entire body of Justinian's laws and who know how to make it function as a coherent system – to undertake the delicate operation of evaluating the existing order and, when necessary, to return to the equitable principles from which new and better solutions may be drawn. Thus was born a new legal system, in which the legislator (with his *auctoritas*) and the jurists (with their knowledge and skills) once again played the leading role. And it may well be said, then, that Irnerius was the first jurist in the 'modern' sense – and that with him our world, our tradition, begins.

In this sense, we can say that Irnerius – and his school – may truly be regarded as a watershed.

[65] This is the ultimate effect of Hincmar of Reims' discourse.

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