

# JUDGING AND SETTLING DISPUTES IN THE MIDDLE AGES

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*Riassunto:* Il periodo compreso tra 11 e 12 secolo è normalmente indicato come età di transizione tra alto e basso medioevo. Lo scritto intende mettere a fuoco gli elementi di continuità e di discontinuità di questo periodo soprattutto con riguardo al fatto che la ricerca di nuovi modelli e di nuove procedure per l'amministrazione della giustizia giocò un ruolo 'costituzionale', non diversamente da quanto avvenuto in altri periodi successivi. In questa prospettiva, l'emergere delle *positiones* nelle prassi giudiziarie e negli *ordines iudiciorum* offre un interessante punto di vista per verificare, da un lato, se le parti fossero più interessate a andare in giudizio o a risolvere le loro controversie in via negoziale; dall'altro per comprendere la politica giudiziaria degli ordinamenti medievali tra due interessi tendenzialmente contrastanti: quello di assicurare giustizia con l'accertamento della verità e quello di ristabilire la pace sociale tramite arbitrati evitando così con l'abuso del processo il rischio di rallentare la giustizia.

*Keywords:* justice (XIth-XIIth centuries); lombard law; ordines iudicarii/iudiciorum; arbitration; commune; public justice; negotiated justice.

*Abstract:* The period between the 11th and 12th centuries is usually indicated as an age of transition from the early to late Middle Ages. The paper aims at focusing on the continuities and discontinuities in this time, and specifically on how the search for new models and new procedures for the administration of justice played a 'constitutional' role, just as it would in many other historical eras to follow. From this perspective, the emergence of *positiones* in the judicial practices and in the *ordines iudiciorum* provides an interesting point of view in order to investigate, on one hand, whether the parties were more interested to go to trial or to settle their disputes by negotiations, and, on the other hand, to understand the legal policy of the medieval governments between two conflicting interests: to ensure justice ascertaining the truth and to re-establish peace through arbitration procedures and avoid malicious litigation which might slow down the course of justice.

*Keywords:* justice (XIth-XIIth centuries); lombard law; ordines iudicarii/iudiciorum; arbitration; commune; public justice; negotiated justice.

1. INTRODUCTION: THE ‘CONSTITUTIONAL’ ROLE OF JUSTICE IN THE 11TH AND 12TH CENTURIES.

Between the 11th and 12th centuries, the cities of northern Italy and Tuscany—and Pisa in particular—founded and ‘politically’ justified their ‘freedom’ on the dual concepts of *iustitia* and *concordia*<sup>1</sup>. This was during a time that more or less coincided with the beginning of a ‘scientific’ method to the study and application of law. In the context of this conference, that method included a return to the study of Roman-style actions and a general Roman-law influence on the entire judicial process<sup>2</sup>.

For what concerns my topic of discussion, I could say *Nihil sub sole novi*. My research is at once dependent on studies from years past as it is still ‘in progress’. In any case, I have attempted to tackle the circular relationship—to borrow the words of Adriano Cavanna—between the legal practice and the legal theory of justice, an intimidating subject matter even when presented under the title of *judicial process*, as is the case of this conference.

I do not believe that I will be able to add very much to the vast and well-researched literature on the subject that is available today. This is thanks to the efforts of both Italian and foreign historians, particularly legal historians, who in recent decades have published fundamental works on the judicial process in the early and late Middle Ages. Indeed, at this point there is little that I can contribute to the dating and attribution of civil-law and canon-law sources, nor can I shed new light on the debate around the ‘alleged’ presence of ‘Roman’, ‘Germanic’ and ecclesiastical elements in medieval culture and society, elements which were already beginning to intertwine and at times even become absorbed in the early Middle Ages, such that they came to define many of the features of the ‘new’ concept of justice that emerged in eleventh and twelfth-century Europe.

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<sup>1</sup> See below nt. 9 and text.

<sup>2</sup> See below nt. 18 and text.

Thus, the thoughts that I would like to share in this paper shall serve as more of a commentary or a survey, so to speak. And they arise from a curiosity of mine. Indeed, it is not uncommon for we legal historians to define the scope of our research by choosing a specific period, generally based on the distinction between early and late Middle Ages, medieval and early modern, and so on. There is certainly nothing wrong with such an approach: indeed, it is widely adopted, and it corresponds to distinctive historical periods which undoubtedly featured their own unique traits. In certain cases, however, we risk losing sight of the intermediate periods, so to speak, which instead have been well documented in previous studies centering on the transition between the early Middle Ages and the Middle Ages<sup>3</sup>. There is the risk that we see certain phenomena as entirely new when in fact they had been incubating over a long period of time; or on the contrary, we might think that certain attitudes and customs had completely died out when in reality they had not only persisted, but even left an indelible mark on the use of specific legal categories. For example, we would not be able to set the ‘freedoms’ obtained by cities in their proper legal context, let alone the subsequent recognition of communes as bodies of public law (as we would call them) within the Empire, without shifting the focus of our research back to at least the 11th century. The same could be said regarding the interpretation and application of many Roman-law concepts.

That is why I would like to concentrate primarily on the period between the 11th and 12th centuries, when the law was still amorphous, so to speak. This is usually indicated as an age of transition from the early to late Middle Ages. I will attempt to focus on the continuities and discontinuities in this time, and specifically

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<sup>3</sup> I will limit myself to citing some more recent publications, which also include useful bibliographical references: *La giustizia nell'alto medioevo (secoli V-VIII)*, Settimane di Studio del Centro di Studi sull'Alto Medioevo (= C.I.S.A.M.) 42, Spoleto 1995; BOUGARD, F., *La justice das le royaume d'Italie de la fin du VIIIe siècle au début du XIe siècle*, Rome, Ecole française, 1995; *La giustizia nell'alto medioevo (secoli IX-XI)*, Settimane di Studio C.I.S.A.M. 44, Spoleto 1997; LOSCHIAVO, L., *Figure di testimoni e modelli processuali tra antichità e primo Medioevo*, Milano 2004; WICKAM, Ch., *Courts and conflict in Twelfth century Tuscany*, Oxford 2003; VALLERANI, M., *La giustizia pubblica medievale*, Bologna 2005; MAUSEN, Y., *Veritatis adiutor. La procédure du témoignage dans le droit savant et la pratique française (XIIe-XIVe siècles)*, Milano 2006; PADOA SCHIOPPA, A., *Giustizia medievale italiana dal Regnum ai Comuni*, Spoleto, C.I.S.A.M., 2015 (Biblioteca, 28).

on how the search for new models and new procedures for the administration of justice played a ‘constitutional’ role, just as it would in many other historical eras to follow.

The 11th century was an extraordinarily important time for the history of Europe. As different historical figures from completely different backgrounds came into contact and formed relationships, new ideas began to circulate—this was instrumental in the subsequent development of legal concepts. Just think of figures such as Lanfranc, who may have been a judge in the court of Pavia in his youth, but who certainly gained more renown as Lanfranc of Bec or Lanfranc of Canterbury (1005/10-1089). His intellectual and political endeavors led to the formation of many bonds with popes Leo IX, Nicholas II (originator of the Norman conquest of southern Italy), Alexander II and lastly, Gregory VII, as well as with Duke William of Normandy, who went on to become King William the Conqueror, Humbert of Silva Candida, Ivo of Chartres, Anselm of Aosta and many other ‘giants’ of the time<sup>4</sup>.

On an international level, a debate was unfolding regarding church reform and the conflict between temporal power and spiritual power. Against this backdrop, tensions were brewing in the relations between rulers and subjects, in particular as concerned the poor response on the part of institutions to society’s demands for justice. These issues were all playing out alongside issues regarding the independence of cities.

Indeed, while early medieval cities had still maintained their role as centers of public administration, it is well known that the issue of justice helped trigger a reorganization of local power in the last few decades of the 11th century, especially

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<sup>4</sup> GIBSON, M. T., *Lanfranco da Pavia, al Bec a Canterbury* (1978), trad. it., Jaka Book, 1989; *The letters of Lanfranc archbishop of Canterbury*, Clover, H., GIBSON, M. T. (edd.), Oxford 1979; PADOA SCHIOPPA, A., «La cultura giuridica», in *Storia di Pavia*, vol. II, *L’alto medioevo*, Milano 1987, pp. 219-235, in part. pp. 226-229 e 234 ; *Vita Lanfranci*, GIBSON, M. T. (ed.), in *Lanfranco da Pavia e l’Europa del secolo XI nel IX centenario della morte (1089.1989)*, Atti del Convegno internazionale di Studi Pavia, 1989, D’ONOFRIO, G. (ed.), Roma 1993, pp. 667-715; COWDREY, H.E.J., «Lanfranco da Pavia» in *Dizionario Biografico degli Italiani*, Roma, Istituto dell’Enciclopedia Italiana, 2004, vol. 63, pp. 573-578. See also below n. 15.

(though not exclusively) in Italy. It started with representatives elected by the so-called ‘citizens’ (‘cives’) being sent to help govern the cities alongside the delegates of the king or emperor, namely the bishops or counts; it continued with the eventual replacement of the latter. From a historical perspective, cities saw clear changes in their culture, economy and society as a whole over the course of their uneven journey from pronouncement of ‘freedom’ to full recognition as communes over a century later<sup>5</sup>. At the same time, however, the fact that there were so many contrasting trends leaves us with the distinct impression that legal concepts and institutions could have ended up being much different than those that eventually prevailed<sup>6</sup>.

As I mentioned earlier, the issue of freedom in the exercise of public functions was inextricably linked with that of control over the administration of justice. The aim was to contain any damage or consequences that might destabilize the public order and create political dissent, such as that which could arise from unpopular decisions in civil and criminal matters. Nonetheless, in certain cases the cities’ foundational oaths were predominantly taken in terms of peace or peacemaking (*concordia*) and defense (*salvamentum*), while others were mainly taken in terms of judicial justice<sup>7</sup>.

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<sup>5</sup> DILCHER, G., *Die Entstehung der lombardischen Stadtkommune : eine rechtsgeschichtliche Untersuchung*, Aalen 1967. See also the following works, which include bibliographical references as well: G., CAMMAROSANO, P., *Storia dell’Italia medievale dal V all’XI secolo*, Bari 2001; PADOA SCHIOPPA, A., *Il diritto nella storia dell’Europa. Il medioevo*, parte I, Padova 2005, pp. 195-212; *Gli inizi del diritto pubblico: L’età di Federico Barbarossa: legislazione e scienza del diritto*, DILCHER, G., QUAGLIONI, D. (edd.), Bologna 2007; STORTI C., “Città e campagna nello specchio della giustizia altomedievale” in *Città e campagna nei secoli altomedievali*, Settimane di studio del Centro italiano di studi sull’alto Medioevo, 56, p. 1, Spoleto 2009, pp. 293-336; WICKHAM, CH., *Sleepwalking into a new world: the emergence of Italian city Communes in the Twelfth century*, Princeton, Oxford 2015; STORTI, C., «Justice, peace and political dissent from the early Middle Ages to the communal Period», in *Italian Review of Legal History* 2(2017) It - Eng -, paper nr. 1, pp. 1-31, especially pp. 1-8.

<sup>6</sup> CONKLIN, G., *Redde singula singulis and Suum cuique tribuens: Re-Thinking Medieval Two-Sword Theory*, in *Proceedings of the Fourteenth International Congress of Medieval Canon Law*, Città del Vaticano, Biblioteca Apostolica Vaticana, 2016, pp. 893-905.

<sup>7</sup> *Leggi del consolato di Genova* [1143], RAGGIA, G. B. (ed.), in *Historiae Patriae Monumenta* (= H.P.M.), *Leges Municipales* I, Augustae Taurinorum 1838, IV, col. 241; *Breve della Compagna*, DESIMONI, C., BELGRANO, T. (edd.), in H.P.M. XVIII, *Leges Genuenses*, Augustae Taurinorum, coll.5-14; *Codice Diplomatico della Repubblica di Genova dal 958 al 1163*, IMPERIALE DI SANT’ANGELO, C. (ed.), vol. I, Roma 1936, n. 285, *Breve della Compagna*, 1157 febbraio, pp. 350-359 (“In nomine Sancte et individue Trinitatis et concordie sempiternae”), in part. p. 351 and see

In this phase of local self-government (to use terms which at this point are familiar to us all), two different forms of justice played equally important roles. To borrow from Mario Sbriccoli's influential classification of the 13th century, on the one hand there were the different models and tools of 'hegemonic' (or public) justice, which aimed to ascertain the truth, while on the other hand there was 'negotiated' justice, which had the simpler goal of re-establishing friendly relations<sup>8</sup>. And this is the first topic that I would like to focus on: that despite the fact that these two forms co-existed, it is impossible to determine which one prevailed over the other.

Though there is a limited amount of documentation available, what we do have actually reveals that the regularity of procedures was of extraordinary concern regardless of whether the dispute was settled in or out of court. Furthermore, in many cases attention to form was of the utmost priority.

## 2. SOURCES ON THE JUDICIAL PROCESS IN THE 11TH AND 12TH CENTURIES

Since the 10th century, numerous authoritative figures had decried the credibility of the civil and ecclesiastical public authorities in their administration of justice. It suffices to mention a famous text by Attone of Vercelli wherein he warned of how unjust justice—especially in terms of general procedure, but also as concerned the rules of evidence—led to destabilizing consequences for social harmony. In that same text he also wrote that no intelligent person of his time dared

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PIERGIOVANNI, V., *Gli statuti civili e criminali di Genova nel Medioevo: la tradizione manoscritta e le edizioni*, Genova 1980, pp. 247-252; ID., *Lezioni di storia giuridica genovese. Il Medioevo*, Genova 1983; *Breve consulum Pisanae civitatis* a. MCLXII, (2) and *Breve consulum Psanae civitatis* a. MCLXIV, (3), in *I brevi dei consoli del comune di Pisa degli anni 1162 e 1164. Studio introduttivo, testi e note con un'appendice di documenti*, BANTI, O. (ed.), Roma 1997, respectively pp. 47 and 75; *Incipiunt capitula totius libri Constitutum Usus Pisanae Civitatis*, in *I costituti della legge e dell'uso di Pisa (sec. XII). Edizione critica integrale del testo tradito dal "Codice Yale". Studio introduttivo e testo con appendici*, VIGNOLI, P. (ed.), Roma 2003, pp. 129-130; *Promissione di Enrico Dandolo in Le promissioni del Doge di Venezia dalle origini alla fine del Duecento*, GRAZIATO, G. (ed.), Venezia 1986, pp. 2-4.

<sup>8</sup> GEARY, P. J., *Extra-Judicial Means of Conflict Resolution*, in *La giustizia nell'alto medioevo (secoli V-VIII)* (n. 3), pp. 569-619, in part. pp. 571-601; WICKHAM, CR., *Justice in the Kingdom of Italy in the Eleventh Century*, in *La giustizia nell'alto medioevo (secoli IX-XI)* (cit. nt 3), pp. 179-250, in part. pp.201-239, NICOLAJ, G., «Formulari e nuovo formalismo nei processi del Regnum Italiae», in *La giustizia nell'alto medioevo (secoli IX-XI)* (n. 3), pp. 347-379, and see below § 6. *Positiones and some concluding remarks*.

have recourse to public judges. Only the poor did so, as they did not have the foresight to know that their rights would not be recognized, but rather denied<sup>9</sup>.

In the 1070s and 1080s, again in northern and central Italy, a new group of judges and lawyers began settling disputes in court in accordance with the laws and customs in force. It was clear that their legal education was more solid at that point. As is well known, one of the new interpretative techniques was to resort to Roman-law fragments, which if anything allowed them to make up for 'lacunae'. This was evidenced by the jurisprudence coming out of the court of Pavia<sup>10</sup> (especially under judge Wilihelmus)<sup>11</sup>, as well as by those *sapientes* (such as the renowned Pepo from the Marturi and Henry IV *placita*) who had begun, albeit sporadically, to resort to the *leges romanae* (as the Justinian compilation was called at the time) in order to settle legal disputes; and as Antonio Padoa Schioppa points out, they were used to win disputes as well<sup>12</sup>. Even outside of Italy, these same techniques could be found in the jurisprudence coming out of southern France and the Duchy of Normandy<sup>13</sup>.

<sup>9</sup> BORDONE, R., «Vescovi giudici e critici della giustizia: Attone di Vercelli (924-960)», in *La giustizia nell'alto medioevo secc. IX-XI* (cit. nt. 3), pp. 457-486, in part. pp. 464-468; PADOA SCHIOPPA, «Processi di libertà nell'Italia altomedievale» (2011), in ID., *Giustizia medievale* (cit. nt. 3), pp. 93-136.

<sup>10</sup> For example, with regard to identifying the competent court, see the references to C. 3,16,1 C. *Ubi de possessione, l. Ubi aut vis*, and 3,19,3 (C. *Ubi in rem actio, l. Actor*) in Expositio ad Grim. 4 *Si quis per 30 annos possederit casas familias vel terras*, § 2: "Sciendum est, quod si quis de invasione vel actione in rem id est malo ordine retenta terra appellatus fuerit, quod, ubicumque litigatores habitent, non alibi nisi ante loci illius comitem cogendum est ad placitum, Codicis tertii libri capitulis quorum hoc unum est [C. 3,16,1]" (Liber *Legis Langobardorum Papiensis Dictus*, BORETIUS, A. (ed.), in Monumenta Germaniae Historica (= M.G.H.), *Legum* t. IV, Hannoverae 1868 (rep. 1965) (= Exp.), pp. 400-401; RADDING, CH. M., *The Origins of Medieval Jurisprudence: Pavia Bologna 850-1150*, Yale University Press, 1988; RADDING, CH. M., «Petre te appellat Martinus. Eleventh-Century judicial procedure as seen through the Glosses of Walcausus», in *La giustizia nell'alto medioevo (secoli IX-XI)*, Settimane di Studio C.I.S.A.M. 44, Spoleto 1997, pp. 827-858, in part. pp. 840-858; CORTESE, E., *Il diritto nella storia medievale*, Roma 1995, II, *Il basso medioevo*, pp. 22-24; PADOA SCHIOPPA, A., *Il diritto nella Storia del diritto in Europa. Dal medioevo all'età contemporanea*, Bologna 2017<sup>2</sup>, pp. 76-77.

<sup>11</sup> WICKHAM, *Courts and Conflict in Twelfth century Tuscany* (n. 3), p. 3.

<sup>12</sup> PADOA SCHIOPPA, A., «Il ruolo della cultura giuridica in alcuni atti giudiziari italiani» (1980), in ID., *Giustizia medievale* (cit. nt. 3), pp. 229-253, in part. pp. 234-237; CORTESE, E., *Il diritto nella storia medievale* (nt. 10), I *L'alto medioevo*, pp. 383-385; II, *Il basso medioevo*, pp. 35-41.

<sup>13</sup> PADOA SCHIOPPA, A., «La cultura giuridica» (n. 4), pp. 231-233; CORTESE, *il diritto nella storia medievale* (n. 10), II, pp. 22-55; NICOLAI, G., «Formulari e nuovo formalismo» (n. 8) *Italiae*, p. 352.

Besides the sparse and intermittent records from the *placita*, one of the main sources on the administration of justice in this period is certainly the interpretive *apparatus* to the so-called *Liber Papiensis*, one of the two collections of Lombard and Italian law from the 7th to 11th centuries (namely, the chronological one). Known as the *Expositio to the Liber Papiensis*, this *apparatus* seems to have appeared around the year 1070. It was primarily of a judicial nature and it has still not been extensively studied<sup>14</sup>.

The *Expositio* contains the interpretations and debates of a ‘new’ and legally ‘solid’ group of judges from the Kingdom of Italy who were operating in the 11th century and the first thirty years of the 12th century (according to some manuscripts). They were generically indicated as judges from the court of Pavia, which was the capital of the Kingdom, and it seems that Lanfranc, whom we spoke of earlier, was among them<sup>15</sup>.

These judges dedicated much attention to the issue of justice, especially as regarded the problems they encountered in implementing a series of over twenty ‘norms’ established by the kings and emperors of the eighth and ninth centuries (starting with those attributable to the Lombard king Ratchis, up to those taken from the capitularies of Charlemagne, Pippin, Louis the Pious and Lothar)<sup>16</sup>. These norms punished all ranks of judges for any violation of the rules of jurisdiction, but also—and to an even greater extent—any violation of their duty to impartiality and fairness in the exercise of the jurisdictional function that was carried out during the *placita*. In the *placita* there was clearly much value placed on ascertaining the truth through

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<sup>14</sup> Sulla datazione della Lombarda cfr. PATETTA F., «Nuove ipotesi sulla patria della cosiddetta Lombarda», in *Heinrich Brunner zum 70. Geburtstag von Schülern und Verehrern dargebrachten Festschrift*, Weimar [1910?], pp. 350-378.

<sup>15</sup> CORTESE, *Il diritto nella storia medievale* (cit. n. 10), II, pp. 16-17 and 22.

<sup>16</sup> Ratchis 7, Charlemagne 18, 35, 41, 51, 58, 68, 69, 88, 93, 112, 118, 125; Pippin. 7, 8, 11; Louis the Pious 35, 36, 46, 48-50; Lothar 61, 62, 66, 98.



rational forms of evidence such as testimony, a fact that also emerged in the commentary on other fragments<sup>17</sup>.

Though they hailed from centuries before, the application of these legal texts and the punishments they established for bad administrators and bad local judges continued to play a fundamental role in court judgements against holders of public office. And this was true for all levels, including decentralized offices such as the numerous royal and imperial judges who appeared in city *placita* starting at the end of the ninth century<sup>18</sup>. These judgements called on the accused to clear themselves of allegations that they had unduly advoked cases, denied justice, or unfairly or only partially exercised their judicial function through decisions based on an erroneous application of the law (that is contrary to the *leges*), or based on discretionary power that did not adhere to the criteria of a *iustum ~~rectum~~ iudicium*<sup>19</sup>. Whether communities or individuals, the victims of such injustices were always ready to express their dissent through public demonstrations or through various forms of either spontaneous or organized rebellion. Indeed, they expected the royal court to establish the truth of the matter and determine that the local administrators and judges had been ‘treacherous’ and unfair, and that this would thus justify their ‘resistance’

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<sup>17</sup> LOSCHIAVO, L., *Figure di testimoni e modelli processuali tra antichità e primo Medioevo*, Milano 2004ID., «La risoluzione dei conflitti in età altomedievale: un excursus storiografico», in *Forme stragiudiziali o straordinarie di risoluzione delle controversie nel diritto comune e nel diritto canonico*, BONNET P. A., LOSCHIAVO, L. (edd.), Napoli 2008, pp. 91-112; BASSANI, A., *La veritas del testimone de auditu alieno dall'alto Medioevo al diritto comune*, Milano 2012; FIORI, A., *Il giuramento di innocenza nel processo canonico medievale: storia e disciplina della purgatio canonica*, Frankfurt am Main 2013.

<sup>18</sup> BOUGARD, *La justice dans le royaume d'Italie* (n. 3), pp. 281-302; PADOA SCHIOPPA, A., «Aspetti della giustizia milanese dal X al XII secolo» (1989), in *Giustizia medievale italiana* (n. 3), pp. 137-227, in part. pp. 150-156.

<sup>19</sup> *Rectum iudicium* in Liut. 28, Rach. 6 (STORTI, «Justice, peace and political» (n. 5), pp. 13-16) and see also *Admonitio generalis*, 789, martio 23, nr. 22, §63: “*Primo namque iudici discenda est lex a sapientibus populi compositane per ignorantiam a via veritatis erret: et dum ille recteum intelligat iudicium, caveat ne decline, aut per adolationem aliquorum aut per amorem cuiuslibet amici aut per timorem alicuius potentis aut propter praemium a recto iudicio declinet; et honestum nobis videtur, ut iudices ieiuni causas audiant et discernant*”; *Ansegisi abbatis capitularium collectio*, 60 *De iudicibus*, 5 “*namque in iudicio diligenter discernatur lex a sapientibus populi composita, ne per ignorantiam a via veritatis erret. Et dum per [...]*”, in «*Capitularia Regum Francorum*», t. I, in *M.G.H., Legum Sectio II*, Hannover 1883, BORETIUS, A., KRAUSE, V. (edd.), p. 58 and p. 402.

and absolve the demonstrators of any wrongdoing<sup>20</sup>. The topic of scandal and its consequences, recently examined by Raffaella Bianchi Riva, was also a primary concern of the church when dealing with the reactions of local communities against unpopular decisions and measures, though the church had different tools at its disposal and adopted a different interpretative approach<sup>21</sup>.

But let us return to the sources from the Italo-Lombard kingdom. It seems that in the meantime, again around 1070, those same norms on the responsibility of judges had been inserted into the kingdom's systematic collection of laws (the so-called *Lombarda*) under the title *de officio iudicis* (the same title found in the Institutes of Justinian *Inst.* IV, 17, but clearly different in terms of content). At least some parts of the *casinensis* version of the *Lombarda* continued to be applied in Italy<sup>22</sup>, and it was commented on by the jurist Carlo di Tocco in the first half of the 13th century in accordance with the 'canons' of the glossators<sup>23</sup>. The entire final part of the second book was dedicated to the judicial process. Besides the above-mentioned *de officio iudicis*, the titles concerned witnesses (*De testibus rubr.* 47); summons; the representation of minors, widows and orphans; lawyers; the identification of the applicable law in the case of conflict of laws (*Qualiter*

<sup>20</sup> See also for bibliographical references and legal sources: STORTI, «Justice, peace and political» (n. 5), pp. 21-28.

<sup>21</sup> See the following, which also include bibliographical references: BIANCHI RIVA, R., «Innocenzo III tra diritto e società: consuetudini, scandali e consenso popolare», in *Vergentis. Revista de Investigación de la Catedra Internacional Conjunta Inocencio III*, 2 (2016), pp. 249-271 and in *Innocent III and his time. From absolute papal monarchy to the Fourth Lateran Council*, BELDA INIESTA, J. & NACCI, M. (eds.), Murcia 2017, pp. 263-286; BIANCHI RIVA, R., «Dal consenso al dissenso. La rilevanza giuridica dello scandalo nelle elezioni episcopali (secc. XII-XV)», in *Historia et ius*, 10 (2016), paper 3; BIANCHI RIVA, R., «Il giudice e la misericordia. Riflessioni sull'amministrazione della giustizia nel diritto canonico classico», in *Vergentis*, 5 (2017), pp. 185-219 and the newly published: DRUWÉ, W., *Scandalum in the Early Bolognese Decretistic and in Papal Decretals (ca. 1140-1234)*, Leuven 2018.

<sup>22</sup> *De officio iudicis* in *Legis Longobardorum libri tres. Syntagma duo, lombarda vulgo dicta, ex libro papiensi confecta*, ed. F. Bluhme, in M. G. H., *Legum s. IV* (n. 11) *A. Lombardae casinensis rubricae legumque initia, ex codice casinensi 328 adumbrata*, r. 37 p. 618; *De officio iudicis*, ivi, *B. Lombardae vulgatae rubricae legumque initia*, tit. 52, p. 633.

<sup>23</sup> The reason there are so few glosses by Carolus de Tocco to the *Lombarda*'s title *de officio iudicis* is probably because the new *ordines iudicarii* had essentially taken the place of the Lombard and Carolingian rules (*Lombarda. Leges Longobardorum cum argutissimis glosis Caroli de Tocco*, Prefazione di ASTUTI G., Torino 1964, reprint Venetiis 1537) (= Carolus de Tocco, *Lombarda*, Lib. II, tit. LIX, pp. 390-397).

*diversarum legum homines res suas diffinire debent*, tit. 48); rational proof for the ascertainment of truth; the possibility of having a duel as a last resort, with legal texts dating back to Otto I and Henry II (*Qualiter quis se debeat defendere et quibus casibus pugna fieri prohibeatur et quibus specialiter fieri precipiatur*, rubr. 49); the use of oaths; and the effects of perjury (*De periuriis* rubr. 50).

The justice that emerges in the *Expositio* could be described as a secular justice, and thus it does not shed light on other aspects that undoubtedly influenced the concept of justice in that century. Indeed, in a practice that started primarily in the 10th century, the kings of Italy began replacing their delegates to city governments, substituting the counts that had once filled this role with bishops. And it is still largely unknown or little known how episcopal justice commonly settled secular disputes, let alone whether judicial proceedings or arbitration were the preferred means. This lack of information is not only due to the disappearance of documentary sources, but also to the fact that there was no obligation to record anything in writing at the time, which would only become a rule starting in the 12th century based on Roman law<sup>24</sup>.

Thus, while bishops played a fundamental role in the development of city institutions, there is little trace of how they handled matters of justice<sup>25</sup>. How much of episcopal justice in the 11th century was administered not through judicial proceedings, but rather through a form of unappealable mediation? Just think of the political relevance of Bishop Daiberto's arbitration in Pisa, the so-called *lodo delle*

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<sup>24</sup> SINISI L., ««Ne falsitas veritati praeiudicet aut iniquitas praevaleat aequitati»: considerazioni sul ruolo della scrittura nel processo romano-canonico fra Basso Medioevo ed Età moderna» (in this book).

<sup>25</sup> VISMARA, G., *La giurisdizione civile dei vescovi (secoli I-IX)*, Milano 1995, in part. pp. 195-210; PADOA SCHIOPPA, A., «Hierarchy and Jurisdiction: Models in Medieval Canon Law», in *Legislation and Justice*, PADOA SCHIOPPA, A. (ed.), Oxford 1997, pp. 3-15 and in pp. 31-45, in part. pp. 38-41; WICKHAM, «Justice in the Kingdom of Italy» (n. 8), pp. 238-244; PADOA SCHIOPPA, A., «Sulla giustizia ecclesiastica nell'età carolingia: i capitolari», in *Chierici e laici, poteri politici e poteri religiosi nei secoli XI e XII, Un omaggio a Ovidio Capitani*, Trieste 2014, pp. 37-68 and in ID., *Studi sul diritto canonico medievale*, Spoleto 2017, pp. 47-77; PADOA SCHIOPPA, A., «Sulla giustizia ecclesiastica nell'età carolingia: i canoni sinodali», *ivi*, 79-126, ID., *La giustizia ecclesiastica milanese nell'età di Ansperto*, *ibidem*, pp. 127-172.

*torri* (ruling on the height of towers, 1088-1092), which put an end to a bloody political conflict between centers of local power—a conflict that originated in “pride, which every day leads to innumerable murders, falsehoods, incestuous marriages between blood relatives, the destruction of houses and many other evils”. Daiberto’s arbitration was requested and accepted by the *commune consilium civitatis*<sup>26</sup>, which some decades later would come to assume exclusive authority over criminal justice (*vindicta*)<sup>27</sup>.

### 3. NEGOTIATING SOLUTIONS TO CONFLICTS

Bishop Daiberto’s arbitration was an example of how the exercise of jurisdictional function went hand in hand with custom, the latter having been established in the first Lombard edicts. It also went hand in hand with the practice that resulted from the legal interpretation of those edicts, namely that of giving mostly judges and public authorities the power to mediate and settle disputes informally, without following the ritual of the judicial process. The records available to us today also confirm this. Even if parties might have initially appealed to a public authority serving as a judge, it can’t have been unusual for a civil or criminal dispute to end up being settled through an agreement between the parties, and not through a sentence. Very likely it was the judge himself who would insist on such a solution. During Liutprand’s reign in the eighth century, these peacemaking procedures, even when forced upon the parties, were called *treuvae*<sup>28</sup>. They were even applied in the case of ‘*inimicitiae*’ caused by more serious crimes, as long as they did not involve the king or his court.

<sup>26</sup> *Securitas Daiberti Episcopi* (Lodo delle Torri) (post 1088, ante 21 aprile 1092), in *I brevi dei consoli del comune di Pisa* (cit. nt. 7), pp. 110-113 and see ROSSETTI, G., «Il lodo del vescovo Daiberto sull’altezza delle torri: prima carta costituzionale della ‘respublica pisana’», in *Pisa e la Toscana occidentale nel Medioevo. A Cinzio Violante nei suoi settanta anni*, Pisa 1992, vol. II, pp. 25-47.

<sup>27</sup> *Sententia contra Vicecomites* 1153 ottobre 28, Pisa, in *I brevi dei consoli del comune di Pisa* (n. 7), pp. 117-119.

<sup>28</sup> STORTI, «Justice, peace and political» (n. 5), pp. 10-13.

When indicating the conclusive act to a peacemaking agreement, it seems that the oldest and in any case most used legal Latin term was *finis*. This was probably used to refer to an agreement between the parties; and although procedural rules cannot be found on the matter, we cannot entirely exclude that even in more ancient times, the participation of a judge or a public authority would have been necessary in order to ensure the agreement's validity and enforcement. The term *finis* had been used in one of Rothari's most celebrated edicts, namely the one on increasing settlement payments (composition) that were due for crimes against the person. According to the king, by increasing composition to an amount that was more than customary, crime victims would be less likely to seek revenge. In other words, acceptance of the composition would have eliminated any reason to seek revenge and re-established friendly relations (*sit sibi causa finita, amicitia manentem*)<sup>29</sup>. Formulas of *finis* could be found in the *Chartularium Langobardicum* during the ninth and tenth centuries, when they were also used for property and financial disputes<sup>30</sup>; they could also be found in the *Expositio*, particularly as concerned succession and the liability of children vis-à-vis the debts of their deceased father<sup>31</sup>.

In the 11th century, the *Expositio* to the *Liber Papiensis* and the formularies attested not only to the existence of such rules, but also to the ways in which they were enforced. As far as criminal disputes were concerned, the acceptance of composition—and thus, for example, the *finis homicidii*—had to be confirmed by oath. By taking an oath, the 'pacified' party had to swear that he would not personally retaliate against the party who had paid the composition or his dependents

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<sup>29</sup> Roth. 74 e anche Roth. 143. The *anglo-saxonum leges* of Ethelbert of Kent had expressly forbidden the acceptance of the *compositiones* without resorting to a judge (STORTI, C., «Legislazione e circolazione di idee e modelli giuridici nei regni germanici», in *Le migrazioni nell'alto medioevo*, Spoleto 5-11 aprile 2018 (C.I.S.A.M., Settimane LXVI, forthcoming)

<sup>30</sup> *Chartularium Langobardicum*, ed. Boretius, in *Monumenta Germaniae Historica, Leges IV*, pp. 595-602. PADOA SCHIOPPA, «Aspetti della giustizia» (n. 18), pp. 179-180; CORTESE, *Il diritto nella storia medievale* (n. 10), II, pp. 19-20; NICOLAJ, «Formulari e nuovo formalismo» (n. 8), pp. 368-369 and with regard to the *finis intentionis terrae*, pp. 358-361.

<sup>31</sup> Exp. ad Liut. 56 § 6 si filius, postquam de paternis rebus iuraverit, aliquid inde inconueniens assecutus fuerit, patris debitum non inde, si finem susceperit, solviturus, non debet quod invenit sibi novum componere.

(*hominibus ex sua parte*), nor would he retaliate through a third party acting on his behalf. It was written that the most common forms of retaliation were theft, robbery (*schacum*), murder, fire, kidnapping (*captio*), wounding and aggression (*asaltus*). The oath's formula concluded with "si Deus et illa sancta evangelia te adiuvent"<sup>32</sup>. It might seem that it was only necessary to appeal to a judge or other figure of public authority when there were changes in the subject of the original composition<sup>33</sup>, but we do not have any certainty in that regard, and there could have been differences among local practices and changes within each political context.

The term *finis* as a synonym of *convencio* was also used ~~in exactly the same way~~ in the so-called private peacemaking practices of the 12th century, as well as in the 12th-century Pisan text *Constitutum Usus*.

While the *Constitutum Usus* was ostensibly a simple ascertainment of the customs in force in the city of Pisa, in reality it was the prototypical city statute. It had been drawn up by the *sapientes* (legal experts) of the city between 1155 and 1160, during the years in which Frederick Barbarossa resisted cities' demands for independence. In the text, the traditional term of *finis et convencio* indicated an agreement reached between two parties in conflict and confirmed by a judge. The judge would have to attest to the fact that the concerned parties had freely entered into the agreement with his assistance, as well as to the lawfulness of the agreement's content<sup>34</sup>. There is no trace of such an arbitral function of judges in the tradition of

<sup>32</sup> Exp. ad Roth. 143 § 7: In hoc quod dicit: "et pro amputanda inimicitia" notandum est, quod per hanc legem post compositionem homicidii factam finis homicidii sacramento debet confirmari in hoc modo.

<sup>33</sup> Form. Ad Roth. 74: Petrus te appellat Martinus, quod tu fecisti ad patrem suum una plagam, et fuit mortuus de ipsa plaga intra anni spacium. - Ipse fecit mihi finem de ipsa plaga. - De plaga potuit tibi facere finem, sed non de morte.

Form. Ad Roth. 143: Martine te appellat Petrus, quod ipse interfecit patrem tuum, et fecit tibi compositionem, et ei fecisti perdonationem, et iurasti, et revindicandi causa interfecisti fratrem suum. - Aut: pro plaga, quam tibi fecit in capite, unde tu finem fecisti ei, revindicandi causa fecisti plagam unam in suo capite.- De torto.

<sup>34</sup> *Constitutum usus* (n. 7), *De fine* VII, p. 173: "*Finis est quandocumque a controversia seu lite vel discordia, que iam est de aliqua re vel fore timetur, utriusque partis concordia transactione vel pacto disceditur. In qua ut valeat iudici est inspicere an consensus partium interfuerit. Ut autem nil valeat iudex debet cognoscere an fraus vel turpitudine vel metus causa intercesserit vel alia que sint contra bonum usus civitatis vel contra equitatem. Refutationem etiam et perdonationem, id est remissionem,*

the early Middle Ages, but it was certainly provided for by Justinian's code under the title *de arbitris*<sup>35</sup>. Furthermore, the introduction or the corroboration of such a function would have undoubtedly eliminated any pretext for challenging the validity of agreements, and it would have provided greater certainty and stability to the resolution of conflicts.

Though we could subject many other provisions in the *Constitutum Usus* to a similar analysis, it is *this* provision that shall lead us to further observations, which I shall delve into in my conclusions<sup>36</sup>.

#### 4. EVIDENCE OF . . . COMMUNAL JUDICIAL JUSTICE

The sources on justice in the first half of the 12th century reveal some recurring problems that we might call 'structural' in nature. As such, they were surely the subject of debate at all levels, meaning from a political perspective but also from a more scientific or doctrinal perspective. I shall look at four of them.

The first is the problem of denial of justice. In 1158, Frederick Barbarossa inflicted serious punishments on imperial judges who were guilty of such conduct. Once the cities were recognized as having *iurisdictio*, the same problem would present itself again with city judges. Even the oldest *ordines iudicarii* (for example, see the one known as *Olim*, of Italian origin—Mantua or Piacenza—and written after 1177; it was widespread in France and in Anglo-Norman territory) already listed all of the procedures that a judge was to undertake on behalf of a plaintiff, under the title *de officio iudicis ante litem contestatam*. Such procedures were to be followed even if the defendant did not appear in court<sup>37</sup>.

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*pro fine accipimus. Que si sint impetu ire vel delusorie vel fraude vel metus causa vel aliter contrausum civitatis, eas nil valere constituimus*".

<sup>35</sup> C. 2, 3 *De pactis*; C. 2, 55 *De receptis arbitris*; D. 2, 14 *De pactis*, Justiniani Novellae (y. 539) 82, 11, 1 *Et quia cognovimus* (STORTI, C., *Intorno ai Costituti Pisani della legge e dell'uso (secolo XII)*, Napoli, GISEM-Liguori editore, 1998, p. 106 and see also SCHMITT-GAEDKE, G., *Die Constituta legis et usus von Pisa (1160): Gesetzbuch im Kosmos hochmittelalterlicher Rechtsgelehrtheit*, Berlin 2009).

<sup>36</sup> *Constitutum usus* (n. 7), *De arbitris et laudatoribus* VI, p. 162. Some remarks in STORTI, *Intorno ai Costituti Pisani* (n. 36), pp. 99-108.

<sup>37</sup> OTHONIS PAPIENSIS, *Ordo iudiciarius qui dicitur 'Olim'*, Augustae Taurinorum 1967 (*Corpus glossatorum iuris civilis*, 4, repr. Moguntiae 1536), *De officio iudicis ante litem contestatam*, caput

The second is the problem of conflict of jurisdiction, which could lead to uncertainty as to who was the competent judge. In more fluid times these were conflicts between sovereign powers (Church and State) or between the Empire and cities. For example, up until the Peace of Reggio (1185) between Frederick Barbarossa and Milan, any citizen could appeal to the imperial court against sentences handed down by local judges<sup>38</sup>. Furthermore, the reforms introduced by Charlemagne and his successors (Louis the Pious) had reaffirmed the principle by which secular and ecclesiastical jurisdictions worked in ‘cooperation’<sup>39</sup>, and the effects of this continued to have significant consequences in terms of conflict of jurisdiction. The oldest *ordines iudicarii* refrained from taking a stance on—or even attempting to resolve—the problem of conflict between episcopal jurisdiction and city jurisdiction. Indeed, such conflict persisted into the late Middle Ages, above all as concerned matters that lay ‘on the border’ between civil and canon law such as credit and usury (for an interesting example, see Roberta Mucciarelli’s study of Siena)<sup>40</sup>. This was not the case with *Lo Codi*, a Provençal *summa* of the first nine books of Justinian’s Code which appeared between 1158 and 1162, and which immediately spread beyond its original territorial limits, thanks in part to its

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V, pp. 10-11. FOWLER-MAGERL, L., *Ordo iudiciorum vel ordo iudiciarius. Begriff und Literaturgattung*, Frankfurt am Main 1984 (Ius Commune. Sonderhefte 19), pp. 73-80, in part. p. 77; EAD., *Ordines iudicarii and libelli de ordine iudiciorum (from the middle of the twelfth to the end of the fifteenth century)*, Turnout-Belgium, 1994, pp. 112-113 e 118); LOSCHIAVO, L., «Ottone da Pavia (Pavia, XII sec.)», in *Dizionario Biografico dei Giuristi Italiani*, BIROCCHI, I., CORTESE, E., MATTONE, A., MILETTI, M. N. (edd.) (= DBGI), Bologna 2013, vol. II, p. 474.

<sup>38</sup> *Conventio cum Mediolanensibus*, 1185 Feb. 11, in M.G.H., *Legum sectio IV, Constitutiones et acta publica Imperatorum et Regum*, t. I, Hannoverae 1893, WEILAND, L., (ed.), n. 303, pp. 438-431 and in 1185 Feb. 11, apud Regium (*Gli atti del Comune di Milano fino all'anno 1216*, Manaresi C. (Ed.), Milano 1919, nr. 148, pp. 216-220). According to the 1183 Peace of Constance between Emperor Frederick I and the Lombard communes, the petition of appeal was a prerogative of the emperor’s court (Pax Constantienis, 1183 iun. 25 – nov. 22, nr. 293-295 in M.G.H., *Constitutiones*, t. I, pp. 408-418, § 10, p. 413; 1183 giugno 25 Constantiae, in *Gli atti del Comune*, nr. 139, §10, p. 200).

<sup>39</sup> PADOA SCHIOPPA, A. «Sulla giustizia ecclesiastica in età carolingia: i capitolari» (n. 25), in part. pp. 50 ss. and p. 76.

<sup>40</sup> MUCCIARELLI, R., *La costruzione del dominio cittadino sulle campagne. Italia centro-settentrionale, secoli 12.-14.*, Siena 2009; EAD., «Storie di debiti e di conflitti: tra procedure di giustizia e prassi politica (Siena fra XIII e XIV secolo. Prime note)», in *Tra storia e diritto. Giustizia laica e giustizia ecclesiastica dal medioevo all’età moderna. Convegno internazionale*, Milano 16-17 novembre 2017.



translation into Latin by Riccardo Pisano. This work made a clear distinction between civil justice and episcopal justice: any members of the laity could turn to a bishop in order to settle their disputes, but such a resolution would not take on a judicial form, so to speak. This represented a strict interpretation of the principle established in C. 1,4,8 (*De episcopali audientia, l. Episcopale iudicium*), whereby the decisions of bishops fell under the broad category of arbitral decisions; furthermore, such decisions could only concern civil matters. If bishops were asked to rule on criminal matters, they were required to refer the case to the city authority (*ad potestatem civitatis*), which was to decide without delay (*sine prolongamento*)<sup>41</sup>. The city statutes reaffirmed this principle, though at the same time they did not exclude that criminal proceedings could be of both a judicial and extrajudicial nature. This was partly due to the influence of Roman law at that point, and even applied to more serious crimes<sup>42</sup>.

The third problem was that of guaranteeing impartial judges. This was an essential condition in order to obtain public consensus on the administration of justice. The phases and duration of the procedure had to be precisely defined and strictly adhered to (think of the innumerable statutory and doctrinal provisions on deferment)<sup>43</sup>—this would not only ensure that the decision was based on the truth,

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<sup>41</sup> *Lo codici: Eine Summa Codicis in Provenzalischer Sprache aus der Mitte des XII. Jahrhunderts*, FITTING, H., SUCHIER H., (edd.), ed. *Fitting, Halle 1906, Lib.I, III De episcopali audientia et de potestate quam habet super clericos*, p. 6: “Eodem modo si duo homines [laymen] habent placitum, episcopus potest esse iudex inter eos, si ipsi volunt: sed non potest fieri appellatio a sententia ipsius\*. Hoc est verum quod potest iudicare inter alios homines, si placito est de avere aut de possessione: set si est de crimine, non potest hoc facere il vescovo deve anche inviare i clerici per tutte le questioni che non può decidere, come quelle nascenti da reato ad potestatem civitatis”. (GOURON, A., *La science juridique française aux XI et XII siècles: diffusion du droit de Justinien et influences canoniques jusqu'à Gratien*, Milan 1978, pp. 92-93; ID., «Du nouveau sur le Codi» (1975), in *La science du droit dans le midi de la France au Moyen Age*, London 1984, VIII; FIORELLI, P., *Intorno alle parole del diritto*, Milano 2008 (Per la storia del pensiero giuridico moderno, 69), p. 12. C. 1,4,8: According to the 408 Constitution of Arcadius, Onorius and Teodosius “Episcopale iudicium sit rato omnibus, qui se a sacerdotibus audiri elegerint, eamque eorum iudicationi adhibendam esse reverentiam quam vestris referre necesse est potestatibus, a quibus non licet provocare. per iudicium quoque officia, ne sit cassa episcopalis cognitio, definitioni exsecutio tribuatur”.

<sup>42</sup> OTHONIS PAPIENSIS, *Ordo iudicarius qui dicitur 'Olim'* (nt. 37), *De transactionibus*, caput XVI, p. 20 (“[...] transactio de re dubia et lite incerta [...]”).

<sup>43</sup> OTHONIS PAPIENSIS, *Ordo iudicarius qui dicitur 'Olim'* (nt. 37), *De dilationibus* caput XXI, pp. 24-25.

but also ensure (to borrow the words of a *summa* from 1186 on the *Decretum Gratiani*) “nichil reprehensione dignum fiet a iudicante”<sup>44</sup>. There was also an attempt to assert the principle of equality of arms as pronounced in D. 50, 17, 41 (*Aequalitas servanda est in iudiciis - non debet licere actori quod reo non permittitur*)<sup>45</sup>.

Lastly, there was the problem of uncertainty of the law. Indeed, judges were sensitive to different issues and had different educations (*ex diversitate scientie atque intellectus* wrote the Pisan *sapientes* in their musings on customs)<sup>46</sup>, leading to different interpretations and thus a variety of potential applications of a norm or similar norms. Furthermore, uncertainty arose in choosing the source of law to be applied to a given case. It was no accident that the oldest statutes established differences between the ‘rituals’ of public justice and those of arbitral justice: judges and arbitrators were in fact ‘invested’ with different powers, and thus the effects of a judge’s sentence were different from those of an arbitrator’s award; what’s more, there were also different limitations imposed on judges and arbitrators in terms of the applicable sources of law. Only arbitrators had the possibility of handing down decisions not based on the literal text of the *lex* or of the *usus*, but on the *rationes* underlying the *lex* and *usus* or *aequitas*, provided they were not contrary to the general principles of Pisa’s ‘constitution’ (“*que contra nostrum constitutionem non sunt*”)<sup>47</sup>. In any case, an attempt was made to arrive at a more precise definition (I am thinking again of the *Constitutum* of Pisa) of the maximum or minimum margin of flexibility that judges had when interpreting the ‘law’<sup>48</sup>.

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<sup>44</sup> *Summa* “*Omnis qui iuste iudicat*” sive *lipsiensis*, in *Monumenta iuris canonici*, S. A, Corpus glossatorum vol. 7, I, LANDAU, P., KOZUR, W., MIETHANES-VENT, K., Città del Vaticano 2014, Vorwort, pp. IX-XI.

<sup>45</sup> Cfr. STORTI, C., «“*Aequalitas servanda est in iudiciis*”. Il principio dell’uguaglianza delle parti nel processo del diritto comune classico», in *Rivista internazionale dei diritti dell’uomo*, 5(1991), pp. 58-81 in part. pp. 78-79.

<sup>46</sup> *Constitutum usus* (n. 7), p. 129: “[...] *ex diversitate scientiae atque intellectus, per diversa tempora eadem negotia atque similia aliter alii et omnino econtra quam alii iudicaverunt* [...]”.

<sup>47</sup> See the combined provisions of *Constitutum usus* (n. 7), *De arbitris et laudatoribus* VI, p. 162 and *De modo cognoscendi et iudicandi* XI, § *Omnis sententia ab arbitris*, p. 176.

<sup>48</sup> STORTI, *Intorno ai Costituti Pisani* (n. 36), pp. 38-44.

5. “IN THE MENTALITY AND IN THE SYSTEM OF THAT WORLD”<sup>49</sup>: THE ROMAN GROUND OF THE *ORDINES IUDICIARII*.

*Placita* such as the one held in Marturi had demonstrated how exceptions to the law in force could be accepted in the halls of justice when they were rooted in Roman-law texts.

The first attempt to bring about substantial justice reform through law was made by studying Roman actions<sup>50</sup>. After all, Ralph Niger, English master of the liberal arts in Paris, had maintained in his *Moralia regum* (1179-1189) that those very actions would have made it possible to eliminate the poor judicial procedures present in most parts of the world (*pravo rito iudiciorum in plerisque partibus terrarum*)<sup>51</sup>. Jurists first had to move past the literal interpretation of the Roman-law definition of ‘judgement’ as *actus trium personarum*, which reduced the meaning of judgement to *actio*; once they accomplished that, they went on to study judicial process as a complex procedure that was carried out before a judge<sup>52</sup>.

The emergence of *ordines iudicarii* and *ordines iudiciorum* as a literary genre went hand in hand with the emergence of self-governing cities. The authors of the *ordines* were prestigious figures in the academic world and in the practice of law, and their colleagues beseeched them to develop a set of essential tools to use in the everyday practice of law: as Roffredus put it, to safely steer the ship to port<sup>53</sup>.

Those *ordines* were continually updated by different authors, and indeed it is often difficult to attribute authorship to the older versions. In any case, they enjoyed widespread circulation, as attested by the many manuscripts that survived to the present day; we must bear in mind, however, that these authors were at least partially

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<sup>49</sup> NICOLAJ, «Formulari e nuovo formalismo» (n. 8), p. 358.

<sup>50</sup> See also for bibliographical references CORTESE, *Il diritto nella storia medievale* (cit. n. 10), II, pp. 116 ss.

<sup>51</sup> CORTESE, *Il diritto nella storia medievale* (cit. n. 10), II, p. 117 e p. 34 nt. 73.

<sup>52</sup> ROFFREDI BENEVENTANI, *Libelli iuris civilis*, Augustae Taurinorum 1968 (Corpus glossatorum iurisi civilis, 6, 1, reprint Dominicus Anselmus Avinionensis 1500), pars I, rubrica *quid sit iudicium*, p. 3.

<sup>53</sup> Ibidem, Incipit *Si considerarem ingenium*.

influenced by the characteristics of the local judicial practices. For example, in some cities, during the *de edendo* phase, the plaintiff was not required to indicate the *nomen* of the action he intended on proposing, but only the *petitum*<sup>54</sup>. Furthermore, efforts were made to frame ‘Lombard’ cases heard in and out of court within the Roman categories of *actiones*<sup>55</sup>. Indeed, Lombard-law concepts could be found in the above-mentioned *libelli iuris civilis* of such luminaries as Roffredus Beneventanus (1170-1243), an ‘itinerant’ historical figure who taught in Bologna, Rome and Naples, and who was appointed as judge of Benevento in 1222 by Honorius III<sup>56</sup>. Besides his *libelli iuris civilis* and *iuris canonici*, he also wrote a treatise on dueling (*de pugna*), wherein he stressed “*de iure Longobardorum*” the need to guarantee the utmost impartiality on the part of the judge, even in such an

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<sup>54</sup> “*Queritur an in libello de edenda actio etiam nomine actionis expresso? Et prudentissima Pisanorum civitas, inter cetera quae apienter disposuit et observant, secundum quod accipi, nomen actionis in libello exprimere constituit. Et merito, ut non liceat actori devagari vel obscuram petitionem facere, cum lex ipsa dicat eum cogendum fore, actionem eligere [D. 14,4,9,1; D. 31,76,8]. Hoc tamen intelligendum est, ubi non actor dubitet et vacillet super facti varietate [D. 43,3,1,4]. Dominus vero Placentinus in libello actionem edendam dicebat, et hoc ipso actionem proponi. Quod causa fuisset expressa [...]*” (JOANNES BASSIANUS, *Die Summa “Quicumque vult”*, WHARMUND, L.(ed.), Innsbruck 1925, reprint 1962 (*Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, B. IV, H. II), pp. 5-6 (and see FOWLER-MAGERL, *Ordines iudicarii and libelli de ordine iudiciorum* (n. 37), pp. 37-38, 63-64). “*Sed quidam ut sunt Pisani et alii, firmiter tenent et observant, quod actor semper nomen actionis expressim in libello scribat et inserat. Et hoc obtinet fere inter omnes, quod vel scribat actor in libello vel dicat postea iudici, ut scribat, et iudex scribit. Et merito, ut non liceat actori devagari vel obscuram petitionem facere, maxime cum cautum reperiatu actorem cogendum esse, actionem eligere [D. 14,4,9,1; D. 31,76,8]. Sed hoc verum esse credo, quando actor non dubitat nec vacillat super facto; secus, si dubitaret de facto adversarii [D. 43,3,1]. Sed et alio modo potest quis edere [...]*” (Der Ordo “*Invocato Christi nomine*”, WHARMUND, L. (ed.), Heidelberg 1931 (*Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, B. V, H. I), *Pars I, De edenda actione*, pp. 14-15 and also in PILLII, TANCREDI, GRATIAE, *Libri de iudiciorum ordine*, ed. BERGMANN, F., Gottingae 1842, pp. 11-12 (FOWLER-MAGERL, *Ordines iudicarii and libelli de ordine iudiciorum* (n. 37), p. 65). See also: *Lo Codi* (n. 41), L. II, 1 *De edendo*, p. 9: “[...] qua actione vult eum vocare ad causam [...]” and with regard to the XIIth century *Constitututa* of Pisa: STORTI, *Intorno ai Costituti Pisani* (n. 37), p. 5.

<sup>55</sup> NICOLAJ, G., *Cultura e prassi di notai preirneriani. Alle origini del Rinascimento giuridico*, Milano 1991, pp. 83-84 e 89 ss.; NICOLAJ, «Formulari e nuovo formalismo» (n. 8), pp. 348-349 and n. 6.

<sup>56</sup> FOWLER-MAGERL, *Ordines iudicarii and libelli de ordine iudiciorum* (n. 37), pp. 52, 82, 85, 11-116; CORTESE, E., «Roffredo Epifani da Benevento (Benevento, 1170 ca. – ivi post 1243)», in DBGI (n. 37), vol. II, pp. 1712-1715 e cfr. anche MASSETTO, G. P., «Gli studi del diritto nella Lombardia dell’XI secolo», in *Lanfranco da Pavia e l’Europa del secolo XI nel IX centenario della morte (1089-1989)*, Roma 1991, pp. 61-116 and in ID., *Scritti di Storia Giuridica*, Milano 2017, vol. I, pp. 85-142, in part. pp. 87-88.

‘irrational’ procedure to resolve disputes (indeed, the judge was to provide the duelists with identical weapons and shields)<sup>57</sup>.

The *ordines* represented different interpretations of the judicial process, which itself was undergoing progressive refinement thanks to the evolution of canon law and its approach to the matter, among other factors. As these changes were occurring, the different phases of the process were also becoming more clearly defined, as were the obligations of judges in each phase. Indeed, all of this was necessary for the very survival of communal governments, which depended on winning the trust and approval of the confrontational medieval communities in their territory. Thus, the predictability of the judicial process was not merely a question of formalism, but rather a guarantee of substantive justice. Namely, it helped reduce arbitrary acts and thus the risk of bias in judges, who were the on the front lines, so to speak: after all, they represented citizens’ first contact with the government.

It is therefore no surprise that the *ordines* also showed a tendency to strengthen the powers of judges, above all to prevent parties from resorting to pretexts or delaying tactics. Around the middle of the 12th century, the above-mentioned Provençal *summa*, *Lo Codi*, outlined formulas to use in the initial phase of the judicial process (what Roman law called *de edendo*) which were no different in structural terms than those in use in Italian territory as described in the *Liber papiensis*<sup>58</sup>; however, it commented on only one passage from the title *de edendo* in Justinian’s *Codex*, namely that which gave the judge the power to force the parties to present all documents that could contribute to an immediate resolution of the dispute. This meant that even if the defendant was the only person who possessed

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<sup>57</sup> ROFREDI BENEVENTANI, *Summula de pugna*, PATETTA, F. (ed.), GAUDENZI, A. (ed.), (Bibliotheca Iuridica Medii Aevi, Scripta anecdota antiquissimorum glossatorum, 2), Bologna 1892, reprint Torino 1962, pp. 74-83, in part. VIII *Quae arma sunt a legibus et per consuetudinem in pugna concessa*, p. 83.

<sup>58</sup> *Lo Codi* (n. 41), L. II, I *De edendo*, p. 9: “Tu, Geralde, debes mich [...]”.

certain documentation, the judge could force him to present it if it formed the basis of the plaintiff's claim<sup>59</sup>.

## 6. POSITIONES AND SOME CONCLUDING REMARKS

One of the big additions to the judicial process not rooted in Roman law was the emergence of *positiones* in the *ordines iudiciorum*. To borrow the words of one of the greatest experts on procedural works in the communal era, these *positiones* constituted “a new form of interrogation”<sup>60</sup>. Naturally, the expression “a new form of interrogation” cannot help but be compared to the *interrogationes* in the Digest. The latter only regarded disputes having to do with property or succession and they were found between the *editio actionis* (*de edendo*) and the trial proper (*litis contestatio*). As pointed out by the uncertain author of the *Tractatus singularissimus positionum*—perhaps Roffredo Beventano—the name *positio* derived from “*ex usu hominum*”<sup>61</sup>; and according to the uncertain author of another treatise entitled *de positionibus*, published under the name of Martino da Fano, the use of *positiones* was due to the *consuetudo causarum*, given that there was no trace of it in either the Roman or the canonical *ius scriptum*<sup>62</sup>.

Thus, according to the *consuetudo causarum*, each party could propose the *positiones* before taking the calumny oath, and thus before the *litis contestatio*; the subject of the interrogations (*positiones*) could be anything that concerned the

<sup>59</sup> *Lo Codi* (n. 41), L. II, I *De edendo*, p. 9: “*et ille qui comendavit pecuniam perdidit cartulas suas que erant in domo et ipsa est combusta, id est arsa, vel perdidit alia iusta causa: iudex debet precipere, ut reus ostendat cartulas quas habet*”.

<sup>60</sup> FOWLER-MAGERL, *Ordines iudicarii and libelli de ordine iudiciorum* (n. 37), pp. 46-47.

<sup>61</sup> The *Tractatus singularissimus Positionum* was published under the name of ODOFREDUS BENEVENTAUS, in *Tractatus ex variis interpretibus collectorum*, Lugduni 1549, f. 181 rv, especially f. 181r, 1-6, reproduced in *Corpus Glossatorum iuris civilis* 5, 5, Torino 1970, and regarding the authorship of the treatise, see: NICOLINI, U., *Trattati «de positionibus»*, pp. 21-22; PADOA SCHIOPPA, A., «Giustizia civile e notariato nel primo Duecento comunale: il caso di Savona», in *Studi medievali*, III, 55 (2013) and in ID., *Giustizia medievale italiana* (n. 3), pp. 375-398, in part. pp. 384-386; CORTESE, «Roffredo Epifani da Benevento» (n. 56), p. 1713.

<sup>62</sup> (MARTINO DA FANO), *Tractatus positionum* in NICOLINI, U., *Trattati «de positionibus» attribuiti a Martino da Fano in un codice sconosciuto dell'Archiginnasio di Bologna (B 2794, 2795)*, Milano 1935, pp. 22-23, and the transcription of the text of the treatise at pp. 67-78. SEMERARO, M., «Martino del Cassero da Fano (Fano ca. 1190 – Bologna? post 1272)», in *DBGI*, pp. 1291-1292

*petitum*, the *causa petendi*, procedural issues such as why the defendant had not appeared before the judge or why a delay had been requested, or any other information on the subject or nature of the dispute that was relevant in order to ascertain the true facts and the true nature of the legal relationship between the parties.

Evidence of *positiones* before the *litis contestatio* can perhaps be found in Pisa's *consitutum usus*<sup>63</sup> and first and foremost in notarial documents, as notaries assisted judges in the writing down of procedural records between the end of the 12th century and the beginning of the 13th century<sup>64</sup>. The first appearance of a 'theory' of *positiones* in procedural treatises can be dated to approximately 1216, which is the year in which Tancred of Bologna most likely wrote his *ordo Assiduis petitionibus* following the 'model' of the *Ordo Invocato Christi nomine*<sup>65</sup>.

This very topic of *positiones* raises what still remains an open question, which we might reflect upon as a way to conclude this analysis.

Indeed, a look at the structure and substance of the *positiones* reveals that they helped lend a markedly adversarial structure to the initial phase of proceedings, similar to what we today might call a cross-examination. While it was a phase that occurred before the judge *in iure*—in accordance with the *ordines*—it nonetheless took place prior to the phase *in iudicio*, meaning before the trial proper had actually begun with the *litis contestatio*. Upon closer inspection, *positiones* and *oppositiones* were also constituent elements of the *brocarda* as a literary form.

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<sup>63</sup> *Constitutum usus* (n. 7), *De placito incipiendo VIII* "Actore vel alio qui pro eo agere potest ante iudicem per se vel per suum advocatum per placitum id concedente confitendo vel negante vel in dubium revocante vel excipiente, causa excepta vel tractata habeatur. Aliter autem pro incepta non teneatur nec antequam incipiatur sacramentum calumpnie ab aliqua partium petatur" (p. 164).

<sup>64</sup> *Il cartulario del notaio Martino (Savona, 1203-1206)*, PUNCUH, D. (ED.), Genova, 1974; for bibliographical references, see: PADOA SCHIOPPA, "Giustizia civile e notariato nel primo Duecento comunale" (n. 61), pp. 375-398, in part. pp. 381-384.

<sup>65</sup> FOWLER-MAGERL, *Ordo iudiciorum vel ordo iudiciarius* (n. 37), pp. 119-122 (on *Invocato Christi nomine*) and pp. 128-130 (on *Assiduis*); EAD., *Ordines iudicarii and libelli de ordine iudiciorum* (n. 37), pp. 11, 46-47 and p. 68.

The *positiones* represented a tool by which both parties involved in the judicial process could ‘interrogate’ each other quite extensively but also in a quite ‘simple’ way<sup>66</sup>. This meant that they could verify whether they would actually be able to demonstrate the validity of their claims, or whether they could resist the claims of the counterparty. They could also measure the strength and effectiveness of the means at their disposal (documents, witnesses, knowledge of facts, etc.) and offset the lack of evidence so as to engage with and oppose the counterparty in practical terms. The advantages for the parties were enormous, in particular for the plaintiff (“*ut relevetur actor ab onere probandi per confessionem adversarii*”)<sup>67</sup>, but also when there was no evidence or the evidence was insufficient to support their claim or their defense<sup>68</sup>.

Thus, the parties could sharpen their weapons, verify their own limits and ascertain the weak points of the counterparty. They could understand from the counterparty’s answers if and to what extent he would have been able to go on the offensive or defend himself (in this regard, it is interesting to examine the interpretations of the meaning of the word *credere* when those of Lombard nationality used it to answer the *positiones*)<sup>69</sup>. They could decide on what strategy to

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<sup>66</sup> ROFREDUS BENEVENTANUS, *De positionibus* (n. 61), f. 181r, nr. 4: “*Quarto item interrogationes differunt a positionibus, alias positiones differunt ab interrogationibus non essentia sed forma. Nam simpliciter et assertive ponitur quod olim cum solemnitate interrogabatur [D. 11 De interrogatonibus, l. 1 Totiens]*”.

<sup>67</sup> PADOA SCHIOPPA, A., «Giustizia civile e notariato» 8n. 67), p. 386-389; CONTE, E., «Consuetudine, Coutume, Gewonheit and Ius Commune. An Introduction», in *Rechtsgeschicht., Legal History*, 24(2016), pp. 234-243, in part. 241-242.

<sup>68</sup> ROFREDUS BENEVENTANUS, *De positionibus* (n. 61), f. 181r, nr. 3 “*Tertio fient autem positiones ut relevetur actor ab onere probandi per confessionem adversarii, cui onus probandi incumbit, nac hoc etiam faciebant interrogationes (D. 11 De interrogatonibus, l. 3 Quia and 4 Voluit)*”; and f. 181v, nr. 14-15: “[...] *quia cum iam diximus positionum usus inventus est ad relevandum actorem ab onere probandi per confessionem [...]. Tamen quia invente sunt positiones ad probandum per confessionem, quod magis necessaria est in negativis, que per testes vel instrumenta probari non possunt, et ad hoc precipue invente sunt interrogationes etiam in iure faciende, scilicet ut fiant probationes ex eis, presertim in illis casibus in quibus aliter fieri non possunt probationes, nisi per confessionem adversarii sint fiende quam affirmative, et hoc videtur equitas suadere ne facultas probationum angustetur [...]*”.

<sup>69</sup> (MARTINO DA FANO), *Tractatus positionum* (n. 61), p. 71: “*Et intellige quod posicio fit aperte in hec verba consueta vel similia «ego pono per sacramentum meum quod ita fecisti, responde per sacramentum tuum quod scis vel credis*”. Et credo quod domini lombardi scienter deierant; et est lombardorum cautela talis, quia, cum interrogatur, ipsi respondent: “non credo” ubi ipsi sciunt pro



adopt during the trial proper (and also, for example, the type of action to undertake when local law permitted them to postpone such choice until the *litis contestatio*). And lastly, they could identify the best witnesses to call in order to ascertain the truth, in the event that the parties ended up going to trial.

This was the very purpose of the *positiones*: while it was absolutely necessary to appeal to a judge in order not to lose a right or claim, once this had been done, there was still time up until the *litis contestatio* to decide whether or not to go to trial. Perhaps, on the contrary, the parties could renounce the judicial process and attempt to settle out of court through the various forms of arbitration that were provided for by law. And even if the judge did not advise the parties to pursue such a solution, the parties themselves might decide to pursue an extrajudicial agreement if they realized that it would be very difficult to ascertain the truth in their dispute.

As Azzone put it: “[...] *meticulosa res est ire ad iudicium* [...]”<sup>70</sup>.

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certo, quasi excusentur per hoc quod, proprie loquendo, aliud est credere quam scire; sed certe in his non refert (p. 71) inter credulitatem et scientiam quoad partes, licet sit differentia quoad testes, unde lex que loquitur in sacramento calumpnie, per quod fiunt positiones, idem appellat scientiam et credulitatem ut *C. iureiurando ca. l. 2 § sin autem vel dignitas* (C. 2, 59, 2, 29) Unde patet ut dixi quod non est differentia inter credulitatem et scientiam. Et attende quod dicitur lege illa (C. 2, 59, 2, 29): “credit et existimat hoc esse iurandum”, nam licet verbum “credendi” possit secundum primam significationem intelligi, verbum tamen “existimat” generale est ad credulitatem et scientiam; tu tamen ut evites et declines lombardicam et adversarii cautelam interroga de utroque scilicet de credulitate et scientia hoc modo: “*quid credis vel scis de hoc quod ego pono?*” sicut invenis quod clerici iurant “*de hiis que sciunt vel credunt*» in sua ecclesia reformanda” (X de accusat., Qualiter, in fine [X, 5, 1, 17]). Sed ut predixi, aliud est in teste credulitas quam scientia, et probatur *X de testibus cum causam* [X 2, 20,37]. On the interpretation of the term “*dubito*”, see also (Odofredus), *Brevis et utilis tractatus iudiciorum in causis civilibus*, in *Tractatus ex variis interpretibus collectorum* n. 61), ff. 11r-12v, in part. f.f. 11v-12r, nr. 28-30: “*Si autem [reus] dubitat, datur ei tempus ad deliberandum, nisi esset suspecta persona ad malignandum [...]. Quidam tamen iudices minus periti consueverunt partem interrogatam compellere respondere credit vel non credit [...]. Sed ipsi errant cum inter hoc sit medium [...]. Cautior debet esse actor ne in suis positionibus tuatur coninctione copulativa, nam poterit si altera pars sit falsa tota negari [...]*”.

<sup>70</sup> AZZONE, *Summa super codicem*, VIORA, M. (ed.), Augustae Taurinorum 1966 (Corpus glossatorum iuris civilis 11), Super C. 1, 2, 3 *De pactis*, p. 23a “*Supra de in ius vocando et de editione actionum que sunt quasi prelude iudiciorum expositum est unde consequenter de iudiciis esset tractandum. Sed quia vocati ad iudicium sepe transigant. Nam meticulosa res est ire ad iudicium. Idcirco videndum esset de transactione et quia non tantum pecunia sed etiam gratia quis a lite sepe desistit. Et decentius est per gratiam remittere quam pecunia vendere actionem vel quia pacta generaliora sunt, ideo videamus de pactis primo*”; and see PARINI VINCENTI, S., *Transactionis causa. Studi sulla transazione civile dal tardo diritto comune ai codici*, Milano 2011.

Thus, on the one hand, we could affirm that, thanks to the *positiones*, the parties were able to carefully decide whether to go on with judicial procedures, do nothing (i.e. waive any claim), or pursue their interests through arbitration or other legal means of settlement of their disputes<sup>71</sup>. On the other hand, medieval governments were also interested in allowing these procedures: indeed, while one of their fundamental goals was certainly to ensure judicial justice and to ascertain the truth<sup>72</sup>, they also placed just as much importance on re-establishing peace through negotiation and avoiding malicious litigation which might slow down the course of justice<sup>73</sup>.

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<sup>71</sup> WICKHAM, CR., «Justice in the Kingdom of Italy in the Eleventh Century», in *La giustizia nell'alto medioevo (secoli IX-XI)*, (n. xx), pp. 179-250, in part. pp. 240-250; VALLERANI, *La giustizia pubblica medievale* (n. 3), pp. 23-34.

<sup>72</sup> *Constitutum usus* (n. 7), *De placito incipiendo* VIII: “[...] *Caveant etiam previsoires et omnes alii iudices per se vel per suos officiales ne a se nec ab aliquo alio in actis suis publicis aliquid contra veritatem scribatur. Qui enim in eis falsitatem aliquam studiose scripserit vel scribatur consenserit, infamia notatur, ut falsarius puniatur*” (p. 165).

<sup>73</sup> And as we have already seen with regard to Pisa's 12th-century *Constitutum* (see passages above corresponding to footnotes 35-36), medieval governments were even willing to grant control over settlements to public judges if necessary.

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