The legal ordering of the medieval international

Julia Costa Lopez, Pembroke College

Thesis submitted in partial fulfilment of the requirements for the degree of DPhil in International Relations in the Department of Politics and International Relations at the University of Oxford

January 2016

Word count: 98.142

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ABSTRACT

Although International Relations scholars make frequent reference to the Middle Ages, most of our ideas about the period are not based on extensive empirical studies. Instead, they rely on a common imaginary of Medieval Europe as an unspecified and idealised system of overlapping authority and multiple loyalties. This thesis recovers a historical understanding of the late-medieval international order by focusing on the fundamental conceptions of the organization of the social held by medieval international practitioners. In particular, it examines a specific community of practice: lawyers of the *ius commune* from the twelfth to the fourteenth centuries.

In doing so, this thesis makes three contributions to the IR literature. From a theoretical point of view, it adds to both English School and constructivist studies of historical international order by focusing on the process of differentiation through representation, as well as on contestation within it. In doing so, it argues for a move from a static understanding of order to the more dynamic notion of *ordering*. Secondly, it contributes methodologically to the historical study of ideas by proposing a methodological emphasis on communities of practitioners as a middle-ground between abstract constructivism and narrow Skinnerian analysis that facilitates the historically grounded consideration of the ordering role of language and ideas. Finally, empirically, this thesis demonstrates the analytical leverage gained from these theoretical moves by providing a detailed account of the international order from the twelfth to the fourteenth centuries, focusing not only on stability, but also on the contentious process of ordering. As a result, this thesis provides a new understanding of late-medieval notions of political authority, community, polity, and identity, while simultaneously highlighting the politics of representation behind them.

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Acknowledgements

I have incurred many debts in the process of writing this thesis. First and foremost among these is that owed to my supervisor Eddie Keene. He is without any doubt the person from whom I have learned the most since I came to Oxford. His ability to see the forest where I could only see the trees has been crucial for the completion of this thesis, and his kindness, careful advice, and dedication to supervision have not only been a model of what a supervisor should be like, but have truly made the process enjoyable. It has been an honour to be his student.

Karma Nabulsi, Andrew Hurrell, Kalypso Nicolaidis, Jan Zielonka, and Todd Hall all kindly read early drafts of some of these chapters, and their comments were crucial to take the project forward. Xavier Guillaume and Benjamin de Carvalho took their time to read on drafts of the initial chapters, and their insightful comments and dedication greatly helped improve it. Magnus Ryan was incredibly generous with his time and helped me make sense of the intricacies of Roman Law.

I am also grateful to my International Relations professors at Universitat Pompeu Fabra, Caterina García, Pablo Pareja, and Josep Ibañez. Not only did they introduce me to IR during my undergraduate studies, but they were instrumental in my decision to pursue graduate studies in the discipline. It is only thanks to their encouragement and support that I was able to come to the UK for both masters and doctoral studies.

I would also like to express my thanks to the La Caixa Foundation, the Department of Politics and International Relations, and Pembroke College, whose financial support has been essential to this project.

I have greatly learned from and enjoyed the company of my fellow doctoral students at Oxford. 'Team Eddie' - Quentin Bruneau, Arthur Learoyd, and Tomas Wallenius – have not only been an invaluable source of intellectual support, but also of friendship. I am also fortunate enough to have made close friends in my year group: Kate Millar, Ellen Ravndal, and James Hollway deserve a particular mention. As fellow travellers, their friendship, all the pub visits, movie nights, lunchtime chats at the DPIR, and ultimately over-commitment to each other's projects have made the whole process bearable. Thank you.

David Martí has been my polisci partner in crime since our time at university. Through innumerable Facebook conversations attempting to fix the world, he has kept me company throughout the process. I also want to thank my friends from back home –now scattered throughout the globe – Alba, Elena, Cristina, Silvia, Mireia, Amaya, Albert, and Ignasi. After over six years of living abroad they have made efforts to come visit wherever I was, enduring at times ungodly hours and complicated trips. Most

importantly, however, and despite the fact that as the DPhil progressed my visits to Barcelona became more infrequent, they have always made me feel at home.

My partner Mike has been an unwavering source of support throughout the process, both personally and intellectually, and it is no exaggeration to say that this thesis would not exist without him. He has directly had to endure the writing of each of the chapters of this thesis, and his willingness to make me laugh, his constant care for my well-being, and his ability to always find the good little things in life have been everything that I could hope for in a partner.

Most of all, however, I am grateful to my family. My sister Laura has been a constant source of strength in my life for the past 25 years and in the middle of the busy life of a young engineer she has always found the time to share moments with me and cheer me up. My parents Oscar and Elvira have helped in more ways and to a greater extent than I am able to put here into words. They have both enjoyed the good moments and suffered with me throughout the process of writing this thesis. Indeed, my father is one of the handful of people that will ever read every single word in this work. Most importantly, for my entire life they have encouraged me to be curious and to be interested in the world. This unconditional love and support from my parents and sister is without any doubt what has enabled me to complete this thesis, and so it is but a small token of my appreciation that I dedicate it to them.

Chapter 1. International Relations in the Middle Ages

International Relations (IR)[1] scholars make frequent reference to the Middle Ages. Often a shorthand for the idea of complexity, the 'medieval international' is evoked as an example of relations not governed by the principles of sovereignty and territoriality, of a moment in which identity transcended political structures and was predicated on the idea of a common religion, and of a situation in which the political loyalty of the peoples populating Europe was not channelled through the unity of the Nation-State but was unevenly distributed throughout a network of lord-vassal relations. Most of our ideas about medieval international relations, however, are not based on extensive studies on the period but rather rely on this common imaginary of Medieval Europe as an unspecified and idealised system of 'overlapping authority and multiple loyalties.'[2]

The main goal of this thesis is to recover a historical understanding of the late-medieval international order. It argues that this can only be done by focusing on the intersubjective understandings and categories that constituted what Bourdieu has termed the "everyday common sense" [3] of medieval international practice, the fundamental understandings of the organization of the social held by medieval international practitioners. In particular, it focuses on a specific community of practice: lawyers of the *ius commune*. University-trained in centres throughout Europe, late-

[1] In this thesis I adopt the now standard disciplinary convention by which International Relations refers to the discipline and international relations to its subject matter.
[2] Hedley Bull, *The anarchical society*, 3rd ed. (Basingstoke: Palgrave, 2002), p. 245.
[3] Pierre Bourdieu, "The social space and the genesis of groups," *Theory and Society* Vol. 14, No. 6 (1985).

medieval jurists went on to occupy important positions in both Church and Secular administrations and as such constitute a crucial community in the political practice of the medieval system. Thus, the central undertaking of this work is an examination of the social categories deployed by these legal scholars concerning international relations from the twelfth to the fourteenth centuries.

In doing so, this thesis makes three crucial contributions to the IR literature. From a theoretical point of view, it adds to both English School and constructivist studies of historical international order by focusing on the process of differentiation through representation, as well as on contestation within it. In doing so, it argues for a move from a static understanding of order to a more processual notion of *ordering*. Related to this, it also contributes methodologically to the historical study of ideas by proposing a methodological focus on communities of practitioners as a middle-ground between abstract constructivism and narrow Skinnerian analysis that allows us to get at the ordering role of language and ideas in a historically grounded way. Empirically, this thesis shows the analytical leverage that we can gain from these theoretical moves by providing a detailed account of the international order from the 12th to the 14th centuries, focusing not only on stability, but also on the contentious process of ordering. In doing so, it provides a new understanding of medieval notions of political authority, community, identity, and polity, as well as of the politics of representation behind them.

This introduction proceeds in two steps. It first sets up the central problematique of the thesis by examining current uses of the medieval international in the context of the study of globalization as well as IR studies focusing on the Middle Ages. In doing so, it shows that the current literature is divided between a tendency to Other the medieval as a perfect opposite to the modern and another that analyses it through a presentist lens of

sovereignty. Second, it outlines the main framework for this thesis, as well as the research strategy and the development of the argument.

1. Transcending the State: Globalisation and the new medievalism

That the world is currently undergoing fundamental change is a widespread idea in contemporary IR scholarship. The past few decades have witnessed a boom in the 'globalization' literature, which highlights a myriad of 'new' phenomena that are allegedly fundamentally transforming the world. From an examination of recent scholarship, it would appear that, from a world of sovereign states as the containers of power, we are transitioning to a new phase in which the economy, transnational groups, multinational corporations and global movements all have their share in a global mode of governance based on a diffusion of power.[4] The state is retreating not only from global politics, but also from the IR literature as the only unit of analysis: new scholarship emphasizing regions, (transnational) networks, information flows or empires, point to the fact that world politics can no longer be understood as strictly inter-national relations.[5]

Facing these empirical and theoretical challenges, scholars have sought new ways of describing and understanding both contemporary international relations and the world that may emerge out of the current changes, striving to find a vocabulary other than that of the state with which to refer to these changes.[6] Thus, while some talk about the impact of two competing forces – globalization and fragmentation,- others, wanting to stress the fundamental discontinuities with the modern, Westphalian period, have

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[4] The literature on globalization and IR is vast. For a classic statement see Susan Strange, *The retreat of the state* (Cambridge: Cambridge University Press, 1996).
[5] Kenichi Ohmae, *The end of the Nation-State: the rise of regional economies.* (London: Harper Collins, 1995).
[6] John Gerard Ruggie, "Territoriality and beyond: problematizing modernity in international relations," *International Organization* Vol. 47, No. 1 (1993).

argued that we are experiencing a crisis of modernity and entering a post-modern era, which entails a complete transformation in the organizing ethos of the system. In the absence of an agreement on the essential features and dynamics of a post-modern world, scholars have proposed aspects such as a reconfiguration of the experience of space and time, the arrival of an information era which constitutes the third phase of capitalist expansion, or the establishment of a global risk society.[7] For some scholars, the contrast between the Westphalian system and past international orders provides a useful source of inspiration for imagining what the new world order may look like. A small, yet significant, group of scholars have suggested that the new world may indeed resemble the medieval period.

This idea is not new; on the contrary, coined by Arnold Wolfers in 1962,[8] already in 1977 Hedley Bull suggested that the world may enter a neomedieval phase, characterised by a secular "system of overlapping authority and multiple loyalties."[9] Bull identified five features that would indicate that the world had entered a neomedieval phase, namely the regional integration of states in supranational organizations, the disintegration of states because of secessionist movements, a challenge to the state's monopoly of violence through restoration of private international violence, the proliferation of transnational organizations such as multinational corporations and finally the technological unification of the world, which would lead to a "global village."[10] However, he concluded that these conditions were (still) not present.

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[7] See David Harvey, *The condition of postmodernity: an enquire into the origins of cultural change* (Oxford: Blackwell, 1990); Fredric Jameson, *Postmodernism, or, the cultural logic of late capitalism* (London: Verso, 1991); and Ulrick Beck, *Risk society: towards a new modernity* (New Delhi: Sage, 1992).
[8] Arnold Wolfers, *Discord and collaboration* (Baltimore, ML: Johns Hopkins Press, 1962), p. 242.
[9] Bull, *The anarchical society*, p. 245.
[10] Ibid., p. 254-66.

It was not until after the end of the Cold War that the idea of a new medievalism revived. Dissatisfied with the literature on globalization, which was not able to adequately combine the integration and the fragmentation dynamics in a coherent manner,[11] or paid too much attention to the economic dimension but left politics and governance aside, authors turned to neomedievalism in search of something that would allow them to make sense of the transformations of the world as a totality while still paying attention to all its dimensions. To be sure, their claim was not that the world was regressing into the European Middle Ages, but rather that these provide a successful "metaphor", "analytic analogy", a "therapeutic redescription" or a "heuristic device"[12] that both highlights and helps us think through important aspects of new global dynamics. At most, scholars such as Kobrin have argued that Westphalian exclusive territoriality is only an historical accident in a broad transhistorical pattern of multiple overlapping authorities.[13]

In any case, for the proponents of the new medievalism, the idea of medieval international relations can help us make sense of a globalised world. Instead of describing the changes with reference to territorialized states, neomedievalism draws on the idea of the non-existence of a clear-cut domestic/international distinction in the Middle Ages to analyse the blurring of borders and boundaries in the current world. From the multiplicity of loyalties and feudal relations it draws the idea of conflicting

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[11] Jörg Friedrichs, "The Meaning of New Medievalism," *European Journal of International Relations* Vol. 7, No. 4 (2001).

[12] See Andrew Gamble, "Regional blocs, world order and the new medievalism," in *European Union and new regionalism: regional actors and global governance in a post-hegemonic era*, ed. Mario Telo (Aldershot: Ashgate, 2001); Jan Zielonka, *Europe as empire* (Oxford: Oxford University Press, 2006); Ronald Deibert, *Parchment, printing and hypermedia* (New York: Columbia University Press, 1997); and especially R. J. Deibert, "'Exorcismus Theoriae': Pragmatism, Metaphors and the Return of the Medieval in IR Theory," *European Journal of International Relations* Vol. 3, No. 2 (1997); and Friedrichs, "The meaning", respectively.

[13] Stephen J. Kobrin, "Back to the future: neomedievalism and the postmodern digital world economy," in *Globalization and governance*, ed. Aseem Prakash and Jeffrey A. Hart (London: Routledge, 1999), p. 181.

duties and obligations, as well as the breaking and merging of identities. It points to the medieval idea of Christianity and the legacy of Rome to understand the emergence of global unifying ideologies; and to the lack of public/private distinction to understand the new role of private actors in global governance.[14] In sum, rather than understanding the current changes in terms of deviations of a state system, the new medievalism tries to conceptualise global relations as an entirely new system to a certain extent similar to that of medieval Europe.

Moreover, the contention of neomedievalists is not only that the whole globe increasingly resembles the medieval patchwork of "overlapping feudal jurisdictions, plural allegiance and asymmetrical suzerainties,"[15] but also that some of the specific new governance structures and emerging types of communities may also be better understood through a medieval lens. Some authors have thus argued that attempting to understand the European Union through a Westphalian conceptual framework obscures some of its fundamental dynamics, and that it is better understood as a neomedieval polity.[16] As opposed to a modern polity based on fixed borders and a common identity, conceiving of the EU as a neomedieval empire points to its blurred borders, overlapping network of institutions and governance structures, divided sovereignty and coexistence of multiple identities and loyalties.[17] When applied to the EU, the idea of a medieval empire underscores that it is not force and domination that maintains it, as in the case of modern European empires, but rather a certain set of economic and social ties.[18]

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[14]Gamble, "Regional blocs"; Kobrin, "Back to the future"; Friedrichs, "The meaning".
[15] J. L. Holzgrefe, "The origins of modern international relations theory," *Review of International Studies* Vol. 15(1989), p. 11.
[16] Zielonka, *Europe as empire*; Ole Weaver, "Territory, authority and identity: the late 20th century emergence of neo-medieval political structures in Europe," in *1st conference of EUPRA, European Peace Research Association* (Florence 1991).
[17] Zielonka, *Europe as empire*.
[18] It is worth noting that this counters the common assumption in IR scholarship that the hierarchical structure was upheld by force and was endowed of actual coercive power. See Andreas Osiander, "Before

The transformations that the world is currently experiencing have drawn the attention of IR scholars to issues of changing and multiple identities, to the consequences of increasingly varied types of actors and the new dynamics that arise from this, and to the shifting and blurring of traditional boundaries. For the new medievalists, the neomedieval analogy serves the purpose of helping to transcend the language of sovereign statehood and think about situations that do not conform to the traditional Westphalian model through the comparison with a moment in which the international political space was differently organized. But what do we – IR scholars – really know about medieval international relations?

In the light of the interest it provokes, it is suprising to discover that the total IR corpus of knowledge about medieval international relations –coming both from neomedievalism and from the general IR scholarship- is pretty limited and mostly concerned with either determining the 'objective' character of medieval relations or the testing of some theory. As a consequence, many present-led preconceptions are carried on to the study of the medieval international. For example, the common imaginary, imbued with a certain idea of progressive betterment of humanity, still thinks of the European Middle Ages as a somewhat inferior, 'backwards' moment, as illustrated by the fact that most of the casual references to medieval politics are made in fear of what is perceived as a disordered, violent, almost barbarous era.[19] When the neomedieval

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sovereignty: society and politics in ancien regime Europe," *Review of International Studies* Vol. 27(2001).

[19] Nicholas J. Rengger, "European communities in a neo-medieval global polity. The dilemmas of fairyland?," in *International relations theory and the politics of European integration. Power, security and community*, ed. Morten Kelstrup and Michael C. Williams (London: Routledge, 2000), p. 58, Kobrin, "Back to the future", p. 4.

analogy is applied, thus, the attention is pessimistically placed in the 'Dark side of Globalization', pointing at the potential for 'chaos', 'anarchy' and 'durable disorder.'[20]

As this shows, the main feature of IR's view of medieval international relations as portrayed by the neomedievalism literature is that it is based on a definition of the medieval as an opposition to the modern. Indeed, despite the claims that neomedievalism is not used as a direct comparison, but for mere inspiration or for heuristic purposes, the image of the medieval system that serves as an inspiration is but a diffuse at best version of medieval politics. This system is usually characterised as a complex one of multiple overlapping authorities and a variety of crossed loyalties, in direct opposition to the modern ideal of internal political hierarchy and affective unity opposed to external anarchy and difference. Very few, if any, references are made to medieval historiography, or events or structures, the whole analogy constituting an appeal to some kind of common imagined idea of medieval international relations. Consider for example Zielonka's idea of a "medieval empire." Despite all the nuances and the careful ideal-typical distinction between Westphalian and Neo-medieval empires, we do not find (and he does not provide) any example of any medieval polity that vaguely resembles the latter. As Osiander observes, the Holy Roman Empire, otherwise the most likely candidate, did not expand "by invitation" nor through "economic and bureaucratic structures."[21] Ultimately, a definition of the medieval system by opposition limits the conceptual resources we have to appreciate the nuances and differences both in the medieval and in the modern era.

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[20] Robert Kaplan, "The coming anarchy," *The Atlantic monthly* Vol. 473, No. 2 (1994). Philip G. Cerny, "Neomedievalism, civil war and the new security dilemma: globalisation as durable disorder," *Civil Wars* Vol. 1, No. 1 (1998).

[21] Andreas Osiander, "Irregulare aliquod corpus et monstro simile. Can historical comparisons help understand the European Union?" (paper presented at the Annual Meeting of the American Political Science Association, August 2010).

2. Between othering and presentism: the medieval in IR scholarship.

Only a handful of scholars have sought to investigate medieval international relations in themselves, and to pay attention to the historical detail and temporal and spatial specificity. In doing so, however, and while opening up the 'black box' of the Middle Ages, they have fallen into a series of theoretical and empirical traps, two of which are of particular concern for this thesis. First, much like in the neomedievalism literature, many authors have a prevalent idea of *a* medieval international relations system, which effectively collapses ten centuries of Western European history and its relations with contiguous geographical spheres into one common ethos. Second, and most importantly, current IR studies present a divided picture of the Middle Ages: it is either orientalized as a heteronomous moment, defined in diametrical opposition to the modern ideal of the international, or brought back under the familiar category of the State in what constitutes an essentially presentist exercise.

Markus Fischer's study of medieval international relations from the 10th to the 14th century constitutes an excellent example of theory-driven presentism in the medieval IR literature. Setting out with the aim of investigating the extent to which medieval international relations indeed differed from modern ones, Fisher analyses the medieval worldview, which he characterizes as a heteronomous and communal discourse, and then compares it to behaviours of the actors and their underlying rationales, to conclude that "in essence, the practices of feudal actors were quite similar to the practices of modern states"[22]. Even if he is rightly concerned with medieval intersubjective beliefs about political and social life in the first part of his analysis, however, the fact that he dismisses these in favour of what he understands as self-help behaviour shows that

[22] Markus Fischer, "Feudal Europe, 800 - 1300: communal discourse and conflictual practices," *International Organization* Vol. 46, No. 2 (1992), p. 461.

Fisher fails to grasp all the implications of what he simply calls "discourse" (as opposed to practices) and remains within a framework that interprets medieval behaviour in modern terms, that is, in light of modern ideas about rationality and power.[23]

Writing from a completely different perspective, and indeed intending to show the extent to which medieval practices and rationalities were different from modern ones, Benno Teschke has argued that the character of feudal relations was determined by a specific economic and property structure: an agrarian economy with conditional property.[24] This account centred on material factors ultimately leads him into a key problem. Indeed, by reducing the whole of feudalism to the structure of property he too readily dismisses the intersubjective, ideational dimension as a by-product of material conditions, and imposes a modern logic, rationality, and identity to the actors. This stems mostly from the fact that Teschke, although nominally recognizing the importance of identity, has a notable non-reflexive understanding of it as stemming from social property relations: "the constitution, operation, and transformation of geopolitical orders are predicated on the changing identities of their constitutive units. (…) Social property relations, mediating the relations between the major classes, primarily define the *constitution* and identity of these political units."[25] Thus most of Teschke's medieval actors have medieval 'class' identities[26] and are as a result involved in logics and processes of 'accumulation' or 'risk minimization' that have a distinctly modern undertone. This is not to say that medieval lords did not try to do something

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[23] For a similar argument, which also includes a historiographical critique of Fisher's piece, see Rodney Bruce Hall and Friedrich V. Kratochwil, "Medieval tales: neorealist "science" and the abuse of history," *International Organization* Vol. 47, No. 3 (1993). and Fisher's response: Markus Fischer, "On context, facts, and norms: response to Hall and Kratochwil," *International Organization* Vol. 47, No. 3 (1993).

[24] Benno Teschke, "Geopolitical relations in the European Middle Ages: history and theory," *International Organization* Vol. 52, No. 2 (1998).

[25] Benno Teschke, *The myth of 1648: class, geopolitics, and the making of modern international relations* (London: Verso, 2003), p. 7, emphasis in the original.

[26] Teschke's understanding of medieval classes does not correspond to the traditional Marxist understanding of classes in capitalist societies. They are thus not based on the relation to the means of production but based on relations of exploitation. Ibid., p. 55.

that *we* can understand as accumulating more power, or that the peasantry did not engage in strategies that *we* can rationalize as risk minimization. Rather, the important thing to examine is whether *those medieval actors* could have understood their own practices as 'accumulation' and 'risk minimization', and, if they didn't, how they understood them. In other words, instead of imposing modern rationalizations to understand the behaviours of medieval actors, we need to look at their intersubjective beliefs about their actions.

Indeed, medieval intersubjective structures have been the focus of a variety of constructivist scholars, who have sought to recover a historicised understanding of the specificities of the medieval order. In this project, the medieval constitutes the best example to demonstrate the extent to which historically-specific structures lead to different international orders, and thus showing that the international is not the unchanging realm posited by Realists.

This was the goal of John Ruggie in his classic critique of Waltz's neorealism.[27] Starting from the premise that an international system is a structure of interacting units, Ruggie argued that a crucial variable misused by Waltz was differentiation, that is, "the principles on the basis of which the constituent units are separated."[28] This analytical component of structures, he argues, allows us to differentiate between different anarchies, that is, between different international systems. The best example of this is the medieval period, which was based on the segmentation principle of 'heteronomy', as opposed to the modern idea of 'sovereignty' (which he elsewhere refers to as 'homonomy.')[29] Heteronomy points to the fact that not all international systems are

[27] John Gerard Ruggie, "Continuity and transformation in the world polity: towards a realist synthesis," in *Neorealism and its critics*, ed. Robert O. Keohane (New York: Columbia University Press, 1986).
[28] Ibid., p. 142.
[29] Ruggie, "Territoriality and beyond".

composed of 'like-units' in the Waltzian sense; on the contrary medieval heteronomy indicates that all the units are functionally different.[30] Thus, these units are said to be feudal chains of lord-vassal relations ruling over fixed but non-exclusive territories.

Despite the nuance in Ruggie's account of the medieval-to-modern transition, his work has entered the IR imaginary through the buzzword of 'heteronomy,' which is said to describe the medieval ethos.[31] Two basic problems arise from this categorization. The first and most obvious one, already to an extent present in Ruggie's account, is the idea that there is anything like *the* (one) medieval international system. As is well known, the conventional periodization for the European Middle Ages spans over ten centuries and an entire (sub)continent. Were the worldview and understandings of the political and of rulership in a seventh century Visigothic kingdom in the Iberian Peninsula, in eleventh century Capetian France, or in the fourteenth century northern Italian cities the same, or similar enough to warrant the idea of a common ethos? Any cursory look at a history textbook on Medieval Europe will immediately reveal that most of the ideas and institutions that we understand as characteristic of the medieval system varied considerably or even do not appear consistently from the fifth to the fifteenth centuries, nor across the whole geography of Europe. The idea that there is any one such thing as '*the* medieval system', implicit in the IR uses of heteronomy, seems misleading at best if the historicity of international relations is to be taken seriously.

Secondly, but intimately related to this, it is unclear exactly what heteronomy may entail. Indeed, as has been noted recently, despite its frequently use, heteronomy is one

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[30] Ibid., p. 151.

[31] In addition to the neomedievalism literature cited above, for examples of the use of 'heteronomy' as encapsulating the medieval period see Ben Holland, "Sovereignty as *Dominium*? Reconstructing the constructivist roman law thesis," *International Studies Quarterly* Vol. 54(2010); Christian Reus-Smit, *The moral purpose of the state* (Princeton, New Jersey: Princeton University Press, 1999); John M. Hobson, "What's at stake in 'bringing historical sociology *back* into international relations'? Transcending 'chronofetishism' and 'tempocentrism' in international relations," in *Historical Sociology of International Relations*, ed. Stephen Hobden and John M. Hobson (Cambridge: Cambridge University Press, 2002).

of the most understudied and underdeveloped concepts in IR.[32] Ruggie wrote of things such as chains of lord-vassal relations, conditional property rights, overlapping authorities and loyalties, and inclusive legitimating structures, but besides these generalities very few details are provided of the actual nuances in medieval ideas about actorhood, politics, communities, or procedural principles. Take for example the idea of lord-vassal chains. Setting aside the fact that feudalism, lord, vassal, and a series of associated concepts are under fierce debate in historiography,[33] if we reduce the entirety of the medieval 'State' (following Ruggie's own terminology)[34] to the category of 'feudal lords', how can we conceive of other existing governance structures such as the late-medieval Italian cities? Even more, the modern concept of the State encompasses both a system of rule and the territory and people over which and on behalf of which the authority is claimed. If feudal lords are the medieval 'State,' how can we conceive of the vast majority of inhabitants of Medieval Europe, who did not hold any ruling rights? Can we safely subsume them under the 'lordly' state as passive recipients of authority without further examination of the bases that underpinned the relations between ruler and ruled?

In this context, Andrew Phillips' work on international order in Latin Christendom stands out as a welcome addition to the scholarship highlighting the heteronomous nature of medieval international relations, but one that nevertheless exemplifies some of the problems of this literature.[35] By approaching the period through the idea of order, he actively reminds us that 'heteronomy' need not mean 'incomprehensible complexity'

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[32] Andrew Phillips and J.C. Sharman, *International order in diversity: war, trade and rule in the Indian Ocean*, (Cambridge: Cambridge University Press, 2015).
[33] The literature on feudalism is too vast to be examined or cited within the scope of this introduction. Feudal concepts as embodied in law as well as some of the historiography on feudalism is examined in detail in chapter 3.
[34] After calling it a 'state' Ruggie adds "if the concept makes any sense at all." Ruggie, "Continuity and transformation", p. 142.
[35] Andrew Phillips, *War, Religion and Empire: The Transformation of International Orders* (Cambridge: Cambridge University Press, 2010).

like its general deployments in the IR literature seem to indicate, and that order is possible without the existence of discrete States. His unpacking of Latin Christendom's order and the identification of separate normative and material structures that constituted it, however, is problematic, as it reinforces the Othering of the medieval system as an opposition to the modern. He thus writes about common tropes about the Middle Ages such as an 'Imperial-Papal diarchy' and feuding. While there is certainly a basis for these claims, and some of the concepts he uses are well-established medieval institutions and will feature later in this thesis, other aspects of late-medieval politics which do not fit with this idealised depiction are presented as being outside the order and thus undermining it. Crucial movements such as conciliarism or mendicant orders, or the presence of the Northern-Italian cities and the strengthening of monarchies are said to counter this ideal medieval diarchy and are thus non-medieval by extension. Even when careful attention is paid to historical institutions and orders, the idea of heteronomy and what it entails seems almost to be based on a (more or less) arbitrary definition of what constitutes the medieval on the basis of its opposition to the modern, rather than in its own terms.

Against this seemingly hegemonic notion of heteronomy, Andrew Latham has recently argued that the late-medieval order did indeed have a (mostly) exclusive and territorially fixed imagination of political space, and as such we can properly speak of medieval States.[36] Following a substantive current in historiography,[37] he argues that from the 12th century onwards there was a notion of sovereignty that allows us to speak

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[36] Andrew A. Latham, *Theorizing medieval geopolitics. War and World Order in the Age of the Crusades* (New York: Routledge, 2012).

[37] See for example Cary J. Nederman, *Lineages of European political thought: explorations along the medieval/modern divide from John of Salisbury to Hegel* (Washington, D.C.: Catholic University of America Press, 2009); Kenneth Pennington, *The prince and the law, 1200-1600. Sovereignty and rights in the Western legal tradition.* (Berkeley: University of California Press, 1993); Sergio Mochi Onory, *Fonti canonistiche dell'idea moderna dello Stato; imperium spirituale, iurisdictio divisa, sovranità* (Milano: Vita e Pensiero, 1951).

of a 'Medieval Corporate-Sovereign State.' In doing so, and in contrast to part of the heteronomy literature, Latham approaches the study of the Middle Ages with careful attention to periodization and serious engagement with historiography, thus challenging the radical and almost unbridgeable discontinuity that is usually posited between the medieval and the modern.

His formulation of medieval States, however, presents the reader with two problems. First and foremost, while the idea of a medieval, sovereign State takes the IR scholar into the comfortable realm of the known, it raises questions about the extent to which modern ideas about the organization of political life have been projected back onto the Middle Ages. In July 1245, Pope Innocent IV issued the well-known decretal *Grandi*, which took the Kingdom of Portugal from King Sancho II and gave it to his brother Alfonso. However, the decretal also specified that this did not deprive Sancho II of his inherited royal dignity, that is, that despite losing his Kingdom he remained a King.[38] This raises some fundamental questions: was the king part of the kingdom? Does the rather monolithic idea of the state allow us to conceive of this relation or of the case of a king without a kingdom? Even more, subsequent jurisprudential elaboration on this issue established that there were two types of kings, by dignity and by election, which had correspondingly different types of rights.[39] In light of this, to what extent can we speak of a generally-applicable concept of 'kingdom' or 'kingship,' let alone of generalizable political templates such as State? While the idea of medieval states may seem comfortably familiar, it seems at best premature to adopt it without more

[38] The issue of medieval deposition theory is analysed in depth in chapter 4. For an account of the deposition of Sancho II of Portugal see Edward Peters, *The shadow king: rex inutilis in medieval law and literature, 751-1327* (Yale: Yale University Press, 1970).
[39] This issue is dealth with in chapter 5. For a consolidated juridical opinion on this issue see *consilium* number 159 in Baldus de Ubaldis, *Consiliorum sive responsorum. Volumen tertium.* (Venice, 1575).

extensive examination of, at least, medieval understandings of the relation between rulers and ruled.

Secondly, Latham's central focus on the structure of war and his insistence on examining separately the legitimizing means of secular and ecclesiastical rulers prevents an account of both as a single social whole. Despite labelling it as the 'late-medieval state system,' he dissects his analysis into two distinctive groups of actors, namely secular polities and the Latin Church and then proceeds by analysing the bundles of ideas that legitimate the use of violence in each of of the cases. Occasional references are made to ecclesiastical polities and doctrines in the treatment of secular rulers, and to secular rulers when dealing with the Church. However, beyond stating the rule of the Church over spiritual matters and its ability to mobilize secular rulers for the purpose of crusading very little analysis is devoted to the interaction between both types of polities. Coincidences in terms of vocabulary and concepts between secular and ecclesiastical principles are portrayed as an 'overlap', failing to capture the extent to which this overlap actually stemmed from the fact that these ideas were developed as part of an integrated order. The examination of these matters would have been necessary in order to both properly understand the reality of late-medieval international relations and, perhaps most importantly, in order to properly understand the evolution and articulation of the ideas that constituted that reality. Instead, Latham's treatment of these ideas in the abstract debilitates, or at least obscures, his argument about them being constitutive. His account is strikingly impersonal in that little is said about how these ideas were located, who held them, among what groups of individuals they were popular, how they were transmitted, etc. This is not to say that specific individuals have to be identified for each idea – his declared aim is looking at long-term (belief) structures as outlined by Braudel's notion of *longue durée*, which entails an explicitly

impersonal approach, but putting forward a constitutive argument of this kind should require a more detailed examination of how these ideas as held, transmitted and enacted by particular social groups and institutions.

We are therefore confronted with two opposing and historiographically unsatisfactory narratives on the late-medieval system. On the one hand, while the concept of a heteronomous order breaks free of the strait-jacket of the sociopolitical imaginary of the state, which would define the presence of discrete, territorially-based political communities as the exclusive domain of IR, it presents a highly idealised and for the most part unspecified idea of the medieval period, and one that is defined in almost-perfect opposition to the modern. On the other hand, subsuming the later middle ages under the umbrella of state systems serves the crucial purpose of demystifying the Middle Ages and highlights the multiple, and important, continuities between the medieval and the modern. However, this is done at the expense of importing crucial modern ideas about the relations between rulers and ruled and, in the particular case of Latham, lacking an integrated view that explains political order and stability as well as war.

3. Research questions and empirical strategy

Facing this, this thesis seeks to recover a historicised understanding of the features of international order in the European Middle Ages. In order to do so, it proceeds in three steps. The first one, and most obvious one, is to reject the idea that there is any such thing as *a* medieval international order, but rather that this changed substantively and evolved throughout the centuries. To this end, and considering that the debate above is centred on the later middle Ages, this thesis is only concerned with the international order at the junction between the High and the Late Middle Ages, that is, from the

twelfth to the fourteenth centuries. The broad question that it seeks to answer is therefore:

> What were the fundamental features of the late-medieval international order?

The second step concerns the study of international orders and how their main features can be determined. Indeed, as we saw above, the literature on the medieval international has highlighted a variety of sometimes contradictory traits of that order. Against this, this thesis argues that in order to better study historical international orders we need to start with a different understanding of order that not only does not consider it as static and impersonal, but also takes into account its plural and evolving nature. In doing so, therefore, the goal is not only to show features other than those posited by current scholarship, but also how the very features of the order were contested and constantly re-imagined.

Indeed, the starting point for the study of order in this thesis is that a fundamental feature of international orders, insofar as social systems, is the nature and arrangement of its main parts. The sociological concept of differentiation, understood as the process by which the various parts of a social system become separated and social expectations become attached to them, provides a useful way of understanding the deeper structure of an international order, and as such provides the guiding concept for the present enquiry.[40]

The issue thus becomes how we can get at the differentiation of historical orders, that is, how this differentiation of groups and political authority can be observed. Differentiation, by its very nature, manifests in and is produced through a variety of means, from 'objective' aspects such as access to resources to deeply subjective ones

[40] Chapter 2 develops this framework.

like embodied practices and tastes. As both the previous sections and a host of constructivist and English School literature have emphasized, however, when studying historical orders, intersubjective ideas and beliefs play a crucial role.[41] Indeed, when thinking about differentiation, a fundamental aspect is the work that agents themselves do in producing and differentiating the social world, through what Bourdieu has called "the work of representation."[42] Through this, actors produce social categories, which are intersubjectively-held linguistic constructions of social groups. In doing so, these categories construct the international realm, and constitute the conditions of possibility for other (material) types of differentiation to take place.

If we want to study the differentiation of a historical international order, therefore, we need to look at its fundamental categories and their production. The broad research question above can therefore be reframed as:

> How was the late-medieval international system differentiated? What were its fundamental categories?

As stated above, understanding differentiation as socially and to an extent linguistically constructed has one further implication. Order, fundamental institutions, and normative complexes need not be taken as reified structures, but rather as structuring language and symbolic games within which ordering moves are constantly performed. Indeed, these ordering moves constitute the work of representation, that is, the work that actors constantly perform to produce and reproduce social categories and through these, an imaginary of the organization of the social. Thus, in addition to order, we should focus on the notion of *ordering*, understood as a struggle for categorization, that is, a linguistic struggle for the differentiation of social groups.

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[41] Reus-Smit, *The moral purpose of the state*; Phillips, *War, religion, and empire*; Adam Watson, *The evolution of the international society: a comparative historical analysis* (London: Routledge, 1992).
[42] Pierre Bourdieu, *Distinction: a social critique of the judgement of taste* (London: Routledge, 1989); Bourdieu, "The social space and the genesis of groups".

The third issue that needs to be considered is where and how we can see and study these discursive constructions. In other words, how do we locate the linguistic and "symbolic struggle over the production of common sense,"[43] in Bourdieu's words? As the case of Latham discussed above shows, constructivists have long been preoccupied with the historical study of intersubjective structures. However, they have done so mostly through the reproduction of abstract and disembodied studies of 'ideas' throughout history. Against this, this thesis' methodological argument is that we can best get at the structuring function of these social categories by examining how they were embedded in the practice of international relations, that is, by examining them not as abstract ideas, but as they were articulated by communities of practice.[44]

In particular, this thesis analyses the categories of one late-medieval community of practice: university-trained lawyers of the *ius commune*, which comprised medieval Canon, Roman, and Feudal Law.[45] The reasons for this choice are two-fold. First, that law plays a key role in international relations is not a new idea in IR scholarship. The work of authors within the English School has constantly emphasized the centrality of law for the international. When talking about modern international law, Hedley Bull said that it identified "the supreme normative principle of the political organization of mankind", that it stated "the basic rules of coexistence among states and other actors in international society", and that it helped "mobilise compliance with the rules."[46] (International) Law, in this view, is therefore what articulates an important part of the *rules of the game*, especially those concerning actorhood, as it deals with the normative

[43] Bourdieu, "The social space and the genesis of groups".
[44] These claims and the idea of a community of practitioners are developed in chapter 2.
[45] Appendix II includes brief biographical notes on the main lawyers cited in this thesis.
[46] Bull, *The anarchical society*, p. 134-36, but see also the rest of chapter 6.

rules that set a behavioural framework[47] for the action of international actors, states in the modern case. If our goal is to understand the categories that structured the medieval international order, examining their deployment in medieval law, and the lawyers that wrote it and commented on it seems therefore warranted.

The second, and even more important reason for this choice concerns the role of law and juristic thought in the later-Middle Ages specifically. Law had a central role in the ordering of life at the time: it was not only the vehicle to make justice effective but also one of the most important means for the articulation and discussion of political ideas. As historian Joseph Canning has put it:

> "From the late eleventh century, the establishment of the scientific study of Roman law and its growth as a university discipline, in conjunction with the development of canon law and its scholarship, gradually produced the ius commune, or common law, a comprehensive legal language, which provided an increasingly sophisticated mode of discourse for the elaboration of ideas relevant to political matters."[48]

Within this context, from the late twelfth century onwards, university-trained canon lawyers started to occupy a variety of positions within both Church and secular administrations.[49] In these positions, they worked in several levels of law courts and managed the affairs and advised secular and ecclesiastical rulers alike; in doing so, they drew on their academic training and used the resources, vocabulary, and concepts of the law they had studied. Many of the documents that will be examined here were originally drafted as practical, legal decisions for real cases throughout Western Europe. These decisions were then compiled and sent to the schools for teaching and commentary by the next generation of lawyers. This connection between academic

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[47] See Peter Wilson, "The English School's approach to international law," in *Theorising international society: English School methods*, ed. Cornelia Navari (New York: Palgrave Macmillan, 2009).
[48] Joseph Canning, *A history of medieval political thought 300 - 1450* (London Routledge, 1996), p. 84.
[49] For the training and professional careers of medieval lawyers see James A. Brundage, *The medieval origins of the legal profession. Canonists, civilians, and courts* (Chicago: Chicago University Press, 2008).

commentary and practice therefore provides an excellent resource to start unpacking the differentiation dynamics of late-medieval international relations.[50]

In line with the idea of lawyers as a community of practice, the main primary sources of this thesis are the writings of university-trained jurists from the twelfth to the fourteenth centuries.[51] The substantive nature of these sources will be examined in detail in chapter 2. However, some broad methodological considerations are pertinent at this point. The practical totality of the primary sources on which this thesis is based were written in Latin and in manuscript form, and are currently preserved in archives and libraries throughout Europe. Very few of these sources have been edited and hardly any have been translated into any modern language. However, due to their continued use, after the invention of printing in the fifteenth century a great amount of these writings were printed in collections. Due to their availability, these Early Modern printed editions of medieval texts constitute the basis for this study, although manuscripts and modern editions have been consulted for reliability whenever possible.

5. Argument and outline of the thesis

The main theoretical and methodological arguments of this thesis are set out in chapter 2, which considers how we can study international orders. From a theoretical perspective, it argues that differentiation, understood as a process rather than as an end-product, allows us to get at the nature of historical international orders. Paramount within this is the linguistic struggle for the representation and categorization of groups,

[50] Lawyers are by no means the only community relevant to late-medieval international practice, and as such this thesis does not claim to be comprehensive in its stufy of the medieval international. Other communities, such as theologians, were also relevant. However, it is the starting point of this thesis that medieval law was particularly important and that, unlike theology, it has been repeatedly overlooked by IR scholars. See for example Brown et al., who do tackle medieval theology but set law aside. See Chris Brown, Terry Nardin, and Nicholas J. Rengger, *International relations in political thought* (Cambridge: Cambridge University Press, 2002).

[51] Appendix I includes an explanation of the system of citations used in this thesis.

which points towards a focus on *ordering* as a contested process, rather than a static notion of order. If the concepts of differentiation and representation, through a struggle for categorization, provide the best way of understanding international orders and orderings, the logical ensuing question is how these categories can themselves be studied. The second part of chapter 2 is concerned with this issue, and thus makes the methodological argument of this thesis. Indeed, it proposes communities of practitioners as a mid-range methodological approach between the abstract ideas and great thinkers that have characterized the approaches of constructivism and the English school, and overly detailed Skinnerian analysis. Based on this, the final part of chapter 2 introduces the specific community of practitioners on which this study is based: lawyers of the ius commune.

After this, chapters three through seven show the purchase that we can get from this approach by conducting a study of international order and ordering from the 12th to the 14th centuries. Chapters three and four in particular take a more static approach, and reconstruct the representational framework of the *ius commune*, that is, they examine the main categories that ordered the international, their meanings, as well as some normative structured behind them.

The specific question that concerns chapter three, which is essential to any study of international order, is the nature and distribution of political authority. Indeed, the nature of medieval political authority lies at the heart of the division we have seen between the heteronomy and state theses. Chapter three re-examines this issue by focusing on four main groups of categories relating to political authority: jurisdiction, power, lord/vassal, and magistrate. It shows how all of these categories had different hierarchical connotations and made the position of and relations between rulers intelligible. Most importantly, the chapter argues that the role of jurisdiction as a

structuring category deeply problematizes both the heteronomy idea of private authority and the state thesis idea of sovereignty.

Having looked at the distribution and nature of political authority, chapter four is concerned with the relation between rulers and ruled through the idea of legitimacy. The first part tackles narratives about the origins of jurisdiction, while the second part tackles four constructions of its moral purpose. Against a standard IR trope that portrays Medieval - and even Early Modern – international relations as essentially relations between individual rulers, this chapter reveals an increasingly important role of the people and argues that communities cannot disappear from our account of the period.

Chapters five, six, and seven move their attention from the stability and meaning of categories to contestation as a fundamental element of the ordering of medieval international relations. Indeed, as set out in chapter two, differentiation is understood as a constantly (re)produced process. Each of the final three chapters discusses a different site of contestation in this ordering process. Chapter five focuses on the contestation within academic discourse by looking at competing ways of understanding three types of secular polities: the empire, a kingdom, and a city. For each of these it reconstructs how different lawyers understood the relation between rulers and ruled as well as their position vis-à-vis other rulers. In doing so it not only shows that the fundamental nature of each one of these was subject to constant re-categorization and re-imagining, but also that there was no universally-applicable template for the idea of a polity that applied to all three.

Chapter six turns its attention to one of the most common tropes about medieval: its Christian identity. It first asks the extent to which the categories analysed in chapters three and four applied to non-Christians. To do so, it reconstructs legal debates in the

thirteenth century about the nature and legitimacy of infidel power, showing that Christian universalism allowed for a variety of answers to the question. It then analyses the constructions of Christians and non Christians – Jews and Muslims in particular – in canon law, showing the extent to which these categories were more polyvalent than the standard IR imagination of the period has so far allowed, and concludes with the examination of three different principles that applied to these relations: segregation, tolerance, and elimination.

Finally, chapter seven illustrates both the ordering function of legal categories and the contestation within legal language through two empirical cases: the dispute between Emperor Henry VII and King Robert of Naples at the beginning of the fourteenth century, and the ordering of trade in the Medieval Mediterranean from the late twelfth to the early fifteenth centuries. Both cases illustrate not only the fundamentally contested nature of the process of ordering, but also the productive interactions between academic commentary and political life in the later Middle Ages.

Chapter 2. International Orders and Communities of practitioners

The main goal of this thesis is to recover a historicised understanding of the late-medieval international order. In order to do so, the first thing that needs to be considered is how we can study international order. This is indeed a particularly pressing topic, as it would seem that the difficulties in applying our pre-established conceptual frameworks to the Middle Ages are at the origin of the discipline's dearth of understanding of the period. Indeed, as Buzan and Little note, "IR scholars increasingly acknowledge that their existing concepts simply cannot begin to capture the complexity of medieval political organization."[1] Developing a framework that allows us to do this is the object of this chapter.

To this end, it proceeds in three parts. It first considers the historical study of international orders and argues that the sociological concept of differentiation provides a useful lens. Understood as a process, differentiation points us towards the work of representation – in this thesis understood primarily as a linguistic struggle for the representation of the social. This part therefore concludes that a focus on ordering as well as order is necessary. The second part considers how we can actually study language and categories historically, and proposes a methodological focus on communities of practice as a *via media* between excessive generality in constructivism and unbearable empirical burdens in the Cambridge School. The final section

[1] Barry Buzan and Richard Little, *International systems in world history* (Oxford: Oxford University Press, 2000), p. 244.

introduces the specific community of practitioners that constitutes the focus of this study: late-medieval jurists of the *ius commune*.

1. International orders and differentiation

International Relations scholars have long been interested in the study of what we can broadly and preliminarily call international orders.[2] On one extreme, neorealists like Waltz have argued that the condition of anarchy constitutes both the defining feature of the international and its main explanatory variable. Accordingly the international realm is an invariable one, with international orders – systems in this formulation- differing from one another mostly in terms of the distribution of capabilities. Vis-à-vis this, a variety of other approaches have studied international orders as a way of emphasizing and exploring the historical contingency of the international. Thus, most notably, the English School has undertaken several cross-historical comparisons of international orders and, in doing so, has produced a variety of conceptual tools that help us study and compare them. Above all, for example, we find the distinction between an international system and an international society, pointing to the difference between mere repeated interaction and shared values and culture. Within the English School tradition we find also the idea of rules and institutions, or "sets of habits or practices shaped towards the realisation of common goals,"[3] as fundamental aspects of any order. Finally, more recently constructivists have also been preoccupied with the issue of international order, in this case understood as shaped by set of hegemonic meta-values

[2] The literature is indeed to vast to be cited in its entirety. See for example, Bull, *The anarchical society*, or Andrew Hurrell, *On global order: power, values, and the constitution of international society* (Oxford: Oxford University Press, 2007).
[3] Bull, *The anarchical society*, p. 71.

and beliefs about social and political organization, which compose the 'constitutional structure' of international societies and their 'fundamental institutions.'[4]

We therefore find a variety of approaches to the study of international order, at the heart of which lay a host of different understandings of what international order actually is. Far from attempting to arrive at a definition at this stage, the starting point for this chapter is that an international order is a social totality. And fundamental within social wholes is the nature and arrangement of their parts, normally conceptualised as units. This is indeed the insight behind most of the approaches above: from Waltz's functional differentiation, to Reus-Smit's moral purpose of the state, the basis on which groups become units of the international has been at the centre of the study.

The concept of differentiation within social wholes provides a useful approach to tackle this issue. A crucial concept in both sociology and anthropology, differentiation can be traced back to authors such as Durkheim and Weber.[5] At a very basic level, the idea of differentiation of a social system calls attention to the makeup of the social arrangements within that system, that is, to the way in which the component units of a system stand in relation to each other, both in terms of what separates one unit from another and of how the aggregate of these relations constitutes a distinct social whole. Within sociology, the debate on differentiation has centred on the idea that as they evolve, social systems get progressively more complex, which in turn leads to increasing specialization. In this sense, it has been tied to the study of modernity as leading increasingly complex and functionally differentiated social systems.

In IR, the concept of differentiation has a long history. Kenneth Waltz, with his idea of functional differentiation of the units as an element of international structures is perhaps

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[4] Reus-Smit, *The moral purpose of the state*.
[5] Émile Durkheim, *The division of labour in society* (New York: The free press, 1997); Max Weber, *Economy and Society: an outline of interpretive sociology* (New York: Bedmister Press, 1968).

responsible for bringing it to the attention of mainstream IR.[6] Ironically, at the same time as he proclaimed it an element of structure, Waltz dismissed functional differentiation as non-existent in the international realm, as the pressure of anarchy leads to all units performing essentially similar functions, that is, to 'like units.[7]' As we saw in the introduction, this is Ruggie's main point of contention, and the basis for the idea of heteronomy. For Ruggie, units in international systems can be segmented in a variety of different ways without the system losing the condition that defines it as international: anarchy. Anarchy is thus not the explanatory variable that Waltz purports it to be. Instead, we should look at principles of differentiation to understand the character and features of different international systems.[8]

Since these debates of the late 1970s and 1980s, and with very few exceptions,[9] consistent engagement with the concept of differentiation in IR scholarship has only re-emerged in the past five years.[10] Authors such as Barry Buzan, Mathias Albert, or Jack Donnelly have sought to engage with the sociological literature, searching for a new "integrative framework"[11] for IR theory that allows for both the comparison of different

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[6] Kenneth N. Waltz, *Theory of international politics* (New York: McGraw-Hill, 1979).
[7] This does not preclude functional differentiation from being central to Waltz's theory in many other ways, among which the definition of the political and the international as a (functionally differentiated) sphere. See the discussion in Jack Donnelly, "The Differentiation of International Societies: an Approach to Structural International Theory," *European Journal of International Relations* Vol. 18, No. 1 (2012).
[8] John Gerard Ruggie, *Constructing the world polity: essays on international institutionalization* (London: Routledge, 1998).
[9] See for example Buzan and Little, *International systems in world history*.
[10] See for example Barry Buzan and Mathias Albert, "Differentiation: A sociological approach to international relations theory," *European Journal of International Relations* Vol. 16, No. 3 (2010); Jack Donnelly, "Rethinking political structures: from 'ordering principles' to 'vertical differentiation' – and beyond," *International Theory* Vol. 1, No. 01 (2009); Donnelly, "The differentiation of international societies"; Jack Donnelly, "The Elements of the Structures of International Systems," *International Organization* Vol. 66(2012); Mathias Albert and Barry Buzan, "Securitization, sectors and functional differentiation," *Security Dialogue* Vol. 42, No. 4-5 (2011); Mathias Albert, Lars Cederman, and Alexander Wendt, eds., *New Systems Theories of World Politics* (Basingstoke: Palgrave Macmillan, 2010); Mathias Albert and L. Hilkermeyer, eds., *Observing International Relations: Niklas Luhmann and World Politics* (London: Routledge, 2004).. For a slightly different approach see also Edward Keene, "The Standard of 'Civilisation', the Expansion Thesis and the 19th-century International Social Space," *Millennium - Journal of International Studies* Vol. 42, No. 3 (2014).
[11] Buzan and Albert, "Differentiation".

international societies and for an understanding of structural change. [12] Indeed, through the definition of types or dimensions of differentiation – for example, segmentary, stratified, and functional,- classification of different international systems is easier and thus comparability is made possible.

The existing approach to the study of international systems, however, is not without problems. First, for Buzan and Albert, the primary focus of this type of research is the identification of a unifying ethos that captures the essence of different international systems on the basis of how the units of the system stand in relation to each other, that is, a "dominant principle of differentiation."[13] However, as it has been pointed out and as this thesis will show, [14] this need not be the case: international systems may have a multiplicity of dimensions of differentiation not reducible to a single, unified principle.[15]

Second, and most crucially, approaches to differentiation in International Relations give no indication of how one should actually go about identifying the component units. The focus is centred exclusively on the types or dimensions along which units could be differentiated, but very little thought is actually put into how units are observable. This is because so far, differentiation theories in international relations have adopted an eminently objectivist and static character. This is evident if we observe Albert, Buzan, and Zürn's definition of differentiation:

> 'Differentiation,' in the broadest sense, refers to the form and structure of a large-scale social entity, traditionally 'society': that is, how and on the basis

[12] Donnelly, "The differentiation of international societies".
[13] Buzan and Albert, "Differentiation".
[14] Donnelly, "The differentiation of international societies".
[15] It is worth noting that Buzan and Albert, in this case writing also with Michael Zürn, have subsequently broadened the goals of the differentiation agenda, including also the overlap between different modes of differentiation, and the genesis of different forms. Even in this work, however, they still maintain the identification of dominant forms of differentiation as a primary purpose. See Mathias Albert, Barry Buzan, and Michael Zürn, *Bringing Sociology to International Relations. World politics as Differentiation Theory.* (Cambridge: Cambridge University Press, 2013), pp. 1-21.

> of which structuring principle, are the main units within a social system (of subsystem) defined and distinguished from one another"[16]

Differentiation is thus a (static) structure, a state, and end-product. In this view, the value of differentiation relies on its ability to generate insights in terms of comparative statics. A system is characterized by a specific structure of differentiation that depending on the approach will be characterized by a dominant form or by various overlapping dimensions across several sectors. In this understanding of structure, however, the deep sense of structure is somewhat lost, as we are referring to a mere arrangement of the parts, rather than how the parts themselves are produced and reproduced as parts. Units are just taken to exist 'out there' in specific arrangements, the task of the researcher being analysing these arrangements.

Differentiation and representation

Against this, this thesis starts from a different notion of differentiation as the process by which "social groups become dissociated from one another, so that specific activities, roles, identities, and symbols become attached to them."[17] Two aspects of this definition are of particular importance for the purposes of this thesis: first, it takes differentiation as a process, which allows for a better understanding of the production and reproduction of differentiation; second, but related to this, it ties differentiation to intersubjectivity through its reference to identities, symbols and roles. This approach does not necessarily represent a radical departure from the IR differentiation literature: it is in no way incompatible with Buzan and Albert's understanding of differentiation, and Donnelly does indeed also explicitly stress the importance of 'norms and

[16] Ibid., p. 1.
[17] Yoffee, cited in Donnelly, "The differentiation of international societies", p. 152.

institutions' as differentiating structures.[18] However, it represents a useful shift in emphasis for the purposes of studying historical international orders.

Differentiation is not only a matter of 'objectively-existing' units, but also has a crucial intersubjective component. Central in the process of differentiation is the work that actors themselves do in the creation and maintenance of the social order by producing and reproducing socially accepted representations of the groups that compose the social space. Units of a system are thus not only differentiated through their positions and their different abilities to access resources, but are also differentiated through the representations that social actors make of their world. Indeed, as Bourdieu notes, a fundamental aspect of any theory of social space is the

> "contribution that agents make towards constructing the view of the social world, and through this, towards constructing this world, by means of the work of representation … that they constantly perform in order to impose their view of the world or the view of their own position in this word- their social identity."[19]

Representation in this sense is understood as the process of synthesising and describing the social world,[20] and all social actors constantly engage in it by naming, classifying, and categorizing the groups and entities that make up this world. The result of this work of representation is the production of a society's common sense, of a view of how the social as a whole 'hangs together,' of "the historically constituted and acquired categories which organize the idea of the social world in the minds of all the subjects belonging to that world and shaped by it."[21] These categories are thus fundamental in the understanding and structuring of the social world.

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[18] Ibid.
[19] Bourdieu, "The social space and the genesis of groups", p. 727.
[20] For general approaches and theories of representation see Stuart Hall, ed. *Representation. Cultural representations and signiying practices* (London: Sage, 1997), particularly chapter 1.
[21] Bourdieu, *Distinction*, p. 469.

What follows from this is that if what we want is to study international orders as differentiated social wholes, the study of this work of representation, of the production of common sense that structures the system provides a good way to understand both what the main components are, and how they stand in relation to each other.

We may then ask, what form these representations take, or in other words, how do we find them? Representations of the world can indeed take a variety of forms: texts, maps, images, and art can all provide significant constructions of the nature of the international.[22] Among all of this, however, language emerges as a particularly powerful means for representing the world. Indeed, while language is essential to human interaction, looking at it through the lens of differentiation and representation reinforces the established idea that language is not a neutral system, but rather a powerful instrument in the production of the social.[23] Vis-à-vis other types of representations, explicit, linguistic ones freeze

> "a certain state of the power relations which [they] aim to fix foverever by enunciating and codifying it. The classificatory system as a principle of logical and political division only exists and functions because it reproduces in a transfigured form … the generally gradual and continuous differences which structure the established order."[24]

If we want to understand the differentiation of an order, therefore, it becomes crucial to examine the production of linguistic social categories, as it is through these categories that the social whole is represented and order is produced.

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[22] Literature on this is vast. See for example Jordan Branch, *The cartographic state: Maps, territory and the origins of sovereignty* (New York: Cambridge University Press, 2014); Lene Hansen, "Theorizing the image for Security Studies," *European Journal of International Relations* Vol. 17, No. 1 (2011); Roxanne Lynn Doty, *Imperial encounters: the politics of representation in North-South relations*, Borderlines (Minneapolis: University of Minnesota Press, 1996).

[23] Friedrich V. Kratochwil, *Rules, norms and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs*, Cambridge studies in international relations (Cambridge: Cambridge University Press, 1989); Nicholas Greenwood Onuf, *World of our making: rules and rule in social theory and international relations*, (Abingdon, Oxon.: Routledge, 2013).

[24] Bourdieu, *Distinction*, p. 780.

Struggle for categorization

It is worth noting at this point that taking differentiation as process and emphasizing language and intersubjectivity does not mean denying the existence of an 'objective,' material dimension of differentiation. Any linguistic representation will not, by necessity, correspond perfectly with the more 'objective' dimension of differentiation, that is, the one that has purely to do with the relation between people and access to valued resources. It is in this tension, however, that we find the final element for the conceptual and methodological approach of this thesis.

Considering that language can never fully account for the entirety of the social order, there is always a gap between linguistic representations and lived experience. This gap allows for space "for symbolic strategies aimed at exploiting the discrepancies between the nominal and the real, appropriating words so as to get the things they designate, or appropriating things while waiting to get the words that sanction them."[25] Indeed, a second element of thinking about differentiation as a process is that insofar as its intersubjective element is constantly reproduced, it is embedded in a constant struggle for categorization, in which different groups seek to change the representations of the world in order to benefit from it and ultimately, change the social world itself:

> "Knowledge of the social world and, more precisely, the categories that make it possible, are the stakes, par excellence, of political struggle, the inextricably theoretical and practical struggle for the power to conserve or transform the social world by conserving or transforming the categories by which it is perceived."[26]

If we therefore want to undertake a historical study of an international system, we need to bear in mind that 'constitutional structures' and 'fundamental institutions' are not reified structures of differentiation that exist unproblematically and create order.

[25] Ibid., p. 487.
[26] Bourdieu, "The social space and the genesis of groups", p. 729.

Rather, they are the sites of deeply political constant contestation over the nature of social, of a 'struggle for categorization' by which some groups become groups and get authorized to act and others disappear as entities. Studying a historical international order is therefore a matter of studying this language game in which the production and reproduction of social categories constitute political acts of differentiation, and thus ordering.[27]

2. Method

Differentiation, understood as a process of creating social groups and assigning social roles and expectations to them, thus provides a good approach to the study of international orders. Central to this process is the work of representation, that is the process of assigning meanings and making the social world intelligible. Considering the historical vocation of this project, this translates into a study of language and the struggle for the production of categories within it. This second section considers how the study of language can be undertaken within an IR context. To this end, it first examines two separate undertakings of this task within IR: constructivism and the English School. It then draws on the Cambridge School in intellectual history to articulate a more explicit methodological understanding, and finally proposes the notion of communities of practitioners as the main focus for study.[28]

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[27] For a similar approach see X. Guillaume, "Unveiling the `International': Process, Identity and Alterity," *Millennium - Journal of International Studies* Vol. 35, No. 3 (2007); Xavier Guillaume, "From process to politics," *International Political Sociology* Vol. 3, No. 1 (2009).

[28] These are of course not the only approaches available within International Relations for the study of language. Indeed, given the specific focus on ordering and contestation in this thesis, postructuralist or Foucauldian approaches to language would seem to also be suitable. The choice not to engage with these approaches on a methodological level has indeed been a deliberate one, as these approaches share a fundamental critical political project which, although I am broadly simpathetic to, would only distract from the analytical goals of this thesis. Essential readings in this tradition would be Michel Foucault, *Power/knowledge: selected interviews and other writings, 1972-1977* (Hemel Hempstead: Harvester Wheatsheaf, 1980); Lene Hansen, *Security as practice: discourse analysis and the Bosnian war* (London: Routledge, 2006); Cynthia Weber, *Simulating sovereignty: intervention, the state and symbolic exchange* (Cambridge: Cambridge University Press, 1995); David Campbell, *Writing security: United*

Language and Ideas in International Relations

Within IR, the historical study of language has been inextricably tied to both the history of international political thought and to the study of ideas and their role in structuring the international. Indeed, notwithstanding Boucher's complaints that "despite being subject to similar pressures, international theory rejected the option taken by political theory of defining itself in terms of its illustrious past and missed the opportunity of firmly anchoring itself on sound philosophical foundations,"[29] IR scholars have frequently sought to inscribe their work in long-standing traditions of ideas about international relations reaching back to Ancient Greece. This section analyses the way this study has been undertaken by two broad schools within IR: the English School and constructivism. It shows that the methodological approaches of both schools are problematic for the goals of this thesis: while some authors have placed too much emphasis on a canon of political thinkers as representative of the thought of their time, others have undermined the historicity of their studies by turning language and ideas into abstract and disembodied entities.

English School authors have long been concerned with the history of international political thought. The study of 'International Theory', as Wight chose to label it, occupied a central role in the research programme of the school, as exemplified by Wight's own tripartite division, by Bull's take on that scheme or by other, more current members of the school's books about the matter.[30] In the case of the English School, moreover, not only do we find an interest in undertaking a historical study of ideas, but this is also linked to their research programme on historical comparisons of

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States foreign policy and the politics of identity, Revised ed. (Manchester: Manchester University Press, 1998).

[29] David Boucher, *Political theories of international relations: from Thucydides to the present* (Oxford: Oxford University Press, 1998), p. 4.

[30] Martin Wight, *International theory. The three traditions.* (London: Leicester University Press, 1991); Bull, *The anarchical society*; Brown, Nardin, and Rengger, *International relations in political thought*.

international orders. Indeed, even if this is not an articulated methodological proposition, if we look at the historical studies on different international systems these are sprinkled with references to theorists of the period, whom are taken as representatives of the thought of that period and consequently of the features of their respective systems.[31]

Despite the positive contribution that is drawing attention to the recurrence and pervasiveness of international theory throughout history – and to the importance of this for the nature of international orders- the English School's approach to history of ideas, and especially in the case of modern, European ideas, has been conditioned by the presentist concern of constructing a typology that inscribed the School itself into a long-standing *via media* tradition of thought about the international. This has led to a history of ideas that relies heavily on a 'canon' of classical theorists who are seen as the main exponents of the thought of the period and who, for the most part, parallel the political theory canon. In the case of the Middle Ages, for example, this canon includes both Augustine and Aquinas, of course, but depending on the extension of the treatment, other authors such as Dante or John of Paris.[32] While this is certainly one way of dealing with the complexity of the different ways the international has been understood in history, this approach has certain problems. First, as Skinner warns us, the selection of the authors that belong to the canon is done from the present and thus responds to presentist concerns.[33] It is thus, a selection a posteriori, which emphasizes continuities

[31] See for example Watson's recurrent references to Agustin, Aquinas and Dante in the chapter on Medieval Europe. Watson, *The evolution of the international society: a comparative historical analysis*.
[32] For the most extensive treatment of a canon of medieval international political theorists see Brown, Nardin, and Rengger, *International relations in political thought*.
[33] There are however, alternative views on the historical nature of canons of classical authors other than selecting them according to presentist concerns. If we follow Skinner's understanding of the relation between intentions and conventions, then these 'classics' in the canon emerge as those who, whilst still limited by the resources available in their conventional context, successfully managed to use them to re-shape and fundamentally alter the context. This understanding thus involves conceptualising the cannon as a more-or-less self-selected and historicised device.

and current themes of the discipline instead of prioritizing those of the people of the time. Brown, Nardin and Rengger are in this sense explicit about this choice:

> "The danger here is that presenting medieval thought in its own terms leads to problems in two directions. (…) It would be difficult to draw connections between this body of thought and that which preceded and followed it. In effect, this strategy would leave one with a series of self-contained accounts of the thought of particular ages with too few points of contact between them. Clearly this would not be acceptable."[34]

The aim is therefore to explicitly draw these continuities at the expense of 'taking medieval thought in its own terms'. If the goal of our study, however, is to understand how the medieval system – or indeed any other international system - was differentiated, taking the thoughts, ideas, and representations of the period in their own terms is precisely what we need.

In the last twenty-five years constructivist IR scholars have undertaken a distinctive kind of study of ideas. The aim, closely aligned with that of this thesis, is no longer to understand past theories of international relations but rather to capture the historical ideas that constituted and constrained action in the past as a way of getting to dynamics of continuity and change in international relations. The idea is that "ideational structures… provide the lenses through which actors interpret the material conditions of their lives, and the language through which they describe themselves and justify their actions"[35], and thus through studying them we can get a better understanding of the actions of those actors. Consequently, these scholars have embarked in broad, trans-historical studies describing the dynamics of state-formation in terms of collective identities, the changes in the modern international system through the shifts in the idea of sovereignty or the different historical international societies in terms of varying

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[34] Brown, Nardin, and Rengger, *International relations in political thought*, p. 5.
[35] Christian Reus-Smit, "The idea of history and history with ideas," in *Historical sociology of international relations*, ed. Stephen Hobden and John M. Hobson (Cambridge: Cambridge University Press, 2002), p. 140.

understandings of the purpose of political power.[36] This way of studying ideas in history focuses therefore on broad social processes and dynamics, as opposed to theories and traditions of thought. In this sense, it is also a rather impersonal history of broad social structures instead of focusing on specific, named authors. Finally, and crucially, constructivists rely mostly on secondary historiographical literature, rather than examining the primary texts.

While this thesis shares constructivism's commitment to examining ideas as the necessary means to understand historical actions, the methodological approach that constructivists have undertaken in their historical studies of international systems is problematic. Indeed, although constructivists present themselves as the champions of historicity, too often we find scholarship that relies entirely on a few, dated secondary sources, that traces 'ideas' through history without any or little reference to the sources and the various historical expressions of the 'ideas' that are being traced, but rather with the 'ideas' being usually modern ideal-typical definitions retrospectively imposed onto the past. For a school that cherishes historicity, this approach leads more often than not to certain sweeping generalizations and striking ahistoricist claims.

Indeed, there seems to be a trade-off between historicity and generality in the way IR has so far approached the historical study of language and ideas. As we have seen, when asking questions about the nature and ordering of the international scholars have either undertaken specific historical studies of individual authors, taking them as representative of the thought of their time, or have relied on an abstract, disembodied and ultimately somewhat ahistorical notion of 'ideas.' This issue has not been

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[36] Rodney Bruce Hall, *National collective identity. Social constructs and international systems.* (New York: Columbia University Press, 1999); Daniel Philpott, *Revolutions in sovereignty: how ideas shaped modern international relations* (Princeton: Princeton University Press, 2001); Reus-Smit, *The moral purpose of the state.*

overlooked by IR scholars. It is worth quoting Reus-Smit's take on the historiographical approach of IR constructivism when compared to the Cambridge School of intellectual history at some length:

> "In Skinner's historiography we find articulated the principal elements of the constructivist approach to history. But there is one crucial difference between the two. For Skinner, the injunction that ideas must be studied in context prioritises fine grained, localised historical inquiry, in which the cultural and political contours of an epoch are garnered from deep understandings of texts and the cultural and linguistic milieus in which their authors enacted them. … Constructivists, in contrast, do big history; they seek insights into 'the changing use of force,' 'the recurrence of genocidal practices,' 'the evolution of the institution of sovereignty,' 'the genealogy of arms control norms,' etc., and their preferred approach is a blend of macro-history and comparative case-study analysis. …Constructivists move between the helicopter view of macro-history and the case-specific analyses of the politics of legitimacy. But in this dance strict fealty to the Skinnerian injunction is compromised; constructivist history frequently explores several ideas in several historical contexts, gaining answers to a set of large-scale questions while sacrificing the kind of 'thick' analysis of individual cases that Skinner might recognise."[37]

While there may certainly be some truth in the idea that the social-scientific enterprise strives to reach a level of overview, or works at a level of abstraction, that makes the kind of fine-grained, in-depth study frequent in historical scholarship more difficult, this is certainly not an excuse to abandon the quest for detailed, nuanced historical analysis altogether. This tension is even more present when the goal of the study is something as broad as to reach an understanding of the basic functioning and features of an international order.

Intellectual history Methods

In order to overcome this trade-off, this thesis will adopt a different approach to the study of language than the ones adopted by English School and Constructivism. Indeed, IR approaches to the history of political thought, mostly concerned with tracing ideas

[37] Christian Reus-Smit, "Reading History through Constructivist Eyes," *Millennium - Journal of International Studies* Vol. 37, No. 2 (2008), pp. 410-11.

and theories through time and then developing and drawing parallels with current situations and theories, and not necessarily concerned with historicising international political thought, have until recently been quite impervious to the new methodologies in intellectual history. However, in the last fifteen years a number of IR scholars have begun to reclaim the use of the new methodological approaches in intellectual history, mostly that of Quentin Skinner and the Cambridge School, not only to gain a better understanding of the classics, but also to a certain extent as a means to analysing the evolution of social and political conditions.[38] Indeed, several voices in IR have recently pointed to the potential benefits of adopting a Skinnerian approach: it helps us understand the current situation by highlighting contrast with the past,[39] examine the historical and linguistic constraints of the legitimating practices of actors,[40] and it yields "a more sophisticated understanding of language in both the reproduction of social norms and conventions and consequently in the process(es) of change itself."[41]

Quentin Skinner's concern arose from a dissatisfaction with two dominant methods in the History of Political Thought, both of which have much in common with the way the subject is approached in IR: one, exemplified by A. O. Lovejoy, stressed the presence of unit ideas in political thought, and was concerned with tracing those through time; another, sometimes labelled textualism, argued that texts themselves contained everything needed to interpret them correctly and that no attention was due to the

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[38] See especially Duncan Bell, "International relations: the dawn of a historiographical turn?," *British Journal of Politics and International Relations* Vol. 3, No. 1 (2001); Duncan Bell, "Language, legitimacy, and the project of critique," *Alternatives: Global, Local, Political* Vol. 27, No. 3 (2002). Evgeny Roshchin, "(Un)Natural and Contractual International Society: a Conceptual Inquiry," *European Journal of International Relations* Vol. (2011); Evgeny Roshchin, "The Concept of Friendship: From Princes to States," *European Journal of International Relations* Vol. 12, No. 4 (2006). See also Beate Jahn's introduction in Beate Jahn, ed. *Classical theory in international relations* (Cambridge: Cambridge University Press, 2006).

[39] Edward Keene, *International political thought. A historical introduction.* (Cambridge: Polity Press, 2005), p. 17.

[40] Reus-Smit, "Reading History through Constructivist Eyes".

[41] Bell, "Language, legitimacy, and the project of critique".

context.[42] Both approaches lead to a misreading of what the authors had said, attributing to them thoughts and concepts that they could not possibly have had in their time, and distorting their arguments in the search for presupposed coherence or elements that must have been addressed. In this context, Skinner set out to find a method that allows us to grasp the meaning of a text in a truly historical manner.

Influenced by the linguistic turn in philosophy, and the notion of language as an intersubjective tool that individuals have to pursue a variety of goals, but which they nevertheless have a limited capacity to change,[43] Skinner argues that in order to understand the meaning of any text, which is nothing but another speech act, we cannot limit ourselves to understanding the meaning of the words, the 'locutionary' force of a text. Rather, we need to understand the intentions of the author *in* writing that text, or rather the 'illocutionary act' that is performed in it.

Following Wittgenstein's notion of language games, language is seen as a self-contained and rule governed system, which makes some resources and practices available and precludes the possibility of others. Understanding the meaning of a text thus becomes understanding what move the author is performing within a specific language game. In Skinner, the language game in which a particular text is inscribed is conceptualized as a series of historically contingent conventions. These conventions are all the socially given meanings, concepts and ways of proceeding in the context of which an author is positioning himself.

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[42] Quentin Skinner, "Some problems in the analysis of political thought and action," in *Meaning and context. Quentin Skinner and his critics.*, ed. James Tully (Princeton, New Jersey: Princeton University Press, 1988), p. 98.
[43] James Tully, "The pen is a mighty sword: Quentin Skinner's analysis of politics," in *Meaning and context. Quentin Skinner and his critics*, ed. James Tully (Princeton, New Jersey: Princeton University Press, 1988), p. 8.

In the context of the goals of this thesis Skinner thus first and foremost points to the need to adopt a much more historically-aware approach towards the history of language and social categories. Indeed, we have already highlighted the crucial role of contestation and struggle between competing representations of the international. When we study these, we must therefore be aware that they are not responding to timeless questions of the international, but that each intervention is rather inscribed in a particular political, linguistic, and conceptual context. Understanding the deployment of certain categories, ideas, and representations thus becomes a matter of what moves are being performed within a certain conventional context.

It is at this point worth examining in more detail what these conventions might entail. Skinner's conventions need not be understood in terms of an integrated framework, like that of Pocock's languages. Conventions refer at the same time to something much more limited and much broader. On the one hand, the conventions against which we need to understand the moves of any author are not necessarily a coherent unit, but something much more diverse and dispersed. In this sense, conventions not only include a series of concepts or central questions, but also go beyond purely linguistic aspects and also encompass much more limited things such as the type of text or the way of framing and structuring it, which do not necessarily have to do with a specific language.

On the other hand, this makes Skinner's conventions a much more ambitious endeavour, as the historian ultimately needs to be familiar with "the whole of (…) the social imaginary, the complete range of the inherited symbols and representations that constitute the subjectivity of an age."[44] It is also worth noting that this broadening of the context to whatever "enables us to appreciate the nature of the intervention

[44] Quentin Skinner, *Visions of Politics*, vol. 1 (Cambridge: Cambridge University Press, 2002), p. 102.

constituted by [the author's] utterances" leads Skinner to the conclusion that "there is no implication that the relevant context need be an immediate one. (…) The problems to which writers see themselves as responding may have been posed in a remote period, even in a wholly different culture."[45] Thus, in order to understand this context against which intentions can be determined requires that the historian becomes familiar with the conventional context of a particular author.

In terms of this thesis, and of the way the history of international political thought has been conducted in IR, this points to the need not to focus on the great classics of political thought, and rather pay much more attention to minor and secondary authors, as these are the ones that exemplify the thought of their moment. Even if we are to re-conceptualise the canon of classics as a historically self-selected canon, in which the great authors are those that, whilst limited by the resources of their time, manage to transcend it and reshape it, looking exclusively at those who change the context may not be the obvious choice if what we want is to understand the standard ideas of a time.

Communities of practitioners

However, Reus-Smit's objection above regarding the impossibility for IR scholars to conduct the kind of 'thick' analysis that Skinner requires considering the level of generality at which they work, should be noted. Even if this should not provide an excuse to err on the opposite side, and as we have seen, provide excessively generalized accounts with little or no attention to historical detail and nuance, it is true that the demands of Skinnerian analysis (i.e. getting acquainted with the entirety of the sociolinguistic context of the author) may be excessive for the goals of IR scholarship. How should we then find the right balance between conducting historically accurate

[45] Ibid., p. 116.

and attentive analysis, and reaching a level of overview or generality suitable to the character of IR inquiry? This section will argue that the idea of communities of practitioners, and to a certain extent, Pocock's notion of languages provides a balance between 'thick' historical analysis and too much generality.

In the past ten years, a group of authors in IR have started to focus on international practices and transnational communities of practice, as part of the so-called 'practice turn.'[46] Drawing from social theory and the works of Bourdieu and Foucault, among others, they have argued that the narrow focus on texts and meaning that characterised certain schools of IR work is not enough to understand world politics, which is instead made of a series of everyday, repetitive, material actions. Practices are thus defined as "competent performances…. Socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out and possibly reify background knowledge and discourse in and on the material world".[47]

Practices, insofar as they are meaningful actions, do not happen individually but rather in a social context that gives them (intersubjective) meaning. The contention is thus that society is organized in groups of people that share an intersubjective structure that gives meaning to these practices. Communities of practice, defined loosely as groups of people that "engage in a process of collective learning in a shared domain of human endeavour,"[48] are thus the reference for meaningful action. In this sense, they provide a useful, self-contained way of approaching Skinner's idea of context: since communities

[46] For example Iver B. Neumann, "Returning Practice to the Linguistic Turn: The Case of Diplomacy," *Millennium - Journal of International Studies* Vol. 31, No. 3 (2002); Emanuel Adler, *Communitarian international relations: the epistemic foundations of international relations* (London: Routledge, 2005); Emanuel Adler and Vincent Pouliot, "International practices," *International Theory* Vol. 3, No. 01 (2011); Emanuel Adler and Vincent Pouliot, *International practices* (Cambridge: Cambridge University Press, 2011); Rebecca Adler-Nissen, *Bourdieu in international relations: rethinking key concepts in IR* (London: Routledge, 2013); Vincent Pouliot, *International security in practice: the politics of NATO-Russia diplomacy* (Cambridge: Cambridge University Press, 2010).
[47] Adler and Pouliot, "International practices", p. 4.
[48] Etienne Wenger, "Communities of practice. A brief Introduction," http://www.ewenger.com/theory/ [Accessed 10/03/2013].

of practice share a common code, and since it is in the context of this code that we need to interpret action, studying these communities provides a limited strategy to get at and understand the context of any particular text or action, and a strategy that operates at a level of generality sufficiently removed from what a 'thick' Skinnerian analysis would entail. Indeed, the usefulness of the concept of communities of practice for the study of the interaction between ideas and social structures has been highlighted by Adler, who argued that "taking real and practical communities as the ontological ground and level of analysis that mediates between individuals and social structures helps overcome the epistemological and methodological problems associated with using ideas to explain social phenomena."[49]

This potential use is only emphasized by the relation between practices and discourse. Considering the vital role of language in giving shared meaning to human experience, Adler explains that "the communities around which knowledge evolves, which play a crucial role in the construction of social reality, are constituted by language. First and foremost, therefore, they are 'communities of discourse.'"[50] In this sense, we no longer talk of language in the abstract, but of linguistic practices that acquire a meaning in the context of the community of practice. The similarity with what Skinner conceives of as the context is once again striking, as the notion of discursive practices takes us beyond the realm of semantics and concepts, and allows us to analyse aspects such as the ways of signing a document, or to whom the document is addressed and how this is done. However by analysing this at the level of the community, rather than striving to understand one single text, one single move, we can leave Skinner's 'thick analysis' and achieve a higher level of generality, whilst still maintaining a historically rigorous approach.

[49] Adler, *Communitarian international relations*, p. 27.
[50] Ibid., p. 13.

The implications of the linguistic constitution of communities of practitioners, however, do not only remind one of Skinner's broad understanding of context, but also of his fellow historian and member of the Cambridge School J.G.A. Pocock, and his concept of languages. Deeply influenced by the publication of Thomas Kuhn's *The structure of scientific revolutions* in 1962, Pocock drew on Kuhn's idea of paradigm as an overarching set of interrelated ideas, assumptions and concepts, a worldview that constituted the framework in which and in reference to which scientists conducted their daily practices. He argued that in the field of history of political thought, these paradigms are "languages", defined as "idioms, rhetorics, ways of talking about politics, distinguishable language games of which each may have its own vocabulary, rules, preconditions and implications, tone and style."[51] In the same way that Kuhn's paradigms were not timeless or universal, and thus the history of science was characterized by subsequent *revolutions* or changes of paradigm, Pocock's languages are historically-specific frameworks that shape the way authors thought about politics, structures that opened certain questions and prevented others from arising. The idea of a self-contained language game can in this sense be useful when studying communities of practice: each community will have its own language game, its own set of interrelated concepts that give meaning to the community's textual and non-textual practices, and that ultimately reflect their worldview, their 'background knowledge' in Adler and Pouliot's terms.[52] However, insofar as they are analogous to communities of practice, the language game that constitutes the community will go beyond the purely conceptual, semantical, and rhetorical understanding of Pocock's languages, and include also other material and practical yet still linguistically constructed aspects.

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[51] J.G.A Pocock, "The concept of a language and the *métier d'historien*: some considerations on practice," in *The languages of political theory in early-modern Europe*, ed. Anthony Pagden (Cambridge: Cambridge University Press, 1990), p. 21.
[52] Adler and Pouliot, *International practices*.

It is worth mentioning that despite Pocock's use of Kuhn, languages do not monopolize the totality of the political thought of their time. Thus, Pocock to some extent abandoned the identification of languages with paradigms: "while we may think of them [languages] as having the character of paradigms, in that they operate so as to structure thought and speech in certain ways and to preclude their being structured in others, we may not describe them as paradigms if the term implies that preclusion has been successfully effected."[53] In this sense, at any point, there are a variety of political languages that coexist: sometimes, the different languages correspond to different groups of authors or practitioners; however, we may also – and actually usually do- find elements from more than one language in the works of an author or in a certain area of practice. This idea of non-exclusivity is also to a certain extent present in the literature about communities of practice, insofar as individuals can be and are part of more than one community, and members of communities can cooperate and interact with each other, resulting in changes in the practices that incorporate elements from other communities.

Finally, another key element that adopting a communities of practitioners perspective highlights is that of learning, and the importance of incorporating this type of study to the study of ideas. Indeed, part of being a group is being a competent practitioner of the practices of the group, to adopt Bourdieu's terminology, and competency is acquired through socialization and learning. In the works of 'practice turn' authors, the role of learning is vital for communities, as it is only through these learning processes that the members can acquire a new set of concepts that give a new meaning of reality, and consequently, a new way of doing and of conceiving what is acceptable and what is not. If we are to adopt communities as our context, therefore, examination of this learning

[53] Pocock, "The concept of language", p. 21.

process and what it involves is vital, not only because it is part of the formation community, but also because it can shed light on the nature of the community itself and its position in society.

In conclusion, the focus on communities of practitioners and their languages in the Pocockian sense provides a good way of balancing the requirements of 'thick', historical Skinnerian analysis and of the level of generality that is expected in academic International Relations. It provides a limited and manageable context for the study of texts, and a way to aggregate the individual texts and details in a way that enables the study of society and structures of thought. Moreover, it calls attention to a necessary complement to the study of ideas, as is the examination of biographical and sociological elements of the authors, which, when done at the level of a community, calls for something closer to prosopography.[54]

3. Law, lawyers, and jurisprudence from the twelfth to the fourteenth centuries

Having established the research strategy and conceptual framework for the study of the medieval international system, this final section turns to examine the community of practitioners that constitutes the focus of this study: university-trained jurists from the 12th to the 14th centuries. In doing so, it seeks to highlight three basic ideas. First, the importance of law in the medieval mind-set, as well as the proximity to political power of trained lawyers. These two facts, which are closely related, explain why we can speak of lawyers as authorized practitioners. The second aspect that will be highlighted here is the training of the lawyers themselves at university: who lawyers were, where they came from, what their study consist of, as this constitutes the basic process of

[54] For a similar approach see Martti Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law, 1870-1960* (Cambridge: Cambridge University Press, 2001).

socialization by which lawyers learned their craft and thus became a community. Finally, the third element are the boundaries of their practice and discourse: what the main texts were, how they were thought of, commented on, studied, and the basic assumptions about interpretation, as these constitute the broad intersubjective bases and rules for medieval jurisprudence.

Law, the twelfth century renaissance, and political power.

The first issue that we need to consider is from where lawyers specifically and more broadly legal language derive its authority to order the late-medieval international. Indeed, at any point in time there are a multitude of discourses and ways of representing the world. What made legal representations in the later Middle Ages particularly effective? The answer to this lies in the social positions that lawyers came increasingly to occupy in the context of an increasingly bureaucratizing political authority.

Indeed, from the twelfth century onwards these jurists started to occupy positions in the progressively busy ecclesiastical courts, which saw an increase in their activity throughout the century, as well as a change in their functioning with the availability of trained judges and attorneys and the adoption of the Romano-Canonical procedure. Slightly later, lawyers also began to occupy positions in royal, imperial or municipal courts, and with the lawyers, these also adopted the new judicial procedures.

Lawyers also occupied progressively high-ranking positions within the secular administration of municipalities, kings, and the empire. Thus, for example, between 1280 and 1320 in the five *sénechausées* of the south of France, 189 jurists served at the service of the King of France, and it was largely through these jurists that the

centralization of the monarchy was implemented.[55] In other territories, mostly in the cities of northern Italy, these lawyers also gravitated towards the services in the municipal communes, with professional standards to access these posts being set as early as the thirteenth century. These trained lawyers provided great assistance in administering increasingly complex polities, which had multiple levels of laws and complex jurisdictions. As king Jaume I of Aragon expressed in the mid-thirteenth century:

> "In any king's court there should be canonists, civilians, and experts in customary law with him, for all kinds of pleas come before him. By the mercy of God for which I give thanks, I have three or four kingdoms where many kinds of cases come up. If I did not have people with whom to deliberate, it would shame me and my court, for neither we nor any non-professional can be learned in the law books everywhere… That is why I have these men with me."[56]

The important role of lawyers in the administration of kingdoms is also indicated by the fact that many of the universities founded during the thirteenth century and later, especially in the Iberian Peninsula and Sicily, were created by Kings and Emperors.[57] These universities and their law faculties provided the royal administration with a "steady stream of functionaries"[58] that served not only in the judicial part of the administration, but also on other extremely important functions such as diplomacy. Indeed, the thirteenth century saw the gradual development of diplomatic practices that gave diplomats full powers [*plena potestas*] in representing and thus binding the rulers that sent them. In this context, people well versed in law that could negotiate agreements and adequately counsel the rulers were increasingly chosen as diplomats, and thus important canonists and romanists such as Azo or Hostiensis led several

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[55] Peter Moraw, "Careers of graduates," in *A history of the university in Europe. Vol 1. The Middle Ages*, ed. Hilde De Ridder-Symoens (Cambridge: Cambridge University Press, 1992), p. 256.
[56] Cited in Norman Zacour, *Jews and saracens in the consilia of Oldradus de Ponte* (Toronto: Pontifical Institute of Mediaeval Studies, 1990), p. 4.
[57] Paolo Nardi, "Relations with authority," in *A history of the university in Europe*, ed. Hilde de Ridder-Symoens (Cambridge Cambridge University Press, 1992).
[58] Brundage, *The medieval origins of the legal profession*, p. 242.

diplomatic missions.[59] Similarly, from the fourteenth century onwards, renaissance Florence mostly relied on professional lawyers for its diplomatic activity.[60]

Not only did jurists hold positions within ecclesiastical courts and later secular court systems, but they also progressively occupied high-ranking offices in both church and secular structures. In the Papal court, for example, it is estimated that from the 1150s onwards, jurists dominated the College of Cardinals, and from 1153 onwards a canon lawyer held the Roman Chancellery.[61] The pervasiveness of lawyers in Rome and then Avignon is even more clear if we see that from the thirteenth century on, Popes were more frequently trained lawyers than theologians. Indeed, a total of fourteen popes between the thirteenth and fifteenth century were trained canonists.[62] And this was not only the case in the highest offices of the Church, but throughout Europe, the study of law gave access to a whole other range of ecclesiastical positions, like bishops or canons.

Lawyers

Despite the diverse set of careers, what constituted jurists as a group was their training in law at a university level. The origin of universities is still a debated issue. We know that law faculties started to appear in the twelfth century initially around a series of teachers who established themselves in certain cities in Northern Italy, most notably Bologna. Students and teachers gradually increased in number to the point in which they associated and constituted themselves into *universitates*, in the Latin sense of associated group or corporation. By the end of the thirteenth centuries there were only

[59] Donald E. Queller, *The office of ambassador in the Middle Ages* (Princeton: Princeton University Press, 1967); Brundage, *The medieval origins of the legal profession*, p. 463-65.
[60] See Lauro Martines, *Lawyers and statecraft in renaissance Florence* (Princeton: Princeton University Press, 1968).
[61] Brundage, *The medieval origins of the legal profession*, p. 132. Moraw, "Careers of graduates", p. 248.
[62] Brundage, *The medieval origins of the legal profession*, p. 347.

16 universities in Europe, most of them in northern Italy, France and the Iberian Peninsula, as well as Oxford and Cambridge in the British Isles.

In this context, law students were men, baptised Christians – the only two requirements to be admitted at university- and in most cases held ecclesiastical benefices, which allowed them to pay for the cost of their studies. From the fourteenth century onwards, however, the number of non-clerics increased, with a progressively higher number of students coming from urban, merchant backgrounds. The very limited number of universities meant that the mobility of law students and jurists was considerable, with students often abandoning their home regions to study at a far away university, and then moving again to practice somewhere else.[63] Although most of them stayed connected to their places of origin throughout their lives, both their mobility in order to study and the mobility that characterised some of their careers later made of lawyers a truly transnational 'European' class, and as such constitute a good community for the study of the international order of the time.

The teaching at the faculties of law centred in what was called the *ius commune*, which combined Roman and canon law. Initially degrees were offered in both separately, but increasingly law students studied both of them, eventually being able to get degrees 'in both laws' [*utrumque iuris*]. This was because the development of and the borrowing between both laws became increasingly interwoven, eventually producing one single system that we call *ius commune* or the common law to all Christendom. Students of either law, thus, needed at least basic comprehension of the other in order to properly

[63] For a detailed account of the mobility of medieval university graduates see Hilde de Ridder-Symoens, "Mobility," in *A history of the university in Europe. Vol 1. The Middle Ages*, ed. Hilde de Ridder-Symoens (Cambridge: Cambridge University Press, 1992).

understand their subject. As a medieval proverb said: "A Romanist without canon law isn't worth much, and a canonist without Roman law is worth nothing at all."[64]

Students attended lectures throughout the day, six days a week. Each lecture, which was delivered in Latin, followed the same structure, at least according to thirteenth century canonist Henry of Segusio (Hostiensis): a summary of the legal text was follow by the reading of the text in question; then parallels with other legal texts were drawn, after which the arguments against the text were spelled out; finally, the questions arising from the text were posed and answered and the lecture finalised by pointing out the most important issues or ideas arising from the texts.[65]

At Bologna, six to seven years of this type of study were required before a student was granted the title of bachelor [*baccalaureus*], which allowed him to teach. After two or so more years of teaching and study, the student was ready to proceed to the first of the two examinations that were required to obtain the title of doctor, a private examination that granted the student the title of licentiate [*licentiatus*] and where the student had to show his knowledge through a discussion of two passages of the law selected by the examiners. The final, public examination to obtain the degree of doctor [*juris civilis/canonici doctor*] "more nearly resembled a pageant than a rigorous test of the candidate's legal knowledge."[66] The candidate had to invite professors and fellow students, buy them gifts and pay for a banquet at the end of the ceremony, all of which amounted to a small fortune that could hardly be afforded without either family support or a sponsor. In this sense, it is worth noting then that the benefits of graduation and of

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[64] "Legista sine canonibus parum valet, canonista sine legibus nihil" translated in Brundage, *The medieval origins of the legal profession*, p. 234.
[65] Antonio García y García, "The faculties of law," in *A history of the university in Europe. Vol 1. The Middle Ages*, ed. Hilde De Ridder-Symoens (Cambridge: Cambridge University Press, 1997), p. 398.
[66] Brundage, *The medieval origins of the legal profession*, p. 260.

having the degree of doctor were limited to those who could afford it, which were most likely those coming from wealthy and influential families.

Indeed, considering the cost of studying and of graduating, many law students attended university but did not graduate – the graduation rate has been determined to be about 25% for some collectives,[67] but was probably much lower. However, they still went through a substantial number of years of intensive training that shaped how they argued, acted and ultimately how they conceived of the world.

It is in the joint analysis of this training and their subsequent careers that we find the key to understanding the evolution of both medieval political thinking and more importantly of medieval political structures. The many years spent in the study of law at the universities not only provided lawyers with knowledge of the *ius commune*, but also made them a community of practice, in which they could "easily recognize one another, not only when they came from the same city or the same region but throughout Christendom". Indeed, through their law training and subsequent dispersion into administrative and judicial service throughout Europe, what we have is a phenomenon of "horizontal integration of elites."[68]

The ius commune

We have so far seen from where legal language derived its authority as well as the training on the basis of which lawyers became a community of practice. This final section examines the textual bases for the activity of the lawyers as well as the main genres of legal practices and commentary.

[67] García y García, "The faculties of law".
[68] Manlio Bellomo, *The common legal past of Europe. 1000-1800* (Washington, D.C.: The Catholic University of America Press, 1995), p. 199.

The basic collection of texts for Roman Law is known as the *Corpus Iuris Civilis.* Three of its four main books were compiled in the sixth century by order of Emperor Justinian I starting in 527. The *Codex* or code was a compilation of imperial constitutions since Hadrian, and it was organized in twelve books. The Digest or *Pandectae* in their Greek name was a collection of excerpts from classical jurisprudential treatises, including a large number by Ulpian. The Institutes (*Institutiones*) was a textbook of law divided into four books. It was compiled by two sixth-century jurists, Teophilus and Dorotheus, who based most of the text on Gaius' Institutes. These three books were issued together as law in 533. Finally, the fourth book, called *Novellae* or Novels was a compilation of 134 imperial constitutions, mostly written in Greek and issued by Justinian. In the later Middle Ages these were known as the *Authenticum*, and were divided into nine collations. From the end of the twelfth century onwards, however, a tenth collation was added which had some new constitutions from German roman Emperors and a collection of Lombard custom and feudal law known as the *Libri Feudorum.*

A basic feature of Roman Law in this sense was that it was so to say a closed system. Lawyers regarded the law books as pretty much sacred: authority had been vested in them through their official issuing by Justinian, and they believed that, as Accursius was to write in the ordinary gloss, "everything is found within the *corpus iuris.*"[69] Not only this, but Justinian himself had said in his decree of promulgation of the Digest that the text contained no contradictions that could not be reconciled.[70] The fact that these texts were regarded as all-encompassing and perfectly coherent clearly stood in clear

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[69] Magnus Ryan, "*Ius commune feudorum* in the thirteenth century," in *Colendo iustitiam et iura condendo. Federico II legislatore del Regno di Sicilia nel'Europa del Duecento. Per una storia comparata delle codificazione europee*, ed. A. Romano (Rome: Edizioni de Luca, 1997), p. 52.
[70] Digest, *Constitutio tanta.* Unless otherwise noted, citations from the Corpus Iuris Civilis are from *Corpus Iuris Civilis Iustinianei, cum commentariis Accursii*, (Lyon 1627).

tension with two facts which help us explain part of the jurisprudential evolution of Roman Law. First, their compilation in the sixth century was done extraordinarily fast considering the sheer size of the project, which meant that they actually contained many contradictory statements. Second, but most importantly, regardless of the claims to include everything, the reality of the late-medieval world did not conform to the world as described in the *Corpus Iuris*. As a consequence, many exercises of creative jurisprudence, parallelisms, and conceptual innovation were required to make the text relevant to late-medieval practice. As we will see in the following chapters, the process of trying to reconcile these two aspects became crucial for both conceptual innovation and for the evolution of jurisprudence.

The basic text of canon law was Gratian's *Harmony of discordant canons*, generally known as *Decretum*. As its name indicated, the book was a compilation of some 3945 excerpts from a variety of sources, including patristic writings, papal pronouncements, and canons from councils and church synods. Inspired by the principles of dialectical analysis espoused by the academic culture of the time, the book attempted to systematize the main themes and resolve the contradictions between different pronouncements.[71] It was structured in three sections: the first one has 101 *distinctiones* (distinctions), each one of which treats a different theme. The second part has 36 cases or *causae*, in which an introductory paragraph sets up a situation that poses some problems of law. After each *causa*, a series of questions or *quaestiones* are asked about the case and the relevant material is successively exposed. The final part is a treatise on the sacraments, composed of five distinctions.

[71] For more on the compilation of the *Decretum* see Anders Winroth, *The making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000).

Contrary to what we have seen in Roman Law, however, the corpus of canon law was not limited to what was in Gratian's *Decretum*, but rather remained a lively and evolving body of law. Indeed, with the growth of church administration, and especially with the increasing role of the Papal court from the twelfth century onwards new laws were continually made, mostly through papal pronouncements on cases and on matters of law. These pronouncements, called decretals, were at first compiled and circulated by the teachers themselves. From the thirteenth century onwards, however, certain Popes ordered and issued official compilations of decretals, which were then sent to the schools to be taught and studied. The first and most important one of these compilations was the *Decretales Gregorii IX,* known as the *Liber Extra* compiled by Catalan canonist Raymond of Penyafort in the first half of the thirteenth century with the decretals of Pope Gregory IX. This work was structured in five books or *libri*, each of which contained several thematically organized titles (*tituli).* The structure of the *Liber Extra* was maintained in the subsequent compilations that made up the *Corpus Iuris Canonici:* the *Liber Sextus* of Boniface VIII, compiled in 1298 which includes the decretals of that Pope along with some of his predecessors; the *Constitutiones Clementiane*, published by order of Pope John XXII in 1317; and the *Extravagantes of John XXIII*, compiled in 1325 by Toulouse canon law professor Guigliermo de Monte Lauduno.

We have thus seen the authoritative texts that constituted the basis for both Roman and Canon Law. The academic activity and teaching of jurists was based on commentaries of these texts, attempting to relate them to one another as well as resolve the issues that arose between contradicting parts. These commentaries, however, took a variety of

forms and were written according to a variety of juristic genres.[72] The basic one was the gloss, a margin commentary on one word of a law or a canon. This gloss could range from very few words to a whole paragraph, and discussed any matters that arose in the interpretation of that word, as well as its relation to other texts. Over the generations, each one of the main texts of both laws came to have what is called an ordinary gloss, that is, the set of glosses that accompanied the text in the standard manuscripts used for teaching and practice. In the case of the *Decretum*, the ordinary gloss was compiled and written by Johannes Teutonicus and Bartolomeus Brixensis in the first part of the thirteenth century,[73] while in the case of the Corpus Iuris Civilis, this was done by Accursius by around 1230. An *apparatus* or *apparatus glossarum* was the name given to an articulated collection of glosses for an entire text. This was the basic genre of commentary for most texts, and in the cases in which it was written by a professor it was also called *lectura.* A final genre was the *summa*, which was a structured and exegetic commentary on a text which did not comment word by word. In this sense, it usually addressed whole chapters at a time, and was shorter than an *apparatus* of glosses.

[72] For a more extended exposition of the various genres, including some that will not be mentioned here see: García y García, "The faculties of law", pp. 394-97; Stephan Kuttner, "The revival of jurisprudence," in *Renaissance and renewal in the twelfth century*, ed. Robert Louis Benson, et al. (Oxford: Clarendon Press, 1982), pp. 311-15.

[73] There are also some fourteenth century additions to the gloss, see "prolegomena" in Kenneth Pennington, ed. *Johannes Teutonicus, Apparatus Glossarum in Compilationem Tertiam*, Monumenta Iuris Canonici (Vatican City: Biblioteca Apostolica Vaticana, 1981).

Figure 2.1. Manuscript of D 2.1 with gloss, 14th century. MS/675, Madrid, Biblioteca Nacional de España.

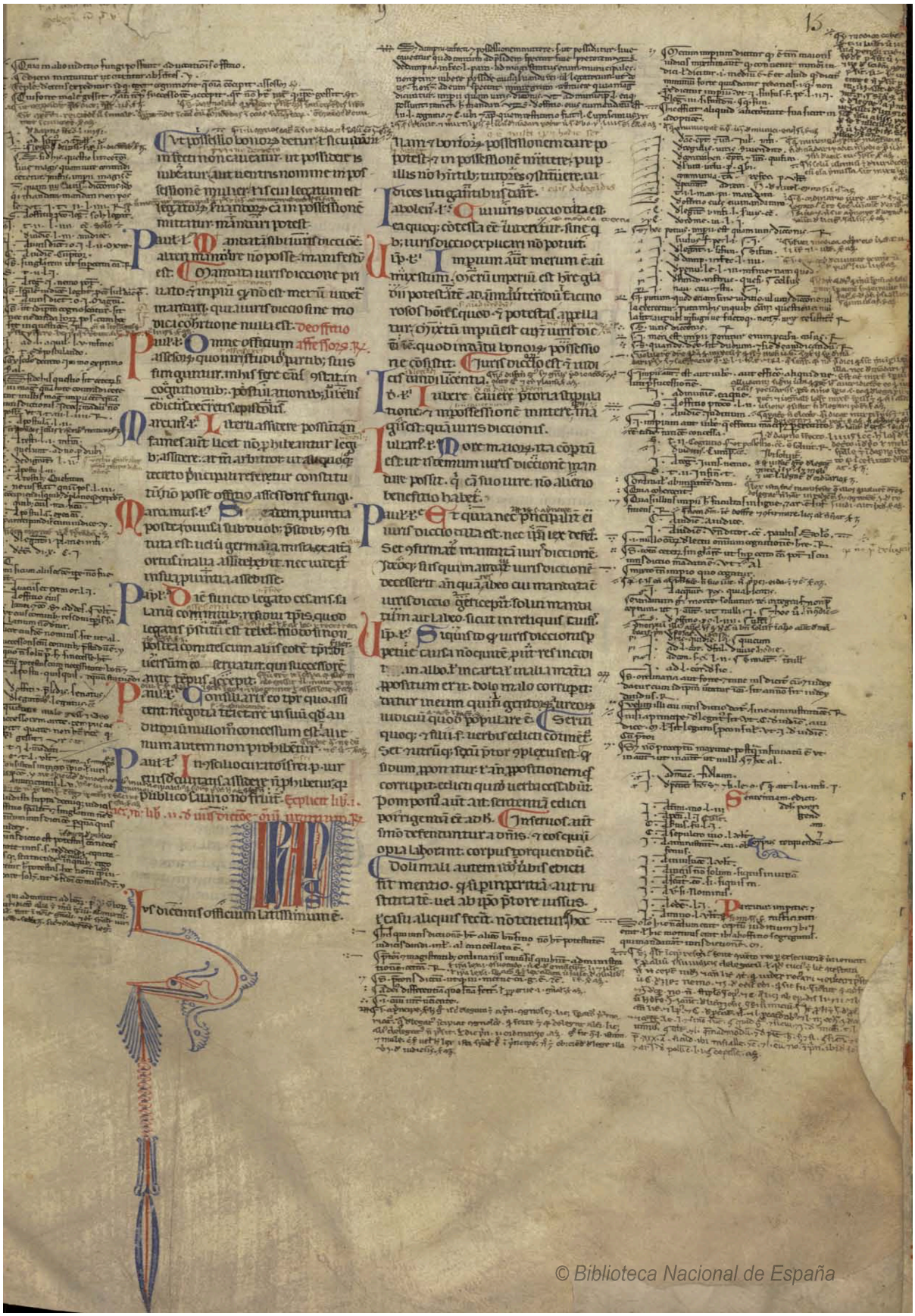
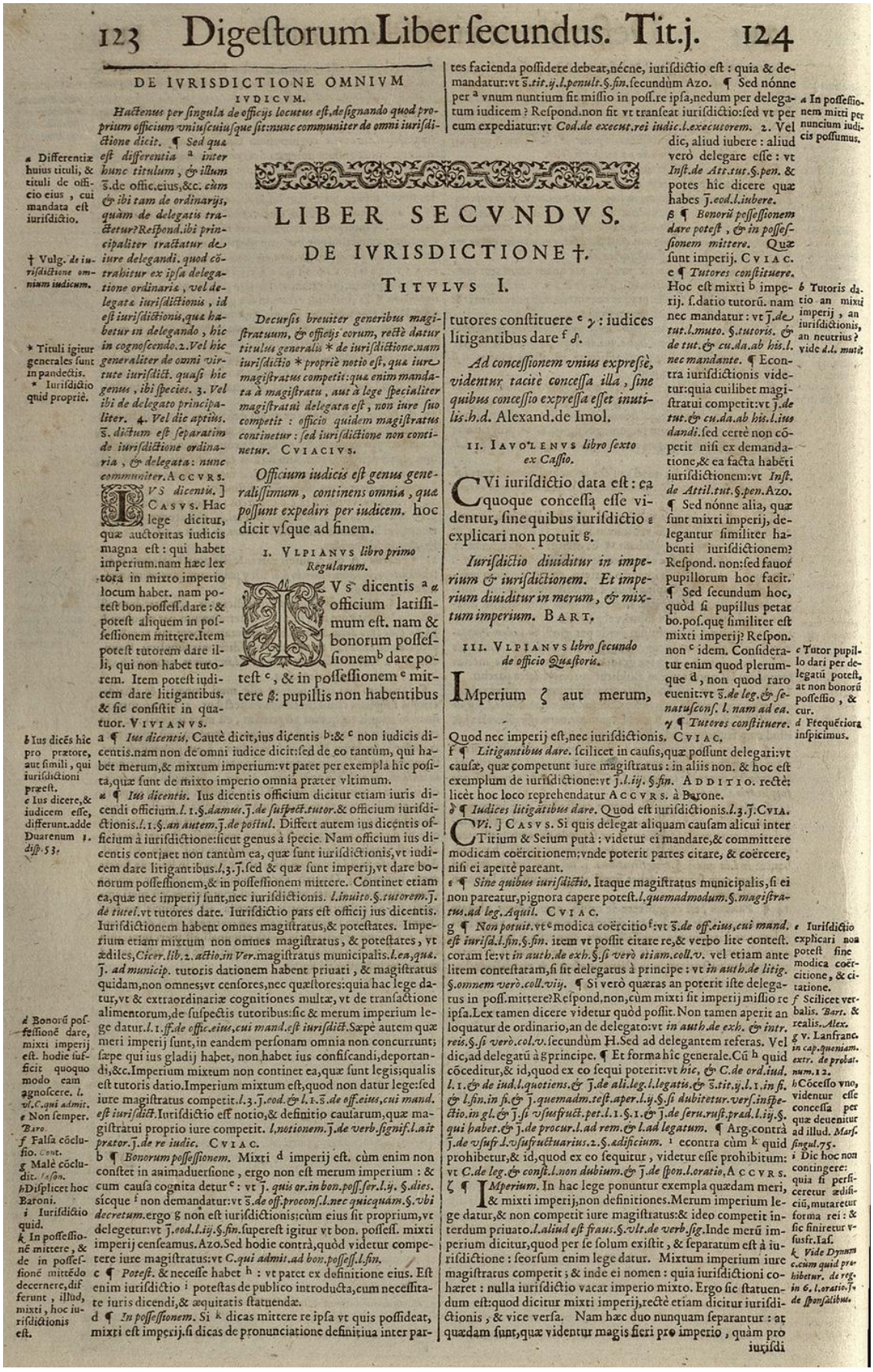


Figure 2.2. Digest 2.1, *Digestum Vetus*, Venice 1627.



123 Digestorum Liber secundus. Tit.j. 124

DE IVRISDICTIONE OMNIVM IVDICVM.

Hactenus per singula de officijs locutus est, de signando quod proprium officium vniuscuiusque sit: nunc communiter de omni iurisdictione dicit. ¶ *Sed qua est differentia* [a] *inter hunc titulum, & illum* ff.de offic.eius,&c. *cum & ibi tam de ordinarijs, quàm de delegatis tractetur? Respond. ibi principaliter tractatur de iure delegandi. quod cõtrahitur ex ipsa delegatione ordinariæ, vel delegatæ iurisdictionis, id est iurisdictionis, quæ habetur in delegando, hic in cognoscendo. 2. Vel hic generaliter de omni virtute iurisdict. quasi hic genus, ibi species. 3. Vel ibi de delegato principaliter. 4. Vel dic aptius.* ff. *dictum est separatim de iurisdictione ordinaria, & delegata: nunce communiter.* ACCVRS.

a Differentiæ huius tituli, & tituli de officio eius, cui mandata est iurisdictio.

† Vulg. *de iurisdictione omnium iudicum.*

* Tituli igitur generales sunt in pandectis.
* Iurisdictio quid propriè.

IVS *dicentis.*] CASVS. Hac lege dicitur, quæ auctoritas iudicis magna est: qui habet imperium. nam hæc lex tota in mixto imperio locum habet. nam potest bon. possess. dare: & potest aliquem in possessionem mittere. Item potest tutorem dare illi, qui non habet tutorem. Item potest iudicem dare litigantibus. & sic consistit in quatuor. VIVIANVS.

b Ius dicẽs hic pro prætore, aut simili, qui iurisdictioni præest.
c Ius dicere,& iudicem esse, differunt. adde Duarenum 1. *disp.* 53.

a ¶ *Ius dicentis.* Cautè dicit, ius dicentis [b]:& [c] non iudicis dicentis. nam non de omni iudice dicit: sed de eo tantùm, qui habet merum,& mixtum imperium: vt patet per exempla hic posita, quæ sunt de mixto imperio omnia præter vltimum.

a ¶ *Ius dicentis.* Ius dicentis officium dicitur etiam iuris dicendi officium. *l.* 1. §. *damus.* ff. *de suspect. tutor.* & officium iurisdictionis. *l.* 1. §. *an autem.* ff. *de postul.* Differt autem ius dicentis officium à iurisdictione: sicut genus à specie. Nam officium ius dicentis continet non tantùm ea, quæ sunt iurisdictionis, vt iudicem dare litigantibus. *l.* 3. ff. sed & quæ sunt imperij, vt dare bonorum possessionem,& in possessionem mittere. Continet etiam ea, quæ nec imperij sunt, nec iurisdictionis. *l. inuito.* §. *tutorem.* ff. *de tutel.* vt tutores dare. Iurisdictio pars est officij ius dicentis. Iurisdictionem habent omnes magistratus,& potestates. Imperium etiam mixtum non omnes magistratus, & potestates, vt ædiles, *Cicer. lib.* 2. *actio. in Ver.* magistratus municipalis. *l. ea, quæ.* ff. *ad municip.* tutoris dationem habent priuati, & magistratus quidam, non omnes; vt censores, nec quæstores: quia hac lege datur, vt & extraordinariæ cognitiones multæ, vt de transactione alimentorum, de suspectis tutoribus: sic & merum imperium lege datur. *l.* 1. ff. *de offic. eius, cui mand. est iurisdict.* Sæpè autem quæ meri imperij sunt, in eandem personam omnia non concurrunt; sæpe qui ius gladij habet, non habet ius confiscandi, deportandi, &c. Imperium mixtum non continet ea, quæ sunt legis: qualis est tutoris datio. Imperium mixtum est, quod non datur lege: sed iure magistratus competit. *l.* 3. ff. *eod.* & *l.* 1. ff. *de off. eius, cui mand. est iurisdict.* Iurisdictio est notio,& definitio causarum, quæ magistratui proprio iure competit. *l. notionem.* ff. *de verb. signif. l. ait prator.* ff. *de re iudic.* CVIAC.

d Bonorũ possessionẽ dare, mixti imperij est. hodie sufficit quoquo modo eam agnoscere. *l. vl. C. qui admit.*
e Non semper. *Baro.*
f Falsa cõclusio. *Cont.*
g Malè cõcludit. *Iason.*
h Displicet hoc Baroni.
i Iurisdictio quid.
k In possessionẽ mittere, & de in possessionẽ mittẽdo decernere, differunt, illud, mixti, hoc iurisdictionis est.

b ¶ *Bonorum possessionem.* Mixti [d] imperij est. cùm enim non constet in animaduersione, ergo non est merum imperium: & cum causa cognita detur [e]: vt ff. *quis or. in bon. poss. ser. l. ij.* §. *dies.* sicque [f] non demandatur: vt ff. *de off. proconsl. l. nec quicquam.* §. *vbi decretum.* ergo [g] non est iurisdictionis: cùm eius sit proprium, vt delegetur: vt ff. *eod. l. ij.* §. *fin.* supereſt igitur vt bon. possess. mixti imperij censeamus. Azo. Sed hodie contrà, quòd videtur competere iure magistratus: vt *C. qui admit. ad bon. possess. l. fin.*

c ¶ *Potest.* & necesse habet [h]: vt patet ex definitione eius. Est enim iurisdictio [i] potestas de publico introducta, cum necessitate iuris dicendi,& æquitatis statuendæ.

d ¶ *In possessionem.* Si [k] dicas mittere re ipsa vt quis possideat, mixti est imperij. si dicas de pronunciatione definitiua inter partes facienda possidere debeat, nécne, iurisdictio est: quia & demandatur: vt ff. *tit. ij. l. penult.* §. *fin.* secundùm Azo. ¶ Sed nónne per [a] vnum nuntium fit missio in possessionem ipsa, nedum per delegatum iudicem? Respond. non fit vt transeat iurisdictio: sed vt per eum expediatur: vt *Cod. de execut. rei iudic. l. executorem.* 2. Vel dic, aliud iubere: aliud verò delegare esse: vt *Inst. de Att. tut.* §. *pen.* & potes hic dicere quæ habes ff. *eod. l. iubere.*

a In possessionem mitti per nuncium iudicis possumus.

β ¶ *Bonorũ possessionem dare potest, & in possessionem mittere.* Quæ sunt imperij. CVIAC.

c ¶ *Tutores constituere.* Hoc est mixti [b] imperij. s. datio tutorũ. nam nec mandatur: vt ff. *de tut. l. muto.* §. *tutoris.* & *de tut. & cu. da. ab his. l. nec mandante.* ¶ Econtra iurisdictionis videtur: quia cuilibet magistratui competit: vt ff. *de tut. & cu. da. ab his. l. ius dandi.* sed certè non cõpetit nisi ex demandatione,& ea facta habẽti iurisdictionem: vt *Inst. de Attil. tut.* §. *pen.* Azo. ¶ Sed nónne alia, quæ sunt mixti imperij, delegantur similiter habenti iurisdictionem? Respond. non: sed fauor pupillorum hoc facit. ¶ Sed secundum hoc, quòd si pupillus petat bo. pos. quę similiter est mixti imperij? Respon. non [c] idem. Considerat enim quod plerumque [d], non quod raro euenit: vt ff. *de leg. & senatusconſ. l. nam ad ea.*

b Tutoris datio an mixti imperij, an iurisdictionis, an neutrius? vide *d. l. muto.*

γ ¶ *Tutores constituere.*

c Tutor pupillo dari per delegatũ potest, at non bonorũ possessio, & cur.
d Ftequẽtiora inſpicimus.

Decursis breuiter generibus magistratuum, & officijs eorum, rectè datur titulus generalis * *de iurisdictione. nam iurisdictio* * *propriè notio est, qua iurę magistratus competit: quæ enim mandata à magistratu, aut à lege specialiter magistratui delegata est, non iure suo competit: officio quidem magistratus continetur: sed iurisdictione non continetur.* CVIACIVS.

Officium iudicis est genus generalissimum, continens omnia, quæ possunt expediri per iudicem. hoc dicit vsque ad finem.

I. VLPIANVS *libro primo Regularum.*

IVS dicentis [a] α officium latissimum est. nam & bonorum possessionem [b] dare potest [c], & in possessionem [e] mittere β: pupillis non habentibus tutores constituere [e] γ: iudices litigantibus dare [f] δ.

Ad concessionem vnius expresiè, videntur tacitè concessa illa, sine quibus concessio expressa esset inutilis. h. d. Alexand. de Imol.

II. IAVOLENVS *libro sexto ex Cassio.*

CVi iurisdictio data est: ea quoque concessa esse videntur, sine quibus iurisdictio [ε] explicari non potuit ε.

Iurisdictio diuiditur in imperium & iurisdictionem. Et imperium diuiditur in merum, & mixtum imperium. BART.

III. VLPIANVS *libro secundo de officio Quæstoris.*

IMperium ζ aut merum, Quod nec imperij est, nec iurisdictionis. CVIAC.

f ¶ *Litigantibus dare.* scilicet in causis, quæ possunt delegari: vt causæ, quæ competunt iure magistratus: in aliis non. & hoc est exemplum de iurisdictione: vt ff. *l. ij.* §. *fin.* ADDITIO. rectè: licèt hoc loco reprehendatur ACCVRS. à Barone.

δ ¶ *Iudices litigãtibus dare.* Quod est iurisdictionis. *l.* 3. ff. CVIA. *Vi.*] CASVS. Si quis delegat aliquam causam alicui inter Titium & Seium putà: videtur ei mandare,& committere modicam coërcitionem: vnde poterit partes citare, & coërcere, nisi ei aperte pareant.

ε ¶ *Sine quibus iurisdictio.* Itaque magistratus municipalis, si ei non pareatur, pignora capere potest. *l. quemadmodum.* §. *magistratus. ad leg. Aquil.* CVIAC.

e Iurisdictio explicari non potest sine modica coërcitione, & citatione.
f Scilicet verbalis. *Bart.* & realis. *Alex.*
g v. Lanfranc. *in cap. queniam. extr. de probat. num.* 12.
h Cõcesso vno, videntur esse concessa per quæ deuenitur ad illud. *Marsſingul.* 75.
i Dic hoc non contingere: quia si perficeretur ædificiũ, mutaretur forma rei: & sic finiretur vſusfr. Iaſ.
k *Vide Dynum c. cum quid prohibetur. de reg. in 6. l. oratio.* ff. *de ſponſalibus.*

g ¶ *Non potuit.* vt [e] modica coërcitio [f]: vt ff. *de off. eius, cui mand. est iurisd. l. fin.* §. *fin.* item vt possit citare re,& verbo lite contest. coram se: vt *in auth. de exh.* §. *si verò etiam. coll. v.* vel etiam ante litem contestatam, si sit delegatus à principe: vt *in auth. de litig.* §. *omnem verò. coll. viij.* ¶ Si verò quæras an poterit iste delegatus in poss. mittere? Respond. non, cùm mixti sit imperij missio re ipsa. Lex tamen dicere videtur quòd possit. Non tamen aperit an loquatur de ordinario, an de delegato: vt *in auth. de exh. & intr. reis.* §. *si verò. col. v.* secundùm H. Sed ad delegantem referas. Vel dic, ad delegatũ à [g] principe. ¶ Et forma hîc generale. Cũ [h] quid cõceditur,& id, quod ex eo sequi poterit: vt *hic, & C. de ord. iud. l.* 1. *& de ind. l. quotiens.* & ff. *de ali. leg. l. legatis.* & ff. *tit. ij. l.* 1. *in fi. & l. fin. in fi.* & ff. *quemadm. test. aper. l. ij.* §. *si dubitetur. vers. inspectio. in gl.* & ff. *si vsusfruct. pet. l.* 1. §. 1. & ff. *de seru. rust. prad. l. ij.* §. *qui habet.* & ff. *de procur. l. ad rem.* & *l. ad legatum.* ¶ Arg. contrà ff. *de vsufr. l. vsufructuarius.* 2. §. *ædificium.* [i] econtra cùm [k] quid prohibetur,& id, quod ex eo sequitur, videtur esse prohibitum: vt *C. de leg. & const. l. non dubium.* & ff. *de ſpon. l. oratio.* ACCVRS.

ζ ¶ *Imperium.* In hac lege ponuntur exempla quædam meri, & mixti imperij, non definitiones. Merum imperium lege datur,& non competit iure magistratus: & ideo competit interdum priuato. *l. aliud est fraus.* §. *vlt. de verb. sig.* Inde merũ imperium dicitur, quod per se solum existit, & separatum est à iurisdictione: seorsum enim lege datur. Mixtum imperium iure magistratus competit; & inde ei nomen: quia iurisdictioni cohæret: nulla iurisdictio vacat imperio mixto. Ergo sic statuendum est: quod dicitur mixti imperij, rectè etiam dicitur iurisdictionis, & vice versa. Nam hæc duo nunquam separantur: at quædam sunt, quæ videntur magis fieri pro imperio, quàm pro iurisdi

Apart from this we find also two other genres that were not based on commentary but still had great importance in both teaching and practice. The first one are the questions or *quaestiones*. These are usually found in collections from the twelfth century onwards, and refer to either points of the law that are unclear or contradictory, and thus attempt to resolve it, or pose problematic cases – real or hypothetical – and attempt to analyse them according to the law. As such, they were mostly used in a teaching context.[74] The second genre are *consilia* or professional opinions given by jurists in the course of an actual court case. These opinions could be solicited by both the judge and the parties, and constituted a staple of medieval judicial practice. From the fourteenth century onwards, moreover, these *consilia* were usually compiled and used for teaching but also by practicing lawyers.

It is in these genres of legal writing, and their importance in teaching and in practice that we find the key to the role of law in ordering the medieval international. Indeed, commentaries and glosses were not only for exegetic purposes but served a fundamental function in teaching and in the development of legal language. Figures 2.1 and 2.2 illustrate two different versions –one manuscript and one printed- of the same page of what would have fundamentally been a core legal text used in teaching and in practice. The 'academic' science of law, focused on theory and concept development, on investigating further the meanings of both ancient propositions and new papal decretals created a system of thought that, through an intensive teaching system, was learned and internalised by subsequent generations of law students. These trained lawyers then went on to serve in church and state administrations, and were able to draw on the conceptual resources they had learned to conduct their activity as attorneys,

[74] The literature on the issue of *Quaestiones* is extensive. As an introduction, and on the relation between the initial *quaestiones* and the later *consilia* as teaching elements see Annalisa Belloni, "*Quaestiones* e *consilia.* Agli inizi della prassi consigliare," in *Consilia im späten mittelalter. Zum historischen Aussagewert einer Quellengattung*, ed. Ingrid Baumgärter (Sigmaringen: Thorbecke, 1995).

judges, administrators, cardinals, or even popes. The products of their practical experience, moreover, served in some cases to train new generations of lawyers, especially in canon law through papal decretals but also in Roman law once the use of *consilia* –or legal opinions- was generalised in teaching.[75] Moreover, it is worth mentioning that obtaining the doctoral degree required the graduate to lecture for a number of years. Most lawyers did that and then went on to have careers in the courts or administration.[76] But even as they were teaching, most lecturers combined this with private law practices or service for political administrations and continued to produce commentaries on the key texts that were then circulated among both students and practicing lawyers. And it is though this at the same time theoretical and practical conversation that we can understand the nature and evolution of the late-medieval international order.

[75] See ibid.
[76] Brundage, *The medieval origins of the legal profession*, p. 265.

Chapter 3. Political Authority

In this chapter we start the reconstruction of the representational framework of the *ius commune*, that is, the basic features, concepts, resources, and structure of the legal language when it was representing the international. A central issue in the production of the international as a social space is where political authority lies. Indeed, as we saw in the introduction, much of the scholarly debate about the medieval international can be reframed into differing opinions of where political authority was located. Thus, on the one hand, authors subscribing to the heteronomy thesis have pointed to the existence of 'overlapping networks of authorities' and of lord-vassal chains, suggesting that besides the general idea of a lord and a vassal, medieval rulers constituted a complex web that was hard to disentangle, let alone synthesize.[1] As Kratochwil and Hall put it "To talk about the Middle Ages is to imply the existence of certain social institutions such as feudalism and personalistic rather than impersonal or state politics; it is to refer to traditional rather than legal rational legitimacy and to controversies between temporal and spiritual authority rather than sovereign supremacy."[2] Indeed, the only exception to this tangled web of rulers, in some sense, is provided by the idea of the 'loose diarchy' – to use Phillips term[3]- of Pope and emperor, standing triumphal above all the feudal lords. Conversely, proponents of the state thesis portray a world where sovereign rulers were enacting a common corporate-sovereign script. Indeed, according to this view, expressions like 'fullness of power', and 'king who does not recognize a superior'

[1] The literature on this side is vast and has been examined in the introduction. See for example Ruggie, "Territoriality and beyond"; Hall and Kratochwil, "Medieval tales".
[2] Hall and Kratochwil, "Medieval tales", p. 487.
[3] Phillips, *War, religion, and empire.*

denote the appearance of a concept of sovereignty and point to rulers possessing these attributes as sovereign, so that we can safely, first, distinguish them from other, sub-state rulers, and second, make them functionally equivalent to each other.[4]

This chapter is an effort at re-examining these issues through an analysis of how political authority was articulated, represented, and thus produced as a social category. Starting with the idea of political authority allows us to examine several connected questions that are crucial to settle the aforementioned debate: was ruler a unified, general category, or were rulers rather conceived through several lenses? What were the attributes of 'rulership'? What did 'rule' mean? Through this, the second focal point of this chapter is to examine how this work of representation of political authority as a social fact understood the relations between rulers. Indeed, as we said in the previous chapter, we must not forget that lawyers had a very practical vocation. However esoteric their discussions could sometimes get, they could not ignore the fact that there were many rulers around them. Examining how lawyers dealt with this variety through both the concept of a ruler and the standing of rulers vis-à-vis each other is the goal of this chapter.

Consequently, the chapter analyses the categories and concepts that ordered the distribution of political authority. In particular, it shows four separate yet still inter-related categories for representing rulership: *iurisdictio*, *potestas*, lord/vassal, and magistrates. The basic argument of this chapter is that through these four categories lawyers constructed a world of multiple, coexisting hierarchies, each one of which was based on a distinct logic. These four categories and their implications are summarized in the table below:

[4] Latham, *Theorizing medieval geopolitics*.

Table 3.1 Four ordering categories

Ordering Category	Subject	Scope	Type of hierarchy
Iurisdictio	Ruling rights	All-encompassing	Diffusely stratified
Potestas	Ruling rights	Varied	Normal/exceptional Partial/full Supremacy
Lord / Vassal	Rulers	Narrow (bilateral)	Direct authority, subordination
Magistrate	Rulers	All-encompassing	Ordinally ranked

While the four are related to what we can broadly consider to be political authority, they do so in different ways. First, two of them, *iurisdictio* and *potestas* represent not rulers in themselves but ruling rights. Thus, while one can *be* a lord, a vassal, or a magistrate, rulers *have* jurisdiction and *potestas.* A second differentiating element between the four categories is their scope: the divisions and conceptual development of *iurisdictio*, magistrate, and certain notions of *potestas* create an idea of political authority that is able to encompass and classify all rulers at once. In the case of lord/vassal, on the contrary, while the idea in itself is applicable to a variety of rulers, the representation is limited to the relation between two.

Most crucially, however, each one of these categories constitutes a different way of vertically differentiating political authority,[5] that is, a type of hierarchy. Lord/vassal and Magistrate create perhaps the most immediately intelligible schemes of hierarchy from an IR perspective: the former represents a bilateral relation of direct authority and subordination, while the latter portrays a world with five ordinal ranks. Against this, *iurisdictio* creates a diffusely stratified world in which hierarchical connotations are clear, but a perfect ordering is not possible, and *potestas* in its many variations tends to

[5] On vertical differentiation see for example Donnelly, "Rethinking political structures".

create a world of binaries where the power on some is exalted against that of others. [6] As a result, when we think about the medieval (legal) ordering of political authority we need to bear in mind that these four hierarchical understandings coexisted and were deployed as ordering categories in a variety of circumstances, at times complementing each other and at times competing.

The chapter proceeds in five sections. The first four analyse the four categorizations of political authority and their connotations in terms of hierarchy and order. The final section considers what this world of multiple hierarchies may begin to tell us in terms of the heteronomy/sovereignty dichotomy, arguing that while the multiplicity of categories and connotations mean that there are certainly elements of both types of ordering principle, the role of *iurisdictio* as the basic representation puts us closer to a heteronomous system.

1. Iurisdictio

The first and central concept through which late-medieval jurists discussed and conceived of political authority is *iurisdictio* (jurisdiction).[7] Originally a Roman Law term denoting the ability of a magistrate to judge cases, successive juristic commentary transformed it into a bundle of closely-associated concepts that were associated with

[6] The concept of hierarchy in IR is broadly used, but quite losely defined. Due to the nature of this research it is necessary to say that the only type of hierarchy that we can get at is represented one, which prevents us from tackling more 'objectivist' approaches to the issue, that is, any notion of hierarchy that is based on actual determination of material power. See Keene's discussion of different sources of power in Keene, "The Standard of 'Civilisation'". In terms of the substantive constructions, however, that of feudalism can perhaps be closer to hierarchy as understood by Lake, while that of magistrates more closely approximates the type of ranked order that would come in the Early Modern period with ideas such as the ranking of powers. For an authority-based understanding see David A. Lake, *Hierarchy in international relations*, (Ithaca, N.Y.: Cornell University Press, 2009), but also to a certain extent John M. Hobson and J. C. Sharman, "The enduring place of hierarchy in world politics: tracing the social logics of hierarchy and political change," *European Journal of International Relations* Vol. 11, No. 1 (2005).; for Early Modern raking of powers see Edward Keene, "International hierarchy and the origins of the modern practice of intervention," *Review of International Studies* Vol. 39, No. 5 (2013). In many ways, as will be discussed below, the working of potestas has a similar differentiation structure to the notion of sovereignty, insofar as based on binaries.

[7] For a comprehensive analysis of *iurisdictio* see Pietro Costa, *Iurisdictio: semantica del potere politico nella pubblicistica medievale, 1100-1433* (Milano: A. Giuffrè, 1969).

political rule, including legislative, judicial, and administrative capacity.[8] Through this association, thus, *iurisdictio* became the principle by which the actors of the medieval system became differentiated. Indeed, the international space became one occupied by holders of *iurisdictio*.

The classical definition of term stated that "jurisdiction is a power publicly introduced with responsibility for pronouncing the law and establishing equity."[9] The definition already points to two crucial components in the medieval conception of political power: judicial power and the idea of justice/equity. Indeed, central to the conception of *iurisdictio* is its association with the idea of *iudicare/iudicari* (to judge/be judged), that is, to be able to say the law, say what is right (*ius dicere*) in any given situation. Political power was therefore associated with the ability to judge and resolve disputes. When in the fourteenth century Bartolus of Sassoferrato was inquiring on Italian cities who recognized no superior, his first question was "Say that there is a city, who does not recognize a superior, and that itself elects a ruler,… who would be its appellate judge?"[10] Political authority was intimately associated with the ability to decide on what was according to the law, and in this sense, the ruler was in many cases referred to

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[8] Brian Tierney, *Religion, law, and the growth of constitutional thought 1150-1650* (Cambridge: Cambridge University Press, 1982), p. 30-31.

[9] For reasons that are beyond the scope of this chapter, translating the definition of *iurisdictio* is highly problematic and renders some of its core components almost meaningless. Accursius, *Digestum vetus. Pandectarum iuris civilis tomus primus* (Lyon, 1560). ad D. 2.1.1 v. *potest*. "Est enim iurisdictio potestas de publico introducta, cum necessitatis iuris dicendi, et aequitatis statuendae." This definition is a variation of Irnerius' original one: "Iurisdictio est potestas cum necessitate iuris s. redendi equitatisque statuende" in Costa, *Iurisdictio*, p. 99. The final accepted definition is that of Bartolus: "Iurisdictio est potestas de publice introducta cum necessitate iuris dicendi et aequitatis, tamquam a persona publica, statuendae" in Cecil N. Sidney Woolf, *Bartolus of Sassoferrato. His position in the history of medieval political thought* (Cambridge: Cambridge University Press, 1913), p. 405-407.

[10] Bartolus ad D. 49.1.1 in Magnus Ryan, "Bartolus of Sassoferrato and Free Cities. The Alexander Prize Lecture," *Transactions of the Royal Historical Society* Vol. 10(2000), p. 77. "Pone quod est civitas, que non recognoscit superiorem, et que eligit ipsa sibi rectorem, nec habet alium officialem: quis erit iudex appellationis? Respondeo: ipse populus, seu ordo qui ipsum officialem facit, quia solus reperitor superior ipsi populo, et sibi princeps est."

as *iudex* (judge).[11] The importance of this aspect of rulership is hardly overstated: one of the central canonistic expressions that conveyed papal claims to universal supremacy was *papa est iudex ordinarium omnium* (the Pope is the ordinary judge of everyone).[12] As we will see below, *Iudex ordinarius* (ordinary judge) was a category of Roman Law referring to the judge that possessed jurisdictional powers by his own right, as opposed to the condition of *iudex delegatus*, which implied exercising someone else's powers. Thus, if the Pope was everyone's ordinary judge, it meant that by his own right, he held direct jurisdiction over everyone.

Despite the fact that the main connotation of *iurisdictio* was that of judging, its association with political authority went far beyond this. Jurisdiction – and thus political power- was not only associated with judicial ability but also with capacity of enforcement and coercion. Medieval jurists argued that in order to have jurisdiction, one needed *imperium,* that is, coercive power, to the point that Irnerius noted that "there is no jurisdiction without *imperium.*"[13] This coercion, however, is not to be understood as based in an exclusively material notion of power. On the contrary, as we will see in the next chapter, the *division iurisdictionis* that established the difference between temporal and spiritual jurisdictions meant that physical and spiritual (and thus verbal / non-material) coercion were considered side-by-side within the broader scheme of *iurisdicti*o.

Through its formulation in the *Corpus Iuris Civilis* and subsequent commentary, moreover, *iurisdictio* was also progressively associated to the power to establish law. The specificities of the process by which this happened are extremely complex and

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[11] For just one example see Huguccio *Summa decretorum,* ad C.6 q.3 c.2. "Unum regem, hic alibi appellatur iudex" (One King, here otherwise called *iudex*) in Mochi Onory, *Fonti canonistiche*, p. 166.
[12] For a comprehensive treatment of the doctrine see J. A. Watt, "The theory of papal monarchy in the thirteenth century: the contribution of the canonists," *Traditio* Vol. 20(1964), pp. 268-273.
[13] Irnerius in Costa, *Iurisdictio*, p. 111. "Imperium: sine quo nulla esset iurisdictio."

beyond the scope of this thesis.[14] The results of this, however, are crucial for our understanding of late-medieval political authority. As we have seen, the definition of *iurisdictio* established as its purpose both 'pronouncing the law' and 'establishing equity.' Jurisprudentially, however, the expression *ius dicere* was quite ambiguous. If at its origins it was tied to interpreting the law for a specific case – and thus we have spoken of judicial functions – this was intimately connected to the ability to generally pronounce what is right [*ius*], that is, establish law. Thus, successive commentary started expanding the idea of 'pronouncing the law' and differentiating it from mere judicial functions, to the point that 'saying the law' became 'establishing the law', that is, legislating. Odofredus de Denariis, for example, already speaks about the power to "judge, say the law and establish equity,"[15] separating both aspects. Thus, *iurisdictio* included legislative functions as well.

Jurisdiction was therefore the category that jurists developed to represent both the notion of political authority and, as we will see below, its distribution. This one category encompassed all governance functions and, contrary to what proponents of the heteronomy thesis may say, it was not necessarily tied to an understanding of political authority as private. Indeed, there is still one aspect of the definition that has not been examined. In relation to its origins, and also to its nature, the standard definition that we saw above said that it was a power "publically introduced." Jurisdiction as an understanding of political power was not based on private or necessarily patrimonial ideas, but rather had an explicit public dimension. "Publically introduced" pointed to two fundamental aspects of the notion of jurisdiction. First, jurisdiction could not be

[14] The aspect of this that concerns the relation between equity, jurisdiction, and law will be examined in more detail in chapter 4. This topic has been object of much academic attention: see especially ibid., pp. 131 ff. Jesus Vallejo, *Ruda Equidad, Ley Consumada. Concepción de la Potestad Normativa (1250-1350)*. (Madrid: Centro de Estudios Constitucionales, 1992), particularly part 3.

[15] Odofredus de Denariis, *Lectura super Digesto veteri*, 2 vols., vol. 1, Opera iuridica rariora (Bologna: Forni, 1967), ad D.2.1.3. "Iudicandi, iurisdicendi et equitatis statuende."

granted or created by private persons [*singuli*]: on the contrary, at its origins it had to be granted by some public institution: either another holder of jurisdiction, a corporation – understood in the late-medieval sense of a transpersonal entity composed of multiple individuals[16]-, or eminently public sources such as the law or custom.[17] Second, and as a consequence of this, the holder of jurisdiction had a public character. Although this public nature could be expressed in many ways, this was essentially connected to a sense of purpose insofar as it was meant to foster what Albericus de Rosate called "the public good."[18]

Moreover, it is crucial to note that this definition of the 'public' does not perfectly map onto our modern construction of this sphere. Thus, for example, Bartolus complained that the general definition of jurisdiction was too unspecific, since according to him, the definition meant that "the father has jurisdiction over the son, the master over the serf, and the tutor over his pupil."[19] While these were clearly relations of power, for Bartolus and for other lawyers after him they were not indicative of jurisdiction,[20] which had a public nature. His solution was adding a central, final term to the definition "as a public

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[16] Corporations and their relation to i*urisdictio* will be examined in chapter 4. For an introduction to medieval corporations from a political thought perspective see Joseph Canning, "Law sovereignty and corporation theory, 1300-1450," in *The Cambridge History of Medieval Political Thought c. 350-1450*, ed. J. H. Burns (Cambridge: Cambridge University Press, 1988); Joseph Canning, "The corporation in the political thought of the Italian jurists of the thirteenth and fourteenth centuries," *History of Political Thought* Vol. 1(1980).

[17] See for example Odofredus de Denariis, *Lectura super codice* (Lyon, 1480), ad C. 3.13 "Qui possunt dare iuridictionem et certe iuridictio alia est ordinaria et alia est delegata. Et certe ordinariam iuidictionem dat imperator, qui est lex animata in temporis… Item lex dat ordinariam iurisdictionem prefecto pretorio et praesidibus provinciarum… Item universitas vel corpus campsorum vel mercatorum dat ordinariam iuridiccionem. Ut hic multo fortius populus… Item quilibet universitas alicuius castri potest dare iuridictionem… Item consuetudo dat iuridictionem voluntariam."

[18] Albericus de Rosate, *Commentarii in primam Digesti veteris partem*, Opera iuridica rariora (Bologna: A. Forni, 1974), ad D.2.1.1. "De publico introducta, id est, propter bonum publicum." The moral justifications of political authority will be analyzed in the next chapter.

[19] Bartolus de Sassoferrato, *Bartoli a Saxoferrato in Primam Digesti Veteris Partem Commentaria cum Additionibus* (Basilea, 1589), ad D.2.1.1. "Sed contra hoc opponi quia secundum hoc, pater in filios, dominus in servos, tutor in pupillos haben iurisditionem."

[20] Before Bartolus, this was not universally the case. Thus, several canon lawyers in the thirteenth century were happy to accept that fathers had jurisdiction over their families. For example, Bernard of Parma claimed that "the head of a family can have ordinary jurisdiction over his family just like a master over his pupils" (dominus familiae potest habere ordinariam urisdictionem super familiam suam sicut magister super discipulos suos), cited in Costa, *Iurisdictio*, p. 119-20 ft. 40.

person" [*tamquam a persona publica*]. The public nature of jurisdiction was thus opposed not to a private sphere like the modern one, but to a much more reduced sphere that took place within the household, the *oeconomia.*[21]

Taking seriously the specifically medieval construction of the public sphere, and its opposition not necessarily to the private, but in some way to the 'domestic' (in the Latin sense of house (*domus*)) has important implications for our understanding of the period. Restricting the space for non-jurisdiction to the realm of the household means that there was a unified notion of political authority for everything outside of it. In other words, except for domestic hierarchical relations, there is a unified understanding of political authority that encompasses all the instances. Thus, for example, as we will see below, it is not only the case that political authority-as-jurisdiction applies equally to Emperors, kings, counts, city officials, and a variety of other secular rulers, but also to all the ecclesiastical ones.

Even more importantly, however, taking seriously the importance of this representation of political authority as jurisdiction, and even more its public nature means that we cannot exclude certain political forms from the medieval distribution of political authority. Indeed, if relations of power excluding the household were conceived as jurisdiction, that means that the category of jurisdiction became much broader than what we now understand as political authority. The power wielded by artisan guilds, for example, or merchant corporations, was clearly understood through the lens of jurisdiction in the same sense as papal power and royal power were. Indeed, when asking about the various sites and origins of jurisdiction, Azo mentioned that "the

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[21] Jesus Vallejo, "Derecho como cultura. Equidad y orden desde la óptica del *Ius Commune*," in *Historia de la Propiedad. Patrimonio Culturar. III Encuentro Interdisciplinar. Salamanca, 28-31 de Mayo de 2002.*, ed. Salustiano De Dios, et al. (Madrid: Servicio de Estudios del Colegio de Registradores, 2002), p. 63.

consensus of those who are of the same profession or business can create an ordinary."[22] Similarly, Baldus asked "whether guilds, for example the wool merchants, can make amongst themselves special statutes"[23] and concluded that they indeed could. The governance of guilds and professions was therefore articulated through the same vocabulary, and thus represented in essentially the same way, as the more conventional authorities were, and consequently, creating any artificial labels that exclude these authorities from the realm of 'political authority' on the basis of they currently belonging to the realm of 'private governance' or to a functionally-differentiated sphere[24] misrepresents the medieval understanding of political authority and constitutes a presentist exercise.

In conclusion, the representation of the political world in terms of jurisdiction that characterized Roman Law commentary yields a particular understanding of political authority. This substantive understanding entailed primarily ability to rule, as well as to execute, to coerce, and to legislate, but, unlike modern understandings of political authority that separate these three governmental functions, these were inextricably tied and entangled in jurists' understanding of political power. The crucial aspect of this redescription, however, was that through its definition of jurisidiction as having a public nature, and through the counterposing of public to the household, *iurisdictio*

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[22] Azo, *Azonis Summa super Codicem*, Corpus glossatorum juris civilis (Augustae Taurinorum: Ex officina Erasmiana, 1966), ad C.3.13. "Item dat iurisdictionem ordinariam universorum consensu. Item consensus eorum qui sunt de eadem professione vel negotiatione iudicem possunt facere ordinarium. Privatorum autem singulorum duorum vel trium vel etiam plurium ex quibus non constituitur universitas vel civitatis vel castri vel ville vel buri vel gratia professionis vel negociationis non instituitur non faciat iudicem."

[23] Baldus ad D.1.1.9, quoted and translated in Canning, *The political thought of Baldus de Ubaldis*, pp. 152-153. The context of this quote is a discussion of whether guilds can enact statutes that contradict the statutes of the city, which in this case is resolved affirmatively. For a similar consideration see Cinus de Pistoia, *Cyni Pistoriensis in Codicem, et aliquot titulos primi Pandectorum tomi, id es Digesti veteris, doctissima commentaria* (Frankfurt, 1578). Ad C.3.13.6, who after confirming that professional groups can indeed apoint their own rulers asks "Secundo quaeritur, ponamus in terminis, mercatores pannorum habent iudicem, vel mercatores ferici, ut est in civitate Lucana. Modo aliquis mercator est mihi obligatus ex alio contractu, quam ratione pannorum vel ferici, coram quo conveniam eum? Dicit glossa quod coram potestate vel praeside, non coram iudice mercatorum."

[24] Buzan and Albert, "Differentiation", p. 332.

effectively became a general category that was able to encompass and thus describe all rulers. Consequently, rulers became one single social position: while it may be uncomfortable from a modern perspective to conceive of states, churches and corporations as doing the same thing, as being variations on the same theme, this is the perspective of the political world articulated in *ius comune* jurisprudence.

Divisions of *iurisdictio* and bundles of rights

When we examine the articulation of political authority in the late-medieval Roman Law, therefore, we are talking about holders of *iurisdictio*, with primarily judicial but also legislative, executive and administrative capacities and a clear public dimension. However, despite this unified idea, both the basic legal texts that jurists were commenting on and the political reality around them evidenced that there were substantial differences between holders of political authority. This section will show how through the discussion of *iurisdictio* and the creation of several typologies within it, jurists represented the different manifestations of power around them and discussed how political authority was distributed.[25] Specifically, an analysis of the divisions of *iurisdictio* portrays a loosely stratified world of holders of jurisdictional rights, whose powers can be compared to one another, but are nevertheless not perfectly ordinal.

These typologies created by the commentators of Roman Law were multiple and varied, emphasizing for example the difference between ordinary and delegated jurisdiction,[26] or between voluntary and contentious one.[27] The most central typology for the discussion of political authority, however, was that based on the association between *iurisdictio* and *imperium*. This association was made explicit in the Digest of Justinian,

[25] This section draws heavily on Jesus Vallejo, "Power hierarchies in medieval juridical thought. An essay in reinterpretation," *Ius Commune* Vol. 19(1992).
[26] Regulated in D.1.21. This topic is further examined below.
[27] Vallejo, "Power hierarchies", p. 7.

which included an entire title devoted to the issue of jurisdiction.[28] In it, it was said that there are two types of imperium: pure (*merum imperium*) and mixed (*mixtum imperium*). The first one is said to include the "power of the sword to punish the wicked, and it is also called *potestas*." The second, "carries jurisdiction to grant *bonorum possessio* [possession of property]" and "includes also the power to appoint a judge."[29] The vagueness of this passage is a good example of the spaces and ambiguities that late-medieval jurists used to further elaborate on Roman Law and, through this, describe and think through their own political reality. Indeed, as the ordinary gloss pointed out, rather than providing a definition or specifying the content of both species of Imperium, what the Digest did was give examples of the types of powers that were subsumed under both.[30] This left room for commentary both based on casuistic and on more abstract considerations, and through this, civilists created and commented on an extensive typology of powers of *iurisdictio*.

The exact nature of the typology evolved extensively throughout the twelfth and thirteenth centuries, until it crystallised in the formulation of Bartolus of Sassoferrato.[31] At the beginning of the thirteenth century, the ordinary gloss stated that "there are four degrees [*gradus*] of *iurisdictio*: simple, mixed, *coercitio modica*, and… *iurisdictio.*"[32] (*Iurisdictio* had thus a double meaning – it was both the broad *genus* and one of the species). As discussed above, *merum imperium* was generally the ability to deal with cases involving capital punishment, freedom, and citizenship, as well as to "dictate

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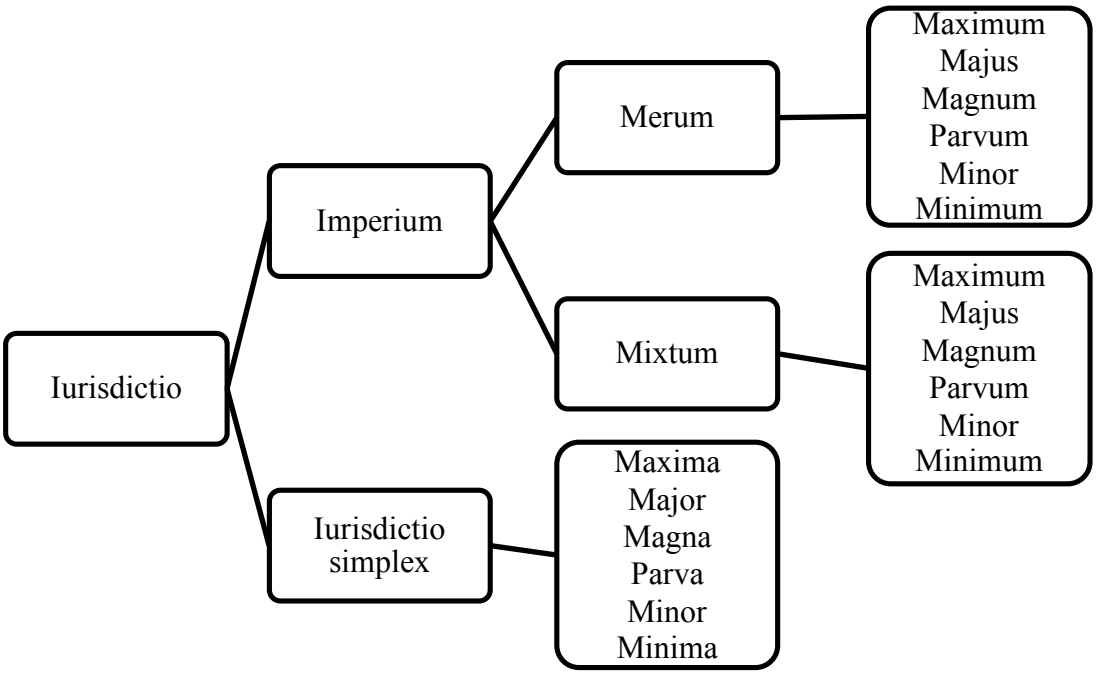
[28] D. 2.1 "De iurisdictione"
[29] D. 2.1.3. Translations of the Digest are based on the translation by Alan Watson, *The Digest of Justinian* (Philadelphia: University of Pennsylvania Press, 1998). "Imperium aut merum aut mixtum est. Merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines, quod etiam potestas appellatur. Mixtum est imperium, cui etiam iurisdictio inest, quod in danda bonorum possessione consistit. Iurisdictio est etiam iudicis dandi licentia."
[30] Accursius, *Digestum vetus*, ad 2.1.3. v. *merum est imperium*.
[31] For this evolution see Vallejo, *Ruda equidad*, particularly parts 1 and 2.
[32] Accursius, ad 2.1.3 v. *Mixtum est*. "Dic ergo quatuor ese gradus iurisdictionis, nam alias merum, alias mixtum, alias coercitio modica, alias remanet in suo nomine, et iurisdictio appellatur."

rules which prescribed [these punishments] for certain offences". *Mixtum imperium*, in contrast, had to do with cases with an "obvious economic content."[33] *Iurisdictio simplex* was the minimum level of jurisdiction that any magistrate could possess, whereas *modica coercitio* was an intermediate case that was extensively debated and eventually abandoned as an independent category due to its inherent ambiguity.

These categories of jurisdiction were clearly hierarchically ordered: *merum imperium* was superior to *mixtum imperium*, which in turn was superior to *iurisdictio simplex*. Commentators, in addition, created several subdivisions or degrees of jurisdiction within each of the categories, using clearly ordinal language such as *magnum/modicum imperium* or *maior/minima iurisdictio*. Bartolus' final classification, which was extensively reproduced, included six subdivisions within each category, ranging from *maximum* to *minimum*. His *Arbor iurisdictionum*, or tree of jurisdictions, is reproduced below[34].

[33] Vallejo, "Power hierarchies", p. 9.
[34] Based on Woolf, *Bartolus of Sassoferrato*, p. 407, and Vallejo, "Power hierarchies", p. 29. The arbor is here reproduced in horizontal, but vertical representations were also frequent.

Figure 3.1 Arbor Iurisdictionum



The *Arbor* clearly creates a variety of categories of jurisdiction, with hierarchical connotations, which could be and were used to discuss political power of a variety of rulers in the later Middle Ages. On the basis of this, the language of jurisdiction and imperium became thus central in the discussion of power. However, two crucial aspects of this language transpire from the examples above. First, the *genus* of *iurisdictio*, as well as all the subspecies within it did not each refer to a specific office or specific rulers. Rather, they provided a language to refer to *bundles of competencies* that could be accumulated in several ways. The notion of a bundle becomes clear if we briefly examine some of the eighteen categories created in Bartolus' typology. Within the *merum imperium*, for example, we find that *maximum* is exclusive to the prince, and includes the ability to enact general laws, whereas *maius* refers to the ability "to punish the wicked", which in this case means to impose capital punishment, incarceration or loss of citizenship. Vis-à-vis this, *magnum* includes among other things the ability to deport, and *parvuum* the ability to relegate, as well as the ability to impose certain

physical punishments. The last two degrees refer to abilities possessed by most rulers, such as minimum and verbal coercion.[35]

The different categories of jurisdiction are thus referring to prerogatives that different rulers have in their exercise, as well as by extension, the ability to enact laws and statutes on those matters. They do not, however, immediately refer to specific rulers. Some of them, as we will see, are reserved to special categories of rulers, such as the maximum types of both *merum* and *mixtum imperium*, which are reserved to the emperor, but the majority of them are just set up as abstract bundles of specific rights. Crucially, however, their bundled nature means that the same ruler can exercise more than one bundle at the same time –as exemplified by the holding of *merum* and *mixtum imperium maximum* on the part of the emperor.

In the context of the general applicability of *iurisdictio* to all holders of political authority, thus, these categories enable the positions of these rulers to be mutually intelligible and comparable to each other. As we observed in the introduction, the proponents of heteronomy focused their attention on chains of lord-vassal relations, which effectively made the positions of rulers not connected by vassalage mutually unintelligible. Consider a hypothetical situation: What was, for example, the standing of the vassal of the King of Castile vis-à-vis the vassal of the King of Hungary? If our understanding of political authority is based on lord-vassal relations this comparison is impossible. The redescription in terms of jurisdiction, however, first of all tells us that we are talking about the same type of social position – i.e. they are both rulers-qua-holders of *iurisdictio*-, but most importantly, makes them comparable through the specific powers that each one hold in terms of the species and subdivisions of *iurisdictio.*

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[35] Bartolus de Sassoferrato, *in Primam Digesti Veteris Partem Commentaria,* ad D.2.1.3.

Intimately related to this, a consequence of this is that, although the language and classifications had obvious hierarchical and stratified connotations within it, the fact that the different types referred to bundles of competencies that could be accumulated, along with the multiple subdivisions within each category, lead to a situation in which it is impossible to outline a clear hierarchy of competencies or positions. The situation is perfectly hierarchical within each category: not only is it is clear that someone with *Merum imperium maximu*s would be above someone with *Merum imperium minor*, but we can also safely say that holding higher degrees within one species means also holding those rights of the degrees below. The problematic issue in terms of hierarchy and comparability comes from the possibility of holding different rights. While the solution to the comparison above is clear, the relation of someone with *merum imperium minor* to someone with *mixtum imperium parvuum* would be less clear. And once we add the accumulation of different types of *iurisdictio* for different offices in the same ruler, we therefore find that we cannot speak of a unitary hierarchy of positions in a Weberian sense, a 'hierarchy of sovereignty' or a 'pyramid of jurisdictions' that some historians talk about,[36] but we can instead speak of a 'loosely stratified' order.[37]

2. Potestas

We have so far seen how *Iurisdictio* was the category that structured the understanding and representation of political authority in medieval *ius commune*. It was not however the only concept available to jurists. This section analyses the discourse around a

[36] António Manuel Hespanha, "Représentation dogmatique et projets du pouvoir. Les outils conceptuels des juristes du ius commune dans le domaine de l'administration," in *Wissenchaft und Rech der Verwaltung seit dem Ancien Régime. Europäische Ansichten.*, ed. Erk Volkmar Heyen (Frankfurt am Main: Vittorio Klostermann, 1984); Joseph Canning, "Ideas of the state in thirteenth and fourteenth-century commentators on the Roman law," *Transactions of the Royal Historical Society* Vol. 33(1983); Susan Reynolds, *Fiefs and vassals. The medieval evidence reinterpreted.* (Oxford: Oxford University Press, 1994); Joseph Canning, *Ideas of power in the late Middle Ages, 1296-1417* (Cambridge: Cambridge University Press, 2011).
[37] Vallejo, "Power hierarchies", pp. 20 ff. This argument contradicts Costa, *Iurisdictio*.

second ordering category: *potestas. Iurisdictio* and *potestas* were both common to both Roman and canon law. However, this specific language of power and rule developed in canon law around the figure of the pope, and was then also used by Roman lawyers. While the language of *iurisdictio* emphasized the distribution of a variety of bundles of rights, in *potestas* we find a language of binaries that emphasizes the distinctiveness and superiority of a ruler versus the regular exercise of the others.

Iurisdictio and *potestas* were closely linked. We have already encountered the connection in Roman Law in the very definition of *iurisdictio*, which started by saying that it was "a power (*potestas*) publicly introduced…" thereby linking both concepts. Both words also appeared side-by-side at various other points in the law books, with the Digest for example stating that *merum imperium* "is also called *potestas*."[38] Lawyers were aware of this connection, and several commentaries discuss the relation, establishing that they are essentially the same. Bartolus, for example, states that "*potestas* and *iurisdictio* are the same, as I said; it is the power of law (*potestas iuris*) and therefore it is jurisdiction."[39] For Roman lawyers, therefore, the discussions of both concepts referred to the same reality: political authority.

This was similar in the case of Canon Law. One of the traditional loci for the discussion of *potestas* in the Decretum was Distinctio 20, which included a text by Pope Leo IV establishing that in order to decide on legal cases, "not only knowledge is necessary, but power as well."[40] The mention of power in this statement was linked to the power the keys that Christ gave to Peter, where one key was to represent knowledge, and the other the (jurisdictional) power of binding and loosing given to Peter in Matthew 16:18.

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[38] D.2.1.3 "Quod etiam potestas apellatur."
[39] Bartolus de Sassoferrato, *in Primam Digesti Veteris Partem Commentaria*.ad D.2.1.3. "Nam potestas et iurisdictio ídem sunt, ut dixi; et est potestas iuris, ergo est iurisdictio."
[40] D.20 d.a.c 1. "Non solum est necessaria scientia sed etiam potestas," translated in Gratian, *The treatise on laws: Decretum DD. 1-20*, trans. Agustine Thompson and James Gordley (Washington, D.C.: Catholic University of America Press, 1993).

Thus, in his commentary on the passage Laurentius Hispanus said that "I believe the key to be jurisdiction," whereas Huguccio stated that "in deciding cases the authority of the Roman pontiffs prevails for… not only knowledge but also power [*potestas*] is needed… power, that is jurisdiction."[41] Canon law had therefore a solid and well-established basis of associating jurisdiction and *potestas*.[42]

Much like in the various discussions and typologies of *iurisdictio,* jurists applied *potestas*-with-adjectives[43] to a variety of power situations. A first notion that was used was that of *plena potestas* (full power). Originally a Roman Law term referring to a proctor with full power to represent his principal,[44] canonists used this and other similar terms –such as *plena auctoritas* and *plenaria potestas* – to refer to the jurisdictional powers that an elected bishop had over his dioceses, and by extension, to the jurisdictional powers of the pope.[45] Therefore, similarly to what happened with the different species of *iurisdictio*, this group of terms centring around potestas with adjectives present rather unspecified yet still hierarchically ordered ideas of power.

Perhaps the most important, and far-reaching, variation on *potestas*, however, was that of *plenitudo potestatis* (fullness of power). The expression was originally used in canon law in a variety of contexts, mostly equivalent to that of *plena potestas*, to refer to the full administrative and jurisdictional authority of a variety of elected officials within the Church.[46] If at its origins it was applied to more than one authority, it progressively

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[41] Both fragments cited in Tierney, *Religion*, p. 32.
[42] Note how the quote by Hugucio has clear connotations of power of deciding and also power of enforcing.
[43] David Collier and Steven Levitsky, "Democracy with Adjectives: Conceptual Innovation in Comparative Research," *World Politics* Vol. 49, No. 3 (1997).
[44] For an analysis of this use in Roman and Canon Law, as well as medieval commentary and practice see Gaines Post, *Studies in medieval legal thought: public law and the state, 1100-1322* (Princeton: Princeton University Press, 1964), chapter 3.
[45] Brian Tierney, *Foundations of the conciliar theory: the contribution of the medieval canonists from Gratian to the Great Schism* (Cambridge: Cambridge University Press, 1955), p. 144.
[46] For an evolution of *plenitudo potestatis* see Robert Louis Benson, "Plenitudo potestatis: evolution of a formula from Gregory IV to Gratian," *Collectanea Stephan Kuttner* Vol. 4, Studia Gratiana 14(1967).

became associated with the papal office through the binary *plenitudo potestatis* / *in partem sollicitudinis* (fullness of power / share of the responsibility). This formula appeared four times in the Decretum, one of which was a dictum by Gratian himself.[47] In it, he was not referring to the papal office, but rather to the relation between a suffragan and his metropolitan, and had thus the meaning of "fullness of office."[48]

The concept, however, became progressively associated with the papal office. Johannes Teutonicus had already stated in the ordinary gloss that "papal authority is full, and that of other bishops is less full [*semiplena*], because they are called to a part of the responsibility not fullness of power,"[49] thus establishing the link between the full/less full gradation, and the *plenitudo potestatis /in partem sollicitudinis* formula applied to the relation between the Pope and the other bishops. This formula was subsequently repeatedly used by pope Innocent III in his letters, a few of which were compiled in the Liber Extra, and became current in commentary towards the middle of the thirteenth century[50]. By the end of the thirteenth century *plenitudo potestatis* was an almost mystical expression associated with the supreme power of the pope over all Christians, closely connected to other formulas such as *Vicarius Dei* (Vicar of God) or *iudex ordinarius omnium* (ordinary judge of all).[51]

The language of *plenitudo potestatis*, moreover, was not to stay restricted to the Papal office, but rather was later applied to a variety of other rulers to denote supreme power.

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[47] Gratian, C.9. d.a. q.3 "Vocantur enim episcopi a metropolitano in partem solicitudinis, non in plenitudinem potestatis." The other three canons are C.2. q.6 c. 11; C.2. q.6. c.12; and C.3, q.6 c.8. Citations of the Corpus Iuris Canonici are from Emil Friedberg, *Corpus iuris canonici*, Ed. Lipsiensis 2a / post Aemilii Ludovici Richteri curas ad librorum manu scriptorum et editionis romanae fidem recognovit et adnotatione critica instruxit Aemilius Friedberg. ed., 2 vols. (Lipsiae: Tauchnitz, 1879).
[48] Watt, "Theory of papal monarchy", p. 252.
[49] Ord. Gloss to D.11 c.2 v. *Plena* "Papae auctoritas plena est, aliorum episcoporum semiplena est, quia ipsi sunt in partem sollicitudinis vocati, non in plenitudinem potestatis."
[50] Kenneth Pennington, *Pope and bishops: The papal monarchy in the twelfth and thirteenth centuries* (Philadelphia: University of Pennsylvania Press, 1984), chapter 2 and especially pp. 59-74.
[51] For the connection to these expressions, as well as for a comprehensive study on *plenitudo potestatis* see Watt, "Theory of papal monarchy", p. 250 ff.

Thus, at the turn of the thirteenth century canonist Huguccio could note in passing that both Pope and Emperor had *plenitudo potestatis* in their respective spheres of action,[52] while in the second half of that century, Hostiensis was noting that although plenitude of power was only a prerogative of the Pope and the Emperor, "not only kings but even inferiors"[53] were wrongly using it. Eventually, towards the end of the fourteenth century Baldus de Ubaldis not only used *plenitudo potestatis* to refer to the power of the emperor, saying that "nothing resists plenitude of power, for it overcomes all positive law" and thus showing, as we will see, the importance of its association with the idea of a *potestas absoluta*, but he could also easily apply it to other rulers, such as the Italian *signori*.[54]

The language of *plenitudo potestastis* had therefore strong hierarchical connotations. However, instead of being associated with bundles of prerogatives, it denotes the hierarchical relation between the whole and the parts, or between geographically unlimited power of the Pope and the geographically circumspect one of the bishops. In this sense, considering its development within Church law, it also has connotations of explicit subordination, rather than vague notions of status. With its extension to rulers other than the pope, therefore, the language of *plenitudo potestatis* carried with it the idea of a strong, central authority.

Finally, we arrive at a crucial third variation on *potestas* in canonist thought, closely linked to the idea of *plenitudo potestatis* as we saw in Baldus' quote above: the

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[52] Ibid., p. 259.
[53] Hostiensis ad X.3.49.2 cited and translated in Jane Black, *Absolutism in Renaissance Milan: Plenitude of Power under the Visconti and the Sforza 1329-1535* (Oxford: Oxford University Press, 2009), p. 37.
[54] Joseph Canning, *The political thought of Baldus de Ubaldis* (Cambridge: Cambridge University Press, 1987), p. 72 and 223-224. See also Baldus cited in Canning, *Ideas of power in the late Middle Ages, 1296-1417*, p. 141. "But, nevertheless, because all the Lombard *signori* through customary usage and, as it were, in theory and practice emply here the words 'by plenitude of power' and are in possesion of that power, as it were, in Word and deed, I think that, without substantially violating the truth, we must believe them when they use such language, because it does not appear true that they would use a deceitful mode of expression… Otherwise… the decrees of such great *signori* would become illusory."

distinction between *potestas absoluta* and *potestas ordinata*. This distinction, coined by canonist Hostiensis, is a refinement of the concept of *plenitudo potestatis*, but one which was to have crucial implications well into the Early Modern period. As Pennington notes, despite the use by Innocent III in his letters, and increasing canonistic commentary, the term *plenitudo potestatis* remained undefined, and connected to a series of statements concerning the divine origin and superiority of the power of the Pope. For example, a commentary on Innocent III's decretal *Quanto persona* stated that the Pope "changes the nature of things by applying the essences of one thing to another… he can make iniquity from justice by correcting any canon or law,"[55] to which Johannes Teutonicus had added "he makes something out of nothing."[56] Hostiensis, writing in the second half of the thirteenth century, gave the concept a central place in his analysis of papal power and primacy. He wrote that, while when he was acting according to what has been established in canon law and Church statutes the pope is exercising the fullness of his office [*plenitudo oficii*], when he "transcends the law, then he uses his fullness of power."[57] In this treatment, fullness of power is the power of the exception, to act above the law and right what is wrong, thus capturing Laurentius' and Johannes Teutonicus' statements above about the power of the Pope to change the nature of things. Thus, *potestas ordinata* and *potestas absoluta* effectively create a standard of normality for the exercise of power, opposing it to an idea of exceptionality and in doing so, highlighting the hierarchically superior position of the

[55] Laurentius Hispanus ad 3 Comp. 1.5.3 v. *Puri hominis* in Pennington, *Pope and bishops*, p. 17-18.
[56] Ibid., p. 64.
[57] Hostiensis *Summa* ad X. 1.8.2 in J. A. Watt, "The use of the term 'plenitudo potestatis' by Hostiensis," in *Proceedings of the second international congress of medieval canon law*, ed. Stephan Kuttner and James D. Ryan (Città del Vaticano), p. 178. "Vel melius ideo dicit hoc, quia tunc potest dici papam uti plenitudine officii, quando secundum iura ius reddit, ut ibi: quando vero transcendit iura, tunc utitur plenitudine potestatis."

exception.[58] Moreover, *potestas absoluta* is linked to *plenitudo potestatis,* insofar as it is the possession of the latter that allows for the overcoming of the restrictions that are placed on the ordained exercise of power.

In the language of *potestas* we therefore find a representation of political authority that, while tied to jurisdiction, has significantly different connotations. While jurisdiction and its species portrayed a myriad of extremely specific bundles of rights that allows for the careful consideration of all rulers, in the case of *potestas* the gradation is much more vague. Instead, the language of potestas seems to revolve around a series of concepts that emphasize the distinction between a strong authority, and smaller, more limited ones, or between the regular exercise of power, and the exceptional one afforded only to certain rulers. As such, and we may remember that these concepts were developed around the figures of the Pope and Emperor, it is a language that emphasizes the differences and exceptionality of supreme power vis-à-vis others. In this sense, this exalting of exceptionality and supremacy is closer to modern notions of sovereignty, and as such constitutes the basis for many historiographical approaches to the concept.[59]

3. Lord/vassal

We have so far seen two different ways of representing political authority; one, jurisdiction, which portrayed an all-encompassing set of rulers with different bundles of rights, and another – *potestas*- which tended to highlight the superior and in some cases exceptional power of some rulers. We may note however one commonality between them: they both refer to political authority in itself rather than to the people that hold it. In opposition to this, the last two categories that we will analyse – lord/vassal and

[58] It is worth noting at this point that this development was not only linked to canon law and the role of the pope, but also to extensive Roman Law discussions about the ability of the emperor to alienate property from his subjects and act unrestrained by law. See Pennington, *The prince and the law*.
[59] See for example ibid.

magistrates – represent the rulers themselves. This section in particular examines feudal language, and points to the existence of a third type of hierarchy, in this case much more based on direct notions of authority and subordination between two rulers.

Despite it being almost a cliché in International Relations scholarship on the Middle Ages, Feudalism is one of the thorniest issues in medieval historiography. Its meaning, periodization, generalizability, and nature are deeply contested, stirring fiery debates.[60] It is beyond the scope of this chapter to analyse feudalism as a whole. In any case, however, it seems incontestable that 'feudal' institutions and relations, for lack of a better word, were present and important in late-medieval society, and as such, they were something with which trained lawyers were forced to deal. Before we proceed with an examination of the content of feudal language, however, it is necessary to consider where this language was found, as this bears great importance for the nature and characteristics of these terms.

Roman Law, in principle, provided little help as its early origin and context of promulgation meant there was no mention of any of the main institutions of feudalism in the main text. This absence notwithstanding, and as we will see, lawyers were able to relate some of these precepts to their reality and we therefore find up to thirty-one

[60] In the mid-twentieth century, a central academic division in the use of feudalism was that between those who considered a broad social system, in the Marxist tradition, and those that gave it a more limited, jurídico-political meaning centring on a system of relations between a noble class. Currently, most historiographical debate is conducted in the context of the second meaning. Even within this, however, the debate is fierce. In the past 40 years, several contributions have contended that feudalism is a creation of modern or early modern historiography, and that medieval realities were too varied for us to speak of a single system. Finally, even among those who are still more-or-less comfortable with referring to feudalism, its particular meaning, implications for both political thought and social organization, and regional variation are still subject to deep contestation. For an approach in the first tradition see Marc Bloch, *Feudal society* (London: Routledge & Kegan Paul, 1961), and on the second F. L. Ganshof, *Feudalism*, 3rd English ed., Medieval Academy reprints for teaching (Toronto: University of Toronto Press, 1996) ; for authors criticising the use of feudalism as a construct see the classic essay by Elizabeth A. R. Brown, "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe," *The American Historical Review* Vol. 79, No. 4 (1974), as well as Reynolds, *Fiefs and vassals*.

mentions of what we can consider feudal terms in the standard gloss.[61] In canon law, Gratian's *Decretum* provided several canons that referred to issues such as fealty and benefices, most famously a letter by Bishop Fulbert of Chartres to William of Aquitaine around 1020 explaining the obligations of a *fidelis* vis-à-vis his lord.[62] Moreover, as we saw in chapter 2, in contrast to the fixed texts of Roman Law, canon law was constantly adapting through new compilations of papal and conciliar pronouncements. Given the saliency of lord-vassal bonds, therefore, from the end of the twelfth century onwards canonists also had a series of papal pronouncements on the issue on which to base their reflections.

The central locus of juristic analysis of feudal relations, however, was neither a Roman nor a canon law text per se. The so-called *Libri Feudorum*[63] was a compilation of a variety of unrelated texts – including letters, treatises, *consilia*, and imperial constitutions written at different times, some of which had already been included in the *Decretum*- that mostly contained Lombard custom and that in many instances contradicted each other.[64] Although initially a separate collection, the *Libri Feudorum* were from the thirteenth century onwards included in Roman Law texts at the end of the *Volumen parvum*, and from the mid-thirteenth century, they were regularly cited in academic commentary.

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[61] Magnus Ryan, "Succession to fiefs: A Ius Commune Feudorum?," in *The Creation of the Ius Commune* (Edinburgh University Press, 2010), p. 145.
[62] C. 22 q. 5 c.18.
[63] The actual medieval term to refer to it varied greatly. *Libri feudorum* is the modern term to refer to it. Other medieval names included *Consuetudines feudorum, Cosntitutiones Frederici, Decima collatio de feudis,* and *De feudis.* See Magnus Ryan, "The Libri Feudorum and the Roman Law" (University of Cambridge, 1993), p. 2.
[64] For an explanation of the process of compilation and the various recensions see P Weimar, "Die Handschriften des Liber Feudorum und seine Glossen," *Rivista internazionale del diritto comune* Vol. 1(1990); Karl Lehmann, *Das langobardische Lehrecht. Handschriften, Textentwicklung, ältester Text un Vulgattext nebst der capitual extraordinaria* (Göttingen, 1896); Ryan, "The Libri Feudorum and the Roman Law", chapter 1.

This rather lengthy, in the context of the present chapter, introduction to the textual sources of what is here called 'feudal language' serves two crucial purposes that necessarily need to precede any examination of the language. First, although we speak of 'feudal law,' the lawyers commenting on the *Libri* and practicing in court were trained civilians and canonists and consequently, the cross-fertilization of ideas, vocabulary, principles, and approach to jurisprudence between the three laws is not only substantial, but also central to how 'feudal language' was to be interpreted. Second, the *Libri* as a source of law stood halfway between local custom and imperial constitution, that is between local restrictions and general applicability.[65] Lawyers never forgot that what they were commenting on was local custom, and that customs varied greatly throughout Europe. Thus, their commentary work can be seen as developing a set of categories of legal analysis of feudal relations that, while in some sense constituted a unified 'feudal law,' never existed as a unified practice in reality.

Having made these previous, but necessary, considerations, the purpose of this section is to examine 'feudal language,' its relation to jurisdiction, and its implications for ideas of rulership and how rulers stood in relation to each other. Through the concepts of *fidelitas* and *homagium*, *feudus* / *beneficium*, and most importantly *dominus* / *vassallus*, this language reveals a hierarchic understanding of authority different to the two we have already seen, and based on an idea of bilateral and direct relations of subordination as well as a certain notion of mutual obligation. It is in this sense a much more restricted representation of rule, as there is no connotation that all rulers must be either lords or vassals, but rather the categories are limited to a specific (yet replicable) bilateral relation.

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[65] Magnus Ryan, "Zur Tradition des langobardischen Lehnrechts," in *Die Anfänge des öffentlichen Rechts*, ed. G Dilcher and Diego Quaglioni (Berlin: Dunker & Humblot, 2009).

The basic scheme of a feudal relation is well known: a vassal gets a fief from a lord in exchange for an oath of fealty/homage, which creates an obligation towards that lord. The relation is thus that of a contract between two unequal parties. According to Rodoffredus Benventanus, "vassals are those who receive something from somebody else in fief [*feudum*]… All these who are called vassals on account of their fiefs swear an oath of fealty to their lords"[66] A first thing that should be noted is that, as opposed to the Romano-canonical terms we have seen in the previous sections, the language of *dominus* and *vassallus* has, first, a purely relational, and second, an extremely concrete nature: neither category refers to a generalizable and substantive notion of political power, but rather identifies the condition of a man in relation to another. Thus, the vassal only exists in relation to the lord, and vice versa. While vassal and lord themselves are categories, and therefore applicable to a variety of people making them fundamentally comparable to each other, what we find here is not sustained reflection on the nature of authority, its origins, or meanings. The language itself does not imply in any sense that all political power is feudal – this is so to the extent that it is arguably a language about property and interpersonal relations rather than political authority.

That being said, despite the contractual nature of the bond, this relation is not between two equals. There is a fundamental asymmetry in the contract: only the vassal swears an oath or, even more, pays homage to the lord in exchange for a fief. Through this, the vassal is explicitly put in a position of subordination vis-à-vis the lord, to which he owes services and a general duty to protect his interests. Although the lord does have obligations towards the vassal, these do not amount to anything comparable to what the vassal owes to him. This idea of subordination and superordination is patent if we

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[66] Rodofredus Benaventanus cited in Magnus Ryan, "The oath of fealty and the lawyers," in *Political thought and the realities of power in the Middle Ages*, ed. Joseph Canning and Otto Gerhard Oexle (Göttingen: Vandenhoeck & Ruprecht, 1998), pp. 214, ft. 7. "Vassalli sunt qui rem aliquam ab aliquo in feudum accipiunt…. Isti omnes qui appellantur vassalli propter feudum iurant fidelitatem dominis suis."

examine how the idea of lords and vassals was inserted into the Romano-canonical system. Indeed, as we saw, since the basis for commentary were Lombard texts, these did not capture the variety of the existing feudal relations. In order to fill in those gaps, lawyers tried to draw parallels and look for applicable principles and bodies of law from their Roman and canonical sources. Thus, while in the case of institutions such as the fief they were unable to find any parallel, for the relation between lord and vassal they established an analogy with the Roman *ius patronatus*, which governed relations between freed slaves (*libertus*) and their former masters (*patronus*).[67] Thus, vassals frequently appeared as *libertus*: Johannes Bassianus, for example, argued that "by the custom of the Kingdom [Lombardy], what we read in the laws about freedmen is applied by everyone to vassals."[68]

The specific hierarchical connotations were thus evident: while *iurisdictio* and *potestas* represented a broad array of jurisdictional rights capable of encompassing a wide variety of rulers, lord/vassal takes us to an explicit acknowledgement of direct subordination between two rulers. This aspect of direct subordination explains the increasing use of feudal bonds as a way of highlighting the superior nature of some offices.[69] Indeed, from the thirteenth century onwards, a series of political relations between rulers which had not been described in feudal terms became progressively feudalised. Through the centrality of the idea of the coronation oath, for example, lawyers began to advocate for a feudalised understanding of the relationship between all kings and the Pope, not only those who actually held their kingdoms as a papal fief.[70] Similarly, as we will see in chapter 7, canon lawyers increasingly portrayed the

[67] Ryan, "*Ius commune feudorum*", p. 62.
[68] Cited and translated in Ryan, "Succession to fiefs", p. 144.
[69] For a general view of feudalism in this sense see Reynolds, *Fiefs and vassals*.
[70] See Canning, *The political thought of Baldus de Ubaldis*, p. 40 ff.

relation between Pope and Emperor as feudalised, and, more generally, it became established that all offices held from the emperor were held as fiefs.

Another crucial aspect of feudal language is its fit into the public/private divide mentioned above. Indeed, in their emphasis on feudalism, IR scholars have frequently emphasized that it constitutes an inter-personal, private mode of power. As Kratochwil ad Hall put it: "To talk about the Middle Ages is to imply the existence of certain social institutions such as feudalism and personalistic rather than impersonal or state politics."[71] The contractual nature of feudal relations is key in these claims. However, detailed examination shows that these need not be the connotations of feudal language. Indeed, when talking about the oath of fealty, canonist Rufinus stated that "oaths of fealty are done either to a person or in respect to a person's office (*dignitatum*)."[72] Oaths of fidelity, therefore, need not be conceived as relations between two private persons, but rather in some cases, increasingly common, they had a public dimension insofar as they were associated to a specific office.

The development of a medieval idea of an office (sometimes expressed through the word *dignitas*) is a complex one. At a basic level, it involved a distinction between the physical person that held political power, who was mortal, and the titles and offices they operated, which were immortal.[73] In jurisprudence, these notions were developed through a discussion of alienation, that is, of the possibility and legitimacy for rulers to diminish the honour or holdings of the office they held, in the context of the Donation of Constantine for the case of the emperor, and through Honorius III's decretal

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[71] Hall and Kratochwil, "Medieval tales", p. 487.

[72] Rufinus, *Summa decretorum*, ed. Heinrich Singer (Aalen: Scientia Verlag, 1963), ad C.15 q. 8 c.3 *alius item*. "Hic sciendum est quod iuramenta fidelitatis fiunt aliquando intuitu personarum, aliquando dumtaxat intuitu dignitatum. Et quidem intuitu personarum, sicut illa, que laicis laici faciunt; contemplatione dignitatum, ut ea, que prelatis ecclesiarum a laicis offeruntur, non utique propter ipsas prelatorum personas, sed propter eas quas ipse persone suscipiunt dignitates."

[73] For a thorough exploration of this theme see Ernst Kantorowicz, *The king's two bodies: a study in mediaeval political theology* (Princeton, NJ: Princeton University Press, 1997).

Intellecto in the case of Kings.[74] The broader implications of the association of fidelity and office for the nature of political authority are crucial. A text by Baldus highlights the relevance:

> "Although the emperor is not bound by positive law, he is bound by the law of contract… He, I say, is bound and not his successor, because the emperor's contract does not pass on to his successor… because imperial rights do not pass on to his successor but are created anew through election… And this is true unless [the emperor] does things which relate to the nature of his office or are a customary part of it, such as infeudation."[75]

We have noted that the feudal bond had a contractual nature. In jurisprudence from the thirteenth century onwards, contracts had generally been understood as belonging to natural law or the *ius gentium*, and as such, to be an effective limit to the power of rulers.[76] As Baldus says, even when jurisprudence claimed that the prince was not bound by the laws [*legibus solutus*], he still had to abide by his contractual obligations. Insofar as private obligations between two parties, however, they died with the person and were thus not inheritable by his successor. Baldus, however, makes an exception: feudal bonds are not contracted between two private persons, but are rather made by the office which we have seen is immortal, and thus not only do they bind the prince –as contracts- but also his successors who take up the office. In the development of feudal language in the context of a broader Romano-canonical system, therefore, we find the

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[74] D. 96 c. 14 for the Donation of Constantine and X. 2.24.33 for *Intellecto*. To these two sites of discussion may be added the Roman Law mentions of the title of *Augustus* for the emperor, as this title was seen as linked to the notion of *augeo* (enlarge), and it was the duty of the emperor to keep enlarging the empire. The discussion was then centered on whether it was legitimate for him to diminish it. See Peter N. Riesenberg, *Inalienability of Sovereignty in Medieval Political Thought* (New York: Columbia University Press, 1956), pp. 22-48 and passim.

[75] Baldus de Ubaldis, ad D.1.4.1, cited and translated in Canning, *The political thought of Baldus de Ubaldis*, p. 85.

[76] For a discussion of this see Pennington, *The prince and the law*, and Canning, *The political thought of Baldus de Ubaldis*, p. 82-86.

key to the fact that feudal bonds transcended the idea of a private realm and were associated with public rule and thus inheritable.[77]

Feudal language therefore takes us to a third way of differentiating rulers, one that refers to direct relations of authority and subordination rather than broad, all-encompassing schemes. In this sense, we seem to be closer to the heteronomy thesis world of a variety of bilaterally-(inter)linked rulers which can hardly be compared to each other. Two caveats we have seen, however, nuance this view: first, lord/vassal as analysed here were *categories* that could be and were deployed, and as such, although comparison between rulers may not be possible, the relation in itself was intelligible and – to an extent – unified.[78] Second, and this will become more relevant in subsequent chapters when we analyse the issue of territory, the link between feudal language and the notion of a (public) office means that feudal relations did not stand in a vacuum but rather were closely related to other concepts, particularly that of jurisdiction. As a result, the relation between feudal and private/public authority, and with this many presuppositions about this matter in the IR heteronomy proponents, needs to be qualified.

4. Magistrates

We move now to the fourth and final way of representing holders of political power: magistracies. As we noted above, despite the nominal continuity of the Empire in their

[77] The specific timing of these jurisprudential developments is disputed in historiography. Pennington seems to assume the binding nature of feudal contracts for the ruler was already common opinion in thirteenth century jurisprudence, based on texts by Guido da Suzara and Cinus de Pistoia. Ryan, on the contrary, argues that neither of those texts mention feudal bonds specifically as they just refer to general contracts, and thus considers that the specific inclusion of infeudation into this scheme is an innovation by Baldus. See Pennington, *The prince and the law*. and Magnus Ryan, "Feudal Obligation and Rights of Resistance," in *Die Gegenwart des Feudalismus*, ed. Natalie Fryde, Pierre Monnet, and Otto Gerhard Oexle (Göttingen: Vandenhoeck & Ruprecht, 2002).

[78] As we noted above, practice varied greatly. Nevertheless, it is possible to identify in jurisprudence the notion of an 'ideal fief' through the expression *natura feudi*, which provided the template against which all actual fiefs were compared. In this sense, therefore, the category of lord vassal was replicable. See Ryan, "*Ius commune feudorum*".

contemporary Holy Roman Empire, the political structure of the latter was dramatically different from the original one. The legal compilations that constituted the basis for juristic commentary, for example, included a multiplicity of titles and books devoted to the discussion of the political organization of the Roman Empire: senators, consuls, praetorian prefects and a variety of other long-dead imperial magistracies filled the pages in the beginning of the Digest, as well as in the Codex and the Institutes. Despite their quite obvious obsolescence, lawyers were not at liberty to ignore these long-lost institutions, and as such, they produced extensive commentary on them. In doing so, however, they developed a jurisprudential language that, far from being obsolete or a pure academic exercise in pointless abstraction, provided a framework for the general understanding and categorization of holders of political power. Much like in the case of *iurisdictio*, this was an all-encompassing framework with clear hierarchical connotations. However, in this case it was based on a clear ranking of positions through the idea of orders of magistrates and their dignity, instead of loose notions of bundled rights.

Rather than providing an integrated typology for the consideration of all magistracies, the law books tended to approach each magistracy separately. Thus, for example, Title 9 of the first book of the Digest dealt with Senators, while the following titles dealt with Consuls and Pretorian Perfects. Despite this approach, however, late-medieval jurists promptly built on the separate treatments to construct a categorization in which all magistrates were included and that thus allowed for comparison between them. The books themselves did not provide too many axes for comparison, barely a few scattered references throughout. Some laws, for example, spoke about ‘greater’ and ‘minor’ judges (*maior* and *minor iudices*), while others mentioned some magistrates were

'distinguished' (*clarissimus*) or 'notable' (*spectabilis*). Drawing on these, however, late-medieval lawyers slowly created a ranked typology.

The exact evolution, author by author, of these classifications is beyond the scope of this chapter.[79] Suffice it however to separate two distinctive periods. In the first one, the first attempts at comparison, dating until the beginning of the thirteenth century, included up to three different categories of magistrates according to their level of greatness – and thus Azo had *Maiores*, *Medii*, and *Minores* while Roffredus Benaventanus had *Maximii, Mediocres,* and *Maiores*- and four categories according to their order – and thus *superillustres, illustres, spectabiles,* and *clarissimi.*[80] With the categories established, then, lawyers would just place some magistrates in each category according to their status and abilities. The distinctive feature of this period, however, is that these discussions are for the most part focused exclusively on the imperial magistracies themselves, with very few and scattered mentions of contemporary holders of political authority.

This clearly contrasts with a second period, starting in the mid-to-late thirteenth century. In this period, the structure of these classifications becomes more stable: five degrees or *ordines* are established – *superillustres, illustres, spectabiles, clarissimi,* and *infimi*- corresponding to five degrees of greatness – *maximi, magni, medii, minors,* and *infimi.*[81] All the Roman magistrates described in the law books are then placed within each category: thus, for example, the Emperor and the Pope occupy the highest rank (*superillustres*), followed by senators, consuls, quaestors and some praetorian prefects

[79] For more on the evolution, see Vallejo, *Ruda equidad*, p. 234 ff. The description in this and the following paragraphs draws heavily from his analysis. However, it modifies some aspects, as seen in the table below, and extends it to the end of the fourteenth century since his analysis stops at the begining of that century.

[80] The translation of all of these terms is problematic, but for general indication of the connotations consider: Major, Medium, and Minor for Azo; Maximum, Mediocre and Greater for Roffredus; and Super-illustrious, Illustrious, Notable, and Distinguished for the five degrees.

[81] For a translation consider: maximum, great, medium, minor, and infimum.

as *illustres*, and this continues for over twenty different magistracies down to the last two offices, the defender of the city and other municipal magistrates, which are *infimi*.

A central issue in the discussion and attribution of the categories to which each magistracy belongs is the kind and degree of jurisdiction that they have. As we have seen, *iurisdictio* as a genus was divided in *merum imperium, mixtum imperium,* and *iurisdictio simplex.* In the context of the discussion of magistracies, *merum* and *mixtum* imperium are discussed jointly and attributed to the four superior degrees, whereas *iurisdictio simplex* is the prerogative of *infimi* rulers. While some differences still apply among degrees – the scope and validity of the *merum* and *mixtum* imperium held by the emperor who is a *superillustre* are of course in no way the same as that held by a *praeses provinciae*, who is a *clarissimus*- a stark division is thus created between those who hold *merum et mixtum imperium*, and those who do not.

The main feature of these classifications, however, is that they include continuous references to rulers that do not find a basis in the law book – rulers contemporary to the lawyers commenting on the books. Thus, for example, we read that "the praetorian prefect is equivalent to kings,"[82] that "cardinals are *illustres* like consuls,"[83] or that "counts are *spectabiles*."[84] It is worth noting that, much like in the discussions on *iurisdictio*, secular and ecclesiastical rulers are routinely compared to the same magistrates and made equivalent to each other. Thus, for example, Bartolus notes that "kings and cardinals… are equivalent to praetorian prefect,"[85] and similar comparisons

[82] Albericus de Rosate, *Commentarii in primam Digesti veteris partem*, ad D.1.12.1 "praefectus praetorius aequiparatur regibus."
[83] Baldus de Ubaldis, *Baldi Ubaldi Perusini in Primam Digesti Veteris Partem Commentaria* (Venice: 1577, 1577), ad D.1.11.1 "Item notat quod cardinales sunt illustres sicut consul."
[84] Ibid. ad D.1.9.2 "Comes sunt spectabiles."
[85] Bartolus de Sassoferrato, *in Primam Digesti Veteris Partem Commentaria*. ad D.2.2.1 "Idem in regibus, et cardinalibus, qui aequiparantur praefecto praetorio."

are established between bishops and counts.[86] A summary table of these discussions and equivalences, taking as the basis the composition in Guillelmus Durantis' *Speculum iudiciale* but also including the writings of several authors, is reproduced below.

Table 3.2 Orders of magistrates and their equivalence in thirteenth and fourteenth century jurists[87]

Jurisdiction	**Ordines**	**Roman Magistrates**	**Contemporary equivalents**	
			Secular	**Ecclesiastical**
Merum Imperium (and Mixtum Imperium)	Superillustres	Emperor Pope Consul*	Emperor	Pope Papal Legates Patriarchs Primates*
	Illustres	Praetorian Prefect of the East Praetorian Prefect of the Illyricum Prefect for Africa Quaestor Senators Other counts Consul*	King Other counts*	Primates* Archbishops* Metropolitans Cardinals Bishops*
	Spectabiles	Masters of the soldiers Praetors Praefect of the Vigiles* Proconsul Agustalis Prefect Prefect of Egypt Vicarius Dux Comes rerum privatarum Comes orientis Consul*	Provincial counts* Ruling provincial counts* Counts* Podestà*	Archbishops* Bishops*
	Clarissimi	Praeses Provinciae Civitatum Rectores	Counts of Italy and Germany* Podestà*	Achdeacons Archpriests Abbots*
Iurisdictio Simplex	Infimi*	Defensores Civitatum Magistratus Municipales	Podestà*	Rectors

* denotes that this position is disputed in jurisprudence

What function do these equivalences fulfil within the broader thought about political authority? Or, in other words, what is the significance of these parallelisms? If we look at the specific instances in which they were used, we can see that the establishment of a clear categorization of magistrates existing in tension with a reality where those offices

[86] The equivalence between bishops and counts is a recurrent theme, established long-before the revival of Roman Law. For some examples of this equivalence in jurisprudence as well as bibliography on the tradition see Vallejo, *Ruda equidad*, p. 232 ft. 73.

[87] Own elaboration taking Vallejo, *Ruda equidad*, p. 248 as the basis and complementing it with a variety of thirteenth and fourteenth century authors.

did not exist enabled the redescription and legitimation of the latter through its associations to legally-existing – and thus legitimate- magistracies.[88]

First, particular details of some offices were used to think through the specifics of some contemporary rulers. We have already seen that kings are considered equivalent to the praetorian prefect. The pretorian prefect of the late Roman Empire was a high-ranking magistrate who was in charge of a large territorial unit called pretorian prefecture. A particularity of this office was that, as the highest magistrate in the prefecture, when they served in their capacity as judges, their decisions could not be appealed. In this context, Baldus comments that "finally, note that you cannot appeal [the decisions of] the king, even if they are subjects of the Roman Empire, because Kings are either equal or greater than the praetorian prefect."[89] We can therefore see that Baldus is not only drawing a parallelism between both offices, but also that he is using the specific governmental prerogatives of one to think through the other, and in doing so, is effectively re-describing the office of the King.

Additionally, through this classification and some of its problems, the lawyers also thought through some of the challenges that their contemporary reality presented. As we have noted, the division of the various kinds of jurisdiction into bundles of rights prevented the consideration of a holistic hierarchy, as the same holder could have different rights for different territories. Specific problems within the classifications of magistrates, however, allowed for the discussion of these issues within the Roman law scheme. This was the case, for example, with the proconsul. This office was the equivalent of the governor of a province for a year. However, only men who had

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[88] Vallejo, *Ruda equidad*; Hespanha, "Réprésentation dogmatique".
[89] Baldus de Ubaldis, *in Primam Digesti Veteris Partem*, ad D.1.11.1. "Ultimo notat quod a regibus non appellatur, etiam si sunt subditi Romano Imperio; quia reges vel pares vel maiores sunt praefecto pretorio secundum Guil. et alios."

formerly been consul could be elected for it, which created a problem identifying the status of the proconsul, since both offices had different dignities. Noticing this, Baldus asked "The gloss says that the proconsul is *spectabile*, but is he not chosen from among the consuls, and aren't all consuls *illustris*?." In his answer, rather than merely resolving the issue, Baldus draws an analogy with his contemporary situation:

> "I answer that by reason of his mission he is *spectabilis,* but by reason of his consulate he is *illustre*, just as the King of Sicily is king with respect to Sicily and provincial count with respect to the Provence, and Duke of Apulia with respect to several cities."[90]

Baldus is hence resolving the issue in this case not only by applying a variation of the distinction between dignity and administration – a late-medieval conceptual innovation itself[91]-, but at the same time, through the analogy between his contemporary situation and that in the books, he is using the latter to rethink, redescribe, and ultimately validate the former. It is worth noting here that, as we have seen throughout, these parallels did not only apply to secular powers, but served the same function with regards to ecclesiastical rulers. Thus, Albericus de Rosate, commenting on the same problem and the same passage said that:

> "the proconsul is *superillustre* in terms of its dignity, but *spectabile* in terms of administration. In the same way, as well, the King of England is duke of Aquitaine and nevertheless King of England… and in this way some cardinals are called bishops, other presbyters, and others deacon cardinals."[92]

This redescription of their contemporary political situation through the magistracies of Roman law not only serves to validate existing rulers, but also to evaluate and in certain

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[90] Ibid. ad. D.1.16.1 "Glossa dicit quod procónsul est spectabilis, sed nonne ex consulibus eligitur et omnis cónsul est illustris? Respondo rationi legationis est spectabilis sed ratione consulatus est illustris, sicut Rex Ciciliae est rex respectum Ciciliae et comes provinciae respectum provinciae, et Dux Apuliae respectu diversarum civitatum."

[91] For more on this see Riesenberg, *Inalienability of Sovereignty*.

[92] Albericus de Rosate, *Commentarii in primam Digesti veteris partem*, ad D.1.16.1. "Sed dic quod procónsul est super illustris quoad dignitatem, sed quoad administrationem spectabilem, sicut alias dicitur… sicut et rex Anglia est dux Aquitanie et tamen est rex Angliae. Sic et cardinales aliqui dicuntur episcopi cardinales aliqui presbyteri, aliqui diaconi cardinales."

cases discuss the appropriate place and powers of some rulers. This is evident in the case of the discussion of the power of the cities. As we have seen, the last degree of magistrates – *infimi* – were only holders of *iurisdictio simplex*. Through the association of Defenders of the city and municipal magistrates to this degree, therefore, it would seem that elected officials within late-medieval Italian cities – usually called *podestà* – would therefore be included in this category. This is certainly the opinion of Bartolus, for example, who writes "I certainly think that the *potestates* which are nowadays elected are municipal magistrates or defenders of the cities, who do not have *merum imperium.*"[93] The problem here was that many of the Italian cities were effectively exercising those powers. This fact did not escape the lawyers: indeed, Guilelmus Durantis noted that "therefore, the *potestates* of the cities of our time, mutilating limbs and amputating heads usurp *merum imperium* for themselves."[94] Considering the fact that lawyers could not ignore the reality of the Italian cities, their commentaries, through the analogies they drew with the various magistrates, tried to explain and evaluate this fact. Some, such as Albericus de Rosate, note that "the potestates of the Lombard cities are in the place of praeses [provincia] and proconsuls on account the Peace of Constance,"[95] thus trying to give a legitimate legal basis for such an exceptional circumstance, but still constructing this fact as exceptional and the normal situation being their equivalence to one of the *infimi* magistrates. Baldus, most famously, simply bypasses the problem by changing the equivalence and arguing, simply, that they were in the category of *clarissimi* as *praesides provinciae* all along:

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[93] Bartolus de Sassoferrato, cited in Ryan, "Bartolus of Sassoferrato and Free Cities", p. 69 ft. 14. "Sed certe ergo puto potestates qui hodie eliguntur ese municpales magistratus … vel defensores civitatum, qui non habent merum imperium."

[94] Guilelmus Durantis, *Speculum juris* (Frankfurt, 1612), ad 1.1. "Ergo potestates civitatum nostri temporis mutilante membra and capita amputante usurpant sibi merum imperium" cited in Vallejo, *Ruda equidad*, p. 245.

[95] Albericus de Rosate, *Commentarii in primam Digesti veteris partem*. ad D.1.16.9 "potestates civitatum Lombardiae ex pace Constantiae sunt loco praesidium et proconsulum."

"Take the examples of Florence, Perugia and the city of Siena: they are considered to occupy the position of a province. Therefore those who exercise authority in them have the position of a *praeses provinciae.*"[96]

The language of magistrates provides therefore a fourth way to represent rulers. Through it, all rulers, both secular and ecclesiastical, could be subsumed under the broad Roman category of magistrates and ranked in one of five possible ranks. We therefore find a perfectly ranked hierarchy of international actors according to their dignity, which allows for both comparison and intelligibility, but also for flexibility and regard for the existing medieval situation.

It is worth noting at this point that the contentious and competing use of these categories in the medieval context meant that despite these hierarchical connottions, the idea of magistrates could also be used in certain cases to denote a notion of supremacy in which some authors have seen the idea of sovereignty. A brief jurisprudential discussion in the mid-fourteenth century provides a first approximation. As we have seen, the categorizations of magistrates included everyone from the Emperor to the last municipal magistrate. For some lawyers in the mid-fourteenth century, however, this was fundamentally wrong. Cinus de Pistoia, thus commented "Some say that the Pope and the Emperor are *superillustres*, but this does not seem true: because the Pope and the Emperor are above all orders, and all others draw from their radiance."[97] Through this move we can start to appreciate the possibility that some rulers were thus not

[96] Baldus de Ubaldis ad C.7.33.12, cited and translated in Canning, *The political thought of Baldus de Ubaldis*, p. 126.
[97] Cinus de Pistoia, *Cyni Pistoriensis in Codicem, et aliquot titulos primi Pandectorum tomi, id es Digesti veteris, doctissima commentaria*. ad D.1.21.1. "Dicunt quídam quod superillustres sunt Papa et Imperator,… Sed istud non videtur verum: quia summus Pontifex et Princeps sunt supra omnes ordines, et ab eis caeteri fulgorem recipiunt."

included in the general categorization, almost establishing an "incompatibility"[98] between them and all the other rulers. In doing so, the all-encompassing scheme of *iurisdictio* and the magistracies is broken, and thinking about some rulers being qualitatively different – and after that, maybe sovereign – becomes possible.

5. Hierarchy, heteronomy, and sovereignty

In this chapter we set out to examine the categories with which lawyers represented not only political authority, but also the relations between holders of that authority. This analysis has revealed the existence of four different groups of categories serving this function, each one of which vertically differentiated between rulers according to different hierarchical principles. When we talk about the medieval international order therefore we are not exclusively in a complex world of incomprehensible lord-vassal relations nor in one of familiar sovereign states, but in both at the same time and more. We are in a world of multiple coexisting, yet perfectly intelligible, hierarchies.

Two crucial implications for thinking about this order follow from this. First, determining the position and fully understanding the actions of any medieval ruler requires examining the joint use of all of these categories, and how they were deployed in their activities and relations with other rulers. Second, and most importantly, this availability of ways of representing political authority was key to the argument we advanced in chapter 2: the medieval order, like any order, was not one of reified structures, but rather was a site of deep contestation where the available linguistic categories were constantly mobilized in particular circumstances for particular purposes.

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[98] Costa, *Iurisdictio*, p. 204 ft. 37. "Rimanendo immutato il quadro generale, è utile osservare come a poco a poco il concetto di sovranità sia approfondito al punto da stabilire una relazione di incompatibilità fra il sovrano e i gradini inferiori dello stesso proceso di potere."

This contestation will be the object of chapter six and seven. For the moment, and as a brief introduction into themes that will occupy us in the upcoming chapters, we may ask what these multiple hierarchical representations tell us about the heteronomy/sovereignty debate. Throughout the chapter we have highlighted how various concepts and constructions show that actually there were elements of both ideas. Thus, the importance of feudalism and the idea of magistrates seems to point towards a heteronomous order, while concepts like *plenitudo potestatis* and *potestas absoluta* come closer to a sovereign imagination. These are however only partial answers – more complete ones require some further consideration of what it would take for us to decide for either concept, that is, what types of worlds do sovereignty and heteronomy when taken as organizing principles of differentiation describe?

Sovereignty has been and continues to be one of the central concepts in IR, and as such, its meaning and implications are fiercely disputed. It is beyond the purview of this chapter to make any attempt at reviewing or clarifying its essence: on the contrary, in being consistent with the methodological framework outlined in the previous chapter, attempting a definition of sovereignty that captured its 'true' meaning would be a deeply ahistorical exercise that would obscure the fact that it has been deployed in a variety of contexts, with a variety of meanings, and for a variety of purposes.[99] Instead, what we can do is consider not what sovereignty *is* but what sovereignty *does* when employed in the specific context that concerns us here: as a representation of the organization of the international, that is, as "the basis on which the constitutive units of the system are differentiated from one another and on the basis of which they assume their identity as constitutive units."[100] In other words, we need to consider, at a

[99] Jens Bartelson, *A genealogy of sovereignty* (Cambridge: Cambridge University Press, 1995).
[100] Ruggie, *Constructing the world polity*, p. 132.

conceptual level, what type of differentiated international system we are representing when we deploy the category of 'sovereignty.'

Looking at sovereignty from this perspective reveals two inter-related core elements in its use as an organizing principle: a distinctiveness of sovereign authority when compared to other authorities, marked by the idea of exclusivity, and the represented equality of those who are sovereign. Regarding the first, one of the omnipresent ideas in any deployment of the notion of sovereignty is that of supreme / final /ultimate political authority. Effectively, this means that a categorical distinction is created between sovereigns and non-sovereigns: the difference is one of kind.

The second, and crucial, element in this conceptual analysis of sovereignty is equality. This means that all those who are sovereign are represented as essentially the same and as recognizing each other as equals. Once again, this does not mean that this needs to be materially the case nor that sovereign representations cannot coexist with other representations that highlight differences. Even more, arguing that equality is at the core of sovereignty as a representation of the international does not mean denying that in its historical use the deployment of this category has led to great inequalities and exclusionary practices. On the contrary, it is precisely the represented equality it conveys that has enabled both the exclusion of those who were not deemed similar enough to be equal, or the obscuring and domination of those whose situation does not afford them the ability to effectively exercise their autonomy.[101] When we portray equality as a core element in the use of 'sovereignty' as an organizing principle we are

[101] John M. Hobson, *The Eurocentric conception of world politics. International theory, 1760-2010* (Cambridge: Cambridge University Press, 2012), p. 333 ff.; Edward Keene, *Beyond the anarchical society: Grotius, colonialism and order in world politics* (Cambridge: Cambridge University Press, 2002); Naeem Inayatullah, "Beyond the sovereignty dilemma: quasi-states as a social construct," in *State sovereignty as a social construct*, ed. Thomas J Biersteker and Cynthia Weber (Cambridge: Cambridge University Press, 1996).

therefore highlighting a representation of sovereigns as being of one and the same kind.[102]

With this in mind, we may now ask whether the representation of political authority reconstructed in this chapter conforms to the conceptual structure of sovereignty as an organizing principle. The case for an affirmative answer to this question as put forward by Latham as well as by a substantive part of historiography rests on the progressive emphasis on the powers of certain rulers through some of the notions that we have examined – *potestas absoluta* and *plenitudo potestatis* – as well as through connected concepts such as *rex qui superiorem non recognoscit* (a king that recognizes no superior) and *rex in regno suo imperator est* (a king is an emperor in his own kingdom). While the latter will be examined in more detail in chapter five, for the proponents of the sovereignty thesis they denote the appearance of the 'supreme'-ness element of sovereignty.

In light of the examination of this chapter, however, and if the notions of *iurisdictio* and magistrate are to be taken seriously, the idea of sovereignty as the defining feature of the order seems utterly problematic. For on what basis are we to distinguish among different holders of jurisdiction to proclaim some sovereign and others not? The mere definition of jurisdiction as a *genus* with several species prevents us from considering that holders of higher jurisdictional prerogatives were in themselves a categorically different *type* of ruler than those with inferior ones. The difference was indeed one of *degree:* 'rulers' as holders of jurisdiction were one identifiable class, that is, they occupied a single type of social position. The presence of distinctive attributes and

[102] I am very much aware that this does not conform to a variety of early modern and modern practices such as divided sovereignty or the wide-spread presence of semi-sovereigns. Nevertheless, I still believe these two conceptual features to be useful for the purposes of this study, as the alternatives would not help illuminate the issues that are under consideration here.

superior jurisdictional powers does not undermine the fact that they were all conceived within one broad scheme, but should rather be understood as introducing some hierarchical distinctions *within* the same group. A brief examination of a passage by Bartolus highlights this point. The passage in question occurs in the context of a discussion of a law in the digest which considers whether a higher judge can be judged by someone of equal or inferior rank. In the discussion, Bartolus considers the case of those who do not recognize a superior:

> "These judges, who do not have a superior, such as the Pope and the Emperor, can be judges in their own cases, …. The same applies to those kings, princes, counts, or cities who do not recognize a superior. However, if they want, they can submit themselves to the jurisdiction of an inferior or an equal."[103]

Considering the case under discussion, Bartolus is forced to deal with those rulers that do not have or recognize – note the difference! – a superior. He does so, however, under the assumption of the existence of a multiplicity of judges of different ranks that can judge each other under certain circumstances. Those who do not recognize a superior present an anomaly – a juridical complication – but that does not extract them from the consideration within the broader framework or turn them into a substantively different class of people.

The same image emerges from the representation of rulers as magistrates: all holders of jurisdiction are represented within the categorization and the distinction between them explicitly and repeatedly articulated as one of categories within a broad kind. Even clearer in this case, moreover, we see that those possessing the distinct attributes that have led some authors to see sovereignty in the period fall within separate categories,

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[103] Bartolus de Sassoferrato, *in Primam Digesti Veteris Partem Commentaria*, ad D.2.1.14. "Fateor quod isti iudices, qui non habent superiores, ut Papa et Imperator possunt ese iudices in causis suis, et iudicare per se, uel per alios, quod ad hoc deputant. Idem est in regibus, principibus, et comitibus, uel civitatibus, qui non recognoscunt superiorem. Tamen si volunt, possunt se submittere iurisdictione minoris, vel aequalis."

and, most importantly, are ranked along and sometimes below rulers who do not possess those attributes. Certain kings who do recognize a superior, for example, would clearly have a higher dignity than some cities who did not. And therefore we see not only that ruler constitutes a single social position, but also that at the same time, not all rulers are equal.

Despite the presence of categories that highlight supremacy, therefore, characterizing the medieval international order as one where sovereignty – or anything we may approximate as such- was the main organizing principle would be misleading. Was it, however, a heteronomous one? A first-cut answer would be affirmative. This, however, would be more because of the vagueness and definitional demerits of the concept of heteronomy than because of its potential as illuminating the differentiation within an international system. Indeed, if we examine the concept of heteronomy as was developed by Ruggie we can see that it is deeply problematic.

While at some points he seems to equate heteronomy with "interwoven and overlapping jurisdictions,"[104] in his analysis of the concept as a way of differentiating units within a system Ruggie cites the Oxford English Dictionary as saying that "'heteronomous' refers to systems wherein the parts are subject to different laws or modes of growth, and 'homonomous' to systems wherein they are subject to the same laws or modes of growth."[105] The difference at the core therefore boils down to a critique of Waltz's 'like units', and heteronomy emerges thus with the meaning of 'un-like units.' This, however, does not tell us much about how units are differentiated, just that they are not alike.

[104] Ruggie, *Constructing the world polity*, p. 23.
[105] Ibid., p. 264 ft. 3.

We may thus think what exactly was 'unlike' about the various jurisdictional positions and holders of jurisdiction that we have examined in this chapter. On the one hand, the suggestion that they were fundamentally different *kinds* of actors could seem to be misleading. Indeed, instead of having the variety of 'laws of growth', the schemes of *iurisdictio* and magistrates are actually able to encompass all the positions. They do so, however, in a way that does not create them as entirely equal, but rather as variations on a theme. These variations, moreover, are hierarchically differentiated – some times loosely stratified, as with the various species within the *arbor iurisdictionum,* and other times perfectly ranked, like in the case of the magistracies. Despite these differences, however, we cannot forget that we are talking about hierarchical differentiation *within* a unified social position – that of 'ruler' as a holder of jurisdiction- rather than through a variety of spheres or fields.[106]

However, this is only a preliminary answer. For while the categories we have examined determined the distribution of political authority, accepting that only holders of jurisdiction are the 'units' of the late-medieval international order is in a sense very restricted. Indeed, given the vast majority of the population in late-medieval Europe did not hold any claim to rulership, does this mean that they did not have a place in the international order? How were the 'ruled' conceived of? Examining this will be the task over the next three chapters, and in doing so we will be able to fully understand the extent to which the late-medieval system was one of unlike units.

[106] As such, Ruggie's claim that heteronomy meant that units were functionally differentiated, while true, should be qualified.

Chapter 4. Rulers and ruled

As we saw in the previous chapter, rulers were understood through the lens of *iurisdictio* as a category of people possessing bundles of jurisdictional rights. These rights varied greatly, from *merum imperium* to *iurisdictio simplex*, and were easily un-bundled, which meant that in many cases, and contrary to the perception of the heteronomy thesis, the spheres of jurisdiction did not overlap. A crucial question regarding the ordering of political authority, however, remains: why did rulers have these rights? Why were there rulers at all? In other words, what were the bases of legitimacy of political authority. This was not an unfamiliar issue to medieval lawyers. On the contrary, it was at the very core of their discussions. Writing in the early fourteenth century, Tuscan jurist Cinus de Pistoia commented that "it is called *iurisdictio* from *iure*, because it is legitimate, and from *diction* because it is power. Thus it is a legitimate power introduced by public law with responsibility for saying the law and establishing equity."[1] Legitimacy was therefore from the beginning tied to the very notion of *iurisdictio*.

The legitimacy of political authority constitutes the object of this chapter. IR scholars have long been concerned with these issues. Indeed, the different normative environments in which political power is embedded constitute an extremely productive avenue of research among constructivists and historical sociologists within IR. Thus, most famously, Reus-Smit, has proposed the "moral purpose of the state" as the

[1] Cinus de Pistoia, *Lectura super codice* (Pavia, 1483), ad C 3.13. "Dicitur autem iurisdictio a iure quod est legitimus et diction quod est potestas. Nam est legitima potestas de iure public introducta cum necessitate iurisdicendi et aequitas statuendae."

normative core of the historically varying constitutional structures that constitute the nature of different historical international societies.[2] While being broadly sympathetic to this endeavour, and acknowledging the importance of the normative beliefs that structure social life, this chapter necessarily departs from Reus-Smit's construction in two ways. First, following historiography, it will start from the premise that legitimacy is not only about purpose, but also about narratives of origin. Indeed, historians have approached the question of medieval notions of legitimacy from two perspectives: traditionally, authors such as Walter Ullmann or Brian Tierney focused on the origins of rulership, on from where political power came.[3] Thus, for example, Ullmann famous model posited that it either came from above, that is from God, or from the people below, thus labelling his models of descending and ascending power respectively. More recently, however, historians such as Joseph Canning have proposed that focusing on the purpose rather than the origin of political power may be a more productive endeavour.[4] As a result, they have examined how different teleological constructions of political power varied throughout the centuries and across genres of political thought. Following both approaches, and while both aspects are undoubtedly interrelated, the division between purpose and origins as sources of legitimacy will serve as the structuring basis for this chapter.

Secondly, and crucially, the term "state" is problematic as the focus of study.[5] While Reus-Smit's starting point is to look for the normative beliefs for "organizing their

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[2] Reus-Smit, *The moral purpose of the state*.
[3] See for example Walter Ullmann, *A history of political thought: the middle ages* (London: Penguin, 1965); Tierney, *Religion*. Ullmann's models of ascending and descending principles have come under extensive criticism in the past few decades. For a traditional critique of the model see Francis Oakley, "Celestial hierarchies revisited: Walter Ullmann's vision of medieval politics," *Past & Present* Vol. 60(1973).
[4] Canning, *A history of medieval political thought 300 - 1450*.
[5] This idea will be developed further in chapter 5.

political life into centralized, autonomous political units,"[6] the centralized, autonomous, and ultimately statist character of medieval political organization is precisely one of the issues under question in this inquiry, and as such cannot be the starting point. As we saw in the last chapter, and despite the vast differences among late-medieval rulers, 'ruler', through its basic concept of *iurisdictio*, could be considered a single social position. Following on the same line, thus, asking for the raison d'être of that position, its social basis of legitimacy is the goal of this chapter. This does not mean however, that the ruled, or the political community disappear of our analysis. On the contrary, when we talk about rulership and political power, we enter the realm of hierarchical and unequal relations between people. As a result, the normative beliefs that legitimize that unequal relation are inextricably linked to both the holders of political authority and those over whom it is held. This is thus in many was a chapter about the ruled as much as about the rulers. Indeed, as we will see, the different discourses of legitimacy of rulership shed light of different constructions of the ruled, and as a result offer different answers to the question of the political community.

Indeed, this chapter reconstructs multiple coexisting views on the legitimacy of rulership, both from a purpose and from an origins perspective. These views were sometimes complementary and other incompatible, but they all were part of the language and representational framework of the *ius commune,* and as such were deployed by lawyers in a variety of situations for a variety of purposes. Besides reconstructing these various views, however, the central concern of this chapter will be examining the various understandings of the ruled that are implied in them. In doing so, it will make two main arguments: first, there was a progressively more important and articulated presence of the ruled as the object, origin, and eventually holder of political

[6] Reus-Smit, *The moral purpose of the state*, p. 31.

power; second, despite this increasing role, the categories to describe the ruled suffered from an essential ambiguity, and one that became a site of contestation as well as powerful conceptual innovation.

One thing remains to be explained before we proceed with the rest of the chapter. The idea of "legitimate power" in the above quote by Cinus de Pistoia above exemplifies, late-medieval jurists could clearly conceive of illegitimate political authority. While the legitimacy and illegitimacy of political power was discussed in many contexts, a specific linguistic binary was crucial in articulating this discussion: *de iure* / *de facto.* A direct translation of those terms would be "in law" / "in fact".[7] Considering that the object of study here are lawyers, the legitimate nature of that what is legally established as opposed to what is effective in reality may hardly seem surprising. As both this chapter and chapter five will highlight, however, there is much more to this distinction and its normative background than a partisan adherence of lawyers to their own professional trade.

1. Origins of jurisdiction

Juristic explanations for the origins of political authority were varied and complex. When discussing the issue of who can grant jurisdiction, for example, Italian jurist Cinus de Pistoia listed "men, law and custom"[8] while the ordinary gloss to the Decretum spoke of the prince, the pope, corporations, law and custom.[9] Despite all the differences between jurists, these various sources can broadly be systematized into three: the prince, law and custom, and the ruled themselves.

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[7] For an elaboration of the *de iure / de facto* distinction see Canning, *The political thought of Baldus de Ubaldis*.
[8] C.8.48.1.
[9] Accursius, *Codicis Iustiniani ex repetita praelectione libri novem priores* (Lyon, 1560), ordinary gloss to 2.1.6.

This section will analyse these three sources paying attention not only to the legitimating source but also to the jurisprudential debates that arose from the discussion of each one of them. As these debates originated from the contradictory precepts contained in the *Corpus Iuris Civilis*, lawyers were forced to confront them and try to find an explanation for them. They became crucial points of discussion for lawyers, not only in order to find a solution to the controversies but also, as the next chapter will show, as sites of conceptual innovation. As far as this chapter and the legitimacy of rule are concerned, however, they show an increasing role of the ruled not only as objects of jurisdiction but also as its ultimate source of legitimacy.

The prince

The first source of jurisdiction is the prince – understood as the Emperor and the Pope. Both existing at the apex of the temporal and spiritual orders, they could appoint rulers within their respective spheres. On the one hand, canon law had long recognized the special ability of the pope to appoint, modify, and depose holders of jurisdiction, through the confirmation of certain canonical elections or the appointment of papal legates. Similarly, that the emperor could grant jurisdiction was almost a given of Roman Law. As Lord of the World (*dominus mundi*), the Emperor was seen as the source and thus the legitimizing origins of many holders of jurisdiction. Thus, for example, it was commonly accepted that those who had their jurisdiction from the emperor had the condition of ordinary judge,[10] and since, as we will see below, all the powers of the Roman people had been granted to the Emperor, there was an extent to which many of the other holders of jurisdiction within the (universal) Empire must in some way or another have received their jurisdiction from him.

[10] For more on this see Vallejo, *Ruda equidad*, p. 66 ff.

The emperor and the pope were thus established as a source of the jurisdiction of other holders of power. While this would explain the origins of many holders of jurisdiction, however, it still raised the question of where the jurisdiction of Pope and Emperor themselves came from. The case of the pope was relatively unproblematic, at least until the late fourteenth century, when Conciliarism challenged the traditional bases of legitimacy.[11] The power of the Pope came directly from God. As the Vicar of Christ, the representative of Christ on earth, the Pope was the head of the Church, the heir of the throne and powers of St. Peter, and thus derived his powers exclusively from God.[12]

The origin of the authority of the Emperor, on the other hand, was more problematic, as the Roman texts gave contradictory statements about this issue. On the one hand, some passages mentioned that the empire, much like the papacy, came from God as a gift to mankind.[13] On the other hand, other passages mentioned the so-called *lex regia* by which the Roman people (*populus Romanus)* had once transferred all their power and jurisdiction to the Emperor.[14] Faced with this, and after some jurisprudential discussion, lawyers arrived at the conclusion that the Empire came from God, through the people, who had acted in a ministerial and thus mediate capacity.[15]

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[11] For more on conciliarism, from a political thought and legal history perspective see Brian Tierney, *Foundations of the conciliar theory: the contribution of the medieval canonists from Gratian to the Great Schism* (Leiden: Brill, 1998); Antony Black, "The conciliar movement," in *The Cambridge history of medieval political thought, c.350-c.1450*, ed. J. H. Burns (Cambridge: Cambridge University Press, 1988).

[12] For the canonistic elaboration on this, and its relation to many of the notions we have seen so far see Watt, "Theory of papal monarchy".

[13] Novel 6, "Maxima quidem in hominibus sunt dona dei a superna collata clementia sacerdotium et imperium."

[14] D.1.4.1 "Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat."

[15] Accursius, cited in Ryan, "Bartolus of Sassoferrato and Free Cities", p. 70. "De coelo: imo populus de terra … sed Deus constituit permittendo, et populus Dei dispositione. Vel dic Deus constituit auctoritate, populus ministerio."

This could have been a simple solution if it were not that it created some additional problems:[16] if the jurisdiction and power of the emperor once belonged to the people – and the word 'transfer' in the enunciation of the *lex regia* did not leave much doubt about it, given the maxim that "no one can transfer more rights [*iuris*] than he has to someone else"[17] – what was the current status of the people? Could they take those powers and jurisdiction back? In other words, was the *lex regia* revocable? This potential problem was exacerbated by contradictory texts within the Roman Law book. On the side of irrevocability, D.1.4.1 made clear that the Roman people had transferred *all* of their powers to the Emperor. C.1.14.12.3, additionally, presented the emperor as the sole legislator by saying that the ability "to create laws is granted to the prince alone."[18] Conversely, however, other passages allowed for other legislators, stating for example that "there is no doubt that the Senate can make law,"[19] or emphasizing the importance of the consent of the Roman people for the validity of law.[20]

The majority opinion among twelfth century glossators was that the *lex regia* was a one-off irrevocable transfer of powers, inspired by God. In the thirteenth century, however, jurists began to argue that the transfer was revocable, or at least, that the people maintained a certain degree of control. As we have seen, the Code said the legislative ability belonged to the "prince alone." In his gloss to D.1.3.9, Accursius attempted to solve the issue by saying that "the prince alone can [legislate], that is, himself alone and no one else alone."[21] The emperor thus emerged as the sole one-

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[16] The following discussion draws heavily from Magnus Ryan, "Political Thought," in *The Cambridge Companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015).
[17] D.50.17.54 "Nemo plus iuris ad alium transferre potest quam ipse haberet." For the significance of this see Ennio Cortese, *La norma giuridica: spunti teorici nel diritto comune classico*, vol. 2, Ius nostrum (Milano: Giuffrè, 1962), p. 177.
[18] C 1.14.12.3 "leges condere soli imperatori concessum est."
[19] D.1.3.9 "Non ambiguitur senatum ius facere posse."
[20] D 1.3.32 "For as the laws themselves restrain us for no other reason than because they are accepted by the judgment of the people."
[21] Accursius, *Digestum vetus* (Lyon, 1604), ad D.1.3.9 v. *Non ambiguitur*.

person legislator, the only individual that could legislate by himself, while the people and the senate, collectively, could also establish law. Even more so, regarding this same issue, Accursius' teacher, Johannes Bassianus had argued that while the Emperor was greater than any other individual, he was nonetheless inferior to the people as a whole. Although this opinion on the revocability of the *lex regia* was to change in the fourteenth century,[22] the ordinary gloss thus enshrined the idea that the Roman people maintained some control.

Law and custom

Law and custom were the second source of jurisdiction. Law (*lex*) for late-medieval jurists was a complicated term with multiple meanings.[23] In the context of the origins of jurisdiction, however, law referred not to any legal provision, and not to any body of law – such as natural law or the law of nations, which were *ius* rather than *lex*[24] – but to the Roman Law as enacted by the emperor, magistrates or the Roman people. Indeed, jurisprudence established that those who received jurisdiction from law had it of their own right, that is, were ordinaries rather than delegates.

The higher position of law as a source of jurisdiction can also be appreciated in the types of jurisdiction it can confer. Indeed, so far we have been considering sources of jurisdiction as political authority in general. However, as we saw in the previous chapter, this was to be conceived as bundles of rights ranging from *iurisdictio simplex* to *merum imperium.* Considering this variation, not all sources could grant the same

[22] For more on this see Canning, *The political thought of Baldus de Ubaldis*, p. 60 ff.
[23] See Vallejo, *Ruda equidad*, p. 266 ff; Jesus Vallejo, "El cáliz de plata: articulación de órdenes jurídicos en la jurisprudencia del *ius commune*," *Revista de historia del derecho* Vol. 38(2009), p. 6.
[24] The Latin distinction between *lex* and *ius* is particularly problematic in the English language. Generally, we can say that *lex* refers to particular enacted rules by a legitimate body, while *ius* can refer to either general systems of law, such as natural law (*ius naturale*) or the law of nations (*ius Gentium*), or to specific rights or duties. The distinction is easier to appreciate in Romance languages, where derivates of *lex* are used for exclusively the first meaning (loi, ley, llei, legge, lei), and derivates from *directum* encompass the same meanings as *ius* (droit, derecho, dret, diritto, direito).

types of jurisidiction. As we will see below, for example, the lower status of corporations in many cases led to a restriction in the jurisdictional rights they could confer. In this context, law was one of the few sources that could *de iure* grant *merum imperium*, along with the prince.

The centrality of custom as a source of law in the later Middle Ages, on the other hand, can hardly be overstated. Although codification was becoming increasingly common, the legal world of the later Middle Ages was still marked by the presence of unwritten law, legitimated on the basis of tradition since time immemorial. In terms of Roman Law, moreover, if as we have seen one understanding of law restricted it only to that emanating from the Roman people, the empire, or any other source specified in the CIC, the logical consequence of this was that all other sources of law at lower levels, written or unwritten, had the status of custom.[25]

In this context, custom, defined as the 'tacit consent of all'[26] could grant jurisdiction. This principle applied generally in cases for example when a particular family of rulers had had jurisdiction since time immemorial. Considering the status of custom as everything not from the Empire, moreover, local rulers could be seen as obtaining their jurisdiction from custom as well, whether this custom was written or tacit. In this sense, and associated with this, a common and contentious issue was whether *merum imperium* could be obtained through custom.[27] We have seen that *lex* was the established way for giving *merum imperium*, and since custom was in a dialectical relation with it, it would seem that unless the specific people that had the custom had been granted the ability to grant *merum imperium* by the law – or by the Emperor who

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[25] André Gouron, "Coutume contre loi chez les premiers glossateurs," in *Renaissance du puvoir législatif et genèse de l'Etat*, ed. André Gouron and Albert Rigaudière (Montpellier: Publications de la Société d'Histore du Droit et des Institutions des Ancies Pays de Droit Écrit, 1998), p. 118.
[26] D.1.3.32 'tacito consensu omnium.'
[27] See most commentaries on D.1.32.2, D.2.1.2, C.8.48.1, and C.8.52(53).2.

was the living law (*lex animata*), – custom could only grant lower types of jurisdiction. As we will see in the next chapter when we examine the case of cities, however, progressive jurisprudence developed alternative opinions on this matter.

The establishment of law and custom as sources of jurisdiction created some further controversies. In many ways, these were a variation of the problems we have seen in conceiving of the relation between the people and the emperor, and concern the role of the consent and the will of the people in political power. Several passages of the CIC enshrined law as paramount over other sources. C. 8.52.2, for example, established that custom could not overrule law.[28] Other passages, however, put forward the opposite view. D.1.3.32 proclaimed that **"**the laws themselves restrain us for no other reason than because they are accepted by the judgment of the people" and that therefore, law could be abrogated by the people through disuse.

Faced with contradictory statements, therefore, jurists proposed different elaborate theories of the relation between law and custom, most of which emphasized both the powers of the emperor, and the important role of the people's consent.[29] On the one hand, a tradition starting with Bulgarus seemed to ultimately grant precedence to the will of the people. As we have seen, the emperor had the power to make general laws for everyone. If a general law was contradicted by a custom of the people, there were two possible solutions. First, this custom was general (*generalis / universalis*), that is, held by the whole people, in which case the law was abrogated. Alternatively, the custom could be territorially circumscribed (*specialis*). In this case, the custom did not abrogate the law, that is, the law continued to be valid in general, but in the specific local case custom was preferred. In other words, "the specific derogated from the

[28] C.8.52(53).2 "The authority and observance of long-established custom should not be treated with contempt, but it should not prevail to the extent of overcoming either reason or law."
[29] The classical treatment of this is Gouron, "Coutume contre loi chez les premiers glossateurs".

general."[30] One precondition however was necessary for this latter type of custom to be preferred to the law: the people had to willingly and knowingly contradict the law (*populus sciens*), that is, the people needed to maintain the custom knowing that it was contrary to law. If they did not, then it was considered a mistake (*populus errans*) and the law took precedence.

The second tradition, exemplified by twelfth-century jurist Placentinus, took a different approach. Searching to maintain the Emperor's role as possessing supreme authority, and as we have seen writing at a time when the *lex regia* was understood as irrevocable, maintained that custom may have had the power to abrogate law before the transfer of power was completed. After it, however, custom could abrogate custom but not law. This was complemented by another solution, which posited that after the transfer, the Emperor took the place of the Roman people, and thus a general custom was as much a custom of the emperor as of the people. In this sense, if a general custom of the Roman people were to abrogate law, this would only be because the Emperor was understood as having full knowledge of it and thus by not explicitly annulling it, it was ratifying it implicitly.[31] In any case, however, much like we saw with the Emperor in the previous section, law and custom as an origin of jurisdiction were marked by a dialectic between the ruler and the ruled.

The ruled

The third source of jurisdiction was the ruled themselves. We have already seen that in the case of the Roman Empire, the Roman people (*populus romanus*) were seen as the origin of the power of the Emperor. In the relation between law and custom, additionally, the ruled also played an important role, either as the origin and thus

[30] Ryan, "Political Thought", p. 429.
[31] Ibid., p. 431.

legitimating basis of the law or explicitly as expressing their consent through custom. However, the most important development in this regard in late medieval jurisprudence was the elaboration of a theory of corporations.

When analysing the sources of jurisdiction, Azo observed that

> "The consensus of all can also give ordinary jurisdiction. Also the consensus of those who are of the same profession or business can create an ordinary. However, one, two three or even multiple private individuals who do not constitute a corporation [universitas], or a city, or castle or villages or town or a profession or business cannot establish jurisdiction or create a judge."[32]

This passage enunciated a distinctive understanding of the relation between rulers and ruled: the corporation. A corporation – broadly expressed through the term *universitas* – was a group of men acting together as one. The idea behind it was that while men most normally act individual – as *singuli* – under certain circumstances they act as a group – as *universis*- and in doing so the collectivity acquires rights, duties, and the capacity to act. Among these abilities was the granting of jurisdiction to one or more people for the management of the affairs of the corporation.

Indeed, jurisprudence on corporations provided the late-medieval political imagination with a more fully articulated notion of the collectivity and its relation to political rule than we have seen so far. The development of this imagination, moreover, was done in a way that is characteristic of conceptual development in late-medieval jurisprudence: in close borrowing between Roman and canon law. The idea of a corporation (*universitas*) had its basis in Roman Law. The fourth title of the third book of the Digest regulated the conditions under which corporations could exist and take action. However, the main

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[32] Azo, *Summa codicem* "Item dat iurisdictionem ordinariam universorum consensu. Item consensus eorum qui sunt de eadem professione vel negotiatione iudicem possunt facere ordinarium. Privatorum autem singulorum duorum vel trium vel etiam plurium ex quibus non constituitur universitas vel civitatis vel castri vel ville vel buri vel gratia professionis vel negociationis non instituitur non faciat iudicem," cited in Vallejo, *Ruda equidad*, p. 56.

development of the concept, especially in what concerned political thought and its impact in the structuring of the social world, occurred in canonical jurisprudence. The structure of the late medieval Church was characterized by the existence of a variety of groups holding some governing rights – abbeys, bishoprics, etc. Among these, the collegiate church, composed by a bishop and its cathedral chapter, constituted the main organizational structure, and presented the canonists with several governance problems. In addressing these issues, and while borrowing from the basis provided by Roman Law, they greatly developed the thought on corporations during the twelfth and thirteenth centuries. Finally, in the thirteenth and fourteenth centuries, the thought on corporations developed within the Church provided readily available models for Roman Lawyers dealing with secular political structures.

As we have said, the basic territorial structure of the church, at the diocesan level, gave rise to several challenges for canon lawyers. Traditionally, the diocesis had been seen as an integral part of the bishop, to the point that a canon in the Decretum claimed that "the Bishop is in the Church and the Church is in the Bishop."[33] Vis-à-vis this focus on the person of the bishop, however, several canons emphasized that the counsel or even consent of the canons was required for certain decisions. This contradiction in the canons created a problem for jurists: how were these two views to be reconciled? The organological metaphors of corporation theory provided a useful way for canonists to think through these issues. The specific details of what decisions required whose consent are beyond the scope of this analysis.[34] The main contention points of this debate are however extremely relevant, as they touched on the fundamental question of

[33] C.7 q.1 c.9.

[34] In any case, Brian Tierney has noted that "there could be no simple and general rule explaning when the consent of the canons was required in the conduct of the corporation's affairs, since their degree of responsibility varied according to the circumstances of the particular case." Tierney, *Foundations of the conciliar theory: the contribution of the medieval canonists from Gratian to the Great Schism*, p. 102.

where authority laid within the corporation. And central in this debate was the role of the election of the bishop: did the election create jurisdiction or was it rather the consecration to the episcopal order? After much debate, towards the end of the thirteenth century jurisprudence finally settled on the fact that election conferred jurisdiction, while consecration conferred administration, which, as we will see below, is the exercise of jurisdiction in the specific case. A first development in canon law was therefore the idea that jurisdiction was created by the members through the election process and then conferred to the head. As Hostiensis noted: "corporations make an ordinary judge by choosing him. It can therefore be said that all the church ministers who are created through election have ordinary jurisdiction."[35]

A second canonical development was no less crucial for the late-medieval political imagination: the assimilation of a corporation with a person, that is, the creation of legal personality. Historians have long discussed whether medieval jurists, in examining the rights of corporations, understood these to have a real existence separate from that of the members – the so-called Realist theory- or whether the *universitas* was considered a mere legal fiction – consequently the Fiction theory.[36] The metaphysical nature of the corporation, however, was not the main occupation of jurists, who were much more concerned with the practical implications of the creation of a legal, collective person – real or not. It seems clear, however, that the Roman Law glossators believed the corporation to be nothing more than the sum of its members. Thus, Accursius, for example, said that "a corporation is nothing but the individual men who are there"[37]. In

[35] Hostiensis, cited in ibid., p. 116. "Universitas facit iudicem ordinarium eligendo ipsum. Potest igitur dici quod omnes ministri ecclesiae qui per electionem creantur iurisdictionem ordinariam habent, ex quo administrationem consequuntur."
[36] For an explanation of the debate see Canning, "The corporation in the political thought of the Italian jurists". For a classic statement in relation to corporations see Otto von Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (Berlin: Weidmann, 1963).
[37] Accursius ad D.3.4.7 " Universitas nil aliud est nisi singli homines qui ibi sunt," cited in Canning, "The corporation in the political thought of the Italian jurists", p. 13.

the context of this discussion on the matter, however, Innocent IV coined a term: *persona ficta et representata.* A fictive and represented person: fictive, because it was not a real person and did not have a soul; represented, because it acted through a head that represented the whole corporation; but a person nonetheless, a bearer of rights and duties.

Insofar as it was an abstract entity, moreover, the corporation allowed for a further crucial trait: it was eternal. That is, it was not only something beyond the men that composed (transpersonal) but also, precisely because of this, it existed in time independently of its members.[38] This is explained clearly by Baldus:

> "Although persons change, the collegium does not… Therefore if the chapter of the Church of Saint Lawrence does something together, and a hundred years go by, and thus none of the old canons is alive, the chapter remains nonetheless obliged, because even if they are not the same canons, the chapter is nevertheless the same. And in this way the obligation is transferred to the new canons in the form of the old chapter. The same is to be understood of the people, which is the same people even if no one is alive of the one which was a hundred years ago."[39]

The corporation was not only distinct from its members, but also distinct and independent from its members in time. As such, jurists developed a way for collectivities and corporate entities to contract obligations in time and thus bind future generations. In doing so, however, the collectivities themselves were also projected in time, and thus acquired an undying and eternal quality.

The establishment of the notion of the corporation as a legitimating site of jurisdiction is of capital importance for the medieval international imagination. First, it represents

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[38] For more on the notion of an undying corporation and its relation to newly introduced Aristotelian ideas about time and eternity see Kantorowicz, *The king's two bodies*, p. 273-313.

[39] Baldus de Ubaldis, *in Primam Digesti Veteris Partem*.D.3.4.7.2 v. *In decurionibus*. "Licet mutentur personae, collegium non mutar, et intellectual collegium residet etiam in uno, si unus solus superest de collegio…. Ergo si capitulum ecclesiae sancti Laurentii fecit quondam cunctum, iam sunt centum anni. Ita quod ex canonicis antiquis nemo vivit, nihilominus ex cunctu capitulum remanet obligatum: quia licet non sint iidem canonici, capitulum tamen est idem, et ideo ad novos canonicos sub forma capituli veteris transit obligation. Idem dicendum est in populo quia idem populus est, licet nemo vivat ex his, qui retro fuerunt per centum annos."

the culmination of what we have seen was a trend in the discussion of the origins of political authority: the increasing presence of the ruled in the legitimation of rule, and even as the holders of jurisdiction. Secondly, through the idea of a fictitious and represented person, it provided a durable understanding of the political community that transcended the specific living persons that are part of it at any point in time. In doing so, as we will see below, it provided another transpersonal counterpart to the idea of the undying office of the holder of *iurisdictio*, and with this we can begin to appreciate how these categories represent a stable international order composed of durable entities.[40]

2. Purposes of rulership

We have therefore seen how jurisprudence posited a variety of possible origins for holders of jurisdiction, ranging from the Roman People, to other holders of jurisdiction, to formal elements like law and custom. Most crucially, however, this examination reveals an increasingly important role played by the governed themselves in the legitimation of political authority. Indeed, we have seen that already in the case of the emperor the people of Rome were considered to be at the origin of his power. The establishment of undying, transpersonal corporations as the locus for the exercise and legitimation of jurisdiction adds to this trend, and has led IR authors such as Latham to posit that the later Middle Ages had a 'corporate-sovereign' understanding of the state.[41]

A similar picture emerges when the legitimacy of political authority is examined from the perspective of its purpose. Indeed, we find that a variety of views coexisted in legal writing, even more so when we take into consideration that the period analysed here

[40] Needless to say, transpersonality is also fundamental for the modern notion of the state. Nevertheless, its medieval origins, and even more its religious origins the context of canon law, have seldom been appreciated by IR scholars. In any case, however, tracing the origins of the modern state is beyond the scope of this work.
[41] Latham, *Theorizing medieval geopolitics*.

extends for over 200 years. While different, these views were not necessarily incompatible, but rather emphasized various aspects of legitimacy, and, by extension, embodied different views of the relation between rulers and ruled. This section explores four different views, which, while often coexisting, were dominant at different times, and displayed in different contexts.

Temporal and spiritual powers

The exposition of the legitimate purposes of political authority in the Middle Ages must necessarily start with an exploration of its division into two functional spheres: temporal and spiritual. One of the elements that have characterized the historical explorations of different moral purposes of rulership in IR scholarship is the assumption that these operate as system-wide structures whose purpose is to justify the segmentation of people into equal groups. As has recently been noted, this approach to legitimacy presupposes a "uniformity and continuity of subjection characteristic of a segmented political order."[42] In the case of the legal ordering of the Middle Ages, however, and as we saw in the previous chapter, segmentation does not constitute the central organizing principle. In *iurisdictio* we find a notion of political authority that encompasses all rulers. At the same time, however, this section examines a functional division within the broad scope of jurisdiction that is crucial to the understanding of the moral purpose of rulership.

The division between the temporal and the spiritual was one of the central axioms of medieval juristic thought on power and authority and, at a fundamental level, one of the few propositions over which no doubt was cast. At the same time, as is well know, the division was one of the central sites of contention in political thought and practice from

[42] Jens Bartelson, "Functional differentiation and legitimate authority," in *Reducing armed violence with NGO Governance*, ed. Rodney Bruce Hall (London: Routledge, 2013), p. 42.

the eleventh century onwards, not only in jurisprudence, but also in theology and philosophy.[43] In doing so, it constructed two functionally-differentiated spheres of political authority that complemented each other, with separate but closely related bases of legitimacy.

The language of temporal and spiritual power revolved around a series of connected conceptual binaries. The adjectives *temporalis* and *spiritualis* constituted the basis for this distinction. As adjectives, however, they were applied to a variety of nouns, therefore yielding various connotations. Thus, for example, it was associated to both *potestas* (*potestas spiritualis* and *potestas temporalis*) and jurisdiction (*iurisdictio in temporalibus* and *in spiritualibus*). Closely connected to this, we also find other categorical binaries such as ecclesiastical and secular (*ecclesiasticus* / *saecularis*) or clerics and layman (*clericus* / *laicus*), which, as we will see, had various connotations and as such, they were not fully interchangeable. Finally, it is worth mentioning that as we can expect, this language was more prevalent in canon law, but by no means restricted to it. Roman law also provided rich discussions of the topic, including the connected distinction of *imperium* and *sacerdotium*.[44] These binaries created a unified view of human society whereby two functionally differentiated spheres coexisted and complemented each other in the management of human society. In so doing, they not only referred to two types of political organization, but also to two different ways of exercising power, to the coordination between several actors, and also to two different functions in society.

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[43] A classic treatment of the topic, which includes a wide selection of translated texts, is Brian Tierney, *The crisis of church and state, 1050-1300* (Englewood Cliffs, NJ: Prentice-Hall, 1964).

[44] See Nov. 6, preface: "The priesthood [*sacerdotium*] and the Empire [*imperium*] are the two greatest gifts which God, in His infinite clemency, has bestowed upon mortals; the former has reference to Divine matters, the latter presides over and directs human affairs, and both, proceeding from the same principle, adorn the life of mankind," translated in Scott, *The civil law* (1902).

At a very basic level, the primary meaning of the distinction represented two kinds of jurisdiction, understood as the ability to say the law – according to the aforementioned connotations of *iurisdictio*– in two separate types of cases. Indeed, what *temporalis/spiritualis* did at a basic level was divide social and political life into two separate spheres: one, the temporal, had to do with earthly governance; the other one, the spiritual, with the care for the eternal soul.[45] Tying to the idea of the importance of the Incarnation, the *Decretum* explained that Christ himself had established the division of spheres of jurisdiction in two in order to prevent rulers from excessive pride. Thus, Christ attributed to each power their "own proper acts," although he himself held both powers. Thus, canonists commented, "he [Jesus] fed the multitudes and drove the sellers away from the temple, which concern the duties of a king, and he also sacrificed himself in the altar of the cross and prayed for his enemies,.. which is the duty of the priest."[46] In this sense, thus, all spheres of life and of action were considered to be divided in two complementary and mutually exclusive categories: each case, rule, or social event by its own nature belonged to either the temporal or the spiritual sphere.

Tied to this idea of two spheres of political power is the idea of two ways of exercising power tied to each sphere. A first metaphor in connection to this is that of the two swords (*utrumque gladii*). The image of the two swords in medieval thought has a long history and was thought to refer to a variety of situations. Its origin is clearly biblical: in Luke's Gospel it is recounted that during the Last Supper, after learning about Jesus imminent fate, the Apostles said 'Lord, behold, here are two swords,' to which he

[45] This division was of course far from perfect in practice, particularly because as we shall see, in a theologically-driven imagination everything could ultimately be susceptible of falling under the 'care of the soul' category.

[46] Simon of Bisignano, *Summa in Decretum Simonis Bisinianensis*, ed. Petrus V. Aimone (Fribourg, 2007). ad D.96 c. 6, v. *Propriis actibus* "idest actus utriusque potestatis uel que in sua persona fecit. Pavit enim turbas, uendentes etiam de templo eiecit, quod ad regis dicens: 'pater ignosce illis quia nesciunt quod faciunt' quod sacerdotis est officium."

replied 'It is enough.'[47] After centuries of medieval exegesis, jurists came to understand these two swords as a metaphor for two powers that God on earth for the management of people and thus spoke of a spiritual and a material sword [*gladius materialis* and *gladius spiritualis*].[48] Insofar as jurisdiction was tied to the ability to enforce, as we have seen, this use of the sword necessarily involved a degree of coercion, and thus in some formulations, the idea of the two swords was tied to two ways of exercising this coercion. Thus, when considering these powers, Hostiensis claimed that

> "There are two deaths, that is, that of the body, which the secular authority inflicts with the material sword by which he punishes wicked men, that is by shedding blood…. The other is spiritual death, which the ecclesiastical prince inflicts with the spiritual sword, that is, the pointed sword of excommunication, which punishes the wicked, expelling and separating them from the Grace of God, which is life."[49]

This passage is clearly a discussion of the idea of *merum imperium*, paraphrasing its Digest definition as the "power of the sword to punish the wicked."[50] As we saw in the previous chapter, certain types of *merum imperium* were associated with the possibility of bodily punishment and ultimately execution. In this context, Hostiensis was faced with the problem of the canonical prohibition for clerics to bear arms, which in some formulations extended not only to actually exercising physical violence but also to dictating capital punishment sentences.[51] The solution, mediated by the idea of the two

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[47] Luke, 22: 38. Other mentions of swords in the bible were also linked to this image.

[48] For an extended discussion of the two swords image as well as its evolution in medieval biblical and theological exegesis see J. A. Watt, "Spiritual and temporal powers," in *The Cambridge History of Medieval Political Thought c.350-c.1450*, ed. J. H. Burns (Cambridge: Cambridge University Press, 1988), p. 370 ff.

[49] Hostiensis, *Lectura sive Aparatus domini Hostiensis super Quinque libris Decretalium*, 2 vols. (Argentini, 1512), ad X.4.17.13. "Duplex est mors, scilicet corporis, quam exercit iudex secularis cum gladio materiali, per quem animadvertit in facinorosos homines (Dig. 2.1.3; C.23q.4 c.36), idest fundendo sanguinem animam, quae dat vitam corpori, extra corpus vertit, et sic anima a corpore separate remanet ipsum corpus mortuum. Alia est mors spiritualis, quam exercet princeps ecclesiasticus gladio spiritual, scilicet mucrone anathematis (C.16 q.2 c.1), quo animadvertit in facinorosos, expellendo et separando gratiam Dei, quae est vita, sive spiritualis anima, animae humana; et haec anima spirituali ab anima humana separate remanet humana anima mortua."

[50] D 2.1.3, "Merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines."

[51] See for example ord. Gloss to C.23 q. 8 c.29 v. *Saepe* " nullus clericus debet dictare vel dare sanguinis effusionem vel truncationem facere per se uel per alium." For a fuller discussion of canonists' discussion

swords, was thus that this exercise of *merum imperium* had two different natures: one of physical punishment, and another one of an immaterial nature through excommunication.

Once again, we see the extent to which *iurisdictio* and its elaborations occupy a central position in the representation and understanding of political authority: the functional division between temporal and spiritual gets incorporated and read through the divisions of jurisdiction, so that each bundle of rights can be thought of as exercised in both temporal and spiritual terms. As a result, jurisdiction could be exercised in two different ways. As theologian John of Paris was to acutely highlight at the turn of the fourteenth century, this had important implications, particularly relating to the spatial dimensions of rule:

> "Secular power is more diverse, … because one man alone cannot rule the world in temporal affairs as can one alone in spiritual affairs. Spiritual power can easily extend its sanction to everyone, near and far, since it is verbal. Secular power, however, cannot so easily extend its sword very far, since it is wielded by hand."[52]

The different ways of exercising power therefore provide the justification for the existence of a variety of secular rulers as opposed to the role of the pope: the power of the sword needs to be exercised physically and thus requires proximity, whilst the power of the word is spatially unlimited. The temporal/spiritual distinction was thus not only associated with two spheres of social life and two ways of exercising power, but was also intimately linked to two different spatial configurations of political life.

The languages of temporal and spiritual therefore highlight a functional differentiation within the broad sphere of jurisdiction, which is tied to separate bases of legitimation

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of the right of clerics to bear arms see Frederick H. Russell, *The just war in the Middle Ages*, Cambridge studies in medieval life and thought (Cambridge: Cambridge University Press, 1975), p. 105 ff.

[52] John of Paris, *On royal and papal power*, trans. John A. Watt, Mediaeval sources in translation (Toronto: Pontifical Institute of Mediaeval Studies, 1971), pp. 85-86.

and separate ways of exercising this authority. However, it is important to remember that this separation is always in the context of a broader unitary framework, that puts both spheres in relation to each other. We are not talking of two separate and independent types of actor with different functions and unrelated bases of legitimation, but two parts of the same whole. This is clear, for example, in this brief passage of canonist Stephen of Tournai:

> "In that city, under that king, there are two peoples; and like two peoples, two ways of life; like two ways of life, two principalities; like two principalities, two jurisdictions. The City is the church; Christ its king; the two peoples, two orders in the church: clerics and laymen; two lives: spiritual and carnal; two principalities: priesthood and kingship; two jurisdictions: divine and human law."[53]

Both spheres are therefore understood as related parts within one whole. And with this we approach the final element of this separation: although functionally differentiated and closely connected, temporal and spiritual do not relate to each other on an equal basis. Rather, the spiritual is considered to be a superior power, insofar as its ends are superior, and thus we find yet another hierarchical element within the ordering of political authority. Indeed, the fundamental axiom of the division of power was complemented by another undisputed tenet – in its general principle, at least-: that the spiritual was in some sense superior to the temporal.[54] At a basic level, this of course stemmed from the centrality of the pursuit of the salvation of the soul, and its inherent superiority to any other earthly endeavours. In jurisprudential language, however, this soon translated into an argument about judicial, and thus jurisdictional superiority, particularly in the case of Pope and Emperor. We can appreciate these elements by

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[53] Stephen of Tournai, "Summa decretorum," in *Die Summa über das Decretum Gratiani*, ed. Johann Friedrich von Schulte (Aalen: Scientia Verlag, 1865), pp. 1, proemium. In eadem civitate sub eodem rege duo populi sunt, et seeundum duos populos duae vitae, seeundum duas vitas duo prineipatus, seeundum duos principatus duplex iurisdictionis ordo proeedit. Civitas ecclesia; civitatis rex Christus; duo populi duo in eeclesia ordines: clericorum et *laicorum;* duae vitae: spiritualis et *carnalis*\ duo principatus: sacerdotium et regnum; duplex iurisdictio: divinum ius et humanum."

[54] Watt, "Theory of papal monarchy".

examining a specific articulation of the moral purpose of political authority that stemmed from this separation: a ministerial view of rulership.

Ministerial view of rulership

What is sometimes called a 'ministerial view of rulership' is perhaps the oldest of the teleological views examined in this chapter and its practical relevance clearly fades over the period analysed. As a legal construction, it was mostly developed in the context of canon law during the 12th and 13th centuries. As such, it became crucial for hierocratic understandings of a papal monarchy and papal supremacy from the 13th century onwards, and was frequently deployed in the so-called contests between Church and State well into the fourteenth century. Its origins, however, are tied to two key early medieval ideas: the division of temporal and spiritual that we have just seen, and an Augustinian and patristic view of the nature of the political.

Agustinian and patristic understandings of the political were based on a specific theological understanding of both human history and human nature.[55] According to this, man was created by God as a fundamentally good and immortal creature, nevertheless possessing both reason and free will. This true nature, however, was lost during the Fall, when men's desires led him to be expelled from paradise on account of original sin. After the fall, therefore, man's true nature had been lost, and mankind existed in a state of fallen nature, marked by the presence of anti-social and sinful desires, such as pride, greed, or lust. The fundamental problem of this state – within the earthly city –

[55] The literature on Augustinian and patristic political thought is vast. A useful starting point is R.A. Markus, "The Latin fathers," in *The Cambridge history of medieval political thought, c.350 - c.1450*, ed. J. H. Burns (Cambridge: Cambridge University Press, 1988). A classical monograph on the political thought of Augustine is Herbert A. Deane, *The political and social ideas of St. Augustine* (New York: Columbia University Press, 1963). It is worth noting that Augustine is one of the few thinkers of this period that have been examined by IR scholars. See for example Brown, Nardin, and Rengger, *International relations in political thought*; Hartmut Behr, *A history of international political theory. Ontologies of the international* (Basingstoke: Palgrave Macmillan, 2010).

was therefore how to repress sin and these anti-social desires. Political rule, in this view understood as little more than outright coercion, was one answer to this problem, meant to ensure peace. A second event in human history, however, had also affected the nature of political authority: the Incarnation of God in Jesus Christ for the redemption of human sin. Central to this possibility of redemption was the Church, understood as the organization that promoted faith, administered sacraments and thus the only way that salvation became possible.

The combination of this with the *divisio iurisdictionis* yields what has been called a ministerial view of rulership. Secular rulers exist in order to fulfil a function within a divinely ordained world that subordinated their activity to the work of salvation and consequently to the dictates of the Church.[56] As Laurentius Hispanus stated "The spiritual [power] invokes the material [one] as their minister on their behalf."[57] In this view, thus, the legitimacy of secular political authority was tied to the extent to which rulers were fulfilling their duties and leading the ruled into a path of salvation. Thus, for example, rulers that failed to fulfill their duties were susceptible of being controlled, admonished and even deposed by the Church. Canon 3 of the Third Lateran Council, for example, stated that:

> If however a temporal lord, required and instructed by the church, neglects to cleanse his territory of this heretical filth, he shall be bound with the bond of excommunication… If he refuses to give satisfaction within a year, this shall be reported to the supreme pontiff so that he may then declare his vassals absolved from their fealty to him and make the land available for occupation by Catholics so that these may… preserve it in the purity of the faith.[58]

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[56] For more on this see Watt, "Theory of papal monarchy", p. 206 ff.
[57] Laurentius Hispanus cited in Mochi Onory, *Fonti canonistiche*, p. 197. "Spiritualis invocat materialem tanquam ministrum suum pro facto quandoque supplendo."
[58] Section 3, canon 3 of the Third Lateran Council, translated in Onyoo Elizabeth Kim, "Canon three of the Fourth Lateran Council from 1215 to the Ordinary Gloss of 1241/66: Canonists' contributions to the delineation of crime and punishment for heresy" (Ph.D., University of Pennsylvania, 2007), pp. 185-86.

In the context of procedures against heresy, thus, secular rulers have a duty to eliminate heretics from their lands, when instructed by the Church. In this view, the legitimacy of secular authority is thus necessarily tied to the ability to fulfil their proper duties in relation to sin and salvation. The consequence of this, of course, is that if they fail to fulfil this request, the Church, following proper procedure can excommunicate them and then sever the links between subjects and ruler. Indeed, as the canonists promptly commented, "the pope could depose all judges or leaders or followers on account of heresy and also on account of other sins…. For he transfers dignity from place to place."[59] It is worth noting at this point that this was not merely a theoretical possibility contemplated by speculative jurists. On the contrary, depositions of rulers – including kings and the Emperor himself – were not a rare occurrence in the period under study. In the thirteenth century, for example, various popes deposed Emperor Frederick II in 1228 and 1245, Sancho II of Portugal in 1245, or Peter III of Aragon in 1283.[60] A ministerial understanding of the legitimacy of rule therefore was based on the divided yet cooperative nature of both powers, under the direction of the spiritual one.

Finally, as we mentioned above, the issue of the legitimacy of political power is inextricably tied not only to rulers but also to understanding of the ruled. Ministerial understandings of rulership are in this sense distinctive, as they seem to provide no explicit articulation of the latter: the ruled exist just as an unidentified and passive recipient of secular and spiritual authorities. Some of the cases above, we find references to both 'territory' and 'Christians', but these are notably vague. In other

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[59] Johannes Teutonicus, gloss on *vassllos ab eius fidelitate denunciet absolutos* cited and translated in ibid., p. 190. The latin words translated as 'leaders' and 'followers' are inicidentally '*duces'* and '*comites'*. Note also the idea of rulers as judges (*iudices*) as developed in the previous chapter.

[60] For more on deposition theory, especially concerning the legal aspect, see Helmut Walther, "Depositions of rulers in the later middle ages: on theory of the 'useless ruler' and its its practical utilization," *Revista da Faculdade de Ciências Sociais e Humanas* Vol. 1, No. 7 (1994); J. A. Watt, "Mediaeval deposition theory: a neglected *consultatio* from the First Council of Lyons," *Studies in Church History* Vol. 2(1965).

commentaries and canons, occasional mentions are made to particularly vulnerable groups that need protection, such as "the oppressed, pilgrims, widows and orphans,"[61] but besides these and the obligatory mentions to the "wicked" who must be punished, the ruled are an indeterminate group unto which power is projected for their own salvation.

Indeed, the only indirectly articulated understanding of the ruled comes from the specific relation between secular and spiritual authorities in relation to the goal of salvation. It is in this context that we can appreciate that the ruled are conceived within the broad notion of one Christian society, to a great extent organically conceived. Secular powers are not only ministers, but also an arm of the Church. Indeed, they are repeatedly referred to as the 'secular arm' [*brachium saeculare*][62] pointing to their function as agents within and of the Church, as the ones that can wield the material sword on its behalf. The point of reference of the ruled is thus the whole of the Ecclesia (*Christianitas*), the entirety of the Christian people.

Tutorial ideas and inalienability

A second, yet intimately connected, understanding of the purposes of rulership are tutorial ideas, or what Walter Ullmann called the "minority thesis." This idea had its origins in Carolingian notions of Kingship, by which the ruled were entrusted to the ruler for their care.[63] As a legal elaboration it was prevalent throughout the period that concerns us here, and deployed both in Roman and in Canon law, and not only as a

[61] Ord Gloss to C.23 q.5 c. 23, v. *Regum.* "Dicit Hier. In hoc c, quod príncipes debent defendere vi oppressos et perefrinos, viduas et pupillos;" and v. *Oppressos* "hic videntur quod ad iudicium saeculare spectatet deferndere oppressus,et viduas et pupillos."
[62] See for example Ord Gloss to C.23 q.5 c. 22 *Incestuosi* "dicitur in hoc canon quod mali qui per ecclesiam non possunt corrigi, volentes in suis criminibus perdurare, coerceri debent per brachium saeculare."
[63] See Walter Ullmann, *The Carolingian Renaissance and the idea of kingship* (London: Methuen, 1969), p. 177 ff. Patristic ideas also pointed in the same direction. The leter from St Paul to the Galatians (Gal 4:1-2), for example, expressed similar ideas.

theoretical elaboration of the notion of rulership, but also in specific and well-known cases. The starting point of this view was that the ruled entity – a kingdom for example - was not able to validly express its will, and as such was in the situation of a minor that needed a tutor to take care of her affairs.

The regulation of minors, pupils, tutors, and the legally insane in Roman law provided a good amount of material from which to draw inspiration.[64] Even more so, a few passages in the Corpus Iuris drew what seemed an explicit connection between minors and the *res publica*. The Codex, for example, included a law that specified that "in extraordinary proceedings, it is customary for relief to be granted to the *res publica* in the same was as to a female minor."[65] In these cases, the jurists promptly commented and drew the connections between minority and the community of the ruled. Thus, for example, Jacobus de Arena commented that "the *respublica* is equated to a minor, since it is ruled by another like a minor"[66] The ruler thus assumes the function of tutor or rector in taking care of and administering the affairs of the community.

In their examination of the responsibilities of the ruler over the ruled, however, lawyers developed a more elaborate doctrine of these responsibilities, one that pitched the will of the ruler against the rights of the ruled community: inalienability. Indeed, much like in the case of tutored minors, the tutor was not at liberty to do anything they wanted, but rather was limited by the rights of the minor. These limits were widely discussed by both canonists and civilians in two separate contexts. For Roman Lawyers, this was done through the discussion in the Digest of the word *Augustus* as an attribute of the

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[64] A useful introduction to the topic in classical times is provided in Andrew Lewis, "Slavery, family, and status," in *The Cambridge companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015).

[65] C 11.30.3. Similar passages are found in D.4.6.22.2 "Labeo states that this Edict also has reference to insane persons, infants, and municipalities," and C2.53.4 "The government usually enjoys the privilege of minors, and therefore it can demand the relief of restitution."

[66] Jacobus de Arena ad C.2.53.4, cited in in Canning, "The corporation in the political thought of the Italian jurists", p. 24 ft.56. "Sed respublica equiparatur minori, ideo quia per alium regitur sicut minor."

emperor and the Donation of Constantine. Etymologically, *augustus* has the same root as *augmentare*, to increase, becoming then an epithet for increasing. Augustus as an attribute of the emperor therefore emphasized his responsibility to increase the empire, and thus, by extension, his special duty not to decrease it. This became particularly relevant in the context of the discussion of the Donation of Constantine. Although now we know it to be an eighth or ninth century forgery, late-medieval lawyers believed this document to be an authentic reflection of historical events. According to it, upon his conversion, Emperor Constantine transferred all his power over the Western Empire to then Pope Sylvester I, who then gave it back to him. When combined with the idea of *Augustus*, the question for the civilians was clear: was it legitimate for Constantine to alienate the entirety of the empire?

Canonists faced a similar question, this time concerning a much more contemporary event. In the context of a revolted kingdom, King Alexander of Hungary and his son future king Béla made a series of concessions to certain prominent nobles in their Kingdom, which had since its inception in 1001 been held as a Papal fief. In 1228 Pope Honorius III sent the two letters that constitute the decretal *Intellecto*, in which he claimed that some of these concessions constituted a breach of the duties of the crown to which the king had committed during coronation oath, and, as a consequence, an alienation of the rights of the kingdom. The question was once again clear: what are the limits of royal action in relation to the rights of their kingdom?

In considering these issues, canonists and civilians developed the doctrine of inalienability.[67] The basis of this doctrine resided in a distinction between ruler and ruled, in this case articulated as the office of the Emperor and the Empire by the Roman Lawyers, or the Crown and the Kingdom in the case of the canonists. According to this,

[67] The classical treatment of the issue is Riesenberg, *Inalienability of Sovereignty*.

both the ruling offices and the ruled bodies were undying transpersonal entities, which had rights attached to them. That the Emperor was tasked with the protection of the Empire involved foremost that no rights of the latter could lawfully be detached from it, that is, alienated. This involved, for example, that the Emperor could not give away part of the Empire, much less the entirety of it, and as a result, was used in the fourteenth century to question the validity of the Donation of Constantine. In the context of Kingdoms, the unlawfulness of these acts was articulated through the relation between the King and the Crown established in the Coronation oath. By virtue of this oath, the King swore to preserve the rights of the Crown, which meant once again that he could not alienate or sell territory from it, and it also placed a limit on the type of privileges that the King could grant to his subjects. As a result, it placed an emphasis on the role of the King as preserver of the rights of kingdom, and thus involved that his power could only be exercised with restraint.

It is important at this point to consider one further issue. It may seem that through discussion of both the emperor and royal offices this dialectical relation between office and community may only apply to these higher-ranking cases. However, this relation applied more generally in many situations of power, including for example the relation between a bishop and his bishopric. Thus for example, Petrus de Ancharano states that "the king, at the time of his coronation, swears not to alienate the things of his kingdom; similarly, the bishops swear [not to alienate] the rights of their bishopric."[68] In this we can see once again how discussion of political authority considered a variety of rulers together as well as another manifestation of the tension between rulers and ruled in the case of dioceses that led to the development of corporation theory.

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[68] Petrus de Ancharano, cited in Kantorowicz *The king's two bodies* p. 358. "Rex iurat tempore suae coronationis non alienare res regni sui. Similiter episcopi iurant sui episcopatus iura."

The implications of these doctrines in terms of both the legitimacy of the ruler and its practical limits in medieval international relations, but also of the relations between him and the ruled become clear if we briefly consider a well-known empirical case: the deposition by Pope Innocent IV of King Sancho II of Portugal in 1245. Under the reign of Sancho II, the kingdom of Portugal experienced severe internal instability in a conflict that confronted the monarchy with the nobility and the clergy. In this context, Pope Innocent IV after multiple warnings to Sancho so that he would put order in his Kingdom, and particularly respect the rights of the clergy, issued the decretal *Grandi* on the 24th of July of 1245. Through this letter, he effectively removed Sancho from office and named his brother Alfonso, the Count of Boulogne, as the *curator* of the realm of Portugal, and eventually as the successor of the King when he died.

In this case, thus, the King had been negligent in his administration of the Kingdom, and consequently had lost his right to administer it. In his commentary on his own decretal, Innocent IV noted that the just causes to remove a king from power "if he does not know how to defend his kingdom or keep justice and peace within it especially concerning religious peoples and places and the poor. And also even more if they do not know how to recuperate what has been lost." Moreover, and this is particularly relevant in order to reinforce that these ideas are not only applicable to kingdoms, Innocent also notes that "the same which we are saying about kings is applicable to dukes and counts and others who have jurisdiction over others."[69] Rulers thus had a responsibility to take care of the community they ruled.

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[69] Innocent IV, *Comentaria doctissima in quinque libros decretalia* (Frankfurt, 1570). Ad X 1.10.1 v. *utilitate.* "Nota causas iustas dandi curatorem regibus…. Si nesciunt suum regnum defendere vel in eo iustitiam et pacem servare maxime religiosis personis locis et pauperibus. Et etiam quod plus est si nesciunt perdita recuperare. Et idem quod diximus in regibus servandum est in ducibus comitibus et aliis qui habent iurisdictionem super alios. Aliis autem privatis non datur curator nisi sint furiosi vel prodigi."

In this case, however, rather than merely deposing Sancho II, Innocent gave him a *curator*. Another Roman Law figure, meaning caretaker or guardian and applied as well in ecclesiastical offices, the function of a *curator* was to administer the community on behalf of the ruler while the latter was indisposed. The somewhat paradoxical result from the modern perspective was a King – Sancho II – from whom the authority over his Kingdom was removed and given to a *curator*, but who nevertheless remained King. The concepts of *dignitas*, which we saw in the previous chapter, and *administratio* are in this sense crucial to understand this situation and elaborate on the relation between rulers and ruled. Innocent IV's justification for not removing Sancho from office was that he was a King by dignity – which we are to understand as a hereditary king. As we will see in chapter 6, the late-medieval juridical understanding of kingship included both hereditary and elective kings – the paradigmatic example of elective kingship being the Roman Emperor, otherwise called King of the Romans (*Rex Romanorum.*) Unlike in the case of the Emperor, which the Pope could lawfully fully depose,[70] Sancho was a hereditary monarch, which meant that his dignity, his crown, could not be removed.[71]

The notion of dignity thus conferred the honour of the title. Administration, on the other hand, referred to the concrete exercise or effective ability to exert power over a community or territory.[72] The separation of both facets of political power thus meant that you could have both the a title without rights over a community – like Sancho-, and

[70] The literature on juridical elaborations of deposition theory in the later middle ages is vast. Peters, *The shadow king: rex inutilis in medieval law and literature, 751-1327*; Othmar Hageneder, *Il sole e la luna: papato, impero e regni nella teoria e nella prassi dei secoli XII e XIII* (Milano: Vita e pensiero, 2000); Watt, "Mediaeval deposition theory: a neglected *consultatio* from the First Council of Lyons."

[71] See chapter 5, particularly the beginning of Baldus' *consilium* on kingship. Baldus de Ubaldis, *Consiliorum sive responsorum. Volumen tertium.*

[72] For more on *administratio* see Costa, *Iurisdictio*, p. 120-25, and Vallejo, *Ruda equidad*, p. 54-55.

rights to the exercise of power without the title – like Alfonso.[73] As Stephen of Tournai, when examined the issue of *administratio* observed: "Neither monks nor other priest have the ability to teach the people from their consecration alone, unless it is assigned to them by a bishop; in the same way, if our lord the emperor grants someone jurisdiction or the ability to adjudicate [*iudicandi potestatem*] and does not assign them a province or a people, as a judges he has a title, that is the name, but not administration." [74]

When considered together with tutorial ideas, the implications of this matter in terms of our understanding of rulership and the political landscape of the late-medieval period are crucial: through tutorial ideas and the notion of inalienability we not only see a more defined understanding of the ruled than that presented by ministerial ideas; we also see that there is a fundamental separation between ruler and ruled. The ruled, in Sancho's case the Kingdom of Portugal, are not only an entity different from the ruler, but also pre-existent and independent from it. As Albericus the Rosate observed: "there were kings, and before that there were peoples without kings." [75] Peoples as a community pre-exist political government and thus do not depend on it. As a consequence, the ruler administers and takes care of the community, but is fundamentally not part of it. We will elaborate more on the specific formulations and understandings of the ruled in the conclusion of this chapter. For the moment, however, suffice it to say that to speak of the types of 'states' of late-medieval Europe in terms of

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[73] On this issue, for example, Odofredus de Denariis, *Lectura super Codice*, Opera iuridica rariora (Bologna: Forni, 1968). ad C.3.13.1. "Sed denuo quero habet ne locum: quod hic dicitur in iudicibus qui habent dignitatem et administrationem. ut est praeses proconsul. Et in iudicibus qui habent dignitatem sine administratione ut sunt iudices calcularii qui habent privilegium a príncipe qui sint iudices et notarii de quibus multi sunt in Tuscia."

[74] Stephen of Tournai, "Summa decretorum", ad C. 16 q. 1. "Nec monachus nec alius sacerdos ex sola consacratione habet executionem docendi populum, nisi assignetur ei ab episcopo; quemadmodum et si dominus imperator concedat alicui iurisdictionem vel iudicandi potestatem et non assignet ei proviciam seu populum, quam iudicem, habet quidem titulum, i. e. nomen, sed non administrationem."

[75] Albericus de Rosate, *Commentarii in primam Digesti veteris partem*, ad D.1.1.5. "Sed erant Reges, et ante erant populi sine regibus."

'Kingdoms' and 'cities' seems at the very least extremely problematic in light of the conceptual separation between ruler and ruled that we have just seen.

Justice and equity

Justice and equity were a third formulation of the purposes of rulership, in this case tied not only to the goals of rule, but to a specific understanding of what ruling in itself meant. Its main site of development was 12th and 13th century Roman jurisprudence, and was embodied in the very definition of jurisdiction when it proclaimed that its main responsibility was 'pronouncing the law and establishing equity'. While after the thirteenth century it was to a large extent set aside, the evolution of the role of equity as interpretation also allowed for the elaboration of the limits of the power of the ruler mentioned at the beginning of this chapter.

The starting point for this understanding of the legitimacy of political authority is a frequent discussion about the meaning of law and what it actually means to legislate, occurring generally at the beginning of legal commentaries to Roman Law.[76] As opposed to modern theories which define law in terms of the enacting power, medieval jurisprudence gave it a more transcendental meaning that did not depend on the specific ruler issuing it. Thus, for example, Guido de Baisio expressed this opinion on the nature and function of law:

> "It can be seen from this that the law restrains all bad thing: because human boldness would not be sufficiently restrained, except if all evil things are restrained by law. Furthermore the purpose of the legislator is to make men good and virtuous, but one cannot be good unless he abstains from all vices. Therefore, restraining all vices belongs to human law."[77]

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[76] For this argument I follow Vallejo, "El cáliz de plata".

[77] Guido de Baisio cited in Vallejo, *Ruda equiad*, p. 269. "Videtur ex hoc quod lex cohibeat omnia mala: quia non sufficienter coerceretur humana audacia, nisi omnia mala cohiberentur per legem, pretera intentio legislatoris est homines facere bonos et virtuosos sed non potest esse bonus, nisi ab omnibusvitiis abstineat: ergo ad legem humana pertinet omnia vitia compescere."

Laws therefore were not understood as positive instruments of government, but rather had a transcendental or religious function in the ordering of the world.[78] Additionally, the fact that law was not tied to a particular type of legislator, meant that in this sense, law applied to rules issued by a multiplicity of actors, by the holders of *iurisdictio* that we saw in the previous chapter.[79]

In this context, we may consider what exactly it means to enact a law. For twelfth and thirteenth century jurists, the starting point was the existence of a divinely-determined objective order expressed in the idea of raw equity (*aequitas rudis*). The function of the ruler was to enact, and specify this raw equity by transforming it into specific propositions, which were law. Law, therefore, was considered by many to be 'constituted equity' (*aequitas constituta*). In his introduction to the Codex, Azo described the process in the following way:

> "Regarding raw equity, rulers aim to draw from it, what is drawn they aim to write into precepts, once it is written in precepts it is to be preserved by imposing it on subjects, and by finding its ideal place within the titles (of the law books)"[80]

Legislating and governing, therefore, became an activity where the ruler was tasked with maintaining this transcendental order, acting as a mediator between rude equity and constituted equity.

Two important implications follow from this. First, in this view we can find another articulation of the fact that *iurisdictio* as rule encompassed both legislative and judicial functions. The ruler, as warrantor of the social order embodied in rude equity, realised

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[78] Note the ties between this statement and an Augustinian understanding of (fallen) nature and political authority. As noted above, the different constructions of the moral purpose of rulership are by no means incompatible.

[79] The term *lex* is complicated and has multiple meanings. Thus, the use of lex in the contxt of the present section contrast with the one that will be employed at the end of this chapter, when *lex* is considered as a source of jurisdiction, and thus restricted to rules enacted by the prince.

[80] Azo, *Azonis Summa super Codicem*., cap. Materia ad codicem "Super rudi equitate intendunt [principes] ipsam eruere, erutam in praeceptis redigere, redactam subditis conservandam iniungere, et sub ydoneis tituis collocare," cited in Vallejo, *Ruda equidad,* p. 303.

and maintained this order both through his establishment of the law – understood as constituted equity- and his judicial function. Indeed, the judicial function was considered to be crucial in the maintenance of order, insofar as it meant the application of constituted equity to actual cases, and in doing so, it maintained the proper order of things.[81]

Second, and crucially, this objective and previous reality of raw equity constituted a limit to the activity of the ruler, insofar as they could not challenge it nor go against it. We may therefore ask what the content of equity was, in order to see what the limits of political authority were. As we noted above the idea of law and equity were imbued with a transcendental content, to the point that the glossator Martinus felt comfortable affirming that "Equity is therefore nothing other than God."[82] Furthermore, equity was also associated to the idea of justice, with Martinus again affirming that "equity is the source and origin of justice."[83] Through these transcendental associations, therefore, equity could be considered the series of indisposable principles – that is, principles beyond the reach of the human legislator – contained in divine law, natural law, and the law of nations. In this we therefore find that independently of what the ruler's will was, her governing activity was meant to enact and reproduce this order and these principles could therefore not be transcended.[84]

We may finally ask what the representation of the ruled was within this framework. On the one hand, it would seem that equity would point towards a homogenisation of the political community. Indeed, certain definitions emphasized the Ciceronian idea of equity as seeking an equal resolution to equal cases, and as such had an undertone of

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[81] For more on this in the canon law case see Peter Landau, "'Aequitas' in the 'Corpus Iuris Canonici'," *Syracuse Journal of International Law and Commerce* Vol. 20(1994)., who shows that in Church cases equity need not mean applying the rigor of the law.
[82] Martinus, *Exordium Institutionum*, cited in ibid., p. 97. "Nihil enim aliud est equitas quam deus."
[83] Ibid.
[84] Canning, "Law sovereignty and corporation theory, 1300-1450", pp. 454-56.

equality. However, we must remember two crucial aspects that transpired in our discussion of the origins of *iurisdictio*. First, as we saw with law and custom, the specific workings of a plurality of jurisdictions meant that the particular derogated from the general. Second, and crucially, this was reinforced by the establishment of corporations as a valid site of jurisdiction. Considering that these corporations varied greatly in nature, and that all their legislation was broadly understood as dealing with raw equity, what emerges from this is a cellular idea of the ruled, as constituted by a variety of groups with special rights and privileges. This cellular plural order is therefore what is mandated by God and needs to be maintained. Thus, although equity is generally tied to treating equal things equally, in the case of the later Middle Ages this involved maintaining a highly unequal order, not only in the sense of hierarchy, but also in the sense of the coexistence of a variety of privileges and special status.

Public utility and the common good

We arrive finally at a fourth construction of the moral purpose of rule in late-medieval jurisprudence: public utility and the common good. As many historians have noted, the language of this last view of the moral purpose of rule is quite varied, revolving around notions of public or common utility [*utilitas publica / commune*] and variations of the idea of a common good [*bonum comune*]. In it, the ruled as a community and as the focus of political authority take a central place.[85]

The re-discovery and translation of Aristotle's work from the twelfth century onward has been seen as playing a crucial role in furthering this view of the purposes of

[85] The central monograph covering late-medieval ideas of the common good, albeit in a theological context is M. S. Kempshall, *The common good in late medieval political thought* (Oxford: Clarendon Press, 1999).

political authority. [86] From the twelfth century onwards, Aristotle's more practical works, recovered through contacts with Muslim and Jewish scholars, began to be translated into Latin and as such became much more accessible for Christian scholars. Two specific works were of great importance for the political thought of the time: the Nicomachean Ethics, and the Politics. While the former was translated at the turn of the thirteenth century, the latter was the last of his books to be translated: only in 1260 did William of Moerbeke complete his translation. As opposed to the Augustinian view of politics that we saw above, Aristotelian understandings of it started from the premise that men were naturally political – thus countering the Augustinian idea of fallen nature – and as such the political community was essential to the realisation of the good.

The notion of a common good played a central role in this view. In particular, three fundamental ideas relating to the common good structured this thought: first, the highest good is the good of the community; second, the goal of political authority is the realisation of common utility; finally, the goal of the city –understood as a political community- is the highest good.[87] In doing so, the common good, and particularly the highest good understood as the intellectual and moral development of human beings, became the central goal of political association, and thus a standard against which the legitimacy of political authority could be assessed. Indeed, the classification of different

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[86] For more on the reception of Aristotle from both a legal and a theological perspective seeJean Dunbabin, "The reception and interpretation of Aristotle's *Politics*," in *The Cambridge history of later medieval philosophy*, ed. Norman Kretzman, et al. (Cambridge: Cambridge University Press, 1982). The work of Cary Nedermann constitutes an oblidged point of reference for this topic, although a critical one that, as will be examined below, points to the influence being more a gradual transformation than a revolution. Cary J. Nederman, "Nature, Sin and the Origins of Society: The Ciceronian Tradition in Medieval Political Thought," *Journal of the History of Ideas* Vol. 49, No. 1 (1988); Cary J. Nederman, "Practical and Productive Knowledge in the Twelfth Century: Extending the Aristotelian Paradigm, c. 1120– c. 1160," *Parergon* Vol. 31, No. 1 (2014); Cary J. Nederman, "The meaning of "Aristotelianism" in medieval moral and political thought," *J. Hist. Ideas* Vol. 57, No. 4 (1996); Cary J. Nederman, "Aristotelianism and the Origins of "Political Science" in the Twelfth Century," *Journal of the History of Ideas* Vol. 52, No. 2 (1991). For a traditional view of the translation of Aristotle as a revolution in political thought see Walter Ullmann, *Medieval political thought* (Harmondsworth: Penguin, 1975).

[87] Bénédicte Sère, "Aristote et le bien commun au moyen âge: une histoire, une historiographie," *Revue Française d'Histoire des Idées Politiques* Vol. 32, No. 2 (2010).

types of regimes was based not only on the number of the rulers – ruled by one, by a few, or by many – but also on the extent to which different regimes did or did not fulfil this idea of the common good. This was, for example, the relation between monarchy and tyranny.

Although we have been referring mostly to Aristotelian ideas, in the case of jurisprudence the vocabulary of the common good, as well as connected concepts such as that of tyranny, was rapidly adopted from the late thirteenth century onwards.[88] We therefore find jurists like Albericus de Rosate speaking of "the public good"[89] as the goal of jurisdiction, Bartolus of Saxoferrato writing a whole treatise on Tyrants,[90] or Baldus making the following observation about the government of cities: "broadly speaking, every city is under a tyrant when its subjects cannot freely speak up to defend the common good."[91] Aristotelian language, therefore, came to pervade the legal treatments of the legitimacy of political authority.

However, it is worth noting that while traditionally historians have seen the re-discovery and translation of Aristotelian texts in the thirteenth century as a turning moment, it seems indisputable that these notions had a separate and pre-existing presence in medieval political thought, including both canon and Roman law. A first source of these ideas was the longstanding influence of Cicero's ideas.[92] This Cicernonian tradition maintained the central importance of sin and the Fall for human nature and the possibilities of the political community. However, contrary to Augustine,

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[88] For the observation of Aristotelianism as a different language of medieval political thought see Antony Black, *Political thought in Europe 1250-1450* (Cambridge: Cambridge University Press, 1992).
[89] Albericus de Rosate, *Commentarii in primam Digesti veteris partem*. ad D.2.1.1 "De publico introducta, id est, propter bonum publicum."
[90] Diego Quaglioni, *Politica e diritto nel Trecento italiano: il "De tyranno" di Bartolo da Sassoferrato (1314-1357)* (Firenze: L.S. Olschki, 1983).
[91] Baldus, ad C.1.2.16, cited in Canning, *The political thought of Baldus de Ubaldis*, p. 225.
[92] Nederman, "Nature, Sin and the Origins of Society: The Ciceronian Tradition in Medieval Political Thought".

this tradition posited that the instinct for grouping had not been lost with the fall, but that sin made it hard to achieve. In this context, it was only reason and language that allowed for the creation of the political community. In doing so, therefore, Ciceronian ideas created a *via media* between Augustinianism and Aristotelian political naturalism, but one that nevertheless allowed for thinking of a certain naturalness and thus goodness of political association.

Roman Law and Canon Law also included multiple mentions of the *utilitas publica* or *utilitas communis*:[93] Cod 12.62.3, for example, specified that "public utility should take precedence over the contracts of private individuals"[94] Indeed, it can be argued that Roman lawyers could well tackle these topics without recourse to Aristotle. As Bartolus observed, in an otherwise fairly Aristotelian treatise on the government of a city: "I shall not use his words [Giles of Rome's] or Aristotle's, for the jurists, to whom I speak, don't know them."[95] Therefore, although the recovery of Aristotelian ideas did have an impact in furthering the common good as the goal of political association, and thus as a standard of legitimacy for political authority, we must bear in mind that similar language had independently existed long before then.

Finally, the idea of the common good puts forward a more developed idea of the ruled than we have seen before. The political community becomes a perfect, self-contained, and natural entity, capable of promoting the highest development of its members in itself, and as such, being the ultimate reference point for the legitimacy of political organization and authority. Much like in the case of equity and justice, however, we must not presume that this meant equality and homogeneity within this political

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[93] Corinne Leveleux-Teixeira, "L'utilitas publica des canonistes: Un outil de régulation de l'ordre juridique," *Revue Française d'Histoire des Idées Politiques* Vol. 32, No. 2 (2010).
[94] Cod 12.62.3. "Utilitas publica praeferenda est privatorum contractibus."
[95] Bartolus de Sassoferrato, "De regimine civitatis," in *Politica e diritto nel Trecento italiano: il 'De tyranno' di Bartolo da Sassoferrato (1314-1357)*, ed. Diego Quaglione (Firenze: L.S. Olschki, 1983). "Verbis autem suis vel Aristotelis non utar: illa enim iuriste quibus loquor non saperent."

community. On the contrary, the idea of the common good appears also in the context of justifications of concessions of special conditions and privileges, such as the ability of guilds and professional associations to self-regulate. The idea of the community embodied in the discourse of the common good therefore is one of a self-contained and organically conceived entity, and as such allows for the presence of inequality within it.

3. Conclusion

In this chapter we have examined a variety of discourses on the origins and purposes of political authority in late-medieval jurisprudence. These various discourses, while certainly not incompatible and at many times complementary, nevertheless emphasized different aspects of authority, and as such could be deployed in a variety of situations. The table below summarizes the four approaches to the purpose of rulership that have been analysed in the second half of this chapter:

Table 4.1 Four purposes of rulership

View	**Ruled**	**Context of juristic deployment**	**Legitimacy tied to**
Ministerial	Christians	Relations between secular and ecclesiastical rulers	Fallen nature and possibility of redemption through the Church
Tutorial and Inalienability	Community as a minor	Secular and ecclesiastical rulers (most frequently kings and bishops)	Preserving the rights of the tutored
Justice	Cellular	12th and 13th century jurisprudence	Enacting justice and raw equity
Common Good	Organic ideas	Post- 13th century secular polities, especially Francia and Northern Italy	Legislating what is just for the common good of the community

As we have noted throughout, the examination of discourses on both the purposes and

the origins of jurisdiction reveal a progressive centrality of the ruled in the legitimation of political power, both as a limit to the power of the ruler and as the origin (and thus principal) of this power. This stands in clear contrast to what constitutes one of the most problematic moves in the heteronomy thesis: the awkward absence of the ruled in the imagination of a heteronomous international system. Indeed, taking Ruggie as our example, he first claims that "the major units were known as *civitates, principes, regni, gentes* and *respublicae,* the idea of statehood not yet having taken hold." Soon after that, however, we read that the medieval state "consisted of chains of lord-vassal relationships. Its basis was the fief, which was an amalgam of conditional property and private authority."[96] On the one hand, therefore, it is posited that the 'units' of the medieval order are cities, princes, kingdoms, etc., while on the other, the medieval 'state' is equated to a personalistic chain of lords and vassals. How are we to reconcile both views? How does the fact that the 'units' in the first instance are both individual and collective entities fit with the personalistic idea of feudal relations? More importantly, if not every person under the rule of a lord was their vassal, how do we conceive of the relation between rulers and ruled, and the place of the latter in the international imagination of the later Middle Ages? These are some of the conceptual and historical issues that are masked with the consideration of the medieval order under the broad umbrella of 'heteronomy'. The only answer that we get is a broad reference to a common religious (Christian) identity that legitimated rule, and on the basis of which "the units viewed themselves as municipal embodiments of a universal moral community."[97] Against this, however, the examination of the legitimacy of rule undertaken in this chapter shows that while some of the legitimating bases did indeed reference a moral Christian community, the ruled as a legitimating source and principal

[96] Ruggie, *Constructing the world polity*, p. 145-46.
[97] Ibid., p. 147.

of political authority played an increasing role in the international imagination, and as such they cannot be dismissed as irrelevant in a feudal and personalistic international.

Moreover, it has also shown that far from there being a single basis of legitimacy and a single understanding of the ruled, a variety of views coexisted. From the indeterminate Christian ruled peoples of ministerial understandings of power, to understandings of transpersonal collectives with rights in inalienability doctrines, or the notion of a corporation, each articulation of the legitimacy of political authority puts forward a distinct view of the collectivity under that authority. A second crucial implication of this is that, as the next chapter will show, the ambiguities in the way the different collectivities were portrayed became a powerful site of contention and conceptual innovation, and in doing so ultimately yielded different and distinct understandings of the nature of a polity.

Chapter 5. Polities

The previous two chapters have focused on the reconstruction of the conceptual tools and categories that lawyers used to represent the medieval international, from the various ideas on political authority, legitimacy, and the idea of the ruled. This chapter moves the analysis from the study of the meaning of categories to the way in which these categories were deployed in order to conceive of the polities of the medieval international: that is, from order to ordering. From what has been a more or less static analysis that emphasized description, therefore, this chapter has a more dynamic focus on use and ultimately contestation.

Indeed, with this chapter we shift the focus to show how within the broad realm of legal discourse – and following its specific rules – there were a variety of ways of representing the relations between rulers and ruled and ultimately, the idea of a polity. The understanding of contestation in this chapter is therefore not one of opposition to a fixed or stable reference point or an established consensus. Rather, contestation draws attention to the fact that each specific representation, text, or author at once reproduces some meanings and categories, shifts others, and produces new ones. With the available linguistic and metalinguistic resources, therefore, a variety of representations are possible at any one time.[1] These, however, are limited (and enabled) by the specific rules of the game, that is, the consideration of what constitutes a valid/competent practice or performance as established in and through practice.

This chapter proceeds in two steps. The first section analyses how IR has approached the idea of a polity, as well as the historiographical debate on the nature of medieval

[1] Antje Wiener, *A theory of contestation* (Heidelberg: Springer, 2014).

polities, in which the idea of the State plays a central role. The rest of the chapter is devoted to analysing how lawyers conceived of three different polities: the Empire, Cities, and Kingdoms. The chapter shows not only how each of these categories were deeply contested but also how for almost the entire period analysed no one single model of polity was applied to all three. The conclusion considers what this means from the point of view of the state and heteronomy theses that started this study.

1. Polities, IR, and the State

The goal of this chapter is to examine how medieval lawyers conceived of their contemporary polities. The use of the word 'polity' here instead of alternatives such as 'state' or 'unit' is a deliberate one. Indeed, at the core of current debates over the future of the discipline lies its predominantly statist character. The State, however understood, has been seen as the main constitutive factor of the international.[2] Against this, this chapter understands that a polity is a specific arrangement of authority, legitimacy, and collective subjectivity.[3] Since the focus of this thesis is on representation, moreover, polity should be understood as a specific way of conceiving of and thus representing these relations between rulers and ruled, as well as the normative principles that guide it. The state in this context constitutes a particular type of polity, and its existence is a matter for empirical investigation rather than a theoretical given.

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[2] For this point, articulated from different traditions see Reus-Smit, *The moral purpose of the state*; R.B.J. Walker, *Inside/outside: international relations as political theory* (Cambridge: Cambridge University Press, 1993).

[3] Alternative definitions could be that of unit in Buzan and Little: "entities composed of various sub-groups, organizations, communities, and many indiiduals, sufficiently cohesive to have actor quality (i.e. be capable of conscious decision-making) and sufficiently independent to be differentiated from others and to have standing at higher levels" or that of polity in Ferguson and Mansbach: "a polity (or political authority) has a distinct identity; a capacity to mobilize persons and their resources for political purposes, that is, for value satisfaction; and a degree of institutionalization and hierarchy (leaders and contituents)". See Buzan and Little, *International systems in world history*, p. 69; Yale H. Ferguson and Richard W. Mansbach, *Polities: authority, identities, and change* (Columbia, S.C.: University of South Carolina Press, 1996), p. 34. These definitions, however, present some problems in the context of the current study, since, as will be discussed below, the notion of actorhood of the polity is problematic in the case of feudal lordships.

The nature of late-medieval polities is at the heart of the IR debate on the period. On the one hand, Latham, pursuing the logic of his argument about sovereignty, claims that "by 1300 at the latest the concept of the state had become well established in the social imaginary of the ruling class of Latin Christendom."[4] This, as we will see, depends on 'slightly recalibrating' traditional Weberian definitions of a state, and posits a corporate-sovereign model. On the other hand, as we saw at the end of the previous chapter, the proponents of the heteronomy thesis have awkwardly dealt with the idea of polity. Indeed, it would seem that the inadequacy of the IR apparatus to deal with medieval polities is the main feature of the period. The most problematic point is the personalization of rule: if the later medieval period was still characterized by a criss-crossing of personal authorities and multiple loyalties, what exactly were these polities? Were they 'lordships'? This would seem to be the case. Teschke, for example, rebrands medieval international relations as inter-lordly relations and points that it was this multitude of lords that constituted the 'medieval state.' This idea of polity moreover relies on the often implicit assumption that the people who were not lords merely factor in as subjects of those lords.[5] However, contrary to much historiography on the topic,[6] lay bases of identity beyond the notion of 'Christians' are rarely elaborated on. We therefore find a contraposition between the idea of the state and an underspecified idea of a medieval lordship.

The debate, however, not only concerns IR scholars. On the contrary, how best to characterize the nature of medieval polities constitutes a thorny issue in historiography. While traditionally historians had embraced the idea that states were a modern

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[4] Latham, *Theorizing medieval geopolitics*, p. 60.
[5] This is why the definition of polity has been broadened here vis-a-vis Buzan and Little. For whether in this view lords did indeed have actorhood and acting capacity, it is not entirely certain that lordships did.
[6] The key text in this sense is Susan Reynolds, *Kingdoms and communities in Western Europe 900-1300* (Oxford: Clarendon Press, 1997).

phenomenon, at best applicable to the late-medieval era, in the last few decades an important historiographical current that seeks to apply the idea of the state to the Middle Ages has emerged. Susan Reynolds, for example, argues that if only we are willing to slightly relax the Weberian notion of a State to "an organization of human society within a more or less fixed area in which the ruler or governing body more or less successfully controls the legitimate use of physical force,"[7] the concept can productively be applied to medieval realities. Thus, we find extensive historical literature on pre-modern state formation, noting how increasingly centralised and bureaucratised governments progressively gained power all throughout the continent from the thirteenth century onwards.[8] On the other hand, however, the move to label medieval polities as states has been intensely criticised, arguing that it presents serious analytical issues and distorts the historical record. Indeed, some have argued that this excessive focus on the state has led to privileging the actors that we believe eventually transformed into the state, such as nations or kings, and in doing so has obscured everything that does not fit into this image.[9]

More importantly for the purposes of this thesis, we may consider whether widening the definition of a state gives us the desired analytical leverage to understand (and possibly also compare) historical international orders. Take for example Susan Reynold's definition above – which is tellingly the one on which Latham bases his claims. If we are willing to claim that more or less legitimate control of violence over a more or less defined territory is all we need to find the state, it is hard to think of historical examples

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[7] Susan Reynolds, "The historiography of the medieval state," in *Companion to historiography*, ed. Michael Bentley (London: Routledge, 1997), p. 110.
[8] Richard W. Kaeuper, *War, justice, and public order: England and France in the later middle ages* (Oxford: Clarendon Press, 1988); Charles Tilly and Wim Blockmans, eds., *Cities and the rise of states in Europe, A.D. 1000 to 1800* (Boulder, Colorado: Westview, 1994); Bernard Guenée, *L'Occident aux XIVe et XVe siècles: les états*, 2nd ed. (Paris: Presses universitaires de France, 1981).
[9] John Watts, *The making of polities: Europe, 1300-1500* (Cambridge: Cambridge University Press, 2009), p. 29 ff; Reese Davies, "The medieval state: the tyranny of a concept?," *Journal of Historical Sociology* Vol. 16, No. 2 (2003).

that would not fit under this concept, particularly if no size limitations are included. Indeed, by her own admission central medieval feudal lordships can legitimately be called states. While it is worth noting that this is done as a move to end the perceived isolation of medieval history and enable comparison, the fact that everything except possibly tribal and kinship groups can be included makes this idea of a state almost akin to 'formal political authority,' and as such does not provide sufficient analytical leverage.[10]

Consequently, the notion of a polity, rather than that of the state, constitutes the basis of this chapter. There is an additional aspect that should be taken into account in order to further specify this use of the concept of a 'polity'. Most of the literature above is concerned with the evolution of material political structures.[11] This dissertation however is concerned with the represented differentiation and ordering of polities. What we are interested in, therefore, is not necessarily how or whether governmental structures expanded or were centralised, but rather how these processes were conceived and ultimately categorised.

Within this broad approach, a specific analytical dimension will be crucial for the purposes of this chapter: homogeneity and heterogeneity in the understanding and representations of polities. That is, to what extent was there a unified idea of a polity, and even more importantly – since it is to be expected that no single understanding of polity could be prevalent at any point in time – to what extent was each of the understandings of a polity applicable to all the polities of the time? This issue has played a crucial role in the debates about the nature of late-medieval polities, and is

[10] Of course, there would be the option of adopting a state-with-adjectives model, which is what Reynolds seems to be going for and Latham actually implements. However, as will be discussed below, the notion of the State is so loaded in IR that it is better to start with polities.

[11] The language used by authors is "actually existing" or "real". The position of this thesis is that linguistic or represented structure as no less real than material ones. See Latham, *Theorizing medieval geopolitics*.

once again linked to the problematique of the state. Indeed, while most of the literature above takes the markers of the state to be an "internal" affair,[12] a crucial contribution of IR scholarship is highlighting the state as an ordering template depending on "external," that is, international markers.

The moment at which this specific idea of a replicable template for a political community appeared has been of central concern for those who have looked at this period. Italian historian Sergio Mochi Onory, for example, in his extensive treatment of the canonistic sources of the modern idea of the state concludes that in the work of the lawyers "appears already, clearly, a problematic identity between *regnum* and *civitas*, with the evident goal of being able to include within a single theoretical framework all the particular legal systems."[13]

In the IR literature on the period, although not explicit, this idea lays behind Latham's identification of the state from the 13th century onwards. Indeed, he maintains that an idea of corporate-sovereign statehood, based on the canonical development of corporation theory, had crystalized and applied to all polities.[14] At the same time however, and this will be a central argument of this chapter, he is forced to examine the polities themselves separately, and to admit that despite the fact that there was an idea of a corporate-sovereign state, there was no "norm of automatic, reciprocal recognition of claims to sovereignty", leading to what he called a principle of "sovereign inequality."[15] Historians have confronted similar issues. Indeed, while Joseph Canning insists on the adequacy of the idea of the state to the fourteenth century, in his treatment

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[12] I am fully aware that the word 'internal' is problematic in this context, as it is inextricably bound up with the notion of the state itself. See Walker, *Inside/outside*; Jens Bartelson, *The critique of the state* (Cambridge: Cambridge University Press, 2001).
[13] Mochi Onory, *Fonti canonistiche*, p. 255. "Nell'elaborazione di questi problemi pubblicistici si profila ormai, nettamente, un'identità problematica tra *regnum* e *civitas,* con l'evidente finalità di poter racchiudere nell'ambito di un unico quadro teorico tutti gli ordinamenti particolari."
[14] Latham, *Theorizing medieval geopolitics*, p. 64 ff.
[15] Ibid., p. 78.

of the political thought of jurists he is forced to treat separately the different kinds of polity. Not only this, but he affirms that "it is essential to distinguish in Baldus' thought the specific forms of government and political entities which he considers. Thus, for instance, to discuss 'the ruler'… is misleading: it is necessary to know which ruler Baldus has in mind."[16]

A central theme of this chapter will therefore be that of homogeneity and heterogeneity of representations of polity. Considering the material we have examined in previous chapters, however, this would rightly seem to be exploring a foregone conclusion, for the nature of a polity is determined by the specific arrangements between rulers and ruled and, as we saw in chapter 3, the notion of a ruler as expressed through the idea of *iurisdictio* encompassed from the Emperor to guilds or to bishops. Given this, it is not surprising that the legitimate bases and the understanding of rulers and ruled differed across all these polities. This chapter, however, in what admittedly constitutes an exercise in presentism, focuses mostly on cities and kingdoms, for it is with regards to these polities that the claims about the origins of the state and the ensuing isomorphism of corporation theory have most often been made. Before we look at these, however, the bases for the Empire must be examined.

2. The Empire as a Polity

Indeed, the analysis of polities must necessarily start with the Empire, as this was the most straightforwardly regulated polity in both Roman and Canon Law. The centuries that constitute the object of study of this project witnessed a relative decline in the political centrality of the Empire, mainly as an effective political institution beyond a central European core, but also in terms of the rhetorical effectiveness of imperial

[16] Canning, *A history of medieval political thought 300 - 1450*, p. 210, ft. 3.

arguments. What in the twelfth century had been a strong institution, capable of putting forward legitimate challenges to polities around and in it, both material and discursive, saw how its head, the Roman Emperor, was excommunicated and deposed in 1245 and had to beg for the forgiveness of the Pope. After the disputes at the beginning of the 14th century, while still maintaining importance in central Europe, its broader legitimacy and capacity was reduced.

From the point of view of legal discourse, however, its place in both canon and Roman law gave it a special centrality. With regards to the representation of the Empire as a polity, three aspects in particular will be examined: first, the discourses on the origins of imperial power and indeed of the Empire itself; second, the nature and limits of the power of the Emperor. Finally we will analyse the uses of the idea that the Emperor is Lord of the World (*dominus mundi*), as this provides the crux of the conceptual difficulties for the rest of polities, but also some interesting reflexions on the part of lawyers about the gap between the legal books and their contemporary political situation.

We must however start by analysing the origins and legitimacy of political authority within the Empire, as these were sites of both conceptual innovation and much controversy. As we touched on in chapter 4, the CIC provided two alternative and mutually contradictory explanations of the creation of the Empire. On the one hand, the opening text of the Digest, the constitution *Deo auctore*, explained that the Empire was created and given to the Emperor by God. In doing so, it established a theocratic base for the Empire and one that, as we will see below when we address the relation between Pope and Emperor, did not have a very extensive understanding of the collectivity of the ruled. Conversely, several passages in the CIC, established that the Empire was created by the so-called *lex regia* when the people of Rome transferred all their powers

to the Emperor. While one of the myths closely connected the existence of the Empire to the people of Rome, therefore, the other established the polity itself as God-given. The lawyer's solution, however, was easy, as Baldus stated: "note that the emperor's authority depends on the *lex regia* which was promulgated at divine command; and thus the empire is said to be immediately from God."[17] God had created the Empire and the people of Rome had been God's agents in so doing.

People and Empire were therefore closely connected, even if the former had clearly preceded the latter. The main issue however was: how should the Roman People be understood? How did it relate to the Emperor? Twelfth century jurists made extensive mention of the Roman people but did not comment on its nature. By the end of the century, however, consensus started to emerge that the Roman people were a corporation. The issue in question concerned once again whether the people could legislate against the Emperor. We have already briefly touched on this in chapter 4, when we examined law and custom as sources of jurisdiction as well as the revocability of the *lex regia*. As we saw, the solution involved the idea that "the prince alone – and no one else alone" could legislate. It was only the Roman people as a whole, understood as a corporation, that could override the Emperor, as the original source of his power. This idea of a corporate model for the relation between the Roman people and the Empire, moreover, was increasingly repeated in jurisprudence throughout the thirteenth and fourteenth centuries. Cinus de Pistoia, for example, established that "the people cannot make laws without the Prince, because since the Emperor is the head of the

[17] Baldus de Ubaldis cited and translated in Canning, *The political thought of Baldus de Ubaldis*, p. 26.

empire, the people cannot do anything regarding the governing of the empire without him, since a corporation does not do anything without its head."[18]

Fundamental in the representation of the Empire as a polity, therefore, was the idea of the Roman corporate people with the Emperor at its head. However, the fact that the Empire had been created by God through the corporate Roman People needed to be squared with the specific election procedure that had been in place since the beginning of the thirteenth century, thus highlighting the religious function of the Empire and marked by the relation between the Pope and the Emperor. Indeed, the affirmation that the Empire came from God and the place that the Emperor occupied could not be separated from the theology and philosophy of history of the time. The mediating factor was the so-called Donation of Constantine, an eighth or ninth century forged document that posited that Emperor Constantine had given the entire Empire to Pope Sylvester I upon his conversion, and then gotten it back from the Pope. The Pope's role fit perfectly into the Christian philosophy of history of the time, according to which the Roman Empire was the last in a succession of Empires in human history, and was to last until the apocalypse. Consequently, with the Donation of Constantine the pope, as the Vicar of Christ, had at once confirmed the role of the Roman Empire and established a relation by which the Empire in some way was its subordinate.

This was confirmed by a second event in this narrative: the translation of empire (*translatio imperii*) by which the Pope had taken the Empire away from the Greeks and given it to the Germans. Indeed, after the fall of the Western Roman Empire, the Empire was understood to have survived in the Eastern, Greek part. The Greeks,

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[18] Cinus de Pistoia, *Cyni Pistoriensis in Codicem, et aliquot titulos primi Pandectorum tomi, id es Digesti veteris, doctissima commentaria*, ad C.1.14.12. "Ut populus non possit legem facere sine principe… quia cum Imperator sit caput imperii… populus quantum ad regimen imperii, nihil sine eo facere potest, quia universitas sine capite suo nihil agit."

however, had gone astray of the true path of salvation, and for this reason the Pope had taken the Empire away from them and given it to the Franks. This even referred of course to the coronation as Emperor of Charlemagne by Pope Leo III. From our point of view, however, two aspects are particularly important. First, this indicated that the actual Roman Empire had survived – the contemporary one to the lawyers was not a new version, but rather the same organisation as the classical one, which was fulfilling a divinely-mandated order. Second, this confirmed once again the role of the pope in relation to the appointment and also the control of the duties of the Emperor.

The Empire was therefore at once conceived through the interaction between the Emperor and the corporate Roman people and as a divinely-ordained entity with a Christian mission to fulfil. This dual understanding is tied to the final element that we will be examining in relation to the Empire: the idea that he was lord of all the world. Indeed, the epithet *dominus mundi* is established in the Digest,[19] and both canonists and Roman lawyers repeatedly adhered to this view. When considered along with the claims of divine origin and its place in a Christian philosophy of history, the claim to be lord of all the world gives us the basic problematic for the consideration of the independent nature of other political communities. For if the Emperor is lord of all the world, how do we understand other rulers in relation to him? We will be examining these issues in subsequent sections of this chapter.

At the same time, however, this tension also posed problems for the understanding of the Empire in itself. For while the texts clearly said that he is lord of all the world, and that all nations are under him, this stood in clear opposition to the contemporary reality of jurists. Two main issues needed to be reconciled: first, who exactly was meant to be under him? Was it all human beings, or just all Christians? And second, how could this

[19] D.14.2.9. "Ego mundi dominus sum."

be squared with the fact that not even all Christians acknowledged his jurisdiction, and that many actually claimed to be independent?

Regarding the latter, we find a variety of scholarly options, some of which will be examined in the context of kingdoms. A particularly problematic text, however, was the very first law of the Codex, *cunctos populos*, which started by saying that "We desire that all peoples subject to Our benign Empire shall live under the same religion that the Divine Peter, the Apostle, gave to the Romans."[20] Although the English translation is clearer, the Latin text posed a fundamental interpretation problem. Indeed, as Cinus noted,[21] it could be read ambiguously as either saying that "all the peoples who are subject to our Empire", implying thus that there were people who were not, or as "all peoples, who are subject to our Empire", thus implying that all peoples were. In a move to save the role of the Emperor not only from being limited, but also from the shame of not being recognized, Cinus argued the following:

> "I say that the Emperor is de iure lord of all the world, but de facto there are some who resist. On account of this, he [the Emperor] used this word [quod, which is the relative pronoun that causes the problems on interpretation] restrictively, and he does so for two reasons. First, so that his laws are not mocked by those [who resist]. (…) The second reason is because those who do not recognize the emperor are vile and unworthy of being bound by his law."[22]

Indeed, according to Cinus, although the Emperor was legitimately Lord of the world, he was only legislating for those who obeyed him, so that his laws would not be disobeyed. With this rather unrealistic move of a clearly pro-Imperial jurist, therefore, the honour of the Emperor was saved.

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[20] C.1.1.1

[21] Cinus de Pistoia, *Cyni Pistoriensis in Codicem, et aliquot titulos primi Pandectorum tomi, id es Digesti veteris, doctissima commentaria*.ad C.1.1..1 "Litera ista quos potest sumi duobus modis. Uno modo implicative… Secundo sumitur restrictive."

[22] Ibid. ad C.1.1.1. "Respondo quod imperator totius mundi de iure Dominus est, sed de facto sunt aliqui qui resistunt. Propter quod ponit hic istam literam restrictivam, et hoc facit duabus rationibs. Prima, ne suae leges aput illos sint illusoriae, quod esse non debet. (…) Secunda ratio est quia illi qui non recognoscunt imperatorem suum Dominum reputantur viles et indigni laqueis suae legis innodari."

We have already noted that there was a corporate understanding of the *populus Romanus*. A fundamental remaining question, however, was who exactly were members of this corporation. The CIC provided at several points brief insights into the history of Rome.[23] Thus, the lawyers were aware that the original Roman people that had enacted the *lex regia* did not correspond in extension to that of the later Roman empire. If the corporate nature of the Roman people meant that their actions could in certain cases be a check against those of the Emperor and enact their own law, knowing who the Roman People were was crucial.

One argument regarding this was that all Christians, whether or not they acknowledged the authority of the Emperor, were part of the Roman People. For example, Bartolus, in a very interesting passage, considers that the gloss says that the Roman People is the entire Empire: "however, you could say, since there peoples [*gentes*] that obey the Roman Empire are fewer, therefore the Roman People is smaller."[24] The issue under consideration is therefore whether we should consider that the Roman people are only those who obey the Emperor or whether it is broader than that. He then proceeds to counter this argument by showing how different types of peoples with different relations to the Emperor are still part of the Roman people: thus, for example, some do not obey the emperor but still use Roman law or some precepts of it, which makes them part of

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[23] See for example D.1.2.2.

[24] Bartolus de Sassoferrato, *Bartoli a Saxoferrato Commentaria... in Secundam Digesti Novi Partem* (Venice, 1590), ad D.49.15.24. "His praemisi, glossa hic dicit quod quinque sunt genera gentium (…) Vos debetis sire, quod duo sunt genera gentium principaliter. Primo populus Romano. Secundo populi extranei. Circa primum quaero, quis dicatur populus Romanus. Glossa dicit hi accipitur pro toto Imperium Romanum… Sed deceres tu, cum modicae gentes sint qui Romano Imperio obedient, ergo videtur quod sit parvuus populus Romanus. Respondeo: quaedam sunt gentes qui Imperio Romano obediunt, et istae sine dubio sunt de populo Romano. Quedam sunt, quae non obediunt Romanum Imperatorem in totum, sed in aliquibus obediunt, ut quia vivunt secundum legem populi Romani et Imperator Romanorum esse dominun omnium fatentur, ut sunt civitates Tusciae, lombardiae, et similes; et istae etiam sunt de populo Romano. Nam cum populus Romanun in eis excerceat iurisdictionem in aliquo articulo, totam iurisdictionem retinet.(…) Quidam sunt populi qui nullo modo obediunt Principi, nec istis legibus vivunt, et hoc dicent se facere ex privilegio Imperatoris, et isti similiter sunt de populo Romano, ut faciunt Veneti. Nam cum illam libertatem ipsi habere se dicant ab imperio Romano et privilegio quodammodo precario teneant ab eo, et posset privilegium illud revocare, quin ellet, cum ei liceat mutare voluntatem suam."

the *populus Romanus,* while others who claim not to obey the emperor or use Roman law, like the Venetians, are said to do this out of privilege, and are thus still part of the people. The argument for formally independent kings and papal territories is particularly interesting, as it mobilises two of the elements we have seen so far: the Donation of Constantine, and the distinction between *dignitas* and administration in relation to the exercise of jurisdiction:

> "There are people who do not obey the Prince, but affirm they are free from him as a result of a contract, such as the provinces who are held by the Roman Church that were given to the Roman Church by Emperor Constantine… This cannot be revoked, yet I say that they are part of the Roman people. For the church exercises jurisdiction in those lands, which were of the Roman Empire, and this I will admit. However, they do not cease to be of the Roman People; rather, the administration of these provinces is granted to someone else. (…) And I say the same of these other kings and princes, who deny being subjects of the King of the Romans, like the King of France, of England, and others. If they don't admit that he is [their] lord, but still remove themselves from his universal lordship through privilege or prescription… they do not cease to be Roman citizens."[25]

Through mobilizing a variety of juridical arguments such as *administratio* or prescription, Bartolus thus manages to keep within the Roman Empire those who do not explicitly obey the emperor, and as such he indirectly maintains the universal lordship of the Emperor. In doing so, moreover, he constitutes the Roman people as a type of community that mirrors the principle that we will see in the next chapter is the basis for membership in the Christian group: "once in, never out."[26] He thus concludes that:

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[25] Ibid., ad D.49.15.24. "Quidam sunt populi qui non obediunt Principi, tamen afferunt se habere libertatem ab ipso ex contractu aliquo ut provinciae, quae tenentur ab ecclesia Romana quae fuerunt donatae ab Imperator Constantino ecclesiae Romanae, posit pro constanti, quod donatio tenuerit, quodqu. Revocari non possit, adhuc dico istos de populo Romano esse. Nam ecclesia Romana excercet in illas terras iurisdictionem, quae erat imperii Romani, et istud fatentur. Non ergo desinunt esse de populo Romano, sed administratio istarum provinciarum est alteri concessa. Vide in simili, Iurisdictio in clericos es concessa totaliter Pape, definunt ne propter hoc clerici esse cives Romani? Certe non, quod apparet quia retinent ius succedent…. Et idem dico de istis aliis Regibus et principibus qui negant se esse subditos Regi romanorum, ut Rex Franciae, Angliae, et similes. Si non fatentur ipsum esse dominum verbalem, licet ab illo universali dominio se subrathan ex privilegio, vel ex praesciptione, vel consiti, non definunt esse cives Romani, per ea qui dicta sunt."

[26] Ryan, "Bartolus of Sassoferrato and Free Cities", p. 68.

"Almost all the peoples [*gentes*] who obey the Holy Mother Church are part of the Roman People."[27]

This, however, need not be the standard opinion. On the contrary, the ambiguity inherent in the idea of the 'Roman people' meant that interpretations with a much more restricted scope were equally possible. Albericus de Rosate, for example, in a text that is extremely critical with the idea of a universal, divinely mandated Roman Empire, affirms that one of the bases of the universal lordship of the Emperor is the idea contained in the CIC that Roman people transferred all power and jurisdiction to him. However, he notes, "the people could not transfer to him [the Emperor] more than they had,.. But they did not have lordship over other peoples [*nationes*], and therefore neither does he."[28] The Roman people in this sense were therefore the people of Rome in a very circumspect sense, insofar for example as Albericus then proceeds to talk about the foundation of Rome by Romulus and Remus and therefore how they had legitimate jurisdiction only over that portion of land.

These are just some brief examples of a variety of debates that surrounded the extension and nature of both the Empire and the Roman people. In terms of the argument of this chapter, however, two aspects are particularly important. First, the relation between the Emperor and the Roman people was understood in corporate terms. Second, the universality of the Empire mediated by its function in Christian history posed a significant challenge to the development of a representation of other polities as independent political communities. The rest of the chapter examines the extent to which

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[27] Bartolus de Sassoferrato, *in Secundam Digesti Novi Partem*, ad D. 49.15.24. "Et secundum hoc quasi omnes gentes quae obediunt Sancta matri Ecclesiae, sunt de populo Romano."

[28] Albericus de Rosate, *Commentarii in primam Codicis partem*, Opera iuridica rariora (Bologna: A. Forni, 1979), ad C.1.1.1. "Imperator enim duas solas causas allegat dominii, quia scilicet habuit a populo Romano, vel quia per iustum bellum occupavit ab hostibus imperii… Sed ad primum respondetur, quod populus non pouit plus in eum transferre quam habuerti… sed non habuit dominium super alias nationes, ergo nec ipse."

corporation theory applied to other polities, as well as how these arguments for independences were developed within a legal discourse.

3. Cities

Having examined the elaboration on the nature of the Empire as a polity, we move now to the jurists' elaborations on the nature of the city. Despite the preeminent agricultural basis of late-medieval Europe, villages, towns, and cities were a reality throughout Christendom. These cities were frequently subject to a variety of legal regimes that ranged from somewhat independent, to entirely subject to the jurisdiction of some lord. With the economic changes from the 12th century onwards, moreover, the population that lived in cities rapidly increased, and accordingly, so did their importance in trade as well as in the governance of medieval Europe.[29] Paramount within this, and of special relevance to the jurists, were the so-called city-states of the northern Italian peninsula, such as Venice, Florence or Pisa. These cities, which were formally under the empire, evolved into great urban areas of at least 50.000 people, with distinct and often changing political systems. The burgeoning urban life of these centres was indeed one of the factors that contributed to the revival of jurisprudence and expansion of the *ius commune*, and they had an active legal life.[30]

For the purposes of this chapter, this central role of Northern Italian cities, as well as the Italian origin of many of the main lawyers, means that cities and their government were an issue of frequent disputes and legal treatment, and as such there is a wealth of

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[29] Literature on medieval cities is vast. Good starting points are provided in H. van Werveke, "The rise of the towns," in *The Cambridge Economic History of Europe from the Decline of the Roman Empire. Volume 3: Economic Organisation and Policies in the Middle Ages*, ed. M. M. Postan, E. E. Rich, and E. Miller (Cambridge: Cambridge University Press, 1963); Steven A. Epstein, "Urban society," in *The New Cambridge Medieval History. Volume 5: c.1198- c.1300*, ed. David Abulafia (Cambridge: Cambridge University Press, 1999). Some interesting work is also being done lately about cities from a comparative perspective. See for example Tom Scott, *The city-state in Europe, 1000-1600: hinterland, territory, region* (Oxford: Oxford University Press, 2012).

[30] Bellomo, *The common legal past of Europe. 1000-1800*.

material about them. Additionally, and unlike kingdoms, as we will see, Roman law provided a more extensive basis to deal with cities. In this case, we clearly find the corporate model that the IR literature has seen as the mark of the presence of the state, although in many cases the pre-eminence of the empire is maintained.

The first issue we need to address is what is a city, and what basis there might be for its existence. The creation of cities was mentioned in D.1.1.5, where it said that "buildings are joined" of the law of nations. Jurists, in truly scholastic fashion, interpreted this to mean that the division of the world was either in those who live together or in those who don't. Among those who do, there are three types of dwellings: villages (*villae*), castles (*castra*), and cities (*civitates*), all of them characterised by buildings being joined. Villages had no walls and were not fortified, castles were fortified but depended on a city. Cities, finally, were understood to be fortified and in addition have a bishop.[31]

Another crucial issue in relation to the treatment of cities in Roman Law is their status as a corporation. Indeed, as we saw in chapter 4, although the general principle was that corporations were banned under Roman Law, there were some exceptions among which were cities and other local corporations. From the 12th century, therefore, cities had been recognized as corporate entities. This does not mean, however, that they were transpersonal entities all along. As we saw, the idea of transpersonality, of a *persona ficta*, was only developed in the mid-thirteenth century under the influence of canonist Sinibaldo dei Fieschi (pope Innocent IV). It is only from the late thirteenth century onwards that we can start appreciating this influence in the treatment of contemporary cities. Baldus, for example, in his commentary on the Peace of Constance, asked: "My question is whether a city, continuing to exist through new citizens who are

[31] For an example of this discussion see Bartolus de Sassoferrato, *Consilia, Quaestiones, et Tractatus* (Venice, 1596)., *Tractatus super constitutioni extravaganti, Ad reprimendum*, v. Lombardiae.

adventitious rather than native ones is said to be the same city. My answer is that it is… because a universal cannot dies just as mankind does not die."[32] In the treatment of cities therefore, we can clearly see the presence of the transpersonal and immortal entity that would characterize what IR has seen as the early modern notion of the state.

Finally, the possession of jurisdictional rights within cities also found a basis in Roman Law. The classical political organization of the Roman Empire contemplated the existence of local (city) magistrates in the figures of the defenders of the city (*defensores civitatis*) and of decurions. In classical times, the latter ones were the members of the city council, while the former ones were introduced in the fourth century as magistrates appointed by the emperor.[33] As we saw in chapter 3, a feature of city magistrates and decurions was that they belonged to the lowest category of magistrates, and as such could not have *merum* or *mixtum imperium*, but rather were limited to *iurisdictio simplex*. In practical terms this meant that they did not have the power to legislate over criminal matters or civil matters of a certain importance. This was not only the classical view, but medieval glossators and commentators readily agreed that this was the proper status of cities. For example, even in the fourteenth century Bartolus could affirm that "I certainly think that the *podestas* who are elected nowadays are municipal magistrates or defenders of the cities, who do not have *merum imperium*."[34]

In strict adherence to legal interpretation, therefore, cities were local corporations of a certain size – to distinguish them from villages and castles-, and they had magistrates and officials who had certain limited political rights to self-regulation, but which were

[32] Baldus de Ubaldis, cited and translated in Canning, *The political thought of Baldus de Ubaldis*.
[33] A. J. B. Sirks, "Public Law," in *The Cambridge companion to Roman Law*, ed. David Johnston (Cambridge: Cambridge University Press, 2015), p. 342 ff.
[34] Bartolus de Sassoferrato, cited in Ryan, "Bartolus of Sassoferrato and Free Cities". "Sed certe ergo puto potestates qui hodie eliguntur esse municipales magistratus et C. De municip. Mag. L. una vel defensores civitatum et in aut. De defens. Nos igitur, qui non habent merum imperium."

nevertheless clearly under the scope of the emperor. This however only provides some rather disjointed building blocks of an understanding of a city. Indeed, we may ask, what was the relation between the corporate city and these magistrates? In other words, since, as magistrates, the defenders of the city and decurions had their power as delegates of the emperor, how was the role of the corporate city conceived in relation to its rulers?

The key aspect of this question concerns the origins of the legislative power of cities. Indeed, as we have repeatedly seen and state, the basis of the power of the Emperor was that *all* the power of the Roman people was transferred to him. When the claims to the universality of the Empire are added, the basis of the legislative activity of the cities becomes less than clear. For although we have seen that the Roman people retained some ability to legislate against the Emperor, in principle no one city could claim to represent the entire Roman people.[35] This was particularly important given the reality that lawyers confronted in cities throughout Europe, but particularly in northern Italian cities were some of the most famous law schools were located. These cities exhibited a variety of forms of government and, while formally under the jurisdiction of the Holy Roman Emperor, actively and repeatedly legislated on matters that went way beyond the scope of *iurisdictio simplex*.

The core of the matter, therefore resided on the origins of the rights of cities to legislate for themselves. Rather than resorting to a natural law basis, which could have been allowed through D.1.1.5, the solution was provided by another passage of the Digest. Indeed, D.1.1.9 included a statement from Gaius' institute that established that

> "all peoples who are ruled by law and customs use partly their own law and partly that common to all man. For whatever law any people has established

[35] Magnus Ryan however, notes that the city of Pisa did actually try to claim this. See ibid., p. 70-71.

> for itself is peculiar to that city [*civitas*], and is called the Civil Law, as being the particular law of that city."[36]

The idea of peoples establishing laws for themselves was particularly problematic for lawyers. As Accursius noted in the ordinary gloss to this passage "how can the *ius proprium*, or that law established by peoples [*gentibus*], take place, if only the Prince can make laws?"[37]

Lawyers considered a variety of answers, and in doing so, established a legitimate basis for the origins of the legislative ability of cities.[38] The option of the ordinary gloss was to explain that this referred to *ius proprium* of a non-general character, which therefore did not conflict with the universal legislative capacity of the Emperor.[39] Others, such as Jacobus de Arena, understood this passage to apply only to the Roman people as well as to other free peoples not subject to the Romans, but not to cities or local peoples living under the Emperor.[40] A final solution, however, was much closer to establishing a basis for the legislative ability of the cities. In this line of reasoning, D.1.1.9 itself, thanks to the slip between *populus* and *civitas* from the first to the second sentence, authorized these local peoples to enact their own laws. As we saw in the previous chapter, law itself was one of the sources of jurisdiction. In this case, therefore, the enactment of D.1.1.9 as part of the Digest by the Emperor meant that as a law, it allowed local peoples to issue their own rules.[41]

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[36] D.1.1.9.
[37] Accursius, *Digestum vetus*. ad D.1.1.9, v. *suo proprio.* "Sed quomodo ius priprium, vel a gentibus statutum, potest habere locum, cum solus princeps possit facere leges, ut c. De leg et constit. L. fin, quae est contra?"
[38] I am following Ryan, "Political Thought", p. 438 ff.
[39] Accursius, *Digestum vetus*. ad D.1.1.9 v. *suo proprio.* "Vel verius hic loquitur de eo iure gentium, quod quasi ipsa natura inter omnes tenet: et priprio, quod non sit generale: unde non est contra"
[40] Jacobus de Arena, *Commentarii in universum ius civile*, Opera iuridica rariora (Bologna: A. Forni, 1971), ad D.1.1.9. "Partim. id est in aliquibus quisquis populus ut Romanus vel alius liber populus non subiectus Romanus."
[41] Rainiero de Forli, *Lectura* ad D.1.1.9, reproduced in Albericus de Rosate, *Commentarii in primam Digesti veteris partem*.

It is important to appreciate what this means in terms of the origins and ability of cities to legislate for themselves: although it could be argued that according to D.1.1.9 all 'peoples' had this ability, what made this passage effective was its enactment into law by the emperor. If we were therefore to reconstruct the origins of the ability of a ruler of a northern Italian city – a *podestà* – to change a statute, this is the chain that we would find: God, mediating the Roman People, gave all power and jurisdiction to the Emperor through the *lex regia.* The emperor then decided to issue the Digest, which confirmed its character as law. D.1.1.9 –qua law, was therefore able to give jurisdiction to peoples (this time local rather than the general Roman people) who, once conceived as a corporation, created the office of the *podestà* as their rector – note also its dual status as an imperial magistrate-, who was then able to change their laws.

Commentaries on D.1.1.9 therefore opened the door for the idea of 'local peoples' having legislative capacity as an imperial concession. However, this did not explain why some local peoples could exercise higher degrees of jurisdiction, particularly *merum* and *mixtum* imperium, while others could not. Bartolus, in a passage that denotes the polysemy of the notion of *populus*, commented on these various degrees:

> "You either ask about a people who has no jurisdiction, such as villages and castles who simply are under some city or lord, or about a people who has all jurisdiction granted by the prince or prescribed. Or you ask about a people who has limited jurisdiction in either civil matters to a certain amount, or in criminal matters to less serious affairs."[42]

There are therefore a variety of local peoples having various degrees of jurisdiction. If we focus, however, on those local peoples who have all jurisdiction, Bartolus provides two explanations for why this may be the case. First, it could be by explicit imperial

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[42] Bartolus de Sassoferrato, *in Primam Digesti Veteris Partem Commentaria*, ad D.1.1.9. "Aut quaeris de populo qui nullam habet iurisditionem, ut sunt villae et castra qui simpliciter subiacent alicui civitati vel domino aut de populo qui habet omnem iurisdictionem concessam a principe vel praescriptam aut quaeris de populo qui habet iurisdictionem limitatam ut in civilibus tantum, ut in criminalibus levibus causis, ut sunt multa castra in marchia."

concession. This was the most straightforward situation, and in the case of the northern Italian cities it was exemplified by the Peace of Constance that Emperor Frederick Barbarossa signed in 1183 with the Lombard league. This Peace granted the cities rights of *merum* and *mixtum* imperium and as such allowed them to exercise these rights *de iure*. Lawyers were well aquainted with this case, as the text was frequently included in medieval legal compilations, and as such it frequently appears as an example of how cities could acquire certain jurisdictional rights.

The main issue, however, lay with a variety of cities that were not the beneficiaries of an imperial grant, but nevertheless exercised those rights. How was this to be justified? Bartolus second explanation, prescription, provided a solution to this, if a rather imperfect one from the point of view of the relation with the Emperor. Indeed, he started from the point of view that these cities who excercised *merum* and *mixtum imperium* without an explicit grant from the Emperor had usurped it.[43] However, in a move that challenged the distinction between *de iure* and *de facto*, Bartolus argued that if it could be proven that these cities exercised these rights since time immemorial, then it was no longer necessary to prove imperial concession: the mere exercise of those rights made it legitimate.[44] Through this argument, therefore, Bartolus made *de facto* jurisdiction legitimate, while still maintaining an (equally legitimate) *de iure* power of the Emperor.

In conclusion, we see that the understanding of cities as polities was based on the notion of a corporation by which the city was considered a transpersonal entity and its own holder of jurisdiction. In this sense, we can see a broad coincidence with the

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[43] Bartolus de Sassoferrato, *Bartoli Commentaria in Primam Codicis Partem* (Lyon, 1552).ad C.2.3.28. "Scitis quod civitates communiter italie non habent merum imperium, sed usurpaverunt."

[44] Ibid. ad C.2.3.28. "Dico tamen si civitas vellet se defendere et merum imperium excercer quod habet necesse allegare concessionem principis. Item longissimum tempus quo dicta civitas merum imperium exercuit, isto casu posito quod non probaretus de concessione principis, tamen si probaret se exercuisse merum imperium valet."

understanding of the Empire. However, it is important to remember that, as the commentaries on D.1.1.9 show, the understanding of cities was in no way that of polities equivalent to the Empire. Even in the arguments that established that cities did not recognize a superior, this was understood as the exercise of rights prescribed against the emperor, rather than through the natural existence of peoples with their own rights to self-government.

4. Kingdoms

The third type of polity that we will look at are Kingdoms. Unlike the case of the Empire and Cities, both of which found a strong treatment in Roman Law, kingdoms posed a particularly hard problem for lawyers: the Corpus Iuris Civilis provided very little basis for their understanding: This was of course partly mitigated by the treatments of the institution in canon law, whose more flexible structure afforded greater adaptability to the contemporary circumstances. Complementing these two sources, moreover, we must not forget that the Bible, and particularly the Old Testament, provided a wealth of information and imagery about kingdoms. As such, and despite their defective treatment in the Roman Law books themselves, kingdoms were a fundamental part of the late-medieval imagination.[45]

So far we have seen how the idea of a corporation played a crucial role in the representation of both the Empire and cities. Indeed, as we saw, central in the argument of the medieval development of the idea of the state is the role of corporation theory as providing a template for the political community.[46] A central concern of this section will be the extent to which it was applicable and applied to kingdoms as well. For if indeed we find that the legal basis for understanding kingdoms were different to the

[45] Reynolds, *Kingdoms and communities*.
[46] Latham, *Theorizing medieval geopolitics*.

ones we have previously seen, the idea of a unified template for the political community would seem utterly problematic.

Kings and emperors

The first issue that the legal framework of the *ius commune* posed regarding kings and kingdoms, and thus one that indeed has occupied part of the IR imagination on the period, was their relation to the emperor. Indeed, as we saw, Roman law established that the emperor was the Lord of the World (*dominus mundi*), and both canonists and civilians had promptly commented that "he is above all kings and all nations are under him."[47] As such, the story of the end of the middle ages has usually been presented as one of abandonment of the universalism of Empire (and Papacy) and emergence of independent kingdoms. Two legal maxims occupy the centre stage in both the historical discussion of kingdoms and the IR imaginary about it: a king is an emperor in his own kingdom (*rex imperator in regno suo est*) and a king who does not recognize a superior (*rex qui superiorem non recognoscit*). In this first section, we will look at their history in order to see what understanding of kingdoms as polities they provided.

The first official confirmation of the idea that some kings don't have a superior is found in Innocent III's decretal *Per venerabilem*, issued in 1202. The case in question concerned the legitimation of the children of count William of Montpellier, who, wanting his six illegitimate children to enjoy full rights, petitioned the Pope to legitimize them. The Pope denied the request: even if he had granted the same request to French King Philip II a few years earlier, in this case William of Montpellier had a

[47] Johannes Teutonicus, Ord. gloss to X.1.6.34. "Imperator est dominus mundi. Super omnes reges et omnes nationes sub eo sunt."

temporal superior (Innocent was deliberately ambiguous as to who this was[48]), and it was to him that corresponded granting this request.[49] Specifically, Innocent III distinguished William's case from that of Phillip II because "the King [of France] does not recognize a superior in temporal affairs."[50]In doing so, therefore, Innocent could be seen as denying what we have seen was a fundamental legal principle: the universal dominium of the emperor.

Reception by canonists, however, sheds further light into this matter. Indeed, *Per venerabilem* was heavily commented on and eventually included in the *Liber Extra*.[51] The vast majority of canonists commenting on it made use of the *de iure*/*de facto* distinction and promptly specified that this was only the case *de facto* since *de iure* the emperor was *dominus mundi*. Thus, for example, Johannes Teutonicus promptly commented that "*de iure* however he is under the roman emperor", and Laurentius Hispanus merely clarified that it was just "*de facto."*[52]

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[48] William's petition through the Archbishop of Arles claimed that he was subject to the pope in both temporal and spiritual affairs, since he was a vassal of the bishop of Maguelone. At the same time, the counts of Montpellier had close ties with the Iberian monarchies, and considered themselves quite independent from the French Kings. From the point of view of the Pope, however, granting the request would have been emphasizing the independence of the count vis-a-vis King Philip Augustus, which posed some problems between the papacy and the French King. The denial of the request and the inherent ambiguity in it were thus the politically wisest moves, and at the same time the highlight the extent to which legal problems were salient in a context of development of feudalism and increasing centralization of government. See Deirdre Courtney-Batson, "*Per venerabilem*: from practical necessity to judicial supremacy," in *Pope Innocent III and his world*, ed. John C. Moore and Brenda Bolton (Aldershot: Ashgate, 1999).

[49] Some classical analyses on this decretal are Brian Tierney, ""Tria quippe distinguit iudicia..." A note on Innocent III's decretal Per Venerabilem," *Speculum* Vol. 37, No. 1 (1962); and Kenneth Pennington, "Pope Innocent III's views on church and state: a gloss to *Per Venerabilem*," in *Law, church and society. Essays in honor of Stephan Kuttner*, ed. Kenneth Pennington and Robert Somerville (University of Pennsylvania Press, 1977).

[50] Innocent III, *Epistolae decretales* (Colonia Agrippina, 1606). *Per venerabilem.* "Insuper cum rex superiorem in temporalibus minime recognoscat."

[51] X 4.17.12.

[52] Johannes Teutonicus, *Apparatus in Compilationem Tertiam, books 3 to 5.*, ed. Kenneth Pennington (http://faculty.cua.edu/pennington/edit401.htm [Accessed 10/10/2015], 2015, periodically updated), ad 3. Comp, 4.12.2, v. *recognoscat*. "De iure tamen subest Romano imperatori." Laurentius Hispanus, "Apparatus glossarum Laurentii Hispanii in Compilationem tertiam," in *The ecclesiology of Laurentius Hispanus (c.1180-1248) and his contribution to the Romanization of canon law jurisprudence, with an edition of the "Apparatus glossarum Laurentii Hispanii in Compilationem tertiam"*, ed. Brendan

Another issue should be considered regarding this maxim. We started the chapter by pointing to the fact that notions of polity involve some theorization or at least development of the relation between rulers and ruled. The idea that the king does not recognize a superior, however, does not provide us with any theorization of what a king is, does, or how it relates to his subjects. It does not therefore provide a sufficient basis for an analysis on the notion of the polity.

The second maxim could be seen as taking a step further in identifying what a king is, as specifies that a king is an emperor in his own kingdom. The specific intellectual origins of this phrase are fiercely debated in historiography, although recent work makes it reasonable to believe that it was of French origin.[53] However, much like in the previous case, this saying was not immediately and universally accepted. Indeed, part of the contestation concerned the extent to which the king, even if it were not to recognize a superior, was indeed exercising the same powers that Roman law afforded the emperor. For example, civilian Guido da Suzzarra (d. 1291) commented: "note that the prince not bound by the laws. What about kings? It is true that these are bound, because no one is found not bound except for the prince."[54] This tells us that, while the equivalence is something that was actively considered, it was not a given that the prince and kings had exactly the same prerogatives. Even in the fourteenth century we still find mentions of this. Albericus de Rosate, for example, writing in the mid-fourteenth

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McManus (PhD thesis: University of Syracuse, 1991), ad 3. Comp, 4.12.2, v. *minime recognoscat*. "De facto."

[53] The main part of the debate took place before the 1960s, in what can only be qualified as an extremely accrimonious scholarly exchange – to the point that historians at the time could call it 'combat' and 'duel'. The initial exchange was between Francesco Ercole and Francesco Calasso, in which the first one argued for French origins of the maxim, and the second one for Italian. In the 1950s the debate was joined by Sergio Mochi Onory, who pointed to its canonistic origins. See Francesco Ercole, "Sulla origine francese e le vicende in Italia della formola: 'Rex superiorem non recognoscens est princeps in regno suo'"," *Archivio Storico Italiano* Vol. 16(1931); Francesco Calasso, *I glossatori e la teoria della sovranità* (Milano: A. Giuffrè, 1951); Mochi Onory, *Fonti canonistiche*. Interesting reviews of the controversy are are Brian Tierney, "Some recent works on the political theories of medieval canonists," *Traditio* Vol. 10(1954), pp. 612-19; E. M. Meijers, "Comptes Rendus - Book review," *Tijdschrift voor Rechtsgeschiedenis* Vol. 20(1951).

[54] Guido da Suzzarra cited in Pennington, *The prince and the law*, p. 94.

century, explained that "even if the King of France and other kings don't recognize a superior, they can't violate the law, as only the prince is not bound by the law, and because all the kings are *de iure* under the emperor."[55] Although a significant proportion of both civilians and canonists therefore accepted that some kings were emperors in their own kingdoms, therefore, this did not necessarily mean that they had all the powers that the emperor had by virtue of Roman Law.

Similarly, in some thirteenth century French jurists we find the same debate about the equivalence of Emperor and kings around the issue of treason. Indeed, according to Roman Law – specifically the *lex Julia* – crimes of treason could only refer to the emperor. In this context, French jurist Jacques de Revigny considered a case in which a French count rebelled against the king, and asked all his vassals to support him. He asked whether vassals were meant to abide by this instruction. He answered that no, since the oath of fidelity did not extend to illegal acts. And in this case, rebelling against the king would be a crime. Why was it a crime? He said some jurists argued that the king was a *princeps* because he did not recognize a superior. However, he disagreed: the king was not a prince (emperor), but rather a magistrate of the Emperor, and as such the crime of treason could be committed against him.[56]

Both maxims therefore appear to have had contested meanings. Most importantly, however, for the purposes of this chapter they are both extremely limited. For, while one tells us that the king does not have a superior, and the other tells us that he exercises the same powers as the emperor, they do not tell us what a king is, or how it relates to his people. Indeed, as Magnus Ryan has noted:

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[55] Albericus de Rosate, *Commentarii in primam Digesti veteris partem*. ad. D.1.3.30(31). "Et ex hoc patet quod Rex franciae licet non recognoscat superiorem et alii reges non pussunt leges transgredi, cum solo de principe inveniatur quod sit solutus legibus et quia omnes reges de iure sunt sub imperio."
[56] Jaques de Revigny, cited in Calasso, *I glossatori e la teoria della sovranità*, p. 46.

> "The doctrine of non-recognition of a superior did not bring civilians any closer to a general set of reflections on the relationship between kings and their subjects; quite the opposite: it absolved lawyers from rendering a separate account of royal power in a given kingdom as the outcome of a specific transaction or negotiation between ruler and people. In fact, it explained nothing: not the origin nor the content nor the extent of royal powers in general or specific term. Royal power simply appeared as an outcome of not recognizing the pre-existing authority of the emperor, and thus emerged as a geographically circumscribed splinter of imperial power."[57]

Kingdoms

How did then legal scholars account for the origin of kingdoms? The Digest provided a tentative answer, and one that could be seen as based in corporation theory. Indeed, D.1.1.5 was an extract from Hermogenian's *Iuris epitomae* (Summaries of Law) that detailed institutions that were founded on the law of nations (*ius gentium*). Among all the elements in the list we find that "kingdoms [were] founded."[58] We have thus what seems to be a natural law basis for the existence of kingdoms, and as such one that would detach their existence from the Roman Empire.

This is more so when we consider that Accursius' ordinary gloss to this passage says specifies that kingdoms are founded "by individual peoples [*gentibus*], who elect kings for themselves."[59] The idea of a *gens*, a group of people, that elects a king would seem to put us immediately in the use of corporation theory on kingdoms by the mid-thirteenth century, thereby providing not only the independence but also a theorization of the relation between rulers and ruled that accorded to the corporate model that we

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[57] Ryan, "Political Thought", p. 436.
[58] "Regna condita". D.1.1.5. The complete text is: **"**by this Law of Nations wars were introduced; races were distinguished; kingdoms founded; rights of property ascertained; boundaries of land established; buildings constructed; commerce, purchases, sales, leases, rents, obligations created, such being excepted as were introduced by the Civil Law."
[59] Accursius, *Digestum vetus*. D.1.1.5. "A singulis gentibus, quae sibi reges elegerunt." This idea goes back at least to Azo. See Ryan, "Political Thought", p. 437 ft. 64.

have seen applied to both Empire and cities. If we were to base or analysis on this text, therefore, we could almost speak of isomorphism and of a unified model of a polity.

However, an examination of the successive commentaries of this passage in the thirteenth and fourteenth century reveals a rather different picture. While the joint presence of a *ius gentium* justification for kingdoms and the idea of election could a priori provide a solid basis for some kind of recognizable idea of kingdoms as states, the most distinctive issue of the commentaries on this passage is their complete lack of attention to this fact. Indeed, a variety of major works gloss over the reference to kingdoms, without either mentioning it or just reproducing the text itself. Thus, for example, Jacobus Butrigarius and Jacobus de Arena do not comment on the law at all, while Azo merely reproduces it verbatim in the context of a commentary to the Institutes.[60]

In contrast to this, an important subset of commentators put forward a different interpretation of the passage. Indeed, Odofredus comments that "the main [kingdoms] were four: Macedonian, Babylonian, African, and Roman, which was always in force, is in force nowadays and will be."[61] Rather than applying the passage to his contemporary kingdoms, therefore, Odofredus sees the passage through the lens of biblical history in accordance with the exegetic interpretation prevalent at the time. The biblical passage in question is the dream of Nebuchadnezzar in the book of Daniel. In it, the King has a dream about a great statue made of four different metals: the head of gold, chest and arms of silver, middle of bronze, legs of iron, and feet partly of iron and partly of clay. Patristic and theological interpretation had long interpreted this dream as

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[60] Jacobus de Jacobus de Arena, *Commentarii in universum ius civile*.; Jacobus Buttrigarius, *In primam e [sic] secundam Veteris digesti [Iustiniani] partem*, Opera iuridica rariora (Bologna: Forni, 1978).; Azo, *Summa aurea* (1537).

[61] Odofredus de Denariis, *Lectura super Digesto veteri*, 1. ad D.1.1.4. "Regna condita. Id est, principalia: que fuerunt quatuor: macedonicum, babylonicum, affricanum, et romanum quod semper vigit. Et hodice viget et vigebit: ut in romanis historiis continetur."

a metaphor for four stages of history, represented by four kingdoms. Within this philosophy of history, the Roman Empire was the last kingdom, meant to last until the apocalypse. For Odofredus, therefore, the idea that kingdoms were founded of the law of nations referenced not the naturalness of his contemporary kingdoms, but rather this broad interpretation of the course of history, which, as we saw earlier, was a justification for the Roman Empire.

These references to the book of Daniel appear in a variety of later commentators in the fourteenth and fifteenth century. Although these make progressively more reference to their contemporary polities, however, for the most part their use of the main text and the gloss still does not fully use the idea of a corporation. Italian Cinus de Pistoia, for example, starts his commentary on *regna condita* recalling the narrative of the four kingdoms. Immediately after, however, he adds: "When peoples [*gentes*], on account of the unpunished nature of their crimes, subjected their freedom to justice, it was necessary that a men was superior to other men, and, as peoples [*populis*] were growing, Kings were constituted and kingdoms were founded."[62] This alternative explanation of kingdoms clearly relies on an Augustinian view of human nature and political power, whereby government is a punishment to control sin. It still provides an account of the origin of kings and kingdoms, but it is one that has very little to do with the idea of a corporation or election. The passage, moreover, continues, by tying this Augustinian understanding of kingdoms to the apocalyptic story of the four kingdoms: "It is true that kings and peoples successively ended up under the aforementioned

[62] Cinus de Pistoia, *Cyni Pistoriensis in Codicem, et aliquot titulos primi Pandectorum tomi, id es Digesti veteris, doctissima commentaria*, ad D.1.1.5. "Distinctae sunt gentes, ut Graeci a Latinis, Italici a provincialibus. Regna condita dicunt quidam, ut in Babylone, quod fuit in Rege suo; macedonum, quod fuit in Rege alexandro. In Rege Africano, quod fuit In Cartaginensible, et Romanum, quod seminavit Caesar, et Augustus moritus est illud, secundum Orosium. Vel quod cum gentes, propter impunitam licentiam scelerunt liberatatem suam suiecerunt iustitiae necesse fuit quod homini praelatus esse homo per quem iura redderentur et excresentibus populis, constituti sunt reges, et regna sunt condita."

kings."[63] We see thus that although Cinus elaborates further on the origins of kingdoms, he is neither directly tying this passage to contemporary polities nor necessarily using a corporate model to understand them.

Cinus' pupil Bartolus provides yet a different interpretation of the passage. In this case, and in the case of Baldus as well as we will see, the central point of contention is whether kingdoms are founded through the law of nations or rather through civil law. Indeed, if they were founded through civil law, that is, the law of the Romans, this would mean that their basis of legitimacy was inscribed in the same scheme as other rulers:

> "It says here that kingdoms were founded. Against this it can be said that this is of civil law… solution: I say that there it referred to magistrates created by civil law. This is different for kingdoms, because kingdoms were founded because of the unrestrained ability to commit crimes, and the Prince was instituted."[64]

Bartolus is thus separating the origin of kingdoms from the system of magistrates established by Roman law, thus giving them a separate basis of legitimation. However, neither here nor anywhere else in his writings does Bartolus comment on the elective nature of kingship, nor on the relation between kings and their kingdoms. Thus, and while a step had been taken in unlinking the nature of kingdoms from the rest of rulers, which derive their authority from Roman law, we cannot speak of the use of the corporate model, or of a unified idea of a political community. Indeed, if anything, Bartolus' treatment of Kingdoms in D.1.1.5 reinforces the stark separation between kingdoms and other polities, establishing two clearly different bases for their existence.

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[63] Ibid. ad D.1.1.5. "Verum est quod Reges et populi sub praefatis Regibus finierunt successive: et modo sunt sub Romano distincti."

[64] Bartolus de Sassoferrato, *in Primam Digesti Veteris Partem Commentaria*, ad D.1.1.5. "Dicitur hic regna condita. Contra imo videtur qud hoc sit de iure civili… Sol. Dic quod ibi loquitur de magistratibus iure civili introductis. Secus in regnis, quia regna propter impunitam licentiam delinquendi condita fuerunt, et Princeps constitutus."

It is not until Baldus that we find a fully formed idea of the Kingdom as a corporation, albeit one that also draws on Augustinian political ideas. Indeed, Baldus' commentary on *Ex hoc iure* starts with a natural law basis for the separation of peoples, stating that God created discord among man by giving different opinions. This made them adversaries and started wars, and this is how different peoples [*gentes*] were separated. In turn, moreover, this separation led to the creation of Kings, since these people needed a head. We thus find a more elaborate basis for the naturalness of separate peoples, as well as a link between this and the existence of kings. While this by itself does not mean that a corporate vision is put forward, however, Baldus later considers the possibility of election as the basis for Kingship:

> "Thirdly, I ask whether nowadays a province could elect a king for itself? And we can see that no: as provinces are under the natural rule of the emperor and therefore cannot give anyone merum imperium. But you say that yes, if there is one such province that is not under the emperor, as Hispania: for if the lords of Castile were to completely die, the inhabitants of the kingdom [regnicolae] can elect a king for themselves of the law of nature."[65]

Baldus thus appears to be the first commentator to directly consider the possibility of kingdoms electing their kings in a *ius gentium* context. While he still does not put this forward as the explanation for the origin of his contemporary kingdoms, however, he admits that the law of nations allows for the possibility of independent provinces electing a kingdom if succession has exhausted. Indeed, he is explicit to specify that Kings, except for the emperor, are transmitted by succession and not election.

Baldus' understanding of Kingdoms as corporations, however, is fully developed in the context of one of his *consilia*. The case in question referred to the Kingdom of Portugal,

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[65] Baldus de Ubaldis, *in Primam Digesti Veteris Partem*, ad D.1.1.5. "Tertio quaeritur an hodie provincia possit sibi eligere Regem? Et videtur quod non: nam provinciae sunt sub naturali dominio Imperatoris, ergo non possent conferre alicuo merum imperium….. Sed tu dic quo sic, si est talis provincia quae non subsit Imperatori, ut Hispania, nam si dominus Castillae diferet in totum, regnicolae possent sibi eligere Regem de iure gentium."

and the relation of King John I with the Ponzano family. King John I had been elected by the estates of Portugal in 1385, after his predecessor Fernando of Portugal had died in 1383 without a legitimate heir. Upon his election, King John had deprived the family of the dignity of admiralty, which had been granted as a privilege by King Dinis (1279-1325). The matter at hand was therefore whether King John I could claim that his election by the estates absolved him of abiding by the commitments of his predecessor.[66] In this context, Baldus produced a fully-fledged theory of kingship and of kingdoms as a transpersonal if not corporate polity.

Kingdoms in this view, were not only "the material territory" but also the same peoples [*gentes*] of the Kingdom, because these peoples [*populi*] are collectively the kingdom."[67] This kingdom is clearly a collectivity, and not only this, but according to Baldus it is transpersonal and immortal:

> "In a kingdom the dignity [dignitas] should be considered, who does not die. And also the corporation or respublica of this Kingdom, which remains even when kings have been expelled, for the respublica cannot die. And for this reason it is said that the respublica does not have an heir, because it lives forever in itself."[68]

We have thus a transpersonal kingdom, and a separate transpersonal office in the person of the King.[69] The relation between both is one by which the King acts on behalf of the kingdom, which cannot act by itself, as it is merely an intellectual, public person

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[66] For more on the context see Peter Linehan, "Castile, Navarre and Portugal," ed. Michael Jones, *The New Cambridge Medieval History Volume 6: c. 1300- c. 1415* (Cambridge: Cambridge University Press, 2000). 643-46; Walther, "Depositions of rulers in the later middle ages", p. 158.

[67] Baldus de Ubaldis, *Consiliorum sive responsorum. Volumen tertium.*, number 159. "Nam Regnum continet in se non solum territorium materiale, sed etiam ipsas gentes Regni quia ipsi populi collective Regnum sunt" – Note once again the ambiguity of the word *populus*: the plural used – Kingdoms are composed of peoples. It is unclear whether they are one people.

[68] Ibid., number 159. "In Regno considerari debet dignitas, quae non moritur. Et etiam universitas, seu respublicas [sic] ipsius Regni, quae etiam exactis regibus erseverat. Non enim potest respublica mori. Et hac ratione dicitur,, quod respublica non habet heredem, quia semper vivit in semetipsa" See also Canning, *The political thought of Baldus de Ubaldis*, p. 215, 267.

[69] In this consilia Baldus clearly enunciates the doctrine of the Kings two bodies. "Porro duo concurrunt in rege: persona et significatio. Et ipsa significatio, quae est quoddam intellectuale, semper est perseveransenigmatice: licet non corporaliter. Nam lice Rex deficiat, quid ad rumbum, nempe loco duarum personarum Rex fungitur. Et persona regis est organum et instrumentum illius persone intellectualis, et publice." On this see Kantorowicz, *The king's two bodies*.

[*persona intellectualis et publica*].[70] The relation established is therefore one where a transpersonal king is responsible for a transpersonal kingdom, and as such, Baldus concludes, King John I was indeed bound by the acts of his predecessors. In doing so, therefore, Baldus is mobilizing tutorial ideas of kingship that we saw in chapter 4. Indeed, he even speaks of the "guardianship of the kingdom"[71] being entrusted to the king.

It is unclear whether this more developed understanding of the relation between kings and kingdoms is a full application of corporation theory. On the one hand, as we have seen, Baldus denies that the kingdom can act. On the other, he affirms that the king is "the organ and instrument" of the intellectual person of the kingdom, which would suggest some agency on the part of the latter. When added to Baldus' theory about the extinction of the kings of Castile, we may say that –if not fully formed – this is quite close to a corporate understanding of kingdoms. It is only in the last years of the fourteenth century, therefore, that we find a fully-articulated notion of the kingdom as a transpersonal corporation, and of the relation between this and the king. Consequently, it is only at the turn of the fifteenth century that we can start to accept the idea of the existence of a generally-applicable template for the explanation of political communities.

It is worth noting, however, that in all of these treatments, including that of Baldus, the relation between the various kings and Emperors is still unclear – at best, as we saw in Baldus' discussion of the possibility of the extinction of a dynasty in Castile, the possibility of kings de facto not recognizing the emperor was accepted. In contrast to

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[70] Baldus de Ubaldis, *Consiliorum sive responsorum. Volumen tertium*, number 159. "Nam verum est dicere quod respublica nihil per se agit, tamen qui regit rem publicam, agit in virtute reipublicae, et dignitatis sibi collatae ab ipsa republica."
[71] Ibid. "Regni tutela, non dilapidatio est commissa"

this, however, a variety of other jurists, both civilians and canonists, developed accounts of kingship that allowed for the *de iure* – and thus legitimate – independence of kings and kingdoms from the emperor. In doing so, they were close to having an understanding of the world as legitimately based in separate communities and as such, to having a natural universally-applicable understanding of a political community. However, it should be noted that as we will see in no case did they rely on the full notion of a corporation in order to do so.

From the point of view of Roman Law, the maximum exponents of this view are the members of the so-called Neapolitan school Marinus de Caramanico and Andreas de Isernia. They were both trained jurists in the south of Italy in a context in which the kingdom of Sicily, comprising both the island itself and the southern part of the Italian peninsula, was a thriving Kingdom that was held as a papal fief.[72]

Marinus de Caramanico, a 13th century Neapolitan jurist, made one such argument in the context of his commentary to the *Liber Augustialis*, the constitutions that Frederick II had issued as King of Sicily.[73] In it, he argued that the King of Sicily was a free king formally independent from the emperor. The reason for this was that kingdoms were founded of the law of nations, which had existed as long as humanity itself, while Roman authority and the Roman people had only come after. Considering this, the Roman Empire was considered to have expanded illegally, and it was consequently just for other Kingdoms to diminish it and regain its rights under the law of nations.[74]

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[72] More on this in chapter 7.

[73] I follow Calasso's edition. Marinus de Caramanico, "Proemium to the *Liber Constitutionum*," in *I Glossatori e la teoria della sovranità*, ed. Francesco Calasso (Milano: A. Giuffrè, 1951); Canning, "Ideas of the state in thirteenth and fourteenth-century commentators on the Roman law", p. 4 ff.; Canning, *The political thought of Baldus de Ubaldis*, p. 68-70; Pennington, *The prince and the law*, p. 103 ff.

[74] Marinus de Caramanico, "Proemium to the *Liber Constitutionum*", pp. 198-99. "Ad hoc quod secundo in premissis obiicitur: quomodo regnum Sicilie dici potest exemptum et liberum, cum imperator presideat univesis… et in temporalibus solus sit mundi dominus…. Sed primo respondeat qui taliter obiicit, quomodo populus romanus, qui imperatorem constituit, et ipse imperator orbem sibi conquisivit et regna,

We see thus how D.1.1.5 could in certain cases be mobilized to undermine the authority of the emperor, and by extension, of Roman Law. Two facts are however crucial. First, in Marinus we see a rather tendentious use of D.1.1.5 insofar as the main text is used, but the ordinary gloss – the one with the corporate understanding that kingdoms elect their kings – is completely overlooked. On the one hand, this was a particularly hard case for the Kingdom of Sicily, which, as is well known, was a papal fief: the argument that the Kingdom itself has elected the king, or that the legitimacy and power of the king derived from anywhere other than the Pope was particularly implausible. Thus, a substantial portion of the argument is devoted to the examination of the feudal relation between Pope and King, and the implications of this for the supreme authority of the latter, which means that the model of a corporation as the naturally existing entity that legitimates political authority is not applied.

Second, and related to this, Marinus does actually employ a notion of a corporate kingdom throughout. This, however, is not a corporation of people, but rather a corporation of things: as has been noted, "a language of *dominium* in its proprietorial aspect pervades… Marinus' commentary."[75] Indeed, following one of the meanings of *universitas* in Roman Law,[76] Marinus describes the King as the owner of a corporate kingdom made of "cities, castles, villages ,… and all the fields," which he can then transfer and trade.[77] Marinus therefore is able to put forward a natural basis for the existence of kingdoms as independent from the Emperor through D.1.1.5. He does so, however, without resorting to corporation theory as implied by the gloss on that passage

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cum longe ante imperium et romanorum genus ex antiquo, scilicet iure gentium quod cum ipso humano genere proditum est, fuerunt regna cognita, condita et distincta dominia."

[75] Ryan, "Political Thought", p. 437.

[76] Pierre Michaud-Quantin, *Universitas: expressions du mouvement communautaire dans le moyen-age latin* (Paris: J. Vrin, 1970).

[77] Marinus de Caramanico, "Proemium to the *Liber Constitutionum*", p. 194. "Nam regnum cocessum est quedam universitas facti corporalis, que constat videlicet ex distantibus corporibus plurium civitatum castrorum, villarum subiectarum…. Sicut dicitr territorium universitas agrorum. Que faci universitas tamquam res corporea vindicatur, possidetur, transit, et traditur."

or as developed by his contemporary scholarship. As such, while it certainly provides a somewhat unified template for the understanding of political communities, it does so without corresponding to the treatment by other jurists of other coexisting polities.

In the case of canon law, we find a progressively developed justification of the independence of kingdoms, which had somewhat started with Innocent III's statement in *Per venerabilem*.[78] A *consilium* of Oldratus da Ponte provides one of the most elaborate examples. Oldratus was a trained canonist and an important jurist in the Papal court at Avignon in the early fourteenth century. The context of the *consilium* in question, number 69, is highly disputed in historiography. Although the traditional interpretation of this *consilium* posits that it was written in a context of disputes between the Emperor, the King of Naples, and the Pope before 1313, recent work has cast doubt on this, which is why it will be presented here.[79]

In this *consilium*, Oldratus tackles the issue of kingship head on by considering whether all the kings and princes should *de iure* be under the emperor.[80] After outlining all the reasons for an affirmative answer, based largely on the role that Roman Law attributed to the emperor through attributes such as *dominus mundi*, Oldratus develops an alternative line of argument. The most remarkable thing of this argumentation is that, rather than relying on Roman or Canon Law, both of which as we have seen create

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[78] See also Gaines Post, "'Blessed Lady Spain' -- Vincentius Hispanus and Spanish National Imperialism in the Thirteenth Century," *Speculum* Vol. 29, No. 2, Part 1 (1954).

[79] This dispute will be examined in chapter 7. The traditional view on consilium 69 is that it was an advisory opinion in preparation for *Pastoralis cura*, along with consilium 43. See for example Pennington, *The prince and the law*, p. 178 ff; Walter Ullmann, "The development of the medieval idea of sovereignty," *The English Historical Review* Vol. 64, No. 250 (1949). More recently, however, Montagu put forward the idea that it was either written for the King of Castile or as a teaching question. Gerald Montagu, "Roman Law and the Emperor - the rationale of 'written reason' in some *consilia* of Oldradus Da Ponte," *History of Political Thought* Vol. 15, No. 1 (1994). McManus, however, has called both interpretations into question, suggesting that the text itself does not provide enough information. Brendan McManus, "The *consilia* and *quaestiones* of Oldratus de Ponte," *Bulletin of Medieval Canon Law* Vol. 23(1999).

[80] Oldradus de Ponte, *Oldradi de Ponte Consilia seu Responsa et Quaestiones aureae* (Frankfurt, 1576), number 69. "An omnes reges et principes debeant de iure subesse imperatori."

many difficulties in order to conceive of kingdoms, Oldratus develops the entire argument relying heavily on a very particular understanding of biblical history.

Oldratus divides all law between divine and human, and proceeds to challenge the idea that the Empire was ever valid in either. In terms of divine law, which includes both the Old and the New Testament, he claims that the Empire did not exist in times of the former, but was rather created later. Following Genesis, he explains that in the beginning God himself ruled the earth, and as such he is the only true *dominus mundi*. Later, however, he gave the gift of dominium to men. Specifically, Oldratus mentions that God gave the right of first occupation, and through this he gave approval to the rule of kings, such as David, Saul, and Salomon. The Old Testament, he concludes, provides no basis for the universal rule of the emperor, as "the Empire did not exist at that time and only started long after that."[81]

In Oldratus' *consilium* we find once again mention of the book of Daniel, this time with an entirely different interpretation. Indeed, while most lawyers, as well as Bible glossators, had seen the book of Daniel as providing support for the universal Empire, Oldratus sees it as explicitly denying this. Traditional interpretation focused on Nebuchadnezzar's role as the first king in a succession of world empires. Thus, for example, Bartolus takes the idea of *imperium* as a gift from God to him in Daniel 2.37 to show that he was, at least *de iure*, universal emperor.[82] Against this, we have seen that Oldratus builds his claim about kings through the concept of *dominium* rather than *imperium*. Consequently, ignoring that specific passage in the book of Daniel, he proceeds to explain how Christ's role as the stone without hands that destroys the

[81] Ibid. "Sed non invenies de imperatore, quia nec illo tempore fuit imperium, sed postea per multa tempora incaepit."
[82] Bartolus, cited in Montagu, "Roman Law and the Emperor", p. 11 ft. 40. "Daniel ii. C. Ubi Nebuchanezzor qui tunc fuit universalis imperator sic ait, 'Tu rex regum es, et deus coeli regnum, fortitudinem gloriam, et imperium dedit tibi'… quod intelligendum est de iure: quia de facto non obedierunt sibi omnia."

statue, specifically the Roman Empire, means that these monarchies were not legitimate.[83]

With this, Oldratus concludes that the basis for the legitimacy of Kingdoms is greater than that of the Empire: "and through this law [of nations] lordships are distinct by occupation, and kingdoms were founded. And in this way, since kingdoms are of this law and emperors were only of the civil law, since they come from the Roman people, kings have a more just title."[84] In Oldratus therefore we see that one of the only was in order to develop an understanding of kingship was not only based on side-stepping the language and legal framework of the *ius commune*, but also necessitated of an unconventional interpretation of biblical history. Moreover, we see that corporation theory is not used at all: on the contrary, Kingship is in this case based on theocratic principles and the consent or role of the governed peoples plays no role.

5. Conclusion

In this chapter we have examined several competing representations of three polities in late-medieval *ius commune*: the Empire, cities, and kingdoms. The starting point of this examination was the claim on the part of the proponents of the State thesis that "by 1300 at the latest the concept of the state had become well established in the social imaginary of the ruling class of Latin Christendom."[85] As we addressed in the first section, central to this claim is the idea of a homogenous or isomorphic representation of the nature of the polity, in this case put forward through the ideal of a corporate community. Against this, however, this chapter has revealed a much more contested

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[83] Ibid.
[84] Oldradus de Ponte, *Consilia*., number 69. "Et de iure isto per occupationem distincta sunt dominia et regna condita… et sic cum de iure isto sint reges et imperatores solum fuerunt de iure civili qua per populum romanum…. Regis iustiorem titulum habent cum a iure quoddamodo natural quod divina providentia constitutum est semper firmum atque, immutabile perseverat."
[85] Latham, *Theorizing medieval geopolitics*, p. 60.

and heterogeneous representational space. At one level, it has shown that corporate ideas did indeed prevail, although they were by no means the only ones, in the representation of both the Empire and of cities, particularly from the late thirteenth century onwards. In this case, both polities were understood through the dialectic between a corporate, transpersonal people, among which some primary rights of jurisdiction resided or remained, and a transpersonal office holder with jurisdictional and administrative ability. In this sense, therefore, we could think of the idea of a corporation as a template for the understanding of polities.

Even in this case, however, we still see some substantial differences that begin to hint at the central argument of this chapter: despite the unifying tendencies of corporation theory, by the end of the fourteenth century – and thus much less so by the end of the thirteenth – the *ius commune* had not yet developed a representation of the political community that was replicable across polities. Thus, for example, while we saw that the corporate ideas in the case of the Empire were articulated through the idea of the *lex regia*, in no case until at least the fifteenth century was the model of the *lex regia* - the idea of a transfer of power and jurisdiction – used for anything other than the empire. On the contrary, the relation between the peoples of the cities and the government, while still corporate, was articulated through a variety of other legal precepts, the *lex regia* thus being understood as a historically specific event, rather than a replicable metaphor for the understanding of polities.[86]

This becomes crucial once we incorporate representations of kingdoms. Indeed, as we have seen, despite the ready availability of resources for the understanding of kingdoms through a corporate model, it is only at the turn of the fifteenth century at the very

[86] Ryan, "Political Thought".See also Canning's remarks in Canning, *The political thought of Baldus de Ubaldis*, p. 94.

earliest that these models began to be used. Up until then, the theories and precepts used to represent kingdoms portrayed them as a fundamentally distinct kind of polity, different than the Empire or cities, let alone of other polities such as bishoprics or guilds. As such, understanding these representations in terms of a crystallized idea of 'the state', that is, as entailing a unified theory and representation of a polity, misrepresents the character of the social imaginary put forward by lawyers.

We may consequently ask, recovering the themes that have occupied us in the previous three chapters, whether this picture conforms best to the model put forward by proponents of the heteronomy thesis. Indeed, we saw in chapter 3 that the variety of coexisting hierarchies created various different jurisdictional positions that were nonetheless mutually intelligible. Similarly, countering some of the prevalent characterizations in the heteronomy thesis, chapter four showed us that merely conceiving of the medieval international order in terms of individual office holders was rather limited, as the variety of justifications for the legitimacy of political authority were inextricably and increasingly tied to the role of the community of the ruled.

What does this chapter tell us about the heteronomy thesis? In order to answer this, we need to understand the concept of heteronomy in IR, which, as some have remarked, "remains extremely understudied."[87] Ruggie originally used the term to indicate "interwoven and overlapping jurisdictions,"[88] and it is in this broad sense that it has been used by IR scholars. Thus, a recent monograph explains that heteronomy "refers to a situation in which multiple actors routinely exercise overlapping authority claims over a single territory."[89] As we mentioned in chapter 3, however, this remains an underspecified concept, insofar as pretty much anything could be constructed as

[87] Phillips and Sharman, *International order in diversity*, p. 3 ft. 3.
[88] Ruggie, *Constructing the world polity*, p. 23.
[89] Phillips and Sharman, *International order in diversity*, p. 139.

heteronomy.

In order to gain some further clarity, we may consider two distinct uses of the concept of heteronomy. For Phillips and Sharman, which constitutes the latest and most developed treatment of the subject, heteronomy is considered in the context of encounters between different normative orders, which, rather than leading to a progressive homogenization, are able to coexist, thereby producing a stable order of unequally-distributed rights of governance. Against this, this chapter has revealed a different ordering structure: one that is based on one normative structure – given the constraints inherent to this thesis, that of the *ius commune* – that nevertheless produces a variety of representations and different positions. Additionally, and while still distinct, these positions are mutually intelligible. Indeed, what this chapter has revealed is distinct about the international imagination of the lawyers of the *ius commune* is the fact that, despite the unified vocabulary and despite the common representations, that is, despite the presence of a single normative structure, there was no unified representation of a political community, but rather an international imagination that was based on heterogeneity rather than homogeneity.

Chapter 6. Boundaries

Having examined both the categories for the distribution of political authority, its legitimacy, and the contestation over the nature of the polity, this chapter shifts its attention to another dimension of the late-medieval international order: religious communities and boundary-drawing. Indeed, the study of order has been from the beginning tied to issue of boundaries and boundary-drawing. For unless we are talking about an order of global or universal extension, each order will necessarily be limited, in either its territorial or its personal extension.

The issue of how we can empirically get at these practices of boundary drawing has been contested, and has largely depended on the approach taken to the issue of order. Scholars focusing on the material aspects of differentiation, such as Buzan and Little, have prioritized the extent and intensity of the interactions and exchanges in identifying the boundaries of an order,[1] while others have focused on more ideational aspects. Thus, most famously, Wight argued that "a state-system will not come into being without a degree of cultural unity among its members,"[2] a unity that is necessarily coupled with a feeling of distinctiveness from its surroundings. Finally, more recently some authors have rejected the notion of boundaries altogether. On one extreme, Osiander, for example, has rejected that we should focus on actual interactions, in the manner of Buzan and Little, but rather argues – in a more ideational sense, that this should be based on potential interaction. As such, "society does not involve any form of bounded or organized community… On the contrary, in its basic form it is coextensive

[1] Buzan and Little, *International systems in world history*, p. 101 ff. It is worth noting that they also consider identity-based drawing of boundaries, throug the idea of mechanically versus socially constructed systems.
[2] Martin Wight, *Systems of states* (Leicester: Leicester University Press, 1977), p. 33.

with humanity."[3] From another perspective, Keene has argued for the abandonment of an in/out approach, in favour of a more granular analysis that allows us to tell who was where at each point in time. [4]

While all of these approaches constitute valuable contributions, they present a basic problem for a study like the present one. Indeed, for almost all of them, the boundaries of an order are a matter of empirical investigation. The nature of this study, however, prevents us from drawing any conclusions in this regard. For, setting aside material interactions, in order to determine how far (geographically or otherwise) the ordering role of these concepts went, a much more extensive empirical inquiry would be needed: it is only through the progressive accumulation of textual evidence of the use of these categories in reference to a variety of regions and polities that the actual extension of their role could even begin to be approximated.

As opposed to this, this thesis adopts a different approach to the issue of boundaries. Rather than being concerned with materially or ideationally existing boundaries of the order, it focuses on represented ones. Thus, it asks three different questions: regarding the categories we have already examined, it seeks to see the extent to which these categories travel or otherwise put: at what point and for what groups of people do different categories start to apply. The first section of the chapter briefly tackles this issue through an examination of who can legitimately have jurisdiction. A closely connected second question are the categories that are used to represent boundaries themselves, that is, categories that are associated to Othering processes and distinctions between us and them, thus getting at the cultural aspects that Wight marked. In contrast to Wight, however, this analysis focuses on represented rather than empirical identity,

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[3] Andreas Osiander, *Before the state. Systemic political change in the west from the Greeks to the French Revolution* (Oxford: Oxford University Press, 2007), pp. 26, but see more broadly pp. 25-27.
[4] Keene, "International hierarchy and the origins of the modern practice of intervention".

unity, or difference. These are the concern of the second section of this chapter. Finally, a third different question, which will occupy the last section of the chapter, adopts a more practical approach and looks at the normative prescriptions for relations between members of different categories, that is, the principles that underpin the relations between distinct groups, as a way of getting at these processes of boundary-making. Ultimately, therefore, what this chapter looks at are the conceptual and represented underpinnings of boundary-making.

Before we can proceed with this analysis, however, we need to consider what types of categories we might be interested in. While so far we have examined aspects relating to the ordering of political authority and ideas of political community, in this chapter we turn attention to another trope about medieval international relations: its Christian identity. Indeed, one of the most commonly mentioned aspects of the period is the extent to which "Christian" was the primary identification of Western Europeans, as well as how their values were based on this religion. While this may broadly be correct, a striking feature of the IR scholarship on the Middle Ages is that only selective attention has been paid to the relations between Latin Christendom and the rest of the world. Indeed, while these varied interactions – ranging from war to cooperation and trade with a variety of polities and communities – have been extensively researched by historians, IR scholars seem to only pay attention to intra-Christian dynamics. Thus, even historiographically informed recent work on the period, such as that of Andreas Osiander and Andrew Phillips, sets aside these interactions, focusing instead on the internal evolution of political structures.[5] The exception to this rule is, of course, the crusades. A staple of the modern IR imaginary of the medieval period, and undoubtedly a central social institution of the late medieval period, the crusades constitute our go-to

[5] Osiander, *Before the state*; Phillips, *War, religion, and empire.*

example of interactions between Christendom and the rest of the world. While in the 1990s some scholars sought to explain them by subsuming them under realist and historical materialist frameworks,[6] the crusades now constitute a tour de force of constructivist historical scholarship. Through them, constructivist scholars have sought to prove and showcase the importance of norms,[7] collective *mentalités*,[8] and constitutive ideas-interests complexes,[9] in what constitutes an excellent and historiographically informed body of literature.

The picture of the medieval period that emerges from the literature on medieval international relations, both on the evolution of political structures and on the crusades, however is all too familiar. It is a transhistorical narrative that portrays political structures of Europe evolving internally in isolation and only relating to the rest of the world through (holy) war. In this common imaginary, relations with non-European peoples are understood as having little or no bearing in the evolution of political structures in Europe, which is a product of developments internal to 'Western civilization.' Therefore, we hear, Non-Christian peoples, and particularly Muslims, existed in a "structurally antagonistic situation"[10] to the Church, "outside of divine and human law,"[11] and as such were to be annihilated.[12] In this view, thus, "the medieval story is important (…) because it is the precursor to the Westphalian order that arose in

[6] Fischer, "Feudal Europe, 800 - 1300: communal discourse and conflictual practices", p. 443. Teschke, *The myth of 1648*, p. 98.
[7] Hall and Kratochwil, "Medieval tales.".
[8] Tal Dingott Alkopher, "The Social (And Religious) Meanings That Constitute War: The Crusades as Realpolitik vs. Socialpolitik," *International Studies Quarterly* Vol. 49, No. 4 (2005); "The role of rights in the social construction of wars: from the crusades to humanitarian interventions," *Millennium - Journal of International Studies* Vol. 36(2007).
[9] Andrew A. Latham, "Theorizing the Crusades: Identity, Institutions, and Religious War in Medieval Latin Christendom," *International Studies Quarterly* Vol. 55, No. 1 (2011); *Theorizing medieval geopolitics*.
[10] Latham, "Theorizing the crusades", passim.
[11] Alkopher, "The role of rights", p. 16.
[12] Alkopher, "The Social (And Religious) Meanings That Constitute War".

Europe and was imposed from there onto the rest of the world," [13] and consequently non-European peoples become a uniform, external group onto which these European institutions are imposed.

The fundamental argument of this chapter is that categories of religious adscription, and thus processes of boundary-making, were much more fluid and contested than this picture of a transhistorical Europe recognizes. Indeed, this chapter shows that the ordering of religious communities never rested on the unified idea of an 'infidel enemy' that seems to emanate from the IR crusading literature. Rather, an examination of the constructions of Jews and Muslims shows an extremely nuanced and varied conceptual apparatus that creates several dynamics of Othering – and consequently allows for a variety of ways of relating ranging from toleration and coexistence to conquest.

1. Jurisdiction

As we outlined in the introduction, the ideas of representation and categories allow us to get at boundary-making processes through a variety of different ways. By way of introduction, this section focuses on one specific aspect: how far the categories that we have examined in previous chapters travel? To whom are they applicable? This issue has tacitly underpinned previous IR treatments of the question. Indeed, behind the idea of the infidel enemy lies the fact that a different set of principles, rights and categories applied to non-Christians.

As we saw in chapter three, the distribution of political authority was governed through the central idea of *iurisdictio*. This section examines the extent to which *iurisdictio* could be applied to non-Christians, through a 13th century debate between Pope

[13] Buzan and Albert, "Differentiation", p. 332.

Innocent IV, and his student, Cardinal Hostiensis. The specific site for the debate was a decretal of Pope Innocent III included in the Liber Extra entitled *Quod super his*, which dealt with the slightly unrelated issue of the fulfilment of crusading vows.[14] Innocent IV, however, used a sentence in this decretal that mentioned crusades "for the defence" [*pro defensione*] of the Holy land as an opportunity to consider whether it was legitimate to invade the lands of infidels.[15] In doing so, he put forward a worldview in which the legitimacy of jurisdiction was not tied to religion, and in doing so, therefore, the same concepts were applicable to both Christians and Infidels.

The thrust of his argument, although also supported by legal citations from both Roman and Canon law, was based on the Bible. Indeed, although his question referred to lands owned by infidels, he explained that everything was actually owned by God, as the creator of the universe. In order to answer the question at hand, however, he felt compelled to examine both the origins of property and of political authority. Thus, citing Genesis, he explained that in the beginning everything was held in common. However, subsequently some began to appropriate some things, which was a natural and good thing to happen, insofar as it avoided discord amongst men. And thus, he explained, it became licit to occupy unoccupied lands, but it was banned to occupy those which already had owners.[16] The implicit question was therefore whether lands occupied by non-Christians were legitimately occupied.

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[14] X 3.34.8.

[15] Innocent IV, *Comentaria doctissima in quinque libros decretalia*. ad X.3.34.8 "sed nunquid est licitum invadere terram, quam infideles possident, vel quae est sua?"

[16] Ibid. "Et nos ad hoc respondemus quod in veritate domini est terra, et plenitudo eius orbis terrarum, et universi qui habitant in eo. Ipse enim est creator omnium, idem etiam ipse Deus haec universa subiecti dominio rationalis creaturae, propter quam haec omnia fecerat, ut habemus in 1. C. Genesis. Et haec a principio seculi fuit communis quousque usibus priorum parentum introductum est, quo, aliqui aliqua et alii alia sibi appropriant, nec fuit hoc malum, imo bonum, quia nature est, res communes negligi, et etiam communio discordiam erant, nisi Dei. Et ideo licebat cuilibet occupare quod occupatum non erat, sed ab aliis occupatum, occupare non licebat."

Having dealt with this, yet without answering the question, he moved to the issue of jurisdiction. In a fairly honest move, he said that he reads in the decretals that *iurisdictio* is just and correct, but that he nevertheless doesn't not know in what way it started.[17] He thus proceeded to consider three distinct possibilities for the appearance of jurisdiction, which somewhat mirror the debates we examined in chapter 4. First, evoking the Augustinian roots we saw in chapter four, he considered that God might have given it to some people so that they punish those who commit crimes. Another option was that God gave it to fathers, who had jurisdiction over their families. We indeed saw in chapter 3 that for some canonists the power of the head of the family was also seen in terms of jurisdiction. Innocent, however, thought that this was only in the beginning, and that in his time this jurisdiction was very minimal. In any case, a progressive extension of the power of the head of the family was the second possibly origin. Finally, based on the biblical example of Saul, he considered that jurisdiction could have also started by election.[18]

In all three cases, however, the religious adscription of the people in question played no role in the appearance of jurisdiction. Thus, summing up these two sections in order to answer his first question, Innocent IV concludes: "Power, possessions, and jurisdiction [*dominia, possessiones, et iurisdictiones*] can be held without sin by infidels, for these were not made for believers, but rather for all rational creatures."[19] By doing so, therefore, we see that despite the fact that the categories of infidel and believer apply, jurisdiction as the category that indicates the legitimate distribution of political

[17] Ibid. "Iurisdictionem enim iustam et rectam lego, ubi dicitur datus gladius ad vindictam.. extra. De ma. Et obe. Solite. Sed quodomo coeperit nescio."
[18] Ibid. "Deus dedit aliquem vel aliquos qui facerent iustitiam super delinquentes, vel iure naturae paterfa. Super familiam suam habebat iurisdictionem omnem a principio. Sed hoc dice non habet nisi in paucis et modicis. Ff. de fur respiciendum. At C. de pa. po. Per totum. Hoc autem certum est qod ipse Deus per se a principio exercuit iurisdictionem, ut no. Extra. De fo comp. licet. Item per electionem poterunt habere principes, sicut habuerunt Saul, et multos alios."
[19] Ibid. "Dominia, possessiones, et iurisdictiones licite sine peccato possunt esse apud infideles, haec enim non tantum pro fideli, sed pro omni rationabili creatura facta sunt."

authority is not limited to believers, but rather it applies to all rational creatures, that is, all human beings.

Against this, Innocent IV's student Henricus de Segusio – otherwise known as cardinal Hostiensis – decided to comment on his teacher's commentary, and radically disagreed with him. The key in this case was an understanding of Biblical history different than that of Innocent. Hostiensis starts by reproducing, and to a large extent agreeing with Innocent's commentary. Indeed, it may seem that there is a natural basis for jurisdiction, irrespective of religious belief. After having put forward this position, however, Hostiensis adds: "however, it seems to me that the advent of Christ, all honour and rule, and all property and jurisdiction were, *de iure* and for a just cause,… taken from infidels and given to Christians."[20] We already saw in chapter 4 that the incarnation played a key role in some patristic understandings of political authority.[21] Indeed, the advent of Christ had enabled salvation and established the Church as the main organization to achieve it. For Hostiensis, this had meant that after that, all the political authority had been transferred to Christians, and thus that infidel rule was *de iure* illegitimate.[22]

Despite the fact that Hostiensis was directly replying to his teacher he was not the first one to suggest that the only legitimate power lay among believers. On the one hand, we saw that a certain understanding of the legitimacy of secular power tied it to the Church and the pursuit of salvation. On the other, there was a solid tradition of canonist thought

[20] Hostiensis, *Apparatus*, ad X.3.34.8. "Mihi tamen videtur quod in adventu christi omnis honor et omnis principatus et omne dominim et iurisdictio de iure et ex iusta causa et per illum qui supremam manum habet, nec errare potest, omni indifeli subtracta fuerit et ad fideles translata."
[21] See Patricia Ranft, *How the doctrine of the incarnation shaped Western culture* (Lanham: Lexington Books, 2013).
[22] As we will see below, this does not necessarily lead to destruction. He could still advocate for toleration.

about legitimacy of secular power and the Church.[23] This body of thought, instead of focusing on *iurisdictio*, centred on the notion of *imperium*. Thus, these canonists argued, *extra ecclesiam non est imperium* - there is no (legitimate) power outside the Church. Along this line of thought, for example, the idea of the coming of Christ having altered the legitimacy of secular power had already been put forward by canonist Alanus Anglicus, albeit most likely referring to Christians who fell astray of the true path rather than infidels.

This brief examination over the extent to which the concepts that were used to order Christians international relations applied also to non-Christians already reveals that the position was not fixed, and that a variety of legitimate legal arguments coexisted. In doing so, it immediately problematizes the claims by some IR scholars that Christian thought portrayed an exclusive community outside of which all power was illegitimate and thus inevitably led to confrontation.[24]

2. The Christian community and its Others

This section moves its attention to another way of getting at boundary-making in medieval law: the production of a common identity differentiated from those of outsiders. Indeed, current IR treatments of the Middle Ages unreflectively suggest not only that 'Christian' was a central, if not the main, identity of Western Europeans at the time, but also that this identity irrevocably led them to a situation of incompatibility with other religions. In order to counter this, this section unpacks two modes of Othering present in late-medieval Canon Law. The first one, which I call substantive, was based on a rigid tripartite framework that assigned specific and opposing

[23] I follow James Muldoon, "Extra ecclesiam non est imperium: The canonists and the legitimacy of secular power," *Studia Gratiana* Vol. 9(1966).
[24] Alkopher, "The role of rights", p. 16 ff.

characteristic to groups. The second one, here called positional, tended to deprive others of substantive attributes and simply considered them in relation to Christians. These discursive dynamics are crucial in order to recover a historicised understanding of the period, as they underlie the production of a Christian identity and as such enable a variety of courses of action.[25] Indeed, following the extensive literature in IR that underscores the mutual constitution of Self and Other, this section also shows the extent to which Christian identity was inextricably bound with these multiple modes of Othering.[26]

Religious others: seeing the world through Christian eyes

Canon law conceived of various groups of non-Christians: references were made specifically to Jews, Muslims, and pagans, as well as to heretics and schismatics, which were technically Christian but held a special status. The types of non-Christians were therefore identified and specified through their religious adscription, thereby constructing a world of separate religious communities. This section shows how this world of religious communities was not created through study or knowledge of the religious features of non-Christian groups. Rather, other communities were constructed through the application of pre-established Christian interpretive frameworks, which emanated from a theologically-driven understanding of the World and of humanity as a whole. In doing so, Christian identity and non-Christian communities became inextricably linked.

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[25] Doty, *Imperial encounters*, p. 5.
[26] Edward W. Said, *Orientalism* (London: Penguin Books, 2003); Tzvetan Todorov, *The conquest of America: the question of the other* (Norman: University of Oklahoma Press, 1999); Iver B. Neumann, "Self and Other in International Relations," *European Journal of International Relations* Vol. 2, No. 2 (1996); Campbell, *Writing security: United States foreign policy and the politics of identity*.

Canonists' conception of the various non-Christian communities was filtered through a very rigid and conservative typology, derived in part from Biblical and patristic sources, but also deeply influenced by late-imperial Roman law.[27] Following this framework, canonists conceived of three types of communities: Christians, Jews, and Pagans (originally those citizens of the Roman Empire that had not converted to Christianity). This typology included both substantive constructions of the features of each group, such as theological notions of what a Jew is and the association of polytheism with Pagans, as we will see, and notions of difference that were explicitly constructed as a continuum among all the positions. In all cases, however, canonists constructed both Christian and non-Christian communities in parallel: the first one as the orthodox, true faith, and the latter ones as its mirroring heterodox Others.

This close connection between the Christian Self and the non-Christian Other is clear, and exceptionally explicit in the case of the Jews.[28] Based on a juridical-theological image that had its origin in Augustine's writings,[29] canonists conceived of Jews as the witnesses of the Christian truth (*testimonium veritatis*). Jews were held collectively responsible for the death of Jesus, which led them to be punished by losing their government and being condemned to wander the Earth and live under Christians. Canonists, following Augustine, articulated this partly through the simile of Cain –the Jews- and Abel – Jesus, in which Cain was punished with exile and subjugation for the murder of his brother, much like the Jews were condemned to live scattered throughout the world for having killed Jesus. At the same time, this punishment served as a

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[27] The literature on the legal status of Jews in the Roman Empire is vast. A good starting point is Amnon. Linder, "The legal status of the Jews in the Roman Empire," in *The Cambridge History of Judaism. Vol 4. The late Roman-Rabbinic period*, ed. Steven T. Katz (Cambridge: Cambridge University Press, 2006).
[28] Despite the extensive historical literature that points to the fundamental role of Jews in the production of Christian identity since at least the Middle Ages, IR scholarship has largely ignored these dynamics.
[29] For a more extended analysis of the Agustinian image of the Jew, as well as for the evolution of this tradition in the Early Middle Ages see Jeremy Cohen, *Living letters of the law: ideas of the Jew in medieval christianity* (Berkeley: University of California Press, 1999) , esp. Chapter 1.

constant reminder for Christians of the truth of the Christian doctrine. Thus, Innocent III's *Constitutio pro iudeis*, a papal bull for the protection of Jews, states that:

> "Although the Jewish perfidy is in every way worthy of condemnation, nevertheless, because through them the truth of our own Faith is proved, they are not to be severely oppressed by the faithful. Thus the Prophet says, 'Thou shalt not kill them, lest at any time they forget thy law,' [Ps. 59:12] or more clearly stated, thou shalt not destroy the Jews completely, so that the Christians should never by any chance be able to forget their Law, which, though they themselves fail to understand it, they display in their book to those who do understand."[30]

Moreover, the mythology of the Jewish witness not only depicted Jews as living stateless throughout Christian lands, but also the fact that they do so in a state of subordination, as *perpetual servants* of the Christians. Although part of this subservience was initially the service they provided in being the witnesses of the truth and keeping the Old Testament for Christians, the idea of perpetual servitude gradually evolved into a fully-fledged doctrine of actual Jewish subordination to Christianity on account of their guilt for killing Jesus.[31] This idea was already enshrined in Gratian's *Decretum*, which states that one cannot justly wage war against the Jews for they "are willing to serve."[32] Subsequent canonistic commentaries reinforced this doctrine, with Hostiensis, for example, arguing that "although the Jews are enemies of our faith, they are our servants [*servi*] and are tolerated and defended by us.[33]"

Jews were then explicitly and functionally constructed as a subordinate Other. Indeed, the Jewish Other was not only a theoretical necessity for the Christian Self – in the way that most of the IR literature has pointed to identity formation as a fundamentally

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[30] Innocent III *Constitutio pro Judeis*, edited and translated in Solomon Grayzel, *The church and the Jews in the XIIIth century* (New York: Hermon Press, 1966), n. 5.
[31] Anna Sapir Abulafia, *Christians and Jews in the twelfth-century renaissance* (London and New york: Routledge, 1995), pp. 65-66. For the evolution of the idea before the twelfth century see John Gilchrist, "The perception of Jews in the canon law in the period of the first two crusades," *Jewish History* Vol. 3, No. 1 (1988).
[32] C.24 q.8 c. 11.
[33] Cited with some slight modifications in David Abulafia, "The servitude of jews and muslims in the medieval mediterranean: origins and diffusion," *Mélanges de l'Ecole française de Rome* Vol. 112(2000). p. 693.

relational process – but also the main substantive attribute of the construction of Jewish-ness. As a result, the existence and nature of the Jews as a community was therefore inescapably tied to that of Christians, creating the first as a community to be punished and the second one as their superiors. At the same time, the punishment itself (their scattering, subjugation, and subservience) was a fulfilment of divine prophecies, and as such reinforced and proved the Christian truth. The Jew was thus a necessary Other within yet outside Christian society, with the function of permanently proving the Christian truth.

This distinctive subject position of the Jews, moreover, points to an important dimension of medieval identity formation and indeed of international relations that has been repeatedly overlooked. It could seem that the subordinate status of Jews and their condition of minority *in* Christian society would set these processes and interactions outside the purview of international relations and into some domestic or internal realm. This would however mean privileging modern forms of collective identification, which tie communities and territory.[34] Instead, if we are to take the historicity of the different ways in which communities have historically been constructed, and thus the historicity of the international itself,[35] seriously, the interaction between Christians and religious minorities in the territories of the former constitute true international relations.

The case of the Jews, therefore, shows that though the IR literature has focused overwhelmingly on the role of Muslims as the key Other for Christian identity,[36] the Christian worldview relied on Jews as their constant and necessary Other. Related to this, a very obvious fact, which is nevertheless rarely noted in IR literature, is that

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[34] Walker, *Inside/outside*; Bartelson, *A genealogy of sovereignty*.
[35] Keene, *International political thought. A historical introduction.*
[36] See for example John M. Hobson, *The Eastern origins of Western civilisation* (Cambridge: Cambridge University Press, 2004); Iver B. Neumann and Jennifer Welsh, "The other in European self-definition: an addendum to the literature on international society.," *Review of International Studies* Vol. 17(1991).

Muslims presented a significant conceptual problem: we have seen the extent to which canonists relied on biblical and patristic sources for their 'knowledge' of other communities, but a significant number of these texts were written before the advent of Islam. Additionally, Christians related to Muslims in two different contexts: first, as full, organized Islamic polities in the Near East and North Africa, Muslims constituted both a threat to Christian control of certain territories, and a profitable commercial partner. Second, particularly from the twelfth and the thirteenth century there were significant Muslim communities living under Christian rule in places such as the Iberian Peninsula and Sicily, as a result of territories changing hands through conquest.[37]

Muslims therefore constituted a complex challenge for lawyers. For example, there was not a single medieval term to refer to Muslims. In Latin, the most common denominations were Saracens (*Saracenus /Sarracenus*) and Agarens (*Agarenus, Hagarenus*), although, as will be explored below, they were also referred to as pagans (*paganus, gentiles*). The origin of both Saracens and Agarens is biblical, and points to a certain assumed lineage or even ethnic origin of Muslims as descendants of Sarah or, alternative, of slave Hagar.[38] Canonists' scholastic definition of Saracen thus stated that:

> "Saracens are those who do not accept neither the Old nor the New Testament, those who do not want to call themselves Agarens, from Abrahams slave Agar, from whom they descend, but rather call themselves Saracens, from Sarah, his free wife. Also among the Saracens are those who

[37] See for example James M. Powell, ed. *Muslims Under Latin Rule, 1100-1300* (Princeton: Princeton University Press, 2014).

[38] Discussions about the origin of the name of the community emphasized that although Muslims called themselves Saracens after Sarah, they actually descended from Abraham's slave Hagar, and as such were better called Hagarens. In doing so, they were not only putting emphasis on the inferior origin of the group and thus placing Muslims in a subordinate position, but also pointing to and ridiculing Muslim arrogance in calling themselves descendants of Sarah.

> received the five books of Moses, but reject the prophets, who are called Samaritans from the city of Samarra." [39]

The first line of the definition, once again, shows the extent to which the construction of non-Christians was implicated in that of the Christian community. Indeed, the first priority in the definition of Muslims (and also of Jews) was situating them in relation to Christian texts. As a result we get a continuum, whereby Saracens do not follow the Old or the New Testament; Jews accept only the Old Testament; and Christian have received both texts. Christian doctrine constitutes the basis for evaluating the differences between other religions, thus reinforcing these non-Christian groups as deviating from the true faith, that is, the Christian faith that has received both books.

In addition to constructing this continuum, this definition is paradigmatic of the rigidity of the tripartite typology of religious communities that canonists used, and as such of the specificities of this Othering process. Indeed, key to any Othering dynamic is the assignment of opposing attributes to both Self and Other through the use of seemingly objective 'knowledge.'[40] We can appreciate a particularly extreme version of this in the case of Muslims, exacerbated by the doctrinal problems mentioned above. The political nature of the 'knowledge' of the Other is manifest in the canonical definitions we have just seen, to the point that Samaritans were included as a category of Muslims.[41]

Indeed, despite these etymological and scholastic concerns, canon lawyers' 'knowledge' of Islam seems greatly distorted to the modern reader. In a milieu in which the knowledge of and engagement with Muslims and their religion was slowly increasing, hardly any legal texts or commentators in the thirteenth century make

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[39] Hostiensis, *Summa aurea* (Venice, 1574), ad X.5.6. Also in Ramon de Penyafort, *Summa de Poenitentia* (Farnborough: Gregg Press, 1967), 1.4.1 and in Bernardus Papiensis, *Summa decretalium*, ed. Ernst Adolph Theodor Laspeyres (Graz: Akademische Druck - U. Verlagssanstalt, 1956).
[40] Said, *Orientalism*; Doty, *Imperial encounters*, p. 7.
[41] Samaritanism is a religion closely related to Judaism based only on the Pentateuch (the first five books of the Bible). For more on the Samaritans see Nathan Schur, *History of the Samaritans*, 2nd ed. (Frankfurt am Main: Lang, 1992).

reference to its monotheism, Muhammad, or any other aspects of Islam.[42] Actually, some even speak of the veneration of idols, equating it to classical and northern paganism. Hostiensis, for example, says that Muslims are "those who worship and adore multiple gods and indeed demons."[43] Canonists therefore faced the challenge of dealing with Muslims with neither a conceptual and theological framework that conceived of the group nor any detailed knowledge of the features of the group. This situation, combined with the presence of the tripartite framework of non-Christian others, led to a debate and a variety of images that sometimes classified Muslims as pagans, other times as Jews, and sometimes even as heretics.[44]

'Pagan' was in some sense the obvious category in which to place Muslims. In the tripartite framework, pagan had basically the residual meaning of "non-Christian, non-Jew," and thus canonists soon drew the parallel between the classical *paganus*, which referred mostly to those Roman citizens that had not converted to Christianity after the Christianization of the Empire, and the new type of 'non-Christian, non-Jew' they were facing. As a result, the words *paganus*, *gentili*, and *Saracenos* or occasionally *agarenos*, began to be used interchangeably. In light of this, it is easier to appreciate the reason for the affirmations of Hostiensis and other canonists, who, partly out of ignorance, partly because of this parallel, posited that Muslims were polytheists and idolaters. Similarly, once the linguistic parallel between *paganus* and *Saracenos* had been established, the

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[42] One notable, and certainly not casual, exception is again Alfonso X's *Siete Partidas*, which states that "The Moors are a people who believe that Mohammed was the Prophet and Messenger of God," at 7.25.0, edited and translated in Robert I. Burns and Samuel Parsons Scott, *Las Siete Partidas. Volume 5. Underworlds: the dead, the criminal, and the marginalized (Partidas VI and VII)* (Philadelphia: University of Pennsylvania Press, 2001), p. 1438. After this, however, it proceeds with an almost literal transcription of the standard legal definition seen above (7.25.1).

[43] Hostiensis, *Summa aurea*., ad. X.5.5 v. Qui sunt.

[44] Indeed, the prevalent trend among theologians was to classify Muslims as heretic. John Tolan, "«Cel Sarrazins me semblet mult hérite». L'hétérodoxie de l'autre comme justification de conquête (XIe-XIIIe siècles)," *Actes de la Société des historiens médiévistes de l'enseignement supérieur public* Vol. 33, No. 1 (2002).

strange inclusion of Samaritans becomes more understandable: "John 4:9 makes clear that Samaritans are not Jews; they must, therefore, be Saracens/pagans."[45]

The construction of Muslims was therefore based on classifying them into a pre-established tripartite scheme that reinforced the superiority of Christianity, rather than on serious engagement with actual Muslim practices and beliefs. Although the awkward position of Muslims in relation to Biblical and patristic sources did not lead to a fully fledged mythology like that of Jewish perpetual servitude, various engagements with Muslims in canon law construct the group as an instrument of God to send messages to Christians, or as directly serving a function for Christians. Gratian's *Decretum*, for example, includes a letter of admonition to the English people that constructs the Saracens as a divinely-sent punishment for the indecorous behaviour of the inhabitants of the Iberian Peninsula, and potentially of the English to whom the letter refers.[46] Saracens, much like Jews, lose purpose and agency and only exist as a tool in a divinely-directed universe. One of the most extreme functional understandings of non-Christians in this sense is found in canonist Humbert de Romans, who claims that:

> "Therefore, just like kings hold tournaments in their kingdoms so that soldiers can exercise, God also allows these Saracen enemies to exist in this world, so that Christians can accumulate merits by waging war against them."[47]

Saracens are therefore not only an occasional punishment to a people that misbehave, but rather, in a construction similar to that of Jews, become a group without agency, at the permanent service of Christianity.

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[45] David M. Freidenreich, "Muslims in Western canon law, 1000-1500," in *Christian-Muslim relations: a bibliographical history*, ed. David Thomas and et al (Leiden: Brill, 2011), p. 42.
[46] D. 56 c. 10.
[47] Cited in Zacour, *Jews and Saracens*, p. 17, ft. 55.

Blurring distinctions

Canonists conceived of a world of religious communities through a very rigid typology that considered Christians, Jews, and pagans in a continuum of types where 'Christian' was the baseline category. However, this framework interacted with a second dynamic which relied less on the production of 'knowledge' and attributes of the Other, and more on their condition of existence vis-à-vis the Self, emphasizing two distinct positions: peaceful, non-threatening minority under Christian rule and enemy. This aspect has led authors such as Norman Zacour to claim that "Jews or Saracens, they could best be perceived in their relationship to Christians, in peace or at war, passive or troublesome, silent or scandalous."[48] This section explores this claim, showing how in terms of both policy and ideas there was a progressive blurring of the distinction between non-Christian groups.

The canon *Dispar nimirum* has usually been taken as the paradigmatic example of the different conceptions between an external enemy and a peaceful minority living under Christian rule. This canon, the summary of which establishes that "we ought not to prosecute Jews, but rather Saracens" is an extract from a 1063 letter by Pope Alexander II to the bishops of Spain and reads:

> "There is indeed a difference between the case of the Jews and that of the Saracens. For it is legitimate to fight the latter, who persecute Christians and expel them from their cities and their own residences. The former, however, are everywhere willing to serve."[49]

Although the canon differentiates between Jews and Muslims, it does so on the basis that the latter pose a threat to Christianity whether the former do not. It is therefore not a substantive conception of Muslims that justifies war against them, but rather the fact that they persecute Christians. Subsequent commentaries on this canon by later

[48] Ibid., p. 22.
[49] C. 23 q.8 c.11.

canonists highlight this particular aspect. For example, Johannes Teutonicus, on the ordinary gloss on this passage took the idea further by saying that "therefore, if Saracens do not persecute Christians we cannot attack them." It is not because of their nature that Christians can attack Muslims, but rather because they are a threat. If they are not a threat, says Johannes Teutonicus possibly thinking about Muslim communities under Christian rule, then Muslims "should not be harmed."[50] This idea, which became standard in subsequent canonical commentaries, indicates a second dynamic of Othering, one based not on the attribution of substantive traits to religious groups, but rather exclusively on the conditions of existence of those groups in relation to Christianity.

The commentaries on *Dispar nimirum* thus create the hypothetical of Muslims living in peace and in doing so placed them in a position comparable to that of Jews. Elsewhere in commentaries, however, we find more substantive associations of Jews and Muslims in the treatment they are to receive from Christians. Indeed, canonists progressively used the extensive canons on the treatment of Jews to think through the conditions of Muslims, therefore blurring the distinction. This was officially sanctioned in the Fourth Lateran Council (1215), which in canon 69, after a series of prescriptions that regulated the conduct of Jews living under Christian rule, sweepingly stated that "the same we also extend to pagans."[51] Through this, the treatment to be received by Jews and Muslims was therefore unproblematically blurred, minimizing the distinction between both and merely taking into account how they allegedly related to Christians.

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[50] Johannes Teutonicus, *Glossa ordinaria* to C. 23 q.8 c.11 v. *persequuntur*. "It is clear therefore that if Saracens do not persecute Christians we cannot attack them. For we can certainly eat with them… And the law [Roman law] says that if they live quietly we should not harm them." The reference to 'not harming them' shows the cross-fertilization between canon and Roman law, as it is an explicit reference to Cod. 1.11.6, which establishes that law-abiding Jews and pagans that live quietly should not be harmed.

[51] Antonio García y García, *Constitutiones Concilii quarti Lateranensis una cum commentariis glossatorum*, Monumenta iuris canonici. Series A, Corpus glossatorum (Città del Vaticano: Biblioteca Apostolica Vaticana, 1981), p. 109.

This blurring, however, extended beyond the mere way in which Christians related to the different non-Christian groups and in some cases included substantive conceptions of religious beliefs and practices. The previous section already highlighted the problems in classifying Muslims within a very rigid framework, and how they were generally assimilated to pagans. In parallel to this, however, starting at the turn of the thirteenth century there is a tendency to assimilate Muslims to Jews based on specific Islamic practices: despite the fact that the mentions of Muslims as polytheistic continue well into the thirteenth and fourteenth centuries, from the turn of the century there seems to have been an awareness among canonists of some practices, particularly regarding food, which led canonists to conclude that 'Muslims Judaize.'

Despite the sweeping assimilation in treatment of Jewish and Muslim communities under Christian rule, Gratian's *Decretum* included one exception: the prohibition to eat with Jews did not apply to "pagans."[52] The decretists, commenting on the *Decretum* in the first few decades after its appearance, accepted the distinction, which was based on the teachings of the Greek Church father John Chrysostom. Writing in the 1180s, however, canonist Huguccio asked himself:

> "With respect to which pagans does [Chrysostom] speak? Nearly all Saracens at the present judaize because they are circumcised and distinguish among foods in accordance to Jewish practices. I say, accordingly, that one ought to abstain from the food of such pagans – that is, those who distinguish among foods- just as from the food of Jews because the same reason for the prohibition (…) applies to both these and these."[53]

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[52] C. 11 q. 3 c. 24 and C.23 q. 4 c. 17. For more on comensality between Christians and non-Christians see David M. Freidenreich, "Fusion cooking in an Islamic milieu: Jewish and Christian jurists on food associated with Foreigners," in *Beyond religious borders: interaction and intellectual exchange in the medieval Islamic world*, ed. David M. Freidenreich and Miriam Goldstein (Philadelphia: University of Pennsylvania Press, 2012); David M. Freidenreich, "The food of the damned," in *Between heaven and hell: Islam, salvation and the fate of others*, ed. Mohammad Hasan Khalil (Oxford: Oxford University Press, 2013); "Sharing Meals with Non-Christians in Canon Law Commentaries, Circa 1160-1260: A Case Study in Legal Development," *Medieval Encounters* Vol. 14, No. 1 (2007).

[53] Huguccio *Summa decretorum*, on C. 11 q.3 c.24 v. *Omnes,* cited in Freidenreich, "Sharing meals", p. 59-60.

Without the ability to distinguish between Muslims and pagans, therefore, some canonists started to perceive Jews and Muslims as similar, or rather, to argue that Muslim practices made them functionally equivalent to Jews. While these commentaries show some engagement with the cultural practices of the groups they were constructing, the fact that the move was extracting Muslims from the pagan category and equating them to Jews shows once again the rigidity of the Christian-centred framework. As a result, while still maintaining a tripartite typology, the treatment of non-Christians in the thirteenth century seems to progressively converge towards two ways of being vis-à-vis Christians, and consequently two types of relations. On the one hand, peaceful non-threatening minorities under Christian rule, both Jewish and Muslim, which are afforded some toleration, and external enemies – mostly Muslim polities – against which war could be waged.[54]

We have therefore seen that the construction of religious others is more nuanced and internally polyvalent than the IR trope of the 'infidel' portrays. Not only this, but the analysis also has shown that despite the insistence of IR in portraying Islam as the main Other of Christianity, Jews were crucial to Christian identity-formation and boundary-drawing, not only being the constant, subservient reminder of the truth of their faith, but also in some cases providing the abstract template for the knowledge of Muslims. Finally, this section also reveals the extent to which the construction of the Christian Self was reliant on the existence of these communities, and thus how these interactions cannot be overlooked.

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[54] Zacour directly suggests that this is the primary way in which canonists conceived of Others, and Muldoon seems to also point in that direction. Zacour, *Jews and Saracens*; James Muldoon, *Popes, lawyers, and infidels: the church and the non-Christian world, 1250-1550* (Liverpool: Liverpool University Press, 1979).

3. Between universalism and exclusion: the treatment of non-Christians.

This section moves its attention to a third way of getting at the drawing of boundaries: the prescriptions for the relations between Christians and non-Christians. Indeed, as is well-known, the way in which identities are constructed and produced are key to enabling some courses of action in the relation between Self and Other and precluding others.[55] We have already seen that the construction of Christians and non-Christians was internally contradictory. Following this, this section examines three different prescriptive principles that stem from these processes: separation, toleration, and destruction. Moreover, it shows that underpinning these three principles are not only the differentiating and Othering dynamics that we examined above, but that the idea of similarity, its logical counterpart, also plays a crucial role.

Segregation: two criteria of difference in interaction

An examination of the interaction of both modes of Othering analysed above shows that the central behavioural principle behind the regulation of minorities was segregation. Moreover, while the second framework points towards a convergence in the consideration of minorities, this section shows that the fact that the tripartite framework dynamics above operated by creating a continuum of positions with Christians as the baseline made proximate positions to Christians more rather than less dangerous, and in doing so it argues that only by paying attention to how both frameworks interacted can we understand the subject positions of non-Christians.

[55] Doty, *Imperial encounters*.

Commenting on a passage that banned Jews from having Christian slaves, the author of the late-twelfth century Summa *Animal est substantia*, claimed that "Jews have the Law and for that reason they can pervert Christian servants faster than *gentiles*, who don't have it. Therefore, we should not sit at the table of Jews, but we can sit at the table of *gentiles*, that is, pagans."[56] The fact that Jews follow the five books of the old Testament that constitute the Talmud made them more similar to Christians, and therefore much more dangerous and less preferable than pagans/Muslims. Indeed, early decretists highlighted how through their obsession with "following literally the law of Moses,"[57] Jews not only misinterpret, but also abuse Christian Biblical doctrines, at the same time that the proximity of both faiths makes them a bigger threat than pagans/Muslims[58].

This idea of the proximity of Jews as threatening is explicitly articulated through the idea of Jews as treacherous guests hosted out of kindness but who, from this close position to Christians, work incessantly to betray them and pervert the Christian faith:

> "Yet, while they are mercifully admitted into our intimacy, they threaten us with that retribution which they are accustomed to give to their hosts, in accordance with the common proverb: 'like the mouse in a pocket, like the snake around one's loins, like the fire in one's bosom.'"[59]

Jews are like a treacherous mouse or snake, living within Christians and always ready to pervert them. Consequently, behavioural prescriptions of canon law with regards to Jews focused not on conversion or elimination, but rather on segregation and minimizing interactions. The canons and papal decretals therefore are destined to

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[56] *Summa animal est substantia*, on D. 54 c. 13 v. *Mancipia*. Ed. E.C. Coppens available at http://www.medcanonlaw.nl/Animal_est_substantia/Introduction.html [last accessed 26/08/2015].
[57] For example, Ramon de Penyafort, *Summa de Poenitentia*., 1.4.1 defined Jews as "those who follow literally the law of Moses, and practice circumcision and everything else that is prescribed by that law [*alia legalia faciendo*]." For more on the identification of Jews with a literal interpretation of the Bible see Cohen, *Living letters*.
[58] See Freidenreich, "Sharing meals". for more examples.
[59] Innocent III, *Etsi iudeos*, edited and translated in Grayzel, *The church*., no. 18.

regulate and minimize as much as possible all interaction between Christians and Jews (and by extension, although with exceptions, Muslims). In this respect, for example, the idea of perversion and contamination lays behind the repeated and extensive canonist prohibitions for Jews to hold office and have Christian servants and nurses. This was a chief concern of the Church and of canonists, to the point that the title devoted to Jews (and Muslims) in all but one of the canonical collections from the thirteenth century onwards was "Concerning the Jews, the Sarracens, and their servants." Gratian's *Decretum* already forbid Jews from holding office, lest they "offend the Christians"[60] and similar prohibitions were made by the Third and Fourth Lateran Councils. The rationale behind this is clear: a people condemned to Perpetual servitude for their crime cannot be in a position of power vis-à-vis Christians, even more so because this position of power may corrupt the integrity of their Christian faith, or as the *Decretum* claimed "lest the Christian religion being subject to Jews, should be polluted."[61]

In certain cases, this concern for 'pollution' of Christians reaches a physical level.[62] Various canons expressed concern that Jews would convert or circumcise Christians if they were to find themselves in a position of authority.[63] Similar regulations also try to prevent intercourse between Jews and Christians,[64] or condemn the physical desecration of hosts by Jews.[65] Through these provisions, therefore, canonists and ecclesiastical officers sought to construct, confirm and maintain a hierarchical relation between Jews and Christians that involved the subordination of the former to the latter, and even more, the physical separation between both groups to the benefit of the Christian faith.

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[60] D.54 c.14.
[61] D.54 c.13.
[62] For the anthropological concept of pollution see Mary Douglas, *Purity and Danger: an Analysis of Concepts of Pollution and Taboo* (London: Routledge, 2002).
[63] To this effect: D.54 c. 14.
[64] IV Lateran Council, canon 68 in García y García, *Constitutiones*, p. 107.
[65] For more on this topic see John Tolan, "Of milk and blood: Innocent III and the Jews, revisited," in *Jews and Christians in thirteenth-century France*, ed. Elisheva Baumgarten and Judah D. Galinsky (New York: Palgrave Macmillan, 2015).

The unique position of Jews in relation to Christians – the fact that they were outside of Christian society but necessarily tied to it– thus made them at the same time closer and more threatening to Christians than Muslims were. In both cases, however, the prescription of canon law was based on the separation between Christians and religious minorities, rather than a destruction of difference, with a view of preserving the purity of the Christian faith.

Toleration: conversion, universalism and humanity

As counter-intuitive as this may seem in light of the standard IR imagination of the period, a second behavioural principle in canon law was toleration. We saw in the case of segregation that it was not only difference, but also its counterpart of similarity, that played a crucial role in inter-religious dynamics. This is even more so the case for toleration, as this rested on a universalist notion of humanity and a specific theology of conversion that portrayed Jews and Muslims as humans and potentially Christians.[66]

Given that canonists constructed their communities in terms of religion, conversion was the way of moving from one community to another. The boundary of the Christian community was in this sense very flexible: conversion was not only conceivable but actively encouraged. Indeed, as is well known, it was one of the central goals of the Church to convert unbelievers and lead them to the path of salvation, eventually leading to the Christianisation of the whole of humanity. This duty was already established in the Bible, as Jesus sent the Apostles to spread the message to all peoples of the world.[67] Since Christianity accepted only one God and one path to salvation, and at the same

[66] For an IR reference to this see Neumann and Welsh, "The other in European self-definition: an addendum to the literature on international society."
[67] Matthew, 28.19.

time had a fairly egalitarian notion of humanity, this resulted in an aspiringly universal religion and worldview, one that aimed at reaching all human beings. In doing so, an extremely powerful basis for equality was established, insofar as all human beings became potential Christians.

This egalitarian notion of humanity came to be crucial in some discussion of non-Christians, and underpinned the tensions between the various constructions of non-Christians that we have encountered so far. Paradigmatic in this sense was pope Innocent IV's discussion of the legitimacy of infidel power that we saw above. His basic argument was that infidels could legitimately have property and jurisdiction, since these are established not "for believers, but for all rational creatures." Innocent IV, however, went further than this. In what constitutes an unprecedented extension of papal power, he claimed responsibility for all human beings:

> "The pope, who is Vicar of Christ, has power not over Christians, but also over all infidels. … Elsewhere [God said]: Feed my sheep [John 21:17]. For all, both the faithful and infidels, are sheep of Christ by virtue of their creation, even if they don't belong to the flock of the Church, and therefore it is apparent that the Pope has legitimate jurisdiction over all, if not de facto."[68]

While the Othering processes we have seen had a marked hierarchical character, and were based on fairly pressing concerns for purity, they were underpinned by a notion of similarity. For Innocent, Christians and non-Christians are equal; they are both sheep, all under the jurisdiction of the Pope – the only obvious difference of course being that Christians already recognize it. What separates them is whether they belong to the Church or not, that is, whether they have been baptised. Potentially, however, all infidels can become Christians through conversion, as by nature they are the same.

[68] Innocent IV, *Comentaria doctissima in quinque libros decretalia*, ad X.3.34.8.

Thus, non-Christians are at once Others and potential Selves, the transition happening through conversion.

In this context, the understanding of conversion was marked by an emphasis on divine grace and free will. Indeed, throughout the Middle Ages, canonists emphasized the voluntary nature of conversion – and the ensuing prohibition to coerce it. A very significant pronouncement in this respect was canon 57 of the Fourth Council of Toledo (633), which Gratian incorporated in his *Decretum*. This canon clearly stated that

> "force incites no one to believe. Rather God takes pity on whomever he wants, and hardens whom he wants [Rom IX, 18]. The reluctant will not be saved, but the willing, as is the irreproachable nature of justice. Just as man, heeding the serpent, fell of his own free will, so with the grace of God calling him and the conversion of his own mind, each man is saved by believing. Thus they are to be induced by the free use of their will to convert rather than impelled by force."[69]

The emphasis on free will is clear. Conversion cannot be coerced, or even bribed,[70] as it only happens voluntarily through God's grace and free will. This idea, moreover, not only applied to the conversion of minorities or to missionary activity. In a context of increasingly violent interactions with neighbouring, non-Christian polities, the prohibition of forced conversion was also considered to apply to these interactions. As canonist Johannes de Ancona stated, "If you say 'they will be converted through invasion' then I answer, they are not to be forced into faith, because only God's grace is able to achieve this."[71] This idea of voluntary conversion, and the corresponding idea that the duty of Christians when fostering conversion was to entice infidels rather than coerce them, were repeated throughout the twelfth and thirteenth centuries in canonistic commentary and papal pronouncements alike.

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[69] D. 45 c. 5, translated by Jessie Sherwood.
[70] For example, the author of the summa *Animal est substantia* in his commentary on D.45 c.3 affirms that Christians "should not give money to the Jews so that they convert."
[71] Johannes de Ancona, *Summa iuris canonici* on 3.34.8, cited in Benjamin Kedar, "Muslim conversion and canon law," in *Proceedings of the Sixth International Conference of Medieval Canon Law, Berkeley 1980*, ed. Stephan Kuttner and Kenneth Pennington (Città del Vaticano: 1985). p. 329.

The way in which canonists envisaged their own community, therefore, was eminently voluntaristic, placing an emphasis on both free will and God's grace as determinants of membership. This element of choice is clear if we examine two debates in canon law that became central problematiques in the thirteenth century: excommunication and heresy, on the one hand, and forced conversion.

At the turn of the thirteenth century, the canonical treatment of heresy experienced a shift from the penitential realm to the criminal. It therefore became considered a public crime, an injury against all, and consequently subjected to criminal procedure[72]. In the context of the consideration of heresy as a crime, contumacy – understood as willing persistence in the crime and refusal to rectify – became a crucial element in identifying it. Once someone was suspected for heresy, the person was formally excommunicated – that is, severed from the sacraments. This was so for a period of one year, after which, had the person not rectified, the element of contumacy and incorrigibility would be considered proven, which warranted being given to the secular authorities for a significantly harsher punishment. Baptism and conversion therefore partially indicated membership in the Christian community, but in remaining in it will played an important role. As Vodola has emphasized, even with the development of the doctrine of excommunication *latae sententiae*, that is, in the moment of commission of the sin and with the formal Church condemnation having only declarative purpose, there was a space of 1 year in which the excommunicate was given the option to reconsider[73]. Thus, whereas in the case of the Jews there was a rhetoric that emphasized their unwillingness to convert, for heretics this was a more crucial and legally regulated situation.

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[72] For an extremely detailed account of this issue see Kim, "Canon three of the Fourth Lateran Council ", particularly chapter 2.

[73] Elisabeth Vodola, *Excommunication in the Middle Ages* (Berkeley: University of California Press, 1986).

Contumacy and unwillingness to go back to the proper path marked by the Church were integral to the definition heretics as a common group.

Forced conversion provides another interesting case for the importance of personal will in differentiating between communities. Starting in the twelfth century and particularly in the thirteenth, the number of instances of forced conversion of Jews throughout Western Christendom increased, as part of a move towards what Moore has termed "the formation of a persecuting society."[74] As a result, canonists were forced to deal with broad social occurrences that were apparently forbidden in canon law. Indeed, in addition to the 602 letter by Pope Gregory I included in D.45 c.3, the ordinary gloss to D45 c.1 clearly stated that "nobody should be compelled into the faith."[75] Canonists however progressively relaxed this doctrine. Thus, drawing on previous canonist work on the coercion of oaths, Huguccio established a distinction between absolute and conditional coercion in baptism, in which anything short of actually physically restricting the person being baptised while she protested throughout was considered valid[76]. This distinction became subsequently widely accepted, and was enshrined in papal policy and subsequent canon law through pope Innocent III's 1201 decretal *Maiores ecclesiae*. In it, the pope was asked to consider whether baptism during sleep or mental illness was valid, and in his reply he broadened the issue to include coerced baptism:

> "It is contrary to the Christian religion that the always unwilling and thoroughly objecting should be compelled to receive and keep Christianity. Wherefore others not illogically distinguish between unwilling and

[74] Robert Ian Moore, *The formation of a persecuting society: authority and deviance in Western Europe, 950-1250* (Oxford: Blackwell, 2007).
[75] Ord. Gloss to D. 45 c.1 v. *fidem* cited in Benjamin Kedar, *Crusade and Mission. European approaches toward the Muslims* (Princeton, NJ: Princeton University Press, 1984), p. 72. Other canonists restated this opinion, for example *Summa Parisiensis*, on D.45 c.1 and D.45 c.3.
[76] Huguccio Summa to D. 45 c.5 s.v. *associatos unctos corporis Domini*, cited in Kenneth Pennington, "The law's violence against medieval and early modern Jews," Rivista internazional di diritto comune Vol. 23(2012), p. 29.

> unwilling, coerced and coerced, because one who is drawn violently by fear and threats, lest he incur injury, receives the sacrament of baptism. Indeed such a man, like the one who falsely agrees to baptism, receives the impressed stamp of Christianity (...) But he who never agrees, but thoroughly refuses, receives neither the substance, nor the sign of the sacrament, because to refuse distinctly is more than to agree a little."[77]

Even when faced with forced baptism, therefore, canonists were still forced to maintained a certain idea of consent, however imperfect and fictional: coerced baptism was acceptable if the person had stopped protesting during the forceful baptism or even if coercion had occurred prior to baptism, and therefore they had converted for reasons other than faith. This was considered conditional coercion and meant that, in Innocent III's words, the person had "agreed a little" and thus baptism was valid. It was only in cases where the person had been physically restrained, actively protested during baptism and refused to acknowledge it after that were considered absolute coercion.

This importance placed on free will seems to therefore create a space for tolerance as a principle guiding the relations between Christians and non-Christians:[78] if conversion cannot be coerced and must happen voluntarily, non-conversion becomes by extension a legitimate position: the construction of the Christian Self as voluntary had the necessary counterpart of the voluntary condition of the Other, who must therefore be respected. This idea of toleration of non-Christians is repeatedly emphasized by canonists, even in contexts where the overall discourse stresses the inferiority and even formal subordination of Christians to non-Christians. For example, Hostiensis in the

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[77] Innocent III *Maiores ecclesiae*, X.3.42.3, translated by Jessie Sherwood.

[78] The literature on medieval tolerance in not only canon law but also theology is vast. The classical study is Joseph Lecler, *Histoire de la tolérance au siècle de la Réforme* (Paris: Aubier, 1955)., and for juristic elaborations on tolerance Mario Condorelli, *I fondamenti giuridici della tolleranza religionsa nell'elaborazione canonistica dei secoli XII-XIV* (Milano: Dott. A. Giuffrè, 1960).. A more recent starting point from the perspective of political theory is Cary J. Nederman, *Worlds of difference. European discourses of Toleration c.1100-c.1500* (University Park, Pennsylvania: University of Pennsylvania Press, 2000).

discussion of the legitimacy of infidel power we saw above,[79] and after having established that non-Christian rule is illegitimate and can be abolished through war by Christians, reiterates up to three times that this in no case means that war should be used for the purposes of conversion, "because everyone is to be left to free will, and only God's grace is valid in this calling." As a result, infidels that do not wish to convert, and as long as they recognize the superiority of the Church, "must be tolerated."[80] Contrary to what we might expect if we only focus on the crusades, medieval law established a clear basis for the toleration of non-Christian communities.

Elimination: humanity and universal reason

We arrive at a third principle of inter-religious relations: elimination. This section analyses the conditions of possibility for the idea of the elimination of non-Christians that pervades the IR literature by drawing attention to the inherent tensions between universalism and exclusion in the Othering modes that we have examined so far. On the one hand, not believing made non-Christians inherently inferior, threatening, and subject to a great amount of (legal) violence in their treatment by Christians. On the other hand, however, this had to be reconciled with the fact that all non-Christians were potentially Christians, to the point that all of them were meant to convert at some point before the Second Coming. The extensive universalistic basis of a human community understood as composed of equal human beings– the idea of the 'sheep' in Innocent IV's commentary – needed to be reconciled with an extremely exclusive and hierarchical understanding in the relations between communities.

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[79] Along with Innocent IV's discussion of the same issue mentioned above, this constitutes one of the few texts of the canonistic tradition that have been examined by IR scholars. See for example Brett Bowden, *The empire of civilization. The evolution of an imperial idea* (Chicago: University of Chicago Press, 2009).
[80] Hostiensis, *Apparatus*, ad X.3.34.8 v. *rursus*.

A key theological development of the twelfth century renaissance was what Abulafia has called the "Christianization of Reason." Reason was integral to the human condition, a tool that God himself had given to men and that made him distinct from animals. As a result, since reason came from God, it was also a tool to get to Truth and prove faith. Reason therefore became at the same time a mark of humanity and an instrument for Christianity.[81] A consequence for this in terms of theology was that the non-conversion of Jews was increasingly portrayed in terms of their lack of reasoning ability.

Canonists display a similar pattern. Within the framework of the *testimonium veritatis,* an element that was frequently deployed to emphasize the religiously inferior nature of the Jews was the "axiomatic identification of Judaism with the literal interpretation of the Bible" [82]. For example, Ramon de Penyafort's in his influential *Summa de poenitentia* proceeded to define the Jews by saying that "Jews are those who follow literally the law of Moses, and practice circumcision and everything else that is prescribed by that law [*alia legalia faciendo*]." [83] Similarly, as we have seen, Innocent III in his bull *Constitutio pro Iudeis* claimed that:

> "Thou shalt not destroy the Jews completely, so that the Christians should never by any chance be able to forget their Law, which, though they themselves fail to understand it, they display in their book to those who do understand."[84]

"Fail to understand it" stands in clear opposition to other passage in the same text, that claimed that Jews "prefer to remain hardened in their obstinacy." Indeed, even if the Jews followed the Old Testament, the coming of Christ had changed the nature of the text. Centuries of Biblical exegesis had produced canonical interpretations that

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[81] See Sapir Abulafia, *Christians and Jews*.
[82] Cohen, *Living letters*, p. 51.
[83] Ramon de Penyafort, *Summa de Poenitentia*, 1.4.1.
[84] Innocent III *Constitutio pro Judeis* in Grayzel, *The church*. n. 5, my emphasis.

reconciled both texts, usually through an allegorical interpretation of the Old Testament as not only according but also forecasting the coming of the Redeemer. The Jews were thus the people that did not understand that everything in the Old Testament foretold the New, and rather maintained a literal interpretation of it, which led to them performing abhorrent practices such as circumcision, or following different dietary practices. By reducing the entire identity of the group to their *inability* to comprehend the text, the inferiority not only of their beliefs and practices, but also to a certain extent of their reasoning ability was highlighted.

We find a similar attitude towards Muslims in the *consilia* of Oldratus de Ponte, an early fourteenth century canonist. In his *consilium* 72, Oldratus considered whether 'a war against the Saracens of Spain is licit.'[85] As a trained canonist, he brought up the debate between Hostiensis and Innocent IV on the legitimacy of infidel power, siding with Hostiensis and concluding that "all are subject to Christ, the sheep, the oxen and the cattle of the field." The first difference between Oldratus and Innocent IV is obvious: while the latter was starting from a basis in which everyone subject to the Pope were sheep –albeit from different flocks – in Oldratus we find a variety of animals. The sheep were Christians, which God had entrusted to Peter for his care. But by the oxen and the cattle of the field he meant "Saracens who, like beasts deprived of all reason, desert the true God and worship idols."[86] Oldratus therefore takes the implications of Christian reason to their furthest-reaching conclusion. Human beings have reason, which proves the Christian Truth. Consequently, Muslims, with their refusal to convert, polytheism, and idolatry, cannot possibly have reason, and are therefore no longer humans, but rather they are like beasts, like the 'oxen and the cattle of the field.' This way, Oldratus solved the tension between universalism and exclusion

[85] Zacour, *Jews and Saracens*., number 72, pp. 47-53.
[86] Ibid., p. 50-51.

present in many other canonists: by redefining humanity through reason, and identifying reason with the Christian faith, he allowed for the exclusion of some from the idea of humanity. As a result, the universalism of the Church is protected, as those who do not convert are no longer human.

The logical consequence of this process of Christianizing reason and redefining humanity was the enabling of the possibility of elimination. If, as we saw with the rationale of segregation, non-Christians posed a threat to the purity of Christianity, but given their exclusion from humanity, conversion was no longer a possibility, elimination became a much more legitimate practice. Indeed, in the *consilium* mentioned above Oldratus uses this very same reasoning to justify the waging of war against Muslims. It is worth noting however, that this dynamic of destruction is only available after a process of absolute Othering, once all similarities between the Christian Self and the non-Christian Other have been discarded to the point that the Other is no longer human.

4. Contested boundaries

This chapter set out to examine the representation of the boundaries of the late-medieval international order. Just like in the case of the representations of the polity, this examination has uncovered that contestation over boundaries, categories, and identities was a deeply ingrained in the ordering of medieval international relations. Indeed, the construction of non-Christian communities by lawyers cannot be reduced to a single modality of 'infidel enemies' against whom Christians waged crusades that seems to emerge from IR scholarship on medieval international relations. While that may certainly have been an element in late-medieval collective mentalities, the examination of Othering practices and understandings in canon law undertaken in this

article reveals a multiplicity of coexisting, mutually reinforcing, and at times competing constructions of Christians, non-Christians, and, more broadly, human beings. It is only when we realise that these identities and constructions were constantly reproduced and reinvented throughout the Middle Ages, that we can start to appreciate how they enabled a variety of relations, from equal to subordination, and a variety of treatments from elimination, to conversion, to peaceful cooperation.

Crucially, moreover, this chapter has established that we cannot conceive of Latin Christendom as evolving in a splendid isolation, and relating to the rest of the world exclusively through war. It was impossible for Christendom to conceive of itself in that way. By its own nature, Christianity situated itself in relation to the rest of humanity, in a teleology of history that started with the biblical Hebrew peoples, identified Christians as the chosen group with the coming of Christ, and proceeded with the Christianisation of all the other peoples on earth, at which point the Second coming would occur. The relation with non-Christian peoples was inherent and necessary in this teleology of history. As a result, Othering processes and the relation with non-Christian communities were central to the construction of the Christian identity, and enabled the constant (re)definition of the orthodoxy that would lead to salvation.

Chapter 7. Ordering the international

We have so far seen both the categories that lawyers used to represent the medieval international and some instances of contestation over these categories, particularly surrounding the notion of the polity. This chapter turns its attention to a different type of contestation: that which surrounded specific international events and areas of practice. Indeed, as we have been noting throughout, the language and categories of medieval jurists not only constituted important representations of the medieval international, but actually effectively ordered it in a variety of cases and situations. Thus, this chapter examines two illustrative cases in order to show how the language and categories that we have examined ordered medieval international relations. The cases show both the centrality of this language as well the extent to which contestation within the language was possible and used.

The two cases have been chosen in order to show the diversity of situations, events, and areas of international practice that were ordered by jurists. Indeed, the first one – a dispute between HRE Henry VII, King Robert II of Anjou, and Pope Clement V is a specific event that concerns both the relation between temporal and spiritual power and the claims to universal power of both HRE and the Pope. Conversely, the second case has a much broader temporal spectrum: it concerns the regulation of trade in the Mediterranean and pays attention to both inter-religious dynamics and to relations between independent cities of relatively equal high standing. Through this variety, therefore, we are able to appreciate the fundamental ordering functions of *ius commune* categories in the late-medieval international.

1. Henry VII and Robert II of Anjou

The dispute between Holy Roman Emperor Henry VII and Robert II of Anjou is one of the most famous events of the later Middle Ages, constituting "the last imperial effort to assert in practice the universal overlordship of the emperor over kings and princes."[1] The facts surrounding the event as well as the vast political literature it produced have been thoroughly examined by medievalists and historians of political thought alike,[2] and it constitutes one of the few events that have trickled into the IR literature.[3] In this context, this dispute has been seen as the beginning or the crystallization of the norm of territorial sovereignty for some, as well as a limitation of the power of the Emperor.[4]

In May 1308, HRE Albert I was murdered by his nephew and thus the process for the election of a new emperor began. The central issue in this election was the role of the French king and more broadly the power of the Capetian dynasty within Europe. The power of the French king had been gradually expanding throughout the thirteenth century, and by the turn of the fourteenth he was undoubtedly the most powerful king in Western Europe, controlling a large network of patronage that extended over a vast territory. After the conflict with Pope Boniface VIII, and the temporary move of the Pope to Avignon – not in the French Kingdom at the time -, the king also enjoyed considerable leverage over the papacy.

Indeed, from the moment Albert was murdered, Philip IV of France manoeuvred to have his brother Charles of Valois elected as emperor. The election seemed stacked in his

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[1] Ullmann, "The development of the medieval idea of sovereignty", p. 1.
[2] Pennington, *The prince and the law*; Ryan, "Bartolus of Sassoferrato and Free Cities"; Ullmann, "The development of the medieval idea of sovereignty"; Canning, *The political thought of Baldus de Ubaldis*.
[3] Latham, *Theorizing medieval geopolitics*; Osiander, *Before the state*, p. 285 ff.
[4] This sections draws on the classic text on the events of this case: William M. Bowsky, *Henry VII in Italy: the conflict of empire and city-state, 1310-1313* (Westport, Conn: Greenwood Press, 1974).. This section also follows Peter Herde, "Chapter 16 (a) From Adolf of Nassau to Lewis of Bavaria, 1292-1347," in *The New Cambridge Medieval History, Volume 7, c.1300 - c.1415*, ed. Michael Jones (Cambridge: Cambridge University Press, 2000). and David Abulafia, "The Italian South," in *The New Cambridge Medieval History, Volume 7, c.1300 - c.1415*, ed. Michael Jones (Cambridge: Cambridge University Press, 2000).

favour: at least three of the electors had close connections to the French crown – the archbishops of Cologne and of Mainz had explicit alliances with the King, and the archbishop of Trier had also sworn an oath of allegiance to him. Pope Clement V and the electors, however, manoeuvred to avoid the Empire falling in Capetian hands, and in 1308 elected count Henry of Luxembourg, until then a fairly minor count raised at the French court and the older brother of the archbishop of Trier, as Emperor instead.

Emperor Henry VII was crowned King of the Romans in Aachen at the beginning of 1309. While previous emperors had most focused on German affairs and disputes, however, from the beginning Henry sought to look beyond these affairs onto other matters that concerned the Empire. First in his priorities was being crowned emperor, as no Emperor had been crowned by the Pope for almost a century, since Frederick II. He thus sent an embassy to Avignon in 1309 to negotiate his coronation with the Pope. Although he was successful in his negotiations, pope Clement V asked that the newly elected emperor take an oath to protect the Church, which he agreed to do. After setting the date for 1312, when the Pope was planning on being in Rome, Henry turned his attention to the politics of the Italian Peninsula.

For almost a century, the Italian peninsula had been ridden with conflict between two broad main factions.[5] The Guelphs were supporters of the Papacy and the French dynasty, while the Ghibellines were Imperial sympathisers. The rivalry played out in many different ways: for example, some cities and lords sided with one or the other – Florence most notably with the Guelphs, and Milan and Pisa with the Ghibellines -; in other cases, however, it was a conflict between social strata within one city – such as the case of Siena,

[5] Useful and classical monographs on this topic are Jacques Heers, *Parties and political life in the medieval West* (Amsterdam: North-Holland, 1977); Randolph Starn, *Contrary commonwealth: the theme of exile in medieval and Renaissance Italy* (Berkeley: University of California Press, 1982).

which had a Guelph people and Ghibelline nobility.[6] The conflicts between both factions had led to incredible political turmoil, whereby alternating factions in government kept forcing their opponents into exile.

In October 1310, Henry descended into Italy, on his way to be crowned Emperor in Rome, with an army of around 5000 men. Henry's policy at the beginning was one of attempting reconciliation and restoring the Empire as a project of peace. In many cities, he forced opposing factions to come together, allowing for the return of the ones in exile and the restoration of their property. Additionally, he appointed a series of imperial delegates or vicars, unto whom power was transferred in his absence. In this initial period of success, moreover, he was crowned King of Italy in Milan in January 1311. This acceptance, however, changed soon: the animosity between the different factions was too long standing to be able to be solved quickly, and Henry did not have the resources to make peace. Some cities, such as Brescia, started to oppose the new King: some were less receptive to the renewed imperial interest but refused to do anything more overt, while others were more opposed and for example refused to open the gates when he arrived. However, the legitimacy of the Emperor-to-be himself could hardly be challenged, as the Lombard Kingdom had long pertained to the Empire.

The only possible and real challenge could come from Robert II of Anjou, also known as Robert of Naples, who got to the throne in 1309. He was formally the King of Sicily and of Jerusalem, although the latter had been lost in the last years of the thirteenth century. Additionally, he only controlled the mainland part of the former, as the island of Sicily itself was under the rule of Frederick II of Aragon since the Sicilian vespers of 1282. He also ruled over a variety of territories in the northern Italian peninsula as well as in the county of Provence, within the territory of the Kingdom of Arles. As a result he was both a

[6] Watts, *The making of polities: Europe, 1300-1500*, p. 164.

Papal vassal, through the Kingdom of Sicily, and an imperial vassal, for the county of Provence. To further complicate matters, Robert was also the cousin of King Phillip IV of France.

At first, through the intervention of the Pope, there was an attempt at negotiating an alliance between both. Indeed, the proposal was that Henry's daughter Beatrice would marry Robert's son. As a dowry, moreover, they would get the Kingdom of Arles, one of the kingdoms of the Empire, and the one in which the papal see of Avignon was. However, while Henry was descending on to Rome to be crowned, Robert's brother John of Gravina's army, at Robert's request – who in turn was pressured by Philip-, occupied the city, and a civil conflict broke out. When Henry made it to Rome, the area around St Peter's, where he was supposed to be crowned, and particularly Castel Sant'Angelo, was occupied by John's troops. The Basilica of St John in Lateran however, was controlled by factions friendly to the emperor, and, considering there was precedent, he was crowned by cardinals there on the 29th of June 1312.

After this episode, Henry moved north and started several legal processes against rebels and enemies of the empire. He passed sentences against whole cities, villages, castles, sometimes including up to 500 people mentioned by name. Many of them, since they were for a crime of lese majesty, included the death penalty for all those involved. Eventually, he started a process against Robert for Treason. Having summoned him, Robert did not appear before the emperor, so Henry sentenced him to death and stripped him of his kingdom, which, we must remember, was a papal fief. In fulfilment of this sentence, moreover he tried to convince a series of rulers and nobles, among which Frederick II of Trinacria to invade the peninsular part of the Kingdom of Sicily.

This was the context for the controversy and the documents that conform this case. It concerned several issues: could Henry confiscate the Kingdom of a king that not only was

not his vassal but was a vassal of the pope? Could he do that without having properly summoned him? Could the pope impose a truth on the Emperor and a King? What were the obligations and relations of the Emperor vis-à-vis the Pope? Ultimately, this case raised a variety of questions about the difficult arrangement between the power, jurisdictions, and territories of the Pope, the Emperor, and other Kings.

The language of the dispute

Setting aside the military elements of the dispute, this case sparked a host of juridical documents: advisory opinions, tracts, papal bulls, and imperial sentences were all written by jurists using the concepts we have examined in the previous chapters. An analysis of these documents, moreover, reveals the flexibility within the rules of the legal language, as well as how the categories employed by the jurists could be put to very different ends. At the same time, however, the constant use of legal terminology highlights the central role of jurists and juridical language in the ordering and resolution of this dispute.

The proliferation of legal documents starts in 1312. Indeed, making clear the increasing tension between the Emperor and the Italian opposition – and particularly Robert II as leader of the Italian Guelphs, some jurists started to produce and send legal briefs to both rulers, trying to support their case. Johannes Branchazzolus, a jurist from Pavia, wrote an opinion for the Emperor, entitled "On the beginning and origin of the power of the Emperor and the Pope."[7] In it, mixing Roman Law with Aristotelian philosophy, he put forward most of the traditional claims for the supremacy of the Emperor: he was *dominus mundi*, and his power was obtained by divine mandate. Additionally, he went as far as

[7] The document is reproduced in Edmund E. Stengel, *Nova Alamanniae, Urkunden, Briefe und andere Quellen besonders zur deutschen Geschichte des 14. Jahrhunderts, vornehmlich aus den Sammlungen des trierer Notars und Offizials, Domdekans von Mainz Rudolf Losse aus Eisenach in der ständischen Landesbibliot* (Berlin: Weidmannsche Buchhandlung, 1921), pp. 44-52, part 1, no. 90.

denying the Pope's role in the coronation of the Emperor, which as we saw in chapter 5, had long been a staple of juristic discussions of the relation. Thus, he stated that

> "as he was crowned before the advent of Christ, so he is still crowned today, since Christ made no innovations concerning [imperial coronation]… Those who have the power to elect have the right to crown… and coronation by the Pope adds nothing substantially to the Emperor's power."[8]

In doing so, therefore, Johannes was making an extremely pro-imperial argument, which went against over one hundred years of canonical jurisprudence. Another treatise in favour of Henry surfaced in the Sicilian court of Frederick II.[9] Perhaps written by Johannes de Calvoruso,[10] the document considered two main issues of interest to us: whether the Pope could impose a truce on the Emperor, and whether the latter had jurisdiction over all Kings. Relying both on Roman and on Canon law, invoking both the *lex regia* and the language of the two swords, this jurist argued for a very strict separation between temporal and spiritual, and for the authority of the Emperor in the former.[11] Additionally, he also sought to counter the idea that the oath the Emperor swore to the pope upon his coronation was an oath of vassalage implying that the Pope was his superior. On the contrary, he argued, "it is an oath of devotion or reverence and humility," as taught by Christian discipline.[12]

The Emperor's side, therefore, put forward a variety of traditional arguments that highlighted the supremacy of the Emperor, some of which pushed the boundaries and

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[8] Johannes Branchazzolus, in ibid., p. 50. I am using Bowsky's translation of this passage in Bowsky, *Henry VII*, p. 185.
[9] Ludwig Weiland, Jakob Schalm, and Margarete Kühn, eds., *Monumenta Germaniae Historica. Legum Sectio IV. Constitutiones et acta Publica Imperatorum et Regum. Tomi IV. Pars II.* (Hannover: 1909-1911). [Henceforth MGH], number 1248.
[10] Pennington, *The prince and the law*, p. 172.
[11] MGH 1248. "Quia cum gladii potestas quid temporale sit et temporalia omnia sub ipsius Romani principis sint protectione ac dispositione divina, quadam providencia… Quod autem omnia temporalia sub ipsium tantum Romani principis dictione ac protectione consistant."
[12] MGH 1248. "Item adjuc instatur contra hoc idem alia ratione, quia imperator iurat pape, ergo est maior eo,… Set ad hoc est responsio prompta, quia illud non est sacramentum suiectionis seu vassallagii nec enim illius per omnia formam habet, sed est sacramentum devoctionis seu reverencie ac humilitatis, quam disciplina docuit christiana, et cuiusdam obsequii christianitatis."

altogether negated the role of the pope. After being crowned, Henry went back to Pisa, and pronounced several sentences against rebel towns and peoples. In addition to individual sentences, however, in March 1313 he felt the need to put forward two imperial decrees of general scope: *Ad reprimendum* and *Qui sint rebelles.*[13] The first one sought to clarify the crime of Lese Majesty. Using fairly strong language,[14] the decree proclaimed that the Emperor was responsible for the peace of the whole world, and that consequently all the souls in the world were subject to him.[15] Based on this, he further argued that he therefore had a right to judge everyone and that – and this would become key in the case of Robert – if people conspired against the Empire, this constituted treason and he could condemn them even if they failed to appear. In *Qui sint rebelles*, Henry once again clarified that anyone in Italy who acted or conspired against the emperor was to be considered a rebel, and could consequently be punished. These two decrees were subsequently incorporated in the Roman Law books, at the end of the *Authenticum*, thus enshrining these imperial claims to be taught and commented on at the schools. At the same time, moreover, these provided the basis for the condemnation *in absentia* of Robert of Naples, which was issued on the 26th of April of that year.[16]

Some time between 26th of April and 16th of May 1313, having condemned and expropriated Robert of Naples, Henry still wanted to act against a variety of other Italian opponents, most of which were commonly understood to be in the lands of the Church. The division between the lands of the Church and the lands of the Empire, as we have seen, was at the centre of this dispute. Knowing that what he intended to do was problematic, Henry asked one of his Imperial Judges, Milanzo for a *consilium* on whether

[13] MGH 929 and 931.
[14] Contra Osiander, *Before the state*, who notes that Henry was being quite tame in his approach.
[15] MGH 929. "Ad reprimenda multorum facinora, qui ruptis totius debite fidelitatis hanis adversus Romanum imperium, in cuius tranquillitate totius orbis regularitas requiescit… quod omnis anima Romano principi sit suiecta."
[16] MGH 946.

he could also condemn these cities.[17] In order to support the imperial claim, Milanzo put forward some juridically dubious arguments. Fist, he argued that given that Robert's sentence meant that he had lost all his property and territories, Bologna and the cities in the Romana now belonged to the emperor. The argument was based on the fact that despite these being lands of the Church, Robert had been exercising some power in these lands on the Church's behalf, and therefore the lands could be confiscated. As a result, he argued, they were no longer under the church and therefore if Henry were to pass a sentence condemning them this would not have been against the Church.[18]

Knowing that this argument was at best legally dubious – Bowsky indeed remarks that Milanzo must have known that the arguments were specious-[19] Milanzo put forward another argument that mimicked the arguments on prescription we have seen, but this time applied to the Church. Indeed, he claimed that although Bologna was formally in Church lands, the Bolognese had for some time been rebellious against it and had persistently refused any ruler appointed by the Church. Hence, the Church could not be said to actually hold any temporal rights [*ius temporale*] in the city. Since the emperor had been the one to give jurisdiction and *merum imperium* to the Church, and the church had after that lost it, the Emperor retained the rights over the city and as such was not acting against the Church.[20] Based on these arguments, however, on the 16 of May 1313 Henry proceeded to condemn a variety of commonly accepted papal territories.[21]

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[17] MGH 981.
[18] MGH 981. "Secunda ratio est quia civitas Bononie et civitates Romaniole et comunitates ipsarum terrarum per sententiam latam contra Robertum olim regem Sicilie sunt incorporati in fiscum imperii pro eo tempore, quo ipse Robertus pro Roman ecclesia dominari debebat in Romaniola et civitatibus antedictis. Si ergo illud ius deductum est per sententiam antedictam et incorporatum in fiscum imperii, satis ratinabiliter patet quod sententia contra comune Bononie et hominesac etiam comunitates et homines Romaniole proferenda non promulgabitur contra terras et homines ecclesie, set contra terras imperii et homines."
[19] Bowsky, *Henry VII*, p. 183.
[20] MGH 981. "Tertia ratio es quia comune et homines civitatis Bononie non optenperant Romane ecclesie, et secum in rebellione persistunt nec recipiunt rectores et comites ecclesie nec ei obtenperant nec obtenperaverunt iam sunt decem et octo anni et ultra. Si ergo ita est sicut est, ecclesia Romana non possidet vel quasi ius aliquod temporale in civitate predicta, quia ius dicit quod iurisditio et merum imperium que

Other jurists, however, sought to counter this expansion of imperial activity by challenging the position of the emperor himself. An anonymous *consilium* written for Robert II some time after the 26th of April 1313, that is, after Henry's sentence, did this, constituting a true demolition of imperial claims to authority. The specific prompt for the document is whether the emperor can rightly accuse and condemn someone for treason (*lesa maiestas*), as he had done with Robert. The anonymous jurist starts by specifying that despite the fact that the CIC is more vague, the crime of lese majesty is limited to three cases: conspiracy or acting against the Roman *res publica*, the Emperor, or against the senators. He first argues that "nowadays that republic of which the aforementioned laws speak no longer exists, but was rather dissolved, and therefore the aforementioned crime [lese majesty] cannot be committed against it."[22] Thus, the central argument relies on the notion of historical change and differentiation between the time when the laws were written and their contemporary time. The second argument is complemented with the idea that if it were to exist, it would not be in the hands of the Emperor but rather of the Pope. To do this, he mobilizes the idea of the Donation of Constantine: much like in the case of the *lex regia,* when all the power of the Roman people had been given to the Emperor, Constantine gave "the city of Rome, therefore the *res publica*, along with the…provinces, all the *regalia* and rights [*iuris*] to the Pope."[23] The consequence of this is that the

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donata fuerunt Romane ecclesie et postmodum confirmata in civitate Bononie per reges Romanorum ita demum retineatur, si possideatur. Verm si possessio iurisditionis perdatur per ecclesiam Romanam vel expelatur de possessione iurisditionis vel ecclesia Romana constituat ibi suum comited et ille non recipiatur per cives Bononie vel suplicetur se posse repelli de dicta civitate, statim ecclesia Romana perdidit ius quod primitus obtinebat. Si ergo ita est, non proceditur contra civitates ecclesie Romane."

[21] MGH 982.

[22] Fritz Kern, *Acta Imperii Angliae et Franciae ab a. 1267 ad a. 1313: Dokumente vornehmlich zur Geschichte auswärtigen beziehungen Deutschlands in ausländischen Archiven gesammelt und mit Unterstützung des Johan-Friedrich-Böhmer-Fonds herausgegeben von Fritz Kern* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1911), pp. 244-47, no. 95. "Constat hodie non esse rem publicam illa, de qua leges preicte locuntur, sed fore penitus addissolutam, unde nec contra ipsam committi potest crimen predictum."

[23] Ibid. "Sicut lege regia translata fuit omnis potestas in principem Romanum, ut Institu tit. De iure naturali c. Sed quod principi [Instit 1.2.6] et extra de translatis c. Cum ex eo [X.1.7.1], ita e provisione divina, que transfert regna et permittit principum potestates, sicut scribitu Eccl (i) X (8), translata fuit civitas Romana,

Emperor no longer has nor presides over the *res publica* and therefore cannot claim to sentence on its behalf or for its benefit.[24]

The argument could have certainly been left here. The author, however, decided to go into more detail of the implications of this argument for the current position of the emperor. Bringing once again the argument of temporal change to the fore, he argues that the status of men is not immutable, unlike that of angels. Consequently, the Emperor being a man, his status has changed since the time the laws were written.[25] Thus, as examples, he first points to the fact that the Emperor used to appoint the Pope, but that now it was no longer the case. After this, however, he proceeds to use the law itself to counter one of the crucial claims of the emperor: that he was *dominus mundi.* The anonymous jurist starts by explaining that before the emperor was lord over almost everyone, and thus he called himself *dominus mundi*, and makes particular emphasis on the idea of *almost*, as even the CIC has several mentions of peoples and enemies who were outside of the purview of the emperor. Nowadays, however, "it is obvious that lordship in the world is held by kings, and princes, and marquises, counts, and other barons and communities."[26]

Empirically, therefore, the anonymous jurist shows that the emperor is no longer lord of the world. Finally, however, he considers whether he should, and here he puts forward not one but two separate arguments that we have seen were current at the time. First, much like we say in Oldratus and in some of the Neapolitan jurists, he argues that the empire

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res tunc publica, cum predictis provinciis, omnibus regalibus, iuribus in Romanum pontificem, ut predictum est."

[24] Ibid. "Quo sequitur, quod, cum ipse rem publicam hon habeat [imperator], ut presit eidem, ut premissio est, nihil ea ratione sibi potest quomodolibet vendicare, quia loci, qui non existit, non potest interesse extimary, ut D. De act empt l.III [D.19.1.4]."

[25] "Cum status non sit immutabilis in hominibus, sicut in angelis, quia hominum et urbium continue facta solvuntur et nihil in humana conditione consistit, quod mutationem non sentiat…. Clarepotest conspici. Quod alius fuit status dignitatis et auctoritatis imperatoris secundum priora tempora et antiqua, quibus predicte leges antique fuerunt tradite et alia plura scripta tam autentica quam apocrifa, quam sit hodie."

[26] "Sed hodie satis est apertum videre, quod dominium habet in mundo tot regibus et principibus, tot marchionibus, tot comitibus et aliis baronibus et comunitatibus per universum orbem in suis dignitatibus et regiminibus constitutis dominia et iura earundem dignitatum suarum habentibus et possidentibus per se ipsos."

was created by force, and thus that it can also be reduced by force. The transcendental interpretation of the Empire and its place in Christian history is therefore lost to this jurist. Second, however, he considers the problematic issue of prescription, arguing that "to the extent that someone has power [*potestatem*] or jurisdiction [*iurisdictionem*] *de iure*, and is not in possession of that power or jurisdiction and has never exercised it, but that or those who are in possession of this same power or jurisdiction, especially since king and princes and other corporations [*universitates*] of the world have been in such possession for so long" the latter should be able to have a right to it through prescription. As an argument for prescription, however, it is not well developed and seems rather an afterthought. Indeed, as we saw, a fully-articulated right of prescription was not developed until some decades later by Bartolus.

This is just a small overview of the abundant legal literature and polemic that this controversy provoked, particularly on the issue of the power of the Emperor. In the middle of these struggles, during the prolonged siege of Siena, Henry VII contracted malaria and died on the 24th of August 1313,[27] thus putting an end to these polemics.

Canon Law and the Pope's response

So far, however, we have only examined the legal disputes between Henry and Robert. As we indicated above, however, the issue also concerned the Pope, not only because of the close relation between him and the Emperor, but also insofar as the Pope was the overlord to many of the cities and territories confiscated by Henry, including the Kingdom of Sicily itself. Indeed, even after Henry's death, however, Clement felt compelled to respond to the claims in *Ad reprimandum* and *Qui sint rebelles*. In March 1314 he issued two key

[27] Bowsky, *Henry VII*, p. 202.

decretals addressing the issue: *Romani principes* and *Pastoralis cura*.[28] The first one addresses the issue of oaths, which we have seen was a central issue of both the imperial constitutions themselves and the jurisprudential literature that surrounded these events. The second one constitutes a direct reply to *Ad reprimandum*, addressing the issue of summons across territories.

However, not only do we have the papal bulls themselves, but also several documents and advisory opinions that must have been written in Avignon at the request of the Pope in order to prepare his response. Several of these documents were written by Oldratus de Ponte, a canonist whom we already encountered in previous chapters. Thus, for example, he composed a *consilium* in which he answered several questions in relation to the dispute, and which then formed the basis for Clement's *Pastoralis cura*.

As in the case in many documents in this dispute, a fairly substantial part of *consilium* 43 is devoted to a discussion of procedural matters and citations in trials. For the purposes of this thesis we will leave the specifics aside, although as Pennington has noted the consolidation of a notion of due process was perhaps the most important and lasting contribution of this dispute.[29] Two aspects of these extended discussions of procedural issues, however, are directly relevant for the argument and analysis of the late-medieval order we have been conducting. First, and most crucially, the centrality of judicial procedure highlights once again the central place of jurisdiction and judicial ideas in the ordering of the medieval international. Indeed, the whole dispute between rulers and their relation concerns precisely whether and under what conditions one can judge the other, what crimes can be committed, and what penalties can be justly imposed. Second, as we saw in chapter 4, the discussion once again shows the extent to which the discussions on

[28] These were later incorporated into the Clementines, as Clem 2.9.1 and Clem 2.11.2 respectively.
[29] Pennington, *The prince and the law*.

the power of the prince and its limitations are relevant. Indeed, a central part of Oldratus' argument is that the right to defend oneself comes from Natural Law, and consequently the prince cannot take it away – or, specifically in the case that concerns us, that the way in which the summons to Robert were issued and the way in which he was subsequently sentence violate his natural rights and are therefore not valid.[30]

After dealing with procedural matters, the last two questions in Oldratus' *consilium* concern more directly the relation between the Emperor and the King. Indeed the sixth question asks "whether a king who is a vassal of the empire on account of certain things but who does not have his residence within the bounds of the empire can commit a crime of *laesa maiestatis* against the emperor," while the last one considered whether this could happen even before the oath of fidelity was made.[31] The questions therefore go to the heart of the understanding of the structure of the medieval international order: the crime of *laesa maiestas* could only be committed against the Emperor, and was a sign of supremacy and of the role of the Emperor in fostering the common good. If the king could indeed commit this crime, and even more if he could do so without any explicit bond of fidelity tying him to the Emperor, the position of the latter would be upheld.

The wording of the question, in addition to the site of the *consilium*, already gives us an indication of the direction of the answers. For while we have repeatedly seen that the claim to be *dominus mundi* was central in the position of the emperor, the very question at least implies that the lands of the Empire are somehow territorially limited – we will see later how this could be argued juridically – and thus that one can have their habitual residence outside of it. Oldratus' argument, however, focuses on the relative position of both rulers,

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[30] Oldradus de Ponte, *Consilia*., number 43. "Et cum Princeps hac non praecedente iudicat, substrahit huiusmodi defensionem iure naturae concessam."
[31] Ibid., number 43. " Utrum rex vassallus imperii pro certis rebus non habens infra districtum imperialem domicilium potuerit commitere crimen laesae maiestatis contra imperatorem."

denying through a variety of means the subordination of the king to the Emperor. He first argues that *maiestas* comes from *maior* (greater), and that it denotes a greater power. Since the emperor was not greater than the King as he held no power over him, he could not commit the crime. How about, however, the relation of vassalage between both? In this case Oldratus argues that vassalage is nothing other than a contract, and that it does not confer *merum imperium* on the Emperor. Thus, he affirms, "if he doesn't have *merum imperium* he is not under his power."[32]

He then reaffirms this position by comparing the situation of the King to that of the *hostis*, the external enemies of the Roman republic, which find their own regulation in Roman law. With regards to these, he affirms that:

> "And this can also be seen in the enemy [hoste], who defying the Prince, or waging war against him, is not said to have committed a crime of lese majesty. Therefore, to speak properly, one is said to commit a crime of lese majesty if he who is subject to the jurisdiction [iurisdictioni] and power [potestati] of the empire, actually removing himself from obedience, takes up the position of an enemy [hostis] and establishes himself as an adversary to his lord."[33]

The equation of King and *hostis* therefore establishes the point that the King is not subject to the Emperor – that is, is not under his jurisdiction - and as such he cannot commit the crime of which the Emperor accused him.

This was by no means the only professional *consilium* ordered at the Papal court in preparation for the Pope's response to Henry's claims. On the contrary, a variety of legal documents recording professional opinions about specific questions of the case have been

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[32] The whole passage reads: "Circa sextam quaestionem attendendum est, quod maiestas dicitur quasi maior stans, sive maior potestas, arguendo ergo a ratione nominis…. Et ibi notatur non committitur crimen laesa maiestatis, nisi cum laeditur maior potestas: oportet ergo quod sit maior potesta, sed ic nulla est potestas in laesi respect laedentis loquendo de potestate, pro ut accipit…. Et si dicatu feudum ab eo tenere. Respond hoc non dat dominio imperium in vassallum. Est enim quidam contractus in quo quis alteri obligatur, …. Non autem imperium conceditu, u… Si nn habet merum imperium non est sub potestate sua: sic enim laedendo non dicitu laedere maiorem potestatem, quia nec potestatem." Ibid., number 43.

[33] Ibid., number 43. "Et hoc est etiam videre in hoste, qui committens in Principem, sive ei bellum indiccens non dicitur committere crime laesae maiestatis… Ille ergo proprie dicitur crimen laesae maiestatis committere qui iurisdictioni et potestati imperii suppositus ab obedientia se realiter subtrahens hostis animum assumit et se domino suo adversarium parat."

preserved and thus provide an excellent view of contemporary thought at the Papal curia.[34] A brief compilation of documents from that period, for example, contains three separate advisory opinions, recording the deliberations held at the time, in addition to a copy of the oath undertaken by the emperor.[35]

These served as the basis for the two papal decretals mentioned above. In them, drawing heavily on the reasoning of all these preparatory documents, sought to re-state and clarify the position of the Emperor, his relation to the Pope, as well as the ability of the Emperor to act in the lands of the Church. In *Romani Principes,* thus, the Pope countered the idea that the oath that the Emperor made was merely of reverence and devotion, as we saw above that the imperial lawyers claimed. On the contrary, drawing heavily on the juridical advisory opinions, he argued that the oath was and had indeed always been of fealty, thus signifying the superior position of the Pope.[36]

In *Pastoralis cura*, he heavily drew on the *consilium* by Oldratus that we have seen above, and argued that the sentence by the Emperor was not valid, since the King of Sicily was notoriously at the time outside the territory of the Empire [*extra districtu imperii*], and thus could not have been cited or forced to appear.[37] In doing so, therefore, he was tacitly establishing that the claims of the Emperor to be *dominus mundi*, were not valid, as his jurisdiction did not extend everywhere. Thus, Clement annulled Henry's sentence on Robert making use of some of the core concepts we have seen governed Papal authority:

> "as much from the superiority which there can be no doubt that we have over the Emperor, as from the power by which we succeed to an Emperor *vacante*

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[34] See Paul Gachon, *Étude sur le manuscrit G. 1036 des archives départementales de la Lozère, pièces relatives au débat du pape Clément V avec l'empereur Henri VII* (Montpellier: J. Martel Ainé, 1894). and appendix VII in MGH.
[35] MGH 1249-1251.
[36] Clem. 2.9.1, *Romani principes*.
[37] Clem. 2.11.2, *Pastoralis cura* "Regem extra districtum imperii in regno scilicet Sicilie notorie ac continue tempore supradicto morantem citare non potuit Imperator"

imperio, and not less from that plenitude of power which Christ… conceded to us."[38]

The effects of the dispute: subsequent commentaries

The importance of the dispute, however, goes beyond the mere events of the 1310s. Indeed, the inclusion of the relevant documents in both canonical and civilian collections meant that they served as the basis for discussion and training of successive generations of lawyers, and as such, their ordering effects were much more lasting in time. An examination of some of these commentaries, moreover, not only serves to see this ordering, but also to qualify some of the claims that have been made about the significance of the dispute.

While *Pastoralis cura* and the other Papal documents were actively commented on by many canonists, civilians did not repeatedly comment on the imperial constitutions. Bartolus of Saxoferrato produced the single most important comment on *Ad reprimendum*, which was subsequently included in many editions of the CIC and extensively cited.[39] Among other issues raised by the constitution, Bartolus addressed the core matter of whether the emperor was indeed Lord of the World, that is, whether he could rightly summon Robert II of Naples as his subject.[40] The legal prompt for this was, as we saw, the

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[38] Cited in Bowsky, *Henry VII*, p. 192.

[39] Bartolus de Saxoferrato *Tractatus super constitutioni extravaganti, Ad reprimendum* in Bartolus a Saxoferrato, *Super authenticis et institutiones* (Lyon, 1581).

[40] Bartolus, *Ad reprimendum* v. Totius orbis. The entire text of the section is as follows: "Totius orbis. Contra: quia maior pars mundi non obedit Principi. Sol. Illud de facto, sed de iure secus. Simile habemus de Daniele 2. C. ubi de Nabuchodonosor rege, qui tunc era universalis imperator, sic ait: "Tu rex regum es, et Deus coeli regnum, fortitudinem, gloriam, et Imperium dedit tibi, et omnia, in quibus habitarent filii hominum, et bestiae agri, volueres quoque, coeli dedit in manu tua, et sub ditione tua universa constituit" [Daniel 2:37-38] Quod intelligendum est de iure: quia de facto non obedierunt sibi omnia, ut legitur in chronicis, ut in d.c.ii per gl. Item contra quia in terris ecclesie nullam habet iurisdictionem, ut in ca. pastoralis. Ex. De re iudi. In cle. Solutio: Ecclesia habet ex donatione Principis etiam eius qui hanc legem condidit, u in ca j. ex. De iureiur. In clem. Unde ipse princeps habere videtur uv l. j. $ omnia n. C. de vet. Iur. Enuncleam?. Vel licet alicuius particulare dominium non sit suum, tamen verum est hic quod hic dicitur. Sicut dicitur dominus gregis, et si unum pecus non sit suum, et ff. e rei vind. L ii. & iii. Et per hoc patet quod Imperator recte dicitur dominus mundi, scilicet, universalis, licet singulares sint domini prediorum(?) suorum. Unde a possessoribus ipse posset vindicare mundum, et l. bene a Zenone. C. de quadrien. Prescrip. & ff. ad legem Rhodia de iactu. L. deprecatio. Nec est opus ut dicames quod omnia sint sua quo ad protectionem, & c. ut no. in j consti. Digestorum in prin. Quia immo omnia sunt ipsius, si universaliter

epithet in D.14.2.9 that said that the emperor was "lord of the world" (*dominus mundi*)[41] as well as the canonical development on the subject.

Bartolus considered first whether the emperor did indeed have a responsibility over the entire world. He noted that against this was the fact that the vast majority of the world did not actually obey him. The *de iure/de facto* distinction, and some biblical quotes, however, were enough for him to justify this. Indeed, after noting that even if de facto this was not the case, *de iure* it followed, Bartolus quoted from the book of Daniel, particularly from Daniel's interpretation of Nabucchadnezzar's dream as implying he rules over all humans and animals. However, Bartolus notes, Nabucchadnezzar did only rule *de iure*, as de facto not everyone obeyed him.

Having quite easily, and traditionally, dealt with this issue, Bartolus moved on to consider the rather thornier argument of whether there were lands of the Church that were not under the jurisdiction of the Emperor. Regarding this, he made not one but two separate (and mutually contradictory) legal arguments, which has led scholars to consider his reasoning

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consideretur. Vel tertio inhaerendo opinioni sanctae matris ecclesiae. Primo fuit Imperium Bablylonis. Secundo fuit Imperium Persarum et Medorum. Tertio fuit Imperium Graecorum. Quarto fuit Imperium Romanorum. Ultimo adventiente Christo, istud Romanorum Imperium incepit esse Christi Imperium, et immo apud Christi vicarium est uterque gladius, scilicet spiritualis et temporalis. Christus enim est lapis abscissus sine manibus cuius regnum non dissipabitur, de quo prohetavit Daniel in D. c. 2, ubi haec omnia imperia describuntur expresse. Dic ergo quod ante Christum Imperium Romanorum dependebat ab eo solo, et imperator recte dicebat qod dominus mundi esset, et quod omnia sua sunt. Post Christum vero Imperium est apud Christum et eius vicarium, et tranfertur per Papam in principem secularem, ut extra. De elect. Ca. venerabilem. Unde si dicimus, omnia sunt Imperii Romani, quia nunc est Christi, verum est si referamus ad persona Christi. Si vero referamus ad personam Imperatoris secularis, non priprie dicitur quod omnia sunt illius, vel sub ei iurisdictione, quia non sunt terrae ecclesiae. Illas enim sibi reservat Papa, in quo principaliter est imperium. In hac ergo constitutione si se retulit ad Iperium, vel si se retulit ad personam suam loquutus est caut. Non enim dicit quod totius orbis iurisditio sit sua, sed quod totius orbis regularitas in eo requiescat. Nam et terras ecclesiae ipse habet certo modo regulare scilicet defendendo eas, et servando in devotione ecclesiae, ut iuravit in d.ca. j. extra. De re iu. In cle. Et hoc pro nunc transitorie dico, quoniam opus per se requereret quae dico, quare sic credo tenere ecclesiam, sic credo Imperatorem sentire, et si male hoc vel aliud intelleferem, sum paratus me corrigere."

[41] The original text of D.14.2.9 is in Greek, the epithet being Εγώ μεν του κόσμου κυρίος, "I am indeed lord of the world". Some modern latin editions use "Ego orbis terrarum dominus sum" ("I am the lord of the lands of earth), while medieval and early modern editions most frequently translate as "Ego quidem mundi dominus."

"plainly a mess."[42] First, he argued that the Church had those lands by virtue of a grant of the Emperor himself, who by the Donation of Constantine transferred the Empire to Pope Sylvester. We have already seen in the previous chapter the conceptual problems that the Donation posed for lawyers, particularly given the difficulties of alienation.

The second argument is a variation of the first. In it, Bartolus goes once again back to the philosophy of history enshrined in the medieval exegesis of the book of Daniel and once again recounts the succession of the four empires in history: Babylonian, Persian, Greek and Roman. Drawing from canon law, and in an argument similar both to that which Hostiensis put forward in the case of the rights of Infidels and to that of Oldratus on Kingdoms, he argues that the incarnation of Christ changed the Roman empire, as Christ himself was the proverbial stone that demolishes the statue in Nabucchadnezzar's dreams. Christ was therefore the legitimate holder of the last empire, the one that was to last indefinitely until the Apocalypse, and the Pope, as the Vicar of Christ on Earth – he indeed uses the expression *Vicarius Christi*- is the legitimate holder of that empire, of both the secular and the spiritual swords. The empire in this sense is transferred by the Pope to the Emperor, and the lands of St Peter are the part that the Pope reserves for itself. As has been noted, in this argument therefore, "the empire constitutes but the exception to the universal Christly *dominium* exercised by the Pope."[43]

We can therefore see that while it is true that the controversy between Henry VII and Robert of Naples established that the Empire was somewhat territorially limited, concluding that "the Empire was a geographically limited state, that the Emperor possessed sovereign authority only within that state, and that states beyond the Empire were sovereign in law and without reference to the (non-existent) universal jurisdiction of

[42] Ryan, "Bartolus of Sassoferrato and Free Cities", p. 76.
[43] Ibid.

the Empire"[44] seems too much of a stretch. Lawyers, especially based on Roman Law, had to go to great pains to legally justify this, and in any case, the most successful argument depended on a highly hierocratic view that basically substituted the universal position of the Emperor with that of the Pope in both temporal and spiritual affairs.

2. Ordering Trade in the Medieval Mediterranean

The second case that we will here examine concerns the ordering of trade in the Medieval Mediterranean. Throughout the Middle Ages, the Mediterranean was the site of intense and repeated contacts between different peoples of various religions, of conflict as well as cooperation, and of intense cultural, technological, and commercial exchange. This is so to the point that since at least Braudel's publication of *La Mediterranée et le monde* in 1966, Mediterranean studies have been a consistent and growing research programme within History.

Paramount within these are the various and intense trade networks that connected Latin Christian, Muslim, and Byzantine polities, as well as the Far East.[45] Indeed, the Mediterranean constituted the main centre for international trade at the time. This was particularly so at the time of our study, when the so-called Commercial Revolution of the Middle Ages was well under-way.[46] Indeed, although the concept itself, its timing, and pace remain debated in historiography, around the early twelfth century there was "an agricultural and demographic expansion that led to a dramatic increase in trade volumes, resulting in profound, irreversible, and long-lasting structural changes in the economy and

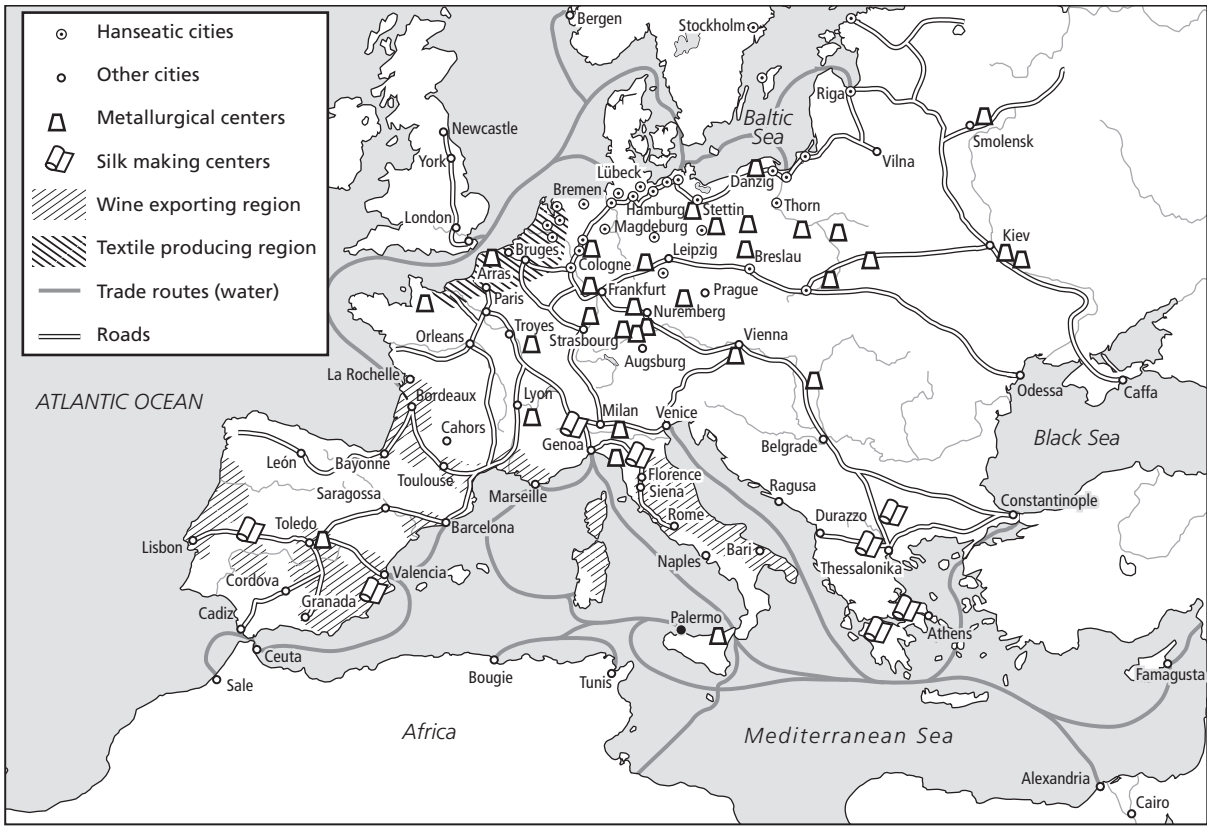
[44] Latham, *Theorizing medieval geopolitics*, p. 74.
[45] A good short introductory text to this topic is Michael Balard, "European and Mediterranean trade networks," in *The Cambridge World History, Vol. 5: Expanding webs of exchange and conflict, 500CE-1500CE*, ed. Benjamin Kedar and Merry Wiesner-Hanks (Cambridge: Cambridge University Press, 2015).. For further focus on the non-Christian past of trade see David Abulafia, "Asia, Africa and the Trade of Medieval Europe. Vol. 2. Trade and industry in the Middle Ages," in *The Cambridge Economic History of Europe from the Decline of the Roman Empire*, ed. Edward Miller, Cynthia Postan, and M. M. Postan (Cambridge: Cambridge University Press, 1987).
[46] Robert S. Lopez, *The commercial revolution of the Middle Ages, 950-1350* (Cambridge: Cambridge University Press, 1976).

society of Latin Europe."[47] In the Mediterranean, merchants and cities of the northern Italian Peninsula, and of the Catalan coast took a prominent role in this expansion of trade, not only establishing vast networks, but also establishing various outposts across the Mediterranean. This was only facilitated by the Crusades, which after the late eleventh century saw the creation of Christian polities in the Near East, which greatly depended from their relations with particularly Italian merchants.

All types of commodities were traded through these networks.[48] While the spice trade occupies a special place in the historical imagination about the period, a variety of other products, including food products, were traded. Thus, for example, grain, wine, and sugar were regularly traded across the Mediterranean, providing sustenance to the growing urban population of some coastal cities. Raw materials were also particularly important. Wood, for example, was necessary for construction throughout the region, but was extremely scarce in the south and eastern Mediterranean, and thus had to be imported from Western Europe. Additionally, manufactured products such as textile or weapons also occupied a central role in trade.

[47] Stefan K. Stantchev, *Spiritual rationality: papal embargo as cultural practice* (Oxford: Oxford University Press, 2014), p. 30.
[48] I follow Balard, "European and Mediterranean trade networks", p. 282.

Figure 7.1 European and Mediterranean trade in the thirteenth century[49]



With very few exceptions,[50] however, these intense and productive trade networks, and the multiple treaties and instances of cooperation between rulers to which they gave rise, have been overlooked by IR scholars. An examination of the legal regulation of this trade, however, reveals the ordering role of law and juridical concepts, at the same time that reinforces the malleability of these categories for different political purposes and in different contexts. This final section will examine two separate sets of documents relating to trade. First, from a canon law perspective, it will look at papal attempts at regulating this trade. In doing so, we can see in application the boundary-making effects of certain

[49] Ibid., p. 278.
[50] Hobson, *The Eastern*; Buzan and Little, *International systems in world history*; Teschke, *The myth of 1648*, p. 96.

categories and practices, in line with what we saw in the previous chapter. Moreover, a brief examination of the contexts in which some of these bans were lifted does nothing but reinforce the contested nature of the boundaries of the late-medieval international order.

However, it is not only in the contacts between Christians and non-Christians that trade became relevant. On the contrary, considering the vast amount of merchants and Christian trading cities involved, disputes between these were extremely common. Thus, the second set of documents concerns trading disputes between Christian polities, more specifically Genoa and Venice. Through an analysis of the legal reasoning of a *consilium* written specifically for this case, we will be able to see how the legal categories were applied in defence of the Genoese, as well as how the entire political order of the *ius commune* was mobilized in the case of a relatively minor dispute between two trading cities.

Papal regulation of trade in the Mediterranean

While some level of trade in the Mediterranean had continuously occurred since the fall of the Western Roman Empire, attempts to regulate it by the Pope only started occurring in the second half of the twelfth century, when, as we have seen, the volume of trade significantly increased.[51] The first document regulating this matter was the canon *Ita quorundam* of the Third Lateran Council, under Pope Alexander III. The canon stated:

> "Cruel avarice has so seized the hearts of some that though they glory in the name of Christians they carry arms, iron, and timber for galleys to Saracens, and become their equals or even their superiors in wickedness and supply them with arms and necessaries to attack Christians. (…) Therefore we declare that

[51] David Abulafia, "The role of trade in Muslim-Christian contact during the Middle Ages," in *The Arab influence in Medieval Europe*, ed. D Agius and R. Hitchcock (Reading, Beirut: Folia Scolastica Mediterranea, 1994). For a detailed evolution of Papal regulation of trade, from which I draw heavily in this section, see Stantchev, *Spiritual rationality*, p. 41 ff. See also Sophia Menache, "Papal Attempts at a Commercial Boycott of the Muslims in the Crusader Period," *Journal of Ecclesiastical History* Vol. 63, No. 2 (2012).

> such persons should be cut off from the communion of the church and be excommunicated for their wickedness."[52]

With this, the Church began to attempt to regulate trade between Christians and non-Christians in a context in which the relations between polities of both faiths in the Near East was particularly complicated. This first canon was fairly restricted in its scope: it merely banned the trade of raw materials and products that could be used to wage war against Christians.

In 1187/88, however, this prohibition was extended. Indeed, a letter of Pope Clement II to the Genovese, starting with the words *Quod olim*, banned all trade with Muslim polities "as long as the war between us and them will last."[53] In this sense, an important aspect that must be noted – and that became even more relevant with subsequent legislation -is that Papal regulation of trade did not conform to a single pattern. On the contrary, much like we saw with the canonical consideration of the possibility of peace in chapter 6, it differentiated between two states of relations between Christians and Muslims: war and peace. In times of war, conforming to the expectations of existential threat and opposition, all trade was prohibited, while in times of peace it was only the exchange of war materials that was banned. Thus, at a very basic level, and mirroring the ideas in canon law that we examined earlier, papal trade policy contemplated the possibility of peace with Muslims, as well as at least acknowledged the presence of commercial exchange.

These prohibitions were re-issued regularly from the thirteenth century onwards. Thus, in the canon 71 of the Fourth Lateran Council of 1215, which called the Fifth crusade, the same prohibitions were restated, this time adding that no counsel or aid could be provided, as well as the possibility of being accepted back in the flock by spending all the profits

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[52] Canon 24, Third Lateran Council, cited and translated in Stantchev, *Spiritual rationality*, p. 45.
[53] X 5.6.12, translated in ibid., p. 50.

from illegal trade on fostering the recovery of the Holy Land.[54] Additionally, from the end of the thirteenth century, the prohibition of trade was regularly included in the yearly Holy Thursday Bull, which was a Papal bull excommunicating a variety of sinners and condemning various behaviours.[55]

The effectiveness of this regulation of trade, particularly once we consider the frequent granting of exemptions that we will se below, has been at the centre of historiographical debate. Indeed, many have seen it as an ineffective policy, sign of the "weakness of its promoters, who did not succeed in obtaining broad public support for their policy", and as "another facet of the decline in papal leadership."[56] However, as has been recently argued by Stantchev, assessing the impact of this policy, and interpreting its significance, need not rely on the extent to which inter-religious trade effectively stopped during the embargoes. Rather, this policy can also be seen as an ordering move, as an exercise in boundary-making aimed at "demarcating religious space by identifying a zone of hope and zone of the damned,"[57] and in doing so, reinforce the role of the pope as the head of all Christians.

One specific document highlights both the ordering function of papal and council legislation, as well as the extent to which this reinforced the role of the Papacy in the governing of Christians: the *Responsiones ad dubitabilia circa communicationem christianorum cum sarracenis*, or the 'Responses to questions concerning the relations between Christians and Saracens'.[58] Issued on the 19th of January 1235, and written by jurist Raymon de Penyafort on behalf of Pope Gregory IX, the document are the official papal responses to a battery of forty questions sent by friars living in Tunis, regarding how

[54] Canon 71, *Ad liberandam,* edited in García y García, *Constitutiones*.
[55] For further clarity, see a summary figure in Stantchev, *Spiritual rationality*, p. 71.
[56] Menache, "Papal attempts at a commercial boycott", p. 258.
[57] Stantchev, *Spiritual rationality*, p. 116.
[58] A critical edition of the five remaining copies of this document, with translations into French and English is available in John Tolan, "Ramon de Penyafort's *Responses to questions concerning relations between Christians and Saracens*: critical edition and translation," (2012), http://halshs.archives-ouvertes.fr/hal-00761257/ [Accessed 20/01/2016]. I follow his edition and translation.

the broad rules that both Pope and Councils had issued applied to specific situations they confronted every day. At least fifteen of the forty questions in particular, concern inter-religious trade.[59]

Thus, for example, concerning the trading of food supplies, Ramon the Penyafort upholds the distinction between peacetime and wartime, adding that excommunication only applies if food is sold to "in wartime and… to Sarracens who are fighting Christians."[60] There was also confusion regarding what exactly was included under the broad categories of 'iron' or 'weapons' that were mentioned in the official canon. Thus, the friars asked whether this included "spurs, bits, and saddles", which were indeed banned, but also about "tiny knives and minuscule nails", or about the transportation of weapons, foodstuff and armed men from one Muslim land to another.[61]

This gives us an insight into the extent to which Church legislation affected the lives of not only Christians living in Western Europe, but also of Christian minorities in other parts of the Mediterranean, and thus emphasizes first of all the extent to which the ordering nature of canon law in particular was not necessarily based on territory but rather on membership of a non-territorial community. Moreover, and crucially, it shows how the attempts to order medieval trade reinforced the governing role of the papacy, insofar as it became not only a key focal point for legislation, but also for the resolution of doubts. In doing so, therefore, we can see a practical example of what we saw Stantchev call the 'spiritual rationality' of the embargo: its ordering role in producing a Christian community.[62] Thus, question 39 and its answer are particularly revealing in this sense:

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[59] These are questions 1-5, 23-27, 29, 33-35, and 37.
[60] Tolan, "Ramon de Penyafort". p. 18.
[61] This refers to questions 2, 27, and 23-26, respectively.
[62] Stantchev, *Spiritual rationality*.

> "39. Also, how should we understand that which is said about Saracens at war with Christians: does it mean with one king or city, or with the Church, or how should it be understood?
>
> We respond: with any Christian."[63]

The papal regulation of inter-religious trade, therefore, can be seen as an ordering move aimed at the creation and reproduction of a Christian polity, governed by the Pope.

At the same time, however, this document also emphasizes that papal policy was willing to consider the specificity of a variety of cases, and through this, open the door to exceptions to the general rules. Indeed, not only did Papal policy itself, as outlined above, recognize the possibility of inter-religious trade, but if we examine the practical application of this policy we can see the extent to which practice embraced contradictory priorities. Despite the prohibitions, and much like in any other general rule of canon law, there existed the possibility of obtaining a papal dispensation that granted the ability of trading banned goods at certain times. Not only this, but these dispensations were regularly sought by a variety of individuals and polities throughout Christendom and correspondingly granted by the pope. A cursory examination of two of the motives and contexts in which these licenses were granted reveals a much more pragmatic approach to the issue of inter-religious relations.

First, inter-religious trade was crucial to the economies of many Christian polities and regions, and even Popes were willing to recognize this and grant the corresponding licenses. In some cases this was a result of exceptional circumstances. In 1347, for example, a trading license was granted to Greek and Genoese merchants to import grain from Turkish lands in order to assuage the famine that their region was suffering.[64] In other cases, however, the licenses granted had a much more general nature. Soon after the

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[63] Tolan, "Ramon de Penyafort". p. 23.
[64] Mike Carr, "Crossing boundaries in the Mediterranean: papal trade licences from the Registra supplicationum of Pope Clement VI (1342–52)," *Journal of Medieval History* Vol. 41, No. 1 (2014), pp. 119, and doc. 21 in the appendix.

proclamation of the embargo by the Third Lateran Council, pope Innocent III granted an extensive trading license to Venice. The argument of the Venetians, which the pope accepted, was that their city lived of ships and trade, and not agriculture, and that consequently a trade ban would disproportionately hurt them.[65] Similarly, after this first instance, Popes granted many licences in a variety of frontier societies such as the Iberian Peninsula, under the argument that the local peoples could not make a living without trading with Muslims.[66] These cases therefore reveal first of all the extent to which many Christian peoples were increasingly dependent on their trade and commercial exchanges with non-Christians. Second, and crucially, the issuing of licences, and the development of the doctrine of 'necessity' (*necessitas*) around these circumstances,[67] shows the extent to which even Papal policy acknowledged and was mindful of this reality, and consequently operated with a variety of priorities beyond the 'destruction of the Other' highlighted by IR scholars.

Second, in other cases we see trading licenses differentiating among different groups of Muslims, and allowing trade with specific polities as a means of defeating others that posed a higher risk to Christian lands. Indeed, with the increasing threat of the Turks from the fourteenth century onwards, some papal licenses started to differentiate between them and Mamluk Egypt. Thus, a 1343 license to trade with Egypt specified that some of the proceedings were to be spent in subsidizing the fight against the Turks, and a variety of other licenses explicitly prohibited trade with the Turks, while allowing it with other Muslim polities.[68] Interestingly in this case, and contrary to what we saw in doctrinal discussions of canon law, Papal policy differentiated between several Muslim

[65] Stantchev, *Spiritual rationality*, p. 56-57.
[66] Ibid., p. 61-62.
[67] See Stefan K. Stantchev, "Embargo: the origins of an idea and the implications of a policy in Europe and the Mediterranean, ca. 1100 - ca. 1500" (University of Michigan, 2009); Stantchev, *Spiritual rationality*.
[68] Carr, "Crossing boundaries", p. 116.

communities and, while still subordinated to the overall idea of the defence of Christendom, embraced the possibility that cooperation with some non-Christians may benefit the pursuit of those higher objectives. In the Papal regulation of inter-religious trade in the Mediterranean we can therefore appreciate both the ordering role of the legal categories that have been examined in this thesis, as well as the ambivalence and room for contestation within legal discourse and practice.

Trade disputes between Italian cities

The ordering of trade, moreover, was not limited to the relations between Christians and non-Christians. On the contrary, many of the Christian commercial polities competed amongst themselves for markets and had frequent disputes. An examination of some of these disputes illuminates the extent to which the legal categories and ways of thinking that we have examined so far were central in ordering medieval international relations.

The case in question concerns the relations between Genoa and Venice after the 1381 Peace of Turin.[69] Since the mid-thirteenth century, the relations between both cities had been tense and frequently turned into war. Indeed, as two of the main maritime powers competed for access to several regions in the Eastern Mediterranean. In 1378, the Fourth war between both powers since 1256 broke out. In this specific case, the contentious issue was the control of the island of Tenedos, in the Aegean Sea, which had ben bought by Venice in 1377 from the Byzantine Emperor John V Palailogos. The two parties at war drew wide alliances with polities and rulers throughout Europe and the Mediterranean and finally, with the mediation of Amadeus VI, count of Savoy, a peace agreement was reached in August 1381, as part of which some navigation rights were recognized to the

[69] Particularly relevant for this are Frederic Chapin Lane, *Venice: a maritime republic* (Baltimore London: Johns Hopkins University Press, 1973); Steven A. Epstein, *Genoa & the Genoese, 958-1528* (Chapel Hill: University of North Carolina Press, 1996); Luigi Agostino Casati, *La guerra di Chioggia e la pace di Torino. Saggio storico con documenti inediti* (Firenze: Successori Le Monnier, 1866).

Genoese in the Adriatic. After this Peace, however, Venetians sought to enforce their claims to the Adriatic, and ban the Genoese from sailing and trading in it.

The document is a *consilium* by Angelus de Ubaldis, younger brother of the famous jurist Baldus de Ubaldis, whom we have already repeatedly encountered.[70] Angelus was also a trained jurist, and had been teaching at Perugia since 1351.In this particular case, Angelus was asked to advise on whether the Venetians could indeed ban the Genovese from sailing through 'their gulf' – which is here to be understood as the Adriatic. Thus, he is asked to answer three questions: whether the Genoese can sail in the Adriatic against the will of the Venetians, and having the latter explicitly banned it; whether the Genoese can dock in ports under Venetian control; and finally whether, in that case, the Venetians are allowed to raise the fees and tariffs that they charge.

This was a particularly thorny issue: on the one hand, Roman Law clearly established that seas, coasts, rivers, and air were common to everyone, and as such could not be owned by any particular person or group.[71] On the other hand, a variety of legal arguments allowed private citizens to develop rights over common property, and as such there was the possibility of recognizing ownership of the Adriatic to the Venetians.[72] Indeed, Angelus himself had accepted this argument in some of his commentaries of the Digest, where he recognized a right of prescription for both Genovese and Venetians in relation to their

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[70] Angelus de Ubaldis, *Consilia* (Frankfurt, 1575), number 290. This *consilium* has rarely been examined by the historical literature. One of the few exceptions is Ugo Petronio, "Venezia, Ancona e l'Adriatico in un consiglio di Raffaele Fulgozio e Raffaele Raimondi da Como," in *Scritti in onore di Dante Gaeta* (Milano: A. Giuffrè, 1984), p. 47 ff.

[71] D.1.8.2: "Certain things are common to all by natural law; some belong to the entire community, some to no one, and the greater number to individuals; these are acquired in various ways respectively. (1) Again, all the following things are common by natural law, namely the air, running water, the sea, and hence the shores of the sea."; Similar opinions were expressed in D.43.8.3 "I think that the shores of the sea over which the Roman people have control belong to them", and C.11.43.4.

[72] The legal specifities of this argument are beyond the scope of this thesis. For further reference see Petronio, "Venezia, Ancona, e l'Adriatico", p. 548 ff.

respective gulfs, and thus ownership.[73] Despite this recognition of ownership, in the first part of the *consilium* Angelus concluded that the Venetians could not indeed ban *bona fide* Genovese merchant ships from sailing through their gulf.

Crucial for our purposes, however, is the third question that Angelus answers: having established that the Venetians could neither restrict sailing in their Gulf nor access to their ports, Angelus is asked whether they can increase the fees and tariffs that Genovese merchants have to pay in order to enter those ports.[74] Although Angelus ultimately concludes that they can, he first considers the argument to the contrary, which runs as follow:

> "Since the right of imposing rents does not belong to them, much less does the ability to increase them, as that power [potestas] only belongs to the Emperor… About this, without any doubt it is to be held that if they have obtained from the Emperor the power to impose rents and taxes, then they can licitly establish them… otherwise not."[75]

The main concern in determining whether the Venetians could raise tariffs was therefore establishing whether they have the right to do so in the first place. And considering that the Codex established that this specific ruling right belonged to the emperor, the only licit situation for the Venetians to have it is by delegation. The first instinct in this case is therefore to go to the established schemes of validity of the *ius commune*, which not only regulate how transfers of ruling rights happened, but also the distribution of those rights.

Angelus, however, was fully aware that the situation described in the law books did not correspond to political practice in northern Italy. Indeed, he immediately notes that by an

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[73] Angelus de Ubaldis, ad D.41.3.45 "Praescripserunt ergo veneti et ianuenses gulfos suos: et sic gulfi illi sui sunt," cited in *ibid., p. 550.*

[74] Angelus de Ubaldis, *Consilia*., number 290. "Tertio, an praesupposito, quod possint Ianuenses cum suis navibus, non armatis, applicare ad dictos portus, possit Dominus Dux et Commune Venetiarum, datia, introitus et ingressus in dictis portibus ultra solitum, per modum statuti, vel alterius dispositiones augere?"

[75] Ibid., number 290. "Et videtur quod non: quia nedum quod eis competat augendi potentia, imo nullo modo eis competit ius indicendi vectigalia, quia talis potestas solius Caesaris est: et C. de noua vectigali. In rubro & nigro. Super hoc indubitanter tenendum est, quod si habent a Caesare potestatem indicendi vectigalia et gabellas, quod ea licite possent indicere, ut patet in iuribus, supra proximo alleg. et in decimal col. Quae sint regalia. c.j. Alias non."

opposing custom, these rights have been commonly usurped by everyone. That is, with the exception that we saw of the northern Italian cities who by the Peace of Constance were granted these rights as well as *merum* and *mixtum imperium*.[76] Angelus is thus confronted with the same tension between the established and legitimate distribution of ruling rights and the actually existing one as the various Roman Law commentators of the early fourteenth century we encountered in chapter 6.

In fact, the apparently theoretical disquisitions about the nature and powers of cities that we saw in that chapter appear here as extremely practically relevant. Not only this, but the academic discussions on this topic are immediately after cited by Angelus in support of his argument. Indeed, he immediately continues in the following way:

> "From this many Doctors [of law] conclude that merum imperium and all regalia prescribe by custom, on which Jacobus de Belvisio, and Innocent [IV], and Iohannes Andreae, and Bartolus… However, regardless of what is de iure or by custom, the contrary can be observed: all temporal lords and cities, who are ruled by themselves, impose rents, taxes, and tariffs; and this can be seen de facto – we will not argue about this further de iure, lest our debate comes into scorn."[77]

The debates about prescription of *merum imperium* are therefore crucial to the settling of this case. While Angelus settles for a *de facto* solution (i.e. cities and lords do exercise these rights), he still feels compelled to argue through both the laws themselves and the jurisprudence associated to it. Through this case, therefore, we can clearly appreciate both the ordering and the restraining role that Roman and Canon law – understood not only as the texts themselves but also with all the commentary and subsequent interpretations – in

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[76] Ibid., number 290. "Alias non: tamen hac contraria consuetudine usurpatum est per civitates et dominos temporalis, qui in civitatibus eorum Omnia exercent regalia: et hac usurpation utuntur omnes communiter, exceptis Lombards, qui ex pace Constantie habent regalia, et merum et mixtum imperium: in corpo. de deen. civita $ iusiurandum. in fin. glossae magnaee, quae incipit hoc generale."

[77] Ibid., number 290. "Ex qua multi Doctores concludunt, ex consuetudine praescribi merum imperium, et regalia universa, de quo ibi per Iaco. De Bel. et per Inn. et Ioan An. De post bon. Bart. C de servi. L. vi.l. j Quicquid autem sit de iure et consuetudine, contrarium observetur, quod omnes domini temporalis et civitates, per se ipsas regentes, imponat vectigalia, datia, et gabellas: et istud observetur de facto, de iure non disputemus ulterius, ne nostra disputatio veniat in derisum."

late-medieval International Relations. Even if the solution was to settle for a controversial –if by that time acceptable – solution that took into account the actual correlation of forces, the discussion and argument was articulated in *ius commune* categories, and was entirely subject to the previous arguments as well as to its logical and argumentative norms.

Contestation and the politics of representation

The previous three chapters have endeavored to show how contestation over categories and representations was a fundamental element of the medieval international, and thus reinforce the argument that we should not only pay attention to order, but also to ordering. This struggle for categorization was not limited to a single type or site: while chapters five and six showed fundamental contestation over the meaning of categories, and the way they related to each other, this chapter has shown the extent to which the categorization of social actors and groups was in itself a fundamentally contested and political process. Indeed, what we have been examining in this thesis has not been a mere set of academic disputes, but rather essentially political struggles over the ordering of the medieval world.

It is worth briefly noting, however, that contestation and the focus on order do not take us to a world where 'anything goes.' Along with the representational struggles, these chapters have also revealed the extent to which the language of the *ius commune*, understood in the Pocockian sense[78] as the categories themselves, the implicit rules that governed the making of legal arguments and made them intelligible, as well as the past accumulation of utterances, acted as the framework within which contestation was at once possible and bounded. In doing so, and we go back to the methodological argument that we outlined in

[78] Pocock, "The concept of language".

chapter two, the importance – but also the usefulness – of focusing on communities of practitioners has become apparent.

Chapter 8. Conclusion

1. International order and communities of practice

This thesis set out with the intention of providing a new account of the late-medieval international order. The first and foremost theoretical problem this goal presented was the fact that the very same thing that makes the medieval theoretically and empirically interesting for IR – its complexity and contrast with the modern international order, - highlighted the limitations of our concepts and approaches to the historical study of international order. Consequently, an important step in this thesis has been to think about how we can tackle the historical study of international orders in a way that overcomes these difficulties.

This thesis has argued – and through its empirical sections endeavoured to show - that incorporating a specific understanding of the sociological notion of differentiation to the study of historical international orders can provide a useful approach. As we saw in chapter 2, differentiation in this sense has two specific features: first, it is understood as a process, rather than a mere static end-product. Indeed, while prevalent uses of the concept within the IR literature have focussed on differentiation as a structural property of international systems,[1] this thesis has argued that that a dynamic approach that sees differentiation as a constantly evolving and reproduced process provides a better understanding of its ordering effects.[2] The second distinctive aspect of this approach to differentiation is the role of intersubjective categories and ideas. Again, while some of the

[1] Donnelly, "Rethinking political structures"; Donnelly, "The differentiation of international societies"; Donnelly, "The Elements of the Structures of International Systems"; Buzan and Little, *International systems in world history*; Buzan and Albert, "Differentiation".
[2] Bourdieu, "The social space and the genesis of groups".

IR scholars who have used the notion of differentiation have pointed to the importance of ideas, this has generally taken a secondary role in their analysis.[3] This thesis, however, building on what is a central constructivist and English School insight,[4] has argued that the categorization and representation of the social world constitute a central part of the differentiation of international orders. This of course does not mean denying that material aspects that are emphasized by scholars in international political sociology and historical constructivism alike are unimportant.[5] Rather, the point here is that representations and categories act both as an enabler and are constrained by their relation to material factors and that, in any case, they provide a useful first approach to the understanding of historical international relations.

This move towards processual and intersubjective differentiation has important implications for the study of order. Indeed, studies of historical international orders have so far, and with very few exceptions, been an exercise in comparative statics.[6] Taking differentiation and representation as processes, however, this work has taken a more dynamic approach to the matter. The argument is that this not only provides for a better and more granular understanding, but also highlights something that has been missing from other approaches to international order: the fact that constant (re)production and contestation are fundamental to it. In doing so, this approach brings to light the politics of differentiation and representation, and thus argues that order cannot simply be understood as a static pattern, but rather it is a constantly reproduced, transformed, and contested

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[3] Most notably Donnelly, "The differentiation of international societies".
[4] Ruggie, *Constructing the world polity*; Reus-Smit, *The moral purpose of the state*; Phillips, *War, religion, and empire*; Watson, *The evolution of the international society: a comparative historical analysis*; Wight, *International theory*.
[5] Buzan and Little, *International systems in world history*; Phillips, *War, religion, and empire.*
[6] Arguably Andrew Phillips' work in *War, Religion, and Empire* starts to move away from this trend by bringing in the notion of transformation. However, Phillips' approach still relies on the existence of a static order that then gets transformed thus yielding a pattern of stability-transformation-stability, which differs from the approach in this study.

process. Ultimately, this approach means that in addition to thinking about order, we should also pay closer attention to *ordering*.

Moreover, the idea of ordering takes us to what constitutes the methodological contribution of this thesis: focusing on communities of practice. If categories and their deployment are indeed constantly reproduced and contested, this immediately raises the question of how we can study these categories and get at their ordering function. Indeed, as we saw in chapter two, IR has faced some challenges in approaching the historical study of ideas. On the one hand, historical constructivists have put forwards mostly disembodied historical studies, where abstract 'ideas' are traced through centuries at a time. On the other hand, the type of questions IR scholars ask seem to preclude the types of analysis that are prevalent in historiography. Indeed, while the Cambridge School has repeatedly pointed to the importance of context and linguistic moves in the history of ideas, the reading and primary source burden that it imposes if what we are interested in is for example the evolution of one concept in various locations over a long period would seem to make this type of research prohibitive.

In order to solve this problem, this thesis has drawn on both the practice turn in International Relations and methodology in the history of ideas in order to propose a methodological approach based on the concept of a community of practice as a useful via-media between both extremes. First, against the practice of some constructivists,[7] it allows us not only to locate abstract ideas historically in specific individuals and groups, but the idea of practice also points us towards those whose language was most authoritative and thus had the most impact in the ordering of international Relations. Second, against the Cambridge School, the idea of a community gives us a limited framework of reference for

[7] For example,Reus-Smit, *The moral purpose of the state*; Chris Brown, "Revolutions in sovereignty: how ideas shaped modern international relations by Daniel Philpott," *Canadian Journal of Political Science* Vol. 35, No. 3 (2002).

the understanding of both categories and specific moves. Indeed, as chapters five through seven have shown, contestation within categories is not an absolute process where anything goes, but rather occurs within a rule-governed framework of categories and meanings. Approaching the study from the point of view of communities of practice and their language – in a Pocockian sense – provides us a manageable focus for this framework and at the same time a historically-grounded one.

2. The Medieval international

The central contribution of this thesis, however, is the historically-grounded examination of the late-medieval international order and the ordering practices of *ius commune* jurists. As we saw in the introduction, and despite the place that it occupies in the IR imagination, studies of medieval international relations remained divided between characterizations of an unspecified heteronomous order and those who saw in it an essentially inter-state order. The analysis in this work has revealed an international order that more closely resembles that of heteronomy proponents. Indeed, if we are to take heteronomy as a principle that produces a series of legitimately dissimilar actors and groups,[8] the ordering categories of the *ius commune* did indeed have this effect. From holders of jurisdiction having different bundles of rights, to fundamentally dissimilar understandings of political community, or to the functional separation between temporal and spiritual, lawyers represented and constructed a world of fundamentally dissimilar actors. However, we need to move past these generalities – for indeed it almost seems impossible to imagine a non-heteronomous order in history, excepting perhaps an extremely restricted and restrictive understanding of the modern society of states. Rather, the contribution of this thesis lies in providing a more detailed and indeed intelligible account of the ordering of the medieval international.

[8] As noted in chapter 5, this seems to be the insight behind Ruggie's approach. However, it differs from Phillips and Sharman, who see it as the stable coexistence and interaction of a variety of normative orders. Ruggie, *Constructing the world polity*; Phillips and Sharman, *International order in diversity*.

The nature and distribution of political authority was the object of chapter three. Indeed, the problems in disentangling what has for most IR scholars been seen as an unintelligible network of lords and vassals has been fundamental to the discipline's approach to the Middle Ages. Against this, this thesis identified four different groups of categories that not only structured and distributed political authority – but made it intelligible. *Iurisdictio*, *potestas*, lord/vassal, and magistrate, all included clearly hierarchical understandings that enabled us to make sense of rulers stood in relation to one another, at the same time that they put forward different connotations. Most importantly, however, this analysis also showed that medieval understandings of political authority do not perfectly correspond to our modern ones: the structuring role of *iurisdictio* as encompassing all rulers, from the Emperor or the pope to the government of guilds, means that we cannot discard some of these actors and decide that only kings and princes were relevant to international relations.

Restricting the view of medieval political authority and ultimately of the medieval international to rulers themselves, however common in IR approaches to the period, is too limited. Indeed, it is a recurring idea that Medieval or even Early Modern international relation were fundamentally relations between princes, only later giving way to a society of states.[9] Chapter four's examination of the legitimacy of rule – through the idea of both purpose and origins – actively challenged this view. Contrary to what we may expect, the ruled were progressively more important as both a source of legitimacy and ultimately as well as the granters and holders of ruling power themselves. Not only this but ideas and concepts that are absolutely fundamental to modern understandings of a society of states – such as for example the abstract personality and thus actor-ness of the State itself – find their origins in conceptual developments of this period such as corporation theory and the transpersonality of a corporation. We cannot therefore understand the international

[9] Recall, for example, Teshke's idea of "inter-lordly relations" in Teschke, *The myth of 1648*.

dynamics of the period without taking into account the bodies of ruled, and their dialectic relation to the rulers themselves.

While the first two empirical chapters provide a more-or-less static examination of the anchoring concepts and categories of the representational language of the *ius commune,* the three final chapters have focused on different sites of contestation within it. Indeed, in line with the theoretical argument outlined above, they have shown that despite the presence of a common set of categories, the ordering role of these notions was deeply contested both in terms of their meaning and their relevance for a variety of actors and situations.

Chapter five has concluded the process of examination of the distribution of political authority and of the political community that started in chapters three and four by looking at how the categories in those chapters were combined in order to represent different polities – specifically the Empire, Kingdoms, and Cities. In doing so, it has sought to push the idea of heteronomy of the medieval further by showing that there was no single model of a polity, that is, that no set of legal categories or models for the understanding of particular arrangements of rulers and ruled was applicable across different polities. Heteronomy thus in this case does not mean only the presence of distinct bundles of ruling rights like the traditional IR image seems to imply, but rather also points us to an order in which, first, fundamentally different notions of political communities coexisted, and second and most importantly, where the international imagination could not and did not conceive of a universally-replicable arrangement for the political organization of human beings.

Having dealt with political authority, chapter six has brought the notion of contestation to bear on one of the tropes about the period in IR scholarship: its Christian identity. This thesis has sought to problematize this image by unpacking the categories and conceptual

constructions that underpinned the separation between Christians and non-Christians. In doing so, it has made two closely-connected arguments: first, it has shown that we cannot understand medieval Europe, and particularly European identity-formation, without paying attention to its relations with the non-Christian world. Secondly, and most crucially, it has shown that these categorizations were fundamentally contested: they never rested on the unified idea of an 'infidel enemy' that seems to emanate from the IR crusading literature. Rather, we have seen an extremely nuanced and varied conceptual apparatus that creates several dynamics of Othering – and consequently allows for a variety of ways of relating ranging from toleration and coexistence to conquest.

Finally, chapter seven has shown how contestation over the fundamental categories went beyond a merely conceptual level and was fundamental in the ordering of actual medieval relations and disputes. The cases of Henry VII and Robert of Naples, on the one hand, and of trade in the Mediterranean, on the other, have highlighted the important ordering function of *ius commune.* Both cases representing complex political issues of the time, *ius commune* categories were at the centre of disputes that concerned not mere arrangements between medieval actors, but ultimately challenged the ontology and legitimacy bases of the late-medieval order in itself. Not only this, but legal argumentation constituted the basis for the dispute at the same time as it fundamentally constrained the range of arguments that were possible. As such, therefore, this study has reasonably shown that the *ius commune*, understood as a language in the Pocockian sense, was a fundamental ordering factor of late-medieval international relations.

However, while this thesis has provided a historically-grounded account of this order, it should in no way be taken as comprehensive of the entirety of the order from the twelfth to the fourteenth centuries, much less of *the medieval* international system. As this thesis has repeatedly emphasized, there is no one such thing as the one, static, medieval international

order. Indeed, since the consequence of the approach of this thesis is that any study of order and ordering will always be incomplete and leave some aspects out, it is pertinent at this point to briefly reflect on these, as both limitations of this project and possible avenues of further research that the approach of this study may have itself opened.

Within the *ius commune* itself there are of course a variety of institutions and categories that were important to the ordering of medieval international relations but that nevertheless have not featured prominently in this study. Central IR concepts and tropes about the medieval – such as the crusades or Just War theory - have indeed been absent. Without denying that these were indeed important elements within the *ius commune*, the approach of this thesis has been to focus on those categories –like *iurisdictio* – which had a most central role and thus present a narrative that best captured the imagination of the time. At the same time, however, these other categories provide interesting avenues for further research. The legal regulation of war, for example, would constitute an excellent case to explore further the interaction between the politics of representation and the material and coercive dynamics that are of course fundamental to any order.[10]

More broadly however, and we will recover this idea below, there is the issue of limiting the study to one community of practice. This thesis has argued that lawyers constituted a group of fundamental importance for the representation and conduct of international relations from the twelfth to the fourteenth centuries. Their specialised training, high mobility, and central role in Church and secular administrations clearly put them in a privileged and authoritative position for the production of the medieval every-day common sense. However, we must of course not forget that they were far from being the only ones. Indeed, for example, at several points we have hinted at the importance of theology and theological doctrine in the development of legal concepts and language. It is beyond any

[10] Phillips, *War, religion, and empire.*

doubt that theologians and their work were crucial to the international imagination of the period – and they have consequently figured prominently in IR studies of the Middle Ages.[11] We could therefore wonder how a study of the ordering process as established by theology would reinforce or modify some of the conclusions and arguments in this work. But the possibility of other communities of practice is not limited to theology as the go-to IR source of ideas for the Middle Ages. Other groups that could provide interesting insights in terms of further research would for example be official chroniclers or missionary friars. Additionally, the presence at any time of a variety of communities of practice, with various languages raises of course interesting questions, both theoretical and empirical. Indeed, we may want to trace how some of the concepts that have played a central role in this thesis developed as a result of the interplay between the treatment of different communities of practice. Or more theoretically, the coexistence of various communities of practice, and thus various languages, opens up the space for theorization of the interaction between them.

A final aspect worth mentioning in this regard is that of Eurocentrism in IR treatments of the medieval. As we saw above, chapter six has sought to contribute to the literature on Eurocentrism by pointing first to the fact that the Christian identity cannot be separated from the internally polyvalent construction of various groups of non-Christians, and second to the variety of principles that guided relations between both groups. Nevertheless, and despite these efforts, this thesis still constitutes a fundamentally Eurocentric endeavour. It is my hope however, that this study builds the foundations for this fundamental problem in the treatment of the medieval to be overcome, and further studies to be undertaken in this area. In particular, insufficient attention has been paid to the Mediterranean as an area of constant contacts. There is a host of material to be examined

[11] Brown, Nardin, and Rengger, *International relations in political thought*; Osiander, *Before the state*.

in a variety of genres – from literature to official chronicles – among which most interestingly are a great number of bilingual treaties between rulers. These documents provide an unexplored opportunity for IR scholars to look at pre-modern international relations and pre-modern international encounters.

3. Revisiting periodization in International Relations

Another important issue that arises from this study is that of periodization and the role of the medieval in our international imagination. Indeed, although this thesis has focused on the reconstruction of the late-medieval international order in itself, an alternative that could have given a coherent narrative to the ordering activity of the *ius commune* lawyers would be one of state formation. The fact that this has not figured prominently in this thesis is indeed a deliberate and programmatic choice. For while the State undoubtedly has had and still has a central importance in the imagination of the discipline, what the medieval as approached in this study forces us to think about is how to approach 'the international' without a recourse to one of the most powerful representations that order our understanding of it. Indeed, the explicit aim of the approach in this thesis has been to reject the idea that the "the medieval story is important (…) because it is the precursor to the Westphalian order that arose in Europe and was imposed from there onto the rest of the world." [12] For the purposes of this conclusion, however, we may nevertheless briefly explore the elements of this state formation story that may have appeared throughout this thesis, and outline some of its implications and avenues for inquiry were this argument to be pursued further.

This study has indeed revealed some uses of legal categories that would nicely fit into a state-formation story. Already in chapter 3, we saw some of the language ordering political

[12] Buzan and Albert, "Differentiation", p. 332.

authority progressively emphasizing the distinctiveness of some top-ranked holders of jurisdiction, be it through concepts like *potestas absoluta* or *plenitudo potestatis*, or through the elimination of the Emperor and of kings from the category of magistrates. The development of the concept of a transpersonal and immortal corporation with an ability to act by itself would also seem to contribute to this narrative. Most importantly, to recover Latham's argument,[13] in chapter five we saw a trend towards what was to eventually become the application of a (corporate) template for the understanding and representation of political communities.

As Latham has of course pointed out, therefore, there would seem to be an argument for a fundamental break in the twelfth century that led to a state-formation story. This would of course fit with the argument by some prominent scholars who identify the (re)discovery of Roman Law as a key driver of change and state-formation – except for the fact that it occurred four centuries earlier than these scholars had originally argued. Indeed, according to this "Roman Law thesis,"[14] a series of concepts within private Roman Law made possible overcoming the ideas of private, divided, and restricted property and rulership that characterized the Middle Ages. While for some this was the idea of dominium as exclusive and absolute property rights,[15] and for others it was the private notion of *repraesentatio* in the transmission of private property,[16] the proponents of this thesis agree that by importing these private ideas into the public realm the modern notion of the state was made possible and thus 'medieval heteronomy' was left behind.

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[13] Latham, *Theorizing medieval geopolitics*.
[14] Holland, "Sovereignty as *Dominium*? Reconstructing the constructivist roman law thesis".
[15] Ruggie, "Territoriality and beyond"; Ruggie, *Constructing the world polity*; Ruggie, "Continuity and transformation"; Friedrich V. Kratochwil, "Sovereignty as *dominium*: is there a right of Humanitaran Intervention?," in *Beyond Westphalia? State sovereignty and international intervention*, ed. Gene M. Lyons and Michael Mastanduno (Baltimore, MD: Johns Hopkins University Press, 1995).
[16] Holland, "Sovereignty as *Dominium*? Reconstructing the constructivist roman law thesis".

Against this, this thesis has shown that while Roman Law was certainly associated with profound changes in the nature of political authority and international order, this process cannot be reduced to a mere importation of concepts into political practice, nor to a mere 'revelation' about the possibilities of strong, centralised, and territorial authority. On the contrary, these doctrines were deeply contested within Roman Law itself. Additionally Roman law was in many cases strongly at odds with political reality. In the specificity of the situation, however, neither Roman Law nor reality could be dismissed, which led to a great amount of extremely productive tensions which ultimately transformed the nature of the order. Our approach therefore would reveal that rather than looking to a fundamental break through the appearance of previously impossible, fully-formed ideas, if we were to put forward a state-formation narrative this would need to be based on the constant production and reproduction of and contestation over categories and their applicability, developed through a complex interaction between academic developments and practical cases. In other words, it would reveal the crucial role of the contested process of ordering.

Finally, the twelfth century did indeed witness important transformations in international order. Indeed, it was a moment of social, political, and economic transformation in Europe, where processes of economic growth, government change and centralization, and professionalization of government structures were interwoven.[17] However, its relevance for International Relations, need not be limited to its possible role in a state-formation narrative. On the contrary, as this thesis has pointed out, considering 'the medieval' as an entire cohesive period as is sometimes done in the neomedievalism literature devoids us of the possibility of appreciating the various crucial changes and dynamics that occurred

[17] The literature on the twelfth century renaissance is very extensive. Of particular importance to the argument of this paper are Robert Louis Benson, Giles Constable, and Carol Dana Lanham, *Renaissance and renewal in the twelfth century* (Cambridge, MA: Harvard University Press, 1987); Charles Homer Haskins, *The renaissance of the twelfth century* (Cambridge, MA: Harvard University Press, 1927); Susan Reynolds, "The Emergence of Professional Law in the Long Twelfth Century," *Law and History Review* Vol. 21, No. 2 (2003); Bellomo, *The common legal past of Europe. 1000-1800*.

within those ten centuries. Central within this, and except for very few exceptions,[18] clearly missing from the IR imagination are these changes that occurred in the twelfth century. Recovering this as a moment of fundamental transformation – regardless of state-formation – is one of the avenues that this study hopes to have opened.

4. Concluding remarks. Towards a new neo-medievalism?

This thesis started with the observation that in part the turn towards the Middle Ages in International Relations was motivated by doubts about the extent to which the state-based vocabulary that has dominated the discipline is suited for the description of our current world. Indeed, we may recall, that neo-medievalists used an idealised image of the period – defined in almost perfect opposition to the modern – in order to try to describe the world towards which current shifts and transformations may be leading us. This thesis has not only shown that many of the assumptions about the Middle Ages were at the very least simplistic, or even possibly wrong, but also that the period deserves study for itself and not only as an imaginary Other. We may, however, by way of a conclusion, briefly point to some aspects in the medieval international order described in this thesis that may at the very least raise interesting questions about the limits of our own concepts.

The historicity of notions of political authority has been a central theme in this thesis, and changes in the configuration of political authority are indeed at the centre of our current concerns. The fact that all holders of *iurisdictio* were considered to have some explicitly public function – we may indeed recall that jurisdiction was a 'power *publically* introduced' - raises questions about the historicity of the public/private distinction, both in terms of its historical development and in terms of its current applicability to international

[18] Most notably Latham, *Theorizing medieval geopolitics*. but also Ruggie, *Constructing the world polity*. seems to point at it.

relations.[19] Indeed, central to current debates is the role of private or non-governmental actors in global governance – do the changes we witness merely imply that our understanding of political authority is too limited? Or rather is the fundamental process we are trying to describe a re-configuration of public/private as ordering social categories? These are some of the questions that an examination and thus historicising of political authority may raise.

At the same time, this thesis has reconstructed an international imagination that, however contested, did not rely on the nation(-State) as the one and fundamental model of a political community. On the contrary, we have seen that a variety of ways of understanding the polity coexisted, competed, and interacted. If anything, it points to the importance of de-naturalizing the idea of exclusivity in membership of political communities that underpins the Nation-State, and opens up questions not only about the coexistence of a variety of alternative models of a political community, but also about the interactions between those models. Even most importantly, perhaps, it may point to re-think the inside/outside dynamic that underpins the conceptual framework of our discipline.[20]

Ultimately, the Middle Ages offer a world of possibilities for International Relations scholars. It constitutes a largely unexplored and forgotten period that challenges some of our most ingrained ideas and tropes about the organization of the social and of international relations. It is my hope that this thesis has contributed to opening the path for the Medieval to occupy a bigger place in IR scholarship.

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[19] Justin Rosenberg, *The empire of civil society: a critique of the realist theory of international relations* (London: Verso, 1994).
[20] Walker, *Inside/outside*. But also Keene, *International political thought. A historical introduction.*

Appendix 1. A note on the citation system for medieval legal texts

This thesis follows the standard citation system for both Roman and Canon law, which is explained below. For further information, the following texts provide a useful and more detailed information: James A. Brundage, *Medieval canon law* (London and New York: Longman, 1995) includes a useful appendix with both the current citation system and older scholarly ways of citing Canon and Roman law. John Gilchrist, "Canon Law," in *Medieval Latin. An introduction and bibliographical guide*, ed. F. A. C. Mantello and A. G. Rigg (Washington, D. C.: The Catholic University of America Press, 1996) provides a useful explanation of the medieval canonical citation system. For Roman Law citation systems in the Middle Ages, see Kenneth Pennington, "Roman and Secular Law," in *Medieval Latin. An Introduction and Bibliographical Guide*, ed. F. A. C. Mantello and A. G. Rigg (Washington, D. C.: The Catholic University of America Press, 1996).

Canon law

Decretum

Gratian's *Concordia Discordantium Canonum* is divided in three parts: the first one has 101 *distinctiones* (distinctions), each one of which treats a different theme. The second part has 36 cases or *causae*, in which an introductory paragraph sets up a situation that poses some problems of law. After each *causa*, a series of questions or *quaestiones* are asked about the case and the relevant material is successively exposed. *Quastio 3* of *Causa* 33, although in this section, constitutes a separate treatise that deals with penitential matters. It is subdivided in 7 *distinctiones*, and known as *Tractatus de Poenitentia*. The third and final part is a treatise on the sacraments, composed of five distinctions. The standard citation forms for all parts proceed from the bigger units to the smaller ones, that is, from *distinctio* to canon, or from *causa* to *quaestio* to canon, as follows:

Part I D.10 c.2

Part II C. 3 q. 7 c. 5

D. 5 de pen. c. 5

Part III D. 4 de cons. c.7

Throughout the *Decretum* Gratian himself added some remarks before and after some of the canons, known as *dicta Gratiani*. If a dictum is before, it is cited as *d.a.c.*, while if it is after a canon, the abbreviation reads *d.p.c.*

Liber Extra and subsequent compilations.

The *Liber Extra* was structured in give books, each one divided in up to 50 titles. Each title contained a number of decretals, or Papal pronouncements in matters of canon law, organized thematically. This thematic structure was maintained in subsequent compilations: the *Liber Sextus*, which was commissioned by Pope Boniface VIII and promulgated in 1298, and the *Constitutiones Clementinae*, which was issued by Pope John XXII in 1317.

X.1.5.2 corresponds to *Liber Extra*, Book 1, Title 5, *capitulum* 2.

Sext 3.2.4 corresponds to *Liber Sextus*, Book 3, Title 2, *capitulum* 4.

Clem 5.6.9 corresponds to *Constitutiones Clementinae*, Book 5, Title 6, *capitulum* 9.

Corpus Iuris Civilis

Digest

The Digest or *Pandectae* in their Greek name was a collection of excerpts from classical jurisprudential treatises, including a large number by Ulpian, which was promulgated as law in 533. It contained fifty books, divided into titles, containing each several paragraphs. Due to its lengths, medieval editions divided it into three volumes: the *Digestum vetus* (books 1-24.2), the *Infortiatum* (books 24.3 to 38), and the *Digestum Novum* (books 39-50). This, however, does not affect the way in which it is cited:

D. 1.4.2 corresponds to Digest, Book 1, Title 4, law 2.

Codex Justinianus

The *Codex* or Code was a compilation of imperial constitutions since Hadrian promulgated by Emperor Justinian first in 529 and then revised in 534. It organized in twelve books divided into titles, each containing individual laws. In the Middle Ages, the Code usually referred to the first nine books, while the last three books was known as the *Tres libri.*

C.3.13.4 corresponds to Code, Book 3, Title 13, law 4.

Institutes

The Institutes (*Institutiones*) was a textbook of law divided into four books. It was compiled by two sixth-century jurists, Teophilus and Dorotheus, who based most of the text on Gaius' Institutes. It is divided into four books, each containing several titles.

Inst. 4.2.3 corresponds to Institutes, Book 4, Title 2, fragment 3.

Novellae

Finally, the fourth book, called *Novellae* or Novels was a compilation of 134 imperial constitutions, mostly written in Greek and issued by Justinian. In the later Middle Ages these were known as the *Authenticum*, and were divided into nine collations. From the end of the twelfth century onwards, however, a tenth collation was added which had some new constitutions from German Roman Emperors and a collection of Lombard custom and feudal law known as the *Libri Feudorum.* The citation system for this book is extremely

complicated, as the medieval structure of the book does not correspond to the modern one. Since it has not been used in this thesis, however, it will not be outlined.

Appendix 2. Biographical notes[1]

ACCURSIUS, FRANCISCUS (1181/5 – 1259-63)

Civilian. Originally from a Florentine family. Studied under Azo at Bologna. He is responsible for the production of the *Glossa Ordinaria* on all parts of the *Corpus Iuris Civilis.*

ALANUS ANGLICUS (active c. 1190- c. 1210)[2]

Canonist. Studied and taught canon law at Bologna from around 1190 to 1215. Little is known about his life. He wrote an extensive apparatus on the *Compilatio Prima*. Although in a first recension he may have followed a dualist approach to the relation between temporal and spiritual powers, he is well-known for later developing a hierocratic position.

ALBERICUS DE ROSATE (c. 1290 – 1360)

Studied at Padua with Oldradus de Ponte and Ricardus Malumbra, but he never taught. A practicing lawyer and public figure, only later in his life did he produce academic commentaries on the Digest and the Code, as well as the first dictionary of jurisprudence entitled *Dictionarium iuris.*

ANDREAS DE ISERNIA (d. c. 1316)

Civilian. Taught Roman Law at Naples, where he was also a Judge from 1288. He was a juridical adviser to Robert of Naples, whom he accompanied to Avignon in 1309.

ANGELUS DE UBALDIS (- d. c. 1400)

Civilian. Younger brother of well-known jurist Baldus de Ubaldis, and of a third jurist brother called Petrus. He taught at Perugia from 1351, and had a very active political life, serving in a variety of embassies and advising several northern Italian cities. He wrote commentaries on all parts of the CIC, and produced a large number of *consilia.*

AZO (d.1220)

Civilian. Born at Bologna, he taught there from 1191, becoming the teacher of important lawyers such as Accursius. He wrote commentaries on various law books, and his *Summa* of the Codex became highly influential.

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[1] In this section I draw mostly on the biographical notes in James A. Brundage, *Medieval canon law* (London and New York: Longman, 1995), pp. 206-30; Canning, *The political thought of Baldus de Ubaldis*, p. 271-77; J. H. Burns, ed. *The Cambridge history of medieval political thought* (Cambridge: Cambridge University Press, 1988), pp. 653-90.

[2] Joseph Canning, "Alanus Anglicus (*fl. c.* 1190 - *c.* 1210)," in *Oxford Dictionary of National Biographhy* (Oxford: Oxford University Press, 2004). Brundage, however, places him as active between 1208 and 1238.

BALDUS DE UBALDIS (1327-1400)

Born in Perugia, he studied civil law there with Bartolus. He briefly taught at Bologna and then went back to Perugia as professor for over three decades, after which he taught at several other universities. He wrote extensive commentaries on both Roman and Canon Law, and had an active life as a legal advisor, producing hundreds of *consilia*.

BARTOLUS DE SASSOFERRATO (1313/14 – 1357)

Studied both canon and Roman Law under Cynus de Pistoia in Perugia, and in Bologna, gaining the *baccalaureus* in 1333 and the doctorate in 1334, promoted by Jacobus Butrigarius, and examined by Raynerius de Forli. From 1339 taught at Pisa, where he was also a magistrate, and from 1343 at Perugia.

BERNARDUS PAPIENSIS (d. 1213)

Canonist. He was a native of Pavia and studied canon law in Bologna with Huguccio, staying afterwards to teach in the 1170s. He joined the papal curia and held several important positions, including that of Bishop of Pavia until his death. He assembled the *Compilatio Prima*, and wrote glosses on the Decretum.

CYNUS DE PISTOIA (1270- 1336/7)

Civilian. Studied at Bologna and in France, and was heavily influenced by the French school of civil law of Jacobus de Ravannis and Petrus de Bellapertica. He taught at Perugia, becoming Bartolus' teacher. He was also a poet and a close friend of Dante.

GRATIAN (fl. ca. 1140, possibly working since 1125)

Canonist, working in Bologna. Little is known about his life. He completed the *Decretum* or *Concordia discordantium canonum* as a work that systematized the existing material in canon law, possibly for teaching or application.

HOSTIENSIS (1190/1200 – 1271)

Henricus de Segusio. Canonist. Born at Susa, in northern Italy, studied canon law at Bologna in the 1220s. He taught canon law in Paris, and it is uncertain whether he taught in Italy. He developed a successful ecclesiastical career, becoming the cardinal-bishop of Ostia (hence the name), and was in a good position to become pope at the conclave of Viterbo (1268-1270), until illness forced him to leave. He wrote several commentaries on the *Liber Extra.*

HUGUCCIO (fl. 1190s, d. 1210)

Canonist. Originally from Pisa, after studying liberal arts and theology he trained in canon law at Bologna, and taught there until he became bishop in 1190. As bishop of Ferrara, he was particularly active as a papal judge-delegate. He produced an important *Summa* on the decretum, which has only survived in manuscript form.

INNOCENT IV (d.1254)

Sinibaldo dei Fieschi. Canonist. Born in Genoa and member of an aristocratic family, he studied civil and canon law at Bologna under Azo, Accursius, Laurentius Hispanus, and Johannes Teutonicus. He taught at Bologna and after that he developed an ecclesiastical career that culminated with being elected pope in June 1243. He wrote an extensive *Apparatus* on the *Liber Extra*, as well as legal commentaries on some of his own decretals as pope.

JOHANNES TEUTONICUS (ca.1170 – 1245)

Canonist. Born Saxon, he studied towards the end of the twelfth century and taught canon law at Bologna ca. 1210/12 – 1213/18, after which he held an ecclesiastic career in Germany. He produced important commentaries on contemporary collections of decretals, and his apparatus to Gratian's *Decretum* became the Glossa Ordinaria.

LAURENTIUS HISPANUS (d.1248)

Canonist. Born in the Iberian Peninsula, he studied canon law at Bologna, as well as civil law under Azo. He was also a practicing lawyer with a reputation in the Papal court. After retiring from teaching he went back to Ourense and held an ecclesiastical career as bishop. He produced crucial glosses on both the *Decretum* and early decretal collection.

ODOFREDUS DE DENARIIS (d. 1265)

Civilian. Studied at Bologna under Accursius, and taught there from 1244. He had an active life as a lawyer, with clients in both Italy and France. He wrote extensive commentaries on several parts of the CIC.

OLDRADUS DA PONTE (d. after 1337)

Canonist. Originally from Lodi, near Milan, studied in Bologna with Jacobus de Arena and Dinus. In 1307 he moved to Padua to teach Roman law until 1311, being Albericus de Rosate's teacher. After that, he worked at the Papal court in Avignon, serving as an auditor and judge at the Rota. In this capacity, he produced several hundred *consilia,* helping to establish the importance of the genre.

RAMON DE PENYAFORT, SAINT (1180/5-1275)

Canonist. Born in Catalunya he studied in Bologna from 1210s, pursuing after a brief ecclesiastical career in Barcelona. In 1230 he became papal chaplain for Pope Gregory IX, who asked him to compile what would eventually become the *Liber extra.* He produced some important works on penitence and marriage, as well as more minor legal works.

RUFINUS (fl. 1150, d. 1191/2)

Canonist. Born in central Italy, he studied and taught at Bologna, and wrote an influential *Summa* on the *Decretum* around 1164.

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