Chapter 1

Introduction

1.1 On the non-linearity of (legal) thought

Legend has it that the emperor of China wanted an accurate map of his empire. No scale would do, even the largest map could not report the tiniest details. The only map that he found satisfactory was as large as China itself – and thus useless.

Some simplification, in other words, is always needed. The problem is to what extent we should indulge in it. Many studies on European legal history – especially those focusing on the history of legal ideas (which constitute the vast majority) – provide beautiful, majestic frescoes depicting a smooth, clear evolution of the subject across time and space and greatly helping the reader to make sense of changes and developments with admirable clarity. This linearity, however, comes at a high price: grand narratives are falsifications. The main problem lies in their teleological approach: the way one event is described as leading to the next. And when the events consist mainly in what somebody thought and wrote, putting them in their 'right' order becomes all too easy. Jurist A influences jurist B, who returns the favour to jurist C, and so on. In so doing, tracing the origin of an idea becomes simple enough. Better still: it becomes always *possible*. This way, incidentally, a few characters would do for the whole plot, since each jurist is chosen to represent a specific moment in time – implicitly becoming the embodiment of his *Zeitgeist*.

A limited number of characters, clear connections and linear development make things convincing. Yet the moment the history of thought (legal or otherwise) starts to make clear sense is often the moment we start getting things wrong. If one were to keep to what one could find in the sources, finding a red thread to bestow continuity through centuries of intellectual history would be a very difficult, and at times a simply impossible operation. Jumping from one point to another in time, and building an *ex post* explanation for this series of jumps, is much easier – but just wrong. The challenge of the scholar is explaining (first to themselves and then to others) the history of a concept without artificially straightening a devious path.

The present work is just an example of what lies behind the façade of grand narratives. It is messy and convoluted – just as history tends to be. It comprises a

study of the medieval interpretations of a short passage of the Digest, dealing with the apparent authority of an invalidly appointed magistrate. It is divided into three main parts: the approach of Accursius and the early civil lawyers to the false praetor; the way canon lawyers (especially Innocent IV) dealt with the similar problem of the false prelate; Baldus de Ubaldis and the application of canon law ideas back to civil law. In effect, the whole thing boils down to just three authors: Accursius, Innocent IV and Baldus. So the book could be much shorter. But that would be misleading, for at least three reasons.[1]

First, because the story could be shortened only with hindsight: at any given time it was far from clear what would have happened next. Accursius had no idea that, more than a century later, someone would solve the same legal problem using a wholly different approach. And those who opposed Accursius did so for their own reasons, which had precious little to do with that later solution.

Second, because very often characters whom we are tempted to neglect as 'minor' (just because what they said has no immediate relevance in our modern system) had a significant influence on the approach of the 'major' characters. All too often the specific way in which a 'major' character understood something and sought to apply (or not to apply) an idea was determined largely by the influence of those 'minor' characters. As this division between 'major' and 'minor' is one made with the benefit of hindsight, it has little to do with what (and who) those authors perceived as relevant or marginal. To understand the three 'major' characters in our story, in other words, it is necessary to look at many others whom we might consider as secondary.

Besides, even if we were to accept this division between primary and secondary characters, despite of its total arbitrariness, we would still need those secondary characters. Jurists did not write for posterity, nor were they engaged in an imaginary dialogue with authors of the past. Of course medieval jurists were expected to look at works written in the past and build on them. But they did so while engaged in discussion with their own contemporaries, because it was for them that they were writing. So if we ignore those contemporaries – 'minor' characters as they may have been – we run the risk of misunderstanding what our 'major' characters were trying to say.

Third, because taking things for granted is a dangerous business. Baldus worked out his 'modern' solution to the old problem of Accursius, but the way it has reached us is hardly what one would expect: a centuries-long process of simplification due to a growing series of misunderstandings. Crucially, this

1 I do not even mention the different but complementary question of the transmission of manuscripts and access to the sources, which would greatly complicate things.

process was largely the product of chance: it was not aimed at clarifying a complex discourse, but at simplifying what was no longer clearly understood. Later authors had increasingly confused ideas as to the reasons behind the complex position of Innocent IV, and they struggled even more to understand why Baldus wanted to complicate the matter any further. To them, both Innocent and Baldus mystified something quite simple, which could well be restored to its pristine simplicity. Such simplification was thus in fact largely a misunderstanding. And yet it is precisely this misunderstanding that led to the modern theory of the *de facto* officer.

If we were to cut things short and ignore many of the authors mentioned in this book, it would be easy to *show* a linear development of the subject from the late Middle Ages to modernity. That, however, would not *prove* such a development. It would simply be a series of ideas duly purified from the context in which they were elaborated. This process of 'purification' would mean ignoring both the reason why something was written and how it was interpreted by later generations. Purified of their history, parallels are easy to make: old ideas and legal principles appear much closer to modern ones. In *showing* their similarity, we often feel exonerated from *proving* it.

Since we look backwards, we measure with hindsight. Whether purportedly, implicitly or even just unconsciously, we always approach the historical development of any given legal institution from our modern point of view. In so doing, we run the risk of making this point of view also our point of arrival. We typically study the development of a subject because we want to know how it arrived in its present state. Weighting the importance of any past event with criteria that do not belong to its historical context, however, means ascribing a value to the event that it did not necessarily possess.[2] What leads to our modern approach is more relevant to us, hence the temptation also to consider it more important in absolute terms. Our goal-oriented approach, in other words, rewrites history. Detaching law from history leads to another and perhaps more deleterious consequence: cryptopandectism. The need to abstract legal principles from their historical context almost necessarily causes them to be considered as abstract rules. Geometry does not need the concept of time: thinking of the law as a geometrical system allows us to apply the same rule to any given historical period with the same result. Thus, the utility-based paradigm feeds on the geometrisation of the law: only a linear account can lead straight to us, and only abstractions can be linear.

The subject of this book puts that utility-driven paradigm (and thus the *more geometrico* approach to the law) to a harsh test, for neither of the main two

2 Cf. Fasolt (2004), ix.

medieval players won the day. Both apologists for the Gloss of Accursius and its detractors gave in to something entirely different – Baldus and the influence of canon law. This U-turn creates a serious problem: everything that happened before suddenly becomes almost irrelevant. All later developments of the subject – from the late Middle Ages to the entire early modern period and beyond – are effectively based on what Innocent IV said, and on his adaptation on civil law by Baldus. We could safely ignore most of what happened before Baldus and still be able to make sense of the development of the *lex Barbarius* from the late Middle Ages to modern times. But in so doing we would remove the issue from its historical context and reduce it to an abstract idea. And the moment we applied this abstraction back to history, we would effectively create a new history of our own.

In briefly recalling the early modern and modern developments of the subject, this final part of the book seeks to explain why – and especially, how – some medieval ideas evolved into modernity while others were forgotten. Looking at the evolution of legal ideas, one might be tempted to give in to relativism. In their historical development, those ideas that prevailed over others underwent a profound transformation. Often this transformation was involuntary: even if a rule did not undergo any change, the context in which it applied did change, and that change necessarily affected the application of the rule itself. In the long run, advocates of legal conservatism are often unwitting accomplices of change.

Just as 'winning' ideas are seldom able to withstand the test of time, forgotten ideas have a certain tendency to resurface at some point. History is always written by the winning side. The same applies to the history of any discipline, law included. A jurist would feel the need to mention a theory he did not agree with when he feared that this theory might prevail. When the opposing theory was already in decline, it was typically still mentioned so as to dismiss it for good. But when the adverse theory was already thoroughly dismissed, there was no longer any point in bringing it up. Initially, this might be due to chivalry – giving the *coup de grâce* to a moribund opponent is acceptable, exhuming the corpse of a foe to mutilate his dead body is somewhat unprofessional. One remembers Achilles for other virtues. As time goes by, however, the reason for not mentioning the old adverse theory becomes more banal: one simply forgets. Centuries after a theory is definitively discarded, it may well happen that someone comes up with exactly the same idea – thinking of it as a brand new and wonderfully modern one. When canon lawyers thought they had a new idea in the early seventeenth century, they were simply saying the same thing as some civil lawyers living in thirteenth-century France. During the nineteenth century, American courts came up with the same idea, happily ignoring both canonists and French jurists. Writing for posterity is an act of optimism.

1.2 Invalid appointments, fugitive slaves and heretical prelates (or, the content of this book)

In the first book of the Digest, a text of Ulpian (Dig.1.14.3) speaks of a runaway slave who comes to Rome, portrays himself as a Roman citizen and is elected praetor. Are his deeds valid? Ultimately, this is the problem of the *de facto* officer (also known as *fonctionnaire du fait* or *Scheinbeamter*). This book deals with the medieval interpretations of that Roman law text, and so with the medieval approach to the *de facto* officer doctrine. It is divided into three main parts. The first part focuses on the Accursian Gloss, its supporters and its increasingly numerous detractors. The last part studies the wholly different interpretation provided by Baldus de Ubaldis a century and a half after the Gloss, and it seeks to understand how that interpretation would provide the basis for later developments in the subject. Between them, the central part of the book explores the approach of canon lawyers to a different yet contiguous concept – the jurisdiction of the secret heretic. The jurisdiction of the heretical prelate (especially the heretical bishop) is ultimately the canon law equivalent of the jurisdiction of the slave-praetor: from a legal perspective, the problem is identical. In both cases the person is legally unable to exercise the office, despite being widely believed to be entitled to it. The similarity with the concept of *de facto* officer is evident. And this similarity becomes identity if we describe the exercise of an office in terms of representation: the *de facto* officer is someone widely but mistakenly believed to be the legal representative of an office.

Modern legal representation, it is widely known, originates in medieval canon law. It should come as little surprise, therefore, that canon lawyers applied it to 'their' side of the problem – the heretical prelate – much earlier than civil lawyers. Civil lawyers came to apply the same concept to the slave-praetor (and, with it, to other similar cases) only later, mainly through the work of Baldus. This accounts for the tripartition of the book. The first part is in effect a study of the pre-representation approach of the civil lawyers to the problem; the second looks at the application of legal representation to the subject by canon lawyers, and the third to its extension to secular law by Baldus. A final chapter, pompously described as Part IV of the book because it would have ill-fitted the third part, simply hints at early modern developments of the subject.

1.2.1 The Gloss and beyond

The first part of this book looks at the greatest achievement of the early glossators, the Accursian Gloss, and its position on the problem of the slave-praetor. The Great Gloss bears the name of the Bolognese jurist Accursius (hence, Accursian Gloss) who wrote it, yet its content is largely pre-Accursian. In

selecting and merging together the glosses of some of the most important jurists of the previous few generations (on our subject, chiefly Azo), Accursius provided a comprehensive commentary on the whole corpus of Roman law known at the time. While Accursius' commentary was doubtlessly comprehensive, the corpus of the texts glossed upon was hardly consistent. Had Accursius lived in the nineteenth century (or even in the early twentieth), he would probably have solved the problem by considering most of the oddities in the text as interpolations that needed to be fixed. Instead, he had to resort to formal logic, and so to the dialectic approach still very much in vogue during his time – the scholastic method. Hence the reason for the long series of distinctions and sub-distinctions, in which all contradictions would be solved, or at least generously watered down. It has been observed that early glossators did not really have a hierarchy in the sources of law.[3] No part of the text could be considered ancillary and of lesser relevance (let alone dispensed with), for each part of the text had the same importance – it all lay on the same level. The forest of sub-distinctions was necessary precisely because it was impossible to fell any of the trees. The case of the slave-praetor provides a good example of this. The Accursian Gloss could not solve its ambiguities, because they were enshrined in the letter of the Ulpianean text. Accursius sought to strengthen the (both logically and legally, slightly wanting) conclusion of Ulpian, but he did not replace it with a better and more coherent one. He could not have done so: it would have meant going beyond the limits imposed by a literal exegesis of the text. This, in retrospect, is why Accursius' interpretation came to be increasingly criticised, and progressively overcome.

Ironically, Accursius wrote his Gloss at the same time as a different and considerably more flexible approach to the Roman texts was beginning to spread. This new approach is often credited to Accursius' contemporary and colleague, Jacobus Balduini, and especially to his pupils – from Odofredus onwards. Whether or not through the influence of the school of Balduini, during the same period the same approach starts to spread also elsewhere, both within Italy and beyond – initially in Orléans. If the positions of earlier glossators greatly differed from each other despite their literal exegesis of the text, it is easy to imagine how variegated such positions now became.[4] This is perhaps one of the reasons why is it so difficult to classify all those jurists under a single definition. Indeed the main name in use, that of 'late glossators', makes sense precisely because it says nothing about what they wrote, but only about when they did. With a few exceptions, the late glossators have attracted little attention

3 See for all Schrage (2001), pp. 414–423. The gradual acknowledgment of natural law as a higher source of law than civil law, as Schrage notes, did not imply a sense of hierarchy within either kind of law.

4 E. g. most recently Padovani (2017), pp. 1–16.

among modern scholars. Yet the wealth of different approaches – and so, normative solutions – found in their writings can be genuinely surprising. This wealth of different solutions is clearly visible in the subject of the slave-praetor, not least as the Accursian Gloss kept rather vague on a crucial issue: the role of the 'common mistake'. Progressively, the issue of the common mistake acquired such importance among late glossators that Barbarius' case was often considered only as an example of a much broader issue – the exact relationship between volition and mistake, especially in the emerging sphere of public law.

1.2.2 Roman law and Canon law

The second part of the book looks at the development of canon law on the jurisdiction of the secret heretic. This part could in turn be divided into three sections: the approach of the decretists and earliest decretalists, Pope Innocent IV, and those coming after him. Just as the book is divided between pre- and a post-canon law, so its canon law part is also divided between pre- and post-Innocent IV. Innocent IV, therefore, plays a pre-eminent role in our story. This pope–scholar left an indelible mark on the development of both laws – canon law first of all, but also civil law, especially (to use an anachronism) its public law sphere.

It is often said that canon law underwent a thorough 'romanisation'. After all, as the brocard has it, 'the church lives according to Roman law' (*ecclesia vivit iure romano*). This brocard however does not necessarily mean that canon law was free to develop as far as its Roman leash would allow. In particular, it does not distinguish between form and substance. As to the form, the brocard is undeniably true: what changed the ecclesiological rules governing the Roman church into canon law as we know it was surely the increasing borrowing of Roman law ideas, principles, and 'mechanisms'. As to the substance, however, in many cases the opposite is true: often it was Roman law that was influenced, and even transformed, by canon law principles. The case discussed in this work is obviously hardly proof of that (the subject would need a large number of thick volumes to be properly studied),[5] and yet it provides a small but telling example in this direction.

In approaching the problem of the heretical bishop's deeds, one of the main texts used by canon lawyers was a short comment from Gratian (C.3, q.7, p.c.1), which in effect merged two excerpts taken from Roman law sources. At first sight, therefore, it would seem that the main influence was from Roman to canon law – not the other way round. The point is that, in the hands of canon

5 See for all Landau (1996), pp. 32–47. Cf. recently O. Condorelli, Roumy and Schmoeckel (2009–2016).

lawyers, the Roman law excerpts were transformed so much that no Roman lawyer would have recognised them. And it was this new elaboration of the old rules that was finally 'reimported' into civil law. The Latin maxim cited above is sometimes found in a slightly different – but very telling – variant: 'Roman law lives in the church' (*ius romanum vivit in ecclesia*). The main difference is the subject: in one case it is the church, in the other Roman law. The concept apparently remains the same. The point is that the verb 'to live' (*vivere*) can be referred both to the church and to Roman law: *ecclesia* and the *ius* are both alive – both *vivunt*. If the church made ample use of Roman law, that same Roman law developed within the church. No comparative lawyer would ever say that, centuries after a 'legal transplant' occurred, the institution, concept or idea 'transplanted' would remain the same. Medieval canon law is in effect the first and foremost case of 'legal transplant' – with the rare peculiarity of being a transplant into a system that was developing much faster, and in a more sophisticated way, than the 'donor' system.

1.2.3 Innocent IV, Baldus de Ubaldis and Ernst Kantorowicz

As mentioned above, the third part of the book deals with the 'reception' of canon law ideas into civil law. More precisely, it focuses on the adaptation of Innocent IV's approach to the jurisdiction of the secret heretic to the problem of the slave-praetor by Baldus de Ubaldis. To show that Baldus was not really the first civil lawyer who noticed the argument, this part will start with a very short introduction to a previous jurist, Albericus de Rosate. Albericus perceived the importance of Innocent IV (and later canon lawyers inspired by him) on the subject, but did not fully understand it. The point is hardly meant to discredit Albericus as a jurist: to fully understand Innocent IV's position, an in-depth knowledge of canon law was needed. Innocent's stance on the secret heretic was itself an application of something much broader: legal representation. Ultimately, for Innocent the deeds are not performed by the heretic as an individual, but as a representative of the office. This is why the deeds can be valid despite the condition of the person who issues them. Thus, studying Baldus' adaptation of Innocent's ideas requires first of all looking at Baldus' concept of legal representation in (what we would call) public law.

Looking at Baldus' approach to representation (especially in public law), the present study cannot ignore one of the greatest works on medieval political thought of the twentieth century, Ernst Kantorowicz's *The King's Two Bodies*. Kantorowicz's genius for synthesis allowed him to accomplish one of the rare works of true interdisciplinarity at a time when that word was not yet used to justify mediocrity. Any scholar remembers Kantorowicz's book at the very least for the explanation of the difference between person and office, especially with regard

to the highest office – that of the king. It has been noted that the medieval jurist by far most quoted in Kantorowicz is Baldus de Ubaldis.[6] This is not for want of competition: medieval jurists abound in that book. Yet Baldus is the second most quoted author in the whole of Kantorowicz's book, closely following Dante.[7] Kantorowicz's interest in Baldus is hardly fortuitous: no other medieval civil lawyer dealt with the concept of representation so extensively and in such depth.

Part of the charm of Kantorowicz's book lies in that it is never boring. In that respect, the fact that the author was not a lawyer by training surely helped: the best way to tedium is tormenting the reader with technicalities. This however left some gaps in Kantorowicz's approach. The relationship between office and office holder is described in its main features and contextualised with many examples, but its (legal) mechanism is not fully studied. That was the task of other authors, by and large medieval canon law scholars. Their work never reached the same universal success as Kantorowicz's, although the quality was just as excellent. Those studies typically described how the relationship between office and incumbent worked. In so doing, they focused on the physiology of representation, not its pathology. One of the most interesting things about the medieval approach to the slave-praetor's case is that, much to the contrary, it allows a focus precisely on the pathology of legal representation.

A legal analysis (or perhaps the *déformation professionnelle* of the lawyer) tends to focus more on the problems in any given solution. Historians, and especially Kantorowicz, highlighted the relationship between person and office. In so doing, however, they left aside the cases where the person cannot act for the office. Those cases are of particular interest, because it is only there that legal problems emerge clearly. To make full sense of those problems, in turn, it is necessary to look in more depth at the legal position of the office, not just as different from that of the incumbent, but as opposed to it. The case of the slave-praetor is precisely one of them – or rather, the case where Baldus dealt in more depth with the opposition between person and office. Just as the proverbial dwarf on the giants' shoulders, this book thus seeks to explore the boundaries of concepts described so magisterially by scholars of far greater calibre.

Studying Baldus' approach to the case of the slave-praetor also means juxtaposing it with the concept of representation in Innocent IV, to see the subtle but profound difference between the two jurists. It is a crucial step in the development of representation: the separation between the internal and the external validity of vitiated legal representation. Innocent IV's genius for legal principles left little room for the problems of human life. Innocent was no friend of legal ambiguities: any 'grey area' in the law ought to be clarified, no matter

6 Canning (2015), p. 112.
7 *Ibid.*

the cost. Applied to legal representation, this firm attitude led him to consider utterly void any relationship between office and third parties where the office was not validly represented by the incumbent. The external validity of representation, in other words, is for Innocent but a consequence of its internal validity. Unlike the pope, Baldus was more interested in 'grey areas' and ambiguous legal issues. Baldus' greater interest in problematic situations (or rather, his greater openness towards their equitable solution) led him to accept – and, crucially, justify – the possibility that the office might act validly towards third parties (external validity) despite the fact that it was not validly represented. Baldus' explanation for the (external) validity of the office's deeds despite the invalidity of the appointment of its representative is ultimately what led to the modern concept of *de facto* officer. If Baldus went beyond Innocent, however, he did so only because he could build on the pope's revolutionary ideas.

1.3 A few methodological remarks

Manuscripts and printed editions

A reader looking occasionally at the footnotes would notice fairly soon the contrast between the author's compulsive research into manuscript sources in the first chapter (on the Accursian Gloss) and his reliance on printed editions in other (though not all) parts of the book. This is not due to the author's increasing laziness (or at least this is what he tells himself), but to the need to understand clearly Accursius' own position on the slave-praetor's case. The attack on Accursius began only a very few years after he wrote his Gloss. Some of his earliest detractors, such as Guido de Cumis, were actually examined by the same Accursius when they received their doctorate.[8] The Gloss was then enriched by later authors, but on our subject the critique against it was surely addressed at

8 Cumis is said to have criticised the Gloss in his doctoral examination … in front of Accursius himself! Meijers (1959*a*), p. 33, text and note 109 (where he transcribed the *additio* on Dig.5.3.31pr, Leiden BPL 6C, *fol.* 66*v*). Meijers also transcribed a similar passage where Cumis told his students how someone else (quite significantly, just like Cumis himself, a student of Jacobus Balduini) did the same. This time however Accursius' wrath was such that the student not only failed the exam, but also abandoned his studies and even hastened to take the vows as a Franciscan monk, *ibid.*, note 108 (transcription of the *additio ad* Dig.4.8.23.1 in Leiden, BPL 6C, *fol.* 54*r*). Cf. also Sarti (1990), pp. 62–63. Although Meijers did not say that also Cumis failed his examination, he was sometimes credited with that conclusion: see e. g. Gualandi (1968), pp. 463–64. It is true that the text of the *additio* might be easily interpreted in that sense, but it would be difficult to reconcile Cumis' bright and swift career with the consequences of such a disastrous failure. Cf. Cortese (2009), pp. 55–56.

what Accursius himself had written. By contrast, when studying the approach of authors such as Baldus de Ubaldis, writing more than a century thereafter, it is no longer vitally important to know for sure whether a certain line is the work of Accursius or, say, of his son Franciscus.

References in medieval legal sources

A constant problem when dealing with *ius commune* sources is what to do with the overabundant and ever-present references in the texts. A healthy solution – the one usually adopted – is to ignore them. In effect, doubt often emerges: do these references really add something to the underlying argument of the jurist? As a rule of thumb, the importance of citations decreases with time. It would take great courage to look for each and every specific quotation found in, say, a seventeenth-century legal text. And the few scholars who display such courage normally do so in order to have an idea as to the sources available to a specific author, only seldom to better understand the substance of his reasoning. This of course is a sensible approach, because the forest of citations feeds itself. An author could not be taken seriously if he did not show a good mastery of what previous and authoritative jurists had already said on the matter. A long list of citations was prima facie evidence of continuity. Thus, stating something and then adding a huge list of authors agreeing with the point meant invoking the strength of all those previous authorities in support of the statement – whether or not the support was in effect genuine. A second problem is deciding whether an author did cite something, or the citation was added later. This is another effect of manuscript circulation, which often resulted the text having a second (and much more complex) life. The constant reproduction of manuscripts poses yet another challenge, for often the original citation was changed into another. Further, if manuscript circulation gave a second life to the text, printed editions often resulted in a third one. Here as well citations were often used with flexibility, sometimes even fantasy.

So why bother at all? Admittedly, it is often just not worthwhile. Much, however, depends on the historical period, the specific subject and the particular author. Roughly speaking, up to the fourteenth century (especially in civil law) the references tend to be more on sources than on other jurists. Of course other jurists are often cited, but not as frequently as other normative sources (mostly, other Roman law texts). As long as the attention of the references was focused mainly on the law (and not – yet – on its interpreters), paying careful attention to those references might be of great importance. This is especially the case for those jurists who had a profound knowledge of the whole legal system. Certain authors made ample show of such knowledge, but sometimes it remained just a show. Other authors possessed a knowledge of the legal sources that today, much to our

shame, would be unthinkable. Broadly speaking, looking at the citations furthers our understanding of the underlying legal reasoning. But sometimes the 'added value' is minimal, and does not justify the effort. At other times, however, it does.

As a rule of thumb, this added value tends to be greater for highly disputed points in the law, or during periods of transition in legal thought. The case of the slave-praetor combines these things: a very controversial subject discussed at a time of extremely important changes. In a society where elected officers were multiplying, the case of the slave-praetor was of great importance: its interpretation might allow the enduring validity of the deeds of city magistrates and other public officers even after their appointment was found out to be void. At the same time, however, the main normative source dealing with the slave-praetor presents undeniable textual ambiguities. An ambiguous passage whose interpretation would greatly affect the community was almost destined to be controversial. This is all the more the case since those controversies took place at a time of profound changes: first the progressive change in the approach of civil lawyers to the Roman law texts, and then the increasing influence of canon law on civil lawyers themselves.

Clearly, various jurists frequently repeated the same thing one after another, often reiterating the same concept, and even borrowing the same words (sometimes whole periods) from previous authors. So this is hardly an unconditional apology for the role of legal citations. Even so, a careful examination of references may prove more fruitful than sometimes assumed. At times, focusing on those references allows us to better understand the legal argument made in the text, and so the reasoning of a jurist, and to notice some subtle differences in the legal arguments of lawyers who apparently seem to say almost the same thing. This is true even for some differences that would appear minimal. Law is not mathematics: the commutative property does not apply to legal citations. Moving the order of the citations found in a previous author's work sometimes resulted in reaching the opposite conclusion: each of those texts cited underpinned a specific argument, and any lawyer knows well that the order of arguments does influence the overall conclusion – both in its logic and, consequently, in its strength.

Looking carefully at these citations may clarify some of the most obscure points in the discussion of the jurists. We will see, for instance, how much can be inferred from those references with regard to problems of mistaken will. Taken at their face value, many statements on the subject would appear cryptic, if not plainly rudimentary. Hence the impression that glossators and commentators alike paid little attention to the problem of the mistake as a pathology of the volition, and the resulting problems on the formation of consent.[9] While it is

9 E. g. Cortese (1966), pp. 243–244.

true that medieval civil lawyers did not venture into profound, lengthy and elaborate discussions on the matter, looking at the precise way in which they referred to other *leges* reveals a considerably greater sensibility and attention to the subject that one might not otherwise fully realise.

Scholarly literature

Scholarly literature is cited on the basis of its instrumentality to the argument, not its subject. The construction of medieval public law was a monumental task, where civil lawyers borrowed from Roman (mostly private) law as much as they did from canon law. More correctly, in building public law concepts they started to lay the grounds for a division between private and public law. Canon law provided a large share of the principles, Roman law provided most of the materials. Thus the relationship between Roman law and canon law might at times resemble that between bricks and mortar. As the focus of this study is on neither those bricks nor that mortar, but on their combination in a very specific case, references will be rather selective. This accounts for the brevity of quotations on some vastly studied subjects. As this study touches upon many subjects, the alternative would be to provide a small legal encyclopedia of secondary literature, which would be of doubtful utility.

Medieval reference system: the lex

This work will often study the arguments of medieval jurists focusing on their specific use of normative references. Any reference to Roman sources will be called *lex*. That is obvious to the student of medieval law, but it might not be so immediate to other readers. Any paragraph in the medieval and early modern editions of the *Corpus Iuris Civilis* (whether or not it corresponds to a paragraph in modern editions) was considered a self-containing normative text, hence the term '*lex*', identified by its opening word or (to avoid confusion) words. According to its length, the passage was often divided into different parts (which were sometimes sub-divided in their turn). But the unit was always the *lex*, which had its own internal logic – and thus also its legal coherence. For instance, the fragment of Ulpian in Dig.2.1.3 was always referred to as the *lex Imperium*. The passage was short but of crucial importance, as it contained several important definitions. The brevity of the passage, however, did not allow further segmentation. So each of those definitions, crucial as they were, constituted a separate section of the *lex* – but not a different *lex*.

This system might be considered the equivalent of the common law technique of citing the names of the parties of a specific case to identify the core of its decision, or the number of the article in a civil law code to refer to a

specific provision (provided that this difference makes still sense today). The *ius commune* did not develop on the basis of procedure, as the common law did, nor of course was it codified. It developed on the basis of the combination of different passages of Justinian's compilation and of canon law sources (and, to a lesser extent, feudal law ones). Each system develops its own idiosyncrasies. Compared with either of the modern solutions above, the medieval reference system just looks more elegant.

Medieval Latin

Compared with the beauty of classical Latin, medieval Latin is simply bad. Poor as it was, however, it was a language in contemporary use among learned people. As such, the text was not amended unless doing so was strictly necessary. If few medieval jurists believed strongly in grammar, the percentage among scribes must have been even lower. Some emendations were therefore necessary, mainly where the spelling of a word would not otherwise allow to make sense of the precise case of the noun, or the tense or person of the verb.

Part I

From Accursius to Bartolus (via France)