JUSTICE, PEACE AND POLITICAL DISSENT FROM THE EARLY MIDDLE AGES TO THE COMMUNAL PERIOD

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Abstract: The 'institutional' affairs that unfolded between the early and late Middle Ages can be (and have been) reconstructed in varying degrees of detail through diplomas, documents and chronicles. Regarding Italy, there is also another source that up to now has been rather ignored, and which might offer some insight into the more strictly legal aspects of these events. Specifically, I am referring to eleventh-century Italian jurisprudence on political crimes. Indeed, legal stances on the repression of dissent, on the justification of resistance to authority and on making peace between 'private' parties can be found in the Expositio to the Liber Papiensis, in the legal formulary and in some glosses appearing in manuscripts which were still in use in the 1130s.

These sources shed light on the expression and organization of political struggle in the Kingdom of Italy – be it through rebellion, protest or association – and on how that was perceived by the legitimate authorities. By studying them, it is possible to analyze how the concept of justice and institutions evolved from the early Middle Ages to the communal period.

Key words: *Expositio ad librum papiensem*, political crime, resistance, private peace, commune cities

1. *Society and law at the birth of the commune*

The development of the Italian city commune has never ceased to pique the interest of historians. Indeed, it forged a novel relationship between rulers and subjects, and as such was probably the most revolutionary and fruitful innovation of medieval law in the evolution of public law[1].

Chronicles dating back to the tenth century speak of coniurationes of citizens against the empire[2], and there is also historiographical evidence of how, in many cases, the political and institutional changes that took place in the cities of northern and central Italy were led by citizens who had formed sworn associations (even in the Dark Ages, these cities had remained hubs of public authority[3]). Furthermore, there is general consensus that these types of associations were formed so that local citizens could reclaim control over powers and functions that at the time were exercised by the empire's representatives.

In a phase that predated the actual formation of the commune, such associations were essentially organizations founded upon a negotiated agreement among their members. They were potentially subversive in

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[1] The idea for this article first took shape during the presentation of a report entitled *Figure del nemico nel diritto medievale*, delivered at the American Academy in Rome on 9 April 2014 during a seminar on the topic of *Dispute, Violence and Peace-making Practices in Medieval Italy* (New Work in the Humanities Series 2013-2014).

[2] On these and previous chronicles, see: G. Dilcher, *Die Entstehung der lombardischen Stadtcommune, Eine rechtsgeschichtliche Untersuchung*, Aalen, 1967, pp. 142 et seq.; Id., *Coniuratio* and *Eid*, in *Lexicon des Mittelalters*, München, Zürich, Artemis Verlag, 1986, vol. 3, pp. 136-137 and 1673-1692; Id., *Hell. Verständig, für die Gegenwart sorgend, die Zukunft Bedenkend, zur Stellung und Rolle der mitelalterlichen deutchen Stadtrechten*, «ZSS GA» 106(1989), pp. 12-45, Italian translation in «Nuova rivista Storica» 74(1990), pp. 489-514; A. Padoa Schioppa, *Il diritto nella storia d'Europa*, p. I, *Il medioevo*, Padova, 1995, pp. 200-205; P. Prodi, *Il sacramento del potere. Il giuramento politico nella storia costituzionale*, Bologna, 1992, pp. 113-115.

[3] G. Sergi, *Le città come luoghi di continuità di nozioni pubbliche del potere. Le aree delle Marche di Ivrea e di Torino*, in *Piemonte medievale. Forme del potere e della società. Per Giovanni Tabacco*, Torino, Einaudi, 1985, pp.5-27; Id. *Interferenze tra città e campagna nei capitolari*, in *Città e campagna nei secoli alto medievali*, Spoleto, 2009 (Settimane CISAM, LVI), pp. 245-263; Ch. Wickham, *Framing the early middle ages 400-800. Europe and the Mediterranean 400-800*, Oxford, 2005, pp. 592-594 and with a specific focus on Italy, pp. 605-606 and 645-656.

nature, as they represented an expression of dissent and disobedience to the legitimate authorities. These groups of citizens were characterized by the swearing of an oath (to be repeated regularly), as well as by their claim to pursue general interests that were different than those championed by the bishops or, in some cases, the counts[4]. Various forms of organized political dissent can also be found in records from the early twelfth century. It appears that most of these associations were founded upon a mutual oath taken by members and by those elected to exercise governmental and judicial functions in the exclusive interest of those members (it should be noted that in later times, not all citizens of a given city necessarily became members of such associations). Such was the case for the Genoese compagna, as recorded in briefs dating to the twelfth century (1143 and 1157)[5], as well as Pisa in 1162[6]:

> Eorum autem reclamationes qui sacramentum consulatui non fecerint, inquisiti, nisi a me vel ab aliquo de sociis meis consulibus remissum fuerit, mea sint voluntate.[7].

By swearing an oath of loyalty (generally called *juramentum*

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[4] P. Michaud Quantin, *Universitas expression du mouvement communautaire dans le Moyen-Âge*, Paris, 1970, pp. 233-234, and on the repetition of the oath, see Dilcher, *Die Entstehung* (nt. 2), p. 190; C. Storti Storchi, *Diritto e istituzioni a Bergamo dal comune alla signoria*, Milano, 1984, especially pp. 181-204.

[5] On the elite nature of the first *Genoese compagna*, I shall limit myself to citing the following works: V. Piergiovanni, *Brevi considerazioni sulla compagna e sul comune genovese*, in Id., *Gli statuti civili e criminali di Genova. La tradizione manoscritta e le edizioni*, Genova, 1980, pp. 247-252; Id., *Le istituzioni politiche: dalla compagna al podestà* now in Id., *Norme, scienza e pratica giuridica tra Genova e l'Occidente medievale e moderno*, Genova, 2012, vol. I, pp. 225-338.

[6] *Breve consulum Pisanae civitatis anno MCLXII*, in *I brevi dei consoli del comune di Pisa degli anni 1162-1164*, O. Banti (ed.), Roma, 1997, § 20, p. 57. The treatment of foreigners was based on these premises.

[7] U. Santarelli, *La normativa statutaria nel quadro dell'esperienza giuridica bassomedievale*, in Id., Ubi societas ibi ius,

A. Landi (ed.), Torino, 2010, pp. 793-806, especially pp. 797-798; A. Padoa Schioppa, *Diritto e istituzioni nell'età comunale*, in Id., *Italia ed Europa nella storia del diritto*, Bologna, 2005, pp. 83-84.

sequimenti), members, in the name of peace and justice, undertook to obey the consuls in the pursuit of mutual interests. In turn, the consuls pledged to enforce the rules governing the exercise of their functions, as agreed upon with members prior to their election, or in accordance with subsequent proposals approved by members in an assembly. Furthermore, as I mentioned above, it was always in the exclusive interest of association members.

From an economic, social and cultural point of view, the last quarter of the eleventh century was characterized by an «increase in wealth», «social mobility» and a «new intensity in the circulation of people, goods and ideas»[8]. Such circumstances set the stage for the emancipation of new social classes, allowing them to seize political power by forming communes. Moreover, this new legal system was set up by and for its members so that it could oppose the established authorities and 'freely' achieve what members considered the 'true' *utilitas* of citizens.

Pietro Costa examined how the terms 'liberty' and 'autonomy' were seen as fundamental aspects of these new communes. In particular, he took a century-by-century look at how, in theory and in practice, public law interpreted the nature and prerogatives of the commune[9]. In terms of the relationship between rulers and subjects, *libertas* was the dominant term in sources dating from the transition period between the early and late Middle Ages, with some mentions dating back to as early as the tenth century. Specifically, it was used with regard to the freedom to exercise certain powers that fell under the public sphere[10], such as the right to

[8] P. Cammarosano, *Storia dell'Italia medievale dal VI all'XI secolo*, Bari, 2001, p. 389.

[9] P. Costa, *Così lontano così vicino, il comune medievale e la sua autonomia*, «Quaderni fiorentini» (= QF) 42(2014) A*utonomia. Unità e pluralità nel sapere giuridico fra Otto e Novecento*, pp. 689-782.

[10] G. Fasoli, *Le autonomie cittadine nel medioevo*, in *Nuove questione di storia medievale*, Milano, 1964, pp. 145-176, especially 153; E. Sestan, *La città comunale italiana dei secoli XI-XIII nelle sue note caratteristiche rispetto al movimento comunale europeo*, in *Forme di potere e struttura sociale in Italia nel Medioevo*, G. Rossetti (ed.), Bologna, 1977, pp. 177-195; E. Artifoni, *Tensioni sociali e istituzioni nel mondo comunale*, in *La storia*, N. Tranfaglia, M. Firpo (ed.), Torino, 1986, pp. 461-491, especially pp. 483-487; R. Bordone, *La società cittadina del Regno d'Italia: formazione e sviluppo delle caratteristiche urbane*

trade and the right to use state property[11]. Indeed, up until at least the third decade of the twelfth century, the term *commune* was primarily used as an adjective or adverb to describe the people as a whole or mutual goods or interests – a long process was still to unfold before it would come to indicate a new legal system[12]. Only between the eleventh and twelfth centuries would the concept and practice of *libertas* expand to include the exercise of governmental, legislative and judicial functions on a local level[13].

However, such a notion of liberty did not exclude deference to a superior authority. For example, if it meant achieving their freedom, citizens might have even been willing to recognize the superiority of a sovereign if he could protect them from the tyranny of their ruler. Indeed, such cases represented nothing short of 'intervention by invitation', which legal doctrine would eventually fully recognize under *ius inter gentes* in early modern law[14]. Milan was an example of a city that took such a route almost two centuries after what might have been the first rebellion (*coniuratio*) against their bishop in 976[15]. Indeed, in order to defend

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nei secoli XI-XII, Torino, 1987; Cammarosano, *Storia dell'Italia medievale* (nt.8), pp. 297 et seq.; Padoa Schioppa, *Il diritto nella storia d'Europa* [nt. 2], pp. 197-199 and M. Ascheri, *La città - stato*, Bologna, il Mulino, 2006, pp. 27-30.

[11] A famous case is that of the *securitas*, or reconciliation, that was reached in Cremona in 996 between the local community (guilty of «conspiracy») and Emperor Otto III, which ended up granting citizens the use of property *pertinentes ad rem publicam* (*Ottonis III Diplomata*, T. Sickel (ed.), in *Monumenta Germaniae Historica* (= MGH)*, Diplomata* 2.2, reprinted in München, 1980, nr. 198, Sp. 606-607), recently examined in E. Coleman, *Origins of the Commune of Cremona, Three Texts translated from Latin (996-1097)* in *Medieval Italy. Texts in Translation*, K. L. Jansen, J. Drell, F. Andrews (ed.), Philadelphia, 2011, pp. 52-53.

[12] O. Banti, «Civitas» *e* «commune» *nelle fonti italiane dei secoli XI e XII*, in *Forme di potere e struttura sociale in Italia* (nt. 10), pp. 217-239, especially pp. 221-232.

[13] On the essentially political nature of communal *libertas*, see M. Sbriccoli, *L'interpretazione dello statuto. Contributo allo studio della funzione del giurista in età comunale*, Milano, 1969, p. 18.

[14] For example, see A. Gentili, Il diritto di guerra (De iure belli libri III. 1598), Milano, A. Giuffré Editore, 2008 (Centro Internazionale di Studi Gentiliani), Lib. I, cap. XVI, *Della difesa dei sudditi altrui contro il loro signore*, pp. 108-114.

[15] Ascheri, La città – stato (nt. 10), p. 35; E. Besta (G. Vismara), *L'età ottoniana*, in

themselves from Frederick Barbarossa, who had destroyed the city in 1162, it appears that the Milanese had not only opened up negotiations with the Byzantine emperor Manuel I Comnenus[16], but also with King Henry II of England[17]. The Milanese offered to recognize the sovereignty of these rulers in exchange for protection from the 'tyrannical' rule of Barbarossa, in order that they could preserve their *libertas*. That very same liberty had actually been granted by the empire as a privilege to Pisa and Genoa in 1162, just a few months apart[18]. In any case, there is no doubt that the concept and reality of sovereignty and 'liberty' had changed, what with so many years having passed since the first expressions of dissent in Europe.

Though it was a sporadic and tortuous process that played out over the course of almost two centuries, with periods of progress and stagnation mixed in with a fair share of defeats, citizens in various regions of Europe were able to gain more and more control of powers that were once considered prerogatives of the public authority. At times they even managed to do so through peaceful means, with the kingdom or empire

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Storia di Milano, vol. II, *Dall'invasione dei barbari all'apogeo del governo vescovile (493-1002*), Fondazione Treccani degli Alfieri, 1954, pp. 484-485.

[16] On Odofredus' account: G. L. Barni, *La lotta contro il Barbarossa*, in *Storia di Milano* (nt. 15), vol. IV, *Dalle lotte contro il Barbarossa al primo signore (1152-1310)*, p. 62.

[17] G. Raccagni, *English views on Lombard City Communes and their Conflicts with Emperor Frederick I Barbarossa*, «Quaderni Storici», 145(2014), pp. 183-218 and in http://www.research.ed.ac.uk/portal/en/publications/english-views-on-lombard-city-communes-and-their-conflicts-with-emperor-frederick-i-barbarossa(86e186ec-abd0-4f03-a151-82747eefb231).html, p. 11.

[18] The privileges were granted in the form of treaties, in MGH, *Legum* s. IV *Constitutiones et acta publica imperatorum et regum*, t. I, Hannoverae, 1910 (reprinted in 1963), nr. 205 *Conventio cum Pisanis*, 1162, April 6, 4: «Et ut Pisani […] sint liberi, etiam sub consulatu et iurisdictionis et potestatibus de se ipsius libere sicut eis placuerit», p. 283; nr. 211 *Conventio cum Ianuensibus*, June 9, 4: Item donamus et concedimus in feudum consulibus et communi Ianuam liberam potestatem eligendi ex se ipsis, firmandi et habendi consules et eis utendi, qui habeant ius et facultatem liberam faciendi iustitiam et puniendi maleficia in civitae et districtu suo bona fide, legibus et secundum bonos mores istius civitatis […». C. Storti Storchi, *Intorno ai Costituti pisani della legge e dell'uso (secolo XII)*, Napoli, 1998, pp. 56-68; Ead., *Per un'indagine sui costituti pisani. Alle origini del ius proprium tra continuità e rinnovamento*, in *A Ennio Cortese*, Roma, 2001, pp. 387-400, especially pp. 399-400.

granting them privileges that simply confirmed their right to exercise functions which had already been taken over by citizens. As for the cities in the Kingdom of Italy, they benefited from the 'good fortune' of a so-called 'incomplete' political authority [19], combined with the weakness and discontinuity of sovereign institutions, such that in some cases they were able to slowly take over the exercise of public functions in novel ways that distinguished them from other European cities[20]. In other situations and periods, this occurred by subverting those in power, who were decried as unjust or 'tyrannical'. Such conflicts resulted in outright rebellions and internal struggles, not only in northern Italy [21] but also in France, Germany[22] and England in the first years of the Norman conquest[23]. Furthermore, it was in these very situations that the chronicles were more likely to use the term *coniuratio/coniurationes*.

Of course, the 'institutional' affairs that unfolded between the early and late Middle Ages can be (and have been) reconstructed in varying degrees of detail through diplomas, documents and chronicles. Regarding Italy, however, there is also another source that up to now has been rather ignored, and which might offer some insight into the more strictly legal aspects of these events. Specifically, I am referring to eleventh-century Italian jurisprudence on political crimes. Indeed, legal stances on the repression of dissent, on the justification of resistance to authority and on making peace between 'private' parties can be found in the *Expositio* to the *Liber Papiensis*, in the legal formulary and in some glosses appearing in

[19] P. Grossi, *L'ordine giuridico medievale. Dieci anni dopo*, Bari, 2006, pp. 41-49.

[20] Sestan, *La città comunale italiana* (nt. 10), p. 187; Cammarosano, *Storia dell'Italia medievale* (nt.8), pp. 212- 223; Padoa Schioppa, *Il diritto nella storia d'Europa* (nt. 2), pp. 202-206.

[21] Costa, *Così lontano* (nt. 9), pp. 759-766.

[22] Padoa Schioppa, *Il diritto nella storia d'Europa* (nt. 2), pp. 199-201.

[23] *Orderici Vitalis angligenae Historia ecclesiastica*, in *Patrologiae cursus completus* vol. 188, Parisii, apud J. P. Migne editorem, 1855, coll. 17-984, for example coll. 310 («pro amissa libertate»), 312 («pro vindicanda libertate»), which can also be found in the English translation *The Ecclesiastical History of Orderic Vitalis*, 6 vol., Oxford Medieval Texts, 1968-1980, translated by M. Chibnall; for an analysis of the work: Id., *The world of Olderic Vitalis*, Oxford, 1984. Specifically, see: Raccagni, *English views on Lombard City* (nt. 17), p. 15.

manuscripts which were still in use in the 1130s.

These sources shed light on the expression and organization of political struggle in the Kingdom of Italy – be it through rebellion, protest or association – and on how that was perceived by the legitimate authorities. By studying them, it is possible to analyze how the concept of justice[24] and institutions evolved from the early Middle Ages to the communal period.

It is a long process that requires an analysis of Lombard and Carolingian laws on dissent. Though it had long become clear that these laws ran against the *leges romanae*, they were nonetheless subjected to methodical interpretation on the part of the judges in Pavia centuries later – surprising given that Roman law was progressively establishing itself in many other spheres[25].

2. *Justification, reconciliation, exile: Political dissent in the early Middle Ages*

The relationship between rulers and subjects was interpreted differently by the Lombard and Carolingian empires, giving rise to three principles that would play a key role in the law's approach to maintaining public order and dealing with political dissent over the course of the eleventh century: firstly, it was deemed lawful to protest against unjust acts committed by the authorities, though the authorities determined the ways in which such dissent could be expressed[26]; secondly, anyone who had peacefully protested against just orders or rulings issued by the authorities would be punished by exile; and lastly, the practice of making peace between private

[24] L. Loschiavo, *La risoluzione dei conflitti in età altomedievale: un excursus storiografico*, in *Il diritto per la storia. Gli studi storico giuridici nella ricerca medievistica*, E. Conte, M. Miglio (ed.), Roma, Istituto storico per il Medio Evo, 2010, pp. 91-111; *La giustizia nell'alto medioevo (Secoli V-VIII)*, Spoleto, 1995 (Settimane CISAM, XLII); *La giustizia nell'alto medioevo (Secoli IX-XI)*, Spoleto, 1997 (Settimane CISAM, XLIV); A. Padoa Schioppa, *Note sulla giustizia medievale nella ricerca storico-giuridica*, in *Storia della giustizia e storia del diritto, prospettive europee di ricerca*, L. Lacché, M. Meccarelli (ed.), Macerata, 2012, pp. 101-113, now in Id., *Giustizia medievale italiana. Dal Regno ai Comuni*, Spoleto, 2015, pp. 293-113.

[25] See note 84 below.

[26] See § 3 below.

parties was to be safeguarded. In the first two cases, subjects were obedient only to the extent that the rulers' actions were just; the last case focused on safeguarding peace in society (or in the kingdom), as well as ensuring that subjects respected the obligations to which they were bound through formal acts of reconciliation negotiated by local authorities. We might say that punishment by exile for those on the losing end of a political struggle and the safeguarding of peacemaking practices between private parties were legacies of the past[27], or in the words of Antonio Padoa Schioppa, examples of the «spolia» used to build the «new structure» that was the commune[28].

Italy in the early Middle Ages was a multiethnic society which, like other European territories, was beset by wars in order to expand or defend its domain. In this context, the more control the kingdom exercised over society, the more it sought consensus from its subjects[29]. In many ways, political and judicial authorities at every level of the hierarchy represented a potential threat to the relationship between the central government and its peripheral cities. If they were to deny justice, or appoint the wrong judge to handle a certain case, then they might be accused of being biased or of colluding with a higher authority – such worries continued into the twelfth century, as clearly expressed by Frederick Barbarossa[30]. In order to avoid these risks, members of society were involved in public hearings known as *placita*. These occasions provided a forum for the 'laity'[31] to voice their opinions on judicial matters, and the government paid

[27] P. Costa review of P. P. Portinaro, *Il labirinto delle istituzioni nella storia europea*, Bologna, 2007, «QF» 37(2008), pp. 598-603.

[28] Padoa Schioppa, *Il diritto nella storia d'Europa* (nt. 2), p. 211.

[29] Obviously, the term 'multiethnic' warrants clarification; for more on this, in addition to references to the historiographical debate, see C. Storti, *Le dimensioni giuridiche della curtis regia longobarda*, in *Le corti nell'alto medioevo*, t. I, Spoleto, 2014 (Settimane CISAM, LXII), pp. 429-472, especially pp. 444-450; Ead., Ascertainment of customs and national and/or personal laws in medieval Italy from the Lombard Kingdom to the Communes, in «Rechtsgeschichte Legal History», 24(2016), pp. 257-265 especially pp. 257-258.

[30] MGH, *Legum* s. IV *Constitutiones* t. I (nt. 18), nr. 176. *Constitutio pacis*, 5, p. 246.

[31] Padoa Schioppa, *Giustizia medievale italiana* (nt. 24), especially pp. 1-253, 287-299.

particular attention to any negative reactions on the part of the public, not only as regarded rulings, but also for what concerned any acts or orders issued by the king's delegates that the public considered illegal or unfair[32].

Under Liutprand and Ratchis, Lombard legislation classified disobedience, protest and rebellion against the authorities as distinct types of crime. Lothar cracked down on different forms of political dissent even further in the Carolingian era, punishing even the simple act of forming an organized political association through rituals such as the swearing of an oath or shaking right hands. However, the severity of such measures to repress political dissent was offset by Carolingian legislation, which provided for different types of justification in certain cases. Thus, punishments were inflicted only after verifying whether there had been a legitimate reason behind such 'resistance'[33].

In this way, lawmakers aimed to accomplish two goals. On the one hand, they sought to fight against political dissent, which was viewed as a crime of public relevance due to the fact that it disturbed the peace and public order in general; thus, jurisdictional authority was centralized, so that cases which had previously been left to negotiation between the parties or to rulings issued by decentralized *curtes* now fell under the authority of the *palatium*. On the other hand, they were making an effort to improve the central government's standing in the eyes of its subjects; thus, they intensified control over those who had been delegated by the king to exercise judicial and executive authority, and they provided dissident subjects who 'justifiably' opposed the decentralized authorities with direct – albeit progressively restricted – access to the king.

a) Peacemaking between private parties

The reconciliation of parties in conflict (*discordia*) was considered an act that benefited the public interest, and as such fell under *causae regales*. In

[32] For more on this, including a bibliography, see C. Storti, *Città e campagna nello specchio della giustizia altomedievale*, in *Città e campagna* (nt. 3), pp. 294-336, especially pp. 299-302.

[33] ~~F~~. Graus, *La concezione medievale del potere e del diritto*, «Studi storici», 50,2(2009), pp. 395-411.

order to prevent disputes or avoid further conflict, local authorities (*iudex aut actor publicus*) sought to encourage the negotiation of an agreement (*treuva*). Any breach of the latter would result in a monetary sanction (*compositio*), to be paid in equal parts to the *publicum* and the injured party. While the *compositio* was determined on a case-by-case basis, Liutprand believed that it should be a considerable amount of money, so as to discourage parties from breaching the agreement:

> Si quis iudex aut actor puplicus in qualicumque civitate aut loco inter homenis qui aliquam discordiam habent, treuvas tulerit, et unus ex ipis hominibus inter quos ipsa truvas tulta sunt, eas ruperit […] [34].

The regulation of peacemaking practices between 'private' parties remained practically unchanged for almost three centuries, as demonstrated by the *expositio* as well as by records dating back to the Carolingian era[35]. However, judges had to reckon with those who, drawing on Roman law, claimed that they were not held to any obligation whatsoever if a judge had negotiated a truce in their absence and/or in the absence of the counterparty (according to Roman law, any agreements reached between absent parties was declared null and void) [36]. Thus, the anonymous *expositor* suggested taking precautionary measures to avoid such problems. Specifically, the arbitrator was to ask each litigant, *singillatim*, to waive any such claim and to accept the imposition of any penalty. This recalls the twelfth-century practice of inserting clauses in peacemaking agreements in which the parties undertook not to breach the agreement by resorting to technicalities in its interpretation, and to avoid

[34] Liutp. 42 a. 723.

[35] Exp. ad Liut. 41 (42), § 2 (*Liber legis Langobardorum Papiensis Dictum* ed. A. Boretio, in MGH, *Legum* t. IV, Hannoverae, 1868, reprinted in 1965) and for more on this topic, including a bibliography, see G. Masi, *Collectio chartarum pacis privatae medii aevi ad regionem Tusciae pertinentium*, Milano, 1943, p. 10; P. Brancoli Busdraghi, *Aspetti giuridici della faida in Italia*, in *La vengeance 400-1200*, D. Barthelemy, F. Bougard, R. Le Jan (ed.), Roma, 2006, pp.159-173, especially p. 162.

[36] Inst. 3, 19 (*Inutilis stipulatio*) § 12.

«omni malo sofysmate»[37].

Emperor Henry I would eventually change the mode of proof in the event that any peace which had been made through the *osculum pacis* (still a widespread custom in the twelfth century) was breached by murder[38]. The alleged murderer was required to prove his innocence by duel, and if he lost, the formulary called for his hand to be cut off as punishment, in addition to paying a composition[39].

Lastly, Frederick Barbarossa inflicted severe penalties on delegates of the empire who not only failed to administer justice, but who also failed to punish any breaches of peace[40]:

> iudices vero et locorum defensores vel quicumque magistratus ab imperatore vel eius potestate constituti seu confirmati, qui iustitiam facere neglexerint et pacem violatam vindicare legittime supersederint, dampnum omne et iniuriam passis resarcire compellantur; et insuper si maior iudex est, sacro erario penam X librarum auri preste, minor autem pena trium librarum auri multetur.

Such peacemaking practices would remain in use for some time and become a characteristic trait of both statutory legislation and the juristic concept of justice and public order[41]. Private parties or city governments[42]

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[37] Masi, *Collectio* (nt. 35), nr. V, Volterra – 1193, October 27, p. 32.

[38] Ibidem, nr. VII, 12 November, p. 39 («pacis hosculo interveniente»); nr. XII, Passignano, 1238, March 19, p. 62.

[39] Exp. ad Heinr. I, 3 also covered in Brancoli Busdraghi, *Aspetti* (nt. 35), pp. 167-168.

[40] MGH, *Legum* s. IV *Constitutiones* t. I (nt. 18), nr. 176. *Constitutio pacis*, 5, p. 246.

[41] A. Padoa Schioppa, *Delitto e pace privata* now in Id., *Italia e Europa nella storia del diritto*, Bologna, 2009, pp. 290-250; on M. Sbriccoli's now classic pairing of negotiated justice – hegemonic justice, see the collection of essays in Id., *Storia del diritto penale e della giustizia. Scritti editi e inediti (1972-2007)*, Milano, 2009 (For the history of modern legal thought, 88), especially pp.47-128.

[42] Masi, *Collectio* (nt. 35), nr. X, Volterra - 1220, May 19: «De pace facienda vel de tregua facienda», p. 48; M. Vallerani, *Pace e processo nel sistema giudiziario. L'esempio di Perugia*, in Id., *La giustizia pubblica medievale*, Bologna, 2005, pp. 167-209; M. Ascheri, *La pace negli statuti dei comuni toscani: una introduzione*, in Iuris Historia. Liber *amicorum Gerhard Dolezalek*, V. Colli, E. Conte (ed.), Berkeley, 2008, pp. 73-87; other bibliographical references can be found in nt. 93.

continued to make peace – in or out of court – using the terms *securitates* and *paces*, while the older term *finis intentionis* was being used less and less[43]. Although jurisdictional authority was being progressively centralized in the hands of the public legal system in order that «ne crimina remaneant impunita», these forms of 'negotiated' justice were widespread, not only in Italy but also in Europe. Indeed, it was a social attitude that persisted for centuries, so much so that even Emperor Charles V had to address its validity in the Duchy of Milan[44].

b) Causae publicae: *Rebellion* (seditio) *without the king's authorization.*

Records show that as far back as the reign of Perctarit[45], the monarchy was intent on containing any scandals or rebellions that may have erupted among its subjects because of biased or corrupt judges. Liutprand only accentuated this further when he intervened in matters of justice in 721, instituting more severe punishments in cases of justice denied (specifically, those cases previously addressed by Rothari), in addition to providing parties with the opportunity to appeal to the king if they believed that a sentence was illegitimate or unjust[46]. However, allowing subjects to appeal directly to the royal court in cases of a denial or miscarriage of justice was a double-edged sword: on the one hand, it enabled the king to exercise more effective control over judicial authority, but on the other hand, as could be expected, it weakened the authority of the king's delegates in the eyes of the subjects. Indeed, in many cases the delegates were already

[43] Masi, *Collectio* (nt. 35), «Breve finitionis et perdonationis et securitatis», Firenze, 1102 October, 13, p. 20. The term *intentio* in Liut. 134, also covered in Busdraghi, *Aspetti* (nt. 35), pp. 160-163; see also *Concordiae*, in MGH *Legum*, t. IV (nt. 24) tit. II, *Capituli Rothari et Liutprandi de scandalis*, p. 239-240.

[44] Padoa Schioppa, *Delitto e pace privata* (nt. 41), especially pp. 242-246

[45] For more on this topic, including a bibliography, see Storti, *Città e campagna* (nt. 32), pp. 307-308.

[46] Liut. 25 - 27 and see A. Padoa Schioppa, *Ricerche sull'appello nel diritto intermedio*, I, Milano 1965, pp. 153-158; Id., *Note sull'appello nel pensiero dei glossatori*, now in Id., *Giustizia medievale italiana* (nt. 24), pp. 255-276; some references can also be found in C. Storti, *Le dimensioni giuridiche* (nt. 29), pp. 456-457.

dealing with problems in their local jurisdictions because of openly expressed dissent or disobedience, above all in recently conquered territories or in territories under threat of conquest by neighboring governments.

In 723, this state of affairs led Liutprand to strengthen the hierarchical link between the dukes and the king by declaring that an offense against the former was equivalent to an offense against the latter. Consequently, this increased the number of cases of sedition, which Rothari had previously considered a crime only if an attack was against the king or against the peace and order of the kingdom[47].

Liutprand used the term *seditio*[48] to describe any uprising that aimed to expel a duke (*iudex*) from a city, unless the rebels had contacted the *palatium* beforehand in order to obtain the king's authorization for such action[49]. Thus, crimes of sedition against decentralized authorities were now considered *causae regales*, falling under the competence of the central court [50]. It did not matter whether a rebellion erupted spontaneously or was the result of a 'conspiracy', whether it had been

[47] Roth. 9.

[48] Isidore of Seville, *Etimologie o Origini*, A. Valastro Canale (ed.), Torino, 2006, V *De legibus et temporibus*, XXVI *De criminibus in lege conscriptis*, 11, «seditio dicitur dissensio civium», p. 414; V, 24 *De instrumentis legalibus*, XXXI, «sacramentum est pignus sponsionis», p. 406; IX *De linguis, gentibus, regnis, militia civibus, affinitatibus*, III *De regnis militiaeque vocabulis*, 55 «coniuratio quae fit in tumultu, quando vicinum urbis periculum singulos iurare non patitur, sed repente colligitur multitudo et tumultuosa in ira conflatur», pp. 749-750..

[49] Liut. 35. *Malum* was a premeditated attack that could potentially result in the victim's death. See also *Codice Diplomatico Longobardo*, C. Troya (ed.), Napoli, 1839, vol. III, a. 733 March 1, pp. 583 et seq., especially p. 587: «Pro illicita autem presumpcione de ipsa autem colleccione […] Hoc autem idem instituimus ut nullus presumat malas causas in qualecumque locum excitare, aud facere, et non potuimus causam ipsam ad arischild*, neque wigrigild, neque ad consilium rusticarum, aud ad sediccionem et magis congruum paruit nobis esse de consilium malum , idest consilium mortis, quia quando se colligunt et super alios vadunt ut malum faciant, aud si casus evenerint, ad (quod) hominem occidant , et plagas et feritas faciant. Ideo ut diximus assimilavimus causam istam ad consilium mortis, quod sunt sicut supra premisimus sol. viginti» (*the laws against sedition and the seditious).

[50] C. Storti, *Le dimensioni giuridiche* (nt. 29), pp. 450-462.

organized in the city where the crime was then committed or in another jurisdiction, or whether it was justifiable or not because of a duke's unjust regime: any rebellion against *iudices* was deemed by Liutprand to be a violation of both the peace of God and the king's peace, which subjects were never to jeopardize («in pace et gratia Dei et regis vivere valeant»)[51].

As the main victim of this crime, the *publicum* was entitled to the possessions confiscated from the leader of the uprising («omnes res eius ad publicum perveniant»), who was also to be put to death for his crime; furthermore, co-conspirators were required to compensate the *publicum* through the payment of the guidrigild. The duke and any other loyal subjects who had been personally affected by the rebellion, including through injury to their relatives or property (*malum*), were also entitled to compensation:

> If an individual in a city organizes a rebellion against his judge without the king's authorization [*voluntas*], or commits a crime [*malum*] against said judge, or seeks to expel the judge without having received an order from the king [*iussio*], or if, as above, several men [*alteri homines*] from one city have rebelled against another city or have attempted to expel another judge without the king's approval [*voluntas*], then the leader of the uprising shall lose his life and all of his possessions shall become property of the publicum; the others who conspired with him [*in malo consentientes*] shall each pay their *guidrigild* to the *palatium*. If they have damaged the home of someone who is loyal to the *palatium* or to the king or duke, or if they have stolen goods from said home, then they shall pay the *octogild* to the *palatium* in addition to the *guidrigild*. That this bad habit may not develop further, and on the contrary, that it may be eradicated so that all may live in the peace and grace of God and the king.

c) Protests against 'just' rulings issued by public authorities

According to Liut. 34, a rebellion which was authorized or ordered by the king was justified. In the wake of Liutprand's policy, in 746 Ratchis extended such justification to include those rebellions which were triggered tout court by unjust orders or rulings, or by a denial of justice, even if the rebels were led by a person of high dignity.

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[51] Liut. 34 (35).

At the same time, Ratchis expanded the crime of sedition to include any crowd of four or more citizens which gathered (*adunacio* - *zava* of *mali homines*) to peacefully protest or violently dispute just orders or rulings issued by the duke («quae ille ei recte dixerit»). Furthermore, he specifically addressed the case of those who refused to appear at trial when summoned or subpoenaed because they wanted to seek out other judges in whom they had greater confidence («aut ad eius iudicium non vadat, confidens in alicuius patrocinio») [52].

> We have been informed that in individual cities, groups of four or more *mali homines* gather in order to protest, peacefully or violently, against their judge *zavas et adunaciones faciunt*, declaring that they do not want to obey the just orders [*recte*] of the duke, or refusing to appear in court (*confidens in alicuius patrocinio*) and they seek to incite others.

As mentioned above, the lawfulness of a rebellion was dependent upon whether the actions of the authorities could be considered just, and rebels were not punished until that was verified. The term *recte* had already been used by Liutprand to evaluate the justness of sentences issued by way of a judge's discretionary power (*arbitrium*), or when assuming that such sentences were within the bounds of the law[53]. Lothar would use the term in the same way in his capitulary of Pavia in 832 (reproduced in the *expositio*[54]), as would Otto III[55]. In the text of the council of Paris in 829,

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[52] Rach. 6, Zava idest rixa, in the gloss in Exp. ad Rachis 6. In the more recent codes «id est firmamentum ad bellum», cf. G. Princi Baccini, *Restituzione germanica di un tecnicismo giuridico longobardo: zava (Rachis 10)*: Appendice I. *Esempi di estrapolazione meccanica nei glossatori medievali di testi giuridici longobardi*, in *Parole longobarde nelle Leges Langobardorum e oltre: identificazioni e restauri*, A. Princi Baccini, M. C. Picchi (eds.), Padova, 2012, pp. 89-122. Cf. also Ead., *Termini germanici per il diritto e la giustizia: sulle tracce dei significati autentici attraverso etimologie vecchie e nuove*, in *La giustizia nell'alto medioevo (Secoli V-VIII)* (nt. 24), pp. 1053-1207.

[53] Liut. 28 (*Si quis causam*): «[…] Et si forsitans iudex causam per arbitrium iudicaverit, et iudicium eius rectum non comparuerit , non sit culpavelis, nisi preveat sacramentum regi, quod non iniquo animo aut corruptus a premio, causam ipsam non iudicassit; nisi sic ei legem conparuissit, et sit absolutus. Nam si iurare non presumpserit, componat ut supra dictum est. […]».

[54] *Capitulare Papiense* a. 832, in MGH, *Legum*, s. II, *Capitularia regum Francorum*, t. II,

rectum appears in the declensions *iustitiae rectitudo* and *incorrectum* with regard to *facti qualitas*[56]. The term also took on the latter meaning in several *placita* during the tenth century[57].

Ratchis placed limits on direct appeals to the king, which Liutprand had provided for in order that subjects could decry poor governing on the part of the local authorities; specifically, now 'dissenters' could only appeal directly to the *palatium* for cases of concern to and under the competence of the king (*causa regis*) [58]. As there was some uncertainty regarding the meaning of such an expression, the expositor adopted a strict interpretation thereof (as will be seen below). Indeed, he referred exclusively to Rothari's edict 9, which called for the death penalty to be inflicted upon anyone who threatened the safety of the king and the state[59].

Furthermore, an appeal could be made to the palatium in order to obtain justice if appellants could prove that they had been the victim of a

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p. I, Hannoverae, 1890, reprinted in 1986, nr. 201, p. 61, nr. 6, and see F. Bougard, *La justice dans le royaume d'Italie de la fin du VIIIe siècle au début du XIe siècle*, Ecole française de Rome, 1995, especially pp. 24-29, 50-51; Prodi, *Il sacramento del potere* (nt. 2), pp. 92-94; S. Balossino, Iustitia, lex, consuetudo: *per un vocabolario della giustizia nei capitolari italici*, «Reti medievali», 6 (2005), pp. 1-48, especially p. 3.

[55] *Festorum placito rex tertius invidet Otto*, in *Expositio* (nt. 35) p. 581, which the *expositio* notes as contrasting with D 2, 12 (feriis), 1, 3).

[56] Concilium Parisiense 829 mensis Iunii die 6, in MGH, *Legum* S. III, *Concilia*, t. II, p. II, Hannoverae, 1908 (reprinted in 1979), p. 650 and 652, cf. A. Padoa Schioppa, *La giustizia ecclesiastica dell'età carolingia: i canoni sinodali*, in. Id., *Studi sul diritto canonico medievale*, Spoleto, 2017, pp. 79-126, in part. pp. 99-102.

[57] In some judicial *placita* of the tenth century, the sentence was introduced by various combinations of the following formula: «rectum eorum omnium paruit qui supra iudicibus et auditores et iudicaverunt ut iusta eurum altercationes» (Storti, Città e campagna (nt. 32), especially pp. 304-305 and p. 325 nt. 101). See also *Forma notitiae pro securitate*, in MHG, *Legum* t. IV (nt. 35), p. 604: «[…] his actis et manifestatione supra facta, rectum iisdem iudicibus et auditoribus aperuit esse, et iudicaverunt ut iuxta eorum altercationem […]».

[58] Ibidem: […] «Si vero de causa regis aliquid dicere voluerit, sit ei licentia veniendi ad palacium […] suscipiat sententiam secundum qualitatem causae, sicut anterius edictum continet».

[59] Exp. ad Rach. 10, §§2-3.

crime (violentiae) and had not obtained justice, or had been wrongfully convicted of a crime due to the bias or corruption of the duke. This included the arimanni, for whom there was a specific procedure in place[60]. If the denial of justice was proved, then the protesters would be acquitted of the charge («non computetur in adunatione»), while the duke would lose his office (honorem) and be required to pay the guidrigild: half to the palatium and half to the injured party.

d) Adunationes, collectae and cospirationes of private individuals and holders of public office: Punishment by exile.

As emperor, king of the Lombards and king of Italy, Lothar I concentrated his efforts on political crimes committed by associations of citizens, and introduced punishment by exile for cases of non-violent organization.

Three rules against the crime of political conspiracy were attributed to Lothar I by the liber papiensis, each of which provides a glimpse of how and what kind of associations were formed in the early decades of the ninth century. What emerges is that there was a perception of organized dissent as being an insidious or dangerous problem for peace in the kingdom[61].

The severity of punishment was based on both the extent to which

[60] A. Cavanna, *Fara sala arimannia nella storia di un vico longobardo*, Milano, 1964 and on the historiographical debate, see Storti, *Le dimensioni giuridiche* (nt. 29), pp. 470-473.

[61] G. Bognetti, *Milano sotto gli imperatori carolingi*, in *Storia di Milano* (nt. 15), vol. II, pp. 363-398; Id., *Appendice*, ibid., pp. 737-740; E. Hlawitschka, *Lotharingien und das Reich an der Schwelle der deutschen Geschichte*, Stuttgart 1968, pp. 10-16, 19, 29, 36, 73, 85 s., 101, 110, 129-131, 172, 176 s., 207; P. Delogu, *Strutture politiche e ideologia nel Regno di Ludovico II*, «Bullettino dell'Istituto storico italiano per il Medio Evo e Archivio Muratoriano», LXXX (1968), pp. 53-114, especially 137-146, 149-153; V. Fumagalli, *Il Regno italico*, in *Storia d'Italia*, Torino, 1978, ad ind; G. Tabacco, *Sperimentazioni del potere nell'Alto Medioevo*, Torino, 1993, ad ind.; G. Albertoni, *L'Italia carolingia*, Roma, 1997, ad ind.; P. Moro, *Venezia e l'Occidente nell'Alto Medioevo. Dal confine longobardo al* pactum *lotariano*, in *Venezia. Itinerari per la storia della città*, S. Gasparri, G. Levi, P. Moro (eds.), Bologna 1997, ad ind.; P. Cammarosano, *Nobili e re. L'Italia politica dell'Alto Medioevo*, Roma-Bari 1998, ad ind.; L. Loschiavo, *Lotario I, imperatore, re d'Italia*, in *Dizionario biografico degli Italiani*, vol. 66 (2006), pp. 171-181.

conspirators' actions had disturbed society as well as on the kind of rituals used to form their bond. Certain rituals were specifically cited, such as shaking right hands (*per dexteram*, previously addressed by Isidore[62]) and the swearing of oaths (*per sacramentum*), and it seems reasonable to think that obligationes per wadiam were also included for Lombard subjects, as regulated by Roth. 360 and 362, and Liutp. 8 (§ *si quidem per wadiam obligatio facta fuerit*) [63]. The innovation here lay in the desire to repress the mere act of association, so much so that the very existence of such rituals became criminally relevant. This was in keeping with orders previously issued by Charlemagne in the Capitulary of Herstal (779), though these had actually been in reference to very specific cases. Those orders were eventually included in the *Lombarda*, but not in the *Liber papiensis*[64].

It was forbidden to assemble in an adunatio (the same term was used in Ratchis 6) if its purpose was to protest against the authorities, and any violation of this was punished as follows: the organizer («ille qui prius ipsum consilium inchoavit») of a 'peaceful' association founded upon the swearing of an oath or some other form of pledge was to be exiled to Corsica; co-conspirators were to pay a fine (bannum) if they were solvent, otherwise they were sentenced to flogging.

Lothar seems to have dealt with these same cases even more severely in the Capitulary of Pavia (832). First of all, its prologue reaffirmed the validity of previous orders issued by Charlemagne and Louis the Pious[65]. Lothar

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[62] Isidore, *Etimilogie* (nt. 48), XI *De homine et portentis*, I *De homine et partibus eius*, 67: «Dextra vocatur a dando, ipsa enim pignum pacis datur; ipsa fidei testis atque salutis adhibetur; et hoc est illud apud Tullium: «Fidem publicam iussu Senatus dedi», id est dextram».

[63] E. Cortese, *Il diritto nella storia medievale*, I, *L'alto medioevo*, Roma, 1995, pp. 162-166.

[64] MGH *Legum Sectio* II, *Capitularia Regum Francorum*, t. I, Hannoverae 1883, nr. 20 *Capitulare Haristallense*, 779 mense martio, 16 *De sacramentis per gildonia*, p. 51 «De sacramentis per gildoniam invicem coniurandis ut nemo facere presumat. Alo vero modo de illorum elemosinis aut de incendio aut de naufragio, quamvis convenentias faciant, nemo in hoc iurare presumat», in *Leges longobardorum cum argutissimis glosis Caroli de Tocco*, G. Astuti ed., Torino, 1964, (= Lomb.), Lib. I, tit. 17 *De aggressione in vico facta et de collectionibus*, l. 7

[65] *Capitulare Papiense* a. 832 (nt. 52) in Lomb. (nt. 62), Lib. I, tit. XVII *De aggressione in*

then divided associations formed for political purposes (*conspirationes*) into three different categories of seriousness based on whether the bond had been entered into by way of oath or handshake:

> ut de cetero in regno nostro nulla huismodi conspiratio fiat nec per sacramentum nec sine sacramento

Regardless of the kind of bond that linked conspirators, they were to be subjected to corporal punishment if their conspiratorial act had resulted in crimes against the person (*malum*). The perpetrators of the crime (*auctores facti*) were to be sentenced to death, while accomplices (*adiutores*) to flogging. Even when it did not lead to the perpetration of crimes, conspirators who had simply agreed to resist or rebel against the authorities were to be punished by mutual flagellation and head shaving. In this case, freemen who had formed an association by shaking right hands would have the possibility of exonerating themselves by swearing, cum *idoneis iuratoribus*, that they were not part of a criminal conspiracy («ut hoc per malum non fecissent»). If they were not able to do so, then they would have to pay a composition in accordance with national law («secundum legem suam»)[66].

On the contrary, Lothar reserved a special procedure for the royal court to deal with assemblies (*collectae*) against the authorities if demonstrations of dissent had been led by exponents of the legitimate government itself, that is to say, by holders of public office (*praepositi*, lawyers, *sculdasci*) or those invested with dignities (Loth. 55).

Indeed, Lothar ordered that local authorities were to inform him of all protests resulting from the negligence of counts. Only in these cases – and not in those of dissent led by associations – would the king be able to review sentences issued by a count, on the condition that the leader of the protest was, as mentioned above, a «praepositus aut advocatus sive

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vico facta et de collectionibus, l. 7. The title in the *Lombarda* dealt with the edicts of Rothari and Liutprand on attacks *in vico*, as well as the *collectae* formed by servants to Louis the Pious, Charlemagne's capitulary cited in nt. 64, and the three laws of Lothar: *Volumus de obligationibus* (4), *Collectam ad malum* (55) and *De conspirationibus* (67).

[66] Loth. 67 De conspirationibus

sculdhais vel qualibet alia dignitate praedicta libera persona». As duly reaffirmed by the *expositio* centuries later, upon review the king could then suspend any sentence of exile or death that was issued by a local court against a public official who had led a protest[67]. The latter official was expected to appear before the *palatium* (Loth. 55) in the company of sureties, where the king, assisted by his curia (*cum fidelibus nostris*), would issue the definitive sentence according to his own assessment of the actual case («quid faciendum sit»)[68]. The same procedure was used for 'professional' rebels (Loth. 54)[69].

3. *The interpretation of rules on rebellions and political associations in the expositio and glossae to the Liber papiensis (11th-12th centuries).*

At some point during or towards the end of the eleventh century, with additions seen until 1137-1138[70], judges and teachers reread the written codes which were still in force and interpreted them through glosses and the *expositio*. Naturally, they did so based on their contemporary experience, taking into account the events and social situation of the time, as well as the political clashes taking place in their cities. Thus, these texts were adapted – perhaps even mistakenly – to cases that had not previously

[67] Exp. ad Loth. 55 Volumus.

[68] Loth. 55 Volumus.

[69] Loth. 54: «De his qui discordiis et contentionibus studere solent et in pace vivere nolunt et inde convicti fuerint similiter volumus, ut per fideiussores ad nostros palatium veniant, et ibi cum fidelibus nostris consideremus, quid de talibus hominibus faciendum sit».

[70] As described by Boretius (MGH, *Legum* t. IV (nt. 35), pp. LIII-LXII), the *Codex Parisiensis* (ivi § 16, pp. LVIII-LIX), which formerly belonged to the Church of Saint Euphemia in Verona and is marked as nr. 7, contains writings which most recently date to 1137-1138; the *Codex Vindobonensis*, marked as nr. 8, dates back to the same manuscript from the eleventh century (ivi § 17, p. LX); the *Codex Londinensis* (once held in the library of a Venetian bibliophile until 1780) dates back to 1030 and is marked as nr. 4; lastly, the extensively glossed code belonging to the Laurentian Library in Florence (marked as nr. 5) dates back to the end of the eleventh century. On the other hand, the Este code, marked as nr. 9, is an 'accurate', late-fifteenth-century copy made by Pellegrino Prisciani of a code which, according to Boretius, dates back to the eleventh century (ivi pp. LX-LXI).

been accounted for, or cases which had simply not been written down by lawmakers.

As far as the method of interpretation was concerned, there is no doubt that 'systematic' criteria and *distinctiones* were used to examine such a vast collection of texts belonging to different systems and eras. The judges and teachers were clearly intent on maintaining the validity of all rules regarding acts of rebellion or protest, whether carried out by individuals or associations[71]. Each rule was analyzed as it related to the entire system of laws governing this matter – a system which had originated with Rothari, and which established that the king was to have the final say over matters concerning general peace and order[72]. According to the formulary, any legal action against those responsible for any form of rebellion, whether individual or by association, was always undertaken by the public prosecutor (*actor publicus*), which was the typical procedure of *causae regales*.

As for the legal language used in the eleventh century, it goes without saying that the *iudex* of the Lombards was always changed to *comes* in the formulary and in the *expositio*. Furthermore, in keeping with Liutprand's edict 34, the organizer of a rebellion was still considered to bear greater responsibility than that of mere followers.

Another evident tendency was that of equating cases which had previously gone under different names in the edicts and capitularies. Specifically, the terms *seditio* in Liutprand and *adunatio* in Ratchis were now considered synonymous: indeed, the *expositio* maintained that the latter's rule strengthened the former's in helping suppress rebellions against the comes[73]. The *Lombarda* also brought the two rules together under the same title (*De seditione*)[74].

On the other hand, both the *expositio* and the glosses reaffirmed the clear distinction between a spontaneous act of rebellion and a

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[71] For example, see Exp. ad Loth. 4 (Volumus), § 2, which also includes references to Loth. 67 (De conspirationisbus).

[72] Roth. 9.

[73] Exp. ad Liutp. 34, § 2.

[74] Lomb. Lib.I, tit. 18 *De seditione contra iudicem vel civitatem levata*.

'conspiratorial' one, the latter referring to a revolt against the authorities which had been organized by forming an association of rebels. This was also reaffirmed by the *Lombarda* under the title *De aggressione in vico facta et de collectionibus*[75].

a) Negligence on the part of the authorities: Strict interpretation of justification for rebellion

Nonetheless, what followed was a strong clash of opinions which seemed to hint at an intense political debate. The biggest doubt concerned the justification of a reaction triggered by injustice or negligence on the part of public authority: while Ratchis (6) permitted it for *adunationes* and Lothar (55) for *collectae*, the question was whether such justification applied to cases in which a reaction was not spontaneous, but rather plotted by one of the associations punished by Lothar 4 and 67, or organized by a holder of public office or person of high dignity.

Based on the text and glosses in Boretius' edition (pending a direct examination of the manuscripts), it seems that there were two main interpretations of this issue in the political debate and jurisdiction of the time: one of an extensive nature, and the other of an opposite, restrictive nature.

The dominant interpretation that appeared in the *expositio* and in the glosses excluded such justification for revolts organized by political associations.

Indeed, the interpreters believed that the exceptions set forth by Lothar in *Collectam* were only applicable to 'informal', sudden rebellions which broke out spontaneously and without premeditation, and not to 'conspiracies' organized by formal associations, which Lothar had already deemed illegal (Loth. 4 and 67) [76]. According to this interpretation, Lothar's chapter 4 was understood to exclude the possibility of dropping charges against rebels united by association, even if there was proof of an unjust act leading to their rebellion.

In the *expositio* to Ratchis 6, the judges and teachers, having analyzed

[75] Lomb. Lib. I, tit. 17.

[76] Exp. ad Liutp. 34, §2.

the ratio of the various rules collected in the *Liber papiensis*, concluded that they did not apply to rebellions against the established authorities when led by formally organized groups. The interpreters also addressed the fact that the king had justified rebellions which were triggered by unjust orders or rulings, or by a denial of justice, even if the rebels were led by a person of high dignity. This rule appeared to have been implemented in Lothar 55, wherein it was stated that the king would personally evaluate the responsibility of the rebellion's leader[77]. Once again, however, the rule was interpreted as only applying to the case of spontaneous collective action, and not in those cases where action had been taken by organizations of formally bound conspirators (punished under Loth. 4 and 67).

The fact that this issue was the subject of debate is also evidenced by additions to the edict in several manuscripts. Indeed, while Ratchis' text in the Parisian, Viennese and Este codes[78] read «Sed ita statuimus, ut si amodo quicumque homo», the words «privatus a publica dignitate» were added from Lothar 55 (themselves glossed in the margin of manuscript nr. 4). This was done in order to clarify even further that with *quicumque homo*, Ratchis had not intended to deal with rebellions led by holders of public office – a case which, on the contrary, was addressed by Loth. 55.

Moreover, the same manuscripts feature an addition to the text in Ratchis 6, whereby the rule was deemed inapplicable to *cospirationes* that had been organized by way of *obligationes, sacramentum or dextera* in accordance with Loth. 4:

> componat sicut anterius edictum de seditione contra iudicem suum levata [Liut. 34] continere videtur. Si haec non per obligationem fuerit, non per sacramentum neque per dextram per capitulis Lotharii "Volumus" [5] "De conspirationibus" [67]

The *expositio* supported this solution as well, while preserving the procedure whereby decisions on *collectae* led by a person of high dignity

[77] Exp. § 3 ad Liutp. 34.

[78] See nt. 70 above.

were to be referred to the king (Loth. 55). Nonetheless, the latter procedure was only available to those who had not organized the *collectae* as a union of formally bound members (through «sacramento neque dextra aut obligatione») – a specification that was missing from the text that shall be examined in the next paragraph[79].

As previously mentioned, Ratchis had permitted direct appeal to the *palatium*: «si vero de causa regis aliquid dicere voluerit». However, the term *causa regis* lacked any clarification, which probably led to an intense debate on what kind of cases could be considered of concern to the king. That would seem to explain why an explicit reference to Roth. 9 was added to the text: «causa regis quae est posita in initio nostri antecessoris Rotharis»[80]. In this way, it was reaffirmed that if someone were to present the royal court with unfounded or groundless accusations of attacks on the king or on peace in the kingdom, or falsely accuse someone of treason in favor of foreign enemies[81], then that person would face the same punishment set forth in the capitulary. Such a strict interpretation thus determined that this edict was only to apply to the aforementioned cases, and not, as some contended, to any *causa regis*[82].

Lastly, the *expositio* to Lothar's *De conspirationibus* stated that the *auctores* (those who were *in capite*) and the *adiutores* (those who were *cum eo*) [83] of associations that had been formed by taking a pledge or oath were not to be subjected to punishments set forth in other sources, such as previous edicts or the *quisquis* fragment of the *lex Iulia maiestatis*[84].

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[79] Exp. ad Rach. 6 § 2.

[80] In the text of codes 7-9, in the margin of code 4.

[81] Ibidem, § 3-6. Rothari had not specified which accusations were being referred to in his rule. On the other hand, both the *formularium* and the *expositio* to Roth. 9 identified the following: attacking the emperor or king; fleeing the kingdom; aiding or abetting enemies to enter the kingdom's territory; aiding or hiding enemy spies; rebelling against the duke during acts of war or against a delegate of the king during military expeditions; or lastly, leaving a comrade-in-arms in the hands of the enemy or refusing to try to free a captured comrade.

[82] Exp. ad Rach. 6 § 4.

[83] *Formularium* ad Loth. 67.

[84] This meant excluding the enforceability of «Romanorum leges de adunatione loquentes» in Exp. ad Loth 67 (*De conspirationibus*). The reference was to a constitution of

b) Negligence on the part of the authorities: Extending justification to sworn unions

While judges had interpreted Ratchis 6[85] as justifying rebellions only when they were spontaneous expressions of dissent triggered by 'bad governance', negligence, or injustice on the part of local authorities, some jurists disagreed. They believed that justification in such cases was to be extended to protests organized by sworn unions and led by a member of the public authorities. It seems reasonable to presume that this was also requested by those charged with conspiracy, together with their lawyers[86]. In addition, these jurists disagreed with the punishment of mandatory exile, stating that any such decision was to be left to the king's discretion:

> capitulum hoc (Loth. 4) a subsequenti Lotharii capitulo quod est 'collectam ad malum faciendum' (Loth. 55) in parte rumpitur, quia si haec adunatio per negligentiam comitis evenerit vel inemendata remanserit, et auctor facti si fuerit prepositus aut advocatus sive sculdais vel qualibet dignitate preditus, post legalem emendationem in loco factam sub fideiussoribus in presentiam regis invitetur et non in Corsicam, nisi regi placuerit[87]

This interpretation was reaffirmed in the *expositio* to Lothar 55 (*Collectam*) [88], but there is no doubt that it was met with strong objection, evidenced by the fact the very same text also considered the opposite opinion: namely, that the king was not entitled to use his discretion in

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Arcadius and Honorius which inflicted the death penalty («gladio feriatur») upon anyone who, united in a *factio*, swore an oath (*sacramenta*) to kill members of the imperial court, in C. Theod. 9, 14,3 and in C. 9,8,5 *Ad legem iuliam maiestatis*, l. *quisquis*). On the emergence of Roman criminal law in the twelfth century, see G. Minnucci, Tractatus criminum saeculi XII editionem criticam congessit, Bologna, 1997.

[85] See nt. 79.

[86] Exp. ad Loth. 4 (Volumus), Form.: «Petre te appellat Martinus, qui est advocatus de parte publica, quod tu fecisti adunationem per obligationem, et fuisti in capite»

[87] Exp. ad Loth 4 (Volumus), § 3

[88] Exp. ad Loth 55 (Collectam) «Capitulum hoc […] dicens vero "si adunatio facta fuerit per neglegentiam comitis vel inemendata remanserit et auctor facti qualibet dignitate preditus fuerit in nostram presentiam veniat" predictum capitulum eademque leges rumpit, quia nec in Corsica mittetur nec mortuus est, donec ad regis conspectum veniat».

deciding on such cases, but rather was obliged to uphold the letter of the law[89].

It is impossible to determine whether such cases were frequent or isolated. The fact remains that a gloss on Lothar 67 (*Conspirationibus*) – a chapter which dealt with the punishments to be inflicted on associations formed by way of oath or handshake – specified the consequences of establishing any kind of association based on the way the criminal bond had been formed:

> aliud iuditium est in conspiratione facta per obligationem, aliud in obligatione per sacramentum aliud in obligatione per dexteram facta

There was no questioning that the leader of a peaceful association formed by way of oath was to be punished by exile, and that his accomplices were to pay a fine; and that the same fine was to be paid by freemen who had formed an association by shaking right hands. Thus, as far as sworn unions were concerned, the true distinction lay between those which had committed crimes and those which had not. In the former case, it remained undisputed that the leaders would be sentenced to death and the accomplices to mutual flagellation. However, the gloss does not seem to have provided for the infliction of such punishment in the event that no crime had been plotted or committed (a case which, on the contrary, Lothar had dealt with).

This interpretation seems to have been reaffirmed by another gloss on Lothar's *De conspirationibus* in a later collection by Carolus de Tocco, according to which punishments were inflicted only upon those associations that were intent on committing crimes: «secus si ad bonum»[90].

Thus, is it possible to conclude that jurists and judges saw peaceful, sworn associations as becoming acceptable to the authorities if they did

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[89] Exp. ad Loth 4 (Volumus), § 3: «Sed, ut quidam dicunt, res convenientius non poterit eum iudicare, quam cum pena per predictam legem sibi imposita, id est quam si eum in Corsicam miserit, ut hic precipitur».

[90] Carolus de Tocco (nt. 64) Lomb., lib. I, tit. 17 *De aggressione*, l. 9 *De conspirationibus*, gl. *a quamcumque*: «scilicet ad malum faciendum, secus si ad bonum».

not commit crimes against the person? Is it reasonable to think that public authority no longer perceived the existence of a sworn association as a threat to the common peace?

In reality, without additional records to examine, it is not possible for a historian to answer these questions.

Over the course of the eleventh century, the jurisprudence coming out of the school of Pavia provided evidence of how political dissent against the legitimate authorities was contained and suppressed by the kingdom and empire. However, the probative force of this evidence cannot extend beyond that specific time period: namely, no later than the end of the eleventh century at most. It is impossible to know with certainty what happened in the first decades of the twelfth century with regard to peaceful or violent protests, as many Italian cities were beginning to fall under the control of sworn associations or groups of citizens led by holders of public office or persons of high dignity.

In short, Italian records and chronicles have not yet provided enough information on the transformation of individual cities to draw any conclusions on the actual organization of rebel groups, nor can it be determined what procedure the courts may have followed, or if they indeed had any procedure in place at all. First and foremost, the handwritten glosses to the *Liber papiensis* and the *Lombarda* will have to be re-examined: a long process to be sure, but one which is clearly necessary.

4. *Conclusions*

Whether private individuals or holders of public office, citizens organized groups to express their dissent and petition for change against the political authority. Indeed, for centuries, their methods of association had been the target of government regulation during the various rulerships of the Kingdom of Italy.

Any expression of dissent against public authority was to come before the royal court for judgement, and this centralization of power may have given rise to a constant, 'defensive' jurisprudence on the matter which continued even after the *palatium* was burnt down. It is likely, then, that those who disagreed with such an interpretation of the law forged ahead with their counterarguments: after all, the old laws had viewed a

spontaneous, immediate protest against the unjust acts of the authorities as the exercise of a right of resistance, to use a modern expression. Indeed, it seems that a political debate on this issue was unfolding in the eleventh century, with effects spilling over to the courts as well.

Though experts in the field (advisors, judges, scholars, lawyers, public officials, members of the city elite) were quite familiar with the law on associations, a number of clashes involving cities, the kingdom and the empire led Frederick Barbarossa to simplify the law with his *Hac edictali* constitution of 1158. This reduced political associations to only two categories (*conventiculae*, *coniurationes*): those that obeyed the empire, and those that opposed the empire's 'intrusions' into their affairs. Barbarossa classified the latter as internal enemies, without distinguishing whether such groups were associations of cities, associations of individuals and cities, or associations of individuals[91]. Once again, just as Liutprand and his successors had done, those in power claimed to be safeguarding peace by fighting against political opposition; and once again, the political opposition justified their actions by pointing to the injustices which had been committed and/or which had not been remedied by the emperor's delegates.

Meanwhile, after centuries of practice, private peacemaking had become firmly entrenched in the legal systems of the cities that would eventually become communes. Peace was safeguarded mainly through 'forced' peacemaking deals or by reaching private agreements with the support of the authorities, thanks in part to the many forms of arbitration that were available. This was especially the case in the beginning, when parties would resort to arbitration so as to avoid the uncertainties surrounding the legitimacy of city judges and the validity *erga omnes* of

[91] MGH, *Legum* s. IV *Constitutiones* (nt. 18), nr. 176. *Constitutio pacis, Hac edictali*, nr. 6, p. 246. Together with Frederick's *De pace tenenda* and Lothar III's *Imperialis benevolentiae*, the *Haec edictali* was inserted in the *Consuetudines feudorum*, which was a 'public law' text that was only put in writing in the twelfth century. This text was in force in imperial courts, alongside Lombard, Frankish and Italian law (more information can be found in my encyclopedia entry: *I giuristi di fronte alla città e all'Impero*, in *Enciclopedia italiana. Il contributo italiano alla storia del pensiero. Ottava appendice*. *Diritto*, Roma, Fondazione Treccani, 2012, pp. 15-21, especially p. 19.

their sentences. Equally entrenched was punishment by exile, which then became banishment.

The cities themselves were dealing with factional conflicts of their own, with the winners doing the same thing to the losers that Barbarossa had done to enemy cities in his empire. The justification of insurrection on the basis of injustices or negligence was no longer an option; as seen quite clearly in the glossators' interpretations, the approach now was not only to expel dissidents, but also to classify defeated political opponents as an enemy in the Roman law sense, with all of the consequences that that implied in terms of loss of freedom and confiscation of property[92].

After the cities secured their autonomy with the Peace of Constance and became communes, their internal conflicts continued to be led by political associations, which went by the Roman law term of factions. Each faction fought to defend its own concept of *publica utilitas*, with its own way of managing it and achieving it. At the end of the twelfth century, after Milan had defeated and then reconciled with Barbarossa, the political tension in the city led the Milanese to divide into two «populi distincti et contrarii». It was almost as if the city had divided itself into two distinctly organized 'comuni', each with its own consuls, podestà, and judges:

> et hoc manifeste colligitur quod quam cito cepit vacare imperium, et civitas habere cepit pacem quod tam cito civitas fuit divisa in diversas voluntates et prelia civilia inchoata fuerunt et tantum crevit, quod in una civitate fuerunt duo populi distincti et contrarii, ut si una pars exibat ad pugnam, alia pars stabat in domo, expectans suorum civium ruinas audire cum gaudio[93].

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[92] D. 49. 15. 24 e D. 50. 16. 118. A. Padoa Schioppa, *Profili del diritto internazionale nell'alto medioevo, in Le relazioni internazionali nell'alto medioevo*, Spoleto 2011 (Settimane, C.I.S.A.M., 58), pp. 1-78, especially pp. 11-12 and C. Storti, *Early Italian Scholars of ius gentium* (in press).

[93] The references are to the year 1197. G. Fiamma, *Chronicon maius* in Id., *Chronicon extravagans et chronicon maius*, ed. A. Ceruti [Milano (1868)], p. 746. For more information and a bibliography, see C. Storti, *Politica e diritto* nel Liber consuetudinum Mediolani *del 1216. Lo spazio giuridico dei Milanesi*, «Archivio Storico Lombardo», s. XII, XXI(2016), pp. 147-169, especially pp. 151-153. See also A. Ascheri, *Al governo della città-Stato nel Medioevo italiano: selezione e controllo del ceto politico* (2003), now in Id., *Giuristi medievali e moderni*, Stockstadt, 2009, pp.151-170.

However, in this Milan, as in other communes, the coexistence of opposing political groups degenerated into violent forms of internal struggles. Once again, those exposed as organizers of dissent were banished (what used to be exile in Corsica under Lothar) and had their property confiscated, only this time they were often punished after a defeat on the battlefield[94]. And once again, it became illegal to take an oath of solidarity and loyalty if its purpose was to form an association that could peacefully protest against the unjust acts of public authority. Indeed, any public expression of dissent was no longer allowed. In other words, the very same forms of association which had given rise to this system of government – the commune – were now being banned by the commune itself. It would not take long for this suppression of political dissent to give way to a new, self-referential concept of public power.

[94] There has been a long and contested historiographical debate on the origins of banishment or exile in the communal period, an account of which can be found in G. Milani, *L'esclusione dal Comune. Conflitti e bandi politici a Bologna e in altre città italiane tra XII e XIV secolo*, Roma, 2003 (Studi Storici 63), especially pp. 27-35; Id., *Banditi, malesardi e ribelli. L'evoluzione del nemico pubblico nell'Italia comunale (secoli XII-XIV)*, in *I diritti dei nemici* «QF» (2009), pp. 109-140, especially pp. 109-111 and P. Costa, *Figure del Nemico. Strategie di disconoscimento nella cultura politico-giuridica medievale*, «Rivista Internazionale di Diritto Comune», 27(2007), pp. 141-166, especially pp. 145 et seq.; Id., *Pagina introduttiva. I diritti dei nemici: un ossimoro?* in *I diritti dei nemici* (nt. 93), pp. 1-40; cf. also L. Scuccimarra, *Combattere con le parole. Note sulla semantica della guerra civile nella prima età moderna*, in «Giornale di Storia costituzionale» 26 (2013), pp. 45-63, in part. pp. 45-46; A. A. Cassi, *Il segno di Caino e i 'figliuoli di Bruto'. I banditi nella (dalla) civitas dell'Italia comunale e signorile tra prassi statutaria e scientia juris*, in *Ai margini della civitas. Figure giuridiche dell'altro tra medioevo e futuro*, A. A. Cassi (ed.), Soveria Mannelli, 2013, pp. 79-104; A. Zorzi, *La questione della tirannide nell'Italia del Trecento*, in *Tiranni e tirannide nel Trecento italiano*, A Zorzi (ed.), pp. 11-36, especially pp. 15-19. Lastly, see C. Zendri, Banniti nostri temporis. *Studi su bando e consuetudine nel diritto comune*, Napoli, ESI, 2016.