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zwischen dem 12. und 19. Jahrhundert

Herausgegeben von
Angela De Benedictis, Karl Härter

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Revolts and Political Crime from the 12th to the 19th Century

Legal Responses and Juridical-Political Discourses

Herausgegeben von
Angela De Benedictis und Karl Härter
unter redaktioneller Mitarbeit von
Tina Hannappel und Thomas Walter

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Preface and Acknowledgements

This volume collects the papers presented at the international conference *Revolten und politische Verbrechen zwischen dem 12. und 19. Jahrhundert: Reaktionen der Rechtssysteme und juristisch-politische Diskurse / Rivolte e crimini politici tra XII e XIX secolo: Reazioni del sistema giuridico e discorso giuridico-politico* held at the Max-Planck-Institut für europäische Rechtsgeschichte, Frankfurt am Main, in April 2011. This endeavour started as an Italian–German co-operation between the *Università di Bologna* represented by Angela De Benedictis and the *Max-Planck-Institut für europäische Rechtsgeschichte Frankfurt am Main*, represented by Karl Härter, based on respective research projects dealing with the history of *tumulti* and political crime.

Our main purpose was to conceive and present new approaches to the history of revolts and political crimes, combining social, political and legal history. Therefore, we have added three more contributions of participants which initially were not presented at the conference but provide additional aspects and case studies to our topic. As a result, this volume covers a wide spectrum of rural, urban and aristocratic revolts, rebellions, uprisings, and upheavals in many European countries and Russia from the Middle Ages to the early 19th century. This variety of phenomena is linked by the main approach to explore the interdependences between revolts and political crime in focusing on the legal responses and the juridical-political discourses (including public media) as explained in more detail in the introductory essay. Hence, this volume presents the contributions in two sections: The first focuses on "Law, Juridical-Political Discourses, Knowledge and Media" and – after a general introductory essay – presents more general studies on criminal law and political crime, the *crimen laesae maiestatis*, treason, the conceptualisation of peasant rebels, *defensa* and resistance, military law and the images of revolts and legal responses in public media as well as the trans-border perception of revolts. The second section comprises different case studies of rural, urban and aristocratic revolts in Italy, Austria, Spain, France, England, Fulda and Saxony, analysing a broad variety of legal responses as well as specific topics and contexts such as minority groups (Moriscos, Jews) or colonial and military occupation.

As an overall result, this collection proves that despite their divers manifestations (concerning actors, motives, causes, results etc.), revolts were perceived, conceptualised and treated between the poles of serious political crimes such as the *crimen laesae maiestatis*, treason, or *infidencia* on the one hand, and protest or resistance on the other hand. In pre-modern Europe (and

beyond) revolts stimulated flexible legal responses, controversial juridical-political discourses and ambiguous media images which may be seen as cross-border characteristics that challenged and to some respect altered the legal systems and the *ius commune* in particular. Thus, the angle of political crime and legal responses provides an important insight: Revolts widely affected the pre-modern legal systems which on the discursive as well as on the practical level developed flexible and appropriate responses – ranging from criminalisation, punishment and military law to mediation, prevention and *Verrechtlichung* – in order to regulate political and social conflicts.

Finally, the editors would like to thank the authors who presented and discussed their contributions at the conference and provided them to this volume as well as the other participants who actively contributed to the discussion, namely Anette Baumann, Gerhard Dilcher, Patrick Lantschner, Winfried Schulze, Friedrich Christian Schroeder, and Andreas Suter. Equally, our thanks goes to the staff of the Max-Planck-Institut für europäische Rechtsgeschichte and its directors Thomas Duve and Michael Stolleis for their indispensable support and help in organising the conference and publishing this volume.

The editors

"Defensa": Resistance against unjust Power in the Medieval Learned Law (12th–13th Centuries)

The recent research in medieval legal history made it clear in detail that the recovery of Roman law did not create a purely intellectual knowledge without any connection to the socio-economic life nor has it "renewed a science most favourable to despotism", as Edward Gibbon pointed out in a famous page of his masterpiece.[1] On the contrary, Roman law had been an important instrument of progress and reform within the medieval society in many ways. In the 12th century, for instance, the ecclesiastical reformers used it to renew the old "evil" procedure and to justify a more centralized structure of the Roman Church.[2] In the same period the rising urban powers referred to Antiquity and to Roman institutions as an effective way to affirm their legitimate authority against both, local seigniorial powers and the claims of the emperor who aimed to control Italian society.[3] Moreover, recent research challenges the old idea that customs were the expressions of popular wills and mentalities, whereas the technical Roman law was far away from the "spirit of the people"; in fact some examples show that invoking Roman law could be an effective way to overcome old ponderous legal rules which no longer fitted the needs of a changing society.[4]

1 Edward Gibbon, *Decline and Fall of the Roman Empire*, vol. 5, first published in 1788 (London/New York 1910; repr. 1962), p. 200.

2 Johannes Fried, Die römische Kurie und die Anfänge der Prozeßliteratur, in: *ZSS KA* 59 (1973), pp. 151–174; Massimo Vallerani, *La giustizia pubblica medievale*, Bologna 2005.

3 Emanuele Conte, Archeologia giuridica medievale. Spolia monumentali e reperti istituzionali nel XII secolo, in: *Rechtsgeschichte. Zeitschrift des Max-Planck-Institut für europäische Rechtsgeschichte* 4 (2004), pp. 118–136; Emanuele Conte, Res Publica. Il modello antico, la politica e il diritto nel XII secolo, in: *Iuris Historia. Liber amicorum Gero Dolezalek*, ed. by di Vincenzo Colli e Emanuele Conte, Berkeley 2008.

4 I tried to show this in Emanuele Conte, Roman law vs. customs in a changing society (Italy, 12th–13th centuries), in: *Custom. The Development and Use of a Legal Concept in the High Middle Ages. Proceedings of the Fifth Carlsberg Academy Conference on Medieval Legal History 2008*, ed. by Per Andersen and Mia Münster-Swendsen, Copenhagen 2009, pp. 33–49.

With regard to medieval reign and power the recent reconsiderations of the famous episode of Roncaglia have shown that the relation between imperial power and Roman law is not as evident and definite as older research has considered it.[5] Nevertheless, it is well established that in many cases recalling Roman law was used in attempts to change the balance of powers. This happened, for the first time, in Rome during the rebellion of the City against the pope, in which the renewal of the Senate and the ephemeral institution of the Roman Commune in 1143 clearly tried to call back the glory of Antiquity. The formula of investment of the judge referred to by the *Graphia Urbis Romae*, probably around 1143, prescribed an oath of submission only to the law – the Justinian's Code – but not to any political authority.[6] And some years later, when Barbarossa was heading for the City to be crowned by the pope, a partisan of the heretic Arnaldus de Brescia wrote him a letter in which the emperor is depicted much more as a "creation of the law" than vice-versa as a "sovereign legislator".[7] Arnaldus had studied in Paris with Peter Abelard and shared this education with some of the most influential members of the

5 Gli inizi del diritto pubblico. L'età di Federico Barbarossa: legislazione e scienza del diritto. Die Anfänge des öffentlichen Rechts. Gesetzgebung im Zeitalter Friedrich Barbarossas und das Gelehrte Recht, a cura di Gerhard Dilcher e Diego Quaglioni, Bologna/Berlin 2007. See particularly the essays by Dilcher, Quaglioni, Struve, Görich. Even more clear André Gouron, Glossateurs et théorie politique, in: *Science politique et droit public dans les facultés de droit européennes (XIIIe-XVIIIe siècle)*, ed. by Jacques Krynen and Michael Stolleis, Frankfurt a. M. 2008, pp. 7–22.

6 Percy Ernst Schramm, *Kaiser, Rom und Renovatio. Studien zur Geschichte des römischen Erneuerungsgedanken vom Ende des Karolingischen Reiches bis zum Investiturstreit*, vol. II, Leipzig/Berlin 1929, pp. 68–104, and with additions and corrections in: Percy Ernst Schramm, *Kaiser, Könige und Päpste. Gesammelte Aufsätze zur Geschichte des Mittelalters, vol. III: Vom 10. bis zum 13. Jahrhundert*, Stuttgart 1969, pp. 313–359. See chapter 51.

7 Philipp Jaffé, *Monumenta Corbeiensia (Bibliotheca rerum germanicarum tomus primus)*, Berlin 1864 (rist. Aalen 1964), pp. 542–43: "[…] Quae loquor attendite. […] Imperatorem non silvestrem, set legum peritum debere esse, testatur Iulianus (*sic pro* Iustinianus) imperator in primo omnium legum dicto, dicens: Imperatoriam maiestatem non solum armis decoratam set etiam legibus oportet esse armatam, ut utrumque tempus, et bellorum et pacis, recte possit gubernari. Idem etiam, unde princeps Romanus imperare et leges condere habeat, paulo post ostendit; set et, quod principi placuit legis habet vigorem et quare, subinfert, cum populus ei et in eum omne suum imperium et potestatem concessit. Set cum imperium et omnis rei publicae dignitas sit Romanorum, et dum imperator sit Romanorum, non Romani imperatoris, quod sequatur considerantibus […]. Quae lex, quae ratio senatum populumque prohibet creare imperatorem?". The text is full of quotations from Justinian's *Corpus Iuris*, which was clearly much appreciated by the followers of Arnaldus.

Roman curia.[8] And the curia was certainly able to recall Roman law to tackle the habitual demands for autonomy of the local churches, notably regarding jurisdiction. Since the beginning, we might conclude, the authority of Roman law and Justinian had served different purposes (as it did later on for centuries). In general, however, it represented a powerful instrument to change traditional power relationships because it provided a repository of arguments, notably in defence against abuses by local powers both ecclesiastical and secular.

This function of the Roman law is not explicitly discernable in the writings of the glossators, and the lack of explicit references to contemporary politics had substantiated the judgement of historiography about the "isolation" of the legal science from political or social "reality". Just a few years after the rebellion of Arnaldus, when the conflict between the emperor and the Lombard cities intensified, we can discern only very scarce references of the political concerns of the jurists who, in spite of being personally deeply involved in the public life of Italian communes, refrained from mentioning politics in their scholarly works.[9]

If we look at other sources and actors, we get a different picture: Roman law seemed to be a reference point for a city such as Pisa, which did not join the "rebellion" of the Lombard League against Barbarossa but negotiated several mutual agreements with the emperor to maintain its autonomy. In pursuing this policy, Pisa approved its very early written legislation, the *Constituta*. According to a keen interpretation of Claudia Storti, this political decision was taken to prevent the danger of an imperial imposition by Frederick Barbarossa.[10] The codification of the customs of Pisa – termed "nostrum ius civile" and introducing the Roman forms of legal action – was quickly compiled and published in 1160.[11] Frederick acknowledged the autonomy of Pisa and its laws, and the city went on its path towards

8 Cardinal Guido da Castello, pope for just some months in 1143, had been also a pupil of Abelard and carried a book containing Justinian's law in his library. Cfr. Werner Maleczek, Das Kardinalskollegium unter Innocenz II. und Anaklet II., in: *Archivum Historiae Pontificiae* 19 (1981), pp. 27–78; André Wilmart, Les livres légués par Célestin II à Città di Castello, in: *Révue Bénédictine* 35 (1923), pp. 98–102.

9 This has been noted by many, and recently by Gouron, Glossateurs et théorie politique.

10 Claudia Storti Storchi, *Intorno ai Costituti pisani dela legge e dell'uso (secolo XII)*, Napoli 1998, pp. 14–17.

11 The Yale manuscript, the oldest surviving witness of this compilation, preserving the text as it was in 1186, was edited in its entirety by Paola Vignoli, *I costituti della legge e dell'uso di Pisa (sec. XII). Edizione critica integrale del testo tradito dal "Codice Yale"*, Roma 2003.

romanisation.[12] To face the power of the Emperor, Pisa used the authority of Roman law, gaining a considerable autonomy in legislation and jurisdiction.

The Roman law could also help jurists to conceive a definition of the "right to resist", particularly against local powers unlawfully rasing excessive taxation. The first important attempt of a jurist to define the right of resistance according to Roman law took place not far from Pisa, in Lucca, between 1195 and 1197, where the Lucan judge and notary Rolandus had to deal with the difficult task to write a comprehensive commentary to the *Tres Libri* of the Justinian Code. Forgotten for centuries, his work is now edited from the five preserved manuscripts.[13] It carries some interesting passages on the right of a citizen to resist to unjust pretentions of local powers which were only relying on the sovereign authority of the emperor.

It may seem curious that the first legal theory on the right of resistance was written by the only lawyer of the age of the glossators which we can clearly consider as a "partisan" of the imperial party. Rolandus was a great admirer of the imperial sovereignty, a real "fan" of his Emperor Henry VI, the son of Frederick Barbarossa, to whom his work is frankly dedicated – the only writing of a "glossator" or learned lawyer of the 12th century devoted to the emperor.[14] Thus, we can consider Rolandus as the only medieval jurist who frankly sided with the imperial power: neither the four doctors at Roncaglia nor any other "venal advocate" of the 12th century adopted such a distinct position. Only this obscure professional judge from Tuscany accomplished the hard task of writing about public law and the *fiscus* (that is the public powers), in particular, stating his intent to instruct the young German emperor how to act according to the prescriptions of Roman imperial law. He did so by interpreting the hundreds of imperial constitutions on public law collected in the three last books of the Justinian Code, and dedicated this impressive work to "his" Emperor Henry VI.

However, we have to be careful to hastily label the Tuscan judge as a partisan of the emperor. Rolandus was deeply involved into the politics of his city and was for sure strongly tied to his commune. Lucca, indeed, had sided

12 Chris Wickham, *Legge, pratiche e conflitti. Tribunali e risoluzione delle dispute nella Toscana del XII secolo*, Roma 2000, pp. 196–206 (= English version).

13 Emanuele Conte/Sara Menzinger, *La Summa Trium Librorum di Rolando da Lucca (1195–1234). Fisco, politica, scientia iuris*, Roma 2012.

14 Strictly speaking Rolandus can not be considered a "glossator", because he did not write glosses. By defining him like this I intend "a learned lawyer of the 12th century".

with the emperor since the times of Frederick Barbarossa.[15] After 1195, when Rolandus dedicated his work to Henry, the young son of Frederick must have appeared as the real winner of the complex political game of the late 12th century. The emperor maintained a better relationship with the pope than his father ever achieved, and he was crowned king of Sicily in Palermo on Christmas 1194. In this respect almost the whole of Italy seemed to be under the rule of a reborn Roman Empire again. However, the sudden death of the young emperor in September 1197 changed the political scene just as Rolandus composed his *Summa*. Rolandus again used the arguments of Roman law, he had compiled in his extensive work, in a short apologetic treatise on the emperor, that was only preserved in a single copy in a Madrid manuscript and likewise dedicated to Henry.[16] While the *Summa* is the first extensive legal work on various aspects of public law comprising such topics as government and administration of the cities, imperial and municipal tax law, military law, and much more, the *Tractatus de Imperatore* is the earliest political work written by a jurist in defence of the imperial idea,[17] "to give to Caesar what is Caesar's, not to offend him about his thing, as we don't want him to offend us about ours".[18] The second part of this phrase is important to understand the legal construction of resistance: public law does not merely outline the absolute powers of the monarch, but also establishes the rights of his subjects. In the first title of book ten of the *Tres Libri*, entitled "de iure fisci", Rolandus in fact outlines a comprehensive treatise on the rights and duties of the imperial power, aiming at a balanced ratio between the first and the latter.[19]

15 Raoul Manselli, La repubblica di Lucca, in: *Storia d'Italia diretta da G. Galasso*, vol. VII, t. 2, Torino 1987, pp. 607–743, pp. 638–641: Lucca had bought the rights of jurisdiction in 1160 from Welf VI of Bavaria, marquis of Tuscany. In 1168 sided for the emperor and fought against Pisa, but later also Pisa chose the imperial party.

16 Ms. Madrid 1876, fol. 68ra-72vb. A description of the manuscript is to be found in Conte/Menzinger, La Summa, cit., CCXX–CCXXV.

17 Although it is very short, we did not try to make a critical edition of the *Tractatus*, because the only preserved manuscript is very uncorrect.

18 So the *Prooemium* of Rolandus' *summa*: "<16.> cum valde expediat scire iura fiscalia que debeantur Cesari nostro, ut eum in suis non offendamus, <17.> sicut eundem nostra nolumus invadere, precipiente nobis Domino ut Cesari sua reddamus (Mt, 22.21)".

19 Emanuele Conte, 'De iure fisci'. Il modello statuale giustinianeo come programma dell'impero svevo nell'opera di Rolando da Lucca (1191–1217), in: *Tijdschrift voor Rechtsgeschiedenis* 69 (2001), pp. 221–244; french translation in: *Mélanges de l'École Française de Rome* 113 (2001), pp. 913–943.

This becomes clear as Rolandus tackles the famous discussion about the so-called *dominium mundi* of the emperor, where he gives an extensive account on this topic based on legal arguments that had never been outlined by any jurist before. The problem he describes is very well known: in a couple of passages the *Corpus iuris* allows the interpretation that the emperor was entitled to an absolute ownership of all the properties of the Empire. The term *mundi dominus*, a translation of a Greek fragment of the Digest (D. 14.2.9), was inserted in the legal books probably around 1170. However, the glossators had already started to discuss a passage of the Code (C. 7.37.3) in which Justinian confirms a precedent law of Zeno that excluded the *fiscus* from the duty to guarantee against eviction. This is shown by the case according to which an officer of the treasury was allowed to sell land whereas the former owner consequently lost his property. The latter could only legally claim the paid price. Justinian tried to transfer this rule to the assets of the emperor (and his wife) using the much debated expression: "omnia Principis esse intelligantur" (C. 7.37.3.1a). This phrase was often interpreted as a statement for an absolute ownership of the emperor comprising everything within the borders of the Empire, with the possible consequence that all private properties in fact could be regarded as leases, fiefs or other imperial concessions.

The legendary discussion between two Bolognese professors, Bulgarus and Martinus, that allegedly took place during a horseback ride together with Frederick Barbarossa, just covers this issue: Martinus affirms that the *dominium* of the emperor is an absolute ownership *quoad proprietatem*, whereas Bulgarus describes it as a power *quoad iurisdictionem et protectionem*.[20] One could expect that a supporter of the imperial power, as Rolandus undoubtedly was, would have tried to affirm the interpretation of Martinus. On the contrary, Rolandus claims that he could not speak against his conscience only to please the emperor;[21] and argues that the principle

20 The story is more than famous and discussed a lot of times by historiography. Among the last essays see Marie Theres Fögen, Römisches Recht und Rombilder im östlichen und westlichen Mittelalter, in: *Heilig, Römisch, Deutsch. Das Reich im mittelalterlichen Europa*, ed. by Bernd Schneidmüller and Stefan Weinfurter, Dresden 2006, pp. 57–83; Emanuele Conte, 'Ego quidem mundi dominus'. Ancora su Federico Barbarossa e il diritto giustinianeo, in: *Studi sulle società e le culture del Medioevo per Girolamo Arnaldi*, a cura di Ludovico Gatto e Paola Supino Martini, Firenze 2002, pp. 135–148.

21 In C. 10.1 *de iure fisci*: "<265.> Sed ne gratificandi Imperio pretextu celestem Regem offendam contra conscientiam loquendo, ideoque anime periculum incurram, <266.> idemque Cesar si nefanda dixero me reputet levissimum,

"everything pertains to the emperor" would subvert the whole system of private law while the expression of Justinian would only mean that the private property of the emperor and the assets of the treasury follow the same rule.[22] Moreover, he continues, the rich subjects sustain the wealth of the Empire, and it would make no sense to deprive them from their properties.[23] Finally, he concludes, the same Frederick Barbarossa had spoken of *allodia* in his constitutions which excludes an eminent imperial property over all private goods.[24]

By discussing the reasons against an absolute and general ownership of the emperor over all and everything, Rolandus also mentions an argument which he elaborates at the end of the treaty on the fiscus. He observes that the subjects have the right to resist to the public officers as prescribed by two laws of the *Tres Libri* and a passage of Ulpianus in the Digest, in which he uses the very word *resistere*.[25]

> "<271.> Tribuit quoque possessoribus defensionis licentiam ut et iniuriam officialium fisci repellant, ut C. e. l. Defensionis (C. 10.1.7), et ff. locati Item § Exercitu (D. 19.2.13.7), et C. de metatis l. Devotum (C. 12.40.5)."

audiant legiste quid super his teste Deo, omnique velo deposito, prout a nostris doctoribus audierim scribo", quoted after Conte/Menzinger, La Summa; the numbers between the brackets refer to this critical edition.

22 "<280.> Quod ergo dicitur "omnia Principis esse intelliguntur", C. de quadri. pres. Bene (C. 7.37.3.1a), ff. ad l. ro. de iactu l. de iactu Deprecatio (D. 14.2.9 *translatum a Burgundio*), incivile est sic iudicare, nisi tota lege prescripta. <281.> Siquid, ut ibi dicitur C. de quadri. pres. Bene (C. 7.37.3.1a), a Principe alienata non revocantur a possessoribus: alienata inquam sive de privata Imperatoris substantia sive de fiscali"; quoted after Conte/Menzinger, La Summa.

23 "<277.> Cum sint certi casus ubi personaliter et realiter eos iussit puniri et subiectos locupletes imperium habere publice intersit, et ab omni honere et damno preter publicum censum qui sit iustus et legitimus eos liberaverit, ut aut. ut iud. sine suf. in prin. (Auth. coll. 2.2,3 = Nov. 8 praef.)"; quoted after Conte/Menzinger, La Summa.

24 "<286.> Ergo non omnia sunt Principis, licet Antoninus dicat: "Ego quidem mundi dominus" (D. 14.2.9 *translatum a Burgundio*) quod quidem ratione iurisdictionis verum esse asserunt doctores nostri, proprietate dominis salva manente. <287.> Nam et eximius Imperator Fredericus in lege quam promulgavit de pace tenenda sic inseruit "ad hec: qui alodium suum vendiderit, districtum et iurisdicitonem Imperii vendere non presumat, et si fiat non valeat" (const. Hac edictali § Qui allodium: MGH Diplomata 10.2, Friedrich I., n. 241 = L.F. 2.53): ac si aperte dixisset subiectos habere allodium"; quoted after Conte/Menzinger, La Summa.

25 D. 19.2.13. 7: "Exercitu veniente migravit conductor, dein de hospitio milites fenestras et cetera sustulerunt. Si domino non denuntiavit et migravit, ex locato tenebitur: Labeo autem, si resistere potuit et non resistit, teneri ait, quae sententia vera est. Sed et si denuntiare non potuit, non puto eum teneri."

This is a forceful argument, underlines Rolandus, to refute that a general and absolute ownership of the Prince over the "private" properties of the subjects could exist because they are so strongly entitled to their rights that they even obtain the right to resist against the requests of public officers.

A few lines further, Rolandus comes back to the same topic and elaborates the earliest comprehensive treatise on the right of resistance in the history of learned law. In view of his declared favour for the emperor this may seem surprising. But the main purpose of the Lucan judge is to defend the idea of the Empire based on the very figure (or institution) of the emperor considered as the institutional guarantee against rapacious claims of the local gentry. Thus Rolandus theorises on the basis of the Justinian's laws a concept of resistance against every abuse of power by the imperial nobility, for instance, through imposing taxes or seizing private properties without the admission of the prince. The argumentation of Rolandus in his *Summa* can be reconstructed as follows: preliminarily, he acknowledges the right of the public officers to seize the belongings of the subjects. This is as legitimate as the right of the father to occupy the *peculium* of his dead son and in this regard also the imperial treasury could use such a right. But a sequestration of private property is legitimate only in the case that it was impossible to detect a lawful owner and no person or no rights were violated.[26]

> "<346.> Sed si questionem referant, tunc civiliter ea sunt tractanda et, omni prava consuetudine reiecta, contra officialium impetum defensionis licentia possessoribus est danda, sicut supra est allegatum. <347.> Quid ergo aliud iam eis faciendum est quam si fiducialiter se deffendant. <348.> Solis ergo imperialibus litteris debent acquiescere, ut C. e. l. Prohibitum et l. Defensionis (C. 10.1.5.2; 7), eo quod a iustitie vigore processerunt. <349.> Si enim locis singulis Romanus Princeps posset adesse, utique vel eius timore a nefandis officiales cessarent, vel ipse eorum compesceret audaciam. <350.> Sed quia sic adesse non potest, ideo pro possessorum fiducia defensionis licentiam dando prefatas constituit leges, ut earum beneficio suffulti invasorum impetum excludant et sine periculo eis resistant, cum et alia communi lege recte possidenti illatam vim liceat propulsare, ut ff. de iust. et iure Ut vim

26 "<343.> Supradictis autem modis fisco quesita procuratores eius possunt invadere vel civili modo potius ea requirere non pigeat reiterare, quod enim procuratores fisci possunt ea invadere legitur in C. de naturalibus li. l. i. (C. 5.27.1.4), et C. de pet. bo. sub. l. i. (C. 10.12.1 pr.). <344.> Nec est mirum si fiscus utatur suo iure: nam et pater occupat peculium filii familie defuncti. <345.> Occupat inquam vel invadit fiscus predicta bona ubi questio a possessoribus non refertur: nam tunc nullus offenditur, numquam iura turbantur, nullus iniuriam patitur"; quoted after Conte/Menzinger, La Summa.

(D. 1.1.3), et sit inquam melius in tempore occurrere cum iuris executio nullam habeat iniuriam (D. 47.10.13.1)".[27]

Any legitimate sequestration had to be based on the ruling of a court, setting aside local customs which could grant subjects a permission to defend themselves against such claims. According to the Code (C. 10.1.5.2 and C. 10.1.7), officers must only act in adherence to imperial letters to substantiate that their actions are legally based. This constitutes a general rule on which the right of resistance is based: because it is impossible for the emperor to be personally present in every single place and to control the acts and insolences of his officers, he has enacted those laws which support and entitle the subjects to prevent unlawful interventions and attacks of public officers (trying to collect unjust taxes, for instance) and to resist without endangerment. This passage clearly demonstrates that the Tuscan judge was actualizing Justinian law by referring to the power of imperial gentry, which continued to impose demands and charges on the peasants, who were looking for protection in the city. It is exactly this political conflict – and the related threat of revolt – which constitutes the background for the emergence of a new legal theory of resistance.

Recalling Cicero next to Justinian, Rolandus continues in his argumentation: "There are two kinds of injustices: the one, on the part of those who inflict wrongs, what is evident; the other on the part of those who do not shield from wrongs, albeit being capable to do so. He who does not prevent or oppose wrongs, though he is able to, is just as guilty of wrongdoing as if he had deserted his parents or his friends or his country as already Cicero pointed out. Moreover, a wrong to which one does not resist, is approved; and who does not recall from error the one who is mistaken, it is as if he was wrong".[28]

In the text of his *Tres Libri* Rolandus uses the expression "Caesariani" referring to imperial vassals, which attempted to dispossess citizens from their property under the pretext of the absolute ownership of the emperor: "Although *caesariani*, abusing their power, consider to pay homage to Caesar,

27 Quoted after Conte/Menzinger, La Summa; the numbers between the brackets refer to this critical edition.

28 "<351.> Nam 'et iniustitie duo sunt genera: unum eorum qui inferunt iniuriam' quod liquido patet; 'alterum eorum <qui ab hiis>, quibus infertur, etsi possunt, non propulsant iniuriam'. <352.> Siquidem quis 'non defendit nec obsistit, si potest, iniurie, tam est in vitio, quam si parentes aut amicos aut patriam deserat', ut in Tullio de officiis libera. in carta tertia (Cic., De officiis, 1.7, 23) et quia 'Error, cui non resistitur, approbatur' (Decr. Grat. D. 83 c.3) et qui errantem 'ab errore non revocat, se ipsum errare demonstrat'"; quoted after Conte/Menzinger, La Summa.

boast themselves by saying that everything belongs to the prince, they really are cheating him: because to act so unfairly was not expressly ordered to them, nor even ever thought by the prince".[29] In consequence, the right to resist consists in the right to repel unlawful demands, claims and interventions of anyone, including public officers, by relying on the power of the law. Law is explicitly presented as a surrogate of the prince: the instrument through which the emperor (as institution) obtains the character of ubiquity.[30] Rolandus adopts a radical position by considering the emperor and his law as the equivalent defences against unjust violence; the emperor himself orders to resist to impiety, but those who accept it and refuse to use the imperial laws will never recover again:

> "<354.> Iam ergo pravorum non timeant iactationes nec Principem propterea vadant consulere: vel quod generali vel speciali permissum est lege, amplius ab eo postulare, cum sit tutius, quia sic Imperator iubet illorum impietati resistere quam acquiescere. <355.> Alioquin miserrimus quisquis acquieverit, et imperialibus edictis suis usus non fuerit quia si quid deffendere iuste poterit, omiserit, tantis artabitur periculis quia vix vel numquam pristinam sanitatem recuperabit."[31]

The use of the expression "deffendere" by Rolandus recalls some constitutions that were issued just some years later in the *Liber Augustalis* by Frederick II, the son of Henry VI, the emperor to whom Rolandus had dedicated his work. Scholars have discussed at length the origins of the institution of *Defensa*, which is clearly shaped in the Sicilian codification.[32]

29 "<353.> Licet enim cesariani, abutendo potestate, arbitrentur se obsequium prestare cesari cum totius oculis se iactando et omnia Principis esse dicendo, res usurpant cum omnino eum decipiunt cum sic inique agere non sit expressim eis commissum, nec unquam inde a Principe cogitatum"; quoted after Conte/Menzinger, La Summa.

30 Laurent Mayali, Lex animata. Rationalisation du pouvoir politique et science juridique (XIIème–XIVème siècles), in: *Renaissance du pouvoir législatif et génèse de l'état*, sous la direction de André Gouron et Albert Rigaudière, Montpellier 1988, pp. 155–164.

31 Quoted after Conte/Menzinger, La Summa.

32 Cfr. L.Aug. 1. 16, 17, 18, 19. The Italian bibliography on the *Defensa* is pretty old, but very interesting: Luigi Siciliano Villanueva, *Studi intorno alla defensa* (off-print from Circolo giuridico, vol. 25), Palermo 1894; Francesco Schupfer, La defensa e l'asino di Apuleio, in: *RISG* 21 (1896), pp. 422–24 e 31 (1901), pp. 85–87; Carlo Alberto Garufi, La defensa ex parte domini imperatoris (in un documento privato del 1227–28), in: *RISG* 27 (1899), pp. 190–194; Frederico Ciccaglione, Le origini delle consuetudini sicule (critica a V. Giuffrida, La genesi delle consuetudini giuridiche delle città di Sicilia. I. Il diritto greco-romano nel periodo bizantino arabo, Catania 1901), in: *RISG* 31 (1901), pp. 77–85; Nino Tamassia, Nuovi studi sulla "defensa"

Despite some scholars who have observed precursors dating back to the late byzantine Antiquity, the *defensa* regulated by the *Liber Augustalis* is defined as a *ius novum* by the main glossator of the Sicilian legal collection, Marinus de Caramanico. As a consequence it endows the emperor to support the weak and the oppressed against tyranny and arrogance. By invoking the name of the emperor (invocatio nominis Imperatoris), unlawful violence could be considered as an insult against him and thus unlawful or violent demands, claims and interventions against "private" persons, properties or rights could be punished not only with a private restitution but also with a respective public fine.[33]

The interrelation between royal protection and *defensa* notably interested Ernst Kantorowicz, who devoted a short illuminating article to the *defensa*[34] as an achievement of Frederick II, based on a secular tradition but perfectly legally shaped in the constitutions. As a result of the legal concept, the person of the King is represented by his law, attaining him a sort of ubiquity and presence independent from his personal appearance. Though it is hard to trace a clear intellectual derivation of this concept, Rolandus had clearly expressed the idea[35] some decades earlier by stating that the law allows the citizens to resist because the emperor can not be present everywhere at any time; and the *summa* of the Lucan judge was well known in the Sicilian Kingdom.[36]

(1900–1901), now in Nino Tamassia, *Studi sulla storia giuridica dell'Italia meridionale*, ed. by Carl Guido Mor, Bari 1957, pp. 271–296; Nino Tamassia, Ancora sulla defensa (1900–1901), in: Mor, Studi sulla, pp. 297–307.

33 Marinus de Caramanico is clearly aware of the importance of this: "Satis potest dici quod haec constitutio (L.A. 1.16) cum tribus sequentibus contineat ius novum. Et per hanc constitutionem succurrit Imperator debilibus, qui saepe a potentibus opprimuntur […]. Unde dicit haec constitutio, si quis timeat offendi in persona sua vel liberorum vel parentum vel in rebus sui […] prohibere potest aggressorem ne ipsum offendat ex parte domini Imperatoris vel Regis […]", in: *Liber augustalis (Constitutionum regni Siciliarum libri. III)*, ed. by Antonio Cervone, Napoli 1773, repr. in: *Soveria Mannelli 1999*, ed. by Andrea Romano, p. 35.

34 Ernst Hartwig Kantorowicz, Invocatio nominis Imperatoris, in: *Bollettino del Centro di Studi filologici e linguistici siciliani* 3 (1955), pp. 35–50. Images of the personal copy of E. Kantorowicz are now available online: http://archive.org/details/ernstkantorowicz.

35 See §§ 349–350, quoted *supra*, note 29.

36 On the manuscript trasmission of Rolandus' text see Conte/Menzinger, La Summa, cit., I. 1.3.

The substantial writings of Rolandus can be considered as an achievement stimulating the development of more elaborated theories on the right of resistance during the 13th century. Most of all, the concept of resistance outlined in the *Summa*, which is based on the Justinian Code, constitutes a legal remedy against every arbitrary use of power and unlawful force. It does not grant a right to resist against unjust laws or the emperor himself because resistance as conceptualised by Rolandus is derived from the prince as the main manifestation of justice, as *lex animata*. This does not authorise him to subvert the laws but oblige him to deliver laws to promote his idea of justice. In this regard, the interpretation of Roman laws as well as practical political considerations were suggesting that the emperor should act as the defender of the weak and insulted. Hence, at the end of his treatise on *de iure fisci* Rolandus frankly addresses "his" prince:

> "<356.> Nam et ego, tantorum scriptor, in auxilium legis et Imperii triumphum illustrissimo Cesari nostro revelare disposui, ut iam iniquorum non utatur opera et ab eis commissum non reliquat inultum, sed eorum malum extirpet exemplum, ut subiecti, hoc videntes, non timore servili sed filiali amore eum diligentes, non exitum sed vitam eius longissimam cupiant et eius posteris laudem et honorem Imperium et gloriam perpetuo vigore cum desiderio expectent."[37]

And with the last words of his tract he recalls the main reason why: "we can confidently use the imperial benefit, that is the immunity against the *Cesariani*: because the Prince, who must protect the oppressed, can not oppress them (as said in the *Novellae*); and because it is better to act on time than to seek revenge afterwards (as said in the Code); and finally because who does not defend himself, nor resist – if he can – is morally as guilty as if he had abandoned his parents or the fatherland (as said in the *Decretum Gratiani*)".[38] As a result, the analyses of the recently edited very "scholastic" treatise of Rolandus reveals that already in the 12th century the problem of "defensa" and resistance was juridically conceptualised by the legal discourse,

37 Quoted after Conte/Menzinger, La Summa.

38 "<357.> Per predicta et alia infra posita, in titulo de metatis in l. Devotum (C. 12.40.5), fiducialiter possumus uti imperiali beneficio et immunitate contra cesarianos, et quia qui debet vindicare oppressos ipse opprimere non debet, ut in aut. ut diffe. iud. (Auth. coll. 9.10 = Nov. 86.4), et quia melius est in tempore occurrere quam post exitum vindicare etc., ut C. quando lic. unicuique iudici vin. l. i. (C. 3.27.1), et quia qui non defendit nec obsistit, si potest, iniurie, tam est in vitio, quam si primates aut patriam deserat, ut causa xxiii. q. iii. Non inferenda (Decr. Grat. C. 23 q.3 c.7)"; quoted after Conte/Menzinger, La Summa.

referring to and using the Roman law on the one hand, but on the other hand responding to political and social conflicts and the threat of revolt. In this regard, the work of Rolandus may be considered as an early stage of the juridification (*Verrechtlichung*) of resistance and revolt.

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