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## Power Hierarchies in Medieval Juridical Thought

### An Essay in Reinterpretation \*

1. The aim of this investigation is to reduce to precise limits one of the concepts which has played a more prominent role in the history of political thought, of administration and of legal procedure: that is the concept of hierarchy. If we link to it the phenomenon of power, we will find immediately an image of reality which is quite understandable for our contemporary minds, but perhaps not so close to that reality which we must understand as historians. It is but another effect of a danger well known to historians in general, and which we can never be sure of avoiding completely: that is the risk of applying to the past concepts and ideas which only belong to the present. Such concepts or ideas can be described as historical for that reason alone, and cannot be indiscriminately applied to the past.<sup>1</sup>

It is rather frequent in the field of institutional history that reality is more fluid than the terms that designate it;<sup>2</sup> the habit of transferring to the past, more or less consciously, modern institutions which share but their name with their medieval fore-runners, and thus of obscuring the

\* This present work, in part based on wider investigations to be published shortly, brings together, with no other modifications than the addition of notes, the lecture given by the author at the Max-Planck-Institut für europäische Rechtsgeschichte, Frankfurt am Main, on July 2nd, 1990, through the kind invitation of Professor Dr. Dieter Simon and Dr. Johannes-Michael Scholz. The translation into English was done by Antonio and Giannela Sánchez. Relevant suggestions were made by Magnus Ryan. To all of them the author wants to express his gratitude.

<sup>1</sup> For the proposal of channels of investigation which could solve the problems that we consider in these introductory passages, see "La storia delle dottrine politiche: un discorso sul metodo", by MAURO BARBERIS, in: *Materiali per una Storia della Cultura Giuridica* 20/1 (1990), pp. 155-188, especially pp. 158-168, in which this author analyses the methodological concepts of Quentin Skinner. MARGARET LESLIE's reflections (In Defence of Anachronism, in: *Political Studies* 18/4 [December 1970] pp. 433-447), also based on Skinner's works, try to prove that it is not always possible or even appropriate to eliminate anachronism totally from the field of historical studies.

<sup>2</sup> For these questions the standard work of reference is still MARC BLOCH's *Apologie pour l'histoire ou métier d'historien*, (Cahiers des Annales 3), (1st ed. 1941), 6th ed., Paris: Armand Colin 1967, pp. 79 ff.; attention must be drawn to the nature of his examples, in most cases institutional. Focusing his attention on juridical history, P. W. A. IMMINCK, *La transformation des concepts en histoire*, in: *Tijdschrift voor Rechtsgeschiedenis* 24 (1956), pp. 1-47, faces the problem of the elaboration on the part of the historian of a "concept formel" of the institution forming the object of his interest appropriate to the chronology of his investigation.

historical institution with the modern one, is so frequent that many examples could be mentioned of monographs whose authors have been unable to avoid the traps set by the object of their study.<sup>3</sup>

There is a further obstacle facing the historian in the field of terminology, a more subtle one. The historian must communicate his findings, show his hypothesis, let his knowledge become known. He is forced therefore to describe phenomena for which he sometimes has no contemporary term warranted by his sources, or presumes that the one he has found might be inexpressive for his readers without subsequent explanation.<sup>4</sup> It is easy to imagine, in such cases, how modification of language, if not its invention, produces modification, and sometimes the invention as well, of reality itself.

2. There would be no need to bring all this to mind if not for the fact that, in our case, all these difficulties are present to a greater or lesser extent, and in order to try to avoid them there is no choice but to adopt the most adequate epistemological options available. These options, conditioned by the object of the research, will also determine its results.

Our objective is now to study a specific aspect of the conceptions prevalent about political power in the territory of western Christendom, in the central decades of the late Middle Ages.

<sup>3</sup> Especially treacherous in the field of juridical history, in which the idea of a substantial continuity and permanence of the phenomena which constitute the objects of its study has traditionally prevailed: ANTÓNIO MANUEL HESPANHA, *Une «nouvelle histoire» du droit?*, in: *Storia sociale e dimensione giuridica. Strumenti d'indagine e ipotesi di lavoro* (Atti dell'incontro di studio, Firenze, 26-27 aprile 1985), a cura di PAOLO GROSSI, (Per la storia del pensiero giuridico moderno 22), Milano: Giuffrè 1986, pp. 315-340, especially pp. 318-319 for the diagnosis; it is an old concern of the author: ANTÓNIO MANUEL HESPANHA, *A história do direito na história social*, Lisboa: Livros Horizonte 1978, pp. 9-14, in which he analyses the causes in detail. From a convincing sociological standpoint, JOHANNES-MICHAEL SCHOLZ, *Éléments pour une histoire du droit moderne*, in: JOAQUÍN CERDÁ RUIZ-FUNES, PABLO SALVADOR CODERCH (eds.), *I Seminario de Historia del Derecho y Derecho Privado. Nuevas técnicas de investigación*, Bellaterra: Universidad Autónoma de Barcelona 1985, pp. 423-524, especially pp. 424-434. The results to which this tradition - still in force to a great extent - leads can be better discerned in historiographic visions of the whole; for instance, that of JOHANNES-MICHAEL SCHOLZ, *Acerca de la historia del derecho en España y Portugal*, in: *Revista Crítica de Derecho Inmobiliario*, año 58, n° 550 (mayo-junio 1982), pp. 633-661, especially p. 636 (translated into Spanish by Mariano Peset; originally, *Zum Forschungsstand der neueren Rechtsgeschichte Spaniens und Portugals*, in: *Zeitschrift für neuere Rechtsgeschichte* 3-4 (1980), pp. 164-187), and, with more attention paid to the problem, although in a more restricted objective scope, JESÚS VALLEJO, *Historia del proceso, procedimiento de la historia. Diez años de historiografía procesal en España* (1979-1989), in: *Hispania. Entre derechos propios y derechos nacionales. Atti dell'Incontro di Studio*. Firenze - Lucca 25, 26, 27 maggio 1989, a cura di BARTOLOMÉ CLAVERO, PAOLO GROSSI, FRANCISCO TOMÁS Y VALIENTE, (Per la storia del pensiero giuridico moderno 34/35), Milano: Giuffrè 1990, pp. 885-921.

<sup>4</sup> Again, see MARC BLOCH, *Apologie pour l'histoire* (note 2), pp. 82 ff.

Our subject is the specific form of the relations prevailing between the several and diverse holders of political power, all of whom operated simultaneously. Since these authorities exercised power over spheres which were totally or partially coincident from a territorial and personal point of view, but, objectively, exercised it in varying magnitudes, we might assume that amongst these authorities certain principles of priority and subordination prevailed which made possible the more or less pacific coexistence of such a plurality of power holders. But since these powers tended time and again towards conflict, we should surely assume the opposite: the establishment of such an order can be attributed to none of them. For none of the existing holders of political power was it possible to constitute unilaterally a new form of relationship affecting all of them universally. None of them disposed of the necessary constituent powers. The legitimacy of each one's position had diverse premises (lineage or tradition for the lay nobility, divine will in the monarchic and the ecclesiastical institutions, corporative representation in *universitates* and *collegia*), but in all cases the resulting social conformation was a *datum*: it could not be disposed of, not even by those centres of power with recognizably superior rank.<sup>5</sup>

The holders of political power also produced laws – although we shall not go into details concerning their diverse types and characteristics. From what has been said it is obvious that the examination of such sources will give only partial results concerning our present topic. In the royal laws, for instance, we sometimes come across ordinances which appear to define the prerogatives of, amongst others, clergy, lay nobility, towns, or *universitates* within the kingdom, and by apportioning separate powers amongst them, to define their mutual relations. Such constitutions must be treated as a reflection of the monarch's *desideratum*

<sup>5</sup> This is an issue of special significance even for periods later than the one which concerns us here. It is perhaps in the debate about the conception or existence of the Modern State where the question has achieved more significance. For our purposes, the two most notable contributions to that discussion are made by BARTOLOMÉ CLAVERO – *Institución política y derecho: desvalimiento del Estado moderno*, in: BARTOLOMÉ CLAVERO, *Tantas personas como estados. Por una antropología política de la historia europea*, Madrid: Tecnos 1986, pp. 13–25 (a revised version of *Institución política y derecho: acerca del concepto historiográfico de «Estado Moderno»*, in: *Revista de Estudios Políticos (Nueva Época)* 19 (enero-febrero 1981), pp. 43–57) – and SALUSTIANO DE DIOS – *Sobre la génesis y caracteres del Estado absolutista en Castilla*, in: *Studia Historica. Historia Moderna* III/3 (1985), pp. 11–46 –. The positions of the two authors are not in all respects the same, but the non-existence, before the bourgeois revolutions, of a constituent power capable of determining the juridical ordination in force, formulated by Clavero as decisive for his particular exposition (p. 21), is accepted by Salustiano de Dios without difficulty (pp. 21 and 26 ff.).

rather than as establishing a concrete order of relations among the centres of power existing in his territory. There are similar reasons to be distrustful of the statements by popes and emperors relating to the ordering of lower jurisdictions. In the case of the commands proceeding from those centres with an inferior position to that of the king, it is much harder to find analogous attempts to define the distribution of power within the relevant jurisdiction.

Not only are these partial sources, but their joint consideration does not give us the desired results. We would obtain an accumulation of points of view without gaining a coherent image. The most acceptable solution, in this case as in others, is to adopt the position of an observer who is not involved, at least formally, in the scheme of centres of political power that we intend to study. The juridical literature can provide such a point of view, for it combines the benefit of distance with the not inconsiderable advantage that its authors were endowed with the adequate instruments (terms, concepts and argumentations) to analyse the phenomenon we are interested in. Such instruments are contemporary with the facts, and that is the guarantee of their acceptability; since they are of a strictly technical nature, they have precision; they are the result and the reflection of a mentality, and herein lies their interest as a basis for an investigation.

We must be fully aware that exclusive reliance on these sources can also lead to distortions, above all thanks to the political commitments of many jurists, for reasons of nationality or pay. I believe that such a risk can be avoided if attention is paid to the body of the jurisprudential sources as a whole, rather than to particular authors. By doing this, we achieve a specific representation of reality, not a precise image of the reality itself; that representation created by the medieval jurists is in certain respects arbitrary since it is not exclusively determined by the actual facts: a conceptual network is drawn by the jurists in an attempt to rationalize their contemporary environment; but other terms and concepts could have been used for the same purpose, at least in theory. The representation, however, is not entirely arbitrary. The theory was a response to specific options, fulfilled a determined function within the society that fostered it, served a determined social logic. To this extent it was capable of conditioning that reality, by creating, consolidating and reproducing a specific way of reflecting on it.<sup>6</sup>

<sup>6</sup> A first reference here to a work on which these pages depend to a great extent, despite one or two commentaries hereafter: ANTÓNIO MANUEL HESPANHA, *Représentation*

Consequently, this study remains quite purposefully within the scope of the history of mentalities, not as a speciality or specific branch or History, but as a method of contributing to the comprehension of the social paradigm, through the study of *ius commune* literature in the chosen coordinates of time and place.<sup>7</sup>

Special attention will be paid, for reasons of availability of sources, to the works of the Italian and French jurists. With regard to the chronology, although some earlier authors will be quoted as well, the present work concentrates on the period between the works of Accursius and Bartolus de Sassoferrato, which basically coincides with the period between the mature epoch of the Decretalists and the works of Johannes Andreae. This is a period whose limited jurisprudential production is sufficiently compensated by its importance within the wide temporary prevalence of the system which we call *ius commune*.

3. Pietro Costa was able to demonstrate some years ago, in an undervalued monograph, the central role played by the term *iurisdictio* in the language used in the late Middle Ages to describe different locations of power.<sup>8</sup> His study of the semantics of power focused on the meaning of the concept by way of a linguistic analysis of the contexts in which the word *iurisdictio* appeared. The effectiveness of his attempt arose mainly from the fact that the medieval definitions of *iurisdictio* by no means reflected the scope of its real content: they remained on the abstract plane. Costa showed the term *iurisdictio* to express the link between subjects of different degrees, who were thus situated in a power relationship which referred to a judicial vision of political power: a particularly individual finds himself in a subordinate situation in relation to another.

dogmatique et projets de pouvoir. Les outils conceptuels des juristes du *ius commune* dans le domaine de l'administration, in: ERK VOLKMAR HEYEN (Hrsg.), *Wissenschaft und Recht der Verwaltung seit dem Ancien Régime. Europäische Ansichten*, (Ius Commune. Sonderhefte 21), Frankfurt am Main: Vittorio Klostermann 1984, pp. 3–28, especially now pp. 5–7 and 12–15.

<sup>7</sup> I accept, therefore, despite some reservations, the basic epistemological outlines formulated by BARTOLOMÉ CLAVERO, *Historia y antropología: hallazgo y recobro del derecho moderno*, in: BARTOLOMÉ CLAVERO, *Tantas personas* (note 5), pp. 27–52 (earlier published as *Historia y antropología. Por una epistemología del derecho moderno*, in: JOAQUÍN CERDÁ RUIZ-FUNES, PABLO SALVADOR CODERCH (eds.), *I Seminario* (note 3), pp. 9–35; see also the minor advance in Clavero's contribution to the volume *Storia sociale e dimensione giuridica* (note 3), pp. 239–243), even with his reservations on the Middle Ages, from which the work's title itself moves away – not so much the content. Also drawing attention to the "mentalities" and history of law, ANTÓNIO MANUEL HESPANHA, *Une «nouvelle histoire»?* (note 3), p. 315.

<sup>8</sup> PIETRO COSTA, *Iurisdictio. Semantica del potere politico nella pubblicistica medievale (1100–1433)*, (Università di Firenze. Pubblicazioni della Facoltà di Giurisprudenza 1), Milano: Giuffrè 1969.

er, to whom he is politically subjected inasmuch as the superior has the right to judge him (*iudicare*), and he, the inferior, can be judge by the superior (*iudicari*). By means of its linkage with the term *imperium*, *iurisdictio* expresses coercive power. The further "context" *iurisdictio-administratio* indicates the exertion of power in particular circumstances. Lastly *iurisdictio* is also a concept to which late medieval juridical literature links the phenomenon of the genesis of norms through expressions such as *facere statuta* or *legem condere*.<sup>9</sup>

However, Costa does not limit himself to the analysis of an alien language; he also invents one of his own. "Process of power" is one of its basic elements. Using this expression Costa attempts to embrace in their entirety the plurality of situations established within the complicated structure of power relations in medieval society. "Valid" and "effective" are the terms which qualify the process of power. The process of power will be all the more valid the more closely it harmonizes with a symbolic system used as a reference point: in our case the *Corpus Iuris*. The highest level of effectiveness of the process of power will be achieved using the hypothesis in which it is conceived on the fringe of such a symbolic referential system. Both possible modalities of the process of power are complementary: it is inconceivable that a process of power can be qualified as effective without the simultaneous existence of a symbolic system that might validate it.<sup>10</sup>

We will later have the opportunity of investigating the usefulness of this terminology and also of discussing some of its implications. As a matter of fact, in Pietro Costa's analysis the valid process of power (that is to say, that which follows from the requirements of the *Corpus Iuris* and is expressed by the use of the terms and concepts that the *Corpus* as a symbolic system provides) is presented as a vertical structure, composed of power relationships which can be defined, in opposition to others, as inferior or superior; and this vertical process of power comes from the idea of hierarchy.<sup>11</sup> The link between the concept of hierarchy and that of jurisdiction has many facets. We will only draw attention here to one of those pointed out by Costa: the one relating to the classification of different species of jurisdiction, as made by medieval jurists.

A more recent study of the same subject has provided us with a new outlook on the problem. This is the work of António Manuel Hespanha

<sup>9</sup> PIETRO COSTA, *Iurisdictio*, pp. 101–124 and 134–164.

<sup>10</sup> PIETRO COSTA, *Iurisdictio*, pp. 84–91.

<sup>11</sup> PIETRO COSTA, *Iurisdictio*, pp. 125 ff.

on "dogmatic representation and power projects".<sup>12</sup> It is also concerned with the relationship between jurisdiction and hierarchy. Some of his contentions will be discussed here.

4. As has been pointed out earlier, the definition of jurisdiction generally accepted by medieval jurists is not always very expressive, and this holds true not only for us but also for them: "*Iurisdictio est potestas de publico introducta cum necessitate iuris dicendi et aequitatis statuendae*";<sup>13</sup> that was the definition almost unchanged since its first formulation (Irnerian, as it appears) until its definitive establishment in Bartolus' work.<sup>14</sup> By contrast a series of divisions established by the jurists with regard to the generic concept of jurisdiction clarifies much more.<sup>15</sup> Thus the distinction could be made, firstly, between a *iurisdictio ordinaria* and a *iurisdictio delegata*;<sup>16</sup> secondly a *iurisdictio voluntaria* and a *iurisdictio contentiosa*<sup>17</sup> and lastly, a *iurisdictio plena* or *plenissima* and a *iurisdictio minus plena*.<sup>17</sup> These are three classifications which corre-

<sup>12</sup> See note 6.

<sup>13</sup> On the definition of *iurisdictio*, the first important works were those of MARTINIEN VAN DE KERCKHOVE, *La notion de juridiction chez les Décretistes et les premiers Décretalistes*, in: *Études Franciscaines* 49 (Juillet-Août 1939), pp. 420-455, and FRANCESCO CALASSO, *Iurisdictio nel diritto comune classico*, in: *Annali di Storia del Diritto* 9 (1965) (= *Scritti di Francesco Calasso*), pp. 89-110 (previously in: *Studi in Onore di Vincenzo Arangio-Ruiz*, vol. IV, Napoli, 1953, pp. 420-443). See also PIETRO COSTA, *Iurisdictio*, (note 8), pp. 99-101; CLAUDIO SCHWARZENBERG, *Giurisdizione (diritto intermedio)*, in: *Enciclopedia del Diritto*, vol. XIX (1970), pp. 200-217; BRIAN TIERNEY, *Religion, Law, and the Growth of Constitutional Thought, 1150-1650* (1982), Cambridge: Cambridge University Press 1983 (rep.), pp. 31 ff.

<sup>14</sup> Precisely carried out to clarify or put in order the different senses of the term in the *Compilation of Justinian*, according to JOHN W. PERRIN, *Azo, Roman Law and Sovereign European States*, in: *Studia Gratiana* 15 (1972), pp. 87-101, especially p. 95. Whether or not it was the aim, it is indeed one of its results; however, others are not to be excluded, being more substantial and projected beyond the Roman text: read on this point ANTÓNIO MANUEL HESPANHA, *Représentation dogmatique* (note 6), *passim*.

<sup>15</sup> We will later draw attention to this distinction; see below, notes 24 to 27 and the corresponding text.

<sup>16</sup> This is the distinction which has undergone the least change throughout history: see, for instance, AZZO, *Summa super Codice* (facsimile edition *Corpus Glossatorum Iuris Civilis*, II, curante Iuris Italici Historiae Instituto Taurinensis Universitatis, rectore ac moderatore MARIO VIOLA, Augustae Taurinorum: ex Officina Erasmiana 1966), *De iurisdictione omnium iudicum et de foro competenti* (C 3,13), p. 68b.

<sup>17</sup> AZZO, *Summa* (note 16), *De iurisdictione omnium iudicum et de foro competenti* (C 3,13), p. 67b. On the distinction, see the rather complicated interpretation by GIOVANNI DE VERGOTTINI, *Lezioni di Storia del diritto italiano. Il diritto pubblico italiano nei secoli XII-XV*, vol. I, (1st ed. 1950), 3rd ed., Milano: Giuffrè 1960, p. 242, who analyses it within the exposition of the meaning of the formula "*rex superiorem non recognoscens*." The denomination might vary (*plena/non plena*, as in the case of the *Ordo "Invocato Christi Nomine"*, attributed to Bencivenne da Siena and edited by LUDWIG WAHRMUND, *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, VI/1, Heidelberg: Carl Winters Universitätsbuchhandlung 1931, *De iurisdictione*, p. 52; or *plena/semplena*, as in the case of GUILLAUME DURAND, *Speculum Iuris, cum Ioann. Andreae, Baldi, reliquiorum*



spond to different aims and needs. We shall not discuss them here. Another *divisio iurisdictionis*, precisely the one which achieves the highest importance among the jurists in the period with which we are concerned, is that which follows from the links, clearly discerned in the compilation of Justinian, between *iurisdictionis* and *imperium*.<sup>18</sup> The basis of these links was a text included in the Digest (D 2,1,3) which turned out to be difficult to interpret especially after the manipulations of post classical jurists.<sup>19</sup> On the basis of D 2,1,3 and related texts, the jurists identify several different kinds of jurisdiction, which vary depending on the *quantum* of power attributed to the holder of each one.

The first task of the jurists is to individualize and define the contents of every species of the genus *iurisdictionis*. The efforts made by Azzo and Accursius, decisive for subsequent literature, provide our starting point; by examining them we can obtain some knowledge of the *status quaestionis* in the first half of the thirteenth century.

There are four kinds of jurisdiction, as defined at that time (see schema I): *merum imperium*, *mixtum imperium*, *modica coercitio* and *iurisdictionis*, the latter is, as can be seen, homonymous with the genus, and is therefore referred to, in order to avoid misunderstanding, as *iurisdictionis in specie sumpta* or *iurisdictionis simplex*.<sup>20</sup> *Merum imperium* is the highest possible level of jurisdiction, the accepted definition being that

que clarissimorum i. v. doctorum visionibus hactenus addi solitis. Pars Prima, Lugduni: sumptibus Philippi Tinghi Florentini 1577, De iurisdictione omnium iudicum, fo. 60rb), but not its basic layout, which is always connected, within the canonistic sphere – see again the Ordo “Invocato” – with the papal *plenitudo potestatis*.

<sup>18</sup> Unavoidably, these being issues so closely related one to another, the different divisions are often dealt with jointly, their connection sometimes arising through the consideration of some of them as a subdivision of others. Thus the different types of *imperium* can be considered, in certain cases, within *iurisdictionis contentiosa*: ODOFREDUS, *Lectura in Primam Digesti Veteris Partem*, Lugduni: excudebant Petrus Compater & Blasius Guido (facsimile edition, Opera Iuridica Rariora, selecta cura et studio DOMINICI MAFFEI, ENNII CORTESE, GUIDONIS ROSSI, II/1, Bologna: Forni Editore 1967), ad l. *imperium*, ff. De iurisdictione (D 2,1,3), fo. 38rb; GUILLAUME DURAND, *Speculum Iuris* (note 17), l. 1, p. 1, De iurisdictione omnium iudicum, fo. 61vb. All this together with the fact that, in some cases, and with arguments by no means feeble, the validity of the division between ordinary and delegated jurisdictions can be challenged – CYNUS OF PISTOIA, In *Digesti Veteris Libros Commentaria*, Francofurti ad Moenum: apud Ioannem Feyerabendt 1578 (facsimile edition, Torino: Bottega d’Erasmus 1964), ad l. *imperium*, ff. De iurisdictione (D 2,1,3), fo. 23vb (p. 680b) –, does nothing but emphasize the progressively growing importance of the link, in its different degrees, between *iurisdictionis* and *imperium*.

<sup>19</sup> FRANCESCO DE MARTINO, *La giurisdizione nel diritto romano*, Padova: CEDAM 1937, pp. 147–148.

<sup>20</sup> AZZO, *Summa* (note 16), De iurisdictione omnium iudicum et de foro competenti (C 3,13), p. 68b; ACCURSIUS, *Glossa in Digestum Vetus*, Venetiis: per Baptistam de Tortis 1488 (facsimile edition, *Corpus Glossatorum* (note 16), VII, 1969), gl. ‘mixtum est’, ad l. *imperium*, ff. De iurisdictione (D 2,1,3), fo. 22rb (p. 41b).

of D 2,1,3: "Merum est imperium habere gladii potestatem ad animadverendum facinorosos homines, quod etiam potestas appellatur". The holder of *merum imperium* has the power of the sword, and he is attributed with necessary powers, first to deal with those cases involving offences for which the punishment is death, mutilation or deprivation of freedom or citizenship; secondly, to impose such penalties through the appropriate judicial decision; and finally, to dictate rules in which such punishments are prescribed for certain offences. The designation *merum imperium* can be understood by its basically penal contents: *merum* stands for what is pure, and this means that no judge whose jurisdiction extends only to financial matters can claim it.<sup>21</sup>

D 2,1,3 did not provide us with any definition of *mixtum imperium*. The text only points out the jurisdictional nature of *mixtum imperium*, and only one of its applications was drawn attention to: "mixtum est imperium, cui etiam iurisdictio inest, quod in danda bonorum possessione consistit". This fact would determine the position of medieval jurisprudence, which would only be concerned with, at least in this first period that we are analysing, the contribution of successive examples which belong to this kind of jurisdiction: questions of *bonorum possessio* in cases of transference *mortis causa*, administration by the tutor of the pupil's property, etc. These are applications defined, unlike those of *merum imperium*, by their obvious economic content.<sup>22</sup>

*Iurisdictio simplex* and *coercitio modica* are lesser species of jurisdiction, on a lower level than the former ones. Some consideration of the first was obligatory because of the curt final passage of D 2,1,3, which expressed less and was less definite than the passage concerned with *mixtum imperium*: "iurisdictio est etiam iudicis dandi licentia". *Iurisdictio*

<sup>21</sup> AZZO and ACCURSIUS, loc. cit. in note 20. Other important texts in Justinian's compilation for determining the penal content of *merum imperium* are D 48,1,2 and N 128,20 (= A 9,14). In his exposition, less strictly bound to the texts of Roman Law than Azzo's, ROFREDUS BENEVENTANUS refers to *amputare capita* and *imponere membri abscissionem* as powers belonging to the holder of *merum imperium*: Tractatus Libellorum, Lugduni: per Mathiam Bonhome 1538, Qui possunt esse iudicis ordinarii vel delegati, fo. 1vb; this text is also studied, for different purposes, by PIETRO COSTA, *Iurisdictio* (note 8), p. 213. Other penalties, such as confiscation, have a special regimen: AZZO, Summa (note 16), Ne sine iussu principis certis iudicibus liceat confiscare (C 9,48), p. 344b. And despite the nature of those penalties most definitive of *merum imperium*, this one was a concept also used in the canonistic sphere: on the canon law version of *merum imperium*, based on the consideration of a *mors spiritualis*, see, for all, JOHANNES ANDREAE, In Quartum Decretalium Librum Novella Commentaria, Venetiis: apud Franciscum Franciscium Senensem 1581, ad c. per venerabilem, Extra, Qui filii sint legitimi (X 4,17,13), fo. 58ra-60rb.

<sup>22</sup> AZZO, Summa (note 16), De iurisdictione omnium iudicum et de foro competenti (C 3,13), p. 69a; ACCURSIUS, loc. cit. in note 20.

*tio simplex* designated the minimum level of jurisdiction held by magistrates of lesser authority appointed to hear cases concerning minor sums.<sup>23</sup>

*Modica coercitio* is a more complex case, which was to disappear in later years as an independent species. The reason for this disappearance can be observed in the works of Azzo and Accursius. In order to understand it, we need to make brief a reference to another classification of jurisdiction which distinguishes between ordinary and delegated jurisdiction. The first pertains, by his own right (*suo iure*), to every magistrate who has received it by the law or by the Prince in order to exert it over a universality of cases in a determined territorial and personal scope which sets the boundaries of his competence. The delegate exerts jurisdiction *alieno iure*, having been given by its ordinary holder the assignment to judge and decide upon a particular case, or an order to exert jurisdiction temporarily within the holder's circumscription.<sup>24</sup> The system and regulation of delegation was the subject of a specific title in the Digest (D 1,21), in which medieval jurists could also find several treatments of the different species of jurisdiction corresponding to the division mentioned above. First, they found that *merum imperium* is not liable to delegation; secondly, that *imperium* is the quality of jurisdiction that enables the magistrate to impose coercively his decisions, and that without coercion, "iurisdictio nulla est" (D 1,21,1 and 5). The result

<sup>23</sup> AZZO and ACCURSIUS, loc. cit. in note 20. On the importance of the Accursian treatment of *iurisdictio stricte sumpta* ("l'insieme dei poteri che spettano ad ogni magistrato in quanto tale"), and, in general, on the difficulty of determining *mixtum imperium*, ANTONIO PADOA SCHIOPPA, *Giurisdizione e statuti delle arti nella dottrina del diritto comune*, in: *Storia et Documenta Historiae et Iuris* 30 (1964), pp. 179–234, especially note 43 in p. 193 and p. 192 (and note 42), respectively.

<sup>24</sup> AZZO, *Summa* (note 16), *De iurisdictione omnium iudicum et de foro competenti* (C 3,13), p. 67b; on Azzo in particular, see JOHN W. PERRIN, "Azo, Roman Law" (note 14), pp. 96–97. ACCURSIUS (ed. cit. note 20), gl. 'quaecumque', gl. 'specialiter', and gl. 'qui mandata', all of them ad l. *quaecumque specialiter*, ff. *De officio eius, cui mandata est iurisdictio* (D 1,21,1), fo. 21r (p. 39). These are concepts that remain in force throughout the period under our consideration, and even later within the canonistic sphere: JOHANNES ANDREAE, *Commentarii Insignes, vulgo Novella, in Sextum Decretalium, Lugduni: apud Haeredes Iacobi Giuntae* 1550, ad c. *cum episcopus*, VI, *De officio ordinarii* (VI 1,16,7), fo. 43ra. Perhaps the most interesting characteristic of the juridical regulation of these forms of exertion of jurisdiction is the possibility of subdelegation, valid only in particular cases: on this question there are some pertinent commentaries in PIERRE MICHAUD-QUANTIN, *Universitas. Expressions du mouvement communautaire dans le Moyen Age latin*, Paris: J. Vrin 1970, pp. 43–44 and 252, and JOSÉ MARÍA GARCÍA MARÍN, *El oficio público en Castilla durante la Baja Edad Media*, Sevilla: Publicaciones de la Universidad de Sevilla 1974, pp. 40 ff. On further developments of this distinction, see also ANTONIO PADOA SCHIOPPA, *Ricerche sull'appello nel diritto intermedio*, vol. II: *I glossatori civilisti*, Milano: Giuffrè 1970, pp. 116 ff., and ANTÓNIO MANUEL HESPAÑA, "Représentation dogmatique" (note 6), pp. 14–15 and 19–21.

of these two conditions was that if the ordinary holder of *merum imperium* delegated his jurisdiction, the delegate, who could not receive *imperium* from him, had no possibility of exerting it effectively. This is where *modica coercitio* operates, inseparable from the jurisdiction with which the delegate receives it. In this way Azzo and Accursius' unclear views of *modica coercitio* can be understood. The first author does not find an independent place for it within the scope of levels of jurisdiction that he defines, linking it instead with *mixtum imperium*.<sup>25</sup> For the second author *modica coercitio* means the degree of coercion needed for the exertion of *iurisdictio simplex*, whose holders are given no *imperium* whatsoever.<sup>26</sup>

5. Through Azzo and Accursius we have been able to observe the fundamental questions arising from the combined treatment of *iurisdictio* and *imperium*, which was to survive for some centuries: the conception of the classification of the different levels of jurisdiction; the difficulty of defining them; the penal delimitation of *merum imperium*, and the regulation of delegation.<sup>27</sup>

In the decades after the appearance of the Accursian gloss, there is an observable tendency towards the clarification of species of jurisdiction, one of the first results of which was to be the abandonment of the most categories which were hardest to individualise. Apart from exceptional cases, for instance the works of Jacobus de Arena, only three species of jurisdiction are considered (see schema II): *merum imperium*, *mixtum imperium* and *iurisdictio*, which express from the highest to the lowest, three different levels of public power, respectively designated *summa*, *media*, and *modica potestas*.<sup>28</sup> There are several attempts to define these species, especially in the two lesser levels, without resorting to the tech-

<sup>25</sup> AZZO, Summa (note 16), De iurisdictione omnium iudicum et de foro competenti (C 3,13), p. 69a.

<sup>26</sup> ACCURSIUS (ed. cit. in note 20), gl. 'imperium', ad l. quaecumque specialiter, ff. De officio eius, cui mandata est iurisdictio (D 1,21,1), fo. 21va (p. 40a); gl. 'etiam imperium', ad l. mandatam, eo. tit. (D 1,21,5), fo. 21vb (p. 40b).

<sup>27</sup> On the latter, see the outstanding work, where the position of Accursius on the delegation of *merum imperium* is clearly expressed, by MYRON PIPER GILMORE, Argument from Roman Law in Political Thought, 1200-1600, Cambridge (Mass.): Harvard University Press 1941, pp. 26-31, also including references to Azzo.

<sup>28</sup> ODOFREDUS, Lectura (note 18), ad l. imperium, ff. De iurisdictione (D 2,1,3), fo. 37vb. The exposition by Guillaume Durand is peculiar. Whereas he only pays individual attention to three species, the last one being, indifferently, *modica coercitio* (Speculum Iuris (note 17), l. 1, p. 1, De iurisdictione omnium iudicum, fo. 60vb), or *iurisdictio* (ibid., fo. 61vb), he sometimes respects the initial fourfold partition (ibid., fo. 61vb as well). On Durand's position, though without reference to the above mentioned nuances, see MYRON PIPER GILMORE, Argument (note 27), pp. 32-33.

nique of enumeration to describe their contents. The purpose of other attempts was to achieve a clear individualization of each one of the recognized species of jurisdiction. Due to the lack of agreement between these different attempts, as well as the frequent refusal of some jurists to recognize the contributions of others, we can conclude that there were no spectacular achievements in this area.

It was by no means an easy task (see schema III). Despite the basically penal characteristics of *merum imperium*, it was not distinguished from *mixtum imperium* according to the simple distinction between civil and criminal cases, although the pertinent terminology existed and was on occasion used for that purpose. Apart from the possibility of penalties doubtfully attributable to either species of *imperium* (for instance, *relegatio*), the offences meriting solely economic penalties could not be conceived as falling within the competence of the holders of *merum imperium*. *Mixtum imperium* includes, in fact, not only the cognizance of major cases outside the limits of the prosecution of crimes but also, within precisely those same limits, cognizance of some other offences which did not involve the serious penalties characterizing *merum imperium*, but were nevertheless still criminal offences. But it did not include those criminal offences, the penalties for which were so slight that they could be imposed by inferior judges, holders only of *iurisdictio simplex*. As a result, the boundaries of *mixtum imperium* can only be determined residually and this was one of the main obstacles faced by jurisprudence in clarifying this distinction: if it was difficult to define each category of jurisdiction, it was equally difficult to distinguish the juridical regime applicable to each one.<sup>29</sup>

<sup>29</sup> ODOFREDUS, *Lectura* (note 18), ad l. imperium, ff. De iurisdictione (D 2,1,3), fo. 38ra-b; JACOBUS DE ARENA, *Commentarii in Universum Ius Civile*, Lugduni: Stephanus Rufo et Johannes Ausultus 1541 (facsimile edition, *Opera Iuridica Rariora* (note 18), XVI, 1971), ad ea. l., fo. 67va-68ra; GUILLAUME DURAND, *Speculum Iuris* (note 17), l.1, p. 1, De iurisdictione omnium iudicum, fo. 60vb-61rb, especially interesting in the case of *relegatio*. Besides, the location of confiscation is still problematical: JACQUES DE RÉVIGNY, *Lectura super Codice, Parrhisiis*: apud Galleotum du Pré 1519 (facsimile edition, *Opera Iuridica Rariora* (note 18), I, 1967), ad l. nulli, C Ne sine iussu principis . . . (C 9,48,1), fo. 406vb, in a similar sense to the passage in Azzo mentioned in note 21. Jacobus de Arena's position is clearly coherent - a characteristic which would give it a special significance in later works, especially those of Bartolus -; he maintains the partition into four species. The relationship between the two inferior ones is analogous to that of the two superior ones: it can be stated that, in his particular conception, *coercitio* is to *iurisdictio* what *merum imperium* is to *mixtum imperium*. Rather more confusing, the work of Odofredus takes up the definitive analysis of the genus *iurisdictio* at the point at which it corresponds to its homonymous inferior degree. In any case, the obstacle that we have mentioned in the text would be permanent, as is pointed out by GIANCARLO VALLONE, *Iurisdictio domini*. Introduzione a Matteo d'Afflitto ed alla cultura giuridica meridionale tra Quattro e Cinquecento,

6. Since the works of Pierre de Belleperche at least, jurisprudence took another direction which was to maintain its hegemony until the mid-fourteenth century. Belleperche took on the restatement of the whole problem of the relationship between *iurisdictio* and *imperium*, and he proposed a new disposition for the classification, delimiting the criteria on which the different kinds of jurisdiction were based and defining each one of the resulting concepts.<sup>30</sup>

In his arrangement of the classification (see schema IV) Belleperche adheres strictly to the method of successive subdivision of the concepts under discussion, reaching each progressive definition by accumulating the characteristics of each fresh criterion. His first step was, therefore, to define *iurisdictio in genere* and reject the prevailing tripartition: *iurisdictio in genere* had to be divided into two different species, *imperium* and *iurisdictio stricte sumpta*, the criterion for the division being the dependence (in the case of *imperium*) or not (in the case of *iurisdictio stricte sumpta*) from the power, office or authority of the judge. The judge with *imperium* can proceed without following a specific action; the judge who has *iurisdictio stricte sumpta* can not. *Imperium* is subdivided into another two species, *magnum* and *modicum*, depending on whether the holder exerts the power by means of noble or mercenary office. There are two kinds of *imperium magnum*, which are *merum* and *mixtum*, depending on whether the magistrate exerts his noble office *aliquid* (first case) or *nihil* (second case) *parti applicando*.

The drawbacks of this procedure are obvious, and we must draw attention to them in order to clarify any doubts before proceeding. The main problem lies in the criteria to which the successive subdivisions answer. First, the difference between the criteria thanks to which *imperium* and *imperium magnum* are subdivided is unclear. Secondly, it is difficult to see how the criterion which divides *iurisdictio in genere* and thus creates the first subdivision can be distinguished from the other two criteria which lead successively to the division of *imperium* into *magnum* and *modicum*, and of *imperium magnum* into *merum* and *mixtum*. In fact the three criteria are variations on the same theme, which is

Lecce: Milella 1985, pp. 21–22. One can take or leave the opinion of Myron Piper Gilmore, but from what we have seen so far we cannot consider it completely unfounded: "The ideas which were sketched in the Gloss of Accursius and the work of Durandus were most completely elaborated in the work of Bartolus of Sassoferrato. Confusion gave place to certainty . . ." (Argument (note 27), p. 36).

<sup>30</sup> The following explanation, in PIERRE DE BELLEPERCHE, *Quaestiones Aureae*, Lugduni: Symon Vincent 1517 (facsimile edition, under the more suitable title *Quaestiones vel Distinctiones*, *Opera Iuridica Rariora* (note 18), XI, 1970), *quaestio* 85, fo. 23vb–25ra.

the degree of connection between the exercise of jurisdictional powers by the judge on the one hand, and action by the plaintiff on the other. This, I believe, basically summarises the three criteria, because noble office is, as opposed to the mercenary one, a form of jurisdictional exertion that is assumed by its holder either independently of the action by the plaintiff, or through the participation of a person who asks for his intervention – although this person does not have to take a part in the process eventually initiated; that is to say, an intervention *ex officio* by the holder of jurisdiction.<sup>31</sup> In the event, only this second criterion, which distinguishes between the noble and mercenary office of the holders, would be followed by subsequent authors, who would reject whatever other nuances there might have been. Only the determination to achieve the symmetry of the classification by means of successive subdivisions, never violating a norm clearly determined before the division nor determined by it, forces Belleperche to distinguish three criteria with such remarkable subtlety and obscurity.

Finally, *iurisdictio stricte sumpta* could be *maior* or *minima*, according to an unproblematic criterion which distinguishes between an amount of more or less than three hundred *aurei*. After establishing the framework for his exposition, Belleperche fills it out by examining the mechanics of delegation of the different types resulting from his classification, a question which had always played an essential part in defining the various grades of jurisdiction. In broad outline his treatment of the matter is as follows: *iurisdictio minima* can be delegated with no limitations; *iurisdictio maior* can be delegated only *ex causa*, the absence of which implies that only the Prince has such ability because “est legibus solutus”; *mixtum imperium* can be delegated with some limitations, and only the Prince can delegate *merum imperium*.

<sup>31</sup> In an obvious terminological connection, the judge's *officium* itself was described as *merum* (or *purum*) when exerted without the need of an action being brought, in the work of HENRICUS DE SEGUSIO (Hostiensis), *Lectura in Quinque Decretalium Gregorianarum Libros*, Parrhisii: Thielmann Kerver 1512, super primo decretalium, ad c. perniciosam, Extra, De officio iudicis ordinarii (X 1,31,1), s. v. inquirere, fo. 146ra. On the relation *iurisdictio-officium iudicis*, and *officium iudicis-actio*, see FRANCESCO CALASSO, *Iurisdictio* (note 13), pp. 103–109. For the jurists after Belleperche who accept the distinction, see: ALBERICUS DE ROSATE, In Primam Digesti Veteris Partem Commentaria, Venetiis 1585 (facsimile edition, *Opera Iuridica Rariora* (note 18), XXI, 1974), ad l. ius dicentis, ff. De iurisdictione (D 2,1,1), fo. 89va; BARTOLUS DE SASSOFERRATO, In Primam Digesti Veteris Partem Praelectiones, Lugduni: ad Candentis Salamandrae Insignae, in vico Mercenario promercales habentur 1546, ad ea. l., fo. 48ra. See, with specific reference to Bartolus, ANTÓNIO MANUEL HESPANHA, *Représentation dogmatique* (note 6), p. 10 and note 19.

Considered as a whole, it is clear that the resulting classification has appreciable advantages compared to the one examined earlier. The first is that the different types of jurisdiction can be identified without reference to the particular and external consequences whenever jurisdiction was exercised, and without having to describe their content by the technique of enumeration.<sup>32</sup> In this way, it is enough to consider the characteristic details of any faculty recognised as jurisdictional in order to classify it according to the types mentioned above. The second advantage is that this classification provided, as a result, a scale of degrees of jurisdiction (from *merum imperium* to *minima iurisdictio*) of greater breadth and possible shades of meaning than other classifications prevailing until then.

However, the classificatory model provided by Belleperche, even after its acceptance by Cynus of Pistoia, would enjoy little success in the works of subsequent jurists.<sup>33</sup> It is difficult to say why, but it might have been due to Belleperche's inability to resolve adequately the problem of the relation between *iurisdictio* and *imperium*. As it turns out, by virtue of the ordinances of D 1,21, mentioned earlier, which state that every holder of jurisdiction has, to a certain extent, the power of coercion, Belleperche is forced to admit, using the categories which he defines, that even the inferior judges, holders of *iurisdictio stricte sumpta maior* or *minima*, exert *imperium modicum*. The disruptive effects of this ambiguity for the classification as a whole are immediate and can be better observed in schema V.

As we can see, as soon as the possibility arises of assigning *imperium modicum* to two positions in the schema, another classification appears, the reverse of the other one, whose genus is no longer *iurisdictio in genere*, but *imperium*. However, we know that *imperium* is a species and not a genus, for which reason such an inverse classification would have to be completed again to include *iurisdictio stricte sumpta*. The result would be, inevitably, an endless chain of linked classifications, which could be read either from left to right or right to left. This is the result of the failure to find an adequate response to the problem we mentioned ear-

<sup>32</sup> That is what Antonio Padoa Schioppa seems to be referring to, when he distinguishes a "systematic" criterion which prevails over the criterion "delle singole attribuzioni" (Giurisdizione (note 23), notes 49 and 50 in pp. 194-195).

<sup>33</sup> See CYNUS OF PISTOIA, *Commentaria* (note 18), ad l. ius dicentis, ff. De iurisdictione (D 2,1,1), fo. 20vb (p. 674b), and ad l. imperium, eo. tit. (D 2,1,3), fo. 23vb ff. (pp. 680b ff.). The small differences of Cynus' exposition might be due to the fact that he does not follow the above mentioned *quaestio* of Belleperche's, but perhaps this author's *Lectura Codicis*.



lier of the relation between *iurisdictio* and *imperium*, which emerges as both genus and species, at once the whole and the part.

7. One of the possible ways of sorting out the difficulty, consciously or not, is shown in the works of Albericus de Rosate. He avoids the obstacle posed by the difficult location of an *imperium simpliciter et principaliter sumptum* within the partitions of jurisdiction by the strategy of making two parallel tripartitions coincide, the first based on *imperium*, the second on *iurisdictio*, in such a way that for every level of *iurisdictio* there is a corresponding level of *imperium*. The isomorphic disposition of both classifications is represented in schema VI.

*Imperium* is, consequently, a faculty added to jurisdiction, not only at the higher levels, but also at the lowest level of *iurisdictio simplex*; the level of *imperium* corresponding to this one can be designated *coercitio modica*, returning in a way to the initial Accursian layout.<sup>34</sup> The problem thus solved, Albericus does nothing less than offer his own classification of the species of jurisdiction, notably different from Belleperche's (see schema VII).

The most striking difference is the subdivision of *merum* and *mixtum imperium*, a contribution taken on board by Albericus from the works of Jacobus Butrigarius.<sup>35</sup> Depending on the degree of coercion implied, *merum imperium* can be *maximum*, *medium* or *modicum*. Within *mixtum imperium* two subspecies appear, depending on the higher or lower degree of cognizance (*cognitio*) required by the case. The contribution of Butrigarius has a special significance for the delegation of the different species of *iurisdictio*, since it is no longer necessary to look for complicated distinctions that determine in which cases *merum imperium* and *mixtum imperium* can be delegated. Only in their minor degree can they be delegated. Whether *merum* and *mixtum imperium* can be delegated or not is therefore drastically rejected as a means of definition.

<sup>34</sup> ALBERICUS DE ROSATE, *Commentaria* (note 31), ad l. *imperium*, ff. De *iurisdictione* (D 2,1,3), fo. 91ra ff.

<sup>35</sup> Jacobus Butrigarius' position is difficult to determine in respect of the classification into species of *iurisdictio*. His guides being Guillemus de Cuneo and Jacobus de Arena, he does not maintain a clear stance on the location of the *modica coercitio* – Guillemus de Cuneo's contribution on this point, acknowledged by Butrigarius and Albericus, means the inclusion of *modica coercitio* within *merum imperium* – and *iurisdictio in specie sumpta* – since one of the possible developments of Jacobus de Arena's work might lead to its inclusion within *mixtum imperium* – in the division that we are analysing: JACOBUS BUTRIGARIUS, *In Primam et Secundam Veteris Digesti Partem*, Romae: Typis Lepidi Fatii 1606 (facsimile edition, *Opera Iuridica Rariora* (note 18), XIV–1 and 2, 1978), ad l. *imperium*, ff. De *iurisdictione* (D 2,1,3), fo. 54a–56a, and ad l. *magistratibus*, eo. tit. (D 2,1,12), fo. 62a–b.

8. However the differences between Albericus' and Belleperche's classifications are not merely differences of form; some of them are more substantial.

The Orleans jurist's classification was susceptible of other forms of development beyond the one we have just considered. It could be used as a starting point for the construction of a real hierarchy of levels of jurisdiction. The criteria used by Belleperche for the subdivision of *imperium* resulted in a number of mutually exclusive species, successive bipartitions with properties defined by the fulfilment or otherwise of a specific condition. The same thing happened to the inferior degrees of *iurisdictio stricte sumpta*. The predictable result was the construction of a hierarchy of cases or situations, the various degrees of which could be attributed to different holders, and which contained in consequence the potential origin of a hierarchy of magistrates with different jurisdictional powers. This use of mutual exclusion could not prevent there being, simultaneously, both a holder of *mixtum* and *merum imperium*, but the sole holder of *mixtum imperium* would clearly be in an inferior position in relation to the holder of *merum imperium*, and so on throughout the lower levels.

This direction, implicit in Pierre de Belleperche's classification, is abandoned by Albericus de Rosate.<sup>36</sup> The Bergamo jurist's classification cannot meet the conditions necessary for the establishment of a hierarchically ordered succession of magistrates. This is due basically to the subdivision of the superior degrees of jurisdiction and the utilization of criteria which admit of indistinct application: the criteria Albericus uses in order to subdivide both species of *imperium* are not mutually exclusive, since they could neither prevent the level of coercion being

<sup>36</sup> The position represented by Belleperche seems to appear, however, in the work of other jurists who order the division of both types of *imperium* by virtue of a criterion that we have seen pointed out before, although not in such a decisive manner: the criterion referring the civil/penal distinction. It appears in the work of Oldradus de Ponte, whose position is close to that of Jacobus de Arena: OLDRADUS DE PONTE, *Consilia seu Responsa, et Quaestiones Aureae, Venetiis: ex Officina Damiani Zenari 1585, consilium 10, fo. 5ra*. But such a disposition cannot be decisive as a guiding criterion for the whole of the classification, even from positions nearer to Belleperche's, e. g. Cynus of Pistoia's. In Albericus de Rosate's approach to the question, the irrelevant nature of the distinction can be more easily appreciated: *criminaliter agere* is not always *merum imperium*; *civiliter agere* is not always *mixtum imperium* (CYNUS OF PISTOIA, *Commentaria* (note 18), ad l. *imperium*, ff. de *iurisdictione* (D 2,1,3), fo. 24va (p. 682a); ALBERICUS DE ROSATE, *Commentaria* (note 31), ad ea. l., fo. 91rb). The real uselessness – or, rather, impracticability – of the civil/penal distinction can be appreciated with special clarity in the practical sphere as well; or, more exactly, in the connection between practice and jurisprudential exegesis: for a convincing and acute portrayal of the problem, see GIANCARLO VALLONE, *iurisdictio domini* (note 29), pp. 21–25 and 30–31.

validly applicable to *mixtum imperium*, nor the application of cognizance to *merum imperium*.

It is evident that in order to qualify as hierarchic or not a particular disposition of elements depends only on what we understand as hierarchy.<sup>37</sup> One simple and clear concept, specifically established for the study of the phenomenon of power, the one we are now using, is offered by the work of Max Weber.<sup>38</sup> If we adapt it to our case, we can define hierarchy as an order of elements fulfilling two conditions: each element has specific characteristics or potentialities of action which its inferiors lack; each element, in relation to its inferiors, can influence decisively their scope of action. Therefore, in a jurisdictional hierarchy, it can be said that a particular holder is given a position hierarchically superior in relation to another if he is invested with powers lacked by the latter, thereby enjoying powers of control over the latter's action with the capacity, through the exercise of certain mechanisms (in general appeal and avocation), of modifying his decisions.

Since superior degrees of *mixtum imperium* and inferior degrees of *merum imperium* are established in Albericus' classification, nothing prevents a holder of the first from having a position superior to that of a holder of *merum imperium modicum*. Whereas by virtue Albericus' division of *imperium* there is a possible hierarchy between the degrees (1) to (3), by the next subdivision this hierarchy is violated, and the scale (a) to (f) cannot then be considered hierarchically ordered. This contradiction is even clearer in the well known

<sup>37</sup> Despite the option that I am to examine, I am aware that one of the main themes of this exposition might be vulnerable to a critique proceeding from a different conception of hierarchy. It is not outlandish to consider the concept of hierarchy, as many others in the field of social sciences, as within the already consolidated category of essentially contested concepts, which includes all those whose application is in itself uncertain and permanently liable to dispute: I translate the definition from MAURO BARBERIS, *La storia delle dottrine* (note 1), p. 173, who also provides bibliography on the subject.

<sup>38</sup> In his well-known lecture on the different types of possible domination (*Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie*, ed. J. WINCKELMANN, Köln, Berlin 1964, p. 161). As a fundamental problem with regard to appeal, that of hierarchy is emphasized from the outset of his investigations by ANTONIO PADOA SCHIOPPA, *Ricerche sull'appello* (note 24), vol. I, 1967, pp. 2-6. There is little to be gained, as far as our present analysis is concerned, from medieval theories of hierarchy formulated outside the strictly juristic milieu. AEGIDIUS ROMANUS (*De ecclesiastica potestate*, 2,13; ed. RICHARD SCHOLZ (1929), Neudruck Aalen Scientia: 1961, pp. 120-128) constructs his theory according to the angelic hierarchy, but only goes into detail with respect to the ecclesiastical structure; "in laicis", he describes only the "prima hierarchia" without completing the scale because "de hoc non sit nobis cure". Neither in the celestial model nor in its earthly manifestation do we find precise criteria for the interaction of the elements in the scales which he defines.

classification of Bartolus de Sassoferrato, the *arbor iurisdictionum*.<sup>39</sup>

This classification (see schema VIII) would become the most influential in the later history of jurisprudence. The difficulties posed by Belleperche's subdivision are now avoided by the exclusion of *imperium modicum*, which had caused so many problems. *Imperium* is the jurisdiction exerted *officio iudicis nobile*; *iurisdictio simplex* is exerted *officio mercenario*. The following criterion is based on the consideration of the public utility (*merum imperium*) or the private utility (*mixtum imperium*) of the faculties exerted by the holder of jurisdiction. *Iurisdictio simplex* also responds to private utility. With such criteria the three definitions can be constructed. After that, Bartolus skilfully establishes three successive subdivisions into six levels according to rather different criteria,<sup>40</sup> which concern not only the nature of the faculties relevant to each one, but also their holders and whether these faculties can be delegated: the eighteen resulting levels respond to the application of criteria as disparate as the scope of application, greater or lesser, of the rules dictated by the holder, the gravity of the penalties imposed for the offences that he is enabled to judge, and the economic importance of the cases that he undertakes. These eighteen levels do not conform strictly to a hierarchy: *mixtum imperium maximum* pertains solely to the Prince, whereas *merum imperium minus* and *minimum* can be held by any infe-

<sup>39</sup> In contrast to the contributions of other authors, Bartolus' is sufficiently well-known. A clear synthesis is provided by MYRON PIPER GILMORE, *Argument* (note 27), pp. 36-44; another one, more concise, with a good schema which includes definitions for each type, is by CECIL N. SIDNEY WOOLF, *Bartolus of Sassoferrato. His Position in the History of Medieval Political Thought*, Cambridge: Cambridge University Press 1913, pp. 405-407; the exposition by ANTÓNIO MANUEL HESPAÑHA, *Représentation dogmatique* (note 6), pp. 16 ff., is of more interest, with lucid remarks about the meanings and consequences of the classification. As it is known, that of Bartolus has an early graphic representation, in the form of a tree-diagram, usually printed in the editions of his work; perhaps a part of the subject under consideration here depends to some extent on the graphic representation itself: from the vertical nature of the schema reproduced, a hierarchy could be expected; the descending branches of the *arbor iurisdictionum* do not lend themselves so clearly to such a vision. The commentary by BARTOLUS (*Praelectiones* (note 31), ad l. *imperium*, ff. *De iurisdictione* (D 2,1,3), fo. 46v ff.) begins with some "diffinitiones et declarationes iurisdictionum" (fo. 47r) which are a later addition, although they do not differ essentially from the original construction (on these, CECIL N. SIDNEY WOOLF, *Bartolus*, note 1 in p. 406).

<sup>40</sup> A manoeuvre pointed out by ANTÓNIO MANUEL HESPAÑHA, *Représentation dogmatique* (note 6), who evaluates Bartolus' criteria in pp. 17-18. This seems to have escaped MYRON PIPER GILMORE, *Argument* (note 27), for whom Bartolus, while examining the question of the delegation of *merum imperium*, "discovers that there are six grades of *merum imperium*" (p. 40). As will be pointed out shortly, that is an insufficient criterion for the six degrees; moreover, we would do well to consider it an invention, rather than a discovery.

rior magistrate. A hierarchic order could exist within each group of six species so defined, as well as in the three subdivided genera of *merum imperium*, *mixtum imperium* and *iurisdictio*, but not between group and group, genus and genus, since there is always the possibility of combining different degrees in unique entitlements which cut across the group and genus boundaries: it would be almost impossible to infer from Bartolus' data a unitary hierarchy by combining the three scales, and meanwhile assume that *merum imperium* has a superior rank to that of *mixtum*. "Hierarchized" interpretations of Bartolus' *arbor* are possible, nevertheless, assuming that each one of the eighteen final levels actually shows functions that can be accumulated rather than independent entities. In fact we know of several cases, from medieval jurisprudence itself, of conflicts generated precisely because of the concurrence, in a specific territory, of holders of different degrees of jurisdiction who find themselves in conflict because they consider that the powers they are trying to exert pertain to their unique competence.<sup>41</sup> There is no need, moreover, to refer to jurisprudence to realize that these conflicts were quite frequent in the juridical and political life of the Middle Ages.

9. From the abstraction of pure theory, we have observed the difficulties presented by the attempts, if they are such, to put into a hierarchic order the different situations of power in force in medieval society, situations which were in fact irreducible to such analysis.<sup>42</sup> Pietro Costa's study is weakened by the imposition of his own system of terms and concepts into that of medieval jurisprudence, which it finally substitutes. The valid process of power in Costa's work may be hierarchic, whereas the medieval jurists' representation of reality is definitely not so.<sup>43</sup>

<sup>41</sup> A rather significant example, in ALBERICUS DE ROSATE, In Primam Codicis Partem Commentarii, Venetiis 1586 (facsimile edition, Opera Iuridica Rariora (note 18), XXVII, 1979), ad l. periniquum, C De iurisdictione omnium iudicum et de foro competenti (C 3,13,7), fo. 153vb.

<sup>42</sup> However, it has hitherto been a commonplace in historiography to speak, above all with regard to Bartolus' classification, of hierarchy, but without sufficient explanation about what was expressed by it. In addition to the next references, see MYRON PIPER GILMORE, Argument (note 27), pp. 41-42: "In summary, this whole exposition by Bartolus of the grades of jurisdiction represents a careful attempt to explain fourteenth century *dominium* in terms of the Roman Law. By dividing the categories of *merum* and *mixtum imperium* and *iurisdictio simplex* into six degrees each and assigning to each of those degrees specific powers, taken either from the Roman constitution or from contemporary practice, Bartolus achieved a hierarchy of superiorities, wherein each superior had what might be called a property right in his power."

<sup>43</sup> PIETRO COSTA, *Iurisdictio* (note 8), p. 162, with regard to Bartolus: "la 'misurabilità' del processo di potere 'iurisdictio', il suo disporsi in una linea verticale, in una gerarchia

At the beginning of this study we mentioned the interpretation of António Manuel Hespanha without dwelling on its details. This interpretation still needs to be explained. According to Hespanha, the medieval doctrines culminating, as we have seen, in Bartolus' work, have only instrumental interest, particularly from a chronological point of view. For Hespanha, the *arbor iurisdictionum* does not reflect a hierarchy across the different levels of the exercise of power which, at the same time, could imply a hierarchic scale amongst the holders of political power thanks to the later attribution of these levels to different magistratures. What Hespanha is most concerned to stress is the fact that, through the creation by the medieval jurists of a specific conception of reality by means of the classifications that we have seen, one specific form of representing the reality of power would be commonly accepted for as long as the system of *ius commune* remained valid (until its crisis in the eighteenth century), and would prepare first the conception and then the appearance of the contemporary administration, based, as it is, on hierarchic criteria. The problem then is that he analyses the classification in forms of jurisdiction, drawing attention as he does so to the projection of this classification into the future (hence "projects of power" in the title of his work), and not to the historical coordinates in which it arises, to our understanding of which he makes but a small contribution.<sup>44</sup>

10. Thus far we have discovered what it is that we are unable to obtain from the classifications we have been analysing. We have achieved a negative determination and now we need the positive one. What can the medieval representation of the reality of power show us? Obviously we cannot undertake a study of intentions, because the true motivations, if there are any, of the medieval jurists will always be unknown to us.<sup>45</sup> Neither can we make do with the conclusion, as frequent as it is easy,

di situazioni di potere . . ."

<sup>44</sup> ANTÓNIO MANUEL HESPANHA, *Représentation dogmatique* (note 6), *passim*; but note carefully, in relation to the content of the last two notes, the following passage on p. 19: "A partir de ce point il est possible d'établir une hiérarchisation de magistrats et de construire dogmatiquement la faculté, pour le supérieur, d'évoquer les causes de l'inférieur." A more accurate approach, unencumbered by projections of the future, can be found in another work by the same author: ANTÓNIO MANUEL HESPANHA, *L'espace politique dans l'ancien régime*, in: *Boletim da Faculdade de Direito. Universidade de Coimbra* 58 (1982) (= *Estudos em Homenagem aos Profs. Doutores M. Paulo Merêa e G. Braga da Cruz*, vol. II), pp. 455–510, especially pp. 478–479.

<sup>45</sup> They provide, in any case, an object of study which is not to be taken up here. On the possibilities of such a study, MAURO BARBERIS, *La storia delle dottrine* (note 1), p. 166 (and note 21), and 168 ff.

that the jurists' constructions responded merely to a sort of academic exercise with no connections with the reality from which they were irredeemably distant because of their teaching activity, their book culture and their desk work.<sup>46</sup> To draw such a conclusion would be to evade the problem we are dealing with, and to deny the importance not only of this study but also that of the numerous works which have attempted to gain an insight into the past through the study of the literature of the *ius commune*.

One consequence of wider import concerns the coherence of the theory of jurisdiction taken as a whole, for this theory had many more facets than those which have occupied us up till now. Not only in the aspects we have considered here, but also in a more general sense, medieval jurisprudence frequently assumed the existence of successive gradations, orderings or classifications of jurisdiction for the fulfilment of different objectives. By assigning to each of these elements a certain value from the quantitative or qualitative point of view, it was possible to order them from higher to lower, thus classifying them in categories which could easily correspond mutually. In fact, by doing this, jurisprudence constructed the so called *ordines iudicum* or *ordines magistratuum*, which do not aim at the ordering of power situations or applications of power, but of power holders, assembling them into the categories of *superillustres*, *illustres*, *spectabiles*, *clarissimi* and *simplices*. The indication of each one's objective competence could be achieved by making each group coincide with the different types of jurisdiction, already defined.<sup>47</sup> Another development, one of the most interesting of jurisdictional theory, concerns the link between the concepts of *iurisdictio* and *dominium*: such a relation was especially useful when it came to describing and analysing a feudal link. Both concepts had a generic nature, which meant they could be subdivided into different types (in the case of *dominium*, the operating distinction was that between *directum* and *utile*) which, in turn, could be subdivided, reflecting in law the complex chain of feudal vassallic relations existing in fact, for the resulting

<sup>46</sup> This sort of assertion can be found even in particularly rigorous monographs: for instance, SUSAN REYNOLDS, *Kingdoms and Communities in Western Europe, 900–1300* (1984), Oxford: Clarendon Press 1986 (rep.); for an analysis of which, see my review, in: *Anuario de Historia del Derecho Español* 57 (1987), pp. 1040–1045.

<sup>47</sup> See, for all, GUILLAUME DURAND, *Speculum Iuris* (note 17), I.1, p. 1, *De iurisdictione omnium iudicum*, fo. 60rb–vb.

scales of *dominium* and *iurisdictio* could be made to correspond.<sup>48</sup> A specific analysis of each of these categories, not all of which are immune to criticism, would certainly be fruitful but would prolong this study unduly.

There are further implications of greater importance. They relate to the influence which the theory exerted over contemporary reality. We shall focus on two of them: one which affected the Prince's position, and one which contributed to the consolidation of a determined form of relation between different political powers.

It is often argued, all the more in general commentaries, that the Prince (that is to say, the emperor in the valid process of power, the king in the effective process, in the terms of Pietro Costa) acquired in this epoch a clear position of political supremacy, thanks precisely to the doctrinal elaboration of the *ius commune*, but the discursive strategies that made this possible are scarcely dealt with in a specific way. Our presentation might enlighten one of those strategies. Since the Prince was accorded the highest position on the scale of political power holders, the translation of such a position to jurisdictional theory leads to the conclusion that he is a holder of *merum imperium*. Since early times, the kings in western Christendom claimed the exclusivity of such a position but they failed in their struggle as a consequence of the real distribution of political power, which could only be rationalized according to the models in the *Corpus Iuris*, by admitting a plurality of holders of *merum imperium*. There is a famous anecdote from the end of the twelfth century in which the emperor Henry VI asked two jurists, Azzo and Lotharius, who had *merum imperium*; Azzo replied in terms of its shared possession, whereas Lotharius flattered the emperor with the answer that he expected; the latter jurist received a horse as a gift, while the former went away empty handed but with the clear conscience of a good

<sup>48</sup> See, for all, MARINUS DE CARAMANICO, Prooemium in Constitutiones Regni Siciliae, edition by FRANCESCO CALASSO, I glossatori e la teoria della sovranità. Studio di diritto comune pubblico, (1st ed. 1945), 3rd ed., Milano: Giuffrè 1957, pp. 175–205, particularly the passage between paragraphs XII and XVI of the indicated edition (pp. 190–196). On the quoted paragraphs by Marinus de Caramanico, see GIANCARLO VALLONE, *Iurisdictio domini* (note 29), p. 51 and note 53 in pp. 51–52, quickly passing through them when his analysis moves into the field of the *cohaerentia territorio* of jurisdiction, a point of view from which, in my opinion, some of the potential of Marinus' discourse is lost; even more briefly, PIERRE MICHAUD-QUANTIN, *Universitas* (note 24), p. 33, with the object of defining the object of his study; in an analysis nearer to that which interests us here, BRUNO PARADISI, *Il pensiero politico dei giuristi medievali*, in: LUIGI FIRPO (dir.), *Storia delle idee politiche, economiche e sociali*, vol. II (Ebraismo e Cristianesimo. Il Medioevo), t. 2 (Il Medioevo), Torino: Unione Tipografico-Editrice Torinese 1983, pp. 211–366, especially pp. 277 ff.



jurist.<sup>49</sup> The subsequent evolution of jurisdictional theory opened the way to the admission of subdivisions within *merum imperium*, and thus permitted the attribution to the monarch of the exclusivity of the superior levels and the subsequent recognition of areas of political action which would become unattainable for any other holder of jurisdiction. Had we followed the contemporary evolution of the diverse *ordines magistratuum*, we would have witnessed a similar phenomenon: whereas the Prince was at first included among the magistrates of superior level (so called *superillustres*), his position became superior to that of the rest of them, especially after the early fourteenth century, and from then on it would be unique and not shared. And so on in other aspects of jurisdictional theory.

The moulding of this theory into structures whose substantial rigidity was not troubled by the accidental variations produced in jurisprudence made its violation difficult. Its legitimacy was, first, assured by its substantial coincidence with the validating system offered by the *Corpus Iuris* (here again the most serviceable elements from Costa's exposition), and second augmented by the added prestige of its utilization in the works of successive jurists who did not abandon the pre-established structures. The paralysing effect of this on the representation of reality was then projected onto the reality itself, since the situations of power likely to occur within it would be considered the more legitimate the more they approximated to the order consolidated as valid by the tradition. The theory of jurisdiction therefore became a factor of stability, and contributed to the reproduction of the relations of power in force.<sup>50</sup>

11. So, instead of concentrating on the implications within the jurists' own work of the various systems of classification, we must turn to the value of juristic discussion as a source for a wider historical understanding of the reality the jurists were attempting to explain.

The jurisdictional theory is the best expression available to us if we are to understand, as a whole, the phenomenon of power in medieval society. If such a theory arises to explain the reality, to represent it, the parallel development of the theory and practice of power can be advanced as a hypothesis. Observing the former, we can get to know the

<sup>49</sup> There is a copious bibliography on this anecdote. Sufficient here to quote, because of its plentiful information, UGO NICOLINI, *La proprietà, il principe, e l'espropriazione per pubblica utilità. Studi sulla dottrina giuridica intermedia*, Milano: Giuffrè 1952 (rist.), pp. 94 ff., and BRUNO PARADISI, *Il pensiero politico* (note 48), pp. 272 ff.

<sup>50</sup> ANTÓNIO MANUEL HESPAÑHA, *Représentation dogmatique* (note 6), pp. 6-7. By the same author, *Une «nouvelle histoire»?* (note 3), pp. 328 ff.

latter, of which it would be a reflection. In the period on which we have focussed our attention the theory is in the process of construction; the formulated hypothesis once accepted, we would be lead to admit that the real relations of power were not completely settled either. A stratification of power situations can be admitted, in the sense that from the first established classifications, some of these situations admit to being considered in a higher position than others of less significance. There are clearly relations of subordination and supraordination. The theory efficiently places every titleholder in his due position within the general configuration, and this is what would contribute to the aforementioned stability.

But there is also a factor of permanent potential conflict. Because we are dealing with a stratification and not an hierarchy, the mechanisms are lacking which would permit the unitary integration of all the elements which result from the classifications previously studied.<sup>51</sup> Perhaps the most evident of these mechanisms is the appeal, an indispensable characteristic of any scale of jurisdiction holders responding to hierarchical principles.<sup>52</sup> However, as a monograph by Antonio Padoa Schioppa has shown, the concept of appeal in the incipient medieval civil doctrine does not reveal the workings of any such principles, which were far from the mentality of its formulators.<sup>53</sup> It seems that it was different in the canonistic sphere, but that was not enough to alter the global composition of powers, in view of the close interconnections between the secular and ecclesiastical structures in medieval society.

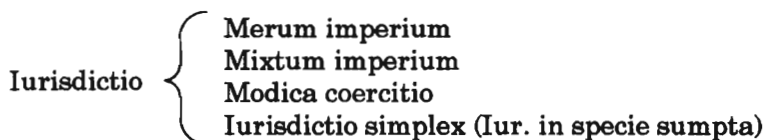
<sup>51</sup> Once again, conceptual precision is required here in dealing with "hierarchy", a term now conflated with "stratification". Now that we have made clear what we wish to express by the former, the latter term does not have any implications for the purposes of this work beyond those just mentioned in the text. The definition and use of both terms, as well as their links and differences, takes on, in the sphere of anthropology, nuances an awareness of which is as useful in gaining an understanding of them as it is superfluous in our case: see LOUIS DUMONT, *Homo hierarchicus. Ensayo sobre el sistema de castas* (1st ed., Paris: Gallimard 1967), translation by Rafael Pérez Delgado, Madrid: Aguilar 1970, especially chapter three, on the concept of hierarchy (pp. 84 ff.), and "Apéndice A" (originally published in: *Cahiers intern. de Sociologie* 29 (1960), pp. 91-112), on hierarchy and stratification (pp. 307 ff.).

<sup>52</sup> For a sociological perspective, see BURTON ATKINS, *Intervention and Power in Judicial Hierarchies: Appellate Courts in England and the United States*, in: *Law and Society Review* 24/1 (1990), pp. 71-103, especially pp. 74-78, where he expresses the most conceptual elements of his dissertation.

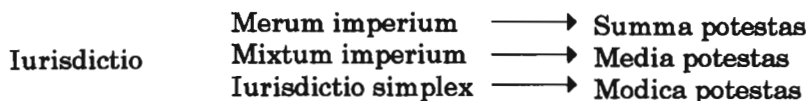
<sup>53</sup> ANTONIO PADOA SCHIOPPA, *Ricerche sull'appello* (note 24), p. 112: "le questioni legate alla gerarchia degli appelli - questioni spesso scottanti anche sul piano politico - rimasero sostanzialmente estranee alla elaborazione dei glossatori." From a more general and basic point of view, an excellent and accurate starting point for this entire subject is provided by BARTOLOMÉ CLAVERO, *Derecho común*, (Temas de Historia del Derecho), 2nd ed., Sevilla: Publicaciones de la Universidad de Sevilla 1979, pp. 75-76.

The result of this situation was the definition of scopes of power that, although qualified as lower or inferior, were zealously and effectively defended by their holders from the interference of those who held superior power. Historians have recognized that the latter espoused as a matter of course a policy of decisive interference in inferior spheres of power, although they should also recognize that these attempts were not always successful. The efficiency of the defence put up by the inferior jurisdictions can be explained not only by merely factual reasons, such as the precarious nature of the central apparatus of power. The central power fought against a mentality, and perhaps it may be necessary to reinterpret, from the point of view of that mentality, such a permanent policy itself. The literature of the *ius commune* still constitutes an excellent starting point for that purpose.

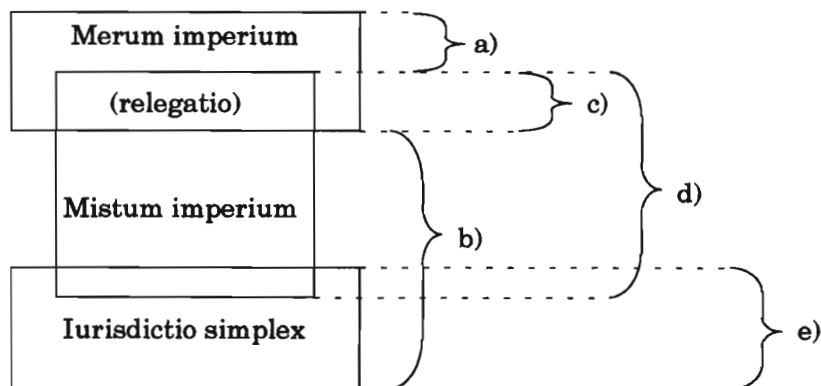
#### SCHEMA I: FOURFOLD OF "IURISDICTIO"



#### SCHEMA II: TRIPARTITION OF "IURISDICTIO"



### SCHEMA III: DIFFICULTIES OF DELINEATING BETWEEN DEGREES OF "IURISDICTIO"



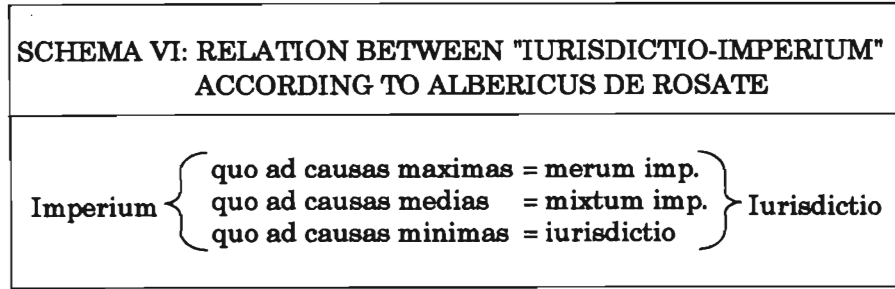
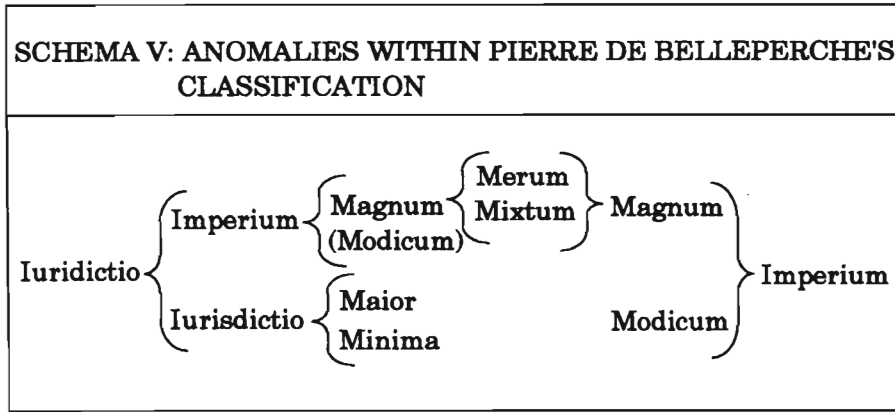
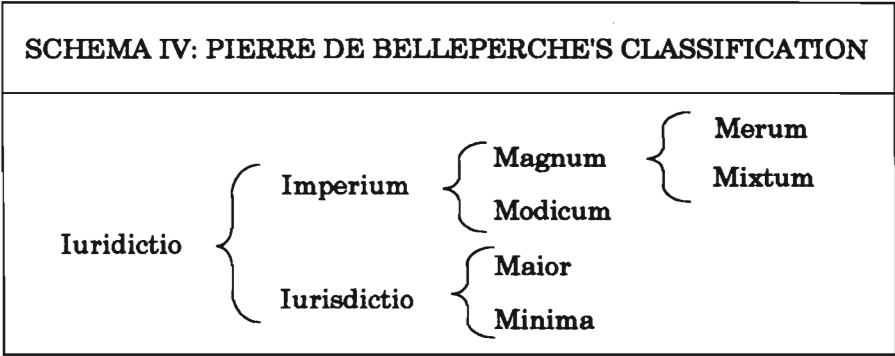
**a) Cases of crime liable to death penalty, mutilation or loss of the status of liberty or citizenship.**

**b) Cases of crimes liable to other penalties, basically of economic content.**

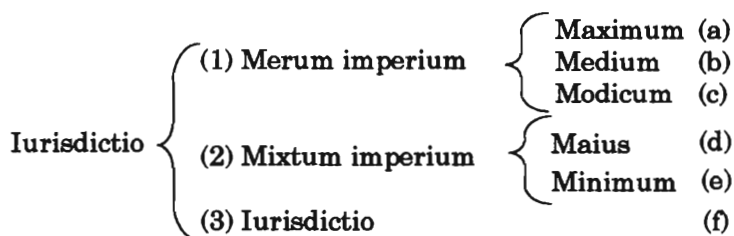
**c) Cases of crimes whose attribution to either Court is doubtful. Grave offenses liable to incidental penalties of economic content.**

**d) Civil cases of higher amount.**

**e) Civil cases of lower amount.**



## SCHEMA VII: ALBERICUS DE ROSATE'S CLASSIFICATION

SCHEMA VIII: BARTOLUS DE SASSOFERRATO'S  
"ARBOR IURISDICTIONUM"