

# IUS COMMUNE

Zeitschrift für Europäische Rechtsgeschichte

Veröffentlichungen des Max-Planck-Instituts  
für Europäische Rechtsgeschichte  
Frankfurt am Main

XXVII

Herausgegeben von DIETER SIMON  
und MICHAEL STOLLEIS



Vittorio Klostermann Frankfurt am Main  
2000

JOSEPH CANNING

## Permanence and Change in Baldus' Political Thought

### I

Baldus was fascinated by issues of permanence and change in human affairs. This was not, perhaps, surprising since he lived through a period of such marked catastrophe and social and political disruption. From the standpoint of a life spent in central and northern Italy, he witnessed the Black Death and its subsequent plagues, climatic deterioration, endemic warfare, the chequered history of the surviving city-republics, the consolidation of *signorie*, an almost entirely absent Roman emperor and, finally, the crisis of papal authority, with the Great Schism unresolved at his death.

In his political thought, Baldus took as his subject the world of change through time within an overarching and permanent legal structure. As he said, surveying the highest level – that of empire,

Now, however, the dispositions of the world have changed, for as Aristotle says in Book 1, *De caelo et mundo*, the world at least will not be born and corrupted, but its dispositions, and nothing is perpetual under the sun, for the cause in itself of corruption is time, Book 4, *Physics*. Although the empire is for ever, as in Auth. 'Quomodo oporteat episcopos' [Coll., 1.6 = Nov., 6], it does not however remain in the same state, because it persists in continual motion, confusion and tribulation. And this is clear from the changing of the four principal [world] monarchies, amongst which two more famous than the others were set up, the first one, that of the Assyrians, and the last one, that of the Romans (as Augustine says in *City of God*, 10.8) which should endure till the end of this world, and be ruled by the emperor in temporal matters and by the pope in spiritual.<sup>1</sup>

<sup>1</sup> 'Nunc autem dispositiones mundi mutatae sunt, nam ut ait Aristoteles, i. celi et mundi, non utique mundus generabitur et corrumpetur, sed dispositiones ipsius et nihil perpetuum sub sole, corruptionis enim causa per se est tempus, iiii. physicorum. Licet imperium semper sit, ut in auth. "Quomodo oporteat episcopos" [Coll. 1.6 = Nov., 6], tamen non in eodem statu permanet, quia in continuo motu et perplexa tribulatione

The Roman empire was clearly itself the product of change but remained the lasting dispensation at least until this world came to an end. Baldus explained why this should be the case elsewhere: the divinely-instituted powers of emperor and pope formed the basic constitutional law for Christendom – their rule was sanctioned by God until the end of the Christian temporal *saeculum*. It was this divine approbation which made the Roman empire permanent.<sup>2</sup> Admittedly, there is an internal tension in the passage quoted between Aristotle's notion of the eternity of the world and the Christian doctrine of its temporal nature, with a beginning through divine creation and an end through God's providence. Baldus was also clearly envisaging empire as such to be a fixed aspect of human existence. But within the final one, that of Rome, all lesser political entities, kingdoms, city-states and lordships inhabited a world of change within the enduring overall structure of imperial and papal power.

In legal terms, the prime way in which Baldus addressed issues of permanence and change was by means of the fundamental *de iure-de facto* distinction, the significance of which is clarified if it is viewed from this perspective. Baldus accorded *de iure* status, in terms of Roman and canon law, to the divinely-sanctioned powers of emperor and pope, that is, to the now permanent authorities in the last empire of mankind. He, like most other jurists of the *ius commune*, was holding on to the empire and the papacy as forms of lasting security to provide an ultimate order of legitimacy in a highly uncertain and dangerous world, an order whose survival to the end of time had been guaranteed by God through his direct historical interventions in human affairs, when Christ confirmed the Roman emperorship and instituted the papal office. Clearly, Baldus recognised the element of change through time in human life, by following Bartolus in also accepting the full legitimacy of those forms of political rule and organisation which had emerged in practice (*de facto*). Behind Baldus' position on this lay his

insistit; et hoc apparet immutatione quattuor principalium regnorum, inter que duo preclariora constituta sunt Assiriorum primum Romanorum postremum, ut ait Augustinus li. x. c. viii. de civitate dei, quod debet durare usque ad finem huius seculi, et per imperatorem regi in temporalibus, per apostolicum regi in spiritualibus' (*Cons.*, 3.278, Brescia 1491, fol. 86r, [= *Cons.*, 1.328, Venice 1575, anastatic reproduction: Turin 1970]). See also the discussion of this passage in E. H. KANTOROWICZ, *The King's Two Bodies. A Study in Mediaeval Political Theology*, Princeton 1957, p. 299. The reference to Augustine is inaccurate.

<sup>2</sup> See J. CANNING, *The Political Thought of Baldus de Ubaldis*, (Cambridge Studies in Medieval Life and Thought, 4<sup>th</sup> series, 6), Cambridge 1987, pp. 26–30.

fundamental approach to law. He held that law, the jurist's proper subject-matter, was concerned with facts which emerged, and specifically with facts in the sense of the works of man:

Every art takes nature for its material ... but the jurist takes the works of man for his material [...] Again, he interprets them; and thus our law is founded upon accidentals, that is on cases which emerge [...] for laws are born of facts [...] But the common material [i. e. of legal science] is not concerned with the works of nature but of man.<sup>3</sup>

This human law, created in a world of changing facts, was itself the product of time:

Our laws consider time and fix their legal enactments in time [...] Time which gives him [i. e. man] life gives him law. Time which is always with us – that is what gives us custom, that is what gives us law. By time we live, are nourished and exist.<sup>4</sup>

The strength which Bartolus and Baldus accorded to the *de facto* argument can cause surprise to modern readers. How could *de facto* powers ever match *de iure* ones? Surely, in law, the advantage must always lie with *de iure* right? Was this just lawyers' clever logic-chopping? For neither jurist was this just an ingenious argument. Baldus went to the heart of the matter by recognising the essentially *de facto* character of human law, itself the product of time and change. He sought to elaborate not a static jurisprudence but one which reflected the reality of change within the permanent legal system of the *ius commune*, a system which was sufficiently flexible to cope with the historical vicissitudes of human life. Any jurisprudence which did not accept the validity of change might have had (in theory) *de iure* right on

<sup>3</sup> 'Omnis ars assumit sibi naturam pro materia[...]sed legista pro materia assumit sibi facta hominum [...] Item ipsa interpretatur et sic ius nostrum est fundatum super accidentibus, id est super casibus emergentibus [...] nam iura ex factis nata sunt [...] Communis vero materia non versatur in factis nature sed in factis hominum' (ad D. 1.1. Rubr., [Lyon] 1498, fol. 4r).

<sup>4</sup> 'Iura nostra considerant tempus, et in tempore fundant leges suas [...] Tempus quod dat sibi [i. e. homini] vitam, dat sibi legem. Tempus vero quod semper accedit ad nos, illud dat nobis mores, illud dat nobis legem, illo [illo ed. Venice 1615; illa ed. [Lyon] 1498] vivimus, nutrimur, et sumus' (ad D. 1.3.32, [Lyon] 1498, fol. 18r). For a full discussion of this passage see J. CANNING, Italian juristic thought and the realities of power in the fourteenth century, in: *Political Thought and the Realities of Power in the Middle Ages / Politisches Denken und die Wirklichkeit der Macht im Mittelalter*, ed. by J. CANNING and O. G. OEXLE, (Veröffentlichungen des Max-Planck-Instituts für Geschichte 147), Göttingen 1998, pp. 229–39, here: pp. 229–30.

its side, but it would have become a dead letter, an antiquarian curiosity.

As regards the practice of political life in Italy, Baldus was particularly interested in two fundamental developments during his lifetime: the consolidation of the sovereignty of the surviving independent city-republics and the legitimation of the power of *signori*. He saw both forms of regime as existing in parallel. Clearly, he explained and justified such developments by use of the *de facto* argument, although he was also very happy to accept (as he must) that there could be *de iure* recognition of raised political status, as when Wenceslas granted the imperial dukedom of Milan to Giangaleazzo Visconti in 1395. In my previous writings I have given considerable attention to these themes. My purpose in this article is to examine Baldus' treatment of these independent cities and *signori* specifically from the standpoint of his notions of permanence and change. From this fresh perspective, I hope thereby to illuminate further these aspects of his thought.

## II

Baldus' treatment of the Italian city-republics might, on the face of it, appear somewhat paradoxical. In order to explain these cities' nature and justify their self-determination in matters of government, he referred to what he saw as permanent human characteristics persisting through, and often bringing about, the process of change in their *de facto* legal position. He used an anthropological and biological approach to explore the underlying social and political reality to which law gave expression.

In his commentary on C. 7.53.5, having explained the relationship between a *populus* as a corporation and its human members, Baldus immediately went on to explain how human beings could (in Aristotelian fashion) be categorised under three headings:

You are to say, incidentally, that man can be considered in three ways. Firstly, insofar as he is in himself an individual naturally composed of soul and body, as in [D. 21.2.56,2]. Secondly, he can be considered insofar as he is an economic body, that is, the head of a family, as in [D. 50.16.195,1], like a *paterfamilias* and the abbot of a monastery. Thirdly, he can be considered insofar as he is a civil or political body, like the bishop of a city and the *podestà*, and this is the case if he were to be considered as being in a position of pre-eminence. But if he is considered in congregation then natural man would be made political, and a people is created out of many men come together, as in [D. 41.3.30].

This people is sometimes girt by walls and inhabits a city, and as such is properly called political from 'polis' which is 'city'. There is another people which is rural and which lives in fortified places and villages, and there has its domicile, as above [C. 6.23.31].<sup>5</sup>

In his political thought, Baldus' prime focus was not so much on the citizens who composed the people, but on the people itself as a corporate body through membership of which an individual became a citizen. He termed this body of the people 'political' (as here) and, indeed, limited his use of this term primarily to the context of the city-state, because of the model of the Aristotelian *polis*. Baldus gave much attention to the notion of the citizen as natural, political man and to problems relating to citizenship and, indeed, one can interpret Baldus' treatment of city-*populi* as being built up from this ultimately Aristotelian concept of the nature of man.<sup>6</sup> Yet this should not obscure the fact that the jurist's overriding concern was with the legal status of the city-*populus* as a whole.

It is also notable that Baldus treated the exercise of authority within the city-*populus* as being political, precisely because it was wielded in the context of a city. Thus man understood as 'as a civil or political body' had two meanings: a person in high authority within the city, specifically the bishop or the *podestà*, was a 'political man', as was the individual citizen through membership of the congregation of the *populus*. Proper emphasis should be given to the first, for which the ultimate model was clearly Aristotle's *politicos* in the sense of a ruler or statesman.<sup>7</sup> Baldus did mention the inclusion of the bishop as a

<sup>5</sup> 'Dic incidenter quod homo potest tripliciter considerari. Vno modo prout est per se quoddam individuum ex anima et corpore naturaliter constitutum, ut [D. 21.2.56,2]. Secundo modo potest considerari prout est quoddam corpus iconomicum, id est, princeps familie, ut [D. 50.16.195,1], sicut est paterfamilias et abbas monasterii. Tertio modo potest considerari prout est quoddam corpus civile seu politicum sicut est episcopus civitatis et potestas, et hoc si consideretur in preeminencia. Sed si consideratur in congregatione tunc homo naturalis efficeretur politicus, et ex multis aggregatis fit populus, ut [D. 41.3.30]. Iste populus quandoque muris cingitur, et incolit civitatem; et idem proprie dicitur politicus a polis quod est civitas. Alius est populus rusticanus qui habitat in castris vel villis, et ibi habet suum domicilium, ut supra [C. 6.23.31]' ([Lyon 1498], fol. 236r).

<sup>6</sup> I disagree somewhat with the interpretation in H. G. WALTHER, *Die Legitimität der Herrschaftsordnung bei Bartolus von Sassoferrato und Baldus de Ubaldis*, in: *Rechts- und Sozialphilosophie des Mittelalters*, ed. by E. MOCK and G. WIELAND, (Salzburger Schriften zur Rechts-, Staats- und Sozialphilosophie 12), Frankfurt am Main, Bern, New York, Paris 1990, pp. 115–39, here: p. 128.

<sup>7</sup> See CANNING, Baldus (n. 2), p. 160, note 4.

political authority elsewhere, again in contrast to an abbot: 'Note that the rule of an abbot over his monks is economic, but the rule of a bishop over his subjects is political'.<sup>8</sup> Baldus was clearly focussing on the issue of authority within a city and was surely right to view the reality of episcopal power in this way. This is a reflection of his view that the clergy were privileged citizens and publicly represented the *respublica*.

In adopting the definition of man as being by nature political, Baldus was following an ultimately Aristotelian anthropological view. This was accompanied by all the resonances of fourteenth-century city-state culture, to which the model of the Greek *polis* could so easily be applied. This view assumed that it was expressing a permanent characteristic of human nature. As far as Baldus was concerned, the notion of natural, political man provided philosophical underpinning for his *de facto* argument in that this addressed the human condition in the here-and-now in this world, as it is. But it is equally significant that Baldus also followed Aristotle in stressing that man, with his political or civil nature, was a form of animal. In his commentary on D. 1.3.2, he noted that 'man is naturally a civil animal', there following William of Moerbeke's translation of Aristotle's famous saying.<sup>9</sup> Baldus expanded this biological view by extending the concept of animal to denote the *populus* as a whole, which through being a congregation of political animals became in effect a form of political animal itself. He used this biological analogy to demonstrate a crucial part of his argument that city-*populi* exercised self-government by means of their own legislation:

A people, therefore, for the very reason that it has existence, consequently has government as part of that existence, just as every animal is ruled by its own spirit and soul [...] Moreover in as much as anything has an essential form it also has a capacity to act. But the people derives its form from itself, and therefore also the exercise of self-preservation as regards its existence and proper form. For it is natural and allowed that anything should strive after the conservation of its existence.<sup>10</sup>

<sup>8</sup> 'Nota quod regimen abbatis in monachos est yconomicum, sed regimen episcopi in subditos est politicum' (ad D. 1.1. Rubr., [Lyon] 1498, fol. 4r).

<sup>9</sup> [Lyon], 1498, fol. 13v: 'homo naturaliter est animal civile'. Aristotle's statement 'ὁ ἄνθρωπος φύσει πολιτικὸν ζῷον' (*Aristotelis Politica*, ed. by W. D. Ross, 1253a, Oxford repr. 1964) is translated by William as 'homo natura civile animal est' (*Aristotelis politicorum libri octo cum vetusta translatione Guilelmi Moerbeke*, ed. by F. SUSEMHL, Leipzig 1872).

<sup>10</sup> 'Ergo eoipso quod populus habet esse habet per consequens regimen in suo esse, sicut omne animal regitur a suo spiritu proprio et anima [...] Preterea quantum

Baldus was making his point very forcefully indeed. Self-preservation is the strongest and most permanent drive of any animal. He was arguing that, given that a *populus* exists, it must (without question) strive for its self-preservation, which takes the form of self-government: that this was a permanent and unalterable characteristic of its nature. This was the way things were.

Baldus' approach was, however, somewhat puzzling in that, if these biological and anthropological aspects of man as a political animal were so fundamental and permanent, why did he only discuss them in the context of city-*populi*, and how could he account for the obvious fact that only a minority of political bodies in fourteenth-century Europe were of this kind? There is no entirely satisfactory answer to these questions, other than to point to the connection between *civitas* and *polis*. Certainly, he saw these permanent characteristics of human political nature as producing change under varying historical circumstances – or, rather, that with changing political conditions the constant features of man's nature could become more or less apparent. This was especially true in the case of the Italian city-republics. Baldus was faced with a situation of rapid flux in this regard. Two main trends faced him. The first was the consolidation of certain cities' independence in the vacuum caused by imperial political impotence and absence from Italy. The second was the accelerating collapse of republican government in many cities as the result, primarily, of internal faction, with the consequence that there was an increasing number of greater or lesser *signori*. What we find, therefore, in Baldus' political thought is that he saw cities as existing in a kind of continuum which stretched from subordination to emperor, pope or *signore* (at one end); through forms of autonomy; to sovereignty within a hierarchy of sovereignty (at the other). It would depend upon the vagaries of historical circumstance whether autonomy became sovereignty and whether sovereignty, once achieved, would be lost.

Baldus was only too well aware that city-republics could crash. It was the common opinion that internal faction was the prime cause – this was always the danger for republics. It had been, notoriously, the

unumquodque habet de forma essentiali tantum habet de virtute activa; sed populus habet formam ex se, ergo et exercitium conservandi se in esse suo, et in forma propria; nam hoc est naturale et permissum quod unumquodque studeat conservationi sui esse, supra [D. 1.3.3]' (ad D. 1.1.9, [Lyon] 1498, fol. 9r).



cause of the downfall of ancient Greek democracies and the Roman Republic. The notion persisted: in modern times Abraham Lincoln believed the Union side had to win the American Civil War lest it be shown to be true that any republic must fall through faction. Although Baldus rejected tyranny when it involved the unjust or illegitimate rule by one man, he was no republican and he accepted tyranny, understood in the contemporary non-pejorative sense of the rule of a *signore*, as a necessary fact of Italian political life and a remedy for faction:

Note that civil war is that which a people begins against itself[...]and where there is this division [i. e. in the city] [...] the sinews of the city, that is the important citizens, are torn apart. As a result a convulsion comes upon the city and commonly leads to a tyranny being necessary, as experience teaches, because the inexperienced and ignorant mob does not stand up to pressures for long. And some wise Genoese used to say that division in the city is the entry of the worm into the cheese.<sup>11</sup>

Unreason drove these dissensions on. Baldus recognised this in the case of the longest-lasting party dispute in Italian cities. It inspired his most evocative statement about fourteenth-century Italian politics:

Guelph and Ghibelline are passions and attachments of the heart like love and hate, and thus the truth of the matter is that they are not those innate passions which, speaking rationally, derive from principles of reason.<sup>12</sup>

Paradoxically, for Baldus, city-*populi* sought their self-preservation but, to do so, they must, when necessary, cease to govern themselves (if their polity became dysfunctional) and accept a change of regime, including the rule of a *signore*. Baldus held that sovereign cities had the natural right to submit themselves to a ruler for their own protection:

If indeed a city does not recognise a superior, nor is there the prospect that a superior could rule it, it can submit itself to him who could govern

<sup>11</sup> 'Nota quod bellum civile est quod in se populus movet [...] et ubi est ista divisio [i. e. civitatis] [...] abscinduntur nervi civitatis, id est magni cives. Vnde civitati advenit spasmus et plerumque inducitur ad necessitatem tyrannidis sicut experientia docet quia imperitum et ignobile vulgus non diu sustinet pressuras. Et dicebat quidam sapiens Ianuensis quod divisio in civitate est vermis ingressus in caseo' (ad C. 6.51.1, [Lyon 1498], fol. 150r).

<sup>12</sup> 'Guelphus et Gebellinus sunt passionēs et partialitates animi sicut amor et odium et ideo secundum rei veritatem non sunt iste passionēs innatē que veniunt a principiis rationis loquendo secundum rationem' (ad C. 9.21.1, [Lyon 1498], fol. 369r).

and defend it, and it can do this by natural law, by which the defence of one's own body is permitted to anyone [D. 1.1.3].<sup>13</sup>

The imperative to preserve one's existence was the fundamental political fact of nature, but whether it took a self-governing republican form varied: such republics came in and out of existence, but the *ciuitas* was, for Baldus, a permanent and natural form of political life. Man was, indeed, a political animal and in community sought his own self-preservation, but to achieve this he both produced and (willingly or unwillingly) accepted change in the forms of government of his political life. Nothing more was fixed as regards the political dispositions of the world.

### III

By the time Baldus wrote, *signori* had been an increasingly established political phenomenon in northern and then central Italy for more than a century and, indeed, became more entrenched during his lifetime. They provided jurists with the most difficult test case as regards the legitimacy of their rule. There was no precedent for them in either Roman or canon law. The violent means by which so many had gained and then exercised their power had led their republican opponents, especially, to brand them all as tyrants. Yet a large number, in the fourteenth century, gained legitimacy for their regimes through imperial or papal vicariates, not to mention the example of Giangaleazzo Visconti's dukedom. The case of the *signori* raised fundamental questions for jurists about the origins of power and the moral norms surrounding its use. It is notorious that Bartolus was hostile to *signori*, whereas Baldus accepted them as a fact of political life and, indeed, devoted his declining years to the service of Giangaleazzo, the most powerful one of all, the arch-villain of Florentine republican propaganda.

Baldus treated the *signori* from the perspective of permanence and change: he accepted both *de facto* justification of signorial rule and also

<sup>13</sup> 'Si quidem ciuitas non recognoscit superiorem, nec est spes quod superior ei possit dominari, potest se submittere ei qui possit eam regere et tueri, et hoc potest de iure naturali, quo tutela sui corporis unicuique permissa est [D. 1.1.3]' (ad X. 2.1.1 (second commentary), Venice 1595 (anastatic reproduction: Turin 1971), n. 9, fol. 151v). In the immediate continuation of this passage, Baldus explained that this was the reason why, in his day, kingdoms had emerged which were not subject to the emperor.

*de iure* legitimation through imperial or papal vicariates.<sup>14</sup> For Baldus, the case of Giangaleazzo was the most important. It is no exaggeration to say that he wholeheartedly embraced his master's dukedom. Like the courtiers at Pavia, he gushingly said that, when Wenceslas conferred the dukedom on Giangaleazzo, 'the Roman empire rose from the dead'.<sup>15</sup> According to Baldus, the duke was consistently called *princeps*, because, through ruling in the emperor's place, he possessed imperial powers within the territories designated, and exercised sovereignty over his subjects.<sup>16</sup>

Indeed, the *signori* in general exemplified in the clearest way a crucial aspect of change in political life. The seeking and exercise of power, as always, was one of the main motors which drove changes of government and forms of rule. Power provided a dynamic force. Baldus fully recognised this aspect of the rule of *signori* and overtly applied the language of power to them. The acid test was whether they possessed *plenitudo potestatis*, the kind which the emperor or pope enjoyed, or a king in his kingdom. In the case of Giangaleazzo, he, as duke, exercised such power *de iure*. But Baldus also held that other *signori* could possess plenitude of power both *de iure* (through the grant of vicariates) and *de facto* (through custom).<sup>17</sup> Above all, he recognised the realities of power in northern Italy:

But nevertheless because all the Lombard *signori* through customary usage, and, as it were, in theory and practice, employ here the words, 'by plenitude of power', and are in possession of that power, as it were, in word and deed, I think that, without substantially violating the truth, we must believe them when they use such language, because it does not appear true that they would use a deceitful mode of expression, see the

<sup>14</sup> See CANNING, Baldus (n. 2), p. 223.

<sup>15</sup> 'Romanum imperium surrexit a mortuis' (*Cons.*, 3.283, Brescia 1491, fol. 88r [= *Cons.*, 1.333, Venice 1575]).

<sup>16</sup> See CANNING, Baldus (n. 2), pp. 221–23. See also J. W. BLACK, The limits of ducal authority: a fifteenth-century treatise on the Visconti and their subject cities, in: *Florence and Italy. Renaissance Studies in Honour of Nicolai Rubinstein*, ed. by P. DENLEY and C. ELAM, (Westfield Publications in Medieval Studies 2), London 1988, pp. 149–60, here: pp. 149–50.

<sup>17</sup> As in *Cons.*, 3.237, Brescia 1491, fol. 70r (= *Cons.*, 1.267, Venice 1575): 'Habere plenitudinem potestatis in temporalibus competit soli [soli ed. Venice 1575; sibi ed. cit.] imperatori vel libero [libero ed. Venice 1575; libere ed. cit.] regi in regno suo, ut [D. 49.15.24], inferioribus autem non competit iure ordinarie potestatis, sed bene possunt habere ex speciali privilegio, puta si vicariatus est eis collatus cum plenitudine potestatis [...] Quia igitur plenitudo potestatis extra omnem iurisdictionem territorii consistit in privilegio, oportet de tali privilegio constare per privilegium principis vel inveteratam consuetudinem.'

argument in [C. 9.27.6]. Otherwise [...] the decrees of such great *signori* would become illusory, as at the beginning of [D. 5.1.75].<sup>18</sup>

There may be an element of irony here in the face of brute facts: our jurist was certainly not going to risk his neck by speaking out against the power of *signori*, as he said in a *consilium* discussing Bernabò Visconti, Giangaleazzo's uncle and predecessor as ruler of Milan:

Neither do I nor would I dare to turn my face to heaven to give my opinion against the might of princes, because there could follow from this opinion many exceedingly bad and dangerous things which are to be avoided, because they would produce a very great scandal.<sup>19</sup>

Indeed, the existing political order would be fundamentally questioned, if he were to take such a view: Baldus bowed to the facts of power. Here, as elsewhere, he was happy to acknowledge that many other lords had, like Giangaleazzo, but by different routes, become *principes*, the prototypes of the Renaissance prince.<sup>20</sup>

A comparison at this point with Baldus' treatment of city-*populi* is revealing. Clearly, the governments of city-states in the second half of the fourteenth century exercised power, internally over their own citizens and others living within their borders, and externally in relations with other territorial states, including by means of war. In reality, cities such as Florence (at which Baldus had taught) and Venice acted as sovereign powers. Certainly, much of Baldus' political thought was concerned with questions related to the sovereignty of self-governing cities. But, whereas Baldus applied the language of power to *signori*, he was circumspect about doing so in connection with city-republics. Above all, he did not accept that city-*populi*, even sovereign ones, possessed the crucial plenitude of power. He held that only personal rulers – emperors, popes, kings or *signori* – possessed *pleni-*

<sup>18</sup> 'Sed tamen quia omnes domini Lombardie de consuetudine usuali et quasi de quadam theoria et practica ponunt hic verba de plenitudine potestatis, et sunt in quasi possessione verbi et facti, puto salva substantia veritatis credendum [esse] eorum sermoni, quia non est verisimile quod falsa voce uterentur, arg. [C. 9.27.6]. Alioquin [...] illusoria fierent decreta tantorum dominorum, ut [D. 5.1.75] in prin.' (*Cons.*, 3.237, Brescia 1491, fol. 70r [= *Cons.*, 1.267, Venice 1575]).

<sup>19</sup> 'Nec ego audeo, nec auderem, ponere os in celum ad consulendum contra potentiam principum, quia multa ex hac opinione possent sequi valde mala et periculosa et cavenda, quia generarent valde magnum scandalum' (*Cons.*, 3.218, Brescia 1491, fol. 61v [= *Cons.*, 1.248, Venice 1575]). See also below n. 22.

<sup>20</sup> See BALDUS ad X. 1.2.1, nn. 70–71, fol. 11v, and X. 2.1.12, n. 12, fol. 158v, Venice 1595 (anastatic reproduction: Turin 1971).

*tudo potestatis*. Sovereign cities themselves existed within a hierarchy of sovereignty at a level below that of kings.<sup>21</sup>

Why was this so? In both Roman and canon law, the figure of the *princeps* possessed plenitude of power – and that figure was a monarch. The term *plenitudo potestatis* itself had had a complicated history. Pope Leo I (440–61) had used the term to indicate how the delegated and therefore partial authority of a papal vicar, that is legate, differed from the pope's which was full in relation to it. By the twelfth century the term had emerged as a way of expressing papal sovereignty and was found, in this sense, frequently and definitively in the decretals of Innocent III (1198–1216). The canonist, Hostiensis († 1271), gave the classic treatment of the term as an expression of papal jurisdictional primacy. In the course of the thirteenth century it was applied by and to secular rulers, including the emperor Frederick II.

There was, however, another term, *suprema potestas* (supreme power), which Baldus applied to the emperor, the pope and kings. He sometimes used this term as a synonym for *plenitudo potestatis*, but, strictly speaking, it signified an ultimate form of power containing plenitude of power within it. Baldus did not seem to have attributed supreme power to *signori*,<sup>22</sup> yet he did allow them plenitude of power. But could *suprema potestas* be applied to sovereign cities? There was, in fact, an excellent republican precedent for the use of the term – the Roman Republic possessed *suprema potestas* before the *lex regia*, as Baldus accepted.<sup>23</sup> Baldus, however, was not willing to equate the Italian cities with the Roman Republic itself. They could be a republic,

<sup>21</sup> See, for instance, BALDUS ad X. 1.2.1, Venice 1595 (anastatic reproduction: Turin 1971), n. 24, fol. 11v: 'Imperator non solet legitimare nisi reservata forma, id est clausula non obstantium adiecta. Sed populus, qui est minoris auctoritatis, non potest istam clausulam derogatoriam apponere, quia ista clausula est de suprema iurisdictione, que vocatur plenitudo potestatis, que non est apud populos.'

<sup>22</sup> See, for instance, Baldus' remarks considering the legality of a grant by the 'magnificus princeps et dominus' Bernabò Visconti, to his concubine: 'Si princeps qui haberet supremam potestatem institueret heredem spurium suum, valeret institutio, quia de iure positivo est inducta quod [quod ed. Venice 1575; quia ed. cit.] non valeat; sed ipse princeps est super omne ius positivum. Sed ad hoc respondetur quod excepto Cesare et liberis regibus, vel similibus, nullus videtur habere supremam originem potestatis, ut in [D. 1.2.1, 11], in auth. "Quibus modis naturales efficiuntur," fi. [Coll., 7.1 = Nov., 89, 15] et fortius delinquent illustres quam alii, ut [C. 5.27.1; C. 6.57.5] (Cons., 3.218, Brescia 1491, fol. 61v (= Cons., 1.248, Venice 1575). But Baldus does go on to say, 'Nos tamen videmus quotidie quod principes et domini faciunt de bonis suis illud quod placet, et quod voluntas eorum servatur pro lege de consuetudine generali, facit [D. 1.4.1].'

<sup>23</sup> Ad D. 1.3.9, [Lyon] 1498, fol. 14r.

but not *the* republic. Likewise, he held back from accepting Bartolus' formula, *civitas sibi princeps*, only going so far as to say that a city was in the emperor's place.<sup>24</sup> Baldus was not willing to say that a sovereign city or *populus* was its own emperor or *populus Romanus*, because this was not actually the case. The Italian city-republics were part of the Roman empire in the widest sense, that is, where Roman law and the Catholic church were operative. Indeed, as he said,

Note that the term *respublica* is used in three ways: firstly, for the whole congregation of the faithful of the empire, or for the whole empire; secondly, for the *respublica* of the city of Rome; and thirdly, for any city. And thus *respublica* sometimes stands for the head and members together, sometimes for the head alone, that is for the city of Rome, and sometimes for the other members.<sup>25</sup>

Italian cities were situated where Roman imperial jurisdiction existed *de iure*: they lay within the *terrae imperii* or the *terrae ecclesiae*, in both of which, according to Baldus, a single form of imperial authority was exercised, but by different people – by the emperor in the first and by the pope in the second (as a result of the Donation of Constantine). Existing at a lower level in the hierarchy of sovereignty, the independent city-republics possessed signs of sovereign power which the emperor and, before the *lex regia*, the Roman Republic had enjoyed: for instance, *laesa maiestas* could be committed against these cities. But the city-*populi* did not possess *plenitudo potestatis*, let alone *suprema potestas*.

But an immediate problem presents itself. If Baldus was willing to accept that *signori* could possess plenitude of power *de facto* and *de iure*, did he consider such *signori* to be at a higher level than cities, in terms of jurisdiction? This consideration might blur the picture of cities and *signori* existing in parallel, with some possessing *de facto* and some *de iure* jurisdiction in the lands of the empire and the church, while sovereignty was only obtainable *de facto*, since any *de iure* powers were conceded by the superior authority of emperor or pope. Surely any body enjoying plenitude of power would have a certain superiority over one which did not?

<sup>24</sup> For a full discussion see CANNING, Baldus (n. 2), p. 116.

<sup>25</sup> 'Nota quod respublica dicitur tribus modis: primo modo pro tota congregatione fidelium imperii, seu pro toto imperio; secundo modo pro republica urbis Rome; tertio modo pro qualibet civitate. Et sic respublica quandoque stat pro capite et membris simul, quandoque pro capite tantum scilicet pro urbe Romana, quandoque pro aliis membris' (ad D. V., Const., 'Omne', [Lyon 1498], fol. 2r).

It is difficult to know how far to take this line of enquiry (if anywhere). There is no clear suggestion in Baldus' works that he sought to place any *signori* above sovereign city-republics. The tone of his statement about the *de facto* claims of Lombard lords to plenitude of power indicated that he was not willing to stand out against them in practice. But the real problem lies with how we are to interpret his views on Giangaleazzo Visconti. Baldus held that Giangaleazzo was not a sovereign ruler in that he was the emperor's subject:

The emperor through granting a fief ennobles rulership, and it is to the advantage of the *respublica* to have just subjects rather than bad ones; and thus it is advantageous to have a subject duke rather than a tyrant.<sup>26</sup>

But, as we have seen, Giangaleazzo was sovereign as regards his own subjects. Furthermore, it was an imperial dukedom, with the duke, according to Baldus, exercising the highest level of sovereign power – that of the emperor himself ('In conclusion I say that the lord duke can do the same in those things committed and conceded to him, as the emperor can himself').<sup>27</sup> Baldus had always said that if the emperor turned up in person the gaps in the exercise of imperial authority would be filled; that the cities gained sovereignty through the absence of the emperor. In his own lifetime, furthermore, his own native city, Perugia, had purchased imperial confirmation of its liberties from the Emperor Charles IV in 1355, as the result of an embassy in which Bartolus himself took part on the city's behalf. Now the empire, Baldus said, had risen from the dead with the grant of the imperial dukedom to Giangaleazzo. This may have been far more than juristic rhetoric. In the context of the expansion of the Milanese state, a development which the surviving free republics in central Italy perceived as a mortal threat to their liberty, Baldus may have considered that Giangaleazzo's sovereign plenitude of power was superior to that of any city-republic. We do not know for certain: it is an intriguing speculation. How, for instance, did Baldus view Florence's claims to *libertà*, when Giangaleazzo's campaigns from 1398 onwards aimed at encircling and then

<sup>26</sup> 'Princeps dando feudum nobilitat regnum, expeditque reipublice potius habere iustos subditos quam perversos; et sic expedit habere subditum ducem quam tyrannum' (*Cons.*, 3.283, Brescia 1491, fol. 88r (= *Cons.*, 1.333, ed. Venice 1575).

<sup>27</sup> 'Concludendo dico quod idem potest dominus dux in sibi commissis et concessis, quod potest ipse imperator' (*Cons.*, 3.277, Brescia 1491, fol. 84r [= *Cons.*, 1.327, Venice 1575]).

capturing the city? We should remember that Baldus was no republican: he accepted the sovereignty of cities as a fact, but was not committed to a republican ideology – far from it.

In the years immediately preceding his death in 1400, Baldus was faced, in his seventies, with the threatened collapse of his world order through the apparently hopeless prolongation of the Great Schism. In an old man's despair, he was willing, in his commentary on the *Decretales*, to accept that the emperor had a role in the ending of the Schism: that of enforcing papal co-operation, especially in the face of a General Council of the church called by the Roman cardinals – a sign of desperation contradicting the jurist's earlier position on the relationship between the emperor and the pope and, indeed, other statements in the same commentary.<sup>28</sup> But the empire represented, for Baldus, an element of permanence in human affairs. It had suffered change through the retreat of imperial authority since the mid-thirteenth century, with the result that sovereign cities had emerged. Baldus accepted this but was glad not to be responsible for it.<sup>29</sup> He was also happy to throw in his lot with Giangaleazzo Visconti's enterprise, especially because, with imperial blessing, it might introduce an element of *de iure* permanence into the chaos of political strife in north and central Italy. There is the distinct possibility that Baldus, who had been eminent in developing *de facto* jurisprudence to cope with this fleeting world of change, in his last years looked increasingly to the certainties of *de iure* imperial authority; that he died looking for stability.

<sup>28</sup> For a full discussion see CANNING, Baldus (n. 2), pp. 41–43.

<sup>29</sup> See BALDUS ad D. 1.8.Rubr., [Lyon] 1498, fol. 36r.