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CHAPTER 1

Italy from Medieval Times to 1800

Mario Ascheri

It is not easy to offer a simple and comprehensive outline of the different central courts known as the Grandi Tribunali, the 'Great Courts' - in the Italian peninsula up to the 18th century. These operated in a complex political context, due to the particular political developments which had taken place in each region over the centuries and the political fragmentation which characterized Italy during the medieval and early-modern periods. Another difficulty results from the fact that the institutional history of these courts has been studied more systematically only in recent times, as opposed to the more traditional historiography which focused more on the doctrinal aspects of the administration of justice, viz. how lawyers and theologians, in particular, had thought and written about the system of justice from the point of view of received dogma. Any brief presentation of the Grandi Tribunali in pre-1800 Italy must therefore remain at present fragmentary. While some aspects have been better researched, historians are still confronted by lacunae and uncertainties in others.

At the beginning of the long period here being considered, two supreme courts were essentially relevant. The first was the court of the Holy Roman Empire, which at the time encompassed the kingdom of Italy, with its capital Pavia, the traditional seat of the king of Italy under the Langobards' rule from the end of the sixth century onwards. The kingdom had been much weakened during the 12th century, but knew a resurgence at those times when the German emperor could afford to be present in the Italian Peninsula. The records show that some important disputes were brought before the emperor's court in Germany by rich monasteries, and that a few proceedings took place in Italy. The emperor retained his position as supreme appellate judge and such proceedings, in particular in feudal cases, continued to occur until the 18th century, when litigants could still appeal to the emperor's court in Vienna.

During the political crisis of the 11th and 12th centuries, regional and local rulers who held sway over the area around their castles - regardless of the legitimacy of their authority - had become the main political actors in everyday life. This was also true in the cities, where bishops to whom privileges had already been granted by the kings in the 10th century onwards could from then on act as the cities' courts. That situation developed rapidly. The courts' history during the 12th century was characterized by a history of two antagonistic tendencies, one aiming at preventing, the other at securing the possibility of proceeding beyond the first instance and beyond the local level. The development of the appeal as a procedural technique, on the one hand, and of specialized judicial institutions within the system of government of the rulers on the other, is to be understood in the light of that tension between local interests. Appeal proceedings became therefore in the course of the 12th century the very symbol of the superior authority, or, in more modern terms, of the 'sovereign'. It was a prerogative which belonged to the emperor, but in Italy there was also the model of the papacy, which through the device of epistola decretales could, instead of acting directly in a judicial

Opposite: An illuminated folio from a 13th-century compilation of legal texts. This folio has texts from Books X and XI of the Très Litt., the final three books of the Códex Littimarinus, surrounded by a plan originally produced, as was the manuscript itself, in Bologna. The illuminated panel introduces Book XI, relating to the collection of public goods, and shows the Emperor's herald admonishing the captain of a ship. The manuscript has been in the possession of Durham Cathedral since at least the 14th century, demonstrating the early international circulation of legal texts.
capacity, determine the standards according to which delegated judges were to decide cases in a due process of law. Indirectly, the technique of delegation enabled the papacy to act as the supreme appellate jurisdiction in the Latin Christian world. Local conflicts of jurisdiction were increasingly submitted to delegate judges, in particular between diocesan churches and abbeys, and were instrumental in promoting the papacy’s policy of restoring unity – including legal unity – in Europe. The collections of papal decretales were the normative expression of that policy, in terms of both substantive and adjectival law.

As regards the secular courts, an important milestone in the lasting political and institutional divisions of Italy was the decision of the papacy, in 1130, to establish the kingdom of Sicily (regnum Siciliae) under Norman rule, with Palermo as its capital, as a distinct entity from the kingdom of Italy (regnum Italice), which covered the central and northern parts of the peninsula. The latter bore the full brunt of the crisis affecting imperial rule and of the triumph of the cities, and those political developments were also reflected in the courts system. The cities were so self-confident of their might that they also claimed the right, the authority of the Emperor Frederick I notwithstanding, to have the final say in litigation before their local courts. The Peace of Constance (1183) was a compromise which was but one stage in the long-standing conflict between the emperor and the cities, and which granted the possibility of appeal to the emperor’s court only in the most important cases. That principle was in fact disregarded, as the cities issued statutes which forced civil and commercial proceedings to be conducted locally, as in the municipal courts of the podesta, or in the merchants’ courts, where local law, or, if necessary, the learned ius commune taught in the universities, was to be applied. In the politically fragmented central and northern part of Italy, this ius commune became prevalent, partly because during the 13th century, the practice of commissioning a consilium sapientis (the opinion of an academic lawyer) in the most important cases became standard procedure. Thus a case was essentially decided by a qualified jurist who was not a member of the court, and who naturally applied the legal rules, notions and methods of the legal learning of the law faculties. The consilium (opinion) requested by the judge, whether upon his own initiative or at the request of a party, was effectively binding. The usage spilled over to the ecclesiastical courts and was one of the main channels through which the learned law of the universities came to pervade Italian legal practice. The opinions often reached an audience far beyond the particular case for which they had been drafted. Already from the mid 13th century onwards, they were often copied and circulated in different courts and jurisdictions, where they were regarded as authorities which could set a precedent.

It was in the same central and northern regions of Italy that, parallel to that procedural system, the network of universities ensured that legal studies were given a prominent place. In those regions, the cities had become city-states which were at least de facto politically independent. Intermittently, when a strong emperor stayed in Italy – as in the case of Frederick II – the imperial jurisdiction was reasserted and for a while imperial justice imposed its own judges locally. Under ordinary circumstances, however, litigation was entirely dealt with within the jurisdiction of the city. Sometimes, an appeal lay open from a decision of the podesta’s court to the court of the Captain of the People, which had emerged in some cities as the leading political authority. But local statutes forbade appeals to authorities outside the city’s
jurisdiction, and in particular to the pontifical court, which was
close at hand and which would have welcomed such proceedings.
Anyone who brought a case outside the city was deemed to have
failed explicitly in his duties as a citizen.

In the central-southern part of the peninsula and in Sicily, the
system under Norman rule (established, as we have seen, by papal
authority) was much more in tune with developments elsewhere
in Europe. Here, during the 12th and 13th centuries, the central
courts were sitting in Palermo, where the Great Royal Court
(magna regia curia) functioned as the supreme court of appeal
coran rege. The whole system of courts was strongly centralised
by the constituciones regni Sicilie promulgated by Frederick II
(in his capacity as king of Sicily) in 1231. The general structure
of the system remained largely in place during the following
centuries, even after Sicily had come (against the wishes of the
papacy) under the Aragonese Crown in 1282, a rule which was
further extended to the kingdom of Naples that, after the demise
of the Hohenstaufen in southern Italy, had been conquered by
the Angevins during the first half of the 13th century. At that
stage, King Alfonso V reformed both the courts system and the
procedural law. It was the king's will to have a court of professional
lawyers specifically entrusted with judicial tasks. The reforms
reinforced the position of the supreme royal court in Naples (Sacro
Reale Consiglio di Napoli), which would remain the highest civil
court in the kingdom of Naples until the end of the 18th century.

The idea of a court of justice functioning as a separate
institution was not new, whether in Naples or elsewhere. In Italy,
the most complex form of monarchical government was, in that
perspective, the pontifical state. In the 13th century, at a time
when the popes claimed to have been given the government of
the world directly from God - and by implication the supremacy
over the imperial government - papal powers were being
concentrated, especially as regards penitential discipline, in the
Apostolic Penitentiary Court, a tribunal called to judge the most
serious sins. These issues had been taken away from the ordinary
jurisdiction of the diocesan courts, which during the same period
were also diverted of their jurisdiction to try heresy, which the

pope assigned to the tribunals of the Inquisition (commissioned
with investigating 'heretical depravity'). Contemporaneously,
the jurisdictional and administrative supremacy of the papacy
supported the institutionalisation of the audientia litterarum
contradictarium (literally 'Audience of adversarial letters'), in which
one may recognise, with a degree of anachronism, a forerunner of
a supreme tribunal of last instance. The ordinary jurisdiction was
delegated by the pope to appointed judges (audimento), selected
among prominent jurists - among whom one may mention
Guillaume Durand (c.1230-96), one of the greatest procedural
lawyers of all time, and still famous for his work on procedural
law, the Speculum iudiciae.

All these developments took place during the 13th century.
During the stay of the papacy at Avignon, the practice of
delivering auditiorem for hearing and deciding cases of canon law
found its institutional expression in the formation of the Rota,
which was regulated by papal bull in 1331. The Rota is the only
Venice offers a vivid exception to the general picture of judicial practice in Italy. From the 10th century onwards, that special legal regime was at times highly controversial, but in the end Venice preferred to stick to its own legal heritage, which had become part of its tradition. There was some paradox in that choice, as the cities on the mainland which were incorporated in the territories under Venetian rule — from Padua to Treviso, or from Verona to Vicenza — were not encouraged to give up the *ius commune* regime which they had adopted before their conquest. As a result, different legal procedures and case law prevailed in Venice and in its mainland dominions. As a whole, the Venetian Republic was therefore less of a legal unity than most other territories in the Italian peninsula. Yet, the Venetian experience grew to become a myth around 1500, it had become a common saw to praise the Venetians as the wisest people because of their unusual but balanced political and legal institutions. On the other hand, precisely because the courts were manned by such a large number of citizens who acted more as juries without being bound by the rules of the *ius commune*, they did not produce printed law reports or case law that could circulate beyond the city’s jurisdiction. Even less likely to produce any case law was the *Avogaria de Comun*, a political jurisdictional body which controlled all the Venetian institutions and, in particular, the appeals coming from the Venetian dominions on the mainland.

Venice’s atypical legal and judicial history started in the 13th century, was strengthened during the 14th century and remained true to its origins, faithfully maintaining its distinctive traditions during the ensuing centuries. Of course, in the case of the *Quarantia*, non-professional courts which directly reflected the leading classes of Venetian society, one easily understands why external observers, especially when they were as attentive and demanding as Montesquieu, would characterise them as political bodies. In Montesquieu’s view, Venetian justice was but a feature of the political tyranny exercised by the aristocracy.

The lagoon city on the Adriatic had always claimed a special relationship with the Byzantine Empire, which gave it some legitimacy to counterbalance the influence of the emperor in the west, and ensured that the Roman law heritage remained alive. However, when, during the 13th and 14th centuries, the system of learned laws spread all over Italy, Venice, governed by a strong class of aristocratic merchants, chose to avoid the complications which would have arisen for their policies from a wholesale acceptance of the laws developed by academic jurists. The Republic’s policy thus rejected the legal tradition which was being adopted in other Italian cities. Its own central and appellate courts — in addition to several other special tribunals — were the aforementioned *Quarantia* in civil and criminal cases. The name is derived from the fact that they consisted of 40 judges, who were Venetian citizens acting as temporary, non-professional magistrates, called up on a rota system to act for a brief period in a judicial capacity. They were to decide cases on the basis of the Venetian laws and statutes, common sense and equity, but not according to the learned laws. In court, the cases were submitted and argued by advocates.

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major medieval court which is still today in existence, although its jurisdiction has changed over the centuries. It was a court of justice staffed by professional lawyers, established as a distinct institution, and which expressed a self-awareness of its specific role in implementing the law. A document discovered by Professor Gero Doležalek (and which reached our own times through non-official channels) shows for example that a few years after it was established, the Rota was able to resist pressure from the emperor to terminate a case in a way the judges believed would have been incompatible with legal standards: they reminded the addressee that they were not, nor could they be, agents who created new law (*ministri iuris sumus, non legum conditores*: we are servants of the law, not law-makers).

At the time when the pope was the undisputed head of Christendom and ruled over a complex bureaucracy and institutional network unparalleled in western Europe, the Rota, as the papacy’s central court of justice, reinforced the image of the Church as an organisation where law played a central role. The administration of justice was entrusted to permanent, professional judges who carried out their judicial tasks with a great degree of
autonomy. It was an image which soon gained in strength. Some of the Rota's judges (for example, the eminent canonist Gilles Bellemere) began to collect notes on the most interesting and important legal issues which had been discussed in specific cases heard by the Rota from 1336-7 onwards. These reports or collected decisiones circulated throughout Europe through numerous manuscripts. They were perceived to be useful for practitioners, because they provided summary illustrations of the difficulties that arose in practice from the application of the new collections of canon law, for example the Liber sextus of pope Boniface VIII (1298) or the Clementinae decretales promulgated under pope John XXII in 1317. These collections and reports on their judicial implementation by the Rota were relevant throughout western Europe because the Church had everywhere developed its specific system of governance. Over the generations, successive layers of reports of the Rota's practice were drafted, and eventually collected in different chronological series known as, respectively, the Decisiones antiquiores, antiquae and novae.

Local authorities were familiar with the ecclesiastical system through the presence in the cities of the ordinary courts of the bishops. The pontifical model was replicated by the secular authorities, as the signori wanted to give legitimacy to their own territorial governance - as was the case in the territories ruled by the House of Savoy, or by the Visconti, who became dukes of Milan in 1395. During the 15th century, just as in earlier developments in Naples, new central courts of justice with supreme appellate jurisdiction were established in the capitals of the various Italian principalities.

A distinction was made in the exercise of their jurisdiction between the administration of 'justice' in a strict sense, and the affairs that came under the qualification of 'grace'. That was because the courts were also entrusted by the prince to examine the increasing flow of requests which reached the prince's administration in matters of grace, where the prince would exercise his special prerogatives. Here again, the Church could serve as a model, as it had established the Apostolic Signature as a tribunal dealing with the most sensitive jurisdictional issues, such as conflicts of jurisdiction between different courts. The secular rulers of Savoy at Chambéry and the Visconti in Milan followed the same pattern and set up law councils which were specialised and professional courts of justice. These institutions played an important role in conveying the image of the prince as the fountain of justice. Alfonso of Aragon had the same concern after he had conquered Naples from the French Angevins around the mid 15th century.

The whole administration of justice had come under strain partly as a consequence of the unchecked growth of the jus commune. The sprawl of the learned jurists' doctrinal production had come to complicate, rather than simplify, the judicial work. In some countries (notably in Spain), the doctrinal authorities which could be adduced in court were reduced to a limited range of eminent authors, but in Italy - until the beginning of the 16th century often identified as the land of the jurists and where professional learned jurists competed with each other - such a device was not an option, and the only alternative was to refer to the 'common opinion' (communis opinio), a technique which emphasized the (relative) doctrinal connections and homogeneity between the predominant legal authors. This was the consensus on jus commune doctrines which was sought in the Italian central courts towards the end of the medieval period.

Any reference to the courts system in Italy would be incomplete without referring also to the higher courts known as Mercanzia. These were institutions created by merchants in the foremost commercial cities in order to represent and advance the interests of the city's industrial and trade communities. Within these institutions a section acted as a high court when decisions rendered by the officials of a corporation or guild under the supervision of the Mercanzia were subject to review. The review proceedings took place before officials (or consuls) who were members of the Mercanzia acting as an appellate college. The purpose of their jurisdictional powers was to decide in the last degree appeals from decisions by the officials of the single corporations, or to adjudicate on cases which had been brought by litigants who were not members of the merchant community.

Dispute resolution among merchants was an effort to provide an alternative to the ordinary system of justice. It was less bound by procedural forms and was governed by principles of merchant law inspired by considerations of equity shared among professionals of common sense. Sometimes, as in Venice, the practice was more closely embedded in a particular tradition. Closer research has revealed that these courts could hardly avoid getting embroiled by the complexities of the learned law. Moreover, it was possible to challenge their decisions outside the network of merchants' courts. In some of the more important Mercanzie, such as, for example, that of Florence, a university-educated lawyer was eventually
called to sit as a judge beside the merchant judges, who were lay judges and sat only for a brief period following a rota system. The presence of an academic lawyer affected the specific features of the merchants' system of adjudication. The change can be explained by the growing ascendancy of the learned legal culture, which did not regard merchant courts as the ideal means to achieve justice, in marked contrast to the approach which had earlier prevailed in the cities with a commercial culture towards the beginning of the 14th century. As a form of alternative dispute resolution, the rationale of the merchants' courts had now come under attack, and its crisis has been explicitly documented. For example, in 1470, a Venetian merchant who had to deal with abstruse terms in a contract of insurance complained that tradesmen had now better be law graduates. In Pesaro, a port on the Adriatic, a merchants' statute of 1532 prescribed that public lectures on Roman law be held. These lectures took place twice a week and it is reported that both the text of the Corpus iuris and the gloss were discussed. In general, it appears that the Romano-canonical procedure and
substantive law had everywhere been successfully asserted. Venice was the only exception, sustained by an uncommon political determination to highlight the Republic's absolute independence from any other power, including that of professional lawyers. Here, in spite of many a controversy and much opposition, an adjusted version of the mercantile system which originated during the 14th century was cultivated.

Elsewhere, criticism against a system of justice perceived to be too protracted, too complex and costly, and therefore also too often unfair, was building up. From the 14th century onwards, many historical records bear witness to the discontent towards judges and advocates, who were held responsible for undue delays in the process of law and for excessive costs. An impressive example of this attitude is to be found in Siena, a city-state which had retained a 'popular' form of government, and which was famous for its artistic and architectural splendours. An important statute of 1309-10 drafted in the vernacular (perhaps the oldest example of such a statute in Italy, and certainly the oldest example which is known to have been preserved) censured in explicit terms the legal professionals, in particular the judges, accused of obfuscating truth and justice! It proved to be no more than an ephemeral outburst, which may help better to understand why the Venetians remained faithful to their alternative particular institutions, but which also reminds us that elsewhere the learned culture of the law faculties had replaced the particular local or regional tradition. That learned culture was expressed by the judges who adjudicated on the circuits of podestà controlled by the larger cities. Through their interaction with counsel and notaries who complied with the same norms and methods, the same learned culture pervaded the entire complex legal life of the era. The litigants who were at the receiving end of that learned justice were unprepared in their comments. The most educated among them have left a large body of testimonials (dating back for a large part to the 15th century) expressing their dismay. It is no coincidence that from the second half of the 14th century and from the time of Francesco Petrarca onwards, humanistic polemics targeted the arcane, enigmatic and all-too-powerful knowledge of the lawyers, as leading to inequitable outcomes because it derived (particularly as regards Roman law) from a deeply flawed textual corpus of laws.

The heaviest criticism directed against the system of justice was aimed at the most developed areas of civil law learning, which affected the status and the economic foundations of the upper social classes, those who had the means to rent their dissatisfaction. One may thus understand that during the early part of the 16th century, it was sometimes fashionable to refer with a certain admiration to the 'swift' justice of the Turks. Thus, for example, the famous Florentine jurist, statesman and judge Francesco Guicciardini wrote around 1530 in his memoirs that in criminal cases, a judge could conduct the proceedings with fairly broad powers similar to the powers usually referred to with the legal phrase of arbitrium indicis, signifying the judge's discretionary powers), although he insisted that in civil litigation, it was necessary to hold on to a firm and clear rule because those cases touched upon the 'security of the citizens' estates. In criminal proceedings, the legal techniques of analogy, extensive interpretation, equity and other devices were permissible whenever they could help to ensure the swift conviction of the defendant and the exemplary punishment of the culprit. In civil cases, by contrast, the judge had to stick strictly to the rules, to avoid any fanciful construction or flexible reading of the authorities. This approach goes a long way to explain why, all the statutory reforms to abridge proceedings notwithstanding, such a result was almost never achieved in civil litigation. The complex and sophisticated remedies worked out by legal authors provided plenty of ammunition for advocates who wanted to challenge a judicial decision. Long-drawn-out litigation, especially in cases of inheritance, became proverbial in popular folklore. The subtle doctrinal distinctions on questions of Roman-canonical procedure and substantive law could not be bypassed by the growing body of statute law and local particular laws which periodically endeavoured to put a halt to the distortions of the judicial machinery. During the early-modern era, the situation did not improve significantly, while a greater sophistication was reached in the literature and doctrines on criminal law.

The 16th century nonetheless witnessed a number of innovations, among which was the new – though notorious – Roman Inquisition (1542), a section of the Holy Office which became a 'national' tribunal. It was organised as a central model but with local branches in almost all parts of Italy, and continued to operate until the papacy was forced to put an end to its activities in the context of the state reforms during the second half of the 18th century.

The new early-modern judicial institutions developed both in the monarchical states and in the city-states which maintained a republican tradition. In spite of many local differences, it is
possible to recognize two alternative patterns in the organization of the central courts. The outline hereafter considers similarities and differences in legal practices among the chief political entities in the Italian context.

THE TERRITORIES UNDER SPANISH RULE

A first general pattern of central judicial institutions is to be found in the principalities. These central judicial institutions were established in order to represent the prince (loco principis constituti). Many of these institutions were styled as 'senates' and were organized along the lines of the prestigious model of the Senate of Milan. The latter had been created in 1499 at the time of the French occupation of the duchy. It replaced the council of justice operating under the Sforza regime, but was influenced by the tradition of the French parlements. The Milanese Senate was staffed with permanent professional judges from Lombardy; their selection reflected the wish to satisfy both the Milanese social elite and the major cities of Lombardy. It proved its resilience by surviving the French occupation, the return of the Sforza rule and later the Spanish regime, and partly owed its prestige and authority to the fact that it was the supreme central court for the Milanese territories. Following the French example of the parlements, it also exercised the prerogative of registering the government's statutes, along with several administrative tasks, including, among many others, the supervision of the university at Pavia. It was thus as much a governmental body as a court of justice, a combination that could put it in a delicate position, especially when it had to deal with a foreign governor. In the absence of any representative parliamentary assembly, the Senate eventually acquired an important role in political life. It became the voice of Lombard interests, the mouthpiece of the Lombard aristocracy. The Senate's members reflected, but also helped to produce, the prominent families which were to become an essential part of the Lombard aristocracy until the 18th century and beyond. It successfully cancelled out the effects of the statutes of Tornor in 1581, by which Philip II had tried to restrict its powers; the Senate registered the statute as usual, but it also sent an interpretative memorandum which effectively allowed it to retain its old prerogatives.

That background is necessary in order to understand what kind of case law the Senate produced. In 1541, Charles V made Lombardy subject to an important body of statute law to which the existing local laws were made subordinate. Its implementation was a major undertaking entrusted to the Senate, but the task was made somewhat easier in that the compilation restated much of the older regional statute law as it had been brought to a degree of harmony by the practice of the Senate itself. The bearing of ius proprium in the Senate's case law also explains why that case law was primarily relevant within the territory, a complement to the constitutions of the Milanese Dominion. Its contribution to the doctrinal developments of the ius commune was of comparatively minor importance. The Senate claimed to exercise wide arbitrary powers so as to assert its institutional position; its decisions could therefore find their justification in considerations of equity which made it difficult to use them as precedents, but which nonetheless were found worthy of studying and enjoyed some circulation. It explains why its decisions were mostly reproduced, in a much-abbreviated form, in the margin of the published versions of the constitutions, but not as separate works.

The Senate had to take account of the higher authority established in 1556 at Madrid in order to ensure the coherence of the policies and their implementation in the Italian dominions of the Spanish Crown: this was the Supreme Council for Italy, an institution which also carried out judicial tasks, as reflected in the law reports of Giovanni Francesco da Ponte published in 1612.

The Supreme Council for Italy was also the higher authority for the major courts in the early-modern kingdom of Naples, among which the Sacred Royal Council was the most prominent. Its practice inspired the first Italian law reports, the work of Matteo d'Afflitto, first published in 1509 and later reprinted several times, with additions, and used throughout the whole of Europe. It was updated by various jurists during the 16th century. After d'Afflitto, many other authors wrote reports, but all these remained private works: whatever their authority, the court refused to consider itself bound by those privately reported cases. Coeval sources nevertheless would normally assert that 'the court's decisions have the force of law' ('decisiones habent vim legis').
Stating the Judgment's Reasons

The matter of stating explicitly the reasons and grounds of a judicial decision was a vexed issue. In Florence, the requirement of a reasoned judgment was introduced as part of the institutional reforms of 1502 designed to resolve the crisis of the political regime. The requirement was a major innovation, and for a few years, it applied even to judgments in criminal cases. It is also noteworthy that the drafting and recording of the reasoning was kept separate from the drafting and recording of the actual decision. The two elements – the judgment and the reasons for it (deciso) – were seen to be relevant to different audiences: the former was essentially of interest to the litigants in the actual proceedings, while the reasoning was relevant to a wider public and of course for the legal profession in general.

In Naples, the success of the collection of 404 reported cases by Matteo D'Afflitto, which became within a few years a classic work of reference (even outside the southern Kingdom), can partly be explained by the fact that, at the time, it introduced a novel genre, defined not simply by the range and interest of the topics the author had selected, but also by the author's capacity to give a brief, accurate and informative account of the reported decisions. The importance of such continental law reports lay not so much with their association with a particular court, but with their doctrinal qualities. In that sense, the genre owed its popularity and authority more to its character of a Professorenrecht than of a Richterecht – it was primarily perceived to express learned doctrines rather than judges' opinions. D'Afflitto's reports were reprinted several times, often with additional annotations by later jurists. The Venetian edition of 1604, for example, reissued the reports and included annotations by six other authors, including Tommaso Grammatico, himself the author of later, and also much-valued, law reports of the same court. The original reports were enriched with many additions including subsequent doctrinal works and some case law, and appeared therefore much longer than the first version.

The – comparatively belated – requirement of stating the (legal) reasons of the decision at Naples was part of a strong reformist agenda. The Royal Council nonetheless successfully resisted complying with the requirement imposed in 1774 by the Tuscan minister Bernardo Tanucci, and a few years later, the old practice prevailed once more. As in the French parlements before the Revolution, the conservative social group of higher judges in Naples proved at the time more influential than the reformist intellectuals and lawyers.

In the 18th century, the Senate of Milan was also much criticized by the enlightened intelligentsia for the secrecy surrounding its judgments. Here, however, the political will to impose reforms was much stronger. The Senate first saw its jurisdiction restricted, and the requirement to state the reasons of the judgments was enacted in 1781 as part of the new procedural system introduced under the Austrian regime. In 1786, the Senate was abolished.

In Rome, while other courts were subject to reform, the Rota continued its practice consisting in publishing its decisions in print as separate leaflets which were afterwards collected, either under the name of the judge who had been responsible for their drafting, or in chronological order. Any good Italian law library has a few shelves of these collections. It is estimated that some 50,000 decisions of the Roman Rota have thus been published.

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of Naples. That reluctance may perhaps be explained by the judges’ concern to avoid any form of binding precedents and, correspondingly, their tendency to found their own decisions on references to arguments borrowed from the ius commune, rather than any local custom, particular practice or case law, because a justification based on the general ius commune would appear more authoritative and give greater weight to the judicial decision. Of course, another approach could on the contrary enhance the value of the local case law, with the result that the range of arguments and authorities available to the judges was even wider, and that they could exercise, and indeed further legitimise and strengthen, their full discretionary powers for deciding a case. A striking example is the success of the doctrine successfully advanced by Matteo d’Afflitto, who argued that the Royal Council – similarly to the emperor – could condemn a party merely ‘ex nudo pacto’, a step no ordinary judge could undertake.

The central courts in the kingdom of Naples also reveal a characteristic policy of the Spanish court and of the viceroys in state-building – a policy which would have lasting consequences in the history of the Italian south. Spanish rule privileged the class of learned and educated judges, a ‘gowned’ elite class (‘logati’) over the old military nobility, which found itself psychologically disarmed, even more so than impaired, in their patrimonial interests. It was the elite class of jurists whose power and influence grew as they made themselves indispensable to the state bureaucracy and system of government, and who effectively appeared as the new aristocracy, among whom the senior judges of the central courts were the most prominent. In the lists of judges in the higher courts of the capital and of the professors in the university, the same names appear again and again. Eventually, it was said that the kingdom had become a Republic of legal gowns, a corporation which, on the basis of the legal system they themselves had shaped, was opposed to any substantial reform of the state and of the social and political order. The legal profession’s hold on the political structures was highlighted in the 18th century by a progressive group of intellectuals inspired by the ‘modernity’ of the kingdom of France and who were therefore nicknamed afrancesados, or ‘Frenchies.’ The difficulty to overcome the position of power of the judges is also illustrated, until the very end of the 18th century, by the convoluted history of the long frustrated attempts to force the Royal Council to state the reasons for its judgments.

THE PONTIFICAL STATE

After the Protestant Reformation, the Roman Rota was no longer the pan-European court it had been in the medieval period. Moreover, its jurisdiction was restricted due to the growing importance in the central administration of the Roman Catholic Church of the Apostolic Congregations and of the Tribunal of the Signature. The Rota nonetheless remained prominent because from the late 15th century onwards it became the central court of the Pontifical State in civil cases. Its medieval law reports continued to be highly regarded and, now in printed form, widespread.

Reform measures were introduced in 1563. The old reported decisions were deemed to be binding, unless two-thirds of the judges wanted to depart from the precedent. One of the reform provisions held that the judge who acted as referens (i.e. the judge who was commissioned to report to his colleagues on a particular case) was bound to deliver his opinion when he was required to do so. The Roman Rota had its own style, the mos rotalí. One of its features was that a judge wrote a tentative legal reasoning justifying the judgment before the actual decision was rendered; the decision would only become executory if left unchallenged by the losing party. If, however, the party who stood to lose the case chose to challenge the decision, the proceedings resumed until a subsequent decision was reached.

Since the 16th-century reform of the court, the reported decisions were considered to be authentic, even though the authenticity of the printed versions would only be directly verified by the court from the end of the 17th century onwards. Even before 1563, the court’s decisions were much sought for their persuasive authority and were frequently published, sometimes under the control of a judge (the so-called coron editions), or by his heirs, or simply collected and presented in chronological order. The auditors or judges of the Rota were pre-eminent jurists who were representative of the Catholic European legal tradition, selected on the basis of ability from the different ‘nations’ of Roman Catholic Europe. For example, in 1545, Emperor Charles V nominated Antonio Aicaretto, a young Spanish jurist (he was born in 1517) who had proved his talents as a legal scholar by publishing Emendations et opiniones. He was a central figure of 16th-century legal humanism and would become later one of the correctores Romani who were in charge of a new edition of the Corpus iuris canonici. He worked as a Rota judge for only a few years, being soon elevated to a bishopric.
Even so, he wrote and published an outline of the rota's procedural practice (*Praxis*), a work only replaced a century later by that of another judge, Jacob Emerix de Matthia, from the diocese of Liège. The latter became judge after having acquired the necessary experience as assistant to his uncle, Jean Emerix, also a judge. Emerix's *Tractatus seu notitia S. Rotae Romanae, 1676–8*, was much more systematic and elaborate than Agustin's book, while his three-volume collection of 1370 *Decisiones* *comitum*, published in Rome in 1701, expressed the author's mature view based on his experience during more than 30 years at the Rota. Emerix also left a diary, which gives a good insight in the day-to-day problems which came up in the Rota's practice. It contains information on his professional relations with Giovanni Battista De Luca, a jurist and confidant of the pope. De Luca's reputation rests both on the fact that he was the first to have written doctrinal legal works in Italian, and on his monumental *Theatrum veritatis et institutae*, a legal encyclopedia largely based on materials borrowed from legal practice, in which case law plays a substantial part, and in which the author discusses with a very independent mind the authorities of the learned legal writers.

The Roman Rota's case law enjoyed great authority, partly because it covered a wide range of legal issues (including many topics of commercial law) but also because it was inspired by principles of equity, consonant with the ecclesiastical character of the court, which appeared all the more useful since they could be used as guidelines for solving many of the uncertainties characteristic of the later *ius commune*.

The Sacred Rota of Macerata, established in 1589, followed the same procedural principles as its Roman model, though its jurisdiction effectively took away some of the territories formerly within the Roman Rota's jurisdiction. The Macerata court was a special privilege granted to the ancient Marches of Ancona and exercised both a civil and ecclesiastical jurisdiction.

Other Rotas founded in the Pontifical State - at Perugia in 1530, Bologna in 1535 and Ferrara in 1599 - were organised along the lines of the 'republican' courts of Florence, Sienna, Lucca and Genoa.

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**CONCLUSIONS**

Throughout the period, there was a marked contrast between the judges of the senates (and similar courts, including also some of the most distinctive, such as the Venetian courts) and the judges of the rotas. Ranged between those two models, one should mention the supreme courts of smaller territories which could not be discussed in this brief outline: Mantova, Monferrato and Parma-Piacenza.

By the 18th century, however, all these judges were the target of mounting criticism: their opponents accused them of upholding the outdated tradition of the *ius commune* and its unenlightened institutional framework, and of manipulating the system of law and justice rather than serving it. That was the ideological climate which paved the way to demands for codification, a process which was to be instrumental in curbing the power of the judges and the authority of their judgments with the intention of simplifying the workings of the law and restoring legal certainty.

In general, however, it seems that the Roman and the Florentine Rotas - presumably because the authentic text of their decisions was published in print - were more highly regarded for their case law, while, conversely, the reputation of the Sacred Royal Council of Naples suffered in consequence from the overabundance of non-authentic reports which circulated and because the network of institutions in which it was anchored proved incapable of reform. Even the judges of the Florentine Rota, in spite of the esteem expressed for their decisions and for their contribution to the doctrinal debate, were not above criticism. This was the case for those judges who came from outside the state, but sought a more permanent establishment in the city by trying to form alliances with the local nobility or by involving that nobility in common, sometimes disreputable, interests. Towards the mid 17th century, for example, voices in Florence complained that some judges were dealing with the merchant community of their home town and were selling goods at a profit to the merchants who were proceeding before their own court.
The Courts of the House of Savoy

A very different pattern of judicial policy can be observed in another complex principality, where under the rule of a local dynasty, a particularist identity was strengthened in the course of the 16th century. These were the territories of the House of Savoy, whose heartland was the duchy of Savoy (with its capital Chambéry), and which subsequently also acquired Piedmont (capital Turin) and the county of Nice. In early-modern times, the rulers were able to impose an absolutist regime at the expense of the parliamentary assembly representing the various social classes (Estates). In order to achieve their goals, the rulers had to enhance the role of the senate.

The Senate of Chambéry, established in 1559, claimed to have the status of a 'sovereign court' after the manner of the French parlements. More than that, however, it also enjoyed considerable political powers. It represented the duchy vis-à-vis the duke, who was often away, preferring to reside in his Italian dominions. As a supreme court, its decisions were deemed to express legal truth in absolute terms. That explains why, even in the other territories under Savoy rule, the law reports of the court by Antoine Favre, first published in 1606, were regarded as an authority. Favre was a judge of the court, later becoming first president of the Senate and famous for his humanistic scholarship. His Codex Paciannus went through several editions in France, Italy, Switzerland and Germany and the later editions were updated with cases of the Senate up to 1635. The book remained a work of reference for centuries, even after 1723, when the court had to state the reasons of its decisions in its judgments. Even at the beginning of the 19th century, it was said that its principles, expressed with the initial words 'in Senatus', were deemed to have been sanctioned by the sovereign.

The Senate of Turin, which was re-established in 1560, also fulfilled several non-judicial tasks, and dealt for some of its business directly with the sovereign, yet did not have the same political weight as its counterpart in Chambéry. Its judges were selected through examination proceedings in order to assess their qualifications. According to a rule set out already in 1616, the Turin Senate was bound to express the grounds of its judgments, at least in cases worth a certain amount, when an application for revision of the judgment had been submitted. The Turin Senate's decisions, too, were widely reported and its reports were considered of special interest.

The later Senate of Nice was created in 1614. It, too, included the grounds of its decisions in its judgments and the records of these decisions have been well preserved.

Towards the beginning of the 18th century, the rulers of Savoy were aware of reform projects which had been undertaken in several European countries along the lines of enlightened absolutism and the rationalisation of law and government. From 1723 onwards, they started reforming the legal system with the help of legislative bodies. In the course of these reforms, a provision of 1729 brought a fundamental change in the legal system, undermining the ascendancy of the jus commune by stating that, henceforth, advocates and judges would no longer be allowed to refer to authors, but only to the statutory texts. If there were a lacuna in the statute law, the judges were to follow the court's precedents, now deemed to be binding.

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deliberately delaying the outcome of proceedings until their own business deals were settled; some, in family litigation, called upon the most influential and powerful members of the prince's court to become guardians or trustees. It was also alleged that some judges openly acknowledged the patronage of prominent government ministers, to whom they publicly paid their respects. These charges were expressed in an unpublished report, probably written on behalf of the Great Duke of Tuscany and therefore reserved (and more reliable); it provides a thoughtful insight to various practices which caused controversy at the time.

The Italian judges of the late ancien régime were largely perceived as a social group opposing the political and social reforms advocated by moderate authors such as Ludovico Antonio Muratori (1672–1750) and enlightened critics, particularly in Naples and Milan, where the circles and figures favouring new ideas and institutions — which would eventually be introduced by the French invaders — were more active than elsewhere. One of the main objections was that the judges were too easily prone to influencing the law they applied, rather than acting as the law's obedient servants, as the theory of the judge as 'bouche de la loi' would eventually impose.