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The Generation of the “Moderni” at Work: Jurists between School and Politics in Medieval Bologna (1270-1305).

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This paper offers a sketch of the life and work of the bolognese circle of professors of law called, in some legal manuscripts of the end of thirteenth century, the “moderni”: it was the generation active in Bologna between about 1270 and 1305, the years of the establishment and triumph of the new government of the city by the popular party. It was not simply a matter of chronology. The new generation of *doctores*, like *Lambertinus Ramponi*, *Pax de Pace*, *Basacomater de Basacomatre*, *Thomas Guidonis Ubaldini*, *Gardinus de Gardinis*, was really different from the previous ones, in their way of thinking and teaching and also in their way of establishing legal theory. Emancipated around 1268, they began to take part in judicial affairs in 1269-70. Then they taught at the university: they wrote short treatises about legal procedure, and above all they wrote a lot of *questiones*, the most common learning method in law school in the second half of the 13th century. After the revolution of 1274 and the ban of the Ghibelline party, they were constantly present in the committees of *sapientes*, charged with reviewing the law, finding the solution for the emergencies in the public affairs and receiving the appeals from defendants implicated in political trials.

I will suggest here three perspectives focused on the indissoluble link between juridical culture and political power in thirteenth century Bologna professors. First, a brief sketch about the main stages of a jurist's career; second, the role of academic culture, especially the *questiones* method, in shaping the political consciousness of the jurists; and finally, the consequences of their direct control over the issues of political justice during the last twenty years of the century.

1. A jurist's career

Many scholars have traditionally been concerned with establishing the social context of the jurists and their families¹. An aristocratic origin has often been assumed, but it has never been thoroughly examined. I believe that such presumption is correct but not sufficient to explain the career of a jurist in the second half of the thirteenth century. Many jurists' families were rooted in a working and merchant middle class: *Martinus Sillimani* was the son of a stationer, who meant to promote his son through academic studies²; *Guillelmus Rombodevino* shows in his name his family's original merchant activity³; *Spagnolus de Abbati* belongs to a rich family of silversmiths, member of the moneylenders guild, the Cambio⁴. Of higher origins were the most significant representatives of the Bolognese Guelphism: *Pax de Pacibus*, *Lambertinus Ramponi*, and *Basacomater de Basacomatribus*.

Two features are common to all these jurists, independently of the family origins. First, many had close relatives or their own father active in the juridical professions: in other words, these jurists represent the second generation of a self-reproducing professional class. Second, a large fraction of the jurists belonged to a popular elite pursuing the social promotion of their members through

¹ See J. Fried, *Die Entstehung des Juristenstandes im 12. Jahrhundert. Zur sozialen Stellung und politischen Bedeutung gelehrter Juristen in Bologna und Modena*, Köln 1974; E. Cortese, *Intorno agli antichi iudices toscani e ai caratteri di un ceto medievale*, in Id., *Scritti giuridici*, Spoleto 2000, pp. XX-XX; J.C. Maire Vigueur, *Gli iudices nelle città comunali: identità ed esperienze politiche*, in *Federico II e le città italiane*, A. Paravicini Bagliani, and P. Toubert, eds., Palermo 1994, pp. 161-176.

² M. Sarti - M. Fattorini, *De Claris archigymnasii bononiensis professoribus a saeculo XI usque ad saeculum XIV*, tomus I, Bologna 1888-1896, p. 244.

³ Ibidem, p. 220.

⁴ Ibidem, p. 226.

political activity. This is what happened in several cases: the relatives of our jurists often held communal administrative offices, drawn by the lot by the communal council or popular organisations. Sometimes they managed to be elected *Antiani*, the most important communal institution. Politics also allowed the transmission of shared social values from one generation to another. The social memory of the family was often deeply marked by this prompt adhesion to the popular party. It is the case of the *Pax de Pacibus* and *Lambertinus Ramponi*, members of recent urban nobility, who were engaged in the defence of the Guelph-popular regime installed in Bologna after the Ghibelline ban of 1274, following the battle of Ponte Saint Procolo in which their relatives were killed by the Ghibelline faction. In short, social origin does not explain all. It is instead necessary to turn to the career of the jurists and their cultural education. The period we may call the formative phase begins in late sixties of the thirteenth century, more precisely in the years 1268-1269. In these two years most of our jurists were emancipated from their parents and began a juridical career. In the same year they reached the doctorate degree in law school. Their first essays were in arbitration, conducted under the patronage of the older masters, like *Rolandinus de Romanzi*, one of the most powerful jurists in Bologna⁵: in 1268, for instance, he issued 12 arbitrations, and many of these were directed to the resolution of political conflicts among the renowned urban families⁶. The same year marks the appearance of *Lambertinus Ramponi*, who and became *doctor legum* and deals with important mediations between conflicting Bolognese families⁷.

Pax de Pacis issues his first arbitration in 1269, the year of his *emancipatio*, and a more important one in 1273 in collaboration with Martino da Fano, one of the most famous jurists of his time. Martino's patronage may have opened the road to politics for him: It is in fact an arbitration within the Lambertini family⁸. At the same time he obtains his doctorate, but shortly thereafter his life would take a decisive turn towards active politics. His father and uncle had died fighting for the *Geremea* faction in the battle of Ponte San Procolo in 1274. In the eighties he continues his arbitration activity, but his prestige is now so high that his mere presence confers prestige to an arbitration⁹.

Basacomater de Basacomatri obtains his doctorate in 1269; being the most prominent member of the family he must settle the disputes with the enemies of his family, in this case the Lambertini of the Gruamonte branch who had killed his brother¹⁰. *Guillelmus de Rombodivino* makes his appearance as a *doctor legum* in 1269 and in the same year drafts a *consilium* together with *Rolandinus de Romanzi*¹¹. *Romanzi* issued another *consilium* about the banished with *Basacomater* and *Thomas de Piperata* in 1271¹². *Thomas Guidonis Ubaldini*, professor of law, appears in 1269. Finally there is *Gardinus de Gardinis*, *iudex* until 1280 and *doctor* since 1283 (hence late compared to the others); his career is partly different, since his role as a *iudex* keeps

⁵ A *consilium* by Rolandino dei Romanzi of 1248 has survived which puts the date back compared to Sarti, Zaccagnini, *Notizie inedite*, p. 175: it was not necessary to be a *doctor*, as it instead postulated by Zaccagnini, edito p. 182: the *consilium* is requested by the *podestà*. See also the *consilium* published by C. Mesini, *Nuovo contributo alla storia di Rolandino dei Romanzi*, in *Studi e memorie*, XIV 1938, 197-220.

⁶ *Chartularium studii bononiensis. Documenti per la storia dell'università di Bologna dalle origini fino al secolo XV*, vol. VIII, *Memoriali del comune di Bologna anno 1268*, Bologna 1927

⁷ See *Chartularium* 1268, cit. n. 197, p. 101 arbitration between two family groups, Reglagatis and Aldevrandi; Much more important are the arbitrations contained in *Chartularium*, vol. IX, Bologna 1931, *Memoriali del 1286*, n. XCI, p. 52, CLXII, p. 94, between Gabrielli and Mariscotti; n. CCLXIX, p. 162 between two members of Romanzi family.

⁸ The 1273 arbitration, contained in the *memoriale* by *Amodei de Sardellis*, is mentioned by Sarti-Fattorini, p. 248.

⁹ *Chartularium*, vol. IX, 1286: He is a witness on pp. 38, 48, 54, 59, 96, 150, 201, 227; arbiter on pp. 103, 194, 247.

¹⁰ Sarti-Fattorini, p. 239.

¹¹ *Chartularium* vol. I, Bologna 1909, n. CLI, p. 154.

¹² *Chartularium* vol. I, CLII, p. 155, Sarti-Fattorini date it at 1269.

him busy for a long time in the communal offices such as the *depositarius* (a financial office) and the *bannitorum* office¹³.

The quality of their involvement in the political life is not so obvious. A fact is immediately evident: the bolognese *iuris professores* and *doctores legum* did not hold formal governmental offices. They never were *Antiani* of the *Popolo*, or *ministrale* of the popular guilds: such offices were instead consistently held by the members of the great families of the *Mercanzia* and *Cambio* guilds, the most important and richest guilds of the Bolognese *Popolo*. A different kind of penetration in the political structures thus appears, and an actual sharing of the power with the elite of the *Popolo*.

Primarily, our professors seemed to prefer economic and financial control offices: like *procurator*, *defensor averis*. Moreover, they were sometimes supervisors of the *officium banditi*, which assured them a wide control over all quarrels about the use and abuse of bans by the foreign magistrates, the *podestà* and the Captain of the people. They owned another monopoly in the judicial field: The office of “*approbatores fideiussorum*”, meaning that whoever wanted to act as a guarantor needed to be examined by *approbatores*.

The jurists’ political role changed after 1274-1277, a long period of internal disorder caused by the two general bans of the Ghibelline families. The loyalty to the new popular and Guelph regime was considered as a requisite to be admitted to the communal institutions. On the contrary, to be recognized as a Ghibelline supporter became dangerous: *Spagnolus Abbatis* was exiled, *Martinus Sillimani* was permitted to remain, but only to teach. Although the composition of the bolognese *Popolo* was so complex that it is dangerous to explain it by the one-dimensional idea of “party”, undoubtedly the highest level jurists such as *doctores* and *professores* formed a homogeneous group within the *Popolo*, able to represent the commune in the most serious emergencies. Consider two cases: in 1278 the act of obedience by Bologna to the Pope was presented by *Antolinus de Manzolino doctor legis*, *Rolandinus de Romanzi*, *Thomas Guidonis Ubaldini* and *Pax de Pacibus* mentioned as *iuris civilis professores*¹⁴. In 1280 the exceptional cabinet of eight *consules* in charge during the external conflict with Ferrara, was composed by *Pax de Pacibus*, *Lambertinus Ramponi*, *Guillelmus Rombodivino*, *Thomas Guidonis Ubaldini*, *Gardinus de Gardinis*.

It was not merely a matter of juridical competence. The jurists became the real reference for every political crisis of the commune: from the administration of ordinary affairs, to the supervision over political trials against Ghibellines and the leading of the commune during war time. During two decades the jurists played an ambiguous and peculiar role. On one hand, they directed the consulting activity in judicial and political matters; on the other, they continued to teach in the law school and to maintain the cultural pre-eminence about the interpretation of the law. Let us begin from the latter point.

2. Juridical culture and justice.

As we have seen in the introductory note this generation of Bolognese jurists was identified in the *libri magni questionum* as the *moderni*. What was the peculiarity of this generation? First, the extensive use of *questiones* as teaching and learning method. They compiled a lot of *questiones*, organized in short collections and in official anthologies published by the university’s stationer.

The first collections of *questiones*, as it is well known, date back to the mid twelfth century and accompany the development of the Bolognese *studium* and the birth of the first French and Provençal universities¹⁵. Their origin is probably in the systematic application of doubt to the law

¹³ Sarti - Fattorini, cit., p. 264.

¹⁴ *Chartularium*, vol. I, , n. XLVII, p. 41-42.

¹⁵ Many collections that were originally attributed to the Bolognese masters were later traced back to the French-Provençal milieu by A.Gouron, *Note sur les collections de Quaestiones reportatae chez les civilistes du XIIIe siècle*, in “*Houd Voet bij stuk*”, *Xenia iuris historiae G. Van Dievoet oblata*, eds. F. Stevens and D. Van den Auwelee, Leuven 1990, pp. 55-66.

par excellence, the Justinianian *Corpus iuris*, and exploits the tools of dialectics to resolve the contradictions of the text¹⁶. But when the method assumes its final form, with *pro*, *contra* and *solutio*, it naturally highlights the differences in opinion and the scientific disagreements between the masters. The same subject is often deliberately taken up by several masters to underline the distance from one's predecessor or competitor¹⁷.

During the thirteenth century the *quaestio* improves also as a teaching method: its role grows compared to the more traditional *lecture*¹⁸, its dialectic structure becomes complete, and it gets classified in several conceptual categories according to the nature of the object of the dispute (*legittima*, *de facto emergens*) or the scholarly origin (q. *disputata*), or the phases of the academic year (*mercuriales*, *dominicales*)¹⁹. The manner and timing for conducting the *questiones* are established by the statutes, prescribing that a copy of the texts debated in the school were to be given to the *stationari* for the composition of official collections²⁰. From 1270 it becomes mandatory for all teachers at the Bologna University to debate at least once a year, and the number of *quaestiones* increases considerably.

After the second half of the thirteenth century the jurists slowly changed the nature of the cases examined in their *questiones*. They dropped the theoretical and scholarly cases for the most current problems presented by the communal law. I would like to direct my attention to the logical and ideological meaning of the *questiones* applied to the statutes of Italian communes. The *questio* is first of all an inquiry about the degree of coherence and legitimacy of a particular law included in the statute book.

An overwhelming majority of *questiones* by the University masters, both in Bologna and elsewhere, concerned problems arising from reading the statutes, from the stratified but uncoordinated rules accumulated in the communal books without any logical order and, most important, lacking legitimacy with respect to the text of *corpus iuris*. The statute law was valid because in force, but openly criticisable and often censurable. The position of the professors on this point was extremely clear. To comply with the statute does not make it immutable nor confers to it the validity of a *lex*, autonomous from the political arena. It implies a systematic doubt about the "new law" of the cities. No provision taken by the communal government was exempt from the examination by the *iuris professor*. The formulation of the *casus* tended to stress the ambiguities in the meaning of the single words, by showing the contradiction in terms, the conflict with other norms, and the uncertain boundaries between different meanings of the same concept. Finally, jurists fought against the simplification of legal language as opposed to a complex and changing reality. It needed a continuous work of adaptation and interpretation. However the criteria of this

¹⁶ H. Kantorowicz, *The quaestiones disputatae of the Glossators*, in Id., *Rechtshistorische Schriften*, hrg. H. Coing, G. Immel, Karlsruhe 1970, pp. 137-184; G. Fransen, *Les questions disputées dans les facultés de droit*, in *Les questions disputées et les questions quodlibétiques dans les facultés de théologie, de droit et de médecine*, Brepols 1985, pp. 225-277; A. Errera, *La quaestio medievale e i glossatori bolognesi*, in "Studi senesi", 108 (1996), pp. 490-530; M. Bellomo, *I fatti e il diritto. Tra le certezze e i dubbi dei giuristi medievali (secoli XIII-XIV)*, Roma 2000.

¹⁷ See the cases of Pillio and Azzone in C. Belloni, *Le questioni civilistiche del secolo XII, Da Bulgaro a Pillio da Medicina e Azzone*, Ius commune, 43, Frankfurt an Main, 1989. Several disputes are related by Odofredo, cfr. N. Tamassia, *Odofredo. Studio storico giuridico*, in id., *Scritti di storia giuridica*, Padova 1967, pp. 372-373.

¹⁸ Such a suggestion, especially after the *glossa accursiana* which had limited the innovation rate in the genre, is put forward by F. Soertemeer, *Les "commenta" ou "lecturae"*, cit., p. 54-55.

¹⁹ M. Bellomo, *"Legere, repetere disputare". Introduzione ad una ricerca sulle "Quaestiones" civilistiche*, in *Aspetti dell'insegnamento giuridico nelle università medievali*, I *Le "Quaestiones disputatae"*, Reggio Calabria 1974 and Fransen, *Les questions disputées*, although with some substantial divergences in the classification criteria.

²⁰ E. Montanos Ferrin, *Las "quaestiones Disputatae" en los estatutos universitarios medievales*, in *Die Kunst der Disputation. Probleme der Rechtsauslegung und Rechtsanwendung im 13. Und 14. Jahrhundert*, a cura di M. Bellomo, München 1997, pp. 157-203, for the *questiones* in the Bolognese statutes p. 166 ff.

interpretation were inspired by an external system of logical and juridical references, that is by the Roman law.

We will examine two main spheres of uncertainty: the meaning of the words (semantic confusion sphere) and the case of people whose condition changes suddenly.

Let us read some examples of the first type. The statute forbids the export of grain out of the *contado*, but if someone was caught with a sack of flour (not grain), does he deserve to be punished all the same²¹? Or a similar case: to find someone with two donkeys loaded with sacks of flour near the gates of town, does it mean that he is smuggling them out²²?

Yet another example is the famous question best known as “*an die vel de nocte*”: the statute called for different fines for crimes committed by day or by night: but if someone committed a crime at dusk, which of the two fines should be inflicted²³?

The field of synonymy and apparent similarities involved highly non-trivial issues of logic, such as the choice of an instrument: in the case of the day/night problem, should an ancient Roman rule be adopted, that was in favour of the perpetrator (dusk was to be considered on the same footing as daylight, for which the penalty was lighter); or rather, as Guido da Suzzara recommends, followed by many others, a purely logical inference should be used, named “*a contrario sensu*”: if the sun is not in the sky, then it cannot be daytime, therefore it is night time and the penalty is heavier²⁴; or yet another variant, developed by Martino *Sillimani*, based on a complex reasoning about the nature of the penalty, and which results in a benign interpretation which excludes the doubling of the penalty²⁵?

Moreover a very real dispute was opened concerning the legitimacy of the interpretation: who is to decide whether *blava* and flour are one and the same thing? The judge or the lawmakers? And moreover, based on what arguments can different things and facts be grouped together? Is a simple lexical analogy enough, or is a specific judgement required? Clearly these questions cast doubt on the ability itself of the judge to solve the problems posed by the statutes.

Another type of question concerns doubts about the condition of a person, especially in the case of change of civil status. If someone was convicted of homicide and afterward took religious vows, may the judge bring him to trial for the murder or is the defendant protected by the ecclesiastical privilege? Similar considerations apply to the banished, whose legal status was subject to sudden change at any moment.

The main problems in this case were concerned with changes in the political orientation of the commune. The most frequent case regards goods seized from the banished: often the *podestà* forced the banished's debtors, or his farmers, to pay their debts to the commune; if soon afterwards the commune pardons the banished, or reaches an agreement with him, can he collect again the debts paid to the commune? The problem is involved because a fundamental mechanism of the city legislation on political bandits, such as the property confiscation, is put under scrutiny, and its implicit illegitimate content is exposed: to radically modify the individual property rights is

²¹ *Alberti Gandini Quaestiones statutorum*, edited by A.Solmi, in “Bibliotheca Iuridica Medii Aevi”, vol. III, Bologna 1901, pp. 157-280, n.XIX p. 165: the Vercelli statute prohibits the export of *blavam* but “contigit quod aliquis portabat farinam”.

²² *Quaestiones statutorum*, n. XX, “idem, aliquis reperitur in via portas bladum super equum”.

²³ E. Montanos Ferrin, “*An de die vel de nocte*”, in “Rivista internazionale di diritto comune”, 7 (1998), pp. 49-80; Bellomo, *I fatti e il diritto*, pp. 573-581.

²⁴ F. Martino, “*Argumenta ex legibus*”, in *Die Kunst der Disputation*. pp. 147 -156, here p. 154. The example well illustrates the problems related “to the extension of the statute provisions to an omitted case”; however the use of a logical locus is a sign of a wider process of “incorporation of the logical ‘*modi arguendi*’ in the world of the law”. See also M. Bellomo, “*Loci locales*” e forme del pensiero giuridico in alcuni testi dei secoli XIII e XIV, in “Rivista di storia del diritto italiano”, 47 (1974), pp. 5-18.

²⁵ In Montanos Ferrin, “*An de die vel de nocte*”, p. 69: the solution, after discussing at length whether the part of the penalty allotted to the public institution or the compensation due to the private subject should be doubled, concludes that the statute is unclear, and therefore chooses the most favourable interpretation.

always an arbitrary act, decided in a moment of emergency. As soon as the political equilibrium, always very changeable in communal cities, is modified, such an act reveals itself as juridically unfounded and a source of new conflicts (between the debtors and the commune, or between the banished who has been pardoned and his debtors). The cases examined here are not merely abstract: they reflect real objections the lawyer could raise at the trial. The *questiones* collections were accessible by a large number of people interested in the trial, and with high probability it was the lawyers who could exploit at best the ambiguities of the language. Moreover, the structure of the doubt involves a specific part of the trial representation activity, that is the raising of an objection to the prosecution, based on a discrepancy between the fact ascribed and what is specified by the statute. To show the limits of legal terms meant to deny the charge. The more objections that were raised to the judge, the more the latter had to address the local lawyers for legal consulting. This explains the main interest of law professors in compiling a great number of *questiones*.

A core of authors, in particular, is consistently propagated through the main volumes - the two *libri magni*, mss S. Pietro 29a, Chigi VIII. 245²⁶, the Rome State Archive miscellanea 1004²⁷ and the Olomuc manuscript²⁸, the Florence manuscript²⁹, the Vittorio Emanuele 1511³⁰ - : it is the so-called “*moderni*” generation, consisting, first of all, of several great masters, leaders in the second half of the thirteenth century, such as *Guidus de Suzzara* (who died in the seventies); *Martinus* da Fano³¹, *Iacopus* d’Arena, *Dinus* del Mugello; and the Bolognese masters mentioned above, *Martinus Sillimani*³², *Lambertinus Ramponi*, *Thomas de Piperata*, *Basacomater de Basacomatre*, *Albertus domini Odofredi*, *Pax de Pacis*. These are the ones who use *questiones* with the highest confidence, and extend the practice of doubt to new subjects and juridical fields.

Many *casus questionum* are concerned with scholarly civil law subjects, reflecting their activity as lawyers and legal representatives in the many property issues that kept dividing the great city families with continuous fights: wills, loans, inheritances supplied ample matter of debate. But besides these, the trial cases became relevant, with special attention paid to the juridical intermediation aspects such as the role of the legal representative, the right to a defence, and the duties of the guarantor: whether private notaries could draft testimonies in the absence of the accuser³³, whether the creditor could present a single charge against many debtors³⁴; whether the *podestà* could demand the penalty from the guarantors even if the latter produced the accused again³⁵; whether a friend, who appears to plead *cause absentie* must also commit himself to

²⁶ Accurately described in Bellomo, *I fatti e il diritto*, op. cit.

²⁷ S. Caprioli, *La miscellanea romana dell'Archivio di Stato (ms 1004)*, in G. D’Amelio, A. Campitelli, S. Caprioli, F. Martino, *Studi sulle quaestiones civilistiche disputatione nelle università medievali*, Reggio Calabria 1974, pp. 118-214.

²⁸ F. Martino, *Giuristi di scuola e pratici del diritto a Reggio e a Padova, il ms Olomuc c.o 40*, in “Quaderni catanesi di studi classici e medievali”, a.VIII, n.16 (1986), pp. 423-445. G. Murano, “*Liber questionum in petiis*”. Osservazioni sul ms. Darmstadt 853, in “Studi medievali”, serie III, XXXIII, II (1992), pp. 645-675.

²⁹ F. Martino, *Le quaestiones del manoscritto Firenze, Biblioteca Riccardiana, 744*, in “Rivista internazionale di diritto comune”, 2 (1991), pp. 175-222.

³⁰ L. Martinoli Santini - P. Peruzzi, *Catalogo delle opere giuridiche contenute nel ms Vittorio Emanuele 1511 della biblioteca Centrale di Roma*, in “Rivista internazionale di diritto comune”, 7 (1996), pp. 217-305.

³¹ About his works see N. Sarti, *Martino da Fano e suoi “notabilia super institutionibus” (ms Città del Vaticano, B.V. Urb. Lat. 156)*, in “Rivista di storia del diritto italiano”, LXIX (1996), pp. 115-153.

³² F. Migliorino, “*Dominus meus in legibus*”: the search for a *liber quaestionum* of Martinus Sillimani, in *The two laws. Studies in medieval Legal History dedicated to Stephan Kuttner*, ed. L. Mayali, S. A. Tibbetts, Washington 1990, pp. 121-151.

³³ By Pax de Pace, in F. Martino, *Quaestiones civilistiche disputatione a Bologna negli ultimi due decenni del secolo XIII. Studio sui manoscritti Leipzig U.B. 992 e Paris B.N. Lat. 4489*, in *Studi sulle questioni civilistiche disputatione nelle università medievali*, cit., p. 242.

³⁴ By Lambertinus Ramponi, in Martino, *Quaestiones civilistiche* cit., p. 243.

³⁵ Thomas de Piperata’s answer is in the negative, in Martino, *Le questiones civilistiche*, p. 249; drawn upon by Alberto Gandino, Giovanni d’Andrea and Alberico da Rosciate.

produce the accused³⁶; and, in general, whether a legal representative was admissible in non-capital criminal trials: Martino Sillimani's answer is clear: "*quod in criminalibus non capitalibus procurator indistincte admittitur*"³⁷. These were important problems in the professional practice, as demonstrated by the actual working of the communal judicial system.

The foreign magistrates often asked the *sapientes* about problems in procedure and in law. Sometimes they were required to do so; sometimes they preferred to base their sentence on the jurist's opinion, in order to avoid objections. Contrary to common opinion, legal consulting was far from being based merely on technical knowledge. The monopoly of interpretation of law exerted by the jurists changed into a real judicial power, because the *consilium sapientis* was able to determine the judge's sentence³⁸. The case of the Bolognese jurists' *consilia* shows the political significance of the subjects handled by professors.

The basic feature of the jurists' interventions is the tireless defence of the trial's formalities. In some cases the basic principles of the trial were involved, as in the *consilium* by two *legum doctores*, Bonagratia Armanni Pascipoveri and Antolinus de Manzolino, who in 1286 ruled that the judge could not force a prosecutor to advance the trial against his own will, since both the common law and the statute forbade it:

super dicta accusatione non possit procedi invito vel non instante dicto accusatore...cum nemo invitus agere vel accusare cogatur³⁹.

It was a weighty decision, limiting the official powers of the *podestà*. In most cases failure to follow the procedural formalities becomes the main reason to invalidate a trial. In a small collection of *consilia* concerning trials ended in the arrest or exile of the accused, kept in the *podestà*'s files of 1292, we get an outline of the possible reasons of annulment⁴⁰, usually because the *solempnitates* called for by the statute were omitted: thus two councillors, Iohannes de Artimixis and Nicolaus de Soldararis, ordered a bandit to be released because, when summoned, he was called by his first name only, and not by last name, as prescribed by the statute. Pax de Pace and Thomas domini Ubaldini justify another release with the absence of witnesses at the moment the ban was declared; in the same way Albertus domini Odofredi, Basacomater de Basacomatri and Lambertinus Ramponi, in a collective *consilium*, annul another ban for lack of summons.

It could appear as a formalistic intervention, typical of a lawyer, but things are not so simple. The defence of the trial form originated from a choice that was cultural and political at the same time: cultural, because the trial was seen as a sequence of acts to be performed according to a mandatory *ordo iuris* requiring a precise series of steps, under penalty of annulment of the whole trial; and

³⁶ Again by Piperata, Ibidem, pp. 254-255, and once again the answer is in the negative, because actually the friend *non plene defendat* the accused, but simply justifies him temporarily.

³⁷ By Martino Sillimani as many as 46 *questiones* survive in the manuscript As Pietro 29: 11 correspond to Chigi VIII, 20 were drawn upon by Giovanni d'Andrea and 13 by Alberico da Rosciate. Also by Martino Sillimani are 32 *questiones* in VE 1511, of which only 6 explicitly trial-related, including one, mentioned above, about the intervention of the legal representative.

³⁸ A. Belloni, *Quaestiones e consilia. Agli inizi della prassi consigliare*, in I. Baumgärtner (Hg.), *Consilia in späten Mittelalter. Zum historischen Aussagewert einer Quellengattung*, Sigmaringen 1995, pp. 19-32; G. Rossi, *Consilium sapientis iudiciale*, Milano 1958; M. Ascheri, *Le fonti e la flessibilità del diritto comune: il paradosso del consilium sapientis* in *Legal consulting in the civil law tradition*, ed. by M. Ascheri, I. Baumgärtner, J. Kirshner, Berkeley 1999, pp. 11-54. For Milan see A. Padoa Schioppa, *La giustizia milanese nella prima età viscontea*, in *Ius Mediolani. Studi di storia del diritto offerti dagli allievi a Giulio Vismara*, Milano 1996, pp. 1-46.

³⁹ *Archivio di Stato di Bologna* (=ASBo), *Comune, Governo Podestà, Giudici ad maleficia, Inquisitiones 1286*, II, reg. 14, c. 8v.

⁴⁰ ASBo, *Curia del podestà*, Carte di Corredo, busta 19. It is a pergameneous sheet, readapted as a book cover, containing six *consilia* about banishments, collected into a "liber ubi sunt scripta consilia data tempore domini Rubei de la Tosa potestatis Bononie", the podestà had been in office in 1292.

political, because once this conception of the trial as a sequence was established, the inspection of formalities became a formidable weapon to put pressure on the foreign judges of the *podestà* 's *familia*.

Let us examine two examples chosen from the *Tractatus de Maleficiis*, written by Alberto Gandino after a long career as a professional judge in foreign *familie* of *podestà*⁴¹. During the two years he spent in Bologna, in 1289 and 1294, he resorted many times to professors' legal consulting. He cites 12 times *Lambertinus Ramponi*, 4 times *Rolandinus de Romanzi*, and one each *Bonagratia Armanni Pascipoveri* and *Thomas Ubaldini Malavolti*. Often the occasion for these direct relations was provided by a doubt about the procedure, solved by asking a *legum doctor* for a *consilium*. However, when reading between the lines, it is possible to notice a difference in methods and ideas between Gandino and his counsellors, probably reflecting true doctrinal conflicts about the procedure.

The first case I want to point out concerns the legal "*proxi*". Gandino intended to limit the faculty of defendants to be represented by professional lawyers: so he agreed with an ancient Roman *regula iuris* that forbade it in case of capital crimes. But the reality was more complex⁴². Gandino recalls a controversial case that took place in Bologna: if a man was charged with a crime the Roman law punished with death, and the communal statute only with a pecuniary fine, could the defendant appoint a lawyer? Gandino would refuse to grant it. But, on the contrary, *Lambertinus Ramponi* and others *doctores* were in favour of electing a legal representative⁴³. The same opinion was expressed in two other *questiones*, maybe two *consilia* presented by *Lambertinus Ramponi* itself to the *podestà*. In short, the strong protection the jurists were able to assure to the right of defence contrasted with the new, harsher concept of justice advanced by Gandino. Also for a serious crimes, for which torture could be inflicted, the accused has the right to present a defence, according to *Lambertinus Ramponi*⁴⁴.

Another case of conflict demonstrates this difference. Gandino had to examine a case of untrue testimony ("*falsum dixerunt dolose*") given during an inquisition that the judge could not conduct, since the act was not included in the list of crimes allowed by statute to be investigated. In other words, Gandino had gone too far in his duty and the trial was probably invalidated. Nevertheless Gandino would punish the witness for forgery, but the *podestà* (and not Gandino) would again seek advice from *Lambertinus Ramponi*, *Ubalдинus de Malavoltis* and some other *doctores*. The *consilium* was once more against Gandino's decision: they refused to punish them because the effect of the forgery was null⁴⁵. However in the *Tractatus* Gandino disagrees with this response and argues the two witnesses must be convicted "*quia in se ipsis maleficium consumatum est*".

The contrast between Gandino and the *doctores* was substantial because the *doctores* considered the formal correctness of the procedure, while Gandino concentrated his thoughts on the crime

⁴¹ H Kantorowicz, *Albertus Gandinus und das Strafrecht der Scholastick* Zweiter Band, *Die Theorie. Kritische Ausgabe des Tractatus de maleficiis*, Berlin 1926, = *Tractatus de maleficis*. On Gandino see D. Quaglioni, *Alberto Gandino e le origini della trattatistica penale*, in "Materiali per una storia della cultura giuridica", a. XXIX, 1 (1999), pp. 49-63.

⁴² *Tractatus de maleficiis*, p. 112. The legal representative can be present only in the less serious cases, not involving a *pena sanguinis*; but not in serious cases "quare procurator in his casibus intervenire non possit quia sententia, que ferenda est in persona domini, ferretur in persona procuratoris".

⁴³ *Tractatus de maleficiis*, p. 119. In case of contrast, the statute prevails: "Nam si statutum simpliciter dicat quod qui homicidium fecerit solvat pro pena M. librarum, tunc dicunt procuratorem posse intervenire ad totam causam per iura primo allegata".

⁴⁴ *Tractatus de maleficiis*, p. 165: "*Dicatis quod defensio prius sit danda, maxime quando tale quid allegatur probari, quo probato iste Titius non debet ad tormenta poni. Et super hoc mihi consuluit Bononie dominus Lambertus Ramponi*".

⁴⁵ *Tractatus de maleficiis*, p. 338: "*qui deliberato consilium dixerunt dictos testes pena falsi non teneri rationibus preallegatis*".

itself: since it had been committed, it had to be sanctioned, like *Dinus del Mugello* wrote in his lectures⁴⁶.

3. *Justice and politics*

In the meantime the same jurists were members of the most important committees of *sapientes* named by the council. The role of these special committees was well known after 1282. As we have already seen, the enactment of anti-Ghibelline laws and the confiscation of a lot of the properties of the banished caused new social and juridical tensions. On one hand, the professors led the reviewing process of the political laws; on the other they monopolised the consulting activity in political trials celebrated by the Captain of the People, whose task was to receive accusations against the Lambertazzi and to investigate the banished. In spite of the violence of the civil fights, the number of indictments against the Lambertazzi remained surprisingly low. As Giuliano Milani has shown in his review on political justice in the eighties, the average number of trials against the banished was about 15 per year⁴⁷. Moreover the procedure followed the ordinary justice mechanisms: the accusers had to prove their counts of indictment, while the defendants were allowed to present witnesses and justifications. It is not surprising that most trials resulted in acquittals.

Judicial actions regarded also another subject: the distribution of property confiscated to the Lambertazzi. Many citizens were obliged to accept an allotment of land belonging to the banished families, assigned by the lot in the communal council. Thus they became landowners and they were forced to pay communal taxes over these new properties. A lot of quarrels arose against such an arbitrary anti-Ghibelline policy. Often it was the former owner who objected to the legitimacy of confiscation: because he was not listed as a Lambertazzo, or he bought the land before the seller was punished with the political ban. But in many cases the new owners themselves objected to the allotment: They complained about the infertility of the fields or the actual type of cultivation that was different from the one recorded in the register of land property.

What is especially interesting is that the decisions in all these cases were assigned to the jurists appointed by the Captain's judges to evaluate the legitimacy of the quarrel through a legal consulting. To draft *consilia* became the most relevant judicial activity accomplished by professors, *doctores legum* and simple judges.

The size of the phenomenon is macroscopic, as my research will demonstrate: It was a matter of hundreds of *consilia* presented by hundreds of jurists. I don't think I am exaggerating when considering this consulting as a kind of informal "jurisdiction" that overlapped the captain's competence over the banished.

In the heading of one of the first *consilia* registers, by the 1281 captain, it is clearly written that the judge "carries out" the *consilia*:

Liber sententiarum latorum et pronuntiatorum per dominum Bernardinum de Medecis iudicem et assessorem nobilis viri domini Hugolini quondam domini Iacobini Rubei honorabilis capitanei comunis et Populi Bononie exequendo formam consiliorum infrascriptorum⁴⁸.

With three main consequences: First, the jurists held the actual control of political justice. The councillors judged based on the acquired evidence and could examine and accept further evidence:

⁴⁶ About the concept of crime as an offense to the *respublica* see M. Sbriccoli, "Vidi communiter observari". *L'emersione di un ordine penale pubblico nelle città italiane del secolo XIII*, in "Quaderni fiorentini", 27 (1998), pp. 231-268. About the principle of necessary punishment see R. Fraher, *The theoretical justification for the new criminal law of the high middle ages: "rei publice interest ne crimina remaneant impunita"*, in "The University of Illinois law review", 1984, pp. 577-595.

⁴⁷ G. Milani, *Dalla ritorsione al controllo. Elaborazione e applicazione del programma antighibellino a Bologna alla fine del Duecento*, in *Quaderni storici*, 94 (1997), pp. 43-74.

⁴⁸ ASBo, *Capitano del Popolo, Giudici del Capitano*, reg. 13, 1281, c.1r.

in practice, they interfered in the actual building of the sentence that the ordinary judge was not able to deliver. In 1285, *Basacomater de Basacomatri* delivers a *consilium* about a lawsuit between two members of the Leoni *societas* elected as *ministrali* for the same semester, which is actually a sentence, delivered after a true hearing: “*hostenditur eum probasse nobis in contradictorio iudicio*”⁴⁹. In another, the councillors are required to express themselves about the legitimacy of an accusation through summons and decide the case should not be tried “*visis et examinatis testibus*”⁵⁰. However in many lawsuits, and especially in the Captain’s ex-officio trials, the offender’s counsel can raise an objection about the validity of the summons or the correctness of the evidence, and in these cases the councillor is involved, who in most cases invalidates the trial⁵¹.

Second, the group of *sapientes* could modify the allotment made by the communal council. It is true that a large part of the measures against the banished was taken by the council; nevertheless it seems that the jurists, especially *Pax de Pacis*, had the power to correct mistakes made in the identification of a person or in the inscription of the lands contested in the Register of confiscated property. In some trials of 1287 the counsel for the S. Maria Maddalena monastery challenges the allotment of a land declared exempt by a previous *consilium* by *Pax de Pacis*, and demands the previous ruling to be respected. The councillor, in this case *Pax* himself, confirms his own ruling⁵².

Third, they imposed their ideological and juridical criteria. In the property trials the contrast is clear between the legally acquired (*de iure*) possessions and the new form of possession derived from coerced distribution of the land. Each time these two types of possession clashed, the jurists preferred the legal one. When a defendant could prove his rights by a legal contract, drawn up by a notary, generally he was recognized as the rightful owner in spite of any possible allotment assigned by the communal council⁵³. In the case of trials against a person, the principles upheld by

⁴⁹ ASBo, *Capitano del Popolo, Giudici del Capitano*, reg 72, c.61v. In another trial, *Capitano del Popolo*, reg. 98 1287, c.33v, two judges allot a land “cum probatum sit per testes dictam dominam tenere et possidere iuxto titulo dictum petium terre et dominum Iohanninum quondam patrem ipsius tenuisse et possidisse per multos annos”.

⁵⁰ ASBo, *Capitano del Popolo*, reg. 99, 1287, c. 28r: “In Christi nomine super premissa notificatione cuius tenor talis est notificatur vobis domino Capitaneo Populi bononiensi et vobis domino Roberto Mascharonis iudicis et cetera, consilium dominorum Liazarii de Liazariis et Iacobi de Tencharariis et mei Brandalexii de Gozadinis est tale vixis et examinatis testibus receptis contra Ugolinum Guezii super notificatione facta de ipso quod per vos dominum Rodulfum pronuncetur non esse probatum contra dictum Ugolinum et in dicta notificatione non esse procedendum”.

⁵¹ Examples from the same book 99 of 1287. At c. 43v *Pax de Pace* legum doctor rules “quod dictus Rodulfus a dicta notificatione seu petitione absolvatur et hoc cum probatum sit per testes per eum.. ipsum esse civem civitatis bon”.

Ibidem, c.59r, Trachedinus de Sabadinis and *Pax de Pacibus* legum doctor issue another *consilium* taking the form of a verdict: “tale est quod predictus Petronius non reperitur confinatus a tempore Ugolini de Rubeis citra nec eo tempore, quod non possit condemnari sed in ... absolutionis sit, et absolvi debeat”.

Ibidem, c. 64 it is Bonincontro degli Ospedali, famous decretist, who judges the evidence in a *consilium*: “est tale quod Iohannes Ugolini Usbergensis de cappella s. Nicolai de Albanis, visis et diligenter examinatis actis cause et testibus productis plene ad sui defensionem probatum de iure suo, et contra ipsum plene non fuit probatum”

⁵² ASBo, *Capitano del Popolo*, reg. 98, 1287, c. 20r: “consilium tale est quod predicta petia terre prative libere et pacifice per vos pronuntietur relaxari predictae domine Adelaxie et Nicholao Bonvixini sindaco et procuratori”. Hence *Pax de Pace* had ordered a correction in the allotment of the land, as another *consilium* by Bonagratia Armanni Pascipoveri issued in the same year demonstrates, Ibidem c. 28r: here the contrast is between the *per breve* allotment to some Azolinus and *Pax*’s sentence favouring the plaintiff Amadore. The councillor favours Amadore and annuls the *per breve* allotment. Similar cases at c. 32r and 41v.

⁵³ An example can be found in a *consilium* by *Basacomater*: ASBo, *Capitano del Popolo*, 1281, c. 1v *Basacomater de Basacomatribus legum doctor* about a petition to delete land from the bandits’ books: it appears that *dictam terra vineata pertinere ad dictam dominam Mariam titullo emptionis in ea facte* and is not among the properties of Iohannis Iacobini Maritate; it should be deleted from the books of properties.

the jurists were even more ideological. Moreover the consultants did not limit their survey to the correctness of the procedure: they verified the evidence, had the power to exclude or accept witnesses, and eventually decided about the guilt or innocence of the accused.

Let me show an interesting *consilium* drafted by a professor mentioned above. Just like in the Gandino's question, one of the central themes of the *consilia* was the right to a defence and a fair trial. In a trial against two confined people, the accuser, a quite famous notary named *Iohannes de Predamala*, objected that the defendants could not have a lawyer according to the special law approved by the *Popolo*. The judge did not rule on the issue, and asked *Thomas Guidonis Ubaldini* to do so. Thomas had no doubt: the Roman law allowed the defendant to be represented by a lawyer if forced to be contumacious (and this was the case, because the two accused were confined in a village); and above all, a general rule suggested that is more right and lawful (*iustius*) to allow the defence than to aggravate the condition of the accused⁵⁴. In another *consilium* of 1287, drafted by *Lambertinus Ramponi*, *Antonius de Manzolinus* and the judge *Nicolaus de Zovenzoni*, after a long search in the different versions of the anti-magnate *ordinamenta*, it is ruled that the captain can investigate the "*receptatores bannitorum*", those who gave shelter to bandits, but cannot consider the witnesses cited in anonymous accusations⁵⁵. These *consilia* are therefore placed on a rather thin boundary line between law and politics. The technical choices, such as the principles quoted to support the ruling, cannot be considered as mere professional interventions, or neutral applications of a Roman juridical corpus shaping the local law. The adaptation of the case to the Roman law principles, when explicit, turns out to be not only a juridical choice but a true act of policy-making.

Registro 100, 1287, c. 9v, *consilium* by Albertus domini Odofredi, legum doctor "est tale "quod dictus Iohannes a Crevarcore a dicta denuntiatione facta per dictum Rainaldus absolavatur cum locatio facta dicto Iohanni de dictis casamentis de iure tenuit et facta fuit tempore debito".

⁵⁴ ASBo, *Capitano del Popolo*, re. 99, 1287, c. 87v, the second part of the *consilium* states: "et eciam quia admittitur a iure ad defensionem absentis eciam qui alias iure comuni idoneus defensor non est, quia iustius talem admittere defensorem quam absentem et indefensum gravi condempnacione afficiere, predictis omnibus consideratis scilicet quod defensor in postis contentus admictatur prestita idonea satisfatione ab eo ad voluntatem iudicis ".

⁵⁵ ASBo, *Capitano del Popolo*, reg. 104, 1287, c. 14v: "quod dominus capitaneus possit suo motu inquirere contra tenentes et receptantes banitos pro parte Lambertaciorum; non autem possit recipere aliquos testes nominatos in cedulis positos in cassa continentes aliquas personas tenuisse et receptasse in domibus eorum aliquos bannitos pro parte Lambertaciorum".