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978-1-108-05140-8 - Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought

Cecil N. Sidney Woolf

Excerpt

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## CHAPTER I

## INTRODUCTION

BARTOLUS<sup>1</sup> was born in the year 1314 at Sassoferrato. Nearly all that we know of his early life he has told us himself<sup>2</sup>. His first master was a Friar Peter<sup>3</sup>, who afterwards established a home for foundlings at Venice—"vir est expertus," Bartolus wrote of him long after, "nullius hypocrisis, mirae sanctitatis apud me

<sup>1</sup> In the first few pages of this introductory chapter I merely attempt to give a brief outline of the known facts of Bartolus' life. The greater part of what we know of Bartolus comes from his own works: I therefore give references to these wherever possible. After his own works, our chief authority must always be Savigny's *Geschichte des römischen Rechts*, vol. vi. chap. 53. But Savigny wrote more than sixty years ago, and there are naturally both additions and corrections to be made. Some of these I have attempted to collect in an Appendix from the following sources:—1. Works published since Savigny's history, which throw light on Bartolus' biography; these, so far as I know, are only two—(i) the publication by Rossi of documents relating to Perugia University (those which concern Bartolus are in vols. v. and vi. of the Perugian *Giornale di Erudizione Artistica*, 1876–7); (ii) a short pamphlet by Lattes, *Un Punto controverso nella biografia di Bartolo*. 2. Passages in Bartolus' works which were not noticed by Savigny. 3. The few mss of Bartolus' works which I have been able to see. Vide Appendix A, below.

<sup>2</sup> Bartolus, *Comment. on Dig. Nov.* Part II. (D. XLV. 1. 132), pp. 148–9, § 8.

<sup>3</sup> Savigny has shown that the fable of Bartolus himself having been a foundling rests on a misunderstanding; the home was established at Venice long after Bartolus had grown up.

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et omnes qui eum bene noscunt...et ex multo amore quem ad illius fratris Petri bonitatem gero, cum calamus hoc scribit, cordis oculus lacrymatur.” At a very early age, thirteen or fourteen, Bartolus went to Perugia and studied law under Cino da Pistoia<sup>1</sup>, famous both as a poet and as a lawyer, the friend of Dante and Petrarch. Bartolus told his great pupil Baldus that “illud quod suum fabricabat ingenium erat lectura Cyni<sup>2</sup>.” Later, but probably not for long, Bartolus studied at Bologna, again under famous lawyers—Jacobus Buttrigarius<sup>3</sup>, Oldradus de Ponte<sup>4</sup>, Raynerius Forlivenis<sup>5</sup> and Jacobus de Belvisio<sup>6</sup>. Here he took his doctor’s degree in 1334, when not yet twenty. For the

<sup>1</sup> Bartolus refers to opinions of Cino as given “me audiente” several times. Vide *Comment. on Dig. Vet.* Part II. (D. xvi. 3. 33), p. 320, § 4; *Comment. on Infort.* Part II. (D. xxxii. 1. 22), p. 156; *Comment. on Dig. Nov.* Part II. (D. xlv. 7, sup. rubric.), p. 299, § 4 and (D. xlvii. 2. 63, § Quod vero), p. 355, § 5; and the important autobiographical passage referred to in the last note but one.

<sup>2</sup> Quoted by Savigny, p. 142, note i.

<sup>3</sup> Bartolus mentions him as his master in *Comment. on Infort.* Part I. (D. xxviii. 3. 17), p. 315, § 8; *Comment. on Infort.* Part II. (D. xxxviii. 11. 10, § Sunt et ex), p. 539; *Comment. on Dig. Nov.* Part I. (D. xli. 2. 3, § Ex contrario), p. 247, § 4; (D. xli. 3. 15), p. 311, § 72 and Quaest. xv.—“Hanc quaestionem disputavit do. Bart. in scholis domini Jac. Butrig. Anno domini mcccxxxiii die xv mensis Decembris” (p. 245).

<sup>4</sup> The only mention I have found is in *Comment. on Codex*, Part I. (C. v. 10. 1), p. 531, § 7. And vide Savigny, p. 143, note k.

<sup>5</sup> Mentioned as his master in *Comment. on Infort.* Part I. (D. xxviii. 3. 17), p. 315, § 8; *Comment. on Dig. Nov.* Part I. (D. xli. 3. 15), p. 299, §§ 4 and 8; *Comment. on Dig. Nov.* Part II. (D. xlv. 1. 73, § Stich), p. 84; *Comment. on Codex*, Part I. (C. v. 10. 1), p. 532, § 10; and Quaestio xiv. § 14, p. 242. And vide Appendix A.

<sup>6</sup> Bartolus frequently refers to Jac. de Belvisio, but never mentions him, as far as I have been able to see, as his master. Vide Savigny, however, p. 143, note k.

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next five years of his life it is difficult to fix the order of events with certainty: we only know that he was Assessor at Todi<sup>1</sup> and Pisa<sup>2</sup>, and that he spent some considerable time in solitude “ad studendum et revidendum libros per me ipsum<sup>3</sup>.” Then in 1339 he became Professor at Pisa<sup>4</sup> University. Here he remained until 1343, when he migrated to Perugia, the city and University most closely connected with his fame. In 1348 he and his brother were made citizens of Perugia, Bartolus being specially exempted from the statute which forbade citizens from holding the professorships of the University<sup>5</sup>. In 1355 Bartolus represented Perugia on an embassy to the Emperor Charles IV at Pisa<sup>6</sup>. The Emperor received him with great marks of honour, made him a Privy Councillor, gave him a coat of arms and the privilege, both for himself and such of his heirs

<sup>1</sup> Vide *Comment. on Infört.* Part II. (D. xxxv. 2. 24), p. 392: “Quaestio erat quaedam Tuderti...Ego dixi per istam legem.” *Comment. on Dig. Vet.* Part I. (D. viii. 3. 38, § Idem juris), p. 603: “Habui hanc quaestionem in civitate Tuderti.” Vide *Tract. de Guelphis et Gibellinis*, ad init.

<sup>2</sup> *Comment. on Dig. Nov.* Part I. (D. xli. 3. 15), p. 309, § 50, and (D. xli. 1. 63, § Quod si servus), p. 233.

<sup>3</sup> *Comment. on Dig. Vet.* Part I., Prima Constitutio (Omnem, § Haec autem tria), p. 13, § 2.

<sup>4</sup> Vide *Comment. on Infört.* Part II. (D. xxxv. 2. 59), p. 398, § 2; *Comment. on Dig. Nov.* Part II. (D. xlv. 1. 73, § Stichii), p. 84; *Comment. on Infört.* Part I. (D. xxviii. 5. 29), p. 338, § 9. Below, p. 5, n. 1.

<sup>5</sup> The documents are in Rossi, nos. 66–8, vol. v. pp. 184–8, and were printed in the sixteenth century by Lancellotti, *Vita Bartoli*.

<sup>6</sup> Vide *Comment. on Infört.* Part I. (D. xxviii. 2. 29, § Forsitan), p. 301, § 1; *Comment. on Const. ad Reprimendum*, sup. rubric., p. 261; *Tract. de Insign. et Armis*, § 3, p. 341; *Tract. de Reg. Civ.* § 18, p. 420; *Tract. Testimoniorum*, § 80, p. 445, and the diplomas in Rossi, nos. 96–9, vol. v. pp. 374–80. No. 99 is also in Lancellotti, op. cit.

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as should be doctors of law, to legitimate bastards and grant the “*venia aetatis*.” Bartolus died not long after, almost certainly in 1357<sup>1</sup>.

In this essay we are to examine Bartolus as a political thinker. This bare outline of the known facts of his life shows us that Bartolus was a lawyer, that his whole life was spent in the study, practice and expounding of law. In fact we shall have continually to keep in mind that Bartolus was no political philosopher; that his political thought is to be found in his commentaries and treatises on Law, not Politics. Just for this reason it is important, before we turn to his political thought, to get some insight into the position of Bartolus as a lawyer.

Bartolus is a Postglossator, the greatest and most famous of the Postglossators. The period of the Glossators had ended and been summed up in the great Gloss of Accursius. The work of the Bolognese Glossators had been primarily to restore the text of the Law Books and then to interpret those texts literally. Their position was very nearly that of the present-day expounder of Roman Law; but they differed from him, not only in the relative poverty of the material at their disposal, but also because to them Justinian’s Law Books represented a still living system of law. This we shall find is a point of great importance. The Law Books were compiled in the sixth century; the Glossators were living in the twelfth and thirteenth centuries. Law and fact necessarily contradicted each other in numerous cases, and where this was so, the

<sup>1</sup> Savigny shows that this must almost certainly be the date, as that 1314 is almost certainly the date of his birth.

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Glossator attempted to bend facts to meet a literal interpretation of the law, or else made concessions to fact only with great reluctance.

The position of the Postglossator was very different. It is not that there was any definite break in the tradition; the work of the Postglossators was the direct continuation of that of the Glossators. Only, in the first place, between the Postglossator and his texts now stood the *Glossa Magna*; in the second place the aim of the Postglossator was essentially, rather to evolve a law practically effective for the world in which he lived, than to expound a law scientifically correct according to the texts. Let us see how Bartolus stands with regard to these two points.

Whatever may be true of the Postglossators generally, Bartolus himself was no slavish dependent on the Gloss. Indeed, a reaction against the overwhelming authority of the Gloss had already begun under his master Cino and the French "Ultramontane" lawyers with whom Cino is, intellectually, in close connexion<sup>1</sup>. A single quotation will illustrate Bartolus' attitude to

<sup>1</sup> Vide Chiapelli, *Vita e Opere Giuridiche di Cino da Pistoia*, pp. 186-91. Vide Bartolus, *Comment. on Dig. Nov.* Part II. (D. XLVI. 1. 17, § Cum fidejuss.), p. 201: "Pet. de Bella Pert...dicit quod hanc glossam diabolus revelavit." Cf. *Comment. on Dig. Nov.* Part I. (D. XLII. 2. 2), p. 384, § 6; *Comment. on Dig. Nov.* Part I. (D. XLIV. 2. 7, § Et generaliter), p. 499. Bartolus also records cases of condemnation of the Gloss by others besides Cino and the Ultramontani. Vide e.g. *Comment. on Infort.* Part II. (D. xxxv. 2. 39), p. 396: "Glossam quae est in...damnavi vobis per istum textum et ibi damnat Dynus et Jac. de Arena." *Comment. on Infort.* Part II. (D. xxxii. 1. 22), p. 157, § 5: "Glossa male loquitur et bene reprehenditur per Jac. de Arena." *Comment. on Dig. Nov.* Part I. (D. xxxix. 1. 5), p. 32, § 3: "Quando legi Pisis, librum habui d. And. de Pisis aliquibus diebus et reprobabat istam opinionem glossae."

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the Gloss. “Nota quod non debemus sequi consilium Imperatoris si videtur nobis quod non sit bene latum, et hoc est contra eos qui judicant secundum dicta nostrarum glossarum. Unde non est mirum si recedatur a dictis glossae, si veritas est in contrarium aut ratio aut lex<sup>1</sup>.” On the other hand the Gloss formed a necessary part of his exposition of the Civil Law; in fact by the statutes of Perugia University the Professor was bound to read the Gloss immediately after the text which he was about to expound<sup>2</sup>. Thus the Gloss must always be considered<sup>3</sup>, no less than the text; only Bartolus was ready to accept<sup>4</sup> it or reject<sup>5</sup> it, as he thought fit. Nor was Bartolus altogether unmindful of

<sup>1</sup> Vide *Comment. on Codex*, Part II. (C. VII. 45. 13), p. 195.

<sup>2</sup> Vide Padaletti, *Contributo alla Storia dello Studio di Perugia nei Secoli XIV e XV*, p. 93: “Item statuimus quod omnes doctores actu legentes in iure canonico et civili immediate postquam legerunt capitulum vel legem, glossas legere teneantur, nisi continuatio capituli vel legis aliud fieri suadeat...”

<sup>3</sup> A glance at any page of Bartolus’ commentaries will illustrate this—as a random example vide the opening words of his *Repetitio* on D. XLII. 3. 55, *Comment. on Dig. Nov.* Part I. p. 298 (this, he tells us, was the first *Repetitio* he ever delivered): “Haec lex difficilis est in textu, difficilior in glossa et difficillima in materia extra glossam.”

<sup>4</sup> Vide e.g. *Comment. on Dig. Vet.* Part I. (D. IV. 3. 19, § De eo qui), p. 426: “Glossa ponit hic unam distinctionem valde pulchram melius et plenius quam in aliqua parte mundi et doctores recitant eam ut jacet.” Cf. *Comment. on Infort.* Part II. (D. XXX. 1. 37), p. 32: “Signa illam glossam ut magistram in hoc titulo.” *Comment. on Infort.* Part I. (D. XXVIII. 2. 29), p. 286.

<sup>5</sup> Vide e.g. *Comment. on Dig. Nov.* Part I. (D. XXXIX. 1. 1), p. 20, § 10: “Sed glossa potest cantare quantum vellet, quia solutio ista est contra dict. §.” Cf. *Comment. on Dig. Nov.* Part II. (D. XLVI. 3. 95), p. 272, § 1: “Est quaedam glossa super verbo ‘interim’ quae intricat istum textum qui de se procedit clare et plene: ideo de illa glossa non curo.” *Comment. on Infort.* Part I. (D. XXVIII. 7. 9), p. 386. *Comment. on Dig. Nov.* Part II. (D. XLVII. 1. 2), p. 332, § 11.

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the text. The story how he and his friend and colleague, Franciscus de Tigrinis, sent from Perugia to consult the famous Pisan manuscript of the Digest, now in the Laurentian library at Florence, is well known<sup>1</sup>. Undoubtedly too much stress is not to be laid on what is, after all, an isolated incident. The main concern of Bartolus was not with the scientific correctness of his texts or their literal interpretation; even so the incident is all the more noteworthy in the age of the Postglossators.

If he was independent of the Gloss, as an authority, still more independent was Bartolus with regard to other lawyers; he boasted that where he borrowed from his predecessors, he made no attempt to hide his borrowing, as others had done<sup>2</sup>—nor need we doubt the truth of this<sup>3</sup>. Elsewhere Bartolus has explained his views

<sup>1</sup> Vide *Comment. on Codex*, Part I. (C. iv. 6. 2), p. 387: "...Misimus usque ad Pisas do. Franc. Accursius (Savigny has shown that this ought to be Franciscus Tigrinis) et ego ad videndum Pandectas." Bartolus recalls this again in *Comment. on Dig. Vet.* Part II. (D. xx. 5. 7, § Quæritur), p. 442. The "litera Pisana" is mentioned again in *Comment. on Dig. Vet.* Part II. (D. XII. 1. 1), p. 3, § 6; the "vel Florentina," found in some editions, being of course an addition, since the ms was not removed to Florence till after Bartolus' death; it is wanting in the only ms of Bartolus' *Comment. on Dig. Vet.* Part II. which I have seen.

<sup>2</sup> Vide *Comment. on Dig. Nov.* Part I. (D. xxxix. 1. 8, § Morte ejus), p. 41, §§ 9, 10: "Et quia iste § singularis est, circa eam materiam protestationis tractabo, quam primo latius tractavit Jo. Monachus Cardinalis...et Jo. Andreae eam recitat de verbo ad verbum...Item And. de Pisis posuit istam materiam in quadam repetitione quam fecit et Jo. prædictum quasi in omnibus est secutus; de eo tamen nullam mentionem facit. Ideo ego de omnibus mentionem facio, ut quod suum est furari non videar; in eo vero quod est meum cognoscar; et si minus bene dixero, ego redarguar; si vero bene, Deus laudetur; ego vero ut minimus instructor reputer."

<sup>3</sup> Savigny indeed quotes a passage from Baldus—"...d. Bart...

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on authority with great precision. The Middle Ages were no doubt far too inclined to bow to authority; but the charge is often somewhat vague, and it is therefore well worth noting his own words, well worth seeing what authorities the man, whom we are to examine in this essay, was prepared to recognise. “Debes scire,” he says, “quod quaedam scripta seu auctoritates sunt approbatae ab Imperatore vel a summo Pontifice, et istae probant et concludunt necessarie...Quaedam sunt scripta per summum Pontificem vel Principem nec approbata nec reprobata; et ista sunt duplicis generis: quaedam sunt scripturae enunciativae, alias recitativae, ut libri historiales, chronica et similia, et istis, si a nostris antiquis creditum videmus, et nos etiam debemus credere, sicut aliis antiquis scripturis....Quaedam sunt scripturae quae procedunt disponendo et determinando, non enunciando, et in his advertendum quid servant studia. Quaedam enim scripturae, tamquam authenticae in studiis reputantur, ut dicta Aristotelis et Hippocratis et similia, quae tamquam scripturae authenticae in studiis servantur, et istis est standum...Quaedam sunt scripturae quae a studiis non approbantur, nisi probentur per rationem, et istae dicuntur magistrales probationes, non tamen necessariae. Istis quidem non est standum si contrarium videretur, et nisi quatenus necessarie concluderent<sup>1</sup>.”

Certainly the passage makes no wide claim for unfettered thought. But we note—and this is the important thing for us—that neither the Gloss nor any

furatus fuit Petro (a Bella Pertica),” but we need not lay too much stress perhaps on a single statement of this sort.

<sup>1</sup> Vide *Comment. on Dig. Vet.* Part II. (D. XII. 1. 1), p. 5, §§ 21–3.



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individual lawyer<sup>1</sup> is given the same position in the lawyer's Studium as Aristotle is allowed to enjoy in the philosopher's or Hippocrates in the physician's Studium—"quae tamquam scripturae authenticæ in studiis servantur." The opinion of the Gloss is thus only "probable," not "necessary," just as is that of any doctor—"nullus te cogit stare opinioni doctoris<sup>2</sup>."

We shall so often in the coming pages of this essay have occasion to note how Bartolus was concerned to evolve a law practically effective for the Italy of his day, that it is unnecessary at present to dwell at any length on this characteristic of his work. It is indeed just this characteristic which redeems the otherwise far from pleasant reading of the voluminous commentaries of Bartolus and their uncouth Latin. At every page we are transplanted into the active many-sided life of the Italian cities of the fourteenth century<sup>3</sup>; there is always

<sup>1</sup> Of course this does not apply to the old Jurisconsulti from whose works the Digest is composed. Vide the following passage which immediately precedes the passage on authority already quoted: "Hic habes locum ab autoritate quia jurisconsultus probat dicta sua per auctoritatem Celsi. Sed contra hoc facit quia auctoritas doctoris, licet sit probabilis, non est necessaria...Solutio: illa jura loquuntur de doctore simplici, sed Celsus, de quo hic loquitur, erat doctor et jurisconsultus, qui habebat potestatem condendi legem, unde et ejus interpretatio, cum sit necessaria, sicut interpretatio principis...merito potuit allegari."

<sup>2</sup> Vide *Comment. on Codex*, Part I. (C. I. 14. 1), p. 87, §§ 7-9: "Debes scire quod est interpretatio generalis et necessaria et in scriptis redigenda et istam potest facere solus Princeps, ut hic. Quaedam est interpretatio necessaria et in scriptis redigenda, non tamen est generalis, et istam potest facere quilibet iudex et proferre sententiam procedendo de similibus ad similia...Tertia est interpretatio probabilis, tamen non est necessaria, et potest in scriptis redigi, ut interpretatio doctorum, quia nullus te cogit stare opinioni doctoris." Cf. *Comment. on Dig. Vet.* Part II. (D. XII. 1. 1), p. 2, § 6.

<sup>3</sup> The following quotations will serve as examples. Vide *Comment.*

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something that reveals the man and his age. We have remarked that most of our knowledge of Bartolus is derived from what he himself tells us; the references, which we have already given, might easily be supplemented. Bartolus, for example, is always ready to illustrate a legal point by appealing to his own experience—to cases he has known or to opinions he has given both at Pisa and Perugia, the two cities most closely connected with his name, as at Florence, the small dependent cities near Perugia, such as Spoleto or Assisi, and elsewhere<sup>1</sup>. Similarly he will recall cases

on *Dig. Nov. Part I. (XLIII. 19. 1, § Quaesitum)*, p. 468: “Hic est bonus textus et est argumentum ad quaestionem. Equus qui currebat ad braviū per seipsum primo ivit, cum ragatius qui equum ducebat inde ceciderit, quod (sic) ille equus debet habere braviū. Breviter ego consuevi dicere sic, quod debemus advertere verba statuti, utrum dicunt, ‘si quis cum equo primo venerit,’ vel ‘ei equitatori qui primo venerit,’ et similia, et tunc non habeat braviū; vel dicant, ‘domino equi qui primo venerit debeatur braviū,’ tunc equo veniente sine equitatore debeatur braviū.” Horse-races took place in numbers of Italian cities at certain times of the year; Dante refers to the famous Lent foot-race at Verona (*Inf. xv. 122*). Bartolus’ decision is very curious and it would be interesting to know if such a rule ever actually held good. Then vide *Comment. on Dig. Vet. Part II. (D. XII. 2. 30, § In popularibus)*, p. 95, § 4: “...ut fuit de facto in civitate ista, facta fuit quaedam societas vel liga per cives huius civitatis contra aliquos contra formam statutorum, quae liga adhuc durat....” Finally we may well notice the number of passages in which Bartolus refuses to consider a matter “quia pendet de facto.” Vide e.g. *Comment. on Dig. Nov. Part II. (D. I. 1. 6, § Filius)*, p. 648, § 3: “Non determino modo quia quaestio est in civitate Clusina, et forte examinabitur in civitate ista.” Cf. *Comment. on Dig. Vet. Part I. (D. IV. 4. 38)*, p. 444, § 7.

<sup>1</sup> *Comment. on Codex, Tres libri (C. x. 43. 1)*, p. 53: “Nota... quod quando quis subit onera sponte, debet protestari, ne prejudicet sibi vel suo privilegio: et sic feci, quando fuit imposita mihi praestantia, de qua potui excusari, tamen nolui me excusare: feci tamen scribere in catastro in lib. solutionum quod illud faciebam non animo