

CHAPTER 2

LIFE OF THE AUTHOR AND HISTORY OF THE *TYBERIADIS*

2.1 Overview of Bartolus' life

Bartolus of Saxoferrato, arguably one of the greatest Italian jurists was born on 10 November 1313 in Venatura, a small village in the territory of Sassoferato (Urbino) in the Italian province of Ancona. Three different surnames have been ascribed to his family, but it has been noted that it was not uncommon for families during this period to be without a surname (Van de Kamp, 1936:5).¹ His parents, Ciccus and Sancta, seem to have been moderately wealthy as he was able to study abroad and to live without an appointment for periods of time (Van de Kamp, 1936:5). A Franciscan monk, Petrus de Assisio, who taught him to read and write Latin, provided his initial education (Walther, 1992:888). His academic brilliance soon enabled him to enrol at the university of Perugia at the age of thirteen, where he not only studied law, but also grammar, rhetoric, dialectic and geometry (De Wet, 1988:74; Kreller, 1950:19; Smith, 1975:81; Robinson *et al.* 1994:65). At Perugia, he studied under Cinus de Sinibuldis de Pistorio and probably also under Oldradus de Laude (Ercole, 1930:251).

Bartolus later moved to the University of Bologna where he was schooled in both canon and civil law under Jacobus Buttrigarius and Rainerius de Forlivio (Smith, 1975:81). At Bologna, two distinct schools of legal professors existed, one school exclusively producing academic commentaries on the *Glossa Ordinaria* of Accursius, while the other school concentrated on legal practice. His mentors at Bologna belonged to the academic school of legal professors, but Cinus, who according to Bartolus shaped his legal insight, was a protagonist of the second school (Van de Kamp, 1936:8). In 1334 he graduated *doctor utriusque iuris*² and the degree was conferred upon him in the San Pietro cathedral at the age of twenty (De Wet, 1988:74; Robinson *et al.* 1994:66).

During the next few years, Bartolus went on sabbatical to the abbey of San Vittore, south of Bologna where he wrote and studied (Von Savigny, 1986:145). He continued to work on his practical legal skills by acting as assessor in Todi, Pisa and Cagli (Calasso I, 1954:73; De Wet, 1988:74). The practical experience gained during this period formed the basis of his adaptation of Roman law to legal practice (Van de Kamp, 1936:10). During this time, he married Pellina Bovarelli and from this union two sons and four daughters were born (Saxoferrato, 1914:13). In 1338 he was invited to the university of Pisa by the ruler of the city-state, Bonifazio dei Gherardeschi, who wished to expand his city and university by luring promising academic scholars from across Italy. The famous jurist, Baldus was already his pupil at this stage and a close friendship existed between him and Bartolus (Van de Kamp, 1936:15). The nature of Bartolus' legal work was dualistic. On the one hand he fulfilled his academic obligations by giving *lecturae*, *repetitiones* and *disputationes*, while on the other he gave practical advice in the form of *consilia*. Due to the fragile political situation in Pisa as well as the outbreak of the plague, he was forced to move to Perugia in 1342. Here he accepted a chair in civil law, which he occupied until his death in 1357 (Van de Kamp, 1936:24).

Bartolus was a prolific writer and produced mainly two types of legal monographs. The one type, termed treatises were monographs on a single subject compiled from his lecture notes (Smith, 1975:81; Van Zyl, 1983:133). These monographs were published by submitting them to the university for commentary from students as well as fellow professors. Most of these were preserved through hand written reproductions and printed during the last decade of the fifteenth century (Van de Kamp, 1936:86). Another type of legal monograph was the legal textbook written mainly for students (Van de Kamp, 1936:94). During his term at Perugia, he was awarded several distinctions. The emperor Charles IV of the Holy Roman Empire bestowed upon Bartolus and his descendants, who were doctors of law, the right to declare persons under twenty-five years of age legal adults as well the right to legitimise illegitimate children (Van de Kamp, 1936:126). He was further awarded the title *consiliarius* and a family crest³ consisting of a red lion on a gilded background was awarded to his family (Van Warmelo, 1977:143). His life was marked by illness and he died on 13 July 1357 in Perugia at the age of forty-three. He

was buried in the church of San Francesco near the Franciscan Abbey in Perugia (Van de Kamp, 1936:148). His will indicates that he was a wealthy man with extensive property holdings in Perugia, Boneggio and Venatura (Van de Kamp, 1936:137).

2.2 School of the “commentators”

Many reasons have been given for the revival of the study of Roman law in the twelfth century in Italy. In all probability it was due to the *renaissance* of the Lombardic Empire and its increasing economic and social welfare which required a more complex legal system (Haskins, 1968:207; Van Zyl, 1983:81). The school of the “commentators” developed in the fourteenth century after a period when the centre of Roman law study had shifted to France (Gerbenzon and Algra, 1979:90). The “commentators” were also known as the “consiliators” or the “post-glossators”⁴ and their academic method consisted of writing commentaries on various aspects of Roman law as well as giving practical opinions in the form of *consiliae* (Van Zyl, 1983:124). The “commentators” differed from previous legal schools in their use of practical commentaries and legal opinions as well as the use of sources outside the *Corpus Iuris Civilis* like canon law, customary law and the statutes of Italian cities (Koschaker, 1947:88; Kreller, 1950:17; Marini Avonzo, 1973:164; Van Warmelo, 1977:144). This led to the birth of a new legal *genre* known as the *mos italicus* (Italian practice) which figured prominently in the fourteenth and fifteenth century.

2.3 Methodology of the “commentators”

The research of the “commentators” was dialectic in nature as they used a more extensive exegesis than previous legal schools, but did not seek to improve on the theoretical basis of textual exegesis laid down by the “glossators” (Van Zyl, 1983:128). Late medieval society was regarded as a continuation of Roman society and, therefore, Roman law was regarded as the positive law (Van de Kamp, 1936:240). Existing law was to be found in the *Corpus Iuris Civilis*, but as often happened; these legal rules were in fact, either outdated or not applicable. The solution put forward by the “commentators” in such an

instance was to analyse the outdated answer and to state that it might well apply in other circumstances but not in the circumstance at hand, thereby creating an opportunity to supply their own creative solution (Van de Kamp, 1936:241). In circumstances where the *Corpus Iuris Civilis* did not touch upon the case at all, the solution was arrived at through argumentation and by quoting relevant analogous texts (*arg.*) from the *Corpus Iuris Civilis*.

Their academic method consisted of extending legal rules to analogous situations in order to find corresponding principles, but it also meant that the “commentators” did not operate as close to the original text as previous schools (Van Zyl, 1983:129). The major *corpus* of their work consisted of an exegesis of the *Corpus Iuris Civilis* as well as commentaries. Each “commentator” supplied his own opinion together with others and distinguished his own (*distinctio*) through grammatical differences. Due to the particular nature of their method, these commentaries were usually of casuistic nature and the result was the creation of a uniform, systematic legal science geared for legal practice⁵ (Van Zyl, 1983:129). The “commentators” strove to adapt the *Glossa Ordinaria* of the famous “glossator”, Accursius⁶, to legal practice and in doing so used not only the *Corpus Iuris Civilis*, but also Germanic customary law, imperial rescripts, statutes, feudal law and canon law (De Monté Ver Loren, 1982:232). The efforts of the “commentators” would form the basis of the systematic European *ius commune* (Feenstra, 1974:116).

2.4 The importance of the school of the “commentators”

The single biggest influence of the school of the “commentators” was the introduction of Roman law into local law and its application to practice (De Wet, 1988:74; Schrage, 1987:67; Van Warmelo, 1977:144). This process spread across Italy to the whole of Western Europe to become the basis for the European *ius commune*. There are two theories that attempt to explain why Roman law was accepted with such ease in this period (Van Warmelo, 1977:144). According to the first theory, Roman law was regarded as *ratio scripta* or common sense in law, recorded on paper. Common sense always prevailed where statute law failed to provide a solution. The second theory

maintains that Roman law was regarded as subsidiary law, implying that whenever local customary law could not supply a solution, Roman law had to be applied (Van Zyl, 1983:139).

The academic method of the “commentators” has often been criticised on various grounds. Heavy reliance on the *Glossa Ordinaria* of Accursius sometimes led to ignorance of the underlying legal rules of the *Corpus Iuris Civilis* (Van Zyl, 1983:139). Furthermore, the “commentators” were devoted to finding a *communis opinio* or general interpretation of the nature of Roman law and this led to frequent repetition and great verbosity. The nature of their arguments consisted of listing both sides of the argument before coming to a conclusion (Van de Kamp, 1936:243). This method often led to the insertion of every possible legal rule that could remotely be of significance, thereby making it difficult to follow the train of thought (Van Warmelo, 1977:144). The comprehensive discussion of the word *vis* by Bartolus, serves as a prime example of this academic method (*Bartolus, Tract.de flum. I, Quod si vis fluminis* [22]). The most scorching criticism came from the French school of legal humanists who criticised the “commentators” for their detailed and grandiose interpretation of sources as well as their poor Latin and verbosity⁷ (Smith, 1975:82; Van Zyl, 1983:140). It has to be remembered, however, that it was not the aim of Bartolus or the “commentators” to reinstate classic Roman law, but rather to cast the law into a systematic form, acceptable to fourteenth century Italian legal practitioners and in this respect they were extremely successful (Marini Avonzo, 1973:166; Koschaker, 1947:90; Van de Kamp, 1936:246).

2.5 Contents of the *Tyberiadis*

The *Tyberiadis*⁸, published in 1355, was the product of Bartolus’ curiosity concerning the legal consequences of natural phenomena pertaining to rivers (Astuti, 1964:iii). It was written while on vacation at a villa near Perugia and consists of three books in which alluvion, islands arising in a river and dry river-beds are discussed respectively (Astuti, 1964:iv; Van de Kamp, 1936:58). The first book is divided into two sections. The first section contains a commentary on Roman law concerning alluvion, while in the second

section a practical application of these legal principles in the form of *propositiones* is supplied. The basis for the book on alluvion is the famous text of the Roman jurist Gaius in D 41 1 7 1⁹. The method of commentary in the first book of the *Tyberiadis* is to examine single words in the text of D 41 1 7 1 and to supply similar and opposing texts to explain the legal position concerning each aspect thereof (Astuti, 1964:viii). Bartolus explains the legal position concerning alluvion by quoting not only Roman law, but also a variety of other sources such as municipal statutes, canon law and customary feudal law. Included in the exposition are various practical examples which indicate Bartolus' fondness of the practical side of law and its application. The text also contains a *prooemium* in which Bartolus explains how a vision in his sleep, urged him to complete the *Tyberiadis*. The treatise was widely distributed after the author's death due, in part, to his fame and also to its singular importance.¹⁰ It combined both theoretical and practical elements into a composition, useful for jurists as well as mathematicians and surveyors (Astuti, 1964:v).

2.6 The 1576 edition of the *Tyberiadis*

The choice for translation fell upon the 1576 printed edition of the *Tyberiadis*, edited by Hercules Buttrigarius¹¹, descendant of Bartolus' mentor and teacher Jacobus Buttrigarius (Astuti, 1964:vi). It was printed by Giovanni Roscio (Johannes Roscius) of Bologna. Astuti (1964:vi) indicates that it is often difficult to choose one text above another, firstly because it is uncertain which archetype was used in printing a specific edition and furthermore because each text contains a certain number of errors. It would require a systematic comparison of all the existing copies of the text to establish an authoritative reading (archetype), but this has, as far as could be ascertained, not yet been attempted.

There are numerous reasons for choosing the 1576 Bologna edition as the basis for translation. The text is relatively clear and contains few abbreviations. It was printed as a separate entity from the rest of the *Opera Omnia* and the letter type, composition and clarity of the diagrams provide for easier translation. It is further rumoured to be a reprint of an early text dating from 1472, thereby supplying one of the few texts from the

period when hand written copies were still used to verify the accuracy of the text. Van de Kamp (1936:85) also indicates that Thomas Diplovattacius, the co-editor, was in possession of an early hand written manuscript of the treatise, which he used to amend the Bologna edition of 1576. The *prooemium* states that the *Tyberiadis* was completed in 1355, two years before the author's death. Printed editions of the treatises were produced only in the last decade of the fifteenth century¹², thereby creating a lacuna of roughly 135 years in which the text underwent significant degradation due to manual recopying. After 1500, the treatises were published solely as a component of the *Opera Omnia* and only rarely occurred in separate editions (Van de Kamp, 1936:85).

There are seven hand written manuscripts of the *Tyberiadis* in the Vatican library and three other manuscripts in the libraries of Torino, Toledo and Brussels respectively (Van de Kamp, 1936:85). Printed copies dating from the fifteenth century are to be found in the National Library in Paris, university libraries in Amsterdam, Leiden, Tübingen, the British Museum and the library of the *Reichsgericht* in Leipzig (Feenstra, 1962:234; Van de Kamp, 1936:94). The following schedule supplies an overview of all the hand written manuscripts of the *Tyberiadis*, separate printed editions and medieval translations.

**EXISTING MANUSCRIPTS OF THE
*TRACTATUS DE FLUMINIBUS SEU TYBERIADIS***

Hand written manuscripts

• **Vatican Library, Rome**

No. Vat. lat. 2280, fol. 48-57

No. Vat. lat. 2625, fol. 135-147

No. Vat. lat. 2641, fol. 54-63

No. Vat. lat. 2660, fol. 171-192

No. Reg. lat. 1891, fol 2-24v

No. Barb. lat. 1308, fol 157-170v

No. Chigi. lat. E212, fol 79-113

- **Royal Library, Turin**

No. 306H III, 15

- **Dom Library, Toledo**

No. 12.16

- **National Library, Brussels**

II, 1442, fol. 224r^o-242r^o

Separate printed editions

- Compilation of treatises printed by Vindelius de Spira in Venice, 1472
- Separate reprint of the *Tyberiadis* by Rufino Gabloneta in Rome, 1483
- Separate reprint of the *Tyberiadis* by Johannes Roscius in Bologna, 1576

Translations of the *Tyberiadis*¹³

- Meurer, N. 1570. *Tractatus Iuridicus de Alluvione, Insulis, Alveo et Jure Aquatico, oder vom Wasserrecht in sich enthaltend Bartoli Tractatus de Fluminibus*. Frankfurt : Johann Albrecht.
- Tobaldutii, C. 1587. *La Tiberiade di Bartole da Sassoferrato del modo di dividere l'Alluvioni, l'Isole, e gl'Alvei*. Rome : Giovanni Gigliotto.

2.7 Bartolus' influence on subsequent legal development

Van Zyl (1983:133) states that Bartolus was probably the single biggest influence contributing to the establishment of Roman law as a European *ius commune*. His writings had a profound influence on generations of jurists across Europe and were cited with the highest authority until the eighteenth century. The later “commentators” were

even sometimes referred to as *Bartolistae* in his honour and the maxim *nemo jurista nisi bartolista* is a clear indication of the high esteem in which he was held. Bartolus' writings were initially known only in Italy, but his fame subsequently spread to Spain, Portugal, France, Belgium and Switzerland¹⁴ (Van de Kamp, 1936:155). Legal humanism of the sixteenth century, in its quest to reinstate classic Roman law, did however not hold Bartolus in high esteem. This led to a division amongst jurists who were humanists, and therefore more theoretically inclined, and those who were geared towards legal practice (Van de Kamp, 1936:156). Legal humanists soon realised, however, that theoretical knowledge was not enough and in their quest for knowledge of legal practice, they made extensive use of writings influenced by Bartolus.

Bartolus also influenced South African law through common law. The scope of this chapter will be restricted to his influence on Dutch law of the seventeenth century, which had a profound influence on South African common law. The writings of Bartolus had a direct influence on seventeenth century Dutch law through verdicts and legal literature (Van de Kamp, 1936:201). When the court of Holland, Friesland and West-Zeeland was established in 1428, many of the judges had studied abroad and were well versed in the writings of Bartolus, but his biggest support came from Nicolaus Everardus, chairman of the court from 1528 (Van de Kamp, 1936:203). Cornelius Neostadius indicates that most of the sentencing was based on Bartolus' writings and this tradition lived on until the end of the seventeenth century when Roman-Dutch jurists began citing later works.¹⁵ His influence is still evident in Jacobus Coren's *Observationes rerum judicatarum*¹⁶ and Johannes a Sande's *Decisiones*¹⁷, but since the eighteenth century his influence was mostly indirect (Van de Kamp, 1936:209).

The significance of Bartolus of Saxoferrato is threefold. Firstly he established a tradition of adapting Roman law to the needs of fourteenth century Italy, thereby laying the foundation for the establishment of Roman law as the *ius commune* of Europe. Secondly, he systematised the discussion of legal problems and thus laid the foundation for a systematic *ius commune* founded on principles rather than rules and thirdly, his fine analysis contributed to a better understanding and wider adaptation of Roman law.

¹ The surname *Severi*, which was later changed to *Alfani*, is commonly ascribed to Bartolus' family (Saxoferrato, 1914:11).

² Authorisation to award a doctorate degree in both canon and civil law was granted to the University of Bologna by Pope John XXII in 1318 (Van de Kamp, 1936:7).

³ According to Cavallar *et al.* (1994:22), the awarding of a family crest by Emperor Charles IV is speculation founded upon a single reference in the *Tractatus de Insigniis et Armis*, an unfinished treatise of Bartolus, concluded by his son-in-law, Nicola Alessandri.

⁴ The term "post-glossator" indicates an underestimation of the importance of the school of the "commentators" and will therefore not be used. For a critical discussion on the nature of the term "post-glossator", see Koschaker (1947:87) and Schrage (1987:66).

⁵ Although the school of the "commentators" is often credited with being inclined towards legal practice, Feenstra (1974:116) indicates that the value of this school is rather to be sought in its consultation of extraneous legal sources outside the *Corpus Iuris Civilis*.

⁶ Accursius, one of the most famous glossators, was born *circa* 1182 near Florence. He studied at Bologna under Azo and is the author of the *Glossa Ordinaria*, a comprehensive commentary on the *Corpus Iuris Civilis* in which a summary of all the important *glossae* on the text is supplied together with an acknowledgement of the original author (Van Zyl, 1983:105).

⁷ *Sunt verbosi et prolixi more suo, ut solent in re facili esse multi, in difficili muti, in angusta diffusi* (Cuiacius, *Responsa Papiniana* 5 *ad leg* 17).

⁸ The authorship of this treatise is above suspicion, however concerning other texts attributed to Bartolus, see Maffei, D. 1979. *Giuristi Medievali e Falsificazioni Editoriali del primo Cinquecento* (Ius Commune Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte, Sonderhefte 10). Frankfurt am Main : Vittorio Klostermann.

⁹ *Praeterea quod per alluvionem agro nostro flumen adicit, iure gentium nobis acquiritur. Per alluvionem autem id videtur adici, quod ita paulatim adicitur, ut intellegere non possimus, quantum quoquo momento temporis adiciatur.* Furthermore, what the river adds to our land by alluvion, becomes ours by the law of nations. Addition by alluvion is that which is gradually added so that we cannot, at any given time, discern what is added (Mommsen *et al.* IV, 1985:488).

¹⁰ The mathematical aspect of this treatise has been extensively discussed in Van Maanen, J.A. *Over het verdelen van aangeslibd land. Euclides* 60 (1984 – 1985), 161 – 168.

¹¹ Hercules Buttrigarius, a legal humanist, was well equipped for the task of editing Bartolus' works being not only a student of geometry and mathematics, but also well versed in Latin, Greek and Hebrew (Astuti, 1964:vi).

¹² Certain editions were printed before 1400, see Gesamtkatalog der Wiegendrucke Herausgegeben von der Kommission der Gesamtkatalog der Wiegendrucke. 1925-1996. 10 vols. Volume 3 Ascher – Bernardus Claravallensis. Leipzig : Verlag von Karl W. Hesseemann.

¹³ Both translations date from the sixteenth century and are, as far as could be ascertained, unavailable in South Africa.

¹⁴ Kisch, G. 1960. *Bartolus und Basel: Basler Studien zur Rechtswissenschaft*, heft 54. Basle : Helbing & Lichtenhahn.

¹⁵ See *Decisio* III, § 10 in Neostadius, C. 1667. *Decisiones utriusque Hollandiae, Zeelandiae, Frisiaeque curiae*. Hagae Comitit : Johannes & Daniel Steucker.

¹⁶ See *Observatio* II, note 6; *Observatio* III, note 10; *Observatio* VI, note 10 in Coren, J. 1642. *Observationes Rerum in eodem senatu Iudicatarum item Consilia quaedam*. Hagae Comitit : Ex Officina Theodori Maire.

¹⁷ See *Paulus lib. III ad Sabinum, ad leg. X* in Sande, J. 1721. *Opera Omnia Juridica*. Brussels : Simon T'serstevens.