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Legal Consulting in the Civil Law Tradition

edited by

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Abstracts

MARIO ASCHERI

Le fonti e la flessibilità del diritto comune: il paradosso del *consilium sapientis*

This paper gives an account of the most recent research on *consilia* and addresses some technical problems related to the function and the development of *consilia* literature. This reexamination reviews the typology of *consilia* and how thoroughly they were integrated in the system of the civil law formerly governed by the supremacy of the *lex*. It discusses the paradox of the *consilium sapientis, stricto sensu*, as an act of binding interpretation in a system characterized by the free interpretation of the law. This practice developed in the course of the twelfth century, and quickly met with the opposition of Innocent III, whose decretal (Comp. III) later inserted in the *Liber Extra*, shows how such a practice let the judge escape his responsibility. The papal condemnation was amplified by Durantis, who gave pride of place to the issues raised by the practice of the *consilium*, popular in the ecclesiastical courts during the thirteenth century, as is shown by the most recent historiography. Durantis's discussion eventually stimulated the Commentators to legitimize their use in the face of papal opposition. This process was already finished by the time of Giovanni d'Andrea, who had the merit of neutralizing the papal opposition (and also Durantis's). However the fourteenth-century legislation of Milan and Florence eloquently illustrates the awareness of the "irrationality" of the *consilium sapientis* in a centralized political system (a situation repeated in the Napoleonic period). The paper concludes with a discussion of the fortune of the *consilia* through the nineteenth century.

INGRID BAUMGÄRTNER

Rat bei der Rechtsprechung. Die Anfänge der juristischen Gutachterpraxis zwischen römischer Kommune und päpstlicher Kurie im 12. und beginnenden 13. Jahrhundert

The praxis of giving legal advice, which was introduced immediately after the foundation of the Roman commune (1144), is here used to analyze the early development of *consilia*, their function in the transition from oral to written culture and the status of their authors until the middle of the thirteenth century. The core of this praxis in Rome was the obligation of the judges to give competent legal advice to the Senators; thus the *consilia* were an important instrument of the commune's self-legitimation. The competition with the papal tribunal in Rome and the legal responsibility of the always changing senatorial committees fostered written forms of expert legal advice to guarantee the continuity of the legal system. The *consilia* or *consilia sapientium* were binding and played a significant role in the procedure. The consultors were judges and advocates (also described as *sapientes*), not law teachers. Their arguments were not aimed at theoretical legal knowledge but were oriented toward a practical goal. *Consilia* were registered in a sort of final statement that usually has been preserved as an insert placed in the sentence. *Consilia* acquired a specific role in the formal procedural scheme, which was developed at the latest in the 1230s. Following the *consilium* was a senatorial confirmation and a sealed order of implementation of the sentence.

The experts came originally from the papal administration. The number of the experts correlated with the number of the senators. To this team belonged the seven palatine judges, numerous *iudices dativi*, and lawyers. A prosopographical analysis of the judges belonging to the different categories makes clear the high social prestige of the legal experts. The strong ties between the different members of these families created a powerful social network which solidified the legal profession.

JULIUS KIRSHNER

Consilia as Authority in Late Medieval Italy: The Case of Florence

Building on the solid foundations established by Engelmann, Rossi, Lombardi, and Martines, who demonstrated the ways in which *consilia sapi-*

entis were necessary for the effective operation of medieval judicial proceedings, the paper explores the critical issue of the authority invested in *consilia* and in the jurist-consultors who produced thousands of authoritative opinions during the late Middle Ages. Such authority was composed of four components: the consultor's expertise guaranteed by his doctoral degree; his institutional impartiality guaranteeing just sentences; the nimbus of prestige surrounding jurists and the sacral character their utterances; and the relative immunity from liability accorded consultorcrats who, unlike judges, were required to express the reasons justifying their opinions. The paper also considers, and then rejects, the view that *consilia sapientis* were treated as a valid source of decisional law and legal precedents. The final section addresses the oft-strained relationship between jurisprudential interpretation and the goals of lawmakers and administrators. A case in point was Florence, where conflicts between jurists and their political masters were ultimately irreconcilable, resulting in a concerted effort by the *Signoria* to politicize the production of *consilia sapientis*.

GÉRARD GIORDANENGO

Consilia feudalia

Feudal law *consilia* appeared in the Milanese area by the middle of the twelfth century. Especially from the second half of the thirteenth century on—when they were more widespread in Italy (Dino da Mugello) and southern France (Girard de Verdel)—they constituted a significant, but not sole, source of legal literature. For the most important fiefs, the *consilia* had a substantial political character, sometimes affecting international affairs such as the French-English conflict, matters concerning the kingdom of Sicily, and the succession to the kingdom of Navarra (or, Majorca). By the fifteenth century, the “new federalism” of the northern Italian principalities placed particular importance on feudal *consilia*, especially with respect to the most famous lawyers of the period such as Baldus and Paulus de Castro. The feudalism of the *Regno* was also extremely receptive to the use of *consilia* (Guillelmus de Perno).

The *consilia*, however, rarely touched on genuine feudal questions such as homage and instead most often revolved around the transfer of property or jurisdiction—the subject of the most strident and numerous debates—and questions of inheritance (later substitutions). The legal lit-

erature of *consilia*, moreover, was never impartial in content. By underscoring the contractual character of feudal law, they gave new meaning to old concepts (*ligesse*) and conferred greater importance on the contracts of infeudation. Old terms were re-interpreted (e.g., *ancien fief*, new fief), and newly created categories contributed to the development of new feudal law that coincided with the re-evaluation of *Libri feudorum*.

VINCENZO COLLI

Consilia dei giuristi medievali e produzione libraria

The *consilia* of the medieval jurists were disseminated in manuscript and in print, in single author collections or those dominated by a single author. It is in these compilations that they are transmitted in the hundreds of editions of the early modern period, the high point in the fortunes of this genre of literature in Europe. Economic factors were decisive in determining the choices made by the first publishers; therefore, their choice of texts assumes an extremely selective character. The decisive phase in the publication of the *consilia* was the 15th century: from about 1470 to 1500 the collections of twenty-six authors were published. The census of incunables encompasses 129 titles corresponding to 98 editions.

By enumerating the edition of the collections and by taking into account the *editiones principes* in relation to reprints, it is possible to delineate the progress of the production of *consilia*. The evolution of the book market is reflected in the editorial policies of the publishers, the criteria used in the selection of unedited material for publication, and in the process of the supplanting of manuscripts with books. The printed editions were intended to replace the manuscripts completely, as indeed happens in the course of the 16th century. Thus the publishing market caused the dispersion of the medieval manuscripts and the loss of many unedited texts.

THOMAS KUEHN

Consilia as Juristic Literature in Private Law

In historical accounts of the private law dimensions of civil and canon law, the doctrinal conceptions and elaborations of professors have been privileged. *Consilia*, even by these same *doctores legentes*, receive attention only insofar as they similarly contributed to doctrines and the development of

communes opiniones. Such a fixation on doctrine masks the degree to which even very humble and immediately practical *consilia* creatively posed case-related facts to abstract doctrinal concepts. This paper examines Florentine cases, beginning with a hypothetical and very academic case and posing it in contrast to *consilia* penned by teams of jurists in actual cases. Strategies of argument, citations of authoritative sources, and other aspects of these texts reveal that jurists employed the language of the law to bring social facts into the realm of law in such a way as to offer meaning, if not always resolution, to those facts. While never losing sight of the doctrinal system they drew from, these practicing jurists also had to confront the immediate interests of the persons who brought the cases to the courts and the social life of the city whose statutes and courts formed part of the legal context of the case.

ANDREA ROMANO

Letteratura consiliare e formazione dei diritti privati europei:
l'esperienza del diritto di famiglia siciliano tardo-medievale

Starting with the "Constitution of Frederick II," the paper describes the Sicilian legal system, stressing how it comprised elements derived from royal enactments, Roman statutory and customary law, and the *ius commune*. This legal system was in a state of precarious equilibrium because of the mutable relationships among barons, cities, and the king. It was deftly managed by the doctors of law acting as royal, baronial, and municipal judges, as well as independent lawyers. After discussing the peculiar role of *consiliatores* in the *Regnum*, where there was no resort to *consilium sapientis iudiciale*, the author takes up family law. Examples drawn from a conspicuous number of hitherto unpublished *consilia* written between the fourteenth and the sixteenth centuries illustrate the critical contributions of Sicilian legal counselors to the creation of local family law.

HÉLÈNE ANGIOLINI

I *consilia* quale fonte per la vita economica: alcuni problemi

Medieval *consilia* constitute a source of particular importance for understanding the economic activities of the late Middle Ages and for analysis and interpretation of these activities by consultant lawyers. The prohi-

bition of interest expressed in canon law and acknowledged by the *ius commune* constitutes the central point of this literature produced to ascertain the presence of *pravitas usuraria* in the economic activities and financial institutions. The common element of legal thought in the Middle Ages is precisely the will to resolve (in light of the constant reference to the *aequitas* and the *aequalitas*—essential data for the evaluation of the economic activities) the existing contrast between norm and practice, between divine precepts and the laws of man.

The paper, based essentially on printed collections of the fifteenth and sixteenth centuries, is divided into four parts. The first concerns bills of exchange, deposits, and insurance, linked principally to mercantile activity. The second deals mainly with civil aspects of the economy such as the management of the public debt and the creation of the *Montes*; while the third is concerned principally with Jewish moneylenders and pawnshops, and the appearance of *Montes pietatis*. The fourth section concerns rural credit.

Among the authors considered are the well-known Baldus de Ubaldis, Bartolus de Saxoferrato, Johannes de Lignano, Petrus de Ancharano and Paulus de Castro, as well as the lesser-known Gaspar Calderinus, Ludovicus Ponatnus, Laurentius de Ridolfis, Marianus Socinus, Angelus de Castro and Alexander Naevius.

OSVALDO CAVALLAR

I consulenti e il caso dei Pazzi:

consilia ai margini della in integrum restitutio

In the political landscape of late medieval and Renaissance Italy, the figure of the exiled is ubiquitous. The case taken into consideration here is that of the Pazzi family, whose members had been banished from Florence after an unsuccessful attempt to overthrow the government headed by Lorenzo de Medici. The legislative enactment repealing the *bannum* and allowing the survivors to return was merely the first step of a legal odyssey that lasted beyond the Medici's return to Florence in 1513. Lawyers were forced to ponder the lawfulness of the Pazzi's *bannum* and, consequently, the legitimacy of the government that inflicted it. The construction of the Pazzi's case as an instance of *crimen laesae maiestatis* prompted lawyers to investigate the modes of succession to Iacopo de Pazzi, the head of the

clan at the time of the so-called Pazzi conspiracy (1478). For the Pazzi, recovering the property that had been confiscated, particularly that portion which was still in the hands of the *fisc*, was certainly desirable and even perhaps vital; yet recovering their former *iura* and privileges was also equally important. Since no charter of “rights” existed, their new position in Florentine society had to be renegotiated; the space they had lost had to be carved out without upsetting the existing map of distribution of privileges and wealth. The opinions rendered by jurists like Francesco Guicciardini and Antonio Strozzi allow historians to follow closely the process by which that space was delimited on the city map.

DIEGO QUAGLIONI

Giurisprudenza consulente e dottrine politiche nella prima età moderna: i *consilia* di Jean Bodin (c. 1529–1596)

It is well known that the most important political work of the French jurist Jean Bodin, *Les six livres de la République* (1576), is written in the manner of a jurist rendering his opinion or *consilium sapientis*.

At the end of the fifteenth century the *consilium sapientis giudiciale* declined, but as a literary genre and as a model for enquiry into law, the *consilium* held great authority. During this period, collections of *consilia* still had an important function, like repertories of *auctoritates*, arguments and answers for the major themes in modern political literature.

Bodin wrote some *consilia* as well. Among them is a *consilium de principe instituendo*, a short work that contains political precepts characterized by most of the major themes of juridical humanism. In Bodin’s political work, which often refers to the *consilia* of medieval jurists, there is still a place for the *consilium* as a literary genre and as a good instrument for a new science—that is, political science.

HANS ERICH TROJE

Die beiden Amerbach als Rechtsgutachter

After a discussion of the new edition of the latest volume of Bonifacius Amerbach’s correspondence, two *consilia* written at the end of his career are analyzed. The first deals with a dispute related to his colleague, Curione, who quarreled with his son-in-law about his deceased

daughter's estate. Because of the validity of her testament, Amerbach advised settling the dispute outside the court. The second *consilium* concerns the problem of the validity of a the marriage between a castrated old man and a virgin. The *consilia* of Basilius Amerbach, Bonifacius' son and follower, are concerned with cases from public as well as private law. The article ends with some remarks on the different terms used in the sixteenth century to describe a *consilium* and on the problems raised by the publication of these texts.

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