Nel Buio delle Folti Tenebre dell'Ordinamento. Justice and Law in the Provinces of the Kingdom of Naples During the Modern Era (17th Century)

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Abstract

This work focuses on the Neapolitan *Jus Regni* and judicial activities of the baronial courts in the Kingdom of Napoli during the early modern period; and in particular, the thorny activity of applying the law in the provincial territories in which individual cases could be subject to different procedural methods deriving from the statutory legislation in effect in each.

A privileged insight into these dynamics comes from a precious source: a collection of sentences passed by a governor, during his service at feudal tribunals in the Barony of Cilento. It allows us to analyse the precise act of the *interpretatio* of the laws with the aim of harmonising local (statutory) law, the *ius commune* and the King's law, as well as to identify the reference jurisprudence used by the magistrate.

I. Introduction

This work focuses on the judicial activity of the Baronial Courts in the Kingdom of Naples during the early modern period. This was a thorny period in the interpretation of the laws and a synthesis between the ideal and deontic level of the application of the formal laws, on the one hand, and their integration within the dynamic context of the actual relationships on the other.

In the early 16th century the feudal establishments of the Kingdom's provinces and territories underwent a significant process of institutional and judicial reorganisation, through the division and reconstitution of the large feudal states enacted by the new dominant power, the Spanish Hapsburgs.[1] Nevertheless – with due regard to the pact that established obedience on the part of the subjects in exchange for the acknowledgement of the ancient rights and privileges granted to the communities over the preceding centuries – the statutory legislation in effect in those territories was reconfirmed as the means for governing relations between the rulers and the ruled. This is no small matter because the first, fundamental obstacle to the affirmation of the Princes' absolute power and

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[1] A. Cernigliaro, *Sovranità e feudo nel Regno di Napoli (1505 – 1557)* (Napoli: Jovene, 1983), I-II.

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constitution of an autocracy depended on the historic formation of the states, each with its own accentuated particularism.[2] This internal particularism, reflected in the diverse means and conditions by which the territories were acquired,[3] was made up of a complex system of sources of law. There were a multiplicity of local laws based on consuetudes and traditions, or municipal and rural statutes. Against these laws stood Roman and canonical common law, the interpretation of which gave rise to problems in terms of settling the differences between the provisions of common and particularist law, which in turn differed greatly depending on the period and place. Between these two sets of law stood the *Leges Regiae* which at every attempt to harmonise the variety of local laws or abolish particular situations of privilege or autonomy, met the fiercest opposition, raised specifically by the custodians of the ancient constitutions, the *togati*, or learned officials of the Naples tribunals. Since it proved impossible to eliminate the variety of local orders, the central powers tried to simplify them, bringing together civil and penal jurisprudence in the same organs, and granting the feuds territorial jurisdiction as courts of first instance. This was the rationale underlying the territorial reorganisation of the Kingdom of Naples in the early 16th century, and the reason the power of the Barons was reconfirmed, in that in a certain sense they became officials of the king. Furthermore, their use of this jurisdiction, at least from a formal point of view, appeared to serve the interests of the crown.

As a further means of limiting the jurisdictional power of the feuds, in addition to limiting advocation and competence to minor offences, the Barons were required to entrust the jurisdictional function to expert judges, thereby disciplining their right to appoint judges in the feudal territories.

This latter directive, already introduced during the reign of Queen Giovanna, was proposed again in the 1630s, in accordance with the legislative iteration typical of the kingdom, through an edict that obliged all holders of judicial office, and those aspiring to such offices, to be in possession of a doctorate in *utroque iure*, as well as knowledge of the laws in effect in the Kingdom of Naples.

From this standpoint, the baronial governors become an important subject of study, in that they were the most important figures in the administration of justice and the application of law. These officials likewise arouse a form of sociological interest, in relation to their lineage and the networks of vertical and horizontal relations that contribute to an understanding of the dynamics of power at the local level. Indeed, in this category we find a series of peculiarities, such as families specialising in the profession by encouraging its members to take a doctorate in law, the closed circle of members of the same family within the tribunals of specific feudal states, which betray special ties with the baronial

[2] G. Astuti, *La formazione dello stato moderno in Italia. Lezioni di Storia del diritto italiano* (Torino: G. Giappicchelli Editore, 1967), 41.

[3] Provinces and feuds, estates and citties, had come to form part of the Prince's dominion over the course of the centuries, individually and successively, on widely differing terms and conditions.

families as clients, or family and client relationships with figures in the Neapolitan high ministry. Moreover, we can see precise strategies in the transmission of family inheritance with the aim of assuring economic, initially, and later, social ascent within a few generations, culminating in the acquisition of a coat of arms. Naturally, these figures were destined to play a leading role in the dynamics of power at local level, through the relationships they entertained at political and social level.

Indeed, due consideration must be given to the inevitable relationships that arose between the feudal tribunals and the various levels of power: the central power (the high Neapolitan magistrature), territorial power (Baronial Courts and *Regie Udienze*, or appeal courts), and local power (*Universitates*), in that the figure of the baronial governor was the one which, physiologically by nature of his office, interacted with all of these levels of the organisation of power.[4]

However, the aspect we will be concentrating on, concerns the application of the law in the provincial territories, in which individual cases could be subject to different procedural methods deriving from the statutory legislation in effect in each. A privileged insight into these dynamics comes from a precious source found in the private archives of the del Mercato family, at the State Archives of Salerno. It consists of a collection of judgments issued by the governor Giovan Nicola del Mercato, during his years of service at a number of feudal tribunals in the Barony of Cilento, Kingdom of Naples, during the second half of the 16th century. It is precious because it allows us to analyse a delicate moment in the administration of justice, in the precise act of the *interpretatio* of the laws regulating certain types of offence with the aim of harmonising local (statutory) law, the *ius commune* and the King's law, as well as to identify the reference jurisprudence used by the magistrate to navigate '*nel buio delle folti tenebre dell'ordinamento*'.

II. The Author Giovan Nicola del Mercato, the *Collegio dei Dottori* and the Role of the *Togati* in the Kingdom of Naples

The del Mercato family was one of that category of families Moscati defined as *provincial bourgeois*, who had a number of factors in common, such as a family specialisation, particular horizontal and vertical relationships, a well-developed matrimonial strategy and precise techniques for transferring inheritance, all serving to raise their social standing and eventual entry into the ranks of the nobility.[5]

[4] For more detail regarding the interaction of the Neapolitan feudal tribunals with the various levels of power, and a comparison with the reality in Spain, see A. Di Falco, 'L'esercizio della giurisdizione feudale nel Regno di Napoli e nella Spagna moderna' *Rassegna Storica Salernitana*, II, 63-95 (2010).

[5] Cfr R. Moscati, *Una famiglia "borghese" nel Mezzogiorno e altri saggi* (Napoli: Edizioni Scientifiche Italiane, 1964).

An average family of landowners, with various estates distributed between Laureana and Agropoli in the district of Salerno, the del Mercatos traded with the capital in dried figs, a fairly lucrative business that allowed them to definitively emerge among the local bourgeoisie, with the acquisition of a doctorate in law by several members of the family, such as Giovan Cola.[6]

Born in Laureana Cilento on 3 June 1618, the young man was initiated into the magistrature out of respect for a family tradition which, in that particular sector, boasted a number of illustrious predecessors: his grandfather, of the same name, a person highly respected amongst the Neapolitan magistrature, for whom Giovan Francesco Sanfelice, on the day Giovan Cola junior was awarded his doctorate, reserved words of great esteem; his uncle, *Dominus* Francesco del Mercato, who conducted his activities predominantly in the ecclesiastic Governments, and another uncle, Francesco Antonio del Mercato, who crowned his career as secretary to the Sacro Regio Consiglio.

In 1640, Giovan Cola took his doctorate and in the following year, was approved to practise in the baronial offices of justice from the *Regia Giunta degli Approbandi*.[7] A member of the Regia Giunta degli Approbandi, namely the Chamber President, Giovan Camillo Cacace, offered to procure him a governorship, or to grant whatever his request might be, in order to find favour with the young man's uncle.

The fortune of Giovan Nicola was largely due to the relationships that he had woven since his university days with the Sanfelice family, from whom he had derived a brilliant career as governor, almost always linked with the feudal circuit leading back to the princes of the Rocca. The probity he demonstrated in the management of his mansions won him the benevolence of the people he served, and the repute and esteem he gained in high places were the basis for his subsequent passage into the service of the house of Doria d'Angri.[8]

The dynamics involving the personnel of the baronial offices of justice cannot be properly interpreted without due regard to the more general dynamics of the political interplay established between the Spanish crown, the feuds, the civil populace and the *togati* in the administration of the Kingdom of Naples. An important role in this context was played by the Neapolitan *Collegio dei Dottori* and in particular, its part in the defence of Neapolitan cultural autonomy with respect to the dominant power.[9]

[6] G. Cirillo, 'Generi contaminati. Il paradigma delle storie feudali e cittadine', in A. Lerra ed, *Il libro e la piazza. Le storie locali dei Regni di Napoli e di Sicilia in Età Moderna* (Manduria-Bari-Napoli: Lacaita, 2004), 193.

[7] The *Giunta* was established following the emanation of the Pragmatic *De Officialibus et his quae eis prohibeantur* of 28 July 1631, which for all those wishing to cover judicial roles of all levels introduced the requirement of a degree and an examination to be held before the *Giunta degli Approbandi*, consisting of three magistrates belonging, respectively, to the *Consiglio Collaterale*, the *Camera della Sommaria* and the *Sacro Regio Consiglio*.

[8] G. Cirillo, *Generi contaminati* n 6 above, 306.

[9] For an analysis of the role of the *Collegio dei Dottori* see I. Del Bagno, *Il Collegio napoletano*

The space that the *togati* had the opportunity to create for themselves within the Kingdom of Naples was broad, and in the 16th and 17th centuries they concentrated their efforts in the field of higher education, through political activity in the *Collateral Council*, in defence of autonomous interests of classes whose roots were linked with those of the formation of the Neapolitan judicial class.[10] There was no lack of energy on the part of the Spanish government to interfere in a more decisive manner in the arrangements for the training of the administrative classes, such as the Lemos reform project to reorganise the doctorate examination, or the actions to gain control of higher education in the late 1620s, which gave rise to fierce protest by the Neapolitan scholars of law.[11]

One of the most fervent opponents of the attempts by the *Visitatore* Francisco Alarcón to lead the kingdom's magistrature back to complete obedience to the crown was Carlo Tapia, who consistently stressed the centrality of the mediatory role of the *togati* in the various instances present in the State as a whole, as well as the ancient origins, prerogatives and powers of the *Consiglio Collaterale*. He was a firm upholder of the role of the magistrates as guarantors of the constitutional equilibrium of the system, demonstrated by their commitment to applying the King's law and their intervention against any infringement of it. Tapia was among the ministers in favour of the *Prammatica* of 1631, which contemplated a rigorous selection process for candidates to the offices of justice, based on proof of a profound knowledge of the *jus regni*.

As previously mentioned, Giovan Cola del Mercato undertook this examination in 1641, and was approved to exercise the profession at the baronial offices of justice, in the circuits of which he spent his entire career, managing to accumulate a knowledge base of primary importance, enhanced by his intensely pragmatic experience within the organs of administration.

The authority acquired in the field even led him to write a *Trattato de' Principi e loro uffiziali di giustizia e di guerra*, a *Commento agli Statuti del Cilento*, and a *Prassi giudiziaria e forense*, addressed to students of his profession. The latter work is of particular interest because it concerns the activities of the baronial governors, trapped as they were between the formal law detached from the reality of the underlying society, and an extremely flexible form of judicial practise, open to specific territorial interpretations which further complicated the achievement of the necessary certainty of the law, a need sharply felt in the *ancien regime*.

dei dottori. Privilegi, decreti, decisioni (Napoli: Jovene Editore, 2000).

[10] To this end, refer to I. Del Bagno, *Legum doctores. La formazione del ceto giuridico a Napoli tra Cinque e Seicento* (Napoli: Jovene Editore, 1993).

[11] On the attempts of the *visitatore* d'Alarcón to control education in the capital, refer to P.L. Rovito, *Respublica dei togati. Giuristi e società nella Napoli del Seicento* (Napoli: Jovene Editore, 1981).

III. The Barony of the Cilento in the 17th Century and the Neapolitan *Ius Regni*

The work of Giovan Cola del Mercato as governor was conducted entirely in the Cilento district, with a few incursions into the State of Cutri in Calabria. He also covered the role of *mastro di Fiera di Mercato Cilento* and was *ius patronatus* of the Venerable Chapel of San Michele di Laureana Cilento.[12]

The Barony of the Cilento, in Principato Citra, encompassed all the towns and villages between the sea and the Solofrone and Alento rivers, with the exception of the ecclesiastical feuds of Castellabate and Agropoli and their respective territories, which had their own constitutions and which only came to form part of the Barony in 1436.

The Barony originally included: Camella, Cannicchio, Copersito, Fiumicello, Galdo, Guarazzano, Laureana, Lustra, Omignano, Ortodonico, Palearia, Pietrafocaria, Pollera, Porcili, Prignano, Puglisi, Rutino, S. Mauro, S. Teodoro, Sessa, Torchiara, Valle and Vatolla. This was the content of the entire Longobard district of Cilento, over which Ruggero, son of Troisio the Norman, came to rule, the consistency and extent of which can be gleaned from the process of reintegration ordered by King Charles in 1266.[13] In his turn, the son of Ruggero, Tommaso, added the feuds of Atena, Casale Boni Riparii, Castelluccio, Corbella, Diano, Fasanella and casali, Magniano, Monteforte, Pantuliano (casale and civita), Policastro, Polla, Postiglione, Sala, S. Severino di Camerota and Sanza Serre to the Barony of the Cilento.

In 1305, after acquiring the feud of Padula, Tommaso founded the celebrated Certosa.[14] Following the crisis of the Sanseverino Princes of Salerno, the Barony underwent a significant process of dismemberment, which gave rise to an increase in the number of jurisdiction.[15]

The more than 40 manors that comprised the Barony were sold off individually, each with its jurisdiction, complicating the panorama of control of the jurisdictions and their efficacy, given that the attribution of a territory to each individual manor was considered highly controversial.

At the height of the modern era, the Barony of the Cilento came to comprise the lands of Rocca Cilento, Ogliastro, Eredita, Finocchito, Monte, Cicerale, Prignano (with the two villages of Melito and Puglisi), Torchiara and Copersito, Rotino, Carusi, Lustra, Santo Martino, Laureana, Matonti, Vatolla, Casigliano, San Mango, Valle, Castagneta, Santa Lucia, Sessa, Omignano, Porcili, Acquavella, Casalicchio, Galdo, Celso, Pollica, Cannicchio, San Mauro, Serramezzana, Capograssi, San

[12] To this end, see A. Di Falco, *Il governo del feudo nel Mezzogiorno moderno (secc. XVI-XVIII)* (Avellino: Il Terebinto, 2012), 304-305.

[13] P. Ebner, *Economia e società nel Cilento medievale* (Roma: Edizioni di Storia e Letteratura, 1979), II, 124-125.

[14] ibid 127.

[15] P. Cantalupo, *Pagine storiche nei Comentaria di Giovan Nicola del Mercato* (Acciaroli: Edizioni del Centro di Promozione Culturale per il Cilento, 2001), 79.

Teodoro, the hill towns of Chiova, also known as Montanari, Cosentini, Ortodonico, Fornelli, Zoppi, Montecorice, Perdifumo and Camella.

The tendency was to exclude Castellabate and Agropoli with their villages, the former because considered as a centre of ecclesiastical power, detached from the feudal body of the Barony, although territorially dependent on it, and the latter

> 'for the historic processes that led it to become a form of feudal entity diverse by origin and development, and for the fact it had remained separate and distinct from the Barony for around four centuries, until its aggregation in 1436'.[16]

Internal relations within the Barony were essentially governed by the statutes, that is to say, the municipal laws, granted in 1487 by the King of Naples, Ferdinando I of Aragon, to the representatives of the Barony, and confirmed by King Alfonso II in 1494.[17] Added to this main body of law a further 18 articles were granted by Prince Ferdinando Sanseverino, the last of the feudal lords to possess the entire Barony.[18] The laws, usages and customs of the Barony of the Cilento were destined to conserve their entire value for a very long time, even after the dismemberment of its territories and the establishment of the various feudal Barons.

The multiplicity of juridical orders with laws adapted to their local reality, each acknowledged by sovereigns and feudal lords alike contributed to the development of a vast array of citizen, provincial and rural statutes closely tied with local usage, in which the particular political communities legally established, in the official form contemplated by the order of each, its own constitutional and administrative structure, its own judicial procedures and its own rules of private law.[19]

In the Kingdom of Naples, the process of codifying the statutory laws reached the height of its development during the years under the Aragon Crown, in the second half of the 15th century, when the intervention of the Crown in its anti-feudal role was considerable, in terms of both extension and quality. This intervention, to the benefit of the lands, cities and state universities, was in the form of concessions in the economic, administrative and judicial fields, and a detailed set of internal rules on internal government concerning the functions, composition and election of local councils and executive bodies.[20]

In this context it is fairly evident that the preparation of whoever would be

[16] ibid 11.

[17] To this end, see F. Calasso, *La legislazione statutaria nell'Italia meridionale* (Bologna: A. Signorelli, 1929).

[18] P. Cantalupo, n 15 above, 8.

[19] C. Meo, 'La legislazione statutaria dei comuni irpini', in F. Barra ed, *Storia illustrata di Avellino e dell'Irpinia. L'età moderna* (Avellino: Sellino & Barra Editori, 1996), III, 337.

[20] ibid 337-338.

called upon to administer justice in the provinces of the Kingdom of Naples, at least at formal level, should contemplate a knowledge of these territorial differences, so characteristic of the Neapolitan judicial order and, necessarily, contemplate a specialisation in the particular statute of the territory in which they were called upon to serve. In this sense, the specialisations of the families, as well as almost always officiating in the same places, gravitating between the *universitates* of the estates of one or more barons, could be considered a reflection of this reality. The different customs, statutes and laws necessarily demanded a specialisation in order to properly comprehend the juridical peculiarities of the territories. After all, the teaching of law at the universities was theoretical and formalistic, whereas what went on in private firms was case-based, current and instrumental in the training of future generations of the order. Hence the notes written by those who held private lessons, or members of the family of the students, who preceded them in the exercise of similar offices, were considered essential teaching material to supplement the *exercitium*.

We begin to see the origins of this particular condition of the order in the Kingdom of Naples, a territory made up as it was of a mixture of juridical material and multiple influences, in the deep embedding of Longobard law in its provinces, which had survived the domination itself and become concurrent with Roman law. To this regard, in a volume dated 1854 jurist Gaspare Capone wrote that the edict issued by Lotario II in 1137 in an attempt to abolish Longobard law, had no effect in Italy this side of the Tiber, given the kingdom's allegiance to Lotario's great enemy, Ruggiero.[21]

During the Longobard domination, a law *d'indole nuova* arose known as *legge longobarda*, which, for many centuries, was concurrent with Roman law to the degree that Capone himself defined it

> '*nostro diritto comune e poscia origine in parte del municipale che fino a' primi anni del corrente secolo ci ha retto*'.[22]

With regard to the permanence and deep entrenchment of Longobard law, the jurist writes that it persisted in the Kingdom of Naples, alongside Roman law, right up until the 17th century.[23]

Bianchini writes that many of Ruggiero's laws which merged in the constitutions of Melfi in 1231, promulgated by Federico II, were of Longobard derivation, rather than Roman, in particular the procedural methodology in civil and criminal jurisprudence, in that they were conducted verbally, without written *libelli*.[24]

Longobard jurisprudence was itself considered, by those practising it, far

[21] G. Capone, *Discorso sopra la storia delle leggi patrie all'altezza reale del Principe D. Ferdinando Duca di Calabria* (Napoli: Tipografia di Gabriele Argenio, 1854), 91.

[22] ibid 32.

[23] ibid 79.

[24] L. Bianchini, *Della Storia delle Finanze di Napoli* (Palermo: Dalla Stamperia di Francesco Lao, 1839), I, 20.

better *noto e spedito* than Roman, which on the contrary they considered '*sì copioso ed intralciato che studiavasi appena da pochi giureconsulti*'.[25] After all, as Pecchia writes, in feudal practise it was widely preferred for matters regarding succession, because Roman law, contrary to Longobard law, did not consider the feud, and also because Federico, in the *in aliquibus* constitution, just as in the other *ut universis* '*alle romane preferì sempre le longobarde*'.[26]

From Ferdinand II – the so-called Catholic – onwards, the Barons of the Kingdom, on occasion of their frequent and generous donations to the sovereign, always claimed Longobard usages and the laws of the Kingdom of Sicily regarding the extension of succession up to the seventh degree of collateral kinship for the ancient and new feuds.[27]

Indeed, regarding the permanence of Longobard influence on feudal law we can observe that in Constitution 189, Federico II himself made clear reference to Longobard usages. For example, regarding female succession, spinsters living with their fathers were favoured over their married sisters if married according to French law, or their feudatory brothers without male heirs, even though first-born. However, this preference did not apply to those married under Longobard law, since according to that law their offspring had equal rights.[28] Again in the 17th century, the regent Tapia noted that traces of Longobard custom could still be observed in the settlement of feudal successions, as does Grimaldi.[29]

On the subject of the permanence of Longobard law in the Kingdom of Naples, Pecchia quotes a case worthy of reproduction in its entirety.

The reference is to the life of *Dottore* Giulio Ferretti, son of noble citizens of Ravenna, who after studying jurisprudence at the University of Padua and receiving the doctorate in law, served the viceroy Toledo in Naples. There he covered the role of *Uditore* in Principato Citra,[30] and later was appointed Commissioner General with sovereign power over the *fuoriusciti,* the political exiles who infested the Kingdom, before finally serving at '*Prefettura di Lucera e del Contado di Molise fino al 1667*'. With regard to this latter date, it can be argued that it is most probably a printing error, and that the correct date should be 1547, the year in which the terrestrial experience of *Dottore* Giulio Ferretti

[25] C. Pecchia, *Storia civile e politica del Regno di Napoli* (Napoli: Stamperia Raimondiana, 1783), III, 270.

[26] ibid, II, 317.

[27] ibid 320.

[28] G. Grimaldi, *Istoria delle leggi e magistrati del Regno di Napoli in cui si contiene la polizia delle leggi e dei magistrati di questo Regno sotto a' Romani, Goti, Greci, Longobardi e Normanni* (Napoli: Nella Stamperia di Giovanni di Simone, 1749), II, 269.

[29] Ibid.

[30] This is Pecchia's version; in reality Maffei, in the biographical reconstruction by Ferretti, talks of his service to the Viceroy with the title *Uditore Regio* as judge-governor of Irpinia, specifically *Principato Ultra*, to then move on, still with the title of *Uditore Regio,* to govern Capitanata and Molise, see D. Maffei, *Giulio Ferretti fra diritto romano e diritto longobardo nell'impero di Carlo V. Ricerche bio-bibliografiche ed un testo in anastatica* (Pratola Serra, Avellino: Elio Sellino Editore, 2003), 15-16.

ended.[31]

The works written by Ferretti include an essay on Longobard law, which were the fruits of an investigation he considered duty bound to conduct consequent to a dispute over which he was presiding in court, as *Uditore* in Principato Ultra. In the debate between the advocates of the parties, Doctor Mercurio Mercogliano, a citizen of Napoil, and *Dottore* Giammarco d'Atripalda, the former – writes Ferretti, as reported by Pecchia, '*ragionò pel suo cliente colle massime del diritto Romano*', while the latter drew out a small Longobard codex and stated:

> '*Domine secundum jus longobardum hic vivimus et secundum id judicatur, juxta consuetudinem hujus Regni, quae est optima legum interpres*'.

Upon hearing these words, Mercogliano, reports Pecchia, *'tacuit et voluntariam cum rubore sententiam contra se sumpsit*'.[32]

The work of Ferretti was published in Venice in 1537, whereas Pecchia dates the Venetian edition to 1595 but, in reality, a second edition was printed, according to Maffei, in 1599.[33]

Ferretti added:

> '*(...) et quod preferatur, ut dictum est, ius longobardum romano in dicto Regno Scicilie est tex. in Constitutionibus imperialibus in constitutione Federici imperatoris incipiente Puritatem in titu. De prestan, iuramento baiulis et camerariis, l. i., et per d. And. De Ysernia in constitut, predictis imperialibus in consti. incipiente Ut universis, in titulo De servando honore comitibus baronibus et militibus, ubi dicit d. And primo iudicari in dicto Regno Scicilie secundum constitutiones, postea secundum consuetudines, tertio secundum ius longobardum, quarto et ultimo secundum ius romanum. Et propterea utile fuit dictum libelllum contrarietatum compillari, ne stutdentes longo studio fastidirentur in dicto iure longobardorum*'.[34]

Pecchia, on his encounter and consequent reading of Ferretti's work, was surprised to find so many provinces which, still under Charles V, lived under *jure longobardorum* but even more so to find that even the celebrated English jurist Seldeno, was aware of what many jurists of the Kingdom still ignored; given that there was no law of principle that obliged subjects to live under *jure romano*, Longobard law was still in effect and assumed the validity of common law for those professing it.[35]

In reality, what Pecchia found was the abridgement of the *Puritatem*

[31] ibid 18.
[32] ibid.
[33] ibid 38.
[34] ibid 43.
[35] ibid 249-250.

Constitution in which Guglielmo II sanctioned the authority of the Constitutions and, in the absence of their application, the litigants could choose between that of Longobard and Roman common law.[36] This was because, as Valletta wrote on Longobard laws:

> *'(...) essendo durata la di loro osservanza fino dopo i Svevi, se ne inserirono molte non solo nel Diritto Canonico, ma nelle Costituzioni di Federigo II, altresì nei Riti della G(ran) C(orte) e nelle Consuetudini di Napoli, oltre quelle della Città di Bari, che hanno per autori i Longobardi medesimi*'.[37]

We learn from Valletta that even the *Consuetudini* of the city of Naples, gathered in various codices by the Archbishop of Naples, Filippo Minutoli, upon commission by Carlo II and published by in 1306, were made up *parte del Diritto degli Ateniesi, che sulli principj di Napoli ebbe vigore e parte del Longobardico avendo i Longobardi nelle Cittadi a Napoli vicine avuta la loro fede.*[38]

In his work on the history of the native or common laws, Capone refers to a compilation of Longobard laws, edited by a Benedictine monk in the 11th century, reputed to be the *vulgata* in three volumes celebrated for the widespread use made of it over the course of several centuries[39]

Valletta also clarifies that the reference to *common law,* made in the constitutions themselves, extended to the law that was most *embraced.*[40]

According to Valletta, discord reigned among the doctors in law, even as to which Roman law to refer to, given the presence of both the Justinian codex and the Theodosian codex. According to the author, the reference by Gugliemo II to Roman common law was to the *Breviario di Aniano*, which endured among the Visigoths, in *Iberia* and *Gaul*, along with the Theodosian codex.[41]

In agreement with the hypothesis of Valletta, that of Capone, according to which, among the most utilised collections of ancient law following the fall of the western empire, the principal one was the codex of Theodosian *il giovine*, the source continually used throughout the reign of the Goths, with the addition of a compendium named after its presumed author, the *Breviario di Aniano*.[42]

The doubt, according to Capone, arises for the period in which Italy was liberated by Justinian, and the *Pandette*, the *Codice* and the *Istituzioni* had already been published. Doubt which extends up to the 12th century, in that

[36] N. Valletta, *Elementi del diritto del Regno napoletano* (Napoli: Nella stamperia di Michele Morelli, 1776), 87.
[37] ibid 73-74.
[38] ibid 103.
[39] G. Capone, *Discorso sopra la storia delle leggi patrie*, n 23 above, 36.
[40] N. Valletta, n 38 above, 87.
[41] ibid 74-75.
[42] G. Capone, n 23 above, 24.

Roman law was used in the middle ages. He is sceptical regarding the observance of Justinian law after his death.[43]

While Roman and Longobard law remained the principal sources, save some additions of the French law to the latter, they gradually accumulated a series of other, Barbarian laws, such as, Salic, Repuarian, Alemmanic, and all the other people settled in Italy since the time of Charlemagne.[44]

Naturally, the burden of resolving the variety of legal sources that characterised Neapolitan law – between Longobard law, the Constitution of the Kingdom, the laws of the kingdom, the body of the statutes, privileges and civil law, the Neapolitan *consuetudini*, the rites of the *Regia Camera*, dispatches and decrees of the supreme Tribunals – fell to the Neapoplitan jurisconsults.[45]

Jurisprudence in southern Italy between the 16th and 17th centuries made great efforts to cleanse the legal order of the kingdoms of their Germanic influence; scholars of common law in the second half of the 18th century reassessed the incidence of Longobard law, to the point of considering it, as we have shown here, as the backbone of the *jus Regni* from the establishment of the Norman-Swabian monarchy.[46]

For example, in the early 16th century Matteo d'Afflitto, although a follower of Andrea d'Isernia who considered Longobard law superordinate to Roman, denied the possibility of recourse to it, and Roberto Maranta, with regard to the *Constitutio Puritatem* mentioned earlier, warned that preferring Longobard law to Roman law betrayed the sense of the constitution itself.[47]

However, sixteenth century jurisprudence was obliged to take into account the tenacious survival, even in proceedings, of institutions and geographical zones that contradicted the proclamation of the decline of Longobard law in the Kingdom. In this regard, Miletti refers to the case of a late 15th century decision of the Sacro Regio Consiglio, which, in its doubt, opted in favour of the Lombardic *glossa* over that of the *Digestae*.[48]

The persistence of Longobard law in many districts of the Kingdom is documented by Carlo Tapia in his *Ius Regni Neapolitani*, published in Naples in 1605, and was likewise confirmed by Marcello Marciano a few decades later, in reference to a number of districts in Abruzzo and Terra d'Otranto. But it was Francesco D'Andrea who launched the idea that Longobard law, although it had long disappeared *ab aula*, truly was the *ius commune*, inspiring a number of

[43] ibid 25.
[44] ibid 29-30.
[45] ibid 125.
[46] M.N. Miletti, 'Peregrini in patria. La percezione del ius regni nella giurisprudenza napoletana d'età moderna', in I. Birocchi and A. Mattone eds, *Il diritto patrio. Tra diritto comune e codificazione (secoli XVI-XIX). Atti del convegno internazionale, Alghero, 4-6 novembre 2004*, (Roma: Viella, 2006), 410.
[47] ibid 413.
[48] ibid 420.

fundamental Frederican constitutions.[49] This call back to the Longobard roots of common law, according to Miletti, was not casual, as it heralded the first signs of an interpretation of the *Ius Regni* at a national level.[50]

The shift in the late medieval sources, guided by juridical science, the accumulation of new laws, dictated by contingency, the lack of a coherent, corroborated design, and above all, the absence of an authoritative decisional centre, that, according to Miletti, opened up broad margins for manoeuvre to creative jurisprudence. This managed to set itself up as the centre of gravity of law production, contributing to the consolidation of the common law within the judicial courts. As Manna reminds us, in the conclusion to his work on jurisprudence and the courts of Naples, the real contribution, in terms of originality and independence, made to southern Italian juridical culture came from practises which, against a historically non-native legislation, imposed an entirely Neapolitan interpretation.[51]

IV. The Longobard Heritage in the Regulation of Judicial Affairs

The influence of the Edict of Rothari, promulgated in AD 643, and the ensuing additions made by Grimoaldo, Liutprando, Rachis and Aistulf, which led to the *Edictum regum longobardum* – the codification of the *antiquae leges patrum*, contained consuetudes and sovereign dictates on which even Roman law had great influence –, was destined for such extraordinary longevity, that almost a thousand years later, several of the consuetudes were still being applied in the Kingdom of Naples. This influence was manifest particularly in private law in relation to individual assets and civil contracts.

The Historical interest of the permanence of Longobard consuetudes in Southern Italy, very much felt by law historians in the early twentieth century, was the subject of heated debate, rather like the one between jurists of the Kingdom of Naples in the 18th century, in the pages of the magazine *Archivio Storico per la provincia di Salerno*.

One of the 20th century's leading scholars of legal history, Romualdo Trifone, put forward the hypothesis that, in relation to the Salernitana area, the civil customs of these peoples were overwhelmed by Longobard consuetude, to the point of '*trasformare gli abitanti del Principato in altrettanti longobardi*'.[52] Trifone's polemic reference was to the work of Luigi Genuardi, *La lex consuetudo romanorum nel principato longobardo di Salerno*, published in the same magazine in 1916, in terms of which, Andrea d'Isernia provided testimony to

[49] ibid 423.

[50] ibid 424.

[51] G. Manna, *Della giurisprudenza e del Foro napoletano dalla sua origine fino alla pubblicazione delle nuove leggi* (Bologna: Arnaldo Forni Editore, 1999), 240.

[52] R. Trifone, 'La lex consuetudo romanorum nelle carte salernitane del XIII secolo' *Archivio Storico per la provincia di Salerno*, I, 11 (1932).

the fact that in the first half of the 14th century, there were people living in accordance with Roman law and Longobard law, which was in effect, the reality of the situation.

Trifone considered that rather than a superimposition of Longobard and Roman usages, and that the reality was a hybrid of the older and newer jurisprudence, somewhat different to that of other territories, despite experiencing the same domination.[53]

Through his scrutiny of a number of documents, this eminent jurist demonstrated how even in 13th century judicial proceedings in the Salerno district, there were people who declared to live in accordance with Roman law in order to have a specific consuetude inherent to the juridical condition of women applied to their case. Indeed, according to Roman law, in relations governed by civil law, women enjoyed a number of advantages not even acknowledged to men, and very different to cases judged under public law, in which there was great inequality between the sexes. According to Justinian law, which had very much tempered the differences between men and women, women could assume custody of children if they so wished, in the absence of a testamentary guardian. As Trifone explains in his analysis of the documents, at a consuetudinal level, the law went further; in that, in the cases he reports, women acted in contracts offering sureties to the counterparts to assure fulfilment of the obligations assumed, this consuetude increasingly serving to attenuate the juridical differences between men and women.[54]

For the Longobards, women were not allowed the levels of emancipation permitted by the consuetudes, but on the contrary were subject to perpetual tutelage and forbidden from disposing of their assets with any degree of autonomy, in other words, without the intervention of the *mundualdo*.

Trifone reports that, in the Salernitana area, usages arose that were more flexible than those typical of the Longobard world, such as, for example, the affirmation of the possibility for husbands to create testamentary *mundualdi* in the place of the legitimate ones, to act according to their will after their death with the aim of safeguarding their wives against any abuse of the *mundio* by those designated by law. In Salernitana practise, women were left virtually free to dispose of their assets, and above all, from the moment in which this practise was established, they were free to consign the charter transferring the *mundio* directly to whom they preferred.[55]

Before this Salernitana *degeneration*, according to Longobard law, women could not assume or alienate obligations, or marry without the consent of the *mundualdo*.

In Northern Italy, Longobard marriage maintained intact the rights of the husband to the full extension of the primitive form, even in the absence of a

[53] ibid 13.
[54] ibid 18.
[55] ibid 19.

formal constitution of the wife's mundio, but on the other hand was subject to profound developments in the area of the original relations of the woman and those of her husband.[56]

However, we can see how, even at the height of the modern era, the diffusion of the practise of safeguarding the *mundio* in the Principato Citra area was anything but in disuse or attenuated, which in itself is testimony to the currency of Longobard consuetude and, therefore, of people who at the moment of stipulating a contract, declared themselves as living under Longobard law. This is simply to remark, once again, that generalisations or the construction of models with the aim of facilitating the interpretation of the complex reality of the Kingdom of Naples in the *ancient regime* do not always serve their purpose.

Testimony of the presence, in a number of geographical areas of the Kingdom of Naples, of ancient consuetudes governing a number of juridical institutes in the provinces at the height of the modern period, is given by the collection of *responsa* written by Giovan Nicola del Mercato in his long career as feudal governor. The collection reports a case in which the representative of a woman living under *iure longobardo* appeals against the figure of the *mundualdo* during the mid-16th century in the territory of Laureana Cilento.[57] According to Longobard law, a married woman had to be assisted by her own *mundualdo*, not only in the disposal of her *quarta*[58] or own assets, but also when consenting to deeds of disposal made by her husband in relation to assets either shared or owned by him.[59]

Thus, the presence of so many dominations in the south of Italy was at the base of the process of stratification of the juridical usages in the sphere of private and family law.

The persistence of these conventions which so heavily conditioned the world of judicial and patrimonial relations of the provincial populations of the Kingdom of Naples, and thereby, the everyday reality of society, made necessary, if not indispensable, the presence of a body of judicial officials with a solid grounding and equally solid knowledge of the *Ius Regni*.

In any attempt to define its architecture and peculiarity, one had to take account of the effect of more than a thousand years on its consuetudinal matrix. The profound break determined by the advent of *ius longobardorum* had led to the beginnings, in the south, of a specific national order, with its own specific

[56] P. Vaccari, 'Aspetti singolari del matrimonio nell'Italia meridionale' *Archivio Storico Pugliese*, I-II, 43 (1953)

[57] Archivio di Stato di Salerno (from now on Assa), Archivi Privati, del Mercato di Rutino e Monteforte, b. 73, fasc.lo 1, ff. 217r – 220t.

[58] Known in Longobard law as *morgencap*, namely the dowry the groom gave the bride on their wedding day, consisting of a series of series of assets and land.

[59] P. Vaccari, n 56 above, 44. For a more detailed analysis of this process, see A. Di Falco, *La pratica decide non già la teorica. Giovan Nicola del Mercato, la Baronia di Cilento e il buon governo del territorio*, (Roma: Ministero dei Beni e delle Attività Culturali e del Turismo Direzione Generale degli Archivi, 2016).

and autonomous framework. This was the principal cause of the great debate that involved the Kingdom's jurists, in the late 17th century, and which continued throughout the following century, on the question of the continuity or discontinuity of Roman law.[60]

That the Longobard presence in southern Italy left indelible marks on many aspects of the judicial system was the conviction of one of the most eminent southern Italian jurists of the 18th century, Domenico Alfeno Vario, who, in siding with the idea of discontinuity, remarked how both Ruggero II and Guglielmo II had permitted the survival of Longobard law by establishing a hierarchy of sources of law that gave precedence to the *Costituzioni regie,* to then make recourse, in case of *lacuna legis*, to the consuetudes and, lastly, to the Roman-Longobard law defined *monimenta iuris communis*.[61]

With regard to the laws to apply to each individual case, Giovan Battista de Luca, in his work 'Il dottor volgare', specified that the order of hierarchy should be the opposite to that given by the various types of existing laws, ie that the last should be first.[62]

With the rediscovery of Roman law following the finding of the *Digesto*, there was a revival of that regulatory tradition even in the Kingdom of Naples, in the form of the *ius commune*, even though, as we have seen, it was neither as widespread nor pre-eminent as in the past.

To this regard it was precisely Pecchia who noted how the consuetudes of the cities of Bari, Aversa, Capua, Catanzaro, Amalfi, Gaeta and Naples were the product of Longobard laws.[63]

To administer law in the Kingdom, knowledge of the Pragmatics, Constitutions, rites and statutes in effect within it rose to the level of *conditio sine qua non*, in order to avail it of the know *how* necessary for the good government of the territory. This was a need strongly felt in the ministerial circles of the Kingdom, more sensitive to the judicial function and the capacity to combine juridical doctrine and practical experience.

Based on what we can glean from the civil and criminal practise most in vogue amongst jurists, all this was made necessary by the priorities of the historically precedent legislation. This is one of the most relevant aspects in the juridical world of the *ancien regime* that contributed greatly to a reinterpretation of the very concept of absolute State, understood as sovereign State, in which the king's law took precedence over any other. The problem arose when the king's law appeared lack any regard to specific cases. Where they encountered such shortcomings, the magistrates were legitimised in deviating from sovereign

[60] I. Del Bagno, *Saggi di storia del diritto moderno* (Salerno: Laveglia Editore, 2007), 31.

[61] ibid 32, fn 55.

[62] G.B. De Luca, *Il dottor volgare overo il compendio di tutta la legge Civile, Canonica, Feudale e Municipale nelle cose più ricevute in pratica; moralizato in lingua italiana per istruzione e comodità maggiore di questa provincia* (Roma: Nelle stamperie di Giuseppe Corvo, 1673), 91-92.

[63] C. Pecchia, n 25 above, I, 250.

decree and reviving a particular rite in their sentences.[64]

In the preamble to his work addressed to the judges of the royal and Baronial Courts regarding the choice of the particular law to apply to a particular case, Tommaso Briganti suggested the following way of proceeding:

> '*se né dalle prammatiche né da' riti, né da' capitoli potrò trarre lume, mi resterà d'indagarlo nelle costituzioni del regno, che da noi devonsi osservare. (…) In mancanza poi di tutte le leggi del regno, (…) mi converrò indagare la discifrazione del mio articolo dalla ragion comune e dalle leggi romane*'.[65]

The significant fact, above and beyond what he leads us to understand as the means of approach to the law by the officiators of justice, is that it highlights the living, still current, and thus never modified the character of ancient laws, such as the constitutions and statutes, which, still in the late 17th century, governed relations within the society of the Kingdom of Naples, wherever there were no more recent and specific laws promulgated by the sovereign applicable to any given case.

In the light of all this, it becomes easier to understand the sense of the reform of 1631 concerning the need to subject any person aspiring to the offices of justice to an examination, to demonstrate their knowledge of the laws governing the Kingdom.

In addition to this were the territorial declinatures of the rules governing the relations of the populations at citizen level, which were the fruit of the statutory laws discussed in the preceding pages. It is understandable that wherever the dictates of law, whether regal or common, came to be lacking, the activities of the judges attempted to bridge the gaps.[66]

Naturally, the judgments of the lower courts did not have, nor could have had the power of the law promulgated by the Neapolitan supreme courts, or the *collegiate* courts.

When for any single case the laws, and hence the decisions of the supreme courts, came to be lacking, the last resort was usually provided by doctrine that originally guided the magistrate in his decision.

V. The Source: *Praxis Judiciaria et Forensis*. A Useful Expedient for the Officiators of Justice

The administration of justice, just as the administration of foreign policy

[64] M. Fioravanti, 'Stato e costituzione', in M. Fioravanti ed, *Lo Stato moderno in Europa* (Roma- Bari: Editori Laterza, 2002), 12-13.

[65] T. Briganti, *Pratica criminale delle corti regie e baronali del Regno di Napoli* (Napoli: Vincenzio Mazzola -Voccola, 1752), I, 32.

[66] ibid 34.

and the army, was one of the bases on which the modern State was constructed. The slow but inexorable work of *reductio ad unum* aimed, on the one hand, toward the constitution or reconstitution of the central and supreme organs of judicial authority, took a fundamental role in the process of the unification of law, contributing to the uniformity of the interpretation of procedural law. On the other, the reform of the ordinary jurisdictions of first instance proved a more arduous task. In the attempt to reduce the jurisdictional powers of the feudal barons, the increase in action by the central courts to assume jurisdiction for itself over cases of feudal jurisdiction, and hence the limitation of feudal competence, was justified by their poor levels of policing and jurisprudence, particularly in criminal matters, and therefore it was established to entrust the exercise of jurisdictional functions solely to expert judges, thereby limiting the right of the feudatories to appoint the judges of the feudal territories.

A fundamental step in this direction was that of forming a central body of officials destined to administer justice within the feudal tribunals, who through the uniformity of the training they received, oriented the interpretative phases of feudal procedure always with reference to a single order, that being the *jus regni neapolitani*.

With the promulgation of *Pammatica* XXIII *de Officialibus et his quae eis prohibeantur*, dated 28 July 1631, the emphasis was placed on the importance of verifying the theoretical and practical preparation provided by their *exercitium*, of candidates for the administration of justice in the tribunals of every degree and order of the Kingdom of Naples. The examination, to be taken before the *Giunta degli Approbandi*, was open exclusively to post-graduates of the Neapolitcan College or an approved foreign university, who had to demonstrate their knowledge of the Pragmatics, the Costitutions, rites and *Capitoli* of the Kingdom.[67]

To practise in the offices of justice in the Kingdom of Naples, the acquisition of that specific know-how, which only experience in the cogs of the bureaucratic-judicial machine of the kingdom could give, was of fundamental importance. Here we are talking of what was usually defined by the term *exercitium*, and which represented the indispensable factor for acquiring an adequate knowledge of the *jus Regni* and to develop sufficient *peritia*,[68] as well as the element of discrimination between the real doctors of the law and the mass of mere pettifoggers. It was an essential requisite in compliance with the affirmed principle

[67] The examination envisaged that the three ministers comprising the Junta presented the candidate with 'two cases, one criminal and the other civil to study for twenty four hours; they then heared the report on the Facts and reasoning of the Sentence promulgated in them, and judged the capacity demonstrated by the candidate: the judgements were *Judicatus Magnae Cauriae Vicariae* (the highest level), *Regias Audientias, Regios Judicatus, sive assessoratus, Baronales, quinquaginta focularia* (which was the lowest level)'; P. Troyli, *Istoria generale del Reame di Napoli ovvero lo Stato antico e moderno delle Regioni e Luoghi che l'Reame di Napoli compongon, una colle loro prime popolazioni, costumi, leggi, polizia, uomini illustri e monarchi* (Napoli, 1752), IV, 196.

[68] I. Del Bagno, *Legum doctores* n 10 above, 145.

of modern jurisprudence, that in addition to theoretical knowledge, one also has to have sufficient practical experience.[69]

To meet this need, manuals of forensic practise (*praticae*) began to appear, the diffusion of which reached their peak in the 16th century, coinciding with the affirmation of the hegemony of the state apparatus, of which they represented the doctrinale architrave and one of the major contributors to that hegemony. The diffusion of the *praticae* continued on through the 17th and 18th centuries[70] and the intent underlying their publication and diffusion in civil and criminal proceedings was evident: to homogenise procedural standards and the interpretation of the laws in order to transcend the existing curial syncretism, especially in the provinces of the Kingdom of Naples.

After all, the problem derived from the very composition of the Kingdom's juridical order in the modern era, characterised by legislative heteronomy and stratification, in which the ancient laws, never having been touched by more recent modifications, could simply be dusted off and applied by the magistrates at any time, giving them ample margin for manoeuvre in any ruling, not being bound, amongst other things, by the obligation to motivate their sentences. However, it must be added that the activities of the judges also aimed to mitigate the penalties contemplated by laws promulgated many centuries earlier, which served societies founded on different values, and to adapt them as best they could to the demands of the societies in which they operated. It suffices to consider, that in a population of warriors such as the Longobards, a great deal of importance was given to a person's word, and so one of the most severely punished offences was falsehood or not being true to one's word, with punishments ranging from the amputation of a limb to the death sentence.

From the introductory pages of the manual written by Giovan Nicola del Mercato, one can grasp the sense of what we have discussed up to this point with regard to the difference between formal and practical law, and the need to avail of officiants sufficiently prepared to cover the roles of justice

As he wrote:

> '*Practica attenditur, et vera interpretatio dixit quae sumitur a practica (...) Ideo inter munera collata mihi assessoratus et populorum regimina, totaliter inespertos capitaneos eorumque locutenentis et inscios actuarios reperisse ex quo tempus in cognitionem causarum distribuendum necesse semper habui, illud consumare in corrigendis eorum erroribus et in eorundem erudictione qui molestissimus assidui mihi fuit cum in tantis minutijs versari contingisset; Hinc actuarij SRC debent esse examinati et aprobati ut refert Tapia lib. 2 Iuris Regni, fol. 164, sic et caeteri saldem idonei converit esse, sed hoc barones non audiunt et sufficit haberem*

[69] M. Sbriccoli, 'Giustizia criminale', in M. Fioravanti ed, *Lo Stato moderno in Europa* n 64 above, 174.

[70] ibid 175.

assicuratum Attictum eius'.[71]

Even del Mercato bore witness to the widespread ignorance amongst the captains of justice, lieutenents and actuaries he had encountered in his many years of experience.

> '*De quibus aliquae legum doctores de quibus da actuarijs qui nihil quo ad ius attinet, sapiunt edocti, in ijs formulis absquae; iure pertinaces effecti nil a dere vel immutare sciunt, et cum casus praeter illas evenit, dicunt causa nova est, et articulus fortis ex quo illum non inveniunt in eorum formulario, cum quo fastosi tripudiant absquae scientia maximis in Gubernis non nulli judicis officium est, ne judicia elusoria fieri constigat.*
>
> *Ut ab hoc discrimine pedes evellerem ego Joes Nicolas de Mercato a Lauriana Cilenti exa argine anfractorum juditiarionum vario tempore observatorum tu in progressu ordinis iudiciarij et ne du ut de caetero laborem minus scatirem: sed ut actui et reo; judicius inespertis satisfacerem hanc Praxim, nostra diligentia cumulavitus*'.[72]

The manual of Criminal and Civil Practise offers an interesting *excursus* into the theory and practise of baronial justice, addressed as it is to those who would be called upon to administer it.

VI. Legal and Forensic Practice: Doctrine Between *Jus Commune* and *Jura Propria*

The list of contents of the treatise written by Giovan Cola del Mercato gives us an idea of the matters that demanded continual comparisons between doctrine and the laws of the Kingdom.

It consists of five volumes organised thus: the first in two parts, one entitled *De introductione et ordine totius judiciariis processus* and the other consisting of a *libello* entitled *De causis prohibitis officialibus baronum*; the second entitled *De appellationibus*; the third *De Arbitris*. The fourth consists of *Miscellanea praxis de juditiis quae summarie trattari solent* and the fifth is devoted to *Praxis Criminalis totius ordinis processus, tam absente quam presente*.

Our attention is immediately drawn to the subject matter of the *libello* in the first volume, concerning cases not falling within the sphere of competence of the baronial officials. This specification was necessary given the infinite potential for conflict that continually arose between the various peripheral magistratures regarding their competence per offence, the consequence of the

[71] n 57 above, b. 69, ff. 2r.
[72] ibid.

absence of any fixed reference standard. It was for this reason, as well as to better define the scope of their actions, that del Mercato felt it opportune to comment on the limits imposed on the activities of the baronial governors.

Their competence was excluded for offences against the State, *nec de appellationibus officialium delegatorum regiarum, et de officialibus fraudantibus Regiam Curiam nec de feudis quaternatis, nec de crimine false monetae*.[73]

The baronial officials, likewise, could not dispense torture *ex processu informativo*, nor *fuorgiudicare* (try *in absentia*), *cum brevitate termini dierum XV*, in case of murder by *scoppetta* not being authorised, in this case, to proceed or to commutate sentence.[74]

This exclusion was the consequence of a pragmatic law promulgated in 1647 which, in the case of crimes involving firearms, granted special mandate *omni appellatione remota* to the Vicaria and the Regie Udienze, with the pre-eminence of the Gran Corte della Vicaria, and with reduction in the term of 15 days;[75] this, in effect, modified the previous legislation that introduced the obligation for the state governors to produce monthly reports on crimes perpetrated with firearms, exempting the baronial governors from this obligation.[76]

Based on what was established law and doctrine, del Mercato goes on to list the further limits and exclusions of the baronial governors: non-interference in spiritual matters; prohibition on granting licenses to impose taxes on the universities and a prohibition on proceeding to compose fiscal matters; prohibition to reserve or promise to reduce a sentence or conviction; prohibition to define terms of exile or other terms at the discretion of the baron in a sentence; exclusion of competence over cases relating to the nobility; prohibition on altering the will of witnesses or imposition of the death sentence.[77]

Naturally, within the same territory, the baron could not avail himself of two officials of the same kind, and if an official were to be disturbed in the exercise of his jurisdiction, he could proceed himself to arrest the perpetrator, in compliance with the prevailing doctrine (Tapia), but also in accordance with the contents of the foreword to the Statute of Cilento.

Del Mercato's attention, as governor to the territorial dimension, derived from the fact that the roles he had covered had almost always been within the territory of the Barony of Cilento.

The statutes represented a defining element in the process of territorial identification and a number of them were extended in the first half of the 16th century, in particular for strategic zones such as the territories of the princes of Salerno, the Sanserverino, in that they were an important element of connection

[73] n 57 above, b. 69, fasc. 25, f. 147v.

[74] ibid fn 148r

[75] Prammatica V 'De Ictus scopictae' *Nuova Collezione delle Prammatiche del Regno di Napoli* (Napoli: Stamperia Simoniana, 1804), VI, 112-113.

[76] Prammatica IV 'De Ictus scopictae', in *Nuova Collezione delle Prammatiche del Regno di Napoli* n 75 above, 111-112.

[77] n 57 above, b. 69, fasc. 25, f. 148r.

along the route for the Calabrie.

As regards the Barony of Cilento, in 1493 the Aragonese sovereigns had granted the Statutes the moment the Barony came back under control of the crown, in accordance with a broader anti-baronial policy aimed at promoting local autonomies coordinated with the united principles of the Kingdom of Naples.[78] Subsequently in 1531, the Sanseverino family supplemented the preceding statutes with a new deal in order to legitimise the dominion of the family, eliminating any form of agreement contained in the previous ones and extending them, since they were lacking in provisions for a number of matters.[79]

Thus the intervention of the Sanserverino family tended to strengthen the sphere of administrative law of the Barony of Cilento. The supplement of 1531 aimed to improve discipline of the activities of the governors, assessors and captains. It established for example, that vice-princes (governors), assessors and captains should hold office for one year, and, just as the majority of the other territories, render account of their actions, or to be judged at the end of their term. This was still in the harmonisation phase of administrative law in the peripheral zones, initiated by the Aragonese sovereigns.

Indeed, the aim of the Aragonese statutes was to standardise administrative law in the peripheral communities, by providing general regulations on municipal elections, the functions of the offices and citizens councils, on the administration of taxes and public assets, and on the competence and remuneration of public officials. Statutory law mainly concerned the cities and territorial States, sanctioning the passage from the oral consuetudes to written laws subsequently ratified by the titled baronage, and later by the *Camera della Sommaria*.[80]

The statutes were a reflection of the socio-economic interests and life of the communities, regarding matters such as the distribution and cultivation of the land, the conservation of the forest heritage and pastures, the prices of the products of the local leather industry, the services of artisans or the prices of agricultural produce, fish and milk, workers' salaries and damages to private or collective property.[81] Naturally, the balance of their priorities differed according to the particular territory of reference.

While it is a historically accepted fact that the organic compilation of the statutes dates back to the second half of the 15th century, Ebner recognises the signs of an earlier, initial unification of the consuetudinary laws, in the *banni dei baiuli*, highlighting the use of expressions in disuse for the period, or prices and currency dating back to earlier times.[82]

[78] P. Ebner, *Economia e società* n 13 above, I, 362-363.

[79] G. Cirillo, *Spazi contesi. Camera della Sommaria, baronaggio, città e costruzione dell'apparato territoriale del Regno di Napoli (secc. XV – XVIII)* (Milano: Guerini e Associati, 2011), I, 236.

[80] ibid 235.

[81] P. Ebner, *Economia e società* n 13 above, 365.

[82] Such as for example the value of the penalty expressed in *augustali*, the gold coin of Federico II, ibid 364.

In the administrative and jurisdictional balance, the *corti della bagliva*, almost always possessed by the universities for the competence attributed to it, very often came into conflict with the feudal jurisdiction of the governor or other *corti della bagliva* arising, following the twinning of other universities in the same territorial State.

The investigation of all offences committed by the university administrators, such as *sindaci, camerlenghi, baglivi*, etc during their administration, was not the competence of baronial officials, but rather, as del Mercato reveals, came under the jurisdiction of the Court of the Vicaria, in compliance with rite number 49. This in effect specifically contemplated investigations of the excesses of the officials of other places, exclusively, if committed in the exercise of their offices; a rite which, although promulgated at the times of Queen Giovanna II, still found application in the 18th century. The competence of the Court of the Vicaria could also be extended to offences and violations perpetrated by the baronial officials, in that the feudatories did not have the faculty to prosecute their own officials.[83]

The rites of the Vicaria represented the procedural reference for civil and criminal trials in the lower courts of justice, both royal and baronial. Thanks to them, the baronial governors were able to orient themselves in the veritable jungle of laws and doctrinal interpretations accumulated over the centuries, and not always unequivocal in relation to individual cases. However, the reality was not exactly as it seemed.

So, what were the appropriate coordinates to avoid losing oneself in this confused panorama? We find the answer in the work of Briganti – author of one of the most widely used manuals of judicial practise in the 17th century – who recommended six useful rules for orienting oneself in cases of doctrinal conflict.

First and foremost, according to the author, one had to be intelligent enough not to choose the ideas of a foreign jurist as the model for trying a usage of the Kingdom of Naples, because their doctrine would only be coherent with the usages and statutes of their own state, or with the tenor and form of Roman law, not considering the many laws of 'our Kingdom' that had corrected, adjusted, or abolished Roman law.[84]

According to Briganti's first rule, one always had to adhere to the most recent doctrine, developed from new interpretations and treatise.

The second rule consisted of establishing which, among the conflicting doctrines, was the most solidly grounded in the principles of law and sustained by logical reason, in that, since the opinions of the *dottori* had only probable,

[83] G. Grimaldi, *Istoria delle leggi e magistrati del Regno di Napoli, in cui oltre de' riti della Gran Corte della Vicaria compilati per ordine della regina Giovanna II, si contiene la polizia delle leggi e dei magistrati di questo Regno sotto al dominio del re Alfonso I e Ferdinando I* (Napoli: Nella stamperia di Giovanni di Simone, 1752), 58-59.

[84] T. Briganti, *Pratica criminale* n 65 above, I, 54.

not authoritative power, the law applied, at least, had to be sustained by reason. Naturally, noted Briganti, to achieve this, the user had to be adequately trained and prepared.

If the conflicting opinions were very much in the balance, and here we introduce the third rule, one had to establish which of these opinions were the most authoritative, basing this judgement on the *curricula* of the authors.

The fourth rule contemplated that in the cases of conflict between doctrines, in cases related to ecclesiastical proceedings, one should adhere to the canonical doctrine.[85]

Briganti's fifth rule established that in cases of conflict between *dottori*, one should take the same side as the Church.

The sixth rule consisted of determining at what age the *dottori* had elaborated their doctrine, because, in Briganti's opinion, since it was impossible that a person did not change opinion at least once during the course of a lifetime, the most authoritative doctrine must certainly be written late in life.[86]

These were Briganti's rules for following the twisted path of justice rather than crawling in the darkness of the *folti tenebre*, this being the most difficult part of the profession of a jurist, since the number of the *quistioni* was truly immense and destined to increase as the world grew.

VII. Criminal Practise. A True Testimony: The Trial of the Brothers Di Costanzo

Thanks to the unique records of del Mercato, we have a real case that gives us the opportunity to verify whether the formal dictates given in so many manuals of civil and criminal legal practise were or were not slavishly observed, and whether they found an effective correspondent in terms of the imposition of penalty.

They also offer the chance to understand the procedure and reasoning underlying the sentence of a Baronial Court judge, as well as the doctrinal references applied and the style of justice most influential on the *curia* itself.

This opportunity is offered by the trial of Agostino di Costanzo, a citizen of Tropea in the province of Catanzaro, who had embarked as a seaman on a tuna fishing vessel with its home port in Agropoli, Cilento.[87] From the statement of the facts given by the governor, an argument had started in the hold of the vessel between Agostino and his brother Costantino, which quickly assumed somewhat violent tones. Agostino, without much forethought, picked up a blunderbuss, and his brother, frightened by the gesture, tried to take cover in

[85] ibid 56.

[86] ibid 59.

[87] The centre of Agropoli, possessed by Ferdinando Sanseverino, prince of Salerno, after the rebellion of the latter passed to the *Regia Curia* and was subsequently sold, in 1533, to Giovanni de Aierbo, for the sum of five thousand ducats.

the hold. At this point Agostino fired a shot from the *scoppetta* (blunderbuss) toward the closed door of the hold, which perforated the door and slightly injured his brother Costantino.[88]

Governor del Mercato, ordered the arrest of the offender at the Agropoli courts of justice, which fell under the jurisdiction of the Duke of Laureana, Giovan Francesco Sanfelice, and began the evidential phase,[89] by hearing the injured party, Costantino, first.

The offence in question contemplated the possibility for the court to proceed *ex officio*, that is to say, without presentation of a complaint. The Baronial Court was authorised to proceed *ex officio*, according to the laws of the Kingdom, as del Mercato himself writes, '*in omnibus delicti delictis in quibus imponit pot. pena mortis civilis, vel naturalis aut membris abscisio ex cap. Regni*'.[90] Amongst other things, the case in question referred to rite 68 of the Vicaria, in that it involved the letting of blood during a fight caused by a stick or a stone or in any other way. What is more, the specific case reported by the governor of Cilento, involved a shot fired from a blunderbuss with intent to cause harm, even though without serious consequences, an offence for which the death sentence was contemplated according to *Prammatica* I entitled *De Ictus scoppittae*, in addition to a penalty of a thousand ducats, according to the *Prammatica* promulgated by the Duke of Medina in early September 1638.

The case presents the full scope of what was the singularity of the Kingdom of Naples, namely the declination of the ordinary legislation and the general rules, according to geographical location, in that it had to take into account the particular settlements reached between a lord and the community and statutes of the reference territory.

Indeed, as del Mercato reports with regard to the possibility of proceeding *ex officio*, reserved for certain types of offence, there were a number of limitations imposed by chapter XLV of the Statutes of Cilento.[91] As opposed to the Vicaria which could proceed *ex officio* at its discretion, the lower courts, as Briganti notes, were obliged to adhere to the Constitutions, Rites, Capitulations and Pragmatics.[92]

Though not part of the territories of the Barony of Cilento, Agropoli adopted its common law and therefore, even in that place it was not possible to proceed *ex officio* in the absence of a complaint.

The institute of *Accusatio* was much more relevant in cases of criminal

[88] n 57 above, b. 73, fasc.lo 1, ff. 170, Casus 4 August 1665.

[89] The evidential phase – a sort of preliminary investigation – was very important for the purposes of the trial, also because as Briganti notes, the sentence depended on its quality. The case in question came under the bracket of a *criminal* trial and, to that regard and based on the manuals of judicial practise most widely used by the baronial officials, once the complaint, or simple accusation had been examined with all possible diligence by the governor or captain, one had to proceed with the *informatione* for the purposes of a successful trial.

[90] n 57 above, b. 73, fasc.lo 1, ff. 170.

[91] n 57 above, b. 65, fasc.lo 1, *In delicto qualiter procedetur*, ff. 266v.

[92] T. Briganti, *Pratica Criminale* n 65 above, I, 95.

offences, to the degree that del Mercato dedicated an entire chapter of his manual to the subject.

> '*Accusatio est remedio ordinarium, Inquisitio extraordinarium; (…) Accusatores sunt necessariis qua sine accusatores nemo damnatus*'.[93]

The plaintiff making the accusation was the injured party, and without his action there could be no judgement and therefore no conviction; in the same way as for *ex officio* which was not always practicable, the absence of complaint by the injured party meant that one of the three parties in a criminal trial was lacking.

In the case of a serious offence, such as the case tried by the court of Agropoli, a simple *libello* was not sufficient, in the same manner as for more minor offences, but the accuser had to appear and make a sworn deposition of the facts and sequence of events in order to perfect the complaint. The accuser was also subject to a pecuniary penalty – a sort of cautionary deposit –, in case the accusation was found to be without grounds; if he were of foreign origin, the accuser also had to pay a cautionary deposit *de judicio sisti in loco judicii* to cover the costs of the proceedings.[94]

In the Kingdom of Naples there were no specific limitations on the right of complaint – *accusatio omnibus regulariter est permissa*[95] – however, complaints for damages were admissible if made by persons related to the injured party within the fourth degree of affinity, whereas, as established by Pragmatic 8 *de compositionibus*, the right to accuse the perpetrator of a homicide lay exclusively with the direct heirs of the deceased, *ab intestato*.

Having heard the facts and completed the phase of *inquisitio* hearing both witnesses and the injured party, del Mercato reports the formal dictates of the various penalties contemplated for the series of offences involved in the singular event, remarking on the possibility of proceeding *ex officio* for the case in question.

The governor also reports that, according to the laws in effect in the Kingdom of Naples, in the case of crimes for which the death sentence, or amputation of limbs were contemplated, the barons did not have the faculty of commuting the sentence, notwithstanding that the possibility of mitigating or commuting *corporalem* penalties into *pecuniariam* was contemplated for cases of *parva crimina*.[96]

Del Mercato uses the laws of the Kingdom, such as Pragmatic no 5 entitled *officio just.* and no 9 entitled *de officio Magistri justitiari*, as expedient for his dissertation, and proceeds to explain that from what he gleaned from the

[93] n 57 above, b. 65, f.lo 1, *In delicto qualiter procedetur*, ff. 267r.
[94] T. Briganti, *Pratica Criminale* n 65 above, I, 99.
[95] n 57 above, b. 65, f.lo 1, *Qui accusare possunt*, ff. 267t.
[96] n 57 above, b. 73, fasc.lo 1, ff. 170r.

reconstruction of the facts, the shot was not fired *de facie ad faciem* since, during the preliminary investigation Costantino had stated he was in the hold and not standing behind the door when he was injured. Therefore del Mercato concluded in the following manner:

> '*Quo ad poenam corporalis ex quo non tetigit eius Constantium personam nec investimentis non pot. dici in personam offensi. Et ideo in isto casu non requiter partis remissio (…) et ideo iuridicem et iustitia pot. commutari poena in persona d. Augustini*'.[97]

In the end, the sentence was commuted for the offender, despite the enunciation of laws that contemplated the death sentence for the offence. By commuting the sentence the governor considered the crime as being in the category of *parva crimina*, exercising an interpretation, entirely deliberate, of prevailing doctrine and quoting the dissertations of Campagna, the works of de Marinis and Rovito.

The forcing of the dictates of law by the governor in this case is evident – deriving from a series of mitigating circumstances that emerged from the preliminary investigation, such as the unintentional nature of the effects of the offence – and typical of the function of the magistrature of the time, which, confronted with excessively severe laws promulgated in far more remote times, through interpretation, aimed to modernise an antiquated judicial order.[98]

[97] ibid fn 171r.

[98] See F. Di Donato, 'La manutenzione delle norme nell'Antico regime. Ragioni pratiche e teorie giuspolitiche nelle società pre-rivoluzionarie' *Studi parlamentari e di politica costituzionale*, 4, 35-60 (2010).