LA DOCTRINA LEGAL EN LA SICILIA ESPAÑOLA DE LA EDAD MODERNA

THE LEGAL DOCTRINE IN THE EARLY MODERN "SPANISH SICILY"

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Resumen: El propósito de este trabajo es el análisis de la doctrina legal siciliana en la temprana Edad Moderna. Particularmente presentaremos una síntesis sobre la contribución de esta doctrina a la configuración del derecho positivo en el reino de Sicilia. En consecuencia, el análisis girará en torno a los géneros literarios presentes en la disertación doctrinal.

Palabras clave: Regnum Siciliae; Decisiones; tratados; tribunales superiores

Abstract: The purpose of the present contribution is to analyze the sicilian legal doctrine in the early modern age. In particular I would like to give an account of the contribution of this doctrine in the effective formation of the positive law of the Kingdom of Sicily. Thus the analysis focuses on the literary genres used by the doctrine achieving that aim.

Keywords: *Regnum Siciliae;* Supreme Courts; *Decisiones;* treaties

Legal science Sicily, between '500 and '600 is characterized by a very close connection with the field of procedure. This is evident, in fact, from the works of Sicilian jurists which are composed in this period, at least from a purely quantitative point of view. A production which is so wide and varied in terms of expressing the legal doctrine of Siciliy between the fifteenth and seventeenth century. It is important from the quantity point of view but especially valuable from that of quality, according to the high degree of authority both within the island and that which reached beyond the borders of it. This is remarked especially from the dissemination of these works which were printed in various editions across most of Europe.

Like all the others modern territorial-political systems in Europe, even Siciliy is characterized by the presence of royal Courts of Appeal, institutions that a consolidated —even if outdated— legal-historical tradition brought together under the generic name of "Grandi Corti" (Great Courts) or "Tribunali Supremi " (Supreme Courts)[1].

It is known that the definition of "Grande Tribunale" can be related to the Supreme Court of every state-organization of the modern period; a high court composed only by the choicest jurists, personally appointed by the sovereign, with exclusive competence on a number of subjects (above all *crimen laesae maiestatis*) and competence of appeal on any sentence issued by lower tribunals. In the past decades, the studies on the "Grandi Tribunali" had a significant development, even though characterized by sporadic occurrence; in addition, it's to point out that, at least by historians of law, it has been paid

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1 Is known that the issue was addressed around the 70s of the last century from studies by GORLA (1977), pp. 445-532; on conceptual and definitional problems posed by this historiographical category cf. ASCHERI (1989); SAVELLI (1994), pp. 397-421; Birocchi (2002), pp.85-93.

more attention to the production of case law —in particular the collections of *decisions*— than to the procedural documentation[2].

Therefore, being so relevant the analysis of these structures, wich stood at the top of the administrative and jurisdictional organization of early modern kingdoms, equally valuable is the study of the officiales, i.e. the judges who formed the courts. These figures, in fact, constituted a powerful and often cohesive class, the so-called *togati*, which greatly influenced the institutional dynamics of the sixteenth-seventeenth century monarchies.

Appointed by the sovereigns in order to set up their own judicial arm and ensure the strict application of the royal law, these officials actually exercised an alternative power, often opposing to the central one. This counter-power stemmed precisely from the prominent role performed, ex officio, in the administration of justice of last degree, not to mention the personal prestige claimed by these judges, chosen among the most distinguished jurists of the realm and coming from the most relevant families.

Therefore, it is certain that in the last decades of the sixteenth century and the first half of the next century, also in Sicily, a tecnique production flourishes. It grows around the nucleus of the Sicilian's Supreme Courts, it was closely related to the activity of these courts. The authors of these doctrinal works were at the same time judges but also jurists. Indeed, in large part they were professors or ex professors at the University of Catania and Messina[3].

The *decisio* is the literary genres that best represent this relationship between doctrine and judicial practice.

Referring to case law in late-medieval and early-modern European law, particularly in the *ius commune* tradition, usually means relying on collections of so-called *Decisiones* or continental-type law reports, which were works written by authors in their private capacity, and therefore works which belonged primarily to legal doctrine. These collections rarely reproduced the text of the judgements, which would anyway, as they did not express the legal principles upon which the judge or the court had relied, not have fulfilled the purpose of reporting decided cases. Most collections of *Decisiones* contain a legal analysis or commentary of one or more decisions from one or more courts. Because many of these printed collections would nonetheless purport to present the legal grounds and reasoning behind the decisions, they were instrumental, as a successful genre in early-modern legal literature, in establishing the notion that cases did contribute to legal developments, and could therefore qualify as an authority or a "source" of law, and therefore as "case law"[4].

The dissemination of collections of *decisiones* of the main European Supreme courts is a global event involving most of Europe. In fact, the authority of those Court allows their *Decisiones* to cross the boundaries of states and give rise to international practice, a European *usus fori*.

It was perhaps the emphasis of this phenomenon to reinforce the idea of the European validity and reception of the *ius commune* that although with new genres than medieval connote also the modern age almost to the nineteenth-century codifications. This view was supported by most of the legal historiography of the second half of the twentieth century, committed, through the search for a common legal past, in the difficult attempt to build an integration on a continent still reeling from the recent World War. One of the most important representative of this vision is certainly Helmut Coing, who moves from the idea of a common law from the twelfth century come to the threshold of codification, in the preparation of his monumental *Handbuch der Quellen und Literatur der neureren europäische Privatrechtsgeschichte*[5].

This vision has been in recent years strongly opposed by those who have first reduce the global extencion of this *ius commune*, which would actually be limited to only a few territories in Western Europe but also its effective penetration in the bodies of the early modern state, far more characterized by rising native State law and Jurists who were active in this context. According to this approach, in fact, the contribution of foreign lawyers would have a residual nature, in a *scientia iuris* that was predominantly "na-

2 The most significant examples are PETRONIO (1977); ID. (1997), pp. 355-453; G.P. MASSETTO (1990), pp. 75-112; MILETTI (1995); SBRICCOLI- BETTONI (1993); KRYNEN (2000), pp. 353-66.

3 CORTESE (1985), p. 131.

4 WIJFFELS (2010), p. 37.

5 In particular, the author expresses this idea in an emblematic article, COING (1967), pp. 1-33.

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tional". In this sense, for example, Duglas Osler criticizes this idea of a "pan-European jurisprudence", Instead he argues that "the real legal history was taking place somewhere else, namely in the national legal systems which were coming into place in the modern period"[6].

Albeit perhaps scaled from the point of view of its territorial extension, it seems, though, that for everything that affects the circulation of collections of *decisiones,* we can still speak of a system of authoritative citations related to the method of the *ius commune* on which it was built a real transnational *usus fori*.

This phenomenon also applies to Sicilian collection of *Decisiones* if we pay attention to the large number of editions printed outside of the island and the frequent references to them that *decisiones* issued by the Supreme Courts especially Neapolitan and Spanish make.

The collection of *Decisiones* by Sicilian jurists stand on the crossroads of several legal traditions at the end of the 16th and beginning of the 17th century. They are anchored in the civil law or *ius commune* tradition, but their perspective is that of the Sicilian´s Kingdom. As works written primarily by the standards of the *ius commune* literature, they reflect in many ways the "law of the books", but because their proclaimed emphasis is on the practice of the Sicilian superior courts, they also reflect to some degree legal practice, or, as it is sometimes called, the "law in action".

In this structure the *communis opinio* that is the *solutio* of the disputes is made by a system of quotations indifferently of domestic and foreign *auctoritates,* but the important is that these sources appear to have been selected almost exclusively within the wide body of available *ius commune* literature.

In the Sicilian collectios of *Decisiones*, only few references to a foreign particular law could be made directly through primary authorities, whether customary law, statutory law or case law. In the vast majority of cases, sicilian Jurists —as most of his contemporaries— had to rely on secondary sources in order to have access to foreign primary authorities. In addition, these secondary sources appear to have been selected almost exclusively within the wide body of available *ius commune* literature. As for customary law, statute law appears to be in most cases quoted via a doctrinal work. However, case law appears to be by far the most frequently quoted type of foreign authority. Another feature of Sicilian´s habits in referring to foreign courts reports is a tendency, already alluded to, to refer to a more or less extensive string of judicial authorities, as if the author sought safety (or rather: legal security) in numbers. A less pusillanimous explanation could also be that, whether considering the European *ius commune* world or a particular polity, the amalgamated references of concurring case law was deemed to establish the judicial equivalent of the *communis opinio doctorum*, and that, since the authority of (supreme) courts was said to stand higher than that of legal authors, such a judicial *communis opinio* could offer a strong argument for establishing a particular principle.

The first collection of *Decisiones* of a sicilian court came out in 1593 and is assigned to the judge Francesco Milanese[7]. The work opens, stating that this is a very fortunate series of *Decisiones* for Sicily. It is, in fact, followed by editions of many other books whose authors, Mastrillo[8], Intriglioli[9], Del Castillo[10], Giurba[11], Muta[12], Caracciolo[13] and Basilicò[14], to name the best-known representatives are the most influential among Sicilian lawyers and judges lived between the second half of the sixteenth and the seventeenth century. Their collections are inherent mainly to causes discussed in the courts of the *Regia Gran Corte*[15] and of the *Concistoro della Sacra Regia Coscienza*[16], with no discernible collections of judgments of the *Curia Rationum*. Most of the *decisiones* regards the feudal matter, the most debated

6 OSLER (1997), p. 404.
7 MILANESE (1593).
8 MASTRILLO (1606).
9 INTRIGLIOLI (1609).
10 DEL CASTILLO (1613).
11 GIURBA (1616).
12 MUTA (1619).
13 CARACCIOLO (1641).
14 BASILICÒ (1669).
15 On The *Decisiones* issued by *the Regia Gran Corte* see ROMANO (1997a), pp. 137-194.
16 On this subject could see F. DI CHIARA (2011).

in local courts, although there are collections entirely focused on criminal disputes or volumes that collect judgments in the field of trade and *census*.

In Sicily, then, published examples of such literature are not found before 1593, but in the fifty years from 1600 to 1650 there are more than even thirty editions, which then diminish to less than ten in the second fifty years of the seventeenth century. The reasons behind that flourishing in this period are attributable to a number of factors. First, the stabilization process of the High Courts in Sicily, which began in the mid-fifteenth century matures with the *prammatica de reformatione tribunalium* of Philip II in November 1569[17]. And 'with that decision, in fact, the structure of the judiciary of the island with the apex courts of the *Regia Gran Corte* end of the *Concistoro della Sacra Regia Coscienza* is essentially defined, including in relation to a preconceived system of ordinary appeals[18]. Added to this is surely the massive professionalization of the judiciary because of the presence, as judges of the supreme courts, of the greatest jurists of the island, especially those which could not but help to increase the prestige of the decisions taken by those courts. These same judges are also the authors of the collections of these *decisiones*. Significant influence may also have been a "fashion" which took the form of a literary genre in those years, which largely succeed in Europe. . Do not underestimate the momentum which was finally derived from the creation and dissemination of printing works in Palermo, useful for decreasing the cost and facilitating the necessary contacts for the editions.

These collections of case law although totally neglected by historians to date, undoubtedly constitute sources of knowledge of primary importance not only for the study of legal thought between the Sicilian XVI and XVII century, but also to investigate the contribution of the doctrine to the interpretation and effective formation of the positive law of the Kingdom of Sicily.

To complete the picture, always with regard to the production of doctrine, treaties explicitly on the procedure for forensic activity are also held in high esteem, in addition to the collections of *Decisiones*. This is also the case for the '*practicae'* and commentaries on the civil and criminal *Ritus Magnae Regiae Curiae* in particular[19], the source of law with which Alfonso V in 1446 intended to regulate the internal praxis of the courts of the Kingdom[20].

These works, which were produced in considerable numbers as early as the second half of the fifteenth century, spread particularly in the late sixteenth and early seventeenth century, in the same period in which, as has been seen, the collections of Sicilian *Decisiones* also thrive. Also the authors of these works are all successful judges and lawyers, who often write not only treated but also collections of *decisions*. This factor determines not only homogeneity, especially in style between the two genres, but also a dense series of reciprocal citations among the *Decisiones* and treaties in a continuous exchange between auctoritates that "play" to legitimize each other.

The two most important and popular treatises on *Ritus magnae Regiae* Curiae are surely the commentaries of Joseph Cumia[21] and Marcello Conversano[22].

While the first work follows a classical pattern in which the author gives his own interpretation of each article of the *Ritus*, the second one has a particular structure. This is, indeed, the edition of the most authoritative commentaries "*quae ante in Curiis allegabantur Manuscripta"*: the aim, stated in the dedicatory letter to the publisher Angelo Orlandi, is to preserve the memory of all those eminent jurists who wrote on the *Ritus* and who were still mentioned in the Sicilian courts. The collection contains the full text of the *Ritus*, includes, among others, comments by Antonio Blasco Lanza, Pietro Rizzari, Gian Luigi Settimo, all professors at the *studium* of Catania and active in the last two decades of the '400 and the first of the next century. To them, teachers of law but also judges in the major courts of the kingdom,

17 *Pragmaticarum* (1637), pp.1-7.

18 On Modern Sicilian administration of justice see BAVIERA ALBANESE (1992), pp. 109-158; SCIUTI RUSSI (1983); ROMANO (1997b), pp. 111-161; for a period longer dating see PASCIUTA (2003), pp. 41-68.

19 The full text of the *Ritus Magnae Regiae Curiae et totius Regni Siciliae Curiarum*, by Alfonso V il Magnanimo is in TESTA (1741), t. I, pp. 240-273.

20 On the *Ritus Magnae Regiae Curiae* see PASCIUTA (2003), pp.88-91.

21 CUMIA (1578).

22 CONVERSANO (1614).

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it is due the start of the *Ritus* interpretation and the creation of the first nucleus of a *communis opinio* destined to mark all the legal doctrine of Sicily in the following centuries.

At the same time, other important jurists are devoted to comment of other sources of law in force in the *Regnium*. This is the case of Mario Muta, author of commentaries on the *Capitula Regni*[23], the *Pragmaticae*[24] and *Consuetudines*[25] of Palermo, or Mario Cutelli, that using its *notae politicae*, to make a comment, in four books, on *Capitula* of Kings like Giacomo, Federico III, II Pietro and Martino[26]. Instead, the *Lucubrationes* by Mario Giurba are devoted to the Statutory legislation of Messina[27].

Another important contemporary work, carried out by one of the most famous jurist of the island, as well as author of a widespread collection of *decisiones*, is the *De imperio et eorum magistratibus iurisdictione* of Garsia Mastrillo[28]. This is not a commentary, such as those analyzed so far, but a political treatise, in which the author analyzes meticulously origin, powers and limits of magisterial authority. This was the first, and in some ways the only of its kind produced in Sicily. For this reason, the treaty enjoyed considerable success since it was perceived as a real essential source for the knowledge of the judicial system.

Conclusion

Works of doctrine, despite their undeniable differences, mainly due to the different literary genres used by the authors, are characterized, in fact, for the purpose of explaining, and perhaps most importantly, for interpreting the *Ritus*, an interpretation that necessarily become creative, arise sufficiently to make the work of teaching a source which takes precedence over the original legal text. This finding seems incontrovertible, even with regard to the perception that users have the same law. In fact, all citations of the *Ritus*, contained in the collections of Sicilian *Decisiones* which in the eyes of contemporaries reflected the law as applied in judicial practice, do not make direct reference to *Ritus*, but to the works in which this law is commented on, particularly in the two commentaries of Conversano and Cumia. So that which goes to make up the *communis opinio*, resolving disputes, is not the source of law, since it is the interpretation which makes the doctrine. The legislation, as such, seen rather in terms of in its deterioration, is unclear and uncoordinated. Hence, this doctrine, with its rationality, corrects it, thus providing a procedural model which to some extent offered an alternative to that imposed directed by standardization.

Moreover, it is no coincidence that in the Sicilian collectios of *Decisiones* statute law —both domestic and foreign— is occasionally, but not frequently, quoted as an authority. Indeed, case law essued by Sicilian or foreign courts appears to be by far the most frequently quoted type of authority, together with the works of doctrine, used as solutio to resolve disputes.

This is a response within the scope of the activity of lawyers, regarding the interpretation and implementation of the law, against the attempt by the Sicilian monarchy to include procedural matters entirely within the legislative powers of the sovereign.

The formal law of the state and legal doctrine are therefore constantly engaged in a silent opposition to electing procedure as an arena for activities and accommodation, with the purpose stated, to bring order to a discipline which in itself is chaotic and less inclined to fall into grids which are unique and preconceived[29]. Simply study the possible relation of the rule laid down by the king and the interpretation given by jurists is useful in order to identify the space occupied by the law actually applied in the Kingdom.

23 MUTA (1605-1627).
24 MUTA (1622).
25 MUTA (1644).
26 CUTELLI (1622).
27 GIURBA (1620)
28 MASTRILLO (1616)
29 This theme is further developed by PASCIUTA (2012), pp. 315-330.

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