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Concepts on the Move

Cross-Cultural and Cross-Disciplinary Transfers, Entanglements, Receptions,
Translations and Redefinitions in Conceptual History

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The Judge in the Seventeenth Century: A Royal Official between Legislation, Doctrine and Case Law. The Sicilian Case

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ABSTRACT/RESUMEN:

A consolidated – even if outdated – legal-historical tradition defines under the generic name of “Grande Tribunale” (Supreme Court) the high Court of every state-organization of the Modern period; a royal 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.

Like all the others territorial-political systems in Europe, even Sicily is characterized by the presence of these royal Courts of Appeal. Therefore, being so relevant the analysis of these structures, which 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 Five 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.

A silent confrontation, then, that elects Law – and in particular the rules of the process – as a privileged ground of clash. This is a capital fact, especially if focusing, as I intend to do in this paper, on the collections of Seventeenth century *decisiones* relating to the judgements of the “Supremi Tribunali” of the *Regnum Siciliae*. These represent a literary genre flourishing in Sicily in that time, a genre to which the most distinguished jurists devoted themselves, the same who, as mentioned, were part of those same courts as judges. These primary sources return an image of a legal doctrine committed to provide such an extensive interpretation of the royal law as to result almost subversive, presenting a scheme in which the doctrine produced by the *togati* became itself a source of law, thus overtaking the royal legitimacy.

Here, then, as the Sixteenth century judge, in his role as high royal official, becomes the balance of the political, institutional and doctrinal reality of the *Regnum Siciliae*.

TEXTO/TEXT:

The purpose of the present contribution is to give an account of how a royal official as the judge in the Seventeenth century might influence the judicial practice applied in *Regnum Siciliae* both *ex officio* as a member of the Supreme Courts of the Kingdom that as a jurist author of works of doctrine especially collections of *decisiones*. An influence that is expressed in terms of application and interpretation of the law of the sovereign.

Like all the others modern territorial-political systems in Europe, even Sicily 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 more attention to the production of case law – in particular the collections of *decisiones* – than to the procedural documentation.²

Therefore, being so relevant the analysis of these structures, which 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.

¹ Is known that the issue was addressed around the 70s of the last century from studies by Gino Gorla, *I Tribunali Supremi degli Stati italiani. fra i secc. XVI e XIX, quali fattori della unificazione del diritto nello Stato e della sua uniformazione fra Stati (Disegno storico-comparatistico)*, in *La formazione storica del diritto moderno in Europa*, I, Firenze 1977, pp.445-532; on conceptual and definitional problems posed by this historiographical category cf M. Ascheri, *Tribunali Giuristi e Istituzioni dal medioevo all'età moderna*, Bologna 1989; R. Savelli, *Tribunali, "decisiones" e giuristi: una proposta di ritorno alle fonti*, in *Origini dello Stato. Processi di formazione statale in Italia fra medioevo ed età moderna*, edited by G. Chittolini-A. Mohlo-P. Schiera, Bologna 1994, pp.397-421; I. Biocchi, *Alla ricerca dell'ordine*, Torino 2002, pp.85-93.

² The most significant examples are U. Petronio, *Il Senato di Milano. Istituzioni giuridiche ed esercizio del potere nel Ducato di Milano da Carlo V a Giuseppe II*, I, Milano 1977; Id., *I Senati giudiziari*, in *Il Senato nella storia. Il Senato nel medioevo e nella prima età moderna*, Roma 1997, pp.355-453; G.P. Massetto, *Monarchia spagnola, Senato e Governatore: la questione delle grazie nel Ducato di Milano. Secoli XVI-XVII*, in "Archivio storico lombardo", CXVI (1990), pp.75-112; M.N. Miletto, *Stylus iudicandi. Le raccolte di "decisiones" del Regno di Napoli in età moderna*, Napoli 1995; *Grandi tribunali e rote nell'Italia di antico regime*, edited by M. Sbriccoli-A. Bettoni, Milano 1993; J. Krynen, *Qu'est-ce qu'un Parlement qui représente le roi?*, in *Excerptiones iuris: Studies in Honor of André Gouron*, edited by B.Durand-L. Mayali, Berkeley 2000, pp.353-66.

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.

A silent confrontation, then, that elects Law – and in particular the rules of the process – as a privileged ground of clash. This is a capital fact, especially if focusing, as I intend to do in this paper, on the collections of Seventeenth century *decisiones* relating to the judgements of the “Supremi Tribunali” of the *Regnum Siciliae*.

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”.³

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 Sicily between the fifteenth and seventeenth century is important from the point of view of quantity 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, evidenced especially by the spread of the largest collections of *decisiones* of the sicilian courts, which were printed in various editions across most of Europe.

The first collection of *decisiones* of a Sicilian court came out in 1593 and is assigned to the judge Francesco Milanese.⁴ 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,⁵ Intrigliolo,⁶ Del Castillo,⁷ Giurba,⁸ Muta,⁹ Caracciolo¹⁰

³ A. Wijffels, *Legal Records and Reports in the Great Council of Malines (15th to 18th Centuries)*, in *Judicial records, law reports and the growth of the Case-law*, edited by J.H.Baker, Berlin 1989, pp. 181-207.

⁴ F. Milanese, *Aureae decisiones Regiae Curiae Regni Siciliae, vol. I e II, Venetiis 1593*.

⁵ G. Mastrillo, *Decisiones Consistorii Sacrae Regiae Conscientiae Regni Siciliae*, Panormi 1606.

⁶ N. Intrigliolo, *Decisiones aureae Magnae Regiae Curiae Regni Siciliae*, Panormi 1609.

⁷ G.F. Del Castillo, *Decisiones Tribunalis Consistorii Sacrae Regiae Conscientiae Regni Siciliae*, Panormi 1613.

⁸ M. Giurba, *Decisiones novissimae Consistorii Sacrae Regiae Conscientiae Regni Siciliae*, Messanae 1616.

and Basilicò,¹¹ 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*¹² and of the *Concistoro della Sacra Regia Coscienza*,¹³ with no discernible collections of judgments of the *Curia Rationum*. Most of the *decisiones* regards the feudal matter, the most debated 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 1569.¹⁴ 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.¹⁵

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 *decisiones* 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.

The collections of *decisiones* by Sicilian judges and jurists stand on the

⁹ M. Muta, *Decisiones novissimae Magnae Regiae Curiae supremisque magistratus Regni Siciliae*, Panormi 1619.

¹⁰ O. Caracciolo, *Decisiones Curiae Pretoris Felicis Urbis Panormi*, Panormi 1641.

¹¹ G. Basilicò, , *Decisiones Magnae Regiae Curiae Regni Siciliae*, Messanae 1669.

¹² On The *Decisiones* issued by the *Regia Gran Corte* see A. Romano, *Le decisiones della Regia Gran Corte del Regno di Sicilia. Forma delle sentenze, registrazione, raccolte*, in *Case Law in the making. The Techniques and Methods of Judicial Records and Law Reports*, vol.2: *Documents*, edited by A. Wijffels, Berlin 1997, pp.137-194.

¹³ On this subject could see F. Di Chiara, *Per un repertorio della dottrina giuridica di età moderna. Le Decisiones del Concistoro della Sacra Regia Coscienza del Regno di Sicilia*, Palermo 2011 (on-line version on www.mediterranearicerchestoriche.it).

¹⁴ *Pragmaticarum regni Siciliae novissima collectio*, Panormi 1637, tomo II, tit. I, pragm. unica, pp.1-7.

¹⁵ On Modern Sicilian administration of justice see A. Baviera Albanese, *L'ufficio di Consultore del Vicerè nel quadro delle riforme dell'organizzazione giudiziaria del secolo XVI in Sicilia*, in "Rassegna degli Archivi di Stato", 1960; now in Ead., *Scritti minori*, Soveria Mannelli (CZ), 1992, pp.109-158 e di V. Sciuti Russi, *Astrea in Sicilia. Il ministero togato nella società siciliana dei secoli XVI e XVII*, Napoli 1983.; A. Romano, *La Regia Gran Corte del Regno di Sicilia*, in *Case Law in the Making. The Techniques and Methods of Judicial Records and Law Reports*, vol. 1, edited by A. Wijffels, Berlin 1997, pp. 111-161; for a period longer dating see B.Pasciuta, *In regia curia civiliter convenire. Giustizia e città nella Sicilia tardomedievale*, Torino 2003, pp. 41-68.

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".

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*¹⁶ in particular, the source of law with which Alfonso V in 1446 intended to regulate the internal praxis of the courts of the Kingdom.¹⁷ 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. This created a framework to render this dynamic and vibrant island of doctrine, which was compact at the same time and characterized by the intrinsic continuity which arose out of contamination between the genres.

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 Conversano¹⁸ and Cumia.¹⁹ So that which goes

¹⁶ The full text of the *Ritus Magnae Regiae Curiae et totius Regni Siciliae Curiarum*, by Alfonso V il Magnanimo is in *Capitula regni Siciliae*, edited by F. Testa, tt. II, Panormi 1741 (riprint edited by A. Romano, Saveria Mannelli (CZ) 1999), t. I pp. 240-273.

¹⁷ On the *Ritus Magnae Regiae Curiae* see B. Pasciuta, *In regia curia*, pp.88-91.

¹⁸ M. Conversano, *Commentaria super ritu regni Siciliae ... a Marcello Conversano collecta*, Panormi 1614.

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 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 issued 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.²⁰ Simply study the possible *krasis* of the rule laid down by the king and the interpretation given by lawyers in order to identify the space occupied by the law actually applied in the Kingdom.

Here, then, as the Sixteenth century judge, in his role as high royal official and at the same time as jurist author of works of doctrine, becomes the balance of the political, institutional and doctrinal reality of the *Regnum Siciliae*. In this regard the collections of *decisions*, made by the judges become primary sources that return this image of a legal doctrine committed to provide such an extensive interpretation of the royal law as to result almost subversive, presenting a scheme in which the doctrine produced by the *togati* became itself a source of law, thus overtaking the royal legitimacy.

¹⁹ G. Cumia, *In ritus magnae regiae curiae ac totius regni Siciliae curiarum Commentaria, praxisque super eiusdem Magnae Regiae Curiae ritibus* [...], Panormi 1578.

²⁰ This theme is further developed by B. Pasciuta, *Le fonti giudiziarie del Regno di Sicilia tra tardo Medioevo e prima Età Moderna: le magistrature centrali*, in *La documentazione degli organi giudiziari nell'Italia Tardo-Medievale e Moderna*, edited by A. Giorgi, S. Moscadelli and C. Zarrilli, Siena 2012, pp. 315-330.