

## A PRIVATE “MANUAL” OF BYZANTINE LAW IN THE SOUTH OF ITALY\*

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After the fall of the Western Roman Empire, the ties of Italy with the power, the culture and the East law, with several discontinuities, continued for more than five centuries. The events related to this rapport present many elements of complexity and show major signs of interference. It is important to note that this enduring connection, following the re-conquest of the territories of our Country, allowed the propagation of the Justinian Corpus Juris and the post-Justinian legal production in the high Middle Age. Although at different times, it encouraged the birth of various law's study and teaching centers in Italy<sup>1</sup>. It is true that between civil and religious conflicts, between Lombard supremacy and arab invasions, between the Papal State and local lords in search of autonomy, the Byzantine imperial authority was forced to reduce considerably its sphere of influence in Italy mainly to focus, from the IX century, on the southern regions.

It was especially with the advent of Emperor Basil I the Macedonian that a period of intense and profitable relations began. The Byzantine influence achieved, in the West, a strong political recovery and began a long period of stability. The management and the direct rule of the annexed territories was accompanied by the permanent settlement of large groups of Greek colonists and by the massive migration of Byzantine monks<sup>2</sup>. These innovations represent the set of events of cultural and institutional integration that determined the significant developments in the legal field, too.

In fact, in the south of Puglia, Basilicata, and Calabria, the Isaurian<sup>3</sup> and Macedonian<sup>4</sup> rules came into force and then applied. Similarly, in the lands binded to the empire, the various compilations and the recent private legal compendia<sup>5</sup> found a huge circulation, that had already been developed by the eastern jurisprudence and they were beginning to compose directly on site<sup>6</sup>. Indeed, in the Italian regions that for several reasons during the years had finally separated from Constantinople, or that had remained closely anchored to the traditions of Latin ethnicity, the imperial law that met the prevalent diffusion and reception was the Corpus Juris of Justinian. Even in this case compendia helped<sup>7</sup>. Of course, the infiltrations of the new law coming from the East<sup>8</sup> occurred, although more limited.

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\*Testo, con note, della relazione pronunciata in occasione della 69ª Sessione della Società Internazionale dei Diritti dell'Antichità (SIHDA), “L'Enseignement du Droit pendant l'Antiquité et l'enseignement des Droits de l'Antiquité dans le Cursus Juridique aujourd'hui”, Istanbul, 7-12 settembre 2015.

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<sup>1</sup> F. Brandileone, *Scritti di storia giuridica dell'Italia meridionale*, a cura di C. G. Mor, Bari 1970, 9-10.

<sup>2</sup> Cfr. F. Calasso, *Medio Evo del Diritto*, I, *Le fonti*, Milano 1954, 99-101; A. d'Emilia, *Il diritto bizantino nell'Italia meridionale*, in «Atti del Convegno Internazionale sul tema: L'Oriente cristiano nella storia della civiltà (Roma 31 marzo-3 aprile 1963; Firenze 4 aprile 1963)», Roma 1964, 370-2.

<sup>3</sup> Egloga di Leone III with three other «raccoltine» of special rules. Cfr. E. Cortese, *Le grandi linee della storia giuridica medievale*, Roma 2000, 177-9.

<sup>4</sup> Ivi, 180ss.

<sup>5</sup> Ivi, 183; Brandileone, *Scritti di storia giuridica cit.*, 66-7.

<sup>6</sup> d'Emilia, *Il diritto bizantino cit.*, 347-8.

<sup>7</sup> «Il *Brachylogus*, la *Lex Romana Utiniensis* e simili». Brandileone, *Scritti cit.*, 231.

In southern Italy, once the Greek political control was achieved, the authority and the imperial will dominated uncontested for long time, imposing the Byzantine law as territorial rules. To the Justinian law came alongside the most modern Byzantine standardization, without ever been explicitly superseded or repealed; so the Justinian's Latin books gave way to Greek Prochiri<sup>9</sup>. It was a phenomenon similar to what happened in the «altre terre imperiali dell'Oriente»<sup>10</sup>, where it was known that «non perpetuo quidem Justinianeus codices sunt observati». The two important prerequisites established, political and legal, in the X and XI centuries facilitated the flowering of special legal schools in the South, probably ecclesiastical. In these study centers frequented by natives of the same places that intended to acquire an appropriate training to become future iudices, aldermen of the judges and notaries, the Byzantine law was mainly taught, considering that since the IX century in the southern lands «juris Justinianeus observantia pene desit», as said Marino Guarani<sup>11</sup>.

The rich legal literature produced by a host of learned professors, in the last decades of the XVIII century, had insisted on the significant Greekness of some Italian areas. The southern Italian «istituzionisti» once examined the early medieval legal affairs, deduced elements to revive the already debated topic of the discontinuity of the Justinian law. The peculiarity of these premises, moving between history and law, began a process of rationalization of private law in a public setting, which gave scientific dignity to «ius regni», freeing it from the uncertainties and the formalistic bonds of the *ius commune*. The perspective adopted allowed to identify the characters of «ius patrium», recognizing it as a very ancient law, for the origins and application; it represented the fulcrum of national law and that became just recently a university discipline, which needed a theoretical accommodation. From this important doctrinal work of reorganization, which almost replaced the reformism of an hesitant and fluctuating government, huge benefits would spring in primis for private teaching of law.

The discovery of the law schools and training centers present and active in southern Italy in the Middle Age is due to the pioneering and tenacious studies, that an authoritative historian of medieval law, Francesco Brandileone, led by the last decades of the XIX century. In particular, he oversaw the publication of a manuscript, that he called *Prochiron legum*, which presented the characteristics of a school textbook of law. It was not the only compilation Greek-Calabrian which was found<sup>12</sup>, but it was the only compilation, including those written in southern Italy, destined primarily to teaching.

The historian did an accurate analysis of the writing, contents, citations, and also notes. Therefore he attributed to the script a subsequent date then the year 920, more precisely between X and early

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<sup>8</sup> Ivi, 12-3.

<sup>9</sup> Ivi, 231; Calasso, *Medio Evo* cit., 101.

<sup>10</sup> Brandileone, *Scritti di storia giuridica* cit., 11 and 41.

<sup>11</sup> M. Guarani, *Praelectiones ad Institutiones Justiniani in usum Regni Neapolitani*, Liber I, Neapoli 1779, 15-6; G. Maffei, *Institutiones juris civilis neapolitanorum*, pars prior, Neapoli 1802, 39. P. Giannone had already stated that «in Taranto Giovanni Sambuco ritrovò l'*Ecloga* de' Basilici, ed il Galateo n'accerta, che in Otranto nel Monastero de' Monaci di S. Basilio molti libri greci furono, anche dopo espugnata Costantinopoli, trovati. Ond'è da credere che [...] nelle Città a' Greci sottoposte avessero tenuta più forza le Novelle Costituzioni promulgate dopo Giustiniano dagli ultimi imperatori d'Oriente, e queste loro ultime compilazioni, onde formossi il *jus Greco*, che i libri di Giustiniano». *Istoria civile del Regno di Napoli*, in *Raccolta dei più rinomati scrittori dell'Istoria generale del regno di Napoli*, ed. Gravier, t. XII, Napoli, 1770, p. 45. For schools, see F. Brandileone, *Scritti di storia del diritto privato italiano*, editi dai discepoli a cura di Giuseppe Ermini, I-II, Bologna 1931, II, 550-1.

<sup>12</sup> Brandileone, *Scritti di storia giuridica* cit., 23; 220-3; C. Ferrini, *Opere*, I, *Studi di diritto romano bizantino*, a cura di V. Arangio-Ruiz, Milano 1929, 487-9.

XI century<sup>13</sup> and he also showed the certainty of the southern origin. Instead, the interpolations and adjustments were dated later by others: Brandileone showed that they introduced some modifications to the script adapting it to the Italian contest, i.e. «Re del Paese» replaced the term of Emperor, and the new formula «Noi comandiamo». These late additions, which probably came from the pen of a student, are dating back to the first half of the XII century, when Ruggiero II founded the Norman monarchy<sup>14</sup>.

The main Greek sources, used in the manuscript compiled in Calabria as the base of his work, were especially the three official compendia: *Ecloga Isaurica*, *Prochiron* and *Epanagoghè* of Basilio and, not least, the private compilation *Epitome legum*<sup>15</sup>. Of course some steps of Justinian's texts were accepted. But it is also true that those pieces that became part of it are not taken directly from the original, rather they were extrapolated from other private compilations, so they are the product of quotations of second or third hand.

Beside the presence, more or less directly, of the great imperial legal works, it is very interesting to note that, in the document, southern customary law<sup>16</sup> took on a leading role. This notion is showed by the changes, for instructional objectives, that were made on the Byzantine sources placed. The primary purpose was to reconcile the official standards of «import» with the needs and customs established in the specific place where the author used to write and in which the manual would be used. Confirmations showed in this direction derived from the case law, that simultaneously Brandileone directed on contemporary nuptial Calabrian instrumenta. The analysis of a considerable collection of this kind of acts, in fact, could prove just the deep reasons of targeted adjustments conducted in the Prochiron: with a special pouring work, the manual was recognizing the case law following in practice that, by doing it, forged some contents and was giving a very original appearance. The social experience of the region recorded significant changes, especially on the subject of marriage and patrimonial relationships, and then successors, considering the significant influence, in this regard, by the Lombard law principles.

An important example of these adaptations can be deduced from the generic and undefined use which the terms «ipobolo» and «teoretro»<sup>17</sup> join the Italian Prochiron. You can see that, to configure the husband's «donazione antenuziale», such phrases are used interchangeably, intending to connect and finally, with a kind of assimilation, to merge the rules laid down by Leo the Philosopher with the principles of Lombard and Frankish matrix<sup>18</sup>. The same nuptial acts testify to the ongoing process of vulgarization, confirming the use of a wide and improper use of such formulas. The terminological and conceptual confusion in this manual, therefore, did nothing but reflect the wording of official documents, in which the two figures were recalled with great ease, without any direct reference to the individual specificities, their extent or incidence on the patrimonial range of the spouses.

Acknowledging and incorporating concrete emerging trends, it is clear that the manual cared to establish and valued the most common uses, the ones that found hospitality and verbalization in the

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<sup>13</sup> Ivi, 85-7.

<sup>14</sup> Ivi, 86-91. Ruggiero II, as wrote Falcano, «aliorum quoque regum ac gentium consuetudines diligentissime fecit inquiri, ut quod in eis pulcherrimum aut utile videbatur, sibi transumeret» (nt. 30, 86).

<sup>15</sup> Ivi, 66-7.

<sup>16</sup> Ivi, 63-75.

<sup>17</sup> «Due istituti speciali del diritto bizantino-postgiustiniano [utilizzati] nelle provincie dell'Italia meridionale». Brandileone, *Scritti di storia del diritto* cit., I, 91ss.

<sup>18</sup> L. Tria, *La disciplina giuridica del matrimonio secondo le consuetudini di Terra di Bari*, Bari 1936, 7-8, declared that «a differenza della legislazione giustiniana, l'Ecloga non richiede la parità tra dote e “donatio propter nuptias”», but the promise in writing to keep the dowry and the ipobolo. Cfr. D'Emilia, *Il diritto bizantino* cit., 366-7.

scriptures which were written in the places to which it was intended for. In this way the text was trying to make a vulgarization of the Byzantine sources and their harmonization with local practices<sup>19</sup>. Surely some Byzantine influences in terms of marriage were notable. Think of the religious celebration<sup>20</sup>, still unknown to the Church of Rome, but not to that of Constantinople, and to the innovations in terms of contracts, all issues that Brandileone deepened following in his studies. Many are also the evidences adduced demonstrating the derivation, from the Byzantine law, of figures in the subsequent Norman legislation<sup>21</sup>.

The teaching and training purposes of the Prochiron legum spring also from other specific elements: the repeated replacement of technical legal terms with those in current and common use; the simplification of the period style and construction, that eliminated the transpositions and aspired to make the speech plain and easy to understand. Again the addition of glosses and explanations in greek or latin word forms detected in the primary sources. Even the addition of referring expressions, for example, «giudici del Paese» or «re del Paese» show the peculiarity of the text and its being destined to a single province. It is true, Brandileone concludes in his careful examination, that in addition to «gli spatarii e spatarcandidati, i domestici e soprattutto i giudici, che s'incontrano continuamente nei documenti greci dell'Italia bizantina, non potevano venire tutti da Costantinopoli»<sup>22</sup>. There were many natives and in order to apply the rules they had to learn them too.

The survey on the scholastic sequences of the medieval Italy, as incomplete and not always entirely clear, became a key player in the scientific and educational reconstruction carried out by Brandileone: his interests and his university teaching opened the history of law in all new scenarios, for the search fields and for study method. In the duel between interpretative guidelines deployed on the pre-eminent influence operated from Germanic law or, conversely, from the Roman tradition<sup>23</sup>, the historian wanted to contrast formalisms and to opt for the inductive method. Even if he was in favor of Romanism and did not remain insensitive to the Brunner's interpretations, then resumed by Besta, he showed a critical and independent thinking. He was deeply convinced that to outline the law history, next to the rules, we should pay close attention to the multifarious external contamination and to the incidence continuously exerted, on the development of the legal system, by the practice and the usages<sup>24</sup>. Especially in southern Italy, where «la tradizione romana si coniugava con quella bizantina con risultati di grande originalità», as Mario Caravale says<sup>25</sup>. This line allowed him to take the distance from that sort of «communis opinio», which by Donato Antonio D'Asti had launched a “bridge” that reached Savigny and beyond. He clearly felt the need to correct the dogma of the «continuata esistenza ed osservanza dei libri giustiniani, come nel resto d'Italia, così anche nelle province meridionali soggette più o meno all'impero greco»<sup>26</sup>, which became dominant among historians.

His idea of law as a plural and dynamic phenomenon, influenced by the space-time variables, found continued support in the direct study of the sources and the interest for the weight of custom.

<sup>19</sup> Brandileone, *Scritti di storia giuridica* cit., 76.

<sup>20</sup> F. Brandileone, *L'intervento dello stato nella celebrazione del matrimonio in Italia prima del Concilio di Trento*, Napoli 1984, now in Idem, *Saggi sulla storia della celebrazione del matrimonio in Italia*, Milano 1906.

<sup>21</sup> Brandileone, *Scritti di storia giuridica* cit., 281-2ss.; d'Emilia, *Il diritto bizantino* cit., 351-2.

<sup>22</sup> Brandileone, *Scritti di storia giuridica* cit., 89-90.

<sup>23</sup> A. Cernigliaro, *Nota di lettura*, in F. Ciccaglione, *Tra Scuola storica e storicismo. Tre saggi*, Napoli 2009.

<sup>24</sup> Brandileone, *Scritti di storia del diritto*, I-II.

<sup>25</sup> M. Caravale, v. *Francesco Brandileone*, in *Dizionario Biografico dei Giuristi Italiani*, Bologna 2013, 331-3.

<sup>26</sup> Brandileone, *Scritti di storia giuridica* cit., 231 and 243.

It outlined a strong signal that moved against the abstractions and deductive reasoning, unsettling established balances. It was the way to turn to the complexity of juridical experience and the enhancement of the Greek-Italic law, that led toward the discontinuity and, at the same time, to a new modernity.