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ESTRATTO

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The Part II of the Code for the Kingdom of the Two Sicilies:
an “excellent” criminal code in a despotic state



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VITA ACCADEMICA

FRANCESCO MASTROBERTI

THE PART II OF THE CODE FOR THE KINGDOM OF THE TWO SICILIES: AN “EXCELLENT” CRIMINAL CODE IN A DESPOTIC STATE*

My speech presents a researching project entitled: The “Codice per lo Regno” and the legislation of Two Sicilies: elaboration, application and european diffusion of a reform model” (PRIN – *Progetti di rilevante interesse nazionale*, 2017 call for proposals under review by the MIUR – *Ministero dell’Istruzione, dell’Università e della Ricerca*), led by me as national coordinator, that involves four executive units located in the University of Bari, University of Salerno, University of Catanzaro and University of Messina, and generally twentytwo professors of eight Univesities of Southern Italy, that are mainly academics of History of Law. It’s hoped that researchers and colleagues that are present today want to collaborate to the research on the side concerning the influence of the Codice per lo Regno on legislation and european codes during the Nineteenth Century. Considering the forthcoming of the bicentenary of the promulgation of the *Codice per lo Regno delle Due Sicilie* of 1819, it’s appropriate to begin deepened studies about one of the best codes of 1800s that, through the mediaton of jurists like Niccola Nicolini, Francesco Magliano, Giovanni Vittorio Englen, succeeded to bend the napoleonic model to the southern Enlightenment line of thinking, in particular to the ones of Gaetano Filangieri and Francesco Mario Pagano. Composed by five parts: *Leggi civili*, *Leggi penali*, *Leggi di procedura nei giudizi civili*, *Leggi di procedura nei giudizi penali* e *Leggi di commercio*, the *Codice per lo Regno delle due Sicilie* was an “excellent” code, that was applicated in an institutional context that gradually, after the constitutional revolution of 1820–21 and the uprisings of 1848, showed in an increasingly clear way his authoritative and intolerant dimension, transforming the *monarchia amministrativa* inherited by the Napoleonics in an arbitrary monarchy where the sovereign decided everything, also in the judiciary field. These aspects have been highlighted only recently by the legal historiography that avoided the *Codice* from

* Intervento tenuto al Convegno internazionale: *Laws Across Codes and Laws Decoded*, Biennial Conference of European Society for Comparative Legal History (Paris, École Normale Supérieure 28 June – 30 June 2018).

the general discredit that follows the Bourbon reign in 1800s, opening the way to research paths of great interest that the present project intend to examine in depth.

Originated by the continuity policy of the French decade, and wanted by Luigi Medici and Donato Tommasi, the promulgation of the *Codice per lo Regno* – that was preceded by the civil administration law of 12 december 1816, the administrative disputes law of 25 march 1817 and the fundamental Law about the *Organizzazione giudiziaria* of 29 may 1817 – involved the best neapolitan law experts – some of whom had been creators and operators of the remarkable napoleonic reforms – that found an opportune political context in order to realise the finally neapolitan codes, free from binding models. The route had already been started during the napoleonic period and, exactly, during his last moment, when Murat – after the independence choice against France and Napoleon – because of the impulse of the ruler neapolitan party decided to begin a wide reform of the codes through the nomination of specific commissions: so the path that brought to the neapolitan codification during the first Restoration began in the 1814 and ended in 1819.

The *Codice per lo Regno* was the first pre-unification italian code and represented completely the continuous choice of the neapolitan government about the napoleonic reforms, confirmed by the substantial conservation of the administrative and judicial systems of the French Decade. For this reason is possible to say that the *Codice* represented during the 1800s a text of reference for the other italian states that within some decades developed their codes. The special laws emanated during the years of the Restoration are also relevant, and in particular two important “appendix” of the code deserve to be mentioned: the law about register and mortgages of 21 june 1819 and the law about the notary of 23 november 1819. This route, influenced by the neapolitan liberal party, was interrupted after the revolutionary events of 1820–21. The Bourbon repression against sectarians and liberals was very strong and the government begin to launch illiberal laws and decrees that set up a dual level of justice in the criminal side: a civil libertarian justice, ensured by the Code, for the crimes that didn't aroused social alert and didn't threatened political and public order, and an illiberal justice, without warranties for the accused people, determined through special laws and decrees about the crimes *contro la sicurezza interna ed esterna dello Stato*. Luigi Settembrini declared in his *Protesta*: «noi abbiamo un codice di leggi civili e penali che è forse dei migliori che sieno in Europa, ma esso è nulla perché la polizia fa tutto, può tutto e non riconosce alcuna legge». The opinion, moreover confirmed by recent researches, suggests an investigation about the relationship between liberal and evolved codes and a really authoritative government.

Another aspect that has to be examined is the one concerning the influence of the *Codice per lo Regno* on the successive pre-unitarian italian codes, begin-

ning from the *Codici Albertini*, on the unitarian italian codes and on American and Spanish codes (in particular on the criminal spanish legislation of the XIX century and on the project of *código español* of 1851, base of the *código* of 1888). The connection, certainly not totally dissolved, between the juridical and cultural inherit of the ancient regime has not to be ignored, and so the relationship of continuity/discontinuity between *jus regni* and codified right. In this respect, in the serveral aspects of interest, the research will dedicate a particular attention to the reconstruction of the intellectual and biographical profiles of the protagonists of the transition, that are the greater southern jurists that lead the passage from the ancient regime to the new one. The research aims to consider aspects and problems linked to the impact of the *Codice per lo Regno* on the peculiar sicilian context, connoted by autonomist pressions. All these lines of research will be studied together to the separed exam of the five parts of the Code, each one related to the following profiles: elaboration, contents, connection with coeval Bourbon laws and decrees, jurisprudential application, doctrinal debates, connection with the society. A particular importance will be allocated to the analysis of decisions of the principal tribunals of the Reign, and to the slow but constant building of a “national” jurisprudence on the Code.

Methodology

The research will be organized in six general researching areas about the whole *Codice per lo Regno*:

a. Relationship between liberal and evolved codes and a really authoritative government and the broadly speaking constitutional of the Code. The research will verify, also by the exam of the decisions, if and how the code had represented a protection for the individual rights.

b. Influence of the *Codice per lo Regno* and the special Bourbon legislation on pre-unitarian and unitarian italian codifications. The research will do a synchronous comparative investifation, compared to the other models used in pre-unitarian Italy and in the coeval european background, and a diachronic comparative investigation in order to understand the influences happened on the progressions of the national juridical culture and the point of connections with the text of unitarian codes.

c. The *Codice per lo Regno* in Europe, and in particular in Spain.

d. The Jurists and the *Codice*. This researching area will be addressed to the recontruction of intellectual and biographical profiles of the grater jurists that worked on the elaboration and interpretation of the Code (Niccola Nicolini, Pasquale e Raffaele Liberatore, Giuseppe Amorosi, Cesare Marini, Gaetano Arcieri, Francesco Magliano, Gaspare Capone, Francesco Canofari, Michele Azzariti, Ni-

cola Armellini, Pasquale Stanislao Mancini, Giuseppe Pisanelli, Giovanni Vittorio Englen, Domenico Capitelli, Francesco Sollima).

e. The teaching of the *Codice per lo Regno*. In the research will be studied the teaching of the *Codice* in the neapolitan University and in the important private schools of law that grew up in Naples during the first half of 1800s.

f. Code and society. In the research will be valued the impact of the code on the southern society of 1800s.

Near to the researching areas will be developed seven sectors of interest linked to the five parts of the *Codice*, to the *Statuto militare* and, in general to the *Codice* in Sicily: 1. Civil Laws, 2. Criminal laws, 3. Civil procedure laws, 4. Criminal procedure laws, 5. Trade laws, 6. Military Code and legislation, 7. *Codice per lo Regno* in Sicily. For every sector the research units will develop the following themes.

a. Elaboration of the legislative text: works of the appointed commissions, projects, opinions, observations, ministerial reports, discussions in the *Supremo Consiglio di Cancelleria* and in the Councils of the Reign.

b. Contents: description of the contents and comparative exam with napoleonic codes and with the main preunitarian, unitarian and european codes.

c. Relationship with Bourbon laws and decrees.

d. Jurisprudence application: exam of the jurisprudence collection of the principal courts of the Reign of Two Sicilies and of the motivations to the decisions, with a particular care to the incidence of the Roman law and the French jurisprudence.

e. Debates and doctrinal works: will be examined the doctrinal works and the ones about the Bourbon codes and, in particular, the several commentaries that were published during the 1800s.

The research unit of Bari will deal with the criminal parts of the *Codice per lo Regno* developing the themes indicated in the detailed description of the research project. The recent historiography has highlighted the high level of the *Leggi penali* with a repressive dimension of the *Leggi di procedura*. The develop of the research according to the indicated methodology will allow an evaluation of this configuration that, in particular, will be observed and studied through the “lens” of sentences, that is to say through a research concerning the concrete application of the codes in judiciary area realized on the excellent printed collections of *Decisioni*, on the great and unexplored manuscript stored by public record offices of Napoli, Trani and Lecce. A such articulated study will provide useful elements for the develop of general researching area connected to the correlation between criminal codification and special legislation and decrees – with an evaluation of constitutional

significance in broad sense of the criminal code in a context of a regime strongly authoritative and repressive – and to the influence of Italian criminal and criminal procedure law, before and after the unification, and European. In the end, during the research will be studied the most important figures and works of Neapolitan criminal law experts of nineteenth century.

The Research Unit of Salerno intends to carry out a critical survey of the implementation tools of the *Codice per lo Regno* and its internal and external circulation channels, with particular reference to Civil Laws and Commercial Laws. It was an important juridical and cultural phenomenon, which confirmed the validity of the codified system of law and, at the same time, closed the French parenthesis by strengthening constitutional autonomy. Some institutes introduced with the code civil, excessively liberal and innovative compared to the figures of the tradition and of the national customs, were modified. It can be assumed that only a part of the ‘uncomfortable’ equations between subjects was corrected or fully restored, so much so that the Code of the Two Sicilies was assumed among the reference models in the preparation of the first Italian Civil Code, as well as in subsequent interpretative phases.

The research activities of University of Catanzaro will focus on three main interconnected themes regarding all the new legal system adopted by the Kingdom of the Two Sicilies during the early years of the so-called “Restaurazione”. Firstly, it will be studied and investigated the regulation of the notarial profession established in 23rd November 1819 with one of the most important additional acts to the first part of the “*Codice per lo Regno delle due Sicilie*”, entirely dedicated to private law. The second theme will concern the regulations of urban and rural policing, introduced by the civil administration’s act in 12th December 1816 and represents the only example of local law to be referred to the Code of 1819. Finally, the last research theme will regard the application of the second part of the same Code in relation to crimes committed by underages, trying to investigate more widely the criminal policy adopted in juvenile delinquency by the Bourbon’s Government during the first half of the 19th century.

The Unit of Messina aims to investigate the impact of *Codice per lo Regno* on the Sicilian legal and social context in the different phases of the Restoration. The islanders, who were excluded from the process of elaboration of this new and impressive normative apparatus imposed by Ferdinand I, staged reactions very different among them, even antagonistic. Almost all the jurists, however, agreed on one point: the administrative reforms of the Bourbon monarchy, the setting aside of the Sicilian constitutional requests and the application of the codes of 1819 quickly marked the end of the autonomy of the Kingdom of Sicily and, with it, of a secular juridical tradition. But this tradition reemerged with insistence in the speeches, in

the works, in the procedural documents and in the reform projects conceived by the Sicilians between 1816 and 1861. Thus, a “culture” of the code and of the constitution, peculiar if compared with that of the Neapolitan provinces, took form.

The Unit will also focus on the relationship between ordinary and military jurisdiction, through archive researches.

Lastly, the Unit intends to deepen the juridical and cultural mechanisms that have sometimes decreed a partial survival of Roman law during the Bourbon experience, despite its formal codicistic abrogation

Conclusions and aim of the project.

The reformism of Restoration, that was rooted in the southern Enlightenment and in particular in the way of thinking of Gaetano Filangieri and Francesco Maria Pagano, culminated with the promulgation of the Codice per lo Regno that, during the 1800s, because of his liberal contents was a point of reference for the most part of european jurists that highlighted the evident contradiction between an evolved code and an illiberal and repressive regime. The Restoration was an important and significant moment of the juridical history of the “Mezzogiorno”, with reflexes in the whole Europe, that, despite of this, did not received the appropriate detailed study on the historiographical level, also because the general disrepute that has followed the Bourbon regime since the National Unity. The research, through the operative and methodological procedures already identified in the description of the project (that plans the recovery and the appreciation of unreleased documents kept in italian and foreign archives), beginning from the several sparks provided by the recent juridical historiography, aims to study deeply the code and the laws of that season of reforms, to verify their role in the social, political and institutional context of the Reign and to consider the influence that they had on the codes of 1800s. It’s planned that the research and results expected will have a significant impact on the european and italian scientific level because of the lack of a work like this and because the recent juridical historiography is wishing for this. It’s possible to believe that the research, because of the methodology chosed and the aims individuated, has a good impact also on other scientific sectors different from history of law and, in particular, on political, social and institutional italian and european history of 1800s. The research moreover aims to create tools and widespread way of access that allow a wide usability of these not only for academics but also for students and researchers in order to stimulate a greater awareness of the history of “Mezzogiorno” and to facilitate studies and researchers in that field. Under this profile, has to be pointed out the purpose of uploading on the internet the acquisitions of the research (unitary databases of laws, codes, decisions, bibliography, doctrine and works considered significant) through the implementation of alrea-

dy existing institutional websites and the creation of specific ones with free-access materials downloadable by the users. The material acquired by the research and the scientific works developed by the members will form the basis for the elaboration of usable contents that have to be included in the mentioned websites. The circumstance of the celebration of the bicentenary from the promulgation of the *Codice per lo Regno delle due Sicilie* of 1819 will draw the attention on the research and its results of public and private institutions of Mezzogiorno that will be called to cooperate in the organization of the conferences and events connected to the project. Under this profile, one of the conferences planned in the project will be for sure organised in 2019, during the bicentenary, with the direct participation of the territory.