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From Ethnic Law to Town Law: The Customs of the Kingdom of Sicily from the Twelfth to the Fifteenth Century

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Abstract

The history of Sicily, the largest island of the Mediterranean, is notably distinct from the history of the rest of Italy. It is because of this distinctiveness that Sicily can serve as a paradigmatic example of a pluralist legal system, one with a mix of both personal-law and territorial-law rules. In the time period that I examine in this essay, customary law took several different forms. What legislation, private records, and judicial decisions all call »custom« plays three different roles: law of specific ethnic groups, rights and customary practices concerning real property, and the law of towns.



Beatrice Pasciuta

From Ethnic Law to Town Law: The Customs of the Kingdom of Sicily from the Twelfth to the Fifteenth Century*

This article is dedicated to Mario Montorzi,
master and friend.

1 The Customary Law of Ethnic Groups: Muslim Sicily and the Norman Conquest

In the early ninth century (827) Muslim invaders seized Sicily, which until then had been, at least in theory, Byzantine territory and thus part of the Roman Empire. The island became part of the *Dar al-Islam*, lands of strict Muslim observance. Initially, Sicily came under the control of the Aghlabids, rulers of the Emirate of Kairouan in North Africa and vassals of the Baghdad caliphate. From the early tenth century (910) Sicily fell under the power of the Kalbids, who, although formally vassals of the Fatimid dynasty of Cairo, ruled the island in practice as an autonomous emirate.¹

The Muslim presence in Sicily did not result in a completely Islamicized population on the island. Islam allowed freedom of religion within certain limits. Christians – both Roman Catholic and Greek Orthodox – and Jews could continue to practice their own faiths provided that they paid a special tax, the *jizya*. The new religion nevertheless enjoyed considerable success, especially in the western part of the island, where almost half the population converted to Islam. In the eastern part, on the other hand, Christians remained decisively in the majority.

Norman expeditions to reconquer the infidel island for the Christian faith began in 1060. Norman knights led by Roger of Hauteville, brother of Robert Guiscard, undertook an extended military

campaign that started with the conquest of Messina (1061), continued with the taking of Palermo (1073) and Syracuse (1082), and effectively ended with the capture of Noto, last bastion of the Muslim administration.²

Yet even amid the Normans' massive military campaign, contacts between Normans and Muslims included some attempts at conciliation. In particular, the Normans' use of Arabic interpreters, Islamic legal specialists, and experts in Sicilian customary law is well documented. In the chronicle of Amatus of Montecassino (b. ca. 1010, d. ca. 1090),³ we read that the Norman leader Robert Guiscard dispatched one Peter the Deacon, »who understood and spoke practically like a Saracen,« as his ambassador to the emir of Palermo.⁴ Another chronicler, Geoffrey Malaterra (d. 11th c.),⁵ mentions that a certain sea captain named Philip, sent to spy on the Muslim fleet at anchor in the port of Syracuse, was equally fluent in Arabic and Greek.⁶ In the delicate negotiations that preceded Sicilian towns' surrender and handover to their new Norman lords, mediation of this sort also played a role in the compilation and recognition of customary legal rules that the new political regime would continue to enforce. The chronicle of Geoffrey Malaterra describes how the inhabitants of Rometta sent envoys to negotiate the surrender and swearing of fealty to the Normans after the capture of the defeated town; the oath was sworn on books of the ancient laws of the city.⁷

* Translation by William P. Sullivan.

1 Muslim Sicily has recently been the subject of renewed interest among historians. For an up-to-date overview and bibliography, see especially JOHNS (2007); METCALFE (2009); NEF (2011).

2 For an efficient summary of the events and methods of the Norman Conquest, see NEF (2011) 21–32.

3 The *Historia Normannorum* recounts events from 1016 to 1078. The text is transmitted only in an Old French-language version published in DE BARTHOLOMAEIS (ed.) (1935).

4 JOHNS (2007) 33.

5 The chronicle of Geoffrey Malaterra recounts events occurring up to 1098. PONTIERI (ed.) (1927–1928).

6 JOHNS (2007) 33.

7 »Libris superstitionis legis suae coram positus, juramento fidelitatem firmant.« PONTIERI (ed.) (1927–1928) 33.

Analysis of the chronicles casts light on this process of negotiated conquest both in individual urban centers in Sicily and in lands in North Africa and on the island of Malta. In legal terms, surrender meant that the population of a defeated community agreed to serve as vassals and subjects of the count of Sicily, becoming part of the new Norman legal and political system. After the handover, the heads of the Muslim community traveled as envoys to Roger I of Hauteville and other Norman military leaders to request a *foedus* – a pact – with the Normans. In return for payment of a tribute, called a *censum* or *jizya*, members of the Muslim community became subjects (*confoederati* or *ahl al-dhimma*) of the new rulers and received the right to protection (*dihimma*) and recognition of their customary law and special legal status.

This brief introduction serves to explain the ethnic diversity that characterizes Sicily, beginning with its inclusion in the Christian West.

2 Norman Sicily: From County to Kingdom

At the end of his campaign of conquest, Roger of Hauteville was granted the title of count of Sicily. From this point onward, the legal and institutional history of the island can be compared with the history of the rest of western Europe during the same period. With the conquest complete, all the towns and lands of Sicily came *de facto* and *de jure* under Roger's jurisdiction. He could choose to grant them in fief to his *fideles* or to hold them directly as part of his own demesne.

The *Gran Conte*, as Roger was called, introduced a model of governance founded on a massive effort to Christianize the local population coupled with direct control of Sicilian territory. The model was implemented through the creation of new bishoprics held by appointees who were the *Gran Conte's* direct vassals.⁸ As a consequence, in the first fifty years of Norman settlement around fifty thousand Muslims emigrated to the lands of Islam

(Al-Andalus, the Maghreb, and Egypt). Especially likely to leave the island were the Muslim intellectual and aristocratic elites. Those who stayed behind continued to be subject to the *dhimma* – a Muslim legal concept that the Normans appropriated for themselves – which guaranteed freedom of worship, legal standing, and other rights in return for payment of the *jizya*.

This fusion of Muslim and Christian models went hand in hand with the adoption of legal institutions designed to ensure more effective rule over Sicilian territory. In the *Dar al-Islam*, the principle of personality of law held primacy: each person was entitled to be judged according to his or her own law. Yet there is also plenty of evidence for members of one religious group »trespassing« into the jurisdiction of another. For example, pre-Norman court registers attest to attempts by Arabic-speaking Jews to obtain justice from the Muslim community's *qadi*.

In 1101 Roger II succeeded his father, the *Gran Conte*, as Count of Sicily at the age of only ten years old. Between 1112 and 1130 Roger successfully undertook a series of military campaigns that resulted in the unification of many of the Norman lands of southern Italy under his own rule: Abruzzo, Bari, Calabria, Capua, Naples, and Puglia. Then, in 1130, the death of Pope Honorius II and the schism that led to the election of two popes, Innocent II and Anacletus II, provided the perfect opportunity to consolidate all these territories into a single, more powerful entity. Indeed, Roger II's support for Anacletus II won him the title of King of Sicily. He was crowned in Palermo Cathedral on Christmas Eve 1130.

3 Custom versus Legislation

The first recorded royal legislation from Sicily dates from the so-called assizes of Ariano. The legislation consists of a body of statutes promulgated in 1140 and applicable to the entire king-

8 The so-called »Apostolic Legation« (*Apostolica Legazia*) was a privilege claimed by the Kings of Sicily that consisted of the right to nominate bishops on the island. The theory behind it was that the ruler of Sicily was concurrently a papal legate. Pope Urban II supposedly granted the right

to Roger of Hauteville in the 1098 bull *Quia propter prudentiam tuam*. It was later the subject of protracted negotiations between the Kings of Sicily and the Roman Curia, and much scholarship has been devoted to the question of whether it was ever really granted. It is nevertheless un-

deniable that the rulers of Sicily exercised the power of nomination over bishops on the island from the Norman conquest onward. On the Apostolic Legation, see FODALE (1991) and most recently VACCA (ed.) (2000).

dom.⁹ Although the exact means by which the corpus of texts was created and promulgated remains uncertain, we can still use the assizes as a starting point for analysis without considering their history in depth.¹⁰

The royal legislation that began to appear in 1140 set forth a clear classification of different types of norms, explicitly taking account of the variety of competing personal-law regimes within Sicilian territory. Although his legislation applied kingdom-wide, Roger II nonetheless provided that preexisting *mores*, *consuetudines*, and *leges* would remain in force, and he guaranteed that the *varietas populorum*, the variety of subject peoples within his kingdom, would continue to enjoy any rights they already held. His only condition was that no pre-existing norms be clearly contrary to the new legislation. »We wish,« he declared, »that the laws promulgated by Our Majesty [...] be obeyed by all, without prejudice to the preexisting uses, customs, and laws for the variety of subject peoples in our kingdom, in force up until now, provided that they not be manifestly contrary to Our enactments.«¹¹

Roger II renewed these efforts to square the hodgepodge of pre-existing laws and customs with his new policies in another assize, known as assize 27, in which he dealt with the law of marriage. The assize reiterates that marriage between Christians is permitted only when celebrated in accordance with canon law – meaning in a church and with the participation of a priest – and that all other forms of marriage, contracted in accordance with custom, were invalid. In the assize Roger also lists the acts he views as essential for ensuring the good governance and welfare of the kingdom: giving laws, governing the people, imposing order on (*instruere*) old customs, and eliminating (*extirpare*) bad customary rules. *Instruere et extirpare*.¹² Roger's centralizing legislative program was aimed above all at reshaping customary law. The ruler hence reserved the power, when necessary, both to

reorganize customs (*instruere*) and to abolish them by force (*extirpare*) – eliminating *prave consuetudines* root and branch – over and above his power to eliminate any customs that were expressly contrary to the new legislation.

4 Personal Law in a Multiethnic Sicily

The Norman rulers' recognition of an array of customary norms particularly affected the principle of personality of law, under which different norms applied depending on the ethnic and religious affiliations of a given party. Twelfth-century Sicily was traditionally defined as a trilingual region. In his *Liber ad honorem Augusti*, Peter of Eboli called the capital city Palermo an *urbs felix populo dotata trilingui*. A well-known illumination in the *Liber* manuscript depicts the city in mourning after the death of King William II by portraying each of the various ethnic groups that made up the city's population separately. In this depiction, linguistic affiliations corresponded to the three major ethnic groups: Latin, Arab, and Greek. Yet in reality the situation was much more complicated. The name »Latin« encompassed Normans, Bretons, Provençals, and the so-called »Lombards,« inhabitants of northern Italian origin.¹³ The term »Greek,« meanwhile, covered a population concentrated in the eastern part of the island that lived under a strong Byzantine cultural influence. The Jews of Sicily were for the most part of Maghreb origin and therefore Arabic-speaking, whereas the Arabs themselves were subdivided into various tribes among which the Berbers were the dominant group.

The right to be judged according to one's own law remained in force throughout the initial period of Norman rule. A privilege granted in 1168 by John, bishop of Catania, provided that »Latini, Greci, Iudei et Saraceni unusquisque iuxta suam

9 For the text of the assizes, see ZECCHINO (1984).

10 For an up-to-date treatment of the problems raised by the assizes, see HOUBEN (1999).

11 »Leges a nostra maiestate noviter promulgatas pietatis intuitu asperitatem nimiam mitigantes mollia quodam moderamine exauctentes; obscura dilucidantes, generaliter ab om-

nibus precipimus observari, moribus, consuetudinibus, legibus non cassatis pro varietate populorum nostro regno subiectorum, sicut usque nunc apud eos optinuit, nisi forte nostris his sanctionibus adversari quid in eis manifestissime videatur.« ZECCHINO (1984) 27.

12 »[...] A]d curam et sollicitudinem regni pertinet leges condere, popu-

lum gubernare, mores instruere, prava consuetudines extirpare.« ZECCHINO (1984) 46.

13 KÖLZER / STÄHLI (eds.) (1994) 56. This famous illumination is found in Bern, Burgerbibliothek, MS 120 II, fol. 98r. For an incisive analysis of the use of all three languages in documents issued by the Norman chancery, see NEF (2011) 73–118.

legem iudicetur.»¹⁴ This document describes a legal framework marked by competition among different legal systems, or at any rate among different court systems, each one reserved for the use of a different ethnic group on the island. An Arab chronicler, the historian Ibn al-Athir, writes in an encomium to Roger II that the king had made accommodation for Islamic law and had broken with Frankish legal practice by establishing a special tribunal, the *diwan al-mazalim*, where Muslims could bring claims of wrongs committed against them and where the king dispensed justice in person, sometimes even ruling against his own son.¹⁵ Muslim observers who traveled to Sicily and described the Norman kingdom all emphasized the Norman kings' adoption of Muslim rules and customs almost to the point of propagandizing. They insisted that the inclusion of Islamic jurists in the Norman *curia regis* was not a mark of submission but rather an acknowledgment of the Muslim community's social and cultural significance.

During the Norman period, recognition of Muslim community customs and the right to use Muslim laws and courts were linked to the *dhimma*. The sovereign's protection, in other words, was granted in exchange for the community's pact of submission. In 1199 Pope Innocent III approved these terms of royal protection to Muslims living in Sicily, thus validating the royal government's policy and confirming that Saracens loyal to the king would be protected and could live according to their own customs.¹⁶ The Muslim community's privileged status was obviously made possible only by direct royal intervention; the sovereign promoted a policy of protection in exchange for aid and support, including military aid. Confirmation of this dependency on royal protection comes from the fact that, during the crisis that led to the end of the Norman dynasty, local Latin lords retaliated against subject Muslims in open violation of the laws of the two communities.

5 Custom at Work: Agreements with the Seigneur and Property Disputes

Traces of customary practices can also be detected in notarial records from the Norman period. The documents consist in large part of peace accords, made under the supervision of local elders, and of agreements modifying land rights. The latter invoke the antiquity of the rights concerned in order to mask a new settlement reached between the community and the local lord, often having to do with taxes.

Here a few examples are available. In 1157 Bosone, Bishop of Cefalù, modified several rights that were held by the *burgenses* of Cefalù, in particular rights having to do with slaughtering animals, production of flour in the mills, and hunting. Bosone stated that he wanted to accommodate the requests that the inhabitants of Cefalù, whose lands and diocese he governed under a concession from the king, had made concerning these rights. He noted that their requests were not a departure »a racionis tramite« and that they were particularly easy to grant given that he himself already wanted to abolish a number of »sinistras consuetudines et pravas de civitate Cephaludi.«¹⁷ By making explicit reference in the notarial act to »bad« customs and to the »spontaneous« request of Cefalù's inhabitants to abrogate them, Bosone masks what is in reality a tax-rate reform that changes the tax on the slaughter of animals, the so-called *ius scannaturae*; eliminates the old practice of paying weavers a quantity of grain in addition to the amount otherwise owed to them for their work; sets a ceiling on the share of bread to which bakers are entitled in return for baking customers' dough; establishes the right to hunt rabbits freely; allows the sale of unlimited quantities of charcoal; and, finally, sets the *ius moliturae*, the amount of grain that must be paid to the public mill in return for grinding. The *prave consuetudines* in this instance were simply customary payments that were higher or lower than the amounts now being established by the authority of the archbishop.

14 LAGUMINA (ed.) (1884–1909) 1:12 n. 15.

15 JOHNS (2007) 255.

16 »Licet enim Sarracenos si in fidelitate predicti regis permanserint diligere ac manutenere velimus et bonas eis

consuetudines adaugere sustinere tamen nec volumus nec debemus ut cum Marcovaldo regni excidium machinentur.« HUIILLARD-BRÉHOLLES (1852–1861) 1:36.

17 GARUFI (1899) 78.

Another context in which local practice was justified with reference to its antiquity is that of the peace agreement. In 1159 Rinaldo de Tusa, grand justiciar of the *Magna Regia Curia* of Sicily, obeyed an order of King William I of Sicily and Admiral Maio of Bari to convene a group of elders for the settlement of a property dispute between Bosone, Bishop of Cefalù and Gilbert, Bishop of Patti. Rinaldo summoned a few of the oldest and most principled men of the area affected by the dispute and instructed them to reach a just and reasonable (*iustum et rationabile*) decision about the lands in question. The decision thus relied on the opinion of *probi viri*, men of reputation and authority. To lend greater solemnity to their opinion, these men swore a public oath. Interestingly, members of each of the major ethnic groups – Latin, Greek, and Arab or Jewish – appear to have been represented among the *probi viri*, at least to judge from their names: Andrea *protopapa* and *presbiter* Leo and Harit ben Elcadah from Petralia; Ionathas Paro, Accardus *vicecomes*, and Gregorius *protopapa* from Collesano; Cale *senex* and Calleas *senex filius Acintuli*; Mohabup *filius de Areo*; Gaytus Cosmas *senex*; Filippus *filius Tome*, Gallis *senex filius Tome*; Abdemelec *senex filius Trumarchi Benireb-ben-Aret*; Petrus *filius Moichisi* from Gratteri.¹⁸ Settlement of disputes about the division of real property relied explicitly on the memories and participation of local elders, who in the Norman period continued to be drawn from all three ethnic groups: Latin, Greek, and Arab.

6 Frederick II: Custom in the *Liber Augustalis*

The relationship between royal legislation and customary law changed with Frederick II (b. 1194, d. 1250). Born to Holy Roman Emperor Henry IV and Constance, last member of the Hauteville

dynasty, Frederick inherited the Kingdom of Sicily from his mother in 1198 before being elected Holy Roman Emperor in 1220. Although Frederick was the only ruler in the many centuries of Sicilian history to hold both titles, king and emperor, he maintained separate administrations and legislated separately for his two domains. In the *proemium* to his *Liber Augustalis*, the corpus of laws that Frederick issued in 1231 for the Kingdom of Sicily, he announces that his new legislation replaces and voids any preexisting laws and customs to the contrary, expressly declaring the earlier norms to be without any effect or authority whatsoever either in or outside of court proceedings.¹⁹ A few years before, in 1230, Frederick had ordered the justiciars of the kingdom to name four of the oldest men residing in each of their respective judicial districts, further specifying that the elders chosen should be both wise and learned and that they should be familiar with the laws and customs from the reigns of Roger II and William I; he instructed the justiciars to send the elders to his court for consultation.²⁰

In the new legal system inaugurated by the *Liber Augustalis*, custom thus continued to hold an important position but one now subject to intense scrutiny from the king. For example, the hierarchy of legal norms to be applied during court proceedings involving noblemen appearing before courts for the nobility now provided that *consuetudines approbate* would be applied only after royal constitutions.²¹ The same hierarchy appears in the famous constitution *Puritatem* (1.62.1), in which the king orders royal judges to apply first royal constitutions, next approved customs, and last *iura communia*, the Roman and Lombard law.²² In a similar vein is the constitution *Cum circa iustitiae* (1.73.1), which again alludes to the judge's duty to apply royal legislation first, then *iura* and *consuetudines approbate*.²³ The same provision is reaffirmed

18 GARUFI (1899) 81–83. The document in question is Archivio di Stato di Palermo, Tabulario di Cefalù, perg. 131.

19 STÜRNER (ed.) (1996) 148 *Proemium*.

20 WINCKELMAN (ed.) (1880) 605 n. 761.

21 STÜRNER (ed.) (1996) 207, *const.* 1.47, *Ut universis et singulis* »[C]omites et barones secundum sacras constitutiones nostras ac in defectu ipsarum secundum regni consuetudines approbatas et demum secundum iura,

quibus constitutiones nostre et predecessorum nostrorum non obviant [...] causam secundum Deum et iustitiam terminare procurent.«). On jurisdiction over nobles, compare PASCIUTA (2008) 73–74.

22 STÜRNER (ed.) (1996) 228, *const.* I 62.1, *Puritatem* »[S]ecundum constitutiones nostras, et in defectu earum, secundum consuetudines approbatas, ac demum secundum iura communia, Longobardorum videlicet et Ro-

manorum, prout qualitas litigantium exiget.«). On the constitution *Puritatem*, compare CALASSO (1940) 499–563; CALASSO (1954) 461–462; CORTESE (1995) 327–332.

23 STÜRNER (ed.) (1996) 244, *const.* 1.73.1, *Cum circa iustitiae* »Qui iuxta tenorem constitutionum nostrarum et iura ac consuetudines approbatas causas audiant.«).

once again in the constitution *Iudices ubique locorum* (1.95.3). Judges, the constitution says, must judge first according to royal constitutions, next Roman and Lombard law, and then finally *consuetudines approbate* not inconsistent with royal legislation.²⁴

In this new hierarchy of norms established by Frederick's legislation, judges and notaries working in the towns and lands of the royal demesne constituted the interface between royal law and local customary law. Both judges and notaries were appointed by the king after passing an examination administered by the king's court. A royal constitution provided that a would-be judge or notary had to submit letters of recommendation to the court from inhabitants of the place where he would be working. These letters had to attest to the applicant's good faith and upstanding conduct as well as his knowledge of local custom. But once admitted to the examination before the *curia regis*, the applicant was tested only on his knowledge of legal scholarship and the *ius scriptum*, not local custom.²⁵

7 Royal Law versus Custom

Frederick used legislation on several occasions to prevent the application of customs that he considered to be contrary to statute. The areas of law in which Frederick's new statutory norms expressly abrogated custom can be grouped under three headings: criminal law; public law, in particular the law of public office and the law regulating taxation; and the law of judicial administration and procedure.

In the first two areas of law, the new legislation intervened repeatedly against customary law, eliminating customs defined as *male* or *prave*. We can see the approach more clearly by looking at a few examples on the law punishing serious crimes and the law on the guardianship of *debiles*. The con-

stitution *Capitalem poenam* (1.22.1) explicitly criticizes the customary rule, in force in several areas of the Kingdom of Sicily, that allowed a man guilty of abducting a virgin or a widow to escape capital punishment, the penalty otherwise provided for by law in such cases, by marrying the abductee. It declares the customary rule to be without legal basis, reaffirming that the required sanction in such cases is death.²⁶ Similarly, Frederick's legislation replaced the variety of statutory and customary procedures regulating compensation (*compositio*) for victims of *iniuria* with a single, predictable rule valid everywhere in the kingdom: the new method of compensation was that of the *ius commune*.²⁷ For the crime of calumny, Frederick also reaffirmed an old statutory penalty that had been abrogated in later times by custom.²⁸ Finally, to protect minors under guardianship from being defrauded or robbed of their inheritances, Frederick forcefully reinstated the duty of guardians to submit accounts to royal officials concerning the administration of their wards' property; he expressly abolished the *prava consuetudo* that exempted guardians from submitting written accounts.²⁹

An analogous attitude is clearly visible in Frederick's legislation concerning matters of public law, in particular public offices and taxation. Administrative practice allowed officials to be appointed in accordance with local custom. The constitution *Cum satis* now strictly forbade this practice by threatening any town that disobeyed with destruction and reduction of its inhabitants to the status of *angararii*, half-free persons.³⁰ Similarly, an enactment issued by William,³¹ repromulgated in the *Liber Augustalis*, reiterated that it was the responsibility of the royal government to eliminate unnecessary (*supervacue*) customs. William's legislation also specified the areas within which bailiffs held jurisdiction to make preliminary assessments of tierce, damages that vassals were required to pay after conviction.³²

24 STÜRNER (ed.) (1996) 279, *const.* 1.95.3, *Iudices ubique locorum* («Iudices secundum formam constitutionum nostrarum et iura communia ac consuetudines approbatas que constitutionibus non resistunt, de purissima conscientia causas audiant et decident.»).

25 STÜRNER (ed.) (1996) 252–253, *const.* 1.79, *Quos omnes*.

26 STÜRNER (ed.) (1996) 174, *const.* 1.22.1, *Capitalem poenam*.

27 STÜRNER (ed.) (1996) 409, *const.* 3.42, *Varietates poenarum*.

28 STÜRNER (ed.) (1996) 316, *const.* 2.14, *Penam calumpnie* («Antiquis sanctionibus provide stabilitam et de consuetudine quadam abolitam.»).

29 STÜRNER (ed.) (1996) 398, *const.* 3.30, *Minoribus*.

30 STÜRNER (ed.) (1996) 209, *const.* 1.50, *Cum satis*.

31 It is impossible to determine whether this William is William I or William II.

32 STÜRNER (ed.) (1996) 235, *const.* 1.67, *Regie maiestatis providentia*.

Overall, in the areas of criminal law, guardianship of *debiles*, and public law, the new legislation mentions custom only when it is being abolished on a specific point. Legislative intervention tends clearly toward opposing custom.

In the area of judicial administration and procedure, on the other hand, custom was included in the hierarchy of sources of law, as discussed above. It thereby took on the force of applicable law accepted by the monarch, albeit subject to the express limitations imposed by statute law and subordinated to royal legislation. This was merely a general provision, however. In the area of procedure, too, a number of specific legislative provisions aimed to eliminate customs that clearly ran contrary to Frederick's general judicial policy approach.

For example, the practice of dueling, as is apparent from the *Liber Augustalis*, was regulated by customary law differently according to the personal law of the dueling parties. The constitution *Prosequentes benivolum* makes explicit reference to the Franks' and Lombards' continued use of dueling both as a means of resolving conflicts and as a type of judicial proof. It imposes strict limits on the capacity to serve as a witness – who can testify against whom – and abolishes the Frankish and Lombard customary rule permitting the use of the duel as a means of judicial proof, reserving use of the duel as a means of proof to the nobility, who continued to hold a right to duel.³³

Dueling was one area in which legislation and custom were in direct conflict. Frederick was obliged to allow the aristocracy, at least, to continue to resolve conflicts outside the ordinary judicial arena. Yet he still insisted on intervening to regulate in minute detail the manner in which duels were to be conducted. At the beginning of his legislation on dueling among the nobility, the monarch makes clear his dislike for the practice, defining dueling as a bad custom – *prava consuetudo*

– devoid of any rational justification and declaring his desire to eradicate the practice entirely.³⁴

Every aspect of judicial procedure, one of the most effective tools of public power, was subject to reform by royal legislation. The scope of customary law in this area was reduced to the absolute minimum.³⁵ Frederick intervened, for example, to abolish the custom of privilege of forum, which prohibited *cives* of certain towns in the kingdom, Messina, Naples, Salerno, and Aversa, from being summoned to judicial proceedings outside their hometowns.³⁶

8 Custom and Feudal Law

There were, lastly, a few areas in which statute and custom operated in harmony. One such area is feudal law. On questions of feudal law, the king declared himself bound to consider both the *cautela iuris antiqui* and the *regni nostri consuetudo*.³⁷ Yet even here, Frederick did not hesitate to intervene when customary law ran contrary to royal policy. For example, he abolished a custom that permitted a vassal to marry or give away in marriage daughters, nieces, and other women of the family without express royal approval, even though the custom had previously been recognized (*obtentata*) by the king as having a force equivalent to that of a privilege in some parts of the kingdom.³⁸

Frederick also intervened in the feudal law governing women's inheritances. »We have heard,« Frederick declared, »that in some parts of our kingdom a *prava consuetudo* that is still in force prohibits a woman from inheriting a fief in the absence of direct male heirs. Barons are accustomed to designate indirect male heirs to whom they marry their daughters in order to prevent the latter from inheriting their fiefs. This custom,« Frederick continued, »is contrary both to natural law and to applicable statute law and is therefore

33 STÜRNER (ed.) (1996) 337–339, *const.* 2.32, *Prosequentes benivolum*.

34 Id.

35 On the *Liber Augustalis* as an *ordo iudiciarius*, see PASCIUTA (2008).

36 STÜRNER (ed.) (1996) 295, *const.* 1.106, *Privilegia quibusdam locis*. On the privilege of forum and on town regulations, compare PASCIUTA (1993).

37 STÜRNER (ed.) (1996) 261–263, *const.* 1.87, *Si quando forte contigerit*. This particular provision dealt with the question of how *res fiscales* could be leased to private parties.

38 STÜRNER (ed.) (1996) 388, *const.* 3.23.1, *Honorem nostri*.

abolished.³⁹ The royal legislation modified the feudal law of women's inheritance for both Franks and Lombards. At the same time, Frederick provided that the management of fiefs inherited by daughters who were still minors would be entrusted to guardians in accordance with an »approved« (*approbata*) custom still in force in the kingdom. The king thus invoked an *approbata* custom while at the same time abolishing a *prava* custom that dealt with exactly the same subject matter. Frederick demonstrated not only his knowledge of customary law within the kingdom but also his ability to use custom as an instrument of power by designating a given customary rule as »good« or »bad« according to the circumstances.

One more example can be found in the law of prescription. Frederick abolished the »duram consuetudinem et iniquam« permitting prescription *more Francorum*, which extinguished any right that went unused for a continuous period of one year, one month, one day, and one hour. This custom had already been officially recognized (*obtentia*) in several regions of the kingdom; the king nevertheless declared that he wished to eliminate it permanently. He instead imposed fifteen new statutory rules governing prescription that he drew from the *ius commune*. These new rules increased the applicable prescriptive period to ten years when the holder of a right remained present in the area and twenty years if he was absent.⁴⁰ The new statutory provisions also affected feudal law, abolishing a custom that had exempted feudal rights from prescription.⁴¹

In pulling together the different strands of our study of custom and its relationship to royal legislation, we can identify two distinct phases during the age of Norman and Hohenstaufen rule in Sicily. In the first phase of Norman rule, an ethnic and religious conception of law predominated. Different rights were recognized depending

on a party's ethnic and religious affiliation. In the second phase, covering the later period of Norman rule and especially the reign of Frederick II, customs began to be treated as territorial law. Their application was now limited for the most part to feudal law, the law of procedure, and the law of marriage and inheritance.

Royal legislation seems generally to have worked against custom. Its field of action encompassed not only *prave* customs – those that were *contra legem* – but also unnecessary (*supervacue*) customs. The legislation was part of a clear effort to demonstrate the exclusive power of the central government over criminal law and the law regulating public offices and taxation.

9 The Independent Monarchy (1296–1416): Custom as Town Law

After the death of Frederick II in 1250, political events surrounding the succession to the throne led to a troubled and complicated change of dynasty. The Angevin dynasty that had conquered the Kingdom of Sicily from Frederick's descendants lost control of insular Sicily as a result of the Sicilian Vespers rebellion and from 1282 onward held only the continental portion of the kingdom. The island of Sicily was from this point forward an independent monarchy.⁴²

Amid this political uncertainty and the weakness of the monarchy, customary law stood at the center of a new transformation in the second half of the thirteenth century, as customs began to be gathered into systematic compilations. In these new compilations, customary law was essentially reconfigured as the law of individual towns.⁴³ The analysis of Francesco Calasso, who argued that the customs of southern Italian towns were essentially equivalent to the town statutes of northern Italy,

39 STÜRNER (ed.) (1996) 392, *const.* 3.26, *In aliquibus regni nostri* (»In aliquibus regni nostri partibus consuetudinem pravam audivimus hactenus tenuisse, quod in bonis comitis, baronis vel militis, qui decessit filiis masculis non relictis, filie non succedunt, sed consanguinei quantumcumque remoti masculini sexus tam balium puellarum ipsarum post mortem patris accipiunt, quam successionem usurpant et ipsas pro isporum dispositione

maritant. Quod quidem et nature dignoscitur esse contrarium, que parentum votis absque discretione sexus tam masculos quam feminas commendavit, et iuri tam communi quam nostro specialiter derogare.«).

40 STÜRNER (ed.) (1996) 404, *const.* 3.37, *Duram consuetudinem*.

41 STÜRNER (ed.) (1996) 405–406, *const.* 3.38, *Consuetudinem hactenus*.

42 For an overview of the events in Sicily, see especially D'ALESSANDRO (1989).

43 On the customs and local legislation of Sicilian towns, see CARAVALE (1986); CORRAO (1995); PASCIUTA (2003) 69–72; PASCIUTA (2005) 36–48.

remains fundamental for our understanding of this new role for customary law, at least for the sources that have so far been studied, even if the substance of his conclusions has since been rejected.⁴⁴ Collections of customs made their first appearance in Sicily at the end of the thirteenth century and became more widespread during the fourteenth. These collections consisted for the most part of compilations of town customs. The towns whose customs were collected were the so-called domanial towns, that is, towns belonging to the royal demesne and subject to direct royal jurisdiction.

In the new political system of the independent Sicilian monarchy, the domanial towns became privileged interlocutors and essential tools of royal governance, drawing strength from the monarchy's effort to reduce the power of the feudal aristocracy. The creation of new mixed collections of norms, combining customs, privileges, and *capitula*, is one of the most noticeable signs of this new political constellation.⁴⁵ In the constitution *Cum devotos*, issued as one of his coronation acts in 1296, the new monarchy's first ruler Frederick III accepted, confirmed, and bestowed »the force and effect« of law (»robur [...] et efficaciam«) on all norms then already in force in his kingdom, whatever their origin and area of application. The text of the constitution enumerates the different sources of law: favors, concessions, donations, privileges, liberties and immunities, customs, and finally orders and statutes. This ensemble of privileges granted to individual persons or towns, customs, and statutes formed a stock of old law that the new legal system could draw on.⁴⁶

The complex of new sources of law that Frederick III listed in his coronation act referred only to the *ius proprium* of the Kingdom of Sicily. The Roman- and canon-law provisions of the *ius commune*, an area of law in which the king lacked both

power and will to interfere, remained in force only as a body of subsidiary norms. What mattered most for Frederick III in this context was to sketch out the basic lines of the Sicilian monarchy's law-reform policy, which accounts for this focus on positive law, one of the central elements of the new political balance.

The essential difference between this new policy and the legal reform efforts of the Norman and Hohenstaufen periods lay in the absence of a hierarchy of sources of law. Frederick III's new system of law was made up of a series of competing sources of law with no preconceived hierarchical structure. Which norm applied in a given case depended in part on the discretion of the king, who could always abrogate existing law or derogate from it in particular circumstances, and in part on the discretion of the interpreter, who could draw on arguments from the scholarly legal literature in order to construe individual legal provisions in favor of one party or the other.

The most important sources of customs in this scheme were the two largest cities of the kingdom, Palermo and Messina. Other domanial towns on the island derived their own customs from these sources either through direct borrowing or indirect influence.⁴⁷ The town customs of Palermo, for example, regulated legal procedure (const. 1–25); *protimesis* (rights of first refusal in property transfers; const. 26); construction (a ban on construction without a permit; rules concerning buildings in ruins; rules governing houses attached to the walls of a town); prostitution; the validity of notarial acts involving transactions in which one party was Jewish, Arab, or Greek and the other Latin Christian, including in situations in which each party was represented by a notary of the same ethnic group and language; usury; dotal and patrimonial property; marriage *more Grecorum* and *more*

44 CALASSO (1929); CALASSO (1959).

45 PASCIUTA (2005) 36–38.

46 Frederick III, cap. 2, in TESTA (1741) (ed.) 1:47–48 (»[...] O]mnes gratias, concessiones, donationes, provisiones, privilegia, libertates, immunitates, consuetudines, constitutiones, ordinationes et leges quas et que sacratissimus imperator Fredericus secundus, [...] Rex Manfredus, [...] rex Aragonum et Siciliae Petrus [...] ac etiam Iacobus nunc [...] Aragonum, olim rex Siciliae [...] nec non Arago-

num et Siciliae regina [...] vel anteriores quicumque principes nostri in regno Siciliae predecessores [...] dederunt fecerunt constituerunt promiserunt vel etiam confirmaverunt.«).

47 For example, the customs of both Corleone and Trapani derive from the customs of Palermo, whereas the customs of Agrigento, Patti, and Lipari were all borrowed from the customs of Messina. PASCIUTA (2005) 39–40. For editions of the Sicilian

town customs, see LA MANTIA (ed.) (1900); SICILIANO VILLANUEVA (ed.) (1894).

Latinorum; guardianship; inheritance; milling and mill management; duties of night watchmen; markets; public baths; town officials; artisans, barbers, and money changers; and the legal force of customs no longer in use.

The style of these customs is very much like the style used for the promulgation of statutes. Preambles of individual customs often adopt a rhetorical posture typical of royal legislation. Their form, in the official edition that survives from the late fifteenth century, has to my mind little in common with what one might call the »classic« form of the custom. Indeed, in reading the text of the collection one has the impression that these customs are in reality norms of positive law. They work within the framework already created by general royal legislation, filling in details along the lines laid out by royal statute or by the *ius commune*. They serve to highlight the political preeminence of the towns, which in this period were using their own laws, legitimated by their air of antiquity, to establish themselves as independent centers of power. Customs, in short, functioned alongside statutes and often even supplanted them.

The impetus for this supplanting of statute by custom must be sought in the political dynamics of the period, or to be more precise in the use of law as a political tool. In the legal lexicon, the term *consuetudo* was used to refer to legal norms that arose from within a community. The difference between statute law and custom lay most likely in the greater stability and durability that the supposedly great antiquity of customs helped give them. This temporal factor, the antiquity of customs, served to legitimate the rules they contained and to protect them from being distorted by the royal administration.

10 Juristic Thought

The argument of the lapse of time as justification of a custom is confirmed, moreover, by the

theories elaborated by the jurists on the nature and legal effect of customs in a monarchy. The two jurists whom I would like to discuss briefly by way of concluding this essay were active in different periods, one medieval, the other early modern. But both jurists saw custom as a limit on and counterweight to royal law.

Andrea da Isernia was a law professor at the *studium* of Naples and high-ranking official in the royal administration under Charles II and Robert I of Anjou who was active at the turn of the fourteenth century. His *Lectura peregrina*, a commentary on the *Liber Augustalis*, probably dates from 1309.⁴⁸ The *proemium* to the *Lectura* is fundamental for understanding the jurists' perspective on the relationship between customs and laws of general application and ultimately on the meaning of the term »custom« itself, or at any rate its meaning in high medieval Sicily.

The focus of Andrea da Isernia's discussion in the *proemium* is the normative value of town customs. The law of *universitates* (i. e., towns), he says, consists of both *ius non scriptum* – of customs, which despite the name can be either written or unwritten – and *leges municipales* or *statuta*. Both types of norm are of equal effectiveness within the legal system.

Across the wide range of subjects that were regulated only at the local level and for which there was no royal legislation, Andrea makes no distinction between custom and positive law.⁴⁹ On the contrary, he makes clear that in contemporary practice it was up to the town government to determine whether a given legal enactment qualified as a custom or not.⁵⁰

Andrea then divides town law into three categories: *secundum legem* (»in accordance with [royal] statute«), *preter legem* (»in addition to statute«), or *contra legem* (»against statute«). Town legislation *preter legem* poses no problem of legitimacy because it concerns only the internal administration of the town and does not contradict the royal *lex*.⁵¹ Legislation *secundum legem* consists of legal provi-

48 On the biography of Andrea da Isernia (b. 13th c., d. before 1316), see the entry Andrea da Isernia in BIROCCHI (ed.) (2013) 1:61–63. Francesco Calasso argued that the *lectura* is datable to the first years of the reign of Robert of Anjou, sometime around 1309. CALASSO (1961) 100–103.

49 Andrea da Isernia, *Proemium super Constitutionibus regni*, in CERVONE (ed.) (1773) 19 (»[P]aria sunt quidem quantum ad hoc consuetudo, statutum et lex municipalis.«).

50 CERVONE (ed.) (1773) 19 (»[E]st consuetudo titulata quando cives statuunt aliquid esse consuetudinem.«).

51 CERVONE (ed.) (1773) 19 (»De statutis preter legem non videtur dubium quin civitas inter se faciat.«).

sions that act to reinforce existing statutes, for example by increasing the penalty for violation of a particular law.⁵² Finally, town customs and statutes that are *contra legem* are void. Andrea's reasoning on this point is dense and concise; he cites the Bologna school's interpretation of the disagreement between the Roman jurist Julian (Dig. 1.3.32) and a constitution of Constantine (Cod. 8.52(53).2).⁵³ Andrea's initial assimilation of the categories of custom on the one hand and statute or *lex municipalis* on the other leads him to agree with those jurists who argued that any custom that ran contrary to statute should be considered invalid.⁵⁴

Andrea's reasoning was reaffirmed several centuries later by another Sicilian jurist, Mario Muta (b. mid-16th c., d. 1636), in his commentary on the general statutes of the Kingdom of Sicily.⁵⁵ In his discussion of feudal law, which he treats as part of town law, Muta asserts that custom is the only limit on the king's power to legislate. Indeed, custom, according to Muta, is by definition older than statute and therefore lies outside the power of

the sovereign. Kings can make laws, but they cannot make customs.⁵⁶ The customs under discussion are, in this instance, feudal rules. »I see only one situation,« Muta says, »in which the king is bound to obey the law, and that is feudal law. Indeed, he is subject to feudal law because it is a custom. The general custom governing fiefs is superior to any individual ruler and therefore binds him.«⁵⁷ Muta argues for the binding force of feudal law by noting that feudal rules are both products of custom, therefore satisfying the requirement of antiquity, and norms of general applicability, meaning that they must win out over individual pieces of royal legislation aimed at regulating specific cases. The term »custom« is thus used to differentiate different areas of law and to justify the existence, or even the preeminence, of certain norms by invoking the category of time. Antiquity, consent, and usage are the prerequisites, at least in theory, for placing limits on the legislative power of the sovereign.



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52 CERVONE (ed.) (1773) 19 (»In duplum secundum legem scriptam statutum diceret quod in quadruplum.«).

53 On the solutions proposed to this antinomy in the gloss attributed by Savigny to Irnerius and on later developments in the jurists' thinking on the problem, including the opinion of Placentinus that the *princeps* held the exclusive power to create law, see CORTESE (1966–1982²) 92 ff.

54 CERVONE (ed.) (1773) 22 (»Consuetudo et per consequens statutum, quod lex municipalis est, contra legem scriptam non valet.«).

55 Mario Muta was one of the most accomplished jurists of his time. Born

in Palermo and active from the end of the sixteenth century through the 1630s, he served as advocate and judge in both the Gran Corte and the Tribunale del Concistoro. He was also the author of the first systematic commentaries published on the capitularies of the Kingdom of Sicily and the *prammaticae* and customs of Palermo, and he edited several collections of *decisiones* of the Gran Corte. On Muta, see the entry »Muta, Mario,« in BIROCCHI (2013) 2: 1403–1404.

56 MUTA (1660) 2:14 (»Consuetudines prius fuerunt in mundo quam leges et consequenter consuetudines non

sunt in Principis potestate [...]. Princeps et Rex licet possit facere leges non tamen potest facere consuetudines in eodem instanti et unico contextu sed bene et consuetudo inducitur ex eius successivis actibus.«).

57 MUTA (1660) 2:14 (»In uno tantum casu video principem non esse solum, nempe lege feudi, quia licet regulariter lege communi sit solutus [...] tamen est subiectus lege feudi quia [...] leges feudi sunt consuetudines potius.«) Muta invokes the authority of Baldus to conclude without hesitation that »consuetudo generalis feudorum est maior quolibet singulari principe et ita ligat eum.«

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