

# Legal Culture and Customary Codes: Non-state Law and Identity Building in Italian History

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**Abstract.** The second thesis of the “*Trento Manifesto*” investigates to what extent the study of legal phenomena of the past can shed light on contemporary legal developments. This question could be relevant as well with reference to old customary codes, such as the Sardinian one, known as *Codice barbaricino*.

In specific areas of Sardinia, an oral customary law – which has been in force for centuries – is still partly applicable. This body of customary rules was transcribed in the 20th century into a code by the Italian scholar Antonio Pigliaru, thus drawing the attention of the mainstream legal culture.

The cornerstone of the Sardinian legal system is the concept of “revenge” as the natural way to put an end to conflicts. Due to the peculiar geographical, social and economic features of Sardinia, revenge and its subsequent codification easily became instruments for affirming cultural, social and historical uniqueness. While pastoral societies guarded jealously their legal traditions to protect the community from external influences, Pigliaru used the transcription to build an original Sardinian identity by basing his work on two main questions: did the unwritten *Codice barbaricino* influence the social and political context of Sardinia? What can this experience of consolidation of an oral legal culture teach to modern legal scholarship?

**Keywords:** revenge, Sardinia, identity, code, transcription, traditions, *Codice barbaricino*

## 1. INTRODUCTION

The second thesis of “*Trento Manifesto*” calls for a reflection on the influence of legal phenomena of the past on the current Italian legal culture. This article will focus on customary codes, and the *Codice barbaricino* in particular, as the expression of the oral customary law of Barbagia, a specific area of Northern Sardinia. The *Codice Barbaricino* is an unofficial law, or non-state law, containing rules, practices and customs that the local community of Barbagia respects, while the Italian State has constantly refused to acknowledge.

The concept of “customary code” can be misleading. It is sometimes used to define oral laws of local communities, thus becoming a synonym of “customary law”. However, for the purposes of this article, “customary code” refers to those cases in which a jurist, or another intellectual with a legal education, transcribes an oral traditional law into an unofficial written text.

In Barbagia, the ancient oral customary law has been transcribed into a code remarkably – and unusually – revolving around the concept of revenge.<sup>1</sup>

English dictionaries define “revenge” in different ways, ranging from a “harm done to someone as a punishment for harm that they have done to someone else”,<sup>2</sup> to “the act of retaliating for wrongs or injury received”, or “something done as a means of vengeance the desire to take vengeance or retaliate” or again “a return match, regarded as a loser’s opportunity to even the score”.<sup>3</sup>

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<sup>1</sup> About revenge, see Verdier and others (1980–1984).

<sup>2</sup> Revenge, see at link 1.

<sup>3</sup> Revenge, see at link 2.

A legal definition of revenge does not exist but legal anthropology has constantly paid considerable attention to revenge as a key concept for conflict settlement in geographically different societies. In addition to the Barbagian community in Sardinia, other relevant examples include the Inuit society in Arctic, the Moundang in Chad or the Mengen in Papua New Guinea. In the Mediterranean area, a standard case of revenge-based legal (customary) culture can be found in the mountains of Northern Albania and Kosovo, whose communities share a number of features with Sardinia, including primarily geographical remoteness and historical weakness of the state. Significantly, the unofficial legal system of this traditional revenge-based society has been also transcribed into a single text, called *Kanun*.<sup>4</sup>

## 2. A SCHOLAR'S RESEARCH AGAINST THE BACKDROP OF THE 1960S BARBAGIA

The *Codice barbaricino* represents both a specific de facto legal system and the expression of a particular sub-culture. This system holds revenge rules as the core of the customary legal system, while other fields of law are basically marginalised. Before analyzing its main features, it is here worth sketching the main traditional features of Barbagia and its communities, as they represent the context in which the customary rules to be later on collected into the written *Codice Barbaricino* were born and evolved.

Barbagia is an internal area of Northern Sardinia with no clear fixed borders.<sup>5</sup> However, to some extent, it can be considered a purely cultural area, “a *forma mentis*”<sup>6</sup> with peculiar characteristics.

This terrain is very hostile, the climate is cold and trade and communications are extremely difficult. There is no space for agriculture or industry, sheepherding is the main source of income and it influences life and family organization. Children learn early sheepherding rules and – at least in the more remote areas – life still tends to develop within pastoral communities in which social differences are non-existent.<sup>7</sup>

Family has a very important – almost sacred – role, since the Barbagian society is not hierarchically structured, but rather organized according to a task-sharing mentality. Men shepherd are often away from home, whilst women stay at home, bringing up children and caring for domestic economy. Women are quite free to perform their duties but they bear a heavy burden and have to master many skills.<sup>8</sup> Guests are sacred and the community cares for them (a feature shared with the Northern Albanian community, organized according to a patriarchal family structure).

Over the centuries, Sardinia has developed a strong spirit of independence. In the past, various foreign powers<sup>9</sup> have tried to conquer Barbagia, but the hostile territory and the fierce character of its inhabitants stopped them. The Romans were never able to subdue this people and called this area “Barbagia” linking it with the strongly negative connotations of barbarians.

<sup>4</sup> See Resta (2002); Yamamoto (2005); Martucci (2010).

<sup>5</sup> See Satta (1988).

<sup>6</sup> Murgia (2011) 8.

<sup>7</sup> About Barbagia, see Liori (2003); Pigliaru (2000); Satta, Loretto (2000).

<sup>8</sup> About family in Barbagia, see Sirigu (2007); Pinna (1971).

<sup>9</sup> See Cattaneo, Carlino (1996).

Barbagia also had a high criminal rate, there were many violent crimes, such as thefts, kidnappings and murders. Barbagia was land of banditry, and bandits had a relevant role in a society which experienced – until recently – limited state influence.<sup>10</sup>

After World War II, the social and economic context experienced significant developments, but the essential features of Barbagia have not changed. Today, Barbagia is a traditional area with deeply rooted customs, a specific language and a marked suspicion and intolerance towards the Italian government. The state is not an insider and is generally not trusted by the community.<sup>11</sup>

In the 1960s Antonio Pigliaru, a Sardinian jurist and legal philosopher, transcribed the rules of Barbagian customary law. Pigliaru transcribed the *Codice barbaricino* in a historical period characterized by the *questione meridionale* (“Southern question”) and by the *questione sarda* (“Sardinian question”). With the phrase “*questione meridionale*” we refer to the extremely difficult social and economic situation that Southern Italy was experiencing soon after the unification of Italy. The South was vastly underdeveloped, the presence of mafia was heavily tangible, brigandage was widespread and a massive migration flow from Southern Italy headed towards Northern Italy, Northern Europe or the United States. Along with these problems, the condition of Sardinia was further complicated by a very high criminality rate. The political and social debate of the time used the term “*questione sarda*” to indicate the particular situation of that island and the bundle of its social and economic problems, violence, crimes, banditry, occupation of lands, emigration. Furthermore, Sardinia was craving for independence and self-government. Sardinians – and the Barbagian communities in particular – did not perceive themselves as Italian and strove to affirm their own separated identity.

Antonio Pigliaru operated in this cultural context. Being born in Barbagia, he knew very well the pastoral communities and its traditions and believed that it was necessary to start a political debate about the condition of his native region. He thought that the oral legal system of Barbagia was a very important peculiarity of Sardinia, and could create a strong sense of identity for all Sardinians.

Originally, Pigliaru devoted himself to the study of banditry as social phenomenon in Barbagia but during his research, he became aware that revenge was a main feature of banditry and focused on it to explain the overall structure of the community.

Pigliaru had to deal with a number of problems in his scholarly challenge. The first problem was to assess how rules on revenge coexisted with state-law in Barbagia. According to Pigliaru, there was a conflict between the *Codice barbaricino* (the non-official law) and the state law. The Italian State did not allow an unofficial legal system to operate on its territory and this was especially true for a revenge-based customary system. Pigliaru deemed that this was a situation of legal pluralism<sup>12</sup> with no clear-cut solutions and he started to work against this backdrop.

The second issue concerned how to distinguish between simple traditions and legal norms. In this respect, Pigliaru followed Norberto Bobbio’s theory<sup>13</sup> according to which a rule is a norm when it regulates an essential situation. A situation is essential for the community when – without it – society changes. If the rule is respected, but is not essential, it is a mere tradition.

<sup>10</sup> About banditry and criminal rate, see Marongiu (2004).

<sup>11</sup> About this topic, see Arlacchi (2007).

<sup>12</sup> Merry (1988) 869–96.

<sup>13</sup> About this topic, see Bobbio (1952).

Another question was which legal form was to be chosen for the transcription. Pigliaru decided to adopt the structure of a code, because he believed that a modern legal form was better suited to convey the substance of an oral traditional law. He thus used several concepts of Italian criminal code: Personal liability, circumstances, malice, prescription.

The last issue concerned the ethnographic method to use for the transcription. In the first phase, the author collected documents and information about the revenge in Barbagia. He later interviewed shepherders and local policemen. He studied books, local newspapers and popular literature as novels and legends. After this work, he selected legal rules and translated them into a code using a modern legal language.

### 3. A LOOK AT THE MAIN FEATURES OF THE CODICE BARBARICINO

Although the legal system of Barbagia is a complete one, containing criminal, civil and procedural rules, Pigliaru decided to transcribe only criminal law<sup>14</sup> and presented it in twenty-three articles as a three-part code: General principles (art.11–10), Offences (art. 11–17) and Measure of revenge (art. 18–23). He attributed the utmost importance to criminal customary law as the core of Barbagian community, since – as mentioned in the previous paragraph – revenge and its rules influenced the whole system and all relationships.<sup>15</sup>

The content of Pigliaru's code is extremely interesting because its rules are deeply rooted in the past (e.g., revenge or the peculiar rules for the guest) while also having some very modern features.

First of all, it must be highlighted that when a dispute arises within a Barbagian community, its members can choose between state law and community law (i.e., the *Codice barbaricino*). If the latter is chosen, revenge becomes compulsory. This marks a striking difference with other revenge-based customary systems, e.g. the Albanian *Kanun*, according to which the non-State legal system is considered to be compulsory for everyone. Moreover, according to the *Codice Barbaricino*, an offence shall be punished only when intentional, as unintentional offences are not crimes. This implies that malice is essential and must be assessed by “judges” (i.e., selected members of the community), while negligence does not imply nor trigger revenge. Additionally, the offender must be totally able to perceive the seriousness of the offence.

However, the most important and peculiar feature of the *Codice Barbaricino* is liability. Liability for the offence is only personal and this is a modern feature because other customary systems based on revenge (e.g., the Albanian *Kanun*) have a family-based or other forms of collective liability.

Special revenge-related rules apply to guests, too: although they are not effective members of the community, they must be avenged by the host in case they are victims of offence or injury.

In the *Codice barbaricino*, there are no rules about women and children, but sheep farmers regularly exclude them from the revenge process. Differently from the Albanian

<sup>14</sup> After Pigliaru's transcription we can find other similar experiments. See e.g. Liori (2003).

<sup>15</sup> The *Kanun* is very different because there is the transcription of all customary law, not only criminal law. So it is a complete and exclusive code composed of a large number of rules. It is impossible to indicate the number of *Kanun* because the text is not organized this way but in paragraphs.

*Kanun*, which rules out women from revenge and does not contain any provisions about children,<sup>16</sup> in the Barbagian system women play an essential “procedural” role, as they collaborate to investigation and they can often be selected as “judges”.

As mentioned, in the Barbagian code, there are several articles about modern legal institutions. We can find a norm about circumstances (art. 13); a norm about statute of limitation (art. 22) or ways to cancel crimes (art. 8).

The *Codice Barbaricino* pays particular attention to revenge, as the cornerstone of the whole customary system of dispute settlement. First of all, revenge must be prudent: a peaceful resolution must be tried before starting revenge. As far as the entity of revenge is concerned, in his transcription, Pigliaru wrote that revenge must be “proportionate”, but in this case “proportionality” has a peculiar meaning. Indeed, revenge must have a content similar to the original offence; it must be broader than the offence but not excessive. Revenge must be progressive, so that, if the entity of the offence increases (e.g., the existence of an aggravating circumstance is assessed), the entity of revenge must increase, too. The avenger can use any modality of revenge, e.g. he can also choose to use state courts or police.<sup>17</sup> For the *Barbaricini*, calling on police or official judges represents the cruelest revenge, because it involves third parties who are out of the community.

The *Codice Barbaricino* also includes a statute of limitation called “prescription”: this means that revenge for the offence must be undertaken within a reasonable period of time. It must be stressed that this peculiar feature does not exist in the Albanian *Kanun*, according to which revenge can continue for a long time.

In the *Codice barbaricino*, it is always possible to put an end to conflicts with a peaceful resolution that takes the place of revenge. In principle, the avenger can murder in order to avenge any kind of offence, but blood revenge usually applies only to very serious offences. However, these provisions allow the possibility of a chain of revenges called *faida*<sup>18</sup> (feud), which can wipe out a whole community. This earned the *Codice Barbaricino* the definition of a “war code”, as the *Barbaricini* do not want peace, deeming it enough to have sure and predictable rules about revenge.<sup>19</sup>

#### 4. PIGLIARU’S LEGACY

The *Codice barbaricino* is a very peculiar cultural product. Its structure (and even the literary style of its articles) are clearly influenced by the provisions of the Italian penal code and the Italian legal culture at large. Nevertheless, it represents in a vivid way a traditional society with its peculiarities. Although its reception in the scholarly world was mixed, as it was initially perceived as “something of a scandal in the Italian juristic milieu”, it later on became a classical reference in legal anthropology.<sup>20</sup>

If it is true that the Italian legal culture influenced Pigliaru’s transcription, did Pigliaru’s legacy influence Italian social sciences or politics? Apart from its reception among legal scholars, Pigliaru’s work was extremely important for anthropologists, philosophers and

<sup>16</sup> See Resta (2000).

<sup>17</sup> See Simoni (2012).

<sup>18</sup> About *faida*, see Marongiu and Newman (1995); Satta and Loretto (2000).

<sup>19</sup> The *Kanun* is also a “war code” and the revenge does not finish. The Albanian society also knows *faida* very well, although there are studies stating that the *Kanun* is as well a “peace code” because it contains many “peace” instruments and institutions.

<sup>20</sup> Ferrari (1998) 3–4.

sociologists, who were provided with extensive information about revenge and conflict resolution in traditional communities, the Sardinian identity, its relationship with the Italian nation state and its modernization processes.<sup>21</sup> Nevertheless, his work had no impact on the economic and political context: no legal reforms were based on his studies and on the *Codice barbaricino*.

Pigliaru transcribed the *Codice Barbaricino* in the 1960s, when revenge rules were very strong. Is revenge still being used today? There is conflicting evidence in this respect. Actually, the *Codice barbaricino* is often cited in Sardinian newspapers, but there are few crimes that are really connected with revenge. Frequently, newspapers indicate ordinary crimes as “act of revenge” only to impress readers. In addition, criminals often use revenge to conceal other crimes. Significantly, the same is reported to happen in Albania, where the *Kanun* still exists but is often abused by newspapers and criminal gangs.<sup>22</sup>

In 2010, Doctor Mustaro, the head of *Squadra Mobile* of Nuoro, a criminal investigation police unit, was interviewed about the current relevance of the *Codice barbaricino*. He stated that he often uses the Code for investigations. At the beginning of investigations, if he finds a circumstantial evidence or has a suspicion that crimes are linked with the *Codice barbaricino*, Pigliaru’s text is still read and used as a starting point. This demonstrates that in Barbagia revenge is partially still alive and this coexistence with state-law is an example of legal pluralism.

In more general terms, it must be highlighted that Pigliaru’s work aimed at preserving a wider range of Sardinian traditions, not only those linked to criminal law. A deeper look at the revenge-based set of rules systematized in the *Codice Barbaricino* shows important connections with the Barbagian key concept of *balentia*, which is perceived as a mix of bravery, boldness and caution. The *balente* is a valorous man (often a bandit or a shepherd) who must be able to avenge his honour without excesses. This concept guided Pigliaru throughout his entire work and led him to shape the *Codice barbaricino* after a broader Sardinian identity based on *balentia*, revenge and honour.<sup>23</sup>

Pigliaru taught a new lesson to Italian legal culture, by introducing participant observation and the methods of legal anthropology to Italian legal scholars, highlighting the importance of analyzing non-legal materials such as novels and legends, and conducting interviews and field studies in the concerned communities. Pigliaru’s *Codice barbaricino* also had a notable influence on the study of dispute processing systems: following his footsteps, many other scholars studied sub-cultures and non-state legal systems in contexts of legal pluralism, bringing to the surface further examples of communities in which state law and non-state law coexist and ultimately confirming the relevance of both of them for building the identity of a specific community.

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