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The Law of the Lawless.
Notes on Pigliaru's
*La Vendetta Barbaricina come ordinamento giuridico**

ABSTRACT: Antonio Pigliaru was one of Sardinia's most prominent intellectuals in the 20th century. Pigliaru's classic work, *La vendetta barbaricina come ordinamento giuridico*, examines the ways in which the tradition of vendetta acts as a legal system in Sardinia's Barbagia region where, Pigliaru claims, state law never fully took root. Pigliaru's work engages with a larger debate on legal pluralism originating, in Italy, with Santi Romano, who argued in *L'ordinamento giuridico* (1918) that law emerges from any form of social organization - not only from the state. Romano's theory was a response to legal absolutism, but its weakness lies in potentially legitimizing the norms of criminal groups. For this reason, Giuseppe Capograssi, one of Italy's greatest legal scholars, expressed his criticism of Romano's work on different occasions. Pigliaru claims to be a keen reader of both, but ultimately produces an interpretation of their thought that does not take into account Capograssi's criticism.

KEYWORDS: Legal Pluralism, Pigliaru.

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1. Antonio Pigliaru is widely considered one of Sardinia's most prominent intellectuals in the second half of the 20th century¹. He was born in Orune, a small town in the Sardinian province of Nuoro, in 1922. In 1947 he graduated in Literature and Philosophy from the University of Sassari and soon started teaching philosophy of law and doctrine of the state at the same University². His scholarly production is vast and diverse, with interests ranging from Giovanni Gentile's idealism to Karl Marx and Antonio Gramsci³.

This contribution focuses on the most celebrated of Pigliaru's writings, the essay titled *La vendetta barbaricina come ordinamento giuridico*, which appeared for the first time in 1959⁴. In his book, Pigliaru claims that since state laws have never fully permeated the Sardinian interior region of "Barbagia", the local society is partly governed by a different legal system, characterized by the practice of vengeance⁵. Pigliaru postulates the existence of a Barbagian society,

¹ P. Carta, *Lottare per il diritto. Ritratti di giuristi umanisti del '900*, Dueville 2020, pp. 99-188; M. Masia, *Pigliaru, Antonio (1922-1969)*, in *Encyclopedia of Law and Society. American and Global Perspectives*, III, Los Angeles-London-New Delhi-Singapore 2007, pp. 1108-1109.

² While a student at University, he overtly manifested support for the fascist regime, by founding and leading a Fascist University Group, which were the student branch of the Italian fascist regime (L. La Rovere, *Fascist Groups in Italian Universities: An Organization at the Service of the Totalitarian State*, in «Journal of Contemporary History», XXXIV (3) (1999), pp. 457-475. With the collapse of the fascist regime in Italy, he was arrested in 1944 on charges of political crimes and espionage. After two years in prison, he was released in 1946 as a result of the amnesty ordered in 1946 by Palmiro Togliatti, at the time the Italian Minister of Justice. See A. Mattone, *Pigliaru, Antonio*, in *Dizionario Biografico degli Italiani*, LXXXIII, Roma 2015, available at [https://www.treccani.it/enciclopedia/antonio-pigliaru_\(Dizionario-Biografico\)/](https://www.treccani.it/enciclopedia/antonio-pigliaru_(Dizionario-Biografico)/); V. Mura, *Pigliaru, Antonio*, in I. Birocchi-E. Cortese-A. Mattone-M. N. Miletta (ed.), *Dizionario biografico dei giuristi italiani (XII-XX secolo)*, II, Bologna 2013, pp. 1585-1586, does not mention his fascist past.

³ See in particular A. Pigliaru, *Struttura, soprastruttura e lotta per il diritto*, Nuoro 2009; A. Pigliaru, *L'eredità di Gramsci e la cultura sarda*, Nuoro 2008; A. Pigliaru, *Persona umana e ordinamento giuridico*, Nuoro 2008.

⁴ A. Pigliaru, *La vendetta barbaricina come ordinamento giuridico*, Milano 1959. Since then, seven editions of Pigliaru's work have been published: A. Pigliaru, *Il banditismo in Sardegna. La vendetta barbaricina come ordinamento giuridico*, Milano 1970; A. Pigliaru, *Il banditismo in Sardegna*, Roma 1973; A. Pigliaru, *Il banditismo in Sardegna. La vendetta barbaricina come ordinamento giuridico*, Milano 1975; A. Pigliaru, *Il banditismo in Sardegna. La vendetta barbaricina come ordinamento giuridico*, Milano 1993; A. Pigliaru, *Il banditismo in Sardegna. La vendetta barbaricina*, Nuoro 2000; finally, the last and most complete edition: A. Pigliaru, *Il banditismo in Sardegna. La vendetta barbaricina*, Nuoro 2021.

⁵ The actual extension of the Barbagia region referred to by Pigliaru is unclear: the term "Barbaria" was first used by the Romans to describe the central mountainous region of

described as underdeveloped and primitive, governed by a set of norms typical of the region of Barbagia, being partially in contrast with the legal system of the Italian state⁶. Pigliaru's contribution thus intervenes in the scholarly debate on the multiplicity of legal orders, which in Italy occupied scholars such as Santi Romano and Giuseppe Capograssi, among others. Pigliaru claims to be a keen reader of both and dedicates his book to the memory of the latter⁷. The main argument of this paper is that the product of Pigliaru's research does not fully reflect Capograssi's scholarship; Capograssi was very critical of Santi Romano's conception of the multiplicity of legal orders, in that it conceded legal nature to the rules produced by criminal organisations; in this sense, this paper contends that Pigliaru did not successfully argue that the legal order of the Barbagian society should, indeed, be considered legal. The latest editions of his work (from 1993 onwards) contain previously unpublished pages which show that he was aware of the precarious nature of his arguments and that placing the practice of vengeance at the foundation of a legal system might be problematic.

Furthermore, Pigliaru describes Barbagian society by making large use of the dominant stereotypes in Italian society, perpetuating the narrative about Sardinia (and especially its inner regions) as a territory that is and has always been static, underdeveloped, primitive and uncivilized. This paper suggests that Pigliaru's insistence on the supposed primordial character of said society seems to have been functional to his theoretical construction.

2. With the crisis of the liberal state and the First World War looming, debates on legal pluralism were gaining momentum across Europe. Otto von Gierke's interpretation of the pluralist legal order of the German Middle Ages found considerable resonance, profoundly shaping contemporary scholarship⁸. In Italy, the debate took a decisive turn with the publication of Santi Romano's

Sardinia, approximately coinciding with the areas of the Gennargentu massif. For the practice of vengeance in Sardinia, see M. Masia, *La vendetta in Sardegna*, in P. Di Lucia-L. Mancini (ed.), *La giustizia vendicativa*, Pisa 2015, pp. 191-203.

⁶ T. Usai, *I fattori culturali del sottosviluppo*, in «Autonomia cronache», I (1967), pp. 55-79, denied the existence of a unitary and homogeneous Barbagian society – albeit in purely sociological terms.

⁷ For Pigliaru's interpretation of Capograssi's thought, see A. Pigliaru, *Saggi capograssiani*, A. Delogu (ed.), Roma 2011. See also G. Riccardo, *Conflitto di ordinamenti e conflitto di paradigmi in Antonio Pigliaru*, in «Lares», LXXIX (1) (2013), pp. 11-33; P. G. Puggioni, *Uomo, azione e relazione nel pensiero giuridico di Antonio Pigliaru*, in «Diacronia», I (2020), pp. 165-194.

⁸ See, for example, F.W. Maitland's introduction to O. Gierke, *Political Theories of the Middle Age*, Translated with an introduction by F. W. Maitland, New York 1900, pp. vii-xlv.

seminal essay *L'ordinamento giuridico*⁹, which was subsequently translated into Spanish, French, German, Portuguese, and English¹⁰. Since its appearance, the work has enjoyed enduring influence, particularly in Italian-speaking contexts¹¹.

In his classic work, Santi Romano argues that the legal phenomenon cannot be reduced to only positive law: on the contrary, in his view, any form of social organisation (or «institution») produces law. Appearing first in two articles in the «Annali delle Università Toscane» (in 1917 and 1918), and then published as a book in 1918, just before Italy's fascist era, *L'ordinamento giuridico* was a strong reaction against legal absolutism and totalitarianism, an effort to free law from its dependence on political power¹². The weak spot in Romano's theory, however, is clearly visible, and it concerns the possibility to consider law the rules produced by criminal organisations, such as the mafia. Romano himself was aware of this, since his book contains a section titled "The order of entities that are considered unlawful or are ignored by the state", which deals precisely with this problem¹³. Romano recognises full legal nature to the orders produced by unlawful organisations, while looking at them purely in terms of their effectiveness: unlawful organisations' orders will be more or less effective depending on the means they can have at their disposal, but their legal character is not denied¹⁴.

In the second edition of his work published in Florence in 1945¹⁵, Romano added copious footnotes addressing some of the most relevant criticism of his theory; however, his additions discussed the questions that had been raised only in part. Giuseppe Capograssi, one of Italy's greatest legal scholars, expressed

⁹ For Gierke's influence on Romano's scholarship see M. Fuchs, *La «Genossenschaftstheorie» di Otto von Gierke come fonte primaria della teoria generale del diritto di Santi Romano*, in «Materiali per una storia della cultura giuridica», IX (1979), pp. 65-80; see also E. Conte, *Legal Pluralism from History to Theory and Back: Otto von Gierke, Santi Romano and Francesco Calasso on Medieval Institutions*, in «Law and History Review», XLII (2024), pp. 169-180.

¹⁰ S. Romano, *El ordenamiento juridico*, translated by S. Martin-Retortillo and L. Martin-Retortillo, Madrid 1963; S. Romano, *L'ordre juridique*, translated by L. F. P. Gothot, Paris 1975; S. Romano, *Die Rechtsordnung*, R. Schnur (ed.), Berlin 1975; S. Romano, *O Ordenamento Juridico*, translated by A. Dal Ri Júnior, Florianópolis 2008; S. Romano, *The legal order*, edited and translated by M. Croce, Abingdon-New York 2017.

¹¹ See, in particular, P. Grossi, *Scienza giuridica italiana. Un profilo storico 1860-1950*, Milano 2000, pp. 109-117.

¹² S. Romano, *L'ordinamento giuridico*, Pisa 1918.

¹³ S. Romano, *The legal order*, cit., p. vii.

¹⁴ Cit., pp. 58-59.

¹⁵ S. Romano, *L'ordinamento giuridico*, Firenze 1945.

his criticism of Romano's work on different occasions¹⁶. He did this in the first version of his 1936 article *Alcune osservazioni sopra la molteplicità degli ordinamenti giuridici*¹⁷; which he kept working on and, three years later, published as a second and final version, titled *Note sulla molteplicità degli ordinamenti giuridici*¹⁸. This new version was longer and more critical of Romano's work¹⁹. Capograssi did not oppose the idea of the multiplicity of legal orders: on the contrary, being deeply Christian, he clearly saw the coexistence of multiple legal orders when looking at the Church and the State²⁰. However, Capograssi maintained that by emphasizing the strong relationship between law and society, institutional theories like Romano's, ultimately identified legal orders with the groups that expressed them, for the simple fact of being groups: in his view, institutionalism had a tendency to confuse law with fact, overshadowing that delicate moment which turns fact into law. In other words, for Capograssi, the mere act of associating does not amount to the birth of a legal order, which instead originates from something more. In Capograssi's view, «the sheer fact turns into legal order only as long as it fulfils a principle or law, which really is the law and the fundamental principle of the whole legal activity»²¹. Capograssi further argues that «it is this fulfilment that becomes fact and materialises in the practical activity of which the birth of the legal order and the establishment of relations, concrete organisations and institutions, are but expressions»²². A social group becomes

¹⁶ For information about Capograssi's life, see M. D'Addio, *Giuseppe Capograssi (1889-1956). Lineamenti di una biografia*, Milano 2011; see also V. Frosini, *Capograssi, Giuseppe*, in *Dizionario biografico degli italiani*, XVIII, Roma 1975, available at [https://www.treccani.it/enciclopedia/giuseppe-capograssi_\(Dizionario-Biografico\)/](https://www.treccani.it/enciclopedia/giuseppe-capograssi_(Dizionario-Biografico)/).

¹⁷ G. Capograssi, *Alcune osservazioni sopra la molteplicità degli ordinamenti giuridici*, in «Studi Saresani», XIV (1936), pp. 77-90.

¹⁸ G. Capograssi, *Note sulla molteplicità degli ordinamenti giuridici*, in «Rivista Internazionale di Filosofia del Diritto», I-II (1939), pp. 9-44, also available now in G. Capograssi, *Opere*, IV, M. D'Addio-E. Vidal (ed.), Milano 1959, pp. 183-221.

¹⁹ See A. Cecchinato, *Capograssi, imperdonabile*, in «Historia et ius», XXIII (2023), pp. 26-32, also in M. Cerrito-F. Di Chiara (ed.), *Tra diritto e religione. Dialoghi e influenze nella storia giuridica*, Roma 2023, pp. 174-182. For more information on the differences between the two versions of Capograssi's essay, see V. Mura, *Statualismo e diritto sociale. Il saggio di Capograssi sulla molteplicità degli ordinamenti giuridici: esercizio sulle varianti delle due edizioni (1936/1939)*, Pisa 1979.

²⁰ G. Capograssi, *Note sulla molteplicità degli ordinamenti giuridici*, cit., pp. 200-202.

²¹ Cit., p. 188: «il fatto nudo si trasforma in ordinamento solo in quanto è adempimento di un principio o legge, che è veramente la legge e il principio fondamentale di tutta l'attività giuridica». All translations are mine unless otherwise noted.

²² Cit., p. 188: «è questo adempimento che diventa fatto e si esplica in attività pratica della quale il nascere dell'ordine normativo e il costituirsi di rapporti e realtà concrete di organizzazioni e istituzioni non sono che manifestazioni».

an order only as long as «the will of the subject takes in, and recognises as his/her own, the group's life»²³: in other words, the birth of the legal order comes from an act of will. In Capograssi's theoretical construction, all concrete legal orders form part and are expression of this unitary legal principle which turns fact into law²⁴:

Since they [i.e. legal orders] share the same principle as their ideal foundation as orders, and all abide by the same law, abiding by the same law in the immense variety of forms, situations, and purposes, they pose and recognise as order the very experience in which they exist and that each of them forms: the principle of reason by which they are dominated leads them, as they recognise themselves as orders, to recognise the entirety of the experience of which each of them is but a form, as an order.

Therefore, Capograssi conceives this unitary legal principle in itself as a legal order, a legal order that does not exist but in the rational recognition of the unity of the human legal experience²⁵. His theory proves particularly fascinating when confronted with the problem of the orders of unlawful organisations. Capograssi does not deny that unlawful organisations can generate orders. Even criminal activity, when exercised in a social form (*forma di vita associata*), is necessarily part of the human activity, and therefore it abides by the laws and purposes of the human activity: «the subject (the thief) freely recognises and fulfils the need to abide by what his activity implies: he freely recognises that action has its own truth, and its own necessity that needs to be respected»²⁶.

To do so, criminal organisations create an order around themselves: this order is the “peace in a time of war” that they need to act against the whole legal experience, or, to use Capograssi's words, «to wage war against the whole experience»²⁷. This peace is the order of the criminal organisation. However, the

²³ Cit., p. 189: «in quanto la volontà del soggetto fa sua e riconosce come sua la vita del gruppo [...]».

²⁴ Cit., p. 196: «E poiché essi hanno per lo meno come fondamento ideale del loro stesso essere ordinamento lo stesso principio e tutti obbediscono alla stessa legge, obbedendo alla stessa legge nella loro immensa varietà di forme, di realtà e di fini essi pongono e riconoscono come ordinamento la esperienza stessa nella quale sono e che tutti formano: il principio di ragione da cui sono dominati li porta, in quanto riconoscono sè stessi come ordinamenti, a riconoscere la totalità dell'esperienza, della quale ognuno non è che una forma, come ordinamento».

²⁵ Cit., p. 197.

²⁶ Cit., p. 203: «Il soggetto (il ladrone) liberamente riconosce e realizza l'esigenza di rispettare quello che la stessa sua attività implica: liberamente riconosce che l'agire ha una sua verità, e una necessità che deve essere rispettata».

²⁷ *Ibid.*: «per muoversi in guerra contro l'esperienza».

order of the criminal organisation is different from other orders because, Capograssi says, it recognises the unitary principle which governs the human legal experience and, at the same time, it denies it. The criminal order does not recognise and contradicts the universality of the principle which governs its own activity²⁸. In other words, the order of criminal organisations only assumes the appearance of a legal order, but for Capograssi it never becomes one, because its “will” to become a legal order does not extend beyond the criminal order itself, to the rest of legal experience.

3. In the preface to *La vendetta barbaricina come ordinamento giuridico*, Pigliaru thanks Giuseppe Capograssi for inspiring the book and dedicates it to his memory²⁹. From the very first page of his *Introduction*, Pigliaru describes Barbagian society as archaic and primitive, «as though emerging from creation»³⁰, characterised by a strong resistance to modern culture, by «backwardness with regard to the progress of history»³¹, and by prevalence of a sheep-farming economy³².

Pigliaru notes that the practice of vengeance does not exclusively apply to banditry, but instead extends beyond it, being common to the whole Barbagian society. Therefore, the legal order of the Barbagian society cannot be examined as the problem of the law produced by a criminal organisation³³. The legal order of the Barbagian society, he concludes, cannot be compared to the codes of vengeance produced by criminal organisations, because, he maintains, the Barbagian society is simply a community of people, «a historical community»³⁴.

²⁸ Cit., p. 204.

²⁹ A. Pigliaru, *Introduzione*, in *Il banditismo in Sardegna. La vendetta barbaricina*, cit., p. 3. Capograssi died in 1956.

³⁰ Cit., p. 11: «una terra che pare appena uscita dalla creazione e che ha tutta l'aria di essere, dopo millenni di storia e di vita, la stessa terra, la stessa vegetazione, gli stessi graniti, la stessa durezza di una terra indocile alle nude mani dell'uomo – la stessa terra insomma (e per tanti versi la stessa economia) che era già prima dei millenni».

³¹ Cit., p. 16: «[...] un sistema di vita che, in termini di generalizzazioni, potremmo dire di tipo arcaico, fortemente impenetrato dalla cultura moderna e dalle forme vitali dell'esperienza storica propria della cultura moderna, e che perciò si presenta come il sistema di una collettività umana fortemente caratterizzata, negli usi e costumi della sua vita quotidiana, dalla sua arretratezza rispetto ai progressi della storia e, in certo senso, al suo stesso sviluppo».

³² It is worth mentioning that Pigliaru's hometown of Orune is situated within the Barbagia region.

³³ Cit., pp. 11-12.

³⁴ Cit., p. 15: «una comunità di vita, una comunità storica».

In an effort to apply Capograssi's theory to the legal order of the Barbagian society, Pigliaru tries to ascertain its "will". Pigliaru claims that the legal order of the Barbagian society does not deny the validity of the rest of the human legal experience. In particular, Pigliaru argues, it does not deny the validity of the legal order of the state, but merely regards as «inadequate» some of the solutions that the state provides³⁵.

The 2021 edition of Pigliaru's work by Paolo Carta contains previously unpublished pages which seem to reveal the extent to which Pigliaru was aware of the problematic nature of his arguments³⁶:

The legal order of the Barbagian society is a matter of fact. The Barbagian community is an entirely original and autonomous legal order. The community itself exists as such, that is as community, communal life, relational life, as long as it exists as a legal order [...].

The Barbagian community indeed exists, lives its own life, as a community that lives and operates, albeit remaining loyal to itself, within a wider and universal community, or society, therefore it lives and operates in constant connection with a different cultural order [...].

Thus, expanding his own life sphere, the Barbagian man [*siz*] is at the same time obliged to take vengeance, he feels as his own the obligation to serve in the military that is imposed by a different legal order [...], and finally, celebrates marriage according to the canonical rite. Furthermore, he does not consider rustling reprehensible [...]; but freely pays taxes and fees and, paradoxically, his fundamental

³⁵ Cit., p. 19.

³⁶ P. Carta, *Introduzione*, in A. Pigliaru, *Il banditismo in Sardegna. La vendetta barbaricina*, cit., pp. XII-XIII: «L'ordinamento giuridico della comunità barbaricina è un dato di fatto. La comunità barbaricina è un ordinamento giuridico perfettamente originario e autonomo. Essa stessa esiste come tale, cioè come comunità, vita comune, vita di relazione, in quanto esiste come ordinamento giuridico [...]. La comunità barbaricina infatti esiste, vive la propria vita, come una comunità che vive e opera, pur restando fedele a se stessa, nell'ambito di una comunità o società più vasta ed universale, sicché vive ed opera a contatto, a quotidiano contatto, con un diverso ordine culturale [...]. Così, espandendo il proprio ambito di vita, l'uomo barbaricino [*siz*] è insieme obbligato alla vendetta, ha come suo il dovere di adempiere all'obbligo militare che gli vien posto da un altro ordinamento giuridico [...], e in fine, di norma, celebra il proprio matrimonio secondo il rito canonico. Inoltre, considera non riprovevole il furto del bestiame [...]; ma paga liberamente imposte e tasse e paradossalmente la sua fondamentale aspirazione, nella pratica dell'abigeato, è forse proprio quella di riuscire a pagare, di poter pagare l'importa sul bestiame anche quando sia di provenienza "cosiddetta" furtiva [...]. È fedele al codice della vendetta, ma per quella materia che il codice non regola, ricorre liberamente alle leggi dello stato (*sa zjustiscia*) accettandone tutte le implicazioni. Cerca anche in materia civile di restar fedele, sin che gli è possibile, alle tradizioni che gli sono più famigliari, ma non esita, sia pure con molto timore e tremore, ad adire gli organi giurisdizionali che lo Stato gli appronta ed offre per risolvere le controversie variamente insorgenti fra le parti [...].».

aspiration, with the practice of rustling, is perhaps precisely to be able to pay the cattle tax, even though it is of “so-called” stolen origin [...].

He abides by the code of vengeance, but for those matters which the code does not regulate, he freely resorts to state laws (*sa zùstiscia* [i.e. *State justice*, in Sardinian]), accepting every consequence of this. In civil law matters he tries to remain loyal, as long as he can, to the traditions that are more familiar to him, but he does not hesitate, be it with much dread and tremor, to appeal the jurisdictional bodies which the state offers to solve the controversies that might arise [...].

If these arguments, excluded from the 1959 version for editorial reasons, were meant to prove that the Barbagian order does not deny the validity of the state legal system, it is easy to see that the argument is not particularly effective: if we were to substitute the words “Barbagian man” with “mobster”, the text would equally work³⁷: but Pigliaru, like Capograssi, denies the legal character of criminal orders. Pigliaru seems to have been aware of this fundamental ambiguity and decides not to include these lines in the final version. Pigliaru knows that conceiving the practice of vengeance as a legal institution and making it the very foundation of a legal order might be problematic. In an essay excluded from the original version, and only posthumously published by the editor Giuffré in 1993 (and again in the 2021 edition), titled *La pratica della vendetta come ordinamento giuridico*, he writes³⁸:

Therefore, to examine the problem of vengeance is, in a way, to repeat the same experience, fundamental for thought, of studying criminal orders, and therefore dealing with, as Capograssi properly noticed, a strongly tormented feeling: on the one hand, the inevitable necessity to recognise those societies as orders and, on the other hand, the insuperable traditional repugnance to recognise them as legal orders. Same as for criminal organisations, for vengeance as well, as an individual practice of justice, there will always be a time when the need to find the same criterion which consents both recognition and rejection will arise [...].

³⁷ Except perhaps for the part concerning the will to pay taxes, not applicable to mobsters.

³⁸ A. Pigliaru, *La pratica della vendetta come ordinamento giuridico*, in *Il banditismo in Sardegna. La vendetta barbaricina*, cit., p. 458: «E per questo in definitiva considerare il problema della vendetta è in certo senso ripetere la stessa esperienza, fondamentale per il pensiero, di chi si trova a studiare il problema dell'ordine giuridico proprio della società dei ladroni e così appunto si trova alle prese, come ben avvertiva il Capograssi, con un sentimento fortemente contrastato, da un lato apparendo fatale la necessità del riconoscere anche quella società come ordinamento e, dall'altro, essendo invincibile e tradizionale la ripugnanza a riconoscere a quelle società dignità di ordinamento. Alla stessa maniera che per l'esperienza della società dei ladroni, anche per la vendetta considerata come pratica individuale della giustizia c'è sempre un punto nel quale sorgerà il problema di trovare quello stesso criterio che consenta insieme il riconoscimento e quella ripugnanza, esattamente indicando il momento in cui la stessa prospettiva, o morale o giuridica, consente questa doppia e in apparenza contraddittoria valutazione su un piano di effettiva non contraddizione, anzi di rigorosa continuità».

In other words, placing the practice of vengeance at the foundation of a legal order means dealing once again with the same dilemma posed by criminal orders, albeit in different terms, which was framed by Capograssi. This is because, under certain conditions, vengeance represents a radically anti-juridical act. At the core of the practice of vengeance is someone who presents himself as the law, someone who says: “I am the law”. Pigliaru knows it, and therefore devotes a great deal of effort to the analysis of the works of authors that dealt with the issue, such as Antonio Rosmini and Hans Kelsen³⁹.

Rosmini distinguishes between the right to «simple» vengeance and the punishment (vengeance) perceived as necessary⁴⁰. The former is the mere desire of the party damaged in their personal dignity to avenge the offense suffered. The latter, that is vengeance as a punishment, as an institution, comes into being only when «simple» vengeance is moderated by an objective moral law, which objectifies the punishment claim. The punishment claim cannot be merely individual: it needs to be a social claim, it needs to be conceived as an act of legal protection. Otherwise, the practice of vengeance becomes an act of integral denial of society and of every legal order because it would be conducted against a legal order, or rather, in radical denial of it.

Pigliaru makes a distinction between what is merely a common phenomenon and what is felt by the community as an obligation, claiming (albeit not entirely convincingly) that the practice of vengeance is a social institution within Barbagian society⁴¹.

In a long footnote placed on his abovementioned reference to Capograssi's theory⁴², Pigliaru discusses the process which leads from vengeance to punishment and devotes an entire page to discussing Hans Kelsen's works. Pigliaru writes that in Kelsen's thought «the justification of the legal nature of vengeance is properly noted, when it is conceived as a social institution, or rather as a criminal law institution, within primitive legal orders»⁴³. These remarks

³⁹ F. De Giorgi, *Rosmini Serbati, Antonio*, in *Dizionario Biografico degli Italiani*, LXXXVIII, Roma 2017, available at [https://www.treccani.it/enciclopedia/antonio-rosmini-serbati_\(Dizionario-Biografico\)/](https://www.treccani.it/enciclopedia/antonio-rosmini-serbati_(Dizionario-Biografico)/).

⁴⁰ A. Rosmini, *Filosofia del diritto*, I, Milano 1841, pp. 761-ss.

⁴¹ For the practice of vengeance in the Barbagia region as a social institution, see M. Marotta, *Etnografia giudiziaria: La vendetta*, in «Ichnusa», II (1956), pp. 25-42.

⁴² See note 28.

⁴³ A. Pigliaru, *La pratica della vendetta come ordinamento giuridico*, cit., p. 463, note 6: «la giustificazione del concetto della giuridicità della vendetta è ben sottolineata, quando essa si pone come istituto sociale, anzi come istituto penale all'interno degli ordinamenti primitivi». See H. Kelsen, *Society and Nature. A Sociological Inquiry*, Chicago 1943, p. 53-ss; see also H. Kelsen,

constitute the core of Pigliaru's argument, without which the whole construction of the Barbagian society as a legal order based on the institution of vengeance would crumble⁴⁴:

a mere private law basis for vengeance (as long as it is conceived as a social institution, as a fact objectively involving the whole community) is the more incompatible, the closer one gets to the prehistory of punishment, and this as a direct consequence of the primitive nature of that society, which, as Kelsen rightly underlines, is characterised by the immediate identification of the individual with the group.

In other words, Pigliaru argues that it is not possible to speak of vengeance as a social institution, that is of a "juridicised" vengeance, unless it operates in the context of a primitive society, which, of course, Pigliaru assumes Barbagian society to be.

However, it is extremely hard to maintain that the practice of vengeance as a legal order in the Barbagian society does not constitute a radical denial of law in the sense explained above: this is because Barbagian society (and Sardinia as a whole) has known the concepts of a public criminal order and of legal punishment, at least since the promulgation of the *Carta de Logu*. Compiled sometime around the mid 14th-century by Mariano d'Arborea, it was amended by his daughter, Eleonora, and issued again at the end of the 14th century, probably between the end of 1390 and the beginning of 1391⁴⁵. While at first it was only meant for the Giudicato of Arborea, which included large parts of the Barbagia region, in 1421 its validity was extended to all of Sardinia's feudal lands, and was formally abrogated only in 1827, when it was substituted by Charles Felix's code. The *Carta de Logu* is the most significant compilation of Sardinian local law (*ius proprium*) and contains norms ranging from agricultural customs to family law, from substantial criminal law to procedure⁴⁶. Most importantly for the

General Theory of Law and State, New Brunswick-London 2006, *passim*, pp. 17, 56-57, 343.

⁴⁴ A. Pigliaru, *La pratica della vendetta come ordinamento giuridico*, cit., p. 463, note 6: «una base meramente privatistica della vendetta (quand'essa sia beninteso configurata in qualche modo come istituto sociale, come un fatto obiettivamente interessante tutta la comunità), è tanto più incompatibile proprio quanto più ci si avvicini alla preistoria della pena e ciò in diretta conseguenza del carattere primitivo di quella società, che, come esattamente sottolinea il Kelsen, è caratterizzata dalla immediata identificazione dell'individuo al gruppo [...]».

⁴⁵ The exact publication date of Mariano's *Carta de Logu* is not known. The best hypothesis on the promulgation date of Eleonora's *Carta de Logu* was forwarded by E. Cortese, *Nel ricordo di Antonio Era. Una proposta per la datazione della Carta de Logu di Arborea*, in «Quaderni sardi di storia», III (1981-1983), pp. 25-50.

⁴⁶ The literature on the *Carta de Logu* and *Eleonora d'Arborea* is vast. For the purpose of this article, it will suffice to mention I. Birocchi – A. Mattone (ed.), *La Carta de Logu d'Arborea*

purposes of this paper, it claims that the right to punishment lies with public authority, leaving no space for individual vengeance: in other words, the *Carta* creates a public criminal order.

Although the *Carta de Logu* largely collects pre-existing local customs, Pigliaru argues that on this specific matter, the clash between local customs and the *Carta* is complete⁴⁷. Pigliaru assumes that before the promulgation of the *Carta*, Sardinians would solve their controversies through vendettas: the possibility is not remote, considering that it was a common custom across Europe at the time⁴⁸. However, the arguments that he puts forward are unconvincing. Similar to other communities situated around the Mediterranean basin, Sardinia had its own form of collective responsibility⁴⁹, the *incarica*. The *Carta de Logu* imposed on the inhabitants of individual villages the obligation to capture the person responsible for certain crimes (such as theft and homicide) committed in the village's territory (*vidazzzone*). Supposing that the villagers were unable to find the person responsible, they were collectively subject to a costly fine⁵⁰. Pigliaru claims that the aim of this rule was not just to compensate for the absence of a police body (as this custom is usually explained), but also to avoid private acts of vengeance⁵¹. In this sense, Pigliaru finds «very persuasive» the fact that chapter VI of the *Carta* orders the villagers to arrest *and* turn the

nella storia del diritto medievale e moderno, Roma-Bari, 2004.

⁴⁷ A. Pigliaru, *Consuetudine e legge*, in *Il banditismo in Sardegna. La vendetta barbaricina*, cit., p. 154.

⁴⁸ See M. Sbriccoli, «*Vidi communiter observari*». *L'emersione di un ordine penale pubblico nelle città italiane del secolo XIII*, in «Quaderni fiorentini per la storia del pensiero giuridico moderno», XXVII (1998), pp. 231-268. For the practice of vengeance in late medieval and Renaissance Italy, see S. K. Cohn – F. Ricciardelli (ed.), *The Culture of Violence in Renaissance Italy, Proceedings of the International Conference (Georgetown University at Villa Le Balze, 3-4 May 2010)*, Firenze 2012.

⁴⁹ On the criminal responsibility of collective bodies in the Middle Ages, see G. Chiodi, «*Delinquere ut universi*». *Scienza giuridica e responsabilità penale delle 'universitates' fra XII e XIII secolo*, in *Studi di storia del diritto*, III, Milano 2000, pp. 383-490; see also D. Quagliani, «*Universi consentire non possunt*». *La punibilità dei corpi nella dottrina del diritto comune*, in *Suppliche e «gravamina». Politica, amministrazione, giustizia in Europa (secoli XIV-XVIII)*, Bologna 2002, pp. 409-425. For canon law, see P. D. Clarke, *The Interdict in the Thirteenth Century: A Question of Collective Guilt*, Oxford 2007; and A. Fiori, *La decretale Si culpa tua e la responsabilità degli enti morali nel diritto canonico classico*, in E. Baura - F. Puig (ed.), *La responsabilità giuridica degli enti ecclesiastici*, Milano 2020, pp. 33-76.

⁵⁰ The *Carta de Logu* contains several chapters dealing with the institution of *incarica*: chapters 6, 7, 13, 15, 33, 38, 39, 45, 46, 49. See G. Murgia (ed.), *Carta de Logu d'Arborea. Edizione critica secondo l'editio princeps (BUC, Inc. 230)*, Milano 2016, and G. Lupinu (ed.), *Carta de Logu dell'Arborea. Nuova edizione critica secondo il manoscritto di Cagliari (BUC 211) con traduzione italiana*, Oristano 2010.

⁵¹ A. Pigliaru, *Consuetudine e legge*, cit., p. 154.

wrongdoer in⁵². The legislator's insistence on two distinct obligations is, in Pigliaru's view, a clear sign that the legislator meant to break cycles of vendettas. However, the close repetition of words with similar meanings, called iteration, is a mere a stylistic artifice which was extremely common, for example, in the Italian communal statutes and which can be observed at the beginning of the same chapter VI of the *Carta de Logu*, which starts with «Volemus et ordinamus»⁵³.

Pigliaru's historical analysis, although not without interesting intuitions, lacks the necessary depth. What he does not explain, but merely describes, is how the Barbagian society's active opposition and willful defiance of substantial parts of the criminal law of the various legal systems which succeeded one another over centuries, can fit with Pigliaru's understanding of Capograssi's scholarship.

4. Pigliaru's book has had an immense success, also testified by its numerous editions. It is rightly considered a pioneering work, in its effort to provide an explanation for the episodes of banditry and vendettas which at the time were particularly frequent in Sardinia. Numerous studies have looked at Capograssi's influence on Pigliaru's thought, which is undoubtedly deep and constantly present⁵⁴. The majority of these studies, however, have overlooked the significant impact of other theoretical frameworks, such as Norberto Bobbio's and Santi Romano's, which considered law essentially and originally as the product of fact, and not of will⁵⁵. Crucially, when Pigliaru needs to prove the legal nature of the Barbagian order, he references Norberto Bobbio's essay *La consuetudine come fatto normativo*⁵⁶. Pigliaru constantly oscillates between two tendencies: on the one hand, the effort to explain the existence of the Barbagian code in Capograssi's terms, that is as the fulfillment of the universal principle of reason which governs the whole legal experience; on the other hand, the temptation to describe the Barbagian order as inextricably linked to its society, claiming that «the legal order of the Barbagian society is a matter of fact»⁵⁷, thus coming closer to Romano's scholarship. In this sense, it is worth noting that when Pigliaru recalls Capograssi's pages in his book, he only quotes the 1936

⁵² Cit., p. 156. See G. Lupinu (ed.), *Carta de Logu dell'Arborea*, cit., p. 60.

⁵³ G. Lupinu (ed.), *Carta de Logu dell'Arborea*, cit., p. 60.

⁵⁴ See note 7.

⁵⁵ With the exception of G. Riccardo, *Conflitto di ordinamenti e conflitto di paradigmi in Antonio Pigliaru*, cit., pp. 17-19.

⁵⁶ N. Bobbio, *La consuetudine come fatto normativo*, Torino 2010.

⁵⁷ P. Carta, *Introduzione*, cit., pp. XII-XIII.

version of Capograssi's article, *Alcune osservazioni sopra la molteplicità degli ordinamenti giuridici*, and not the 1939 version, which featured sharper criticism of Romano's institutionalism⁵⁸.

The most problematic aspect of Pigliaru's theoretical construction in light of Capograssi's scholarship, lies in the claimed juridical nature of an order which is constitutionally founded on vengeance, in a society that has known for centuries the concept of the necessity of punishment and the idea of a public legal order. Pigliaru's argumentation of the legal nature of an order based on a radically ant-juridical act can only hold as long as Barbagian society is considered archaic, primitive and underdeveloped. He relinquishes any effort to provide an historical account of Barbagian society, adducing the impossibility to reconstruct the developing process of a customary order because of the «lack of sources, of documents, of "facts" that it leaves on its way, especially when the protagonist of the story is a community still at a primitive cultural level, without a historiography which, before anything else, perhaps expresses the moment when a primitive culture organises itself and develops at a different and new level»⁵⁹. He recognises that further comparative studies would need to be conducted to verify his claims, and he mentions the case of Albania, which seems to have had a similar trajectory to Sardinia⁶⁰. However, he does not seem to feel the need to thoroughly justify his assertions on the supposed primordial character of Barbagian society, which he simply understands as true. In an analysis that is situated at the intersection of jurisprudence, general theory of law and comparative law, the historical dimension of the issue seems to have been entirely overlooked. Instead, Pigliaru merely accepts the narrative already circulating in the Italian cultural discourse, asserting that Barbagian society had been immobile for centuries, even millennia⁶¹. Relevant examples in this sense include *La delinquenza in Sardegna*, a classic in criminal anthropology written by Cesare Lombroso's pupil Alfredo Niceforo in 1897, in which he described the inhabitants of the Sardinian inner regions as genetically prone to criminal activity⁶²; particularly significant for Pigliaru's understanding of the Barbagian

⁵⁸ A. Pigliaru, *Introduzione*, cit., p. 13, note 2.

⁵⁹ Cit., p. 76: «Il processo formativo di un dato sistema consuetudinario, non dimentichiamolo, raramente consente un'operazione storiografica troppo sottile per la scarsità di fonti, di documenti, di "fatti" che lascia nel proprio cammino, specie allorquando protagonista di una tale storia è una comunità ancora a livello di una cultura di tipo primitivo, e quindi nel proprio ambito priva di quella storiografia che prima di ogni altra forse esprime il punto in cui una cultura primitiva prende ad organizzarsi e svilupparsi ad un diverso e nuovo livello».

⁶⁰ Cit., pp. 73-74, note 40.

⁶¹ Cit., p. 11, see note 26.

⁶² A. Niceforo, *La delinquenza in Sardegna. Note di sociologia criminale*, Palermo 1897.

community is the influence of Giovanni Lilliu, probably Sardinia's most celebrated archaeologist⁶³. In an essay concerning prehistoric Sardinia published in 1951, Lilliu writes that the Nuragic civilisation possesses, «as a result of insular segregation in relation to other environments and within itself – those consistent characteristics of fixity and of static conservation which form, even nowadays after all, the picturesque, but mostly negative structure of the island's life and society»⁶⁴. Around ten years after the 1959 edition of Pigliaru's book, Lilliu develops the concept of “costante resistenziale”, with which he describes the entire history of Sardinia as resistance to external powers, and applies it with specific emphasis to the Barbagia region, as the one which mostly resembles the “original” Sardinia⁶⁵. Pigliaru adopts this view without discussing it. Sardinian medieval historiography, however, has progressed immensely since the 1960s, and time has probably come to look at works such as Pigliaru's in a new light and with new vigour⁶⁶.

⁶³ G. Lilliu, *La costante resistenziale sarda*, A. Mattone (ed.), Nuoro 2002.

⁶⁴ G. Lilliu, *Preistoria sarda e civiltà nuragica*, in *La costante resistenziale sarda*, cit., pp. 143-144: «Purtroppo non si può far luogo ancora ad una precisa distinzione di momenti successivi – che esistettero certamente – della civiltà nuragica, la quale, come è “religiosamente” monumentale, conserva anche della religiosità – pure per effetto di segregazione insulare in relazione ad altri ambienti ed in se stessa – quei consentanei caratteri di fissità e di statica conservazione formanti, ancor oggi del resto, la struttura pittoresca, ma per più aspetti negativa, della vita e della società isolana».

⁶⁵ G. Lilliu, *La costante resistenziale sarda*, in *Studi Sassaresi, III, Autonomia e diritto di resistenza, Atti del Convegno di Studi, Sassari, 12-15 maggio 1971*, Milano 1973, pp. 47-61, now also available in *La costante resistenziale sarda*, cit., pp. 225-237.

⁶⁶ For an updated historical overview, see, for example, *Il tempo dei Vandali e dei Bizantini. La Sardegna dal V al X secolo d.C.*, Nuoro, Ilisso, 2022; *Il tempo dei Giudicati. La Sardegna medievale dal X al XV secolo d.C.*, Nuoro 2023, and the bibliography therein.