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Preserving Trust: Strength of Contracts and Abuses of the Spanish Inquisition

The impacts of the presence of the Tribunal of the Spanish Inquisition in the Kingdom of Sicily were manifold, affecting politics, business, and society. In addition to monitoring and supressing political and religious dissent, the tribunal played a central role as a civil and criminal legal court at the disposal of its close associates. The exceptionally cumbersome and threatening presence of the tribunal prompted *prammatiche-concordie* (royal decrees) in 1580, 1597, and 1635, which represent the Spanish monarchy's steps to safeguard the coexistence of the secular court and the Holy Office.[1]

The monarchy's goal was to protect those who feared the tribunal's economic repercussions, specifically relating to contractual agreements. Those closely associated with the Inquisition could exercise the *privilegium fori* (privilege of forum, or the entitlement to have legal issues settled in the tribunal's court by inquisitorial

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1 Vito La Mantia, *Origine e vicende dell'Inquisizione in Sicilia* (Turin, 1886); Carlo Alberto Garufi, *Fatti e personaggi dell'Inquisizione in Sicilia* (Palermo, 1978); Henry C. Lea, *The Inquisition in the Spanish Dependencies* (London, 1922); William Monter, *Frontiers of Heresy: The Spanish Inquisition from the Basque Lands to Sicily* (Cambridge, 1990); Francesco Renda, *L'inquisizione in Sicilia. I fatti. Le persone* (Palermo, 1997); Melita Leonardi, *Governo, istituzioni e inquisizione nella Sicilia moderna. I processi per magia e stregoneria* (Acireale-Rome, 2005); Maria Sofia Messana, *Inquisitori, negromanti e streghe nella Sicilia moderna (1500–1782)* (Palermo, 2007); Valeria La Motta, *Contra haereticos. L'Inquisizione spagnola in Sicilia* (Palermo, 2019); Giovanna Fiume, *Del Santo Uffizio in Sicilia e delle sue carceri* (Rome, 2021). For the political and institutional conflicts connected with the jurisdictional sphere of the Holy Office, see Vittorio Sciuti Russi, *Astrea in Sicilia. Il ministero togato nella società siciliana dei secoli XVI e XVII* (Naples, 1983), 139–171; *idem*, "Inquisizione, politica e giustizia nella Sicilia di Filippo II," *Rivista storica italiana*, CXI (1999), 37–64; Manuel Rivero Rodríguez, "La Inquisición española en Sicilia (Siglos XVI a XVIII)," in Joaquin Pérez Villanueva and Bartolome Escandell Bonet (eds.), *Historia de la Inquisición en España y América* (Madrid, 2000), II, 1033–1222.

judges, who were able to prosecute any individual without exception). By waiving this privilege during the negotiation of contracts, tribunal officials and *familiares* (familiars, collaborators who were cloaked in secrecy) could guarantee to the other parties a contract that their agreement could not be overruled by the tribunal. The act of waiving this privilege could be used effectively, for example, to implement one's own financial strategies. Furthermore, because the world of business was driven by precise rationales, such forms of guarantee were often called for.[2]

This article addresses two key issues relating to Sicily during the Spanish Inquisition. First, what types of guarantees were offered to individuals who contracted business with tribunal officials and familiars? To what legal means could individuals resort to protect themselves against the use of the privilegium fori? Second, how cogent were contracts in a society disciplined by different types of justice based on multiple legal systems?

THE EFFECTS OF THE INQUISITION ON CONTRACTS IN SICILY The introduction of the Tribunal of the Holy Office into Sicily at the beginning of the sixteenth century rendered the process of justice extremely dubious and murky. The tribunal was imposed as an extraordinary judicial power, directly dependent on the king, with vast ideological clout and entitled to proceed against anyone, including churchmen and nobles. The Holy Office relied on the complicity of a network of a deliberately unspecified number of *familiares*. In addition to their preferential court, the familiars also benefited from a licence to carry weapons, numerous tax exemptions, and exoneration from both military service and hefty municipal rates. They played a decisive role in the control that the Inquisition managed to exert throughout Sicily.[3]

2 Paolo Prodi, *Il sacramento del potere. Il giuramento politico nella storia costituzionale dell'Occidente* (Bologna, 1992); Richard H. Helmholz, *The Spirit of Classical Canon Law* (Athens, Ga., 1996), 145–173; Alain Supiot, *Homo juridicus. Essai sul la fonction anthropologique du Droit* (Paris, 2005), 146–156; Wim Decock, "Trust Beyond Faith. Re-Thinking Contracts With Heretics and Excommunicates in Times of Religious War," *Rivista Internazionale di Diritto Comune*, XXVII (2016), 301–328; Marco Cavarzere, "Regulating the Credibility of Non-Christians: Oaths on False Gods and Seventeenth-Century Casuistry," in Andreea Badea, Bruno Boute, Steven Vanden Broecke, and Cavarzere (eds.), *Making Truth in Early Modern Catholicism* (Amsterdam, 2021), 63–84. Regarding familiars, see Gonzalo Cerrillo Cruz, *Los familiares de la Inquisición española* (Valladolid, 2000).

3 Sciuti Russi, "La Inquisición española en Sicilia," *Studia historica, Historia moderna*, XXVI (2004), 82.

Protests and resistance emerged immediately after the introduction of the Holy Office into the kingdom. A petition sent to King Ferdinand by the Parliament insisted on limiting the power of the Inquisition's officials and for guarantees to be given to creditors who were unable to collect from debtors whose assets had been confiscated by the Inquisition. The protests did not elicit the desired results; Ferdinand merely reduced the number of familiars.[4]

Agreements and contracts made between Christians and Judaizers (those who had faked conversion to Catholicism) became a legal problem. When such neophytes became entangled in inquisitorial nets, their property could be "confiscated and devolved as restitution for the heresies committed by neophytes and Jews, enemies of the Catholic faith"; anyone who had dealings with them, and who expected to collect debts from them, were forced to "make objections and litigate" with the tribunal. This situation produced disastrous results and led to a request to adopt a measure ensuring that obligations to "natural" Christians should be given "preference" and that their claims were settled by drawing on any confiscated assets. The problem was anything but new; the same request had already been made to King Ferdinand in 1514, albeit without leading to any evident result.[5]

A further request to the emperor was made to curb the Holy Office's malfeasance in the confiscation of assets. Debtors under inquisition—or those already condemned—were often harassed and blackmailed by the officials of the Holy Office, even if no remaining debt was owed. This situation created bad blood and discontent, as well as grievous prejudice. The emperor yielded only on certain conditions, namely that the persons involved were

4 On the practice of confiscations, see Henry Kamen, "Confiscations in the Economy of the Spanish Inquisition," *Economic History Review*, XVIII (1965), 511–525; Vincenzo Lavenia, "Avidi inquisitori? Tribunali della fede e denaro tra Medioevo ed età moderna," *Giornale di Storia*, XXXIII (2012), 557–594; *idem*, "Confisca dei beni," in Adriano Prosperi (ed.), *Dizionario Storico dell'Inquisizione* (Pisa, 2010), I, 375–376; Germano Maifreda, *The Business of the Roman Inquisition in the Early Modern Era* (London and New York, 2017), 139–178.

5 La Mantia, *Origine e vicende dell'Inquisizione in Sicilia*, 47–48; Lea, *The Inquisition in the Spanish Dependencies*, 13. On Judaizers' presence, diffusion, and repression in Sicily, see Renda, *L'Inquisizione in Sicilia*, 275–297. *Capitula Regni Siciliae, quae ad hodiernum diem lata sunt, edita cura ejusdem regni deputatorum* (Panormi, 1743), II, 54, 55. *Capitula Regni Siciliae*, I, 584. On the protests advanced in the Parliament of 1514, see Renda, *L'Inquisizione in Sicilia*, 44–46.

not suspected of the crime of heresy and were not descended from Jews.[6]

The network of trust underpinning the legal relations inherent in the commercial markets of Sicily—already fragile in its own right—suffered greatly from the breach created by infringements committed by the Holy Office's officials and familiars as both creditors and debtors. The fact of being liable to trial meant that the outcome of any negotiation could be completely distorted if one of the parties could impose his privilegium fori. The petition for a case to be tried by the judges of the Holy Office rather than in the ordinary court—or even the mere threat of doing so—made any possible action of the counterparty vain or ineffective.

In Sicily, as in any other *ancien régime* context, although it was considered deplorable not to honor one's debts—which could even lead to excommunication—the collection of debts was often difficult, if not impossible. As a result, it was not rare for lenders to be willing to transfer a debt for less than its value for the sake of getting at least something for it. More privileged—or more powerful—lenders could put themselves forward as assignees without recourse, freeing the debtor, so to speak, and taking the risk of his insolvency entirely upon themselves. Such assignments took place via payments with subrogation through which the new creditor took the place of the original creditor, taking over his rights vis-à-vis the debtor.[7]

Generally, those with the resources to invest in the credit circuits often negotiated on two fronts. On the one hand, they dealt with creditors who had difficulty enforcing their rights and who were willing to collect their debts partially. On the other hand, they dealt with debtors who were unable to honor their obligations and were attracted to the idea of accepting the ulterior demands of the new creditor just to be rid of their original debts. In both cases, operations of this type could prove to be exceptionally lucrative.[8]

6 *Capitula Regni Siciliae*, II, 55.

7 For excomunication as a result of failure to pay a debt, see Lucien Febvre, "L'application du concile de Trente et l'excommunication pour dettes en Franche-Comté," *Revue Historique*, CIII (1910), 225–247; Tyler Lange, *Excommunication for Debt in Late Medieval France: The Business of Salvation* (Cambridge and New York, 2016).

8 For a case concerning Sicily, see Carmelo Trasselli, "Un banco Genovese a Palermo nel 1570," *Revue Internationale d'Histoire de la Banque*, III (1970), 177–236, 235–236.

Parliament requested that the emperor ban the assignment of credits to the officials of the Holy Office and that transgressors incur consequences. Charles V appears to have grasped the sensitivity of the problem, but chose to resolve it in his own manner, ordering that, for the assignments in question, the condition of the tribunal should not be altered and that assignments were to be considered null when made in favor of a person who was more powerful by virtue of his office. This blatantly ambiguous resolution ensured that the problem would turn up again a century later.[9]

Even after acknowledging in his own way the validity of the complaints about the infractions of the officials and familiars, the emperor went on to confirm that their role and work must in any case be upheld and promoted. Consequently, their immunity and privileges had to be respected in both civil and criminal matters. Thus the callous use of their status needed to be prevented lest the power deriving from it should have disastrous effects on the economic life of the kingdom, especially in the sphere of trade.[10]

The fact that the participation of those party to the privilegium fori in commercial and financial activities altered the operation of the markets and, more generally, the mechanism that regulated economic life, came into the open in the further demands made to Charles V in 1534. At the extraordinary session, Parliament requested that the officials, ministers, and familiars of the Holy Office be prohibited from the performance of activities from which clerics were barred, or at least that any legal disputes arising from them should be tried by ordinary magistrates and not those of the Inquisition. Charles V's reply was icy, turning the matter over the Inquisitor General.[11]

EFFECTS OF THE PRIVILEGIUM FORI Setting the judges, officials, and familiars outside the jurisdiction of the civil government and allowing the Holy Office to become an autonomous power drastically affected Sicily's economy and politics. By Viceroy Marco Antonio Colonna's 1577 calculation, there were 30,000 people

9 *Capitula Regni Siciliae*, II, 57.

10 Lea, *The Inquisition in the Spanish Dependencies*, 20–22. On the political tensions triggered by jurisdictional conflict during the reign of Charles V, see Renda, *L'Inquisizione in Sicilia*, 42–71.

11 *Capitula Regni Siciliae*, II, 99–100.

exempt from ordinary jurisdiction (the privilegium fori extended to the relatives and servants of those entitled to it)—a sizable number considering that the total population of Sicily was around 1.1 million.[12]

In 1575, the president of the Kingdom of Sicily, Carlo d'Aragona, expressed to Phillip II his concerns regarding the excessive number of beneficiaries of the privilege. The coexistence of this sphere of power alongside the state was soon transformed into a fully fledged political conflict. The clientelist and factionary rationale had clear repercussions in the legal doctrine produced in defense of the two blocks of power, with the baronets and the Inquisition on one side and the power of the viceroy and royal justice on the other.[13]

By 1580, when the Holy Office's vast power was legitimized by royal decree, the Inquisition had become parallel to the viceroy, an institution that guaranteed subjects' loyalty to the Spanish crown and served as sentinel and tutor of the political conscience of officialdom. Affiliates like the familiars were crucial to the performance of the functions of the viceroy, which were by then under the remit of the Inquisition. During the next two decades, concern and critical dissent intensified over both the use of the privilegium fori and the violations by Holy Office officials and familiars. In 1591, in response to building tension, the Crown prohibited aristocrats and nobles from being ascribed as familiars of the Inquisition.[14]

12 Sciuti Russi, "Inquisizione, politica e giustizia," *Rivista storica italiana*, CXI (1999), 39, 40. Francesco Maggiore Perni, *La popolazione di Sicilia e di Palermo dal X al XVIII secolo. Saggio storico-artistico* (Palermo, 1892), 156.

13 D'Aragona even stated that the tribunal of the Gran Corte "had no more justice to administer, because the officials and their servants who are now entitled to the privilege of the tribunal of the Inquisition are so numerous that they cover most of the Kingdom." Sciuti Russi, *Astrea in Sicilia*, 143.

Helmut G. Koenigsberger (trans. Anna Várvaro), *L'esercizio dell'impero* (Palermo, 1997), 172–173; Sciuti Russi, "Inquisizione, politica e giustizia," 40. It did not go unnoticed that the most illustrious exponents of the judicial institutions of the kingdom appeared on the list of the officials and familiars of the Holy Office. Renda, *L'Inquisizione in Sicilia*, 100.

14 Lea, *The Inquisition in the Spanish Dependencies*, 28–32. Sciuti Russi, "Inquisizione, politica e giustizia," 45–46; *idem*, *Astrea in Sicilia*, 164–166. On this phase of adjustment, see Rivero Rodríguez, "La Inquisición española en Sicilia," 1096–1115. Francesco Fortunato (ed. Adelaide Baviera Albanese), *Los avertimientos del doctor Fortunato sobre el govierno de Sicilia* (Palermo, 1976; orig. pub. 1591); Alfonso Crivella (ed. Baviera Albanese) *Trattato di Sicilia* (Caltanissetta, 1970; orig. pub. 1593). On the two texts by Fortunato and Crivella, see Sciuti Russi, "Inquisizione, politica e giustizia," 54–55, 39–40. *Idem*, "La Inquisición española en Sicilia," 86.

Political dysfunction continued during the 1590s, and the good management of the markets and the maintenance of the very relations that underpinned society were endangered. An anonymous memoir written during the period notes that merchants, both Sicilian and foreign, made efforts to become familiars. The result was in disorder and uncertainty in the markets, observable in bankruptcy procedures, the management of wheat surveys/statements (*riveli*), the distribution of taxes due to the Crown, and the collection of duties. The effects were even visible in operations of trade and insurance.[15]

The core of the anonymous writer's reasoning pivoted on how the introduction of inquisitorial justice had accentuated the inequality before the law between the rich and the poor. More specifically, it stressed that the new judicial sphere was creating dangerous distortions. In fact, beyond the political rhetoric, the issue did not boil down to a simple opposition between the people and the upper ranks of society. The chief problem was uncertainty brought about by the presence of the Inquisition, as reflected in the reduction of relations-based agreements and expectations, and hence on trust.

THE INSTITUTIONALIZATION OF THE WAIVER OF THE PRIVILEGIUM FORI

The gravity of the situation forced Phillip II to intervene with another decree in 1597, in which he accepted some of the demands to restrict further the number of familiars and curb the power of the judges of the Holy Office. In this decree were important implications for the world of business. For example, notaries charged with forgery and public bankers charged with fraud were now to be tried in the secular court. The decree also importantly acknowledged that those who enjoyed the privilegium fori of the Tribunal of the Inquisition could waive their entitlement to it.[16]

The waiver of the privilegium fori, though, was already practiced. Forty years earlier, in authorizing Bartolomeo Masbel to open a bank in Palermo in 1556, Viceroy Juan de Vega had given instructions that

15 The memoir was written between 1591 and 1597. Sciuti Russi, "Inquisizione, politica e giustizia," 57–58.

16 From 1597 various crimes were removed from the jurisdiction of the Inquisition judges, including sedition, murder and intentional injury, and tax debts to the Real Patrimonio. The new decree appeared to represent the victory of the viceroy's party over that of the Inquisition, fully satisfying the centralistic criteria of the court of Palermo. Nevertheless, the Holy Office was still able to exert power and influence through its clientele networks. Rivero Rodríguez, *La Inquisición española en Sicilia*, 1144–1145; Mario Cutelli, *Codicis legum sicularum libri IV. A totidem Siciliae, & Aragoniae regibus latarum cum glossis, sive notis iuridico-politicis* (Messina, 1636), 498.

bankers be obliged to waive the right to any special court, particularly the "court of the office of the Inquisition." The aim was to prevent the banker from eluding royal justice in the event of bankruptcy. Moreover, even the guarantors involved in the foundation of the bank were required to waive their privilegium fori for the same reason.[17]

By legally formalizing the waiver of the privilegium fori in 1597, the waiver had effectively been institutionalized. Those who could not or would not accept the risk of entering into a contract with someone who had the right to the privilegium fori now had the means to ensure any resulting legal disputes would be settled in secular courts. Although the legal basis of the waiver was anything but solid, as evidenced by the criticism it received, this new instrument was widely used by those habitually engaged in the credit circuits and in loan contracts.[18]

On April 17, 1626, in the office of the notary Giovan Battista Strada, the goldsmith Baldassar Cosentino borrowed from Francesco Mirata the sum of 47 *onze*, undertaking to return it within four months. It was agreed that the annual interest could not exceed 12 percent of the loan. Cosentino waived his right to the inquisitional court. Mirata remained in Strada's office for another loan, this one for Francesco Castagnetta, a silversmith who belonged to the same Palermo guild of goldsmiths and silversmiths as Cosentino. Strada was in fact one of the notaries regularly used by the guild. It is likely that Cosentino and Castagnetta knew each other and they both also knew Strada. The second contract differs from the first only in terms of the amount given and taken on loan, this time 50 *onze*. Mirata imposed the same clause to waive recourse to the tribunal in the event of dispute. We do not know whether Cosentino possessed this privilege, but Castagnetta certainly did. The conditions agreed with Mirata by the two craftsmen were not particularly favorable, but they were hardly the worst to be found on the market.[19]

17 Antonino Giuffrida, *Le reti del credito nella Sicilia moderna* (Palermo, 2011), 48, 241.

18 *Responsum d. Ludovici a Paramo, adversus obiectiones secundo loco, excitatas contra iurisdictionem sancti Officij Regni Siciliae* (Madriti, 1599). Páramo had already addressed the issue five years earlier, putting forward similar arguments. See *Responsum d. Ludovici de Paramo, inquisitoris Regni Siciliae, pro defensione iurisdictionis Sancti Officij, adversus oppositiones & capitula udicum secularium eiusdem Regni* (Madriti, 1594), 52v–66v. On Paramo's arguments, see Rosolino, "Tra fedeltà e fiducia. Lo Stato, l'Inquisizione, le relazioni giurate," *Studi Storici*, II (2023, forthcoming).

19 Notary Giovan Battista Strada, MMCMVI, fols. 132v–134r, Archivio di Stato di Palermo (Palermo State Archives, hereinafter ASP); *ibid.*, fols. 134r–135r; *idem*, MMDCCCXCIV, fols. 79r–83v, ASP; *idem*, MMCMVI, fols. 261r–265v, ASP.

On October 24, 1626, Strada drew up a similar loan contract between Baldassar Lixi and three partners, Pietro Moretto, Jacobo Maffiolino, and Bartholomeo Depra. They jointly took on a loan from Lixi for the sum of 80 *onze*, to be repaid within six months at an interest rate of a maximum of 14 percent. Lixi, like Mirata in the other two contracts, also requested and obtained from the counterparties the waiver of the privilegium fori.[20]

These specific cases suggest how the Sicilian business world was addressing the impact of the Inquisition on economic life. Waiving the privilege to the court of the tribunal was an indispensable condition for agreeing to a contract to lend or receive money on loan at interest rates that were generally high (up to 14 percent but never less than 8 percent) and to undertake to return it in the short term (four or six months but up to one year). These were contracts made against payment, which always entailed a risk. Therefore, they attracted the attention and suspicion of those who, in the light of Counter-Reformation moral theology, wanted to scrutinize the ways in which debit/credit relations were managed. Such contracts were used mostly by people involved in commerce, finance, and the world of trade. As Giovanni Domenico Peri wrote in his treatise *Il negotiante*: "The Merchants are not in the habit of making loans to each other, so that when they need money they go to the marketplace and, through the broker, they take on loan the money they need and in this way can meet their requirements." In Sicily, even the exponents of the aristocracy were in the habit of obtaining money in this way to meet the financial demands connected with the management of their great estates.[21]

20 Strada, MMCMVI, fols. 52v–54v, ASP.

21 Giovanni Domenico Peri, *Il negotiante* (Venice, 1672–1673), IV, 50. On Peri's work, and on this passage in particular, see Raymond de Roover, *L'évolution de la lettre de change: 14–18 siècles* (Paris, 1953), 69–70; Rodolfo Savelli, "Modelli giuridici e cultura mercantile tra XVI e XVII secolo," *Materiali per una storia della cultura giuridica*, XVIII (1998), 17–19.

For example, on October 31, 1641, Don Ottavio Lanza, Prince of Trabia, jointly with the brothers Don Giovanni and Don Ignazio Graffeo, borrowed from Pietro Colle the conspicuous sum of 480 *onze*, at an annual interest rate of 12%, to be returned within ten months. Don Ottavio was the only official debtor. On the same day he declared that the obligation pertained exclusively to himself. Notary Matteo d'Ippolito, CCLXVI, fols. 54v–59r, ASP. Five years later, on June 16, 1646, Don Ottavio applied to Colle again to have further money. This time, however, he contracted the debt jointly with his son Don Lorenzo Lanza, Count of Mussomeli; Don Francesco Celesti; Don Francesco Starrabba; and Giuseppe Manicuni. The interest rate was the same, but the amount, 760 *onze*, was much greater. D'Ippolito, CCLXVII, fols. 856r–861r, ASP.

In any case, whether it was a question of small or large amounts of money, those who entered into contracts of this kind knew that they could be at risk of unforeseen damages. The interest rate, which only specified an upper limit, was not agreed at the time of the contract but was defined later on the basis of the current value of the exchange differences between the marketplaces. Very often, however, these exchange differences were simply a sort of cover, and the upper ceiling became the actual rate. For this reason, it was widely maintained that these contracts were used as particularly onerous credit instruments to avoid the canonical ban on usury.[22]

This explains the presence of guarantors, who were called upon to stand surety with the debtor for the return of the sum with the agreed interest. These obligations were supported by the reputations of the parties involved and by the bond of trust between the contracting parties, which was quite often established with the assistance of third parties, such as notaries and brokers, who circulated necessary information about the parties. Nevertheless, even all of these safeguards were hardly ever enough, and the attention paid to the definition of contract conditions was a clear sign that ending up in court was seen as a real and not remote possibility. Furthermore, although wealth was not an unequivocal sign of a person's good reputation, it offered reassurance regarding the results that might be obtained through eventual legal action.[23]

On the other hand, as an anonymous writer—plausibly a businessman—wrote in 1573, "Rich people do not take loans *a cambio* out of read need, but by choice, expecting that they will enrich themselves by employing the credit and money of their partner, in addition to their facility in these types of negotiation

22 One of the most famous examples in this debate is the *Trattato de' cambi et in particolar de' cambi detti di Lione e di Bisenzone* written by Marco Palescandolo in the last quarter of the sixteenth century. It was finally published in Giovanni Cassandro, *Un trattato inedito e la dottrina dei cambi nel Cinquecento* (Naples, 1962), 111–167.

23 On how the bonds of trust underpinning credit/debit relations were based on the credibility that the persons involved were able to create and preserve, see Craig Muldrew, *The Economy of Obligation. The Culture of Credit and Social Relations in Early Modern England* (Basingstoke, 1998); Margot C. Finn, *The Character of Credit: Personal Debt in English Culture, 1740–1914* (Cambridge, 2003); Laurence Fontaine, "Antonio e Shylock: Credit and Trust in France, c. 1680–1780," *Economic History Review*, LIV (2001), 39–57; *idem*, *L'économie morale: Pauvreté, crédit et confiance dans l'Europe pré-industrielle* (Paris, 2008). Laurie Nussdorfer, *Brokers of Public Trust: Notaries in Early Modern Rome* (Baltimore, 2009).

where they expect to earn more than what they believe they risk losing."[24]

A few decades later, in his 1619 treatise, *De commerciis et cambio*, the jurist Sigismondo Scaccia elaborated on these arguments, noting that the use of certain economic and legal instruments was no longer restricted to people in the business world. The increasingly widespread use of money in this manner posed the inescapable problem of putting all creditors in the same category. It seemed to many people that the time was ripe to consider the mechanisms hitherto applied only to certain monied individuals as valid for the masses.[25]

As loans were borrowed, transferals of debt inevitably circulated. Such assignments brought into question the collectability of debts after the personal relationship of trust that had given rise to the original obligation no longer existed. The extent of this problem emerged clearly during the Parliament of 1615. Observing that creditors who wished to "oppress" their debtors were in the habit of assigning the credits that they held to "privileged persons or institutions," Parliament requested for the privilegium fori only to be used by those people who, objectively, had an "effective interest in the matter in their own name" and not by those who had instead taken over the obligation "by transfer or donation" or "by entering into it in some other manner." It was no longer possible to acquire a credit in this way and then request its collection through legal channels using one's privilegium fori. Cases in which the "transfer or donation" of bonds to privileged persons or institutions made in order to prevent the debtors from submitting to the jurisdiction of their own regular court caused serious prejudice to these individuals by depriving them of the power to defend themselves.[26]

24 *Dialogo, nel quale si ragiona de' cambi, e altri contratti di merci: e parimente delle Fere di Ciamberi, e di Trento* (Genoa, 1573), 34–35.

25 Savelli, "Between Law and Morals: Interest in the Dispute on Exchanges during the 16th Century," in Vito Piergiovanni (ed.), *The Courts and the Development of Commercial Law* (Berlin, 1987), 79–87; *idem*, "Modelli giuridici e cultura mercantile," 7–12. Savelli, "Between Law and Morals," 39–43; *idem*, "Modelli giuridici e cultura mercantile," 12–17. See also Rodolfo De Laurentiis, "Sigismondo Scaccia (1564?–1634) fra pratica e teoria giuridica agli inizi dell'età moderna," *Rivista di Storia del Diritto italiano*, LXIV (1991), 231–287; Daniela Tarantino, "Scaccia, Sigismondo," in Italo Birocchi et al. (eds.), *Dizionario Biografico dei Giuristi Italiani, XII–XX secolo* (Bologna, 2003), II, 1811–1814. Sigismondo Scaccia, *Tractatus de commerciis et cambio* (Rome, 1619), 217–218, 236.

26 On the conventional assessment of a person's reputation, see Emily Kadens, "Pre-Modern Credit Networks and the Limits of Reputation," *Iowa Law Review*, C (2015), 2429–2455; *idem*, "The Dark Side of Reputation," *Cardozo Law Review*, XL (2019), 1995–2027. *Capitula Regni Siciliae*, II, 344.

Even after the institution of the waiver of the privilegium fori in 1597, tensions were not abated. In the 1630s the Spanish government considered the power of inquisitorial justice and further reduced its scope. In 1633 the Sicilian jurist Mario Cutelli was sent to Spain by the viceroy specifically "with the task of explaining to the sovereign and to the Council of Italy the serious inconveniences caused to public order and to the economic life of the kingdom by the endless legal disputes between the ordinary magistrates and the Tribunal of the Holy Office." Shortly after arriving in Spain, Cutelli published the *Patrocinium*, in which he not only denounced the usurpations perpetrated by the Holy Office in violation of what had been established in the decrees of 1580 and 1597 but also made a political issue of the need to prevent judges of the Inquisition from dealing with offenses that weighed heavily on the network of trust underpinning commercial and financial markets.[27]

The result was a royal decree in 1635, which again touched on the question of the waiver of the privilegium fori. The principal beneficiaries of this provision were creditors who could now insist on the waiver in the event of going to litigation with the debtor—who could always turn out to be a familiar. The degree to which the waiver was crucial to the life of Sicily is illustrated by the particular attention Cutelli paid to it in the *Patrocinium*. His further reflections on the matter of the waivers in his *Decisiones* became an important element in the orientation of jurisprudence. It was clear that the privilegium fori, and the practical possibilities of curbing it, was a political and judicial issue that went well beyond the confines of Sicily.[28]

27 Sciuti Russi, "Inquisizione, politica e giustizia," 62, 64; *idem*, "Cutelli Mario," in *Dizionario biografico degli italiani* (Rome, 1985), XXXI, available at https://www.treccani.it/enciclopedia/mario-cutelli_%28Dizionario-Biografico%29/. *Pragmaticarum Regni Siciliae tomus tertius in quo continentur Regiae Sanctiones, Pragmaticae, Capitula, Decreta, & Edicta, in veteribus Codicibus praetermissa, vel postea, usque ad hodiernum diem, publicata* (Palermo, 1700), 117–118.

28 Cutelli, *Patrocinium pro regia iurisdictione inquisitoribus siculis concessa* (Madriti, 1633), cap. IIII et ult., 55–56, 136v–140; *idem*, *Decisiones supremorum huius Regni Siciliae Tribunalium iuxta orationes editas* (Messina, 1632); Michaelis de Cortiada, *Decisiones cancellarii et sacri regii Senatus Cathaloniae, sive Praxis contentionum et competentiarum regnorum inclytae coronae Aragonum super reciproca in laicos & clericos jurisdictione* (Lyons, 1699; orig. pub. 1661–1665), I, 374–375; Alphonsi Narbona, *Commentaria ad l. XX. tt. I lib. 4. Novae Recopilationis legum Hispaniae* (Toleti, 1673), II, 566–579; Thomae Carlevalii, *De judiciis, de foro competenti, et legitima judicum potestate, ac de judiciis in genere, judicio executivo, & concursu creditorum* (Lugduni, 1702), I, 239, 259; Laurentii Mattheu et Sanz, *De regimine urbis, et regni Valentiae* (Valentia, 1656), I, 151; Didaco Guerreyro, *Opusculum de privilegijs familiarium, officialium que sanctae inquisitionis* (Conimbricae, 1699).

The institutionalization of the waiver and the necessary regulation of its use made sense only under one of two conditions. First, the contracting parties had to keep the promise comprised in the contract not to appeal to their own special justice. Second, in the absence of the first condition, in any eventual legal dispute, royal justice had to take precedence over that of the Inquisition.[29]

However, the inclusion of the waiver in loan contracts suggests that it had become commonplace, at least in the world of business. Furthermore, the waiver was a form of guarantee of any possible variations that could alter the legal status of the counterparty to the contract. A person's legal status could change, and even those who did not have the privilegium fori at the time of signing the contract might acquire it later while the contract was still operative, especially because it was common for such a relationship to continue over time and even to be transmitted to one's heirs.[30]

The situation in Sicily, characterized by pressure from the Inquisition and the institutionalization of the waiver of the privilegium fori to defend business logic, had far-reaching implications beyond the kingdom. For instance, Alfonso De Olea cited the royal decree of 1635 in his famous 1652 treatise, *De cessione iurium et actionum*, referring explicitly to the contents of the regulation regarding assignments. Olea also observed that the 1635 decree had not been effective, noting that officials of the Inquisition continued during his time to accept assignments of credits. It was nevertheless true that the regulation was open to more than one interpretation.[31]

29 Frequent non-compliance with such royal decrees continued to be a source of tension and conflict. Lea, *The Inquisition in the Spanish Dependencies*, 38; Jose Martínez Millán, "Los problemas de jurisdicción del Santo Oficio: La Junta Magna (1696)," *Hispania Sacra*, XXXVII (1985), 205–259.

30 Sheilagh Ogilvie, Markus Küpker, and Janine Maegrath, "Household Debt in Early Modern Germany: Evidence from Personal Inventories," *Journal of Economic History*, LXXII (2012), 134–167.

31 D. Alphonsi De Olea, *Tractatus de cessione jurium et actionum* (Lugduni, 1694), 69; Cutelli, *Codicis legum siculorum libri IV*, 506. It was not exactly clear—for the assignment to be considered null and the assignor obliged to drop the case—how a person's status of being more powerful was to be deduced. Furthermore, the assignments and donations of rights to those entitled to the privilegium fori risked neutralizing everything that had been achieved through the recognition and institutionalization of the waiver of recourse. A guarantee obtained in this manner at the time of definition of the contract conditions would have no effect if the obligation were later taken over by a third party entitled to the same privilege. On the other hand, donations and assignments of rights were contracts and, as such, the possibility of an eventual trial ending up in the hands of the Inquisition appeared to undermine the network of trust based on protection of and adherence to agreements based on the rationale of the obligation. Muldrew, *The Economy of Obligation*, 315–333.

The adopted solutions to the questions posed in the introduction to this paper were intended to ensure that, should the entitlement move beyond the original obligation, the contract would not be neutralized. For debtors, contractual agreements called for a dual oath that included the promise to repay the loaned amount and to waive any privileged condition. Francisco Salgado de Somoza discussed this aspect of the waiver in his 1651 treatise *Labyrinthus creditorum concurrentium*, where he stressed the cogency of contractual logic and, more directly, adherence to the promise made freely by a familiar in the definition of the agreement. Although *Labyrinthus* is a treatise on bankruptcy, Salgado's consideration of the institution of the waiver was pertinent because every bankruptcy procedure created a hierarchy of creditors, and the possibility of disruption by the tribunal was a source of uncertainty.[32]

The strength of the juridical logic supporting the waiver stemmed from the will expressed privately by the parties at the time the terms of the contract were defined. In Salgado's eyes, this observation was significant, based on the vindication of the importance of autonomy that characterized the private legal dimension. Its valorization responded to the need not to let relationships based on trust be destroyed by the abuses committed in the exercise of forum privilege. The urgency of the issue was evident. To fail to

32 Italo Birocchi, *Causa e categoria generale del contratto: un problema dogmatico nella cultura privatistica dell'età moderna* (Turin, 1997); James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford and New York, 1991); Robert Feenstra, "Pact and Contract in the Low Countries from the 16th to the 18th century," in John Barton (ed.), *Towards a General Law of Contract* (Berlin, 1990), 198–215; Birocchi, "Tra tradizione e nuova prassi giurisprudenziale: La questione dell'efficacia dei patti nella dottrina italiana dell'età moderna," in Barton (ed.), *Towards a General Law of Contract*, 250–367; Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Leiden and Boston, 2012); Carlos de Cores, *La teoria generale del contratto. Una prospettiva storica* (Turin, 2020). Francisco Salgado de Somoza, *Labyrinthus creditorum concurrentium ad litem per debitorem communem inter illos causatam, Tomi Duo* (Lyons, 1672; orig. pub. 1651), I, 46. The use of the adverb *freely* appears to highlight the binding nature of the contractual intention expressed in conditions of liberty. In the light of the merciless logic of credit/debit relations, and the balance of power inevitably expressed in the contract conditions, use of this word might seem provocative, if not paradoxical. However, the extent to which this balance of power was exposed to radical alterations in the event of one of the two parties proving to be a familiar of the Holy Office, shows the importance of the use of this adverb in sealing the promise made *ex pacto*. On Salgado de Somoza and his *Labyrinthus*, see Mercedes Galán Lorda y Patricia Zambrana Moral, *Francisco Salgado de Somoza [1595–1665]*, in *Diccionario crítico de juristas españoles, portugueses y latinoamericanos* (Barcelona, 2006), 471–473; Wolfgang Forster, *Konkurs als verfahren. Francisco Salgado de Somoza in der Geschichte des Insolvenzrechts* (Cologne, 2009).

recognize the legal force of the waiver of privileged justice administered by the Holy Office was to let the very logic of promise/expectation be irreparably compromised.[33]

Salgado's position was supported by the new general theory of contract that had recently been proposed, thanks mainly to the work of Spanish jurist and Jesuit Pedro De Oñate. In his view, which was influenced by writings on the role of consent and the element of will by Barolomé de Albornoz and Francisco Garcia, the contract was nothing more than the projection of the freedom to obligate oneself through an act of will. Oñate radically rethought the contract as an intentional, voluntary, and free act.[34]

What constituted the essence and very definition of the contract were primarily the expressed wills of the contracting parties. The principle underlying the covenant was clear, as was that the central aspect of the matter lay in the importance assumed by the autonomy of the will. The contract was essentially a covenant generated through consent.[35]

An insistence on the logic of consensus carried an additional element; for if the contract was essentially traceable to the action of consent, the element of freedom was crucial. It is unknown whether Salgado was aware of Oñate's conclusions. By the printing of the first edition of *Labyrinthus*, five years had passed since the publication of the first volume of Oñate's work, entitled *De contractibus in genere*. What is certain, however, is that Salgado's insistence on the dimension of contractual autonomy—founded on freedom and will—was aimed to legitimize further the new institution of the waiver of the Holy Office's privilege of forum for officers and familiars in the face of power as threatening and cumbersome as the Tribunal of the Inquisition.

33 To substantiate his position, Salgado referred to Pedro Barbosa, *Commentarii ad interpretationem tituli, ff. de iudiciis* (Lugduni, 1622), IV, 94, 95.

34 Pedro De Oñate, *De contractibus in genere* (Rome, 1646). Birocchi, *Causa e categoria generale del contratto*, 228–238, 281–289; Decock, *Theologians and Contract Law*, 163–182; Cores, *La teoria generale del contratto*, 252–268.

35 Oñate, *De contractibus in genere*, I, 15, II, 199–200.