

LEGAL CULTURE AND LEGAL TRANSPLANTS, ITALIAN NATIONAL REPORT

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I. Introduction. II. The end of the ius commune, the Napoleonic period, and the restoration of the old regime in Italy. III. Some points of friction between the French civil code and the legal landscape of the Italian peninsula after the downfall of Napoleon and before the enactment of the civil code of 1865. IV. The first civil code of united Italy (1865), and the French legacy in Italy until the end of the nineteenth century. V. The search for a national legal science and the turn towards German legal science after the Italian civil code of 1865. VI. A legal language with many affiliations. VII. The turn of the late nineteenth century and the twentieth century up to the civil code 1942. VIII. From the end of the Second World War to the beginning of the twenty-first century. IX. Concluding remarks: towards a theory of cultural control.

I. INTRODUCTION

Throughout history, cross cultural contacts have changed the experiences of all human groups on earth. In this overall picture the law is no exception. With respect to every legal principle, institution or rule we may ask to what extent its origins lie in the local dimensions of the law, or instead transcend them. Innovation in the law, like in other branches of culture, is a real possibility, of course. Nonetheless, a comparative approach to the study of law shows that to innovate often means building upon what has been made by others. This happens more frequently than most jurists would think, for a variety of reasons. Conflicts are part of this dynamic, although a variety of other means, including ideology and prestige, can bring about legal change through the transplant or the circulation of foreign legal model.

Since the beginning of the modern epoch, marked by the discovery of America in 1492, this process has gained momentum and the last two centuries have witnessed an unprecedented expansion of the transnational dimensions of the law through war, conquest, colonization, commerce and finance, migration, religious or ideological pressure or hegemony, academic research and teaching, science, technology, and the emergence of an incipient, fragile world law set by the international community.

But even before the year 1500 the role of cross cultural encounters was prominent in shaping the legal systems of the world. Indeed, one can look back to prehistory, and still find patterns of imitation and diffusion of cultural elements that must have included, what we would now label with a loose term, as the 'law'. The hallmark of legal thought shared by Western

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nations in the last five hundred years is the notion that the law is a 'gift' of the West to the other civilizations of the world. This is an assumption that does not meet reality, but belongs entirely to the mythology of Western law, built and the denial of other legal orders, and the refusal to clarify what legality is under colonial conditions.

Since the last quarter of the twentieth century, the literature on comparative law has been paying increasing attention to the topic of legal transplants and to their relationship to the notion of legal culture.² To an extent, both notions are ill-defined and problematic, since they are approached through the use of different methodologies and represent the meeting point of a variety of themes. Nonetheless, despite their shortcomings, both concepts are essential tools to break the mould of positivistic approaches to the law that would instead deny those tensions, contradictions, and struggles that are the vehicles of identity building and change in the law as in other social field. Both are indeed central to the critical reconstruction of the transnational dimensions of the law in the last one hundred and fifty years.³

The questionnaire prepared by the general reporter focuses on transplants relating to civil and commercial matters and invites national reporters to explore this general theme for each country from the sixteenth to the twenty-first century. With regard to Italy, the above mentioned subject is best approached by concentrating on the evolution of these fields of the law in the last two centuries.

The early nineteenth century up to the Congress of Vienna (1814) and restoration is the period in which the many States of pre-unitary Italy were first exposed to legal transplants that marked the end of the *ius commune*, i.e. the learned law of continental Europe based on Justinian's compilation and that limited the role played by the canon law in the life of the community.

After the end of the Napoleonic period and the restoration, Italy became a unified, independent country under the House of Savoy in 1861. The new Kingdom of Italy quickly enacted the first national civil code of 1865, and a commercial code of the same year. Both were heavily indebted to the French civil and commercial codes. From the beginning of the

¹For a general view of the topic: Graziadei, M., "Comparative Law as the Study of Transplants and Receptions", in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2007, p. 455 ff.

³ In this vein: Kennedy, D., "Three Globalizations of Law and Legal Thought: 1850-2000", in D. Trubek and A. Santos (eds.), *The New Law and Economic Development. A Critical Appraisal*, Cambridge, 2006, 19 ff.

nineteenth century up until the 1870's, commentaries and other works on the French codes written in France, or in other countries where the Napoleonic codes were in force, were regularly translated into Italian. In the following decades, Italy experimented with legal developments of the greatest interest for all students of legal transplants.

From the last two decades of the nineteenth century until the end of the second world war Italian legal doctrine fell under the influence of German legal scholarship. A French based code was thus read in the light of German legal theory. In 1882, Italy produced a commercial code that abandoned the model set by the French commercial code. Sixty years later, the civil code of 1865 was substituted by the present civil code of 1942.

The codification of 1942 unified the civil and the commercial codes of the Kingdom of Italy on the verge of the collapse of the fascist regime. Republican Italy amended the new code to purge it from the fascist legacy and thus to preserve it. This code abandons the structure of the French civil code, but on several crucial issues, as will be seen, loyalty to the French model was confirmed. Subsequent waves of legislative and doctrinal change have shown how the code is actually just one element in the constellation of factors determining the law relating to civil and commercial matters in Italy, which includes constitutional law and European law.

In the last thirty years, the main factor of change influencing the evolution of Italian law in the field of civil and commercial law is the law of the European Union. A tangible token of this influence is the consumer law code enacted in 2005, which consolidates legislative provisions implementing EU law in the field of consumer transactions. At a more general level, American and to a minor extent English legal literature, which was previously largely absent from the set of citations of Italian authors on civil and commercial law, has now become a point of reference for several Italian scholars.

By now, a vast literature illustrates most aspects of this dynamic for the nineteenth century and for the first half of the twentieth century. To be sure, the history of legal transplants and legal culture in the field of civil and commercial law belongs to a larger picture which includes public law and much else. In particular, private law cannot really be held aloof from political and social realities, despite the recurrent tendency to claim for it a high degree of autonomy from other branches of the law and from other regulatory systems.

In this paper it is virtually impossible to do justice to the impressive contribution of legal historians to the reconstruction of the path followed by

Italian law in this period.⁴ The work presented below aims at revisiting the key episodes of this story and at offering in the conclusion some general reflections from the point of view of the relationship between legal culture and legal transplants.

I must add that this is not the first time that an Italian comparative lawyer looks back at the history of Italian law to explore the relationship between legal culture and legal transplants.

The ground-breaking works of Rodolfo Sacco have shown how the law should be decomposed in different formants to produce a more accurate assessment of the diffusion of foreign elements in any given environment. The role that unarticulated assumptions – cryptotypes in his own words – play in the process of legal change has been first set out in his seminal contributions.⁵ With respect to Italian law, Sacco showed how Italian lawyers in the nineteenth century and during the twentieth century have drawn upon French and German doctrines and rules to produce outcomes that many would qualify as hybrids.

Antonio Gambaro and Attilio Guarneri have explored the vicissitudes of the Italian codifications concerning civil and commercial law and their relations to the general patterns of Italian legal culture on several occasions.⁶ Gianmaria Ajani,⁷ Elisabetta Grande,⁸ Maurizio Lupoi,⁹ Ugo

⁴ I am especially indebted to the general works of Grossi, P., *Scienza giuridica italiana. Un profilo storico 1860-1950*, Milano, 2000; Solimano, S., *'Il letto di Procuste'. Diritto e politica nella formazione del codice civile unitario. I progetti Cassinis (1860-1861)*, Milano, 2003; Padoa Schioppa, A., *Storia Del Diritto In Europa dal Medioevo all'età contemporanea*, Bologna, 2007.

⁵ The gist of several of his many works in the field is summarized by Sacco, R., “Legal Formants: A Dynamic Approach to Comparative Law”, *Am. J. Comp. L.* 1, num. 39, 1991, p. 343. See now: Sacco, R., *Anthropologie juridique : apport à une macro-histoire du droit*, Paris, 2008; A. Gambaro, A. and Sacco, R., *Sistemi giuridici comparati*, 3rd ed., Torino, 2008.

⁶ Gambaro, A. and Guarneri, A., “Italie”, *La circulation du modele juridique français, 14 Travaux de l'Association Henri Capitant*, Paris, 1993, p. 77; Gambaro, A., “Vicende della codificazione civilistica in Italia”, *Trattato di diritto civile diretto da Rodolfo Sacco, Le fonti del diritto italiano*, Torino, 1998, p. 405 ff.; Guarneri, A., “La circulation des modèles au cours de deux dernières siècles”, *Rapports Nationaux Italiens au XIII^e Congres International de Droit Comparé (Montreal 1990)*, Milano, 1990, I. ff.

⁷ Ajani, G., “By Chance and Prestige: Legal Transplants in Russia and Eastern Europe”, *American Journal of Comparative Law*, num. 43, 1995; Id., “Legal Borrowing and Receptions as Legal Transplants”, *Encyclopaedia of Law and Society*, D. S. Clark (ed.), t. III, 2007, p. 1508 ff.; Id., “Legal Change and Institutional Reforms, Ret tog tolerance”, *Festkrift til Helge Johan Thue*, Oslo, 2007, p.473 ff.

⁸ Grande, E., “Italian Criminal Justice: Borrowing and Resistance”, *Am. J. Comp. L.*, num. 48, 2000, p. 227; Id., *Imitazione e diritto-ipotesi sulla circolazione dei modelli*, Torino, 2000.

⁹ Lupoi, M., *Sistemi Giuridici Comparati: Traccia di un Corso*, Napoli, 2001. Lupoi’s “legal flux” focuses on the perceived need which originates the demand for a transplant, rather than on the transplant itself.

Mattei,¹⁰ P. G. Monateri,¹¹ have further contributed on the general aspects of legal transplants. Recent work by Antonio Gambaro takes position on the methodology to be used in assessing proposals for legal transplants, and in particular on the legal origins literature that seeks to establish a correlation between legal families and economic development.¹²

The present contribution draws upon all these works and I wish to openly acknowledge my debt to them.

II. THE END OF THE IUS COMMUNE, THE NAPOLEONIC PERIOD, AND THE RESTORATION OF THE OLD REGIME IN ITALY

Even before the entry of the Napoleonic army in Italy, in several Italian States there were signs that the system of the *ius commune* in the Italian *paeninsula* was changing its nature under the pressure of absolutism.¹³ The clearest sign of this crisis was the tendency of local rulers to nationalize the sources of law, a move that will inaugurate a season of legocentric law with lasting consequences.¹⁴

The first enactments going in this direction were the Royal constitutions of Piedmont of 1729, confirmed in 1770. This text established that courts of law must base their judgments on the laws enacted by the Prince, on local statutes, on judicial precedents and on the *ius commune*, with the exclusion of citations to legal authors.¹⁵ With this provision the sovereign wish to put an end to the cosmopolitan attitude dominating the interpretation of the law during the epoch of the *ius commune*, in order to establish a system of sources of law that was squarely based upon the notion that the supreme law making authority rested with the ruler.

Similar laws were enacted in the Kingdom of Naples in 1774, and for the Duchy of Este in 1771, where the tract *Sui difetti della giurisprudenza*

¹⁰ Mattei's many contributions to the topic are now conveniently set out in the most recent edition of R. B. Schlesinger's, *Comparative Law*, by U. Mattei *et al.*, 7 ed., Mineola, N. Y. 2009; U. Mattei, U. And Nader, L., *Plunder: When the Rule of law is Illegal*, London, 2008

¹¹ Monateri, P. G., *The Weak Law: Contaminations and Legal Cultures*, *Transnat'l L. and Contemp. Probs.*, num. 13, 2003, p. 577.

¹² Gambaro, A., "Common law e Civil Law : evoluzione e metodi di confronto", Carpi, F. *et al.* (coord.), *Due iceberg a confronto: le derive di common law e civil law*, Milano, 2009, p. 9 ff.

¹³ Tarello, G., *Storia della cultura giuridica moderna: Assolutismo e codificazione del diritto*, Bologna, 1998; Ascheri, M., *Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoleon*, *Tul. L. Rev.*, num. 70, 1995-1996, p. 1041.

¹⁴ Cp. Grossi, P., *Assolutismo giuridico e diritto privato*, Milano, 1988.

¹⁵ For a detailed analysis of this provision, which in Piedmont was applicable also to the allegations of lawyers, and of the legislation of other Italian Kingdoms to the same effect: Braun, A., "Professors and Judges in Italy: It Takes Two to Tango", *Oxford Journal of Legal Studies*, num. 26, pp. 665, 673 ff.

(1742-1743) written by the erudite Ludovico Antonio Muratori had given voice to discontent of sectors of the legal culture and of government with the poor handling of disputes by lawyers and the courts.¹⁶ Quite often, all these provisions were more honoured in the breach than in the observance, in the sense that the intention of the rulers to govern the dynamics which were linked to the activity of the jurists had little impact upon their practices.

This situation of incipient crisis degenerated into an open crisis of the old system with the entry of the Napoleonic army into Italy in 1796, following the defeat of Habsburg Austria in Lombardy and of the House of Savoy in Piedmont.

In the following years, all the Italian territories fell under the direct or indirect rule of France, with the only exceptions of the two islands of Sardinia and Sicily.¹⁷ Piedmont and Liguria were directly annexed to the French empire. North-eastern and central Italy became parts of the Kingdom of Italy established in 1805 by Napoleon who was its king. The other important satellite state of France was the Kingdom of Naples governed first by Joseph Bonaparte (1808) and then by Gioachino Murat until the fall of Napoleon in 1814.

In all the territories where the French rule was established, the new governments enacted laws to abolish the feudal regime, i.e. property and succession laws which entrenched noble status and defeated equality of treatment among citizens, were changed although equality between the sexes within the family remained largely a mirage.¹⁸ The administration followed, throughout, the French model, and the institutions and the language of justice was clearly influenced by this change.¹⁹

The enactment of the French civil code was part of the program of consolidation of the Napoleonic power in Italy, which, after an initial opening towards democratic institutions, was now turning towards political

¹⁶ Di Renzo Villata, M. G., "Ludovico Antonio Muratori e la scienza giuridica della sua epoca tra conservazione e suggestioni di riforma", in G. Alpa, *I difetti della giurisprudenza ieri e oggi: Giornata di Studi L.A. Muratori*, Milano, 2002, pp. 83 ss.

¹⁷ For a detailed examination of the sources of civil and commercial legislation in the pre-unitary States of Italy: Ranieri, F., "Kodifikation und Gesetzgebung des allgemeinen Privatrechts", Erster Teil, Italien, in H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. III, "Kodifikation und Gesetzgebung des allgemeinen Privat- und Prozeßrechts (1815-1914)", München, 1982, pp. 177-396; Astuti, G., *Il code Napoléon in Italia e la sua influenza sui codici degli stati italiani successivi*, Annali di storia del diritto. Rassegna internazionale, 1970-1973, 1 ff.

¹⁸ Cp. di Renzo Villata, M. G., "Persone e famiglia nel diritto medievale e moderno", *Digesto*, 40 ed., sez. civ., t. XIII, 1995, 457, ff., pp. 518-527.

¹⁹ Fiorelli, P., "Lingua giuridica dal De Luca al Buonaparte", Fiorelli, P. (coord.), *Intorno alle parole del diritto*, Milano, 2008.

absolutism. As an act of political deliberation, similar to that occurring in other European countries, it was simply the fruit of the pressure of the French military and political power, although some historians tend to reject the idea that it was the fruit of outright imposition in the light of the reformist ideas that circulated in Italy before the arrival of the French. And yet, the correspondence of the Emperor with his brother in Naples about the adoption of the code (and the possibility to introduce modifications to it) makes abundantly clear to what extent Napoleon in person was investing in the code.²⁰

In any case, there is no doubt that Napoleon put great skill in easing the transition to the new regime by building consensus around the code and luring jurists into appreciating its qualities,²¹ although in practice the professions were not always quick to adapt.²²

The French code entered into force in its original version in Piedmont in 1804. In the following year it was introduced in the territory of Genoa and in the Republic of Liguria. By the 1809 it had entered into force in all the other territories under the French rule, including the former Papal States.

In the Kingdom of Italy, Napoleon ordered that an Italian and a Latin translation of the code be prepared.²³ The official Italian translation of the text, which entered into force on the first of April 1806, was granted by law authoritative status for the purposes of the administration of justice.²⁴ The contrast with the language of the sources of law in force up to then must have been striking in terms of simplification,²⁵ and yet the secret of the

²⁰ di Renzo Villata, M. G., "Tra codice e costume: Le resistenze", *Codici. Una riflessione di fine millennio (Atti dell'incontro di studio Firenze, 26-28 ottobre 2000)*, Milano 2002, pp. 351, 351 ff.

²¹ Cavanna, A., "Mito e destini del «Code Napoléon» in Italia. Riflessioni in margine al «Panegirico a Napoleone legislatore» di Pietro Giordani", *Europa e diritto privato*, 2001, 85 ff., 93-98; Halperin, J. L., *Codes et traditions culturelles, Codici. Una riflessione di fine millennio, op. cit.*, 223 ff.

²² E.g. notaries lagged behind the law in matters like the new formalities for wills and testaments, with the result that litigation concerning their validity flourished: Soffietti, I., *La nuova società e il diritto: Il caso delle successioni in Piemonte, All'ombra dell'aquila imperiale. Trasformazioni e continuità istituzionali nei territori sabaudi in età napoleonica (1802-1814). Atti del convegno*, Torino, 15-18 ottobre 1990, I, Roma 1994, 300 ff.

²³ On the preparation of this translation: Cappellini, P., *Note storiche introduttive*, in *Codice di Napoleone il Grande per il Regno d'Italia (1806)*, Riedizione anastatica dell'originale a cura e con presentazione di G. Cian, Padova, 1989. On the general picture: Dölemeyer, B., "C'est toujours le français qui fait la loi - Originaltext und Übersetzung", Dölemeyer B. et al. (eds.), *Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen ausserhalb Frankreichs*, Frankfurt a. Main, 2006, 1 ff.

²⁴ Terzo Statuto costituzionale del Regno d'Italia, 5 giugno 1805: "... la sola traduzione italiana potrà essere citata nei tribunali e avere forza di legge".

²⁵ See Conti, V., "Le traduzioni italiane dei codici napoleonici", *I linguaggi politici delle rivoluzioni in Europa (XVII-XIX)*, Firenze, 1992, p. 333.

success of the code rests largely in its language, legitimating once more the jurists vis à vis judges and bureaucrats.²⁶

The committee of jurists entrusted with the preparation of this translation provided also those slight modifications of the code that were essential to distinguish it from the original, such as changing all the textual references to French citizens with textual references to Italian citizens. More substantial amendments were discussed, including the possibility to abolish divorce, which was introduced by the code, but they were set aside since the constitutional law introducing the code in the Kingdom of Italy prohibited any amendment for a period of five years. When this period expired no change to the code was eventually introduced.²⁷

In the Kingdom of Naples the decision to introduce the civil code was taken by Napoleon's brother in 1808. Here too, there were initial attempts to procrastinate the entry into force of the code provisions on divorce, but Napoleon himself objected to them, so that the code entered into force in its entirety in 1809.²⁸

After the fall of Napoleon, the restoration of the old regime did not uniformly bring back the ancient feudal jurisdictions, and the ancient laws. In the region of Genoa and in Lucca, the French code remained in force unchanged during the restoration.

The Kingdom of the Two Sicilies (comprising Naples and Sicily), enacted its own code in 1819. This text, for the parts relating to civil matters, was remarkably close to that of the code Napoleon, despite the obligation undertaken under the treaty of alliance with Austria to repeal all the laws introduced by the French.²⁹ The Kingdom of Sardinia (including Piedmont and Sardinia) enacted its civil code in 1837. The official name of it was Civil Code for the States of the King of Sardinia, but it is also known as codice Albertino, after the name of the King Carlo Alberto. This code followed very closely the French code, except in a few areas, like family law, which was very conservative, and intestate succession, as recent studies have shown.³⁰

²⁶ For this essential remark, Gambaro, A., *Codici e diritto giurisprudenziale*, in P. Cappellini, B. Sordi (eds.), *Codici. Una riflessione di fine millennio*, cit., 507, pp. 528-530.

²⁷ See on this point, S. Solimano, *L'edificazione del diritto privato dalla restaurazione all'unità*, in *Atti dei convegni lincei – Convegno il bicentenario del codice napoleonico (Roma, 20 dicembre 2004)*, Roma, 2006, 55 ff.

²⁸ di Renzo Villata, M. G., *Tra codice e costume: le resistenze*, in Cappellini, P., Sordi, B. (eds.), *Codici. Una riflessione di fine millennio, op. cit.*, 351 ff.

²⁹ For a detailed examination of the provisions of this code see: Caprioli, S., *Codice civile: struttura e vicende*, Milano, 2008, 54 ff.

³⁰ Mongiano, E., *Patrimonio e affetti. La successione legittima nell'età dei codici*, Torino 1999, 228 ff.; Id., *Un modello taciuto: l'influenza dell'ABGB sulla disciplina successoria del codice civile albertino*,

The Duchy of Parma and Piacenza and the Duchy of Modena first repealed the code, but then proceeded to codification respectively in 1820 and in 1852. The first of these codes shows traces of the influence of the Austrian code, while the second is the only codification of this period to include a part on commercial law, which was otherwise contained in a separate commercial code.

This second wave of codification shows that, in many respects, the pre-unitary States of Italy desired to acquire a more modern institutional structure, whether in political terms they were following a reactionary line (like the Kingdom of the Two Sicilies), or a liberal-conservative line (like the Kingdom of Sardinia).

On the other hand, the Kingdom of Lombardy Venetia, a part of the Austrian empire since 1815, adopted the Austrian Civil Code of 1811, which was made available in an Italian translation. This text, like the codes mentioned above, remained in force in these regions (or parts of them) until the end of the Austrian presence in Italy. In several respects the Austrian Code was more egalitarian than the Code of the Kingdom of Sardinia. When the hour of Italian legislative unification arrived there were therefore worries that such code could be extended to Lombardy and Venetia with the effect of introducing in this part of Italy a backward looking notion of paternal power and a more unequal treatment of women.³¹

The Grand Duchy of Tuscany and the Papal States (including Bologna and Rome) returned to the *ius commune* and remained the only States where the *ius commune* was formally in force until the adoption of the civil code of 1865 for the new, unified Kingdom of Italy proclaimed in 1861 (see below). Nonetheless, the judges applying the *ius commune* of this period, at least in Tuscany, relied on the Roman law sources and treated them as if they were codified law.³² After an initial period of resistance, one can detect the tendency to treat the Code Napoleon (on the basis of its Romanistic component) as a form of *ratio scripta*, not dissimilar from the other sources of the *ius commune*.³³ Moreover, not all the institutions introduced by the French were abolished. Even the harshly reactionary Papal State had to carry out some reforms to keep abreast of change. Accordingly, in 1821 Pope Pius VII

Convegno internazionale “L'ABGB e la codificazione asburgica in Italia e in Europa” Pavia 11-12 ottobre 2002.

³¹ Cp. Solimano, S., “Il letto di Procuste”. Diritto e politica nella formazione del codice civile unitario, *op. cit.*, 16 ff.

³² Montorzi, M., Il caso della Toscana: una terra di diritto giurisprudenziale e forense di fronte alla cultura ed alle tensioni dell'omologazione codicistica, in Dölemeyer, B. *et al.*, (eds.), *Richterliche Anwendung des Code civil in seinen europäischen Geltungsbereichen ausserhalb Frankreichs*, *op. cit.*, 309 ff.

³³ Amodio, C., Il Code civil nella giurisprudenza toscana della Restaurazione, 359 ff.

promulgated a regulation concerning trade that followed closely the French code of commerce of 1804.

III. SOME POINTS OF FRICTION BETWEEN THE FRENCH CIVIL CODE AND THE LEGAL LANDSCAPE OF THE ITALIAN PENINSULA AFTER THE DOWNFALL OF NAPOLEON AND BEFORE THE ENACTMENT OF THE CIVIL CODE OF 1865

The entry into force of the French civil code in Italy had subverted the structure of the sources of law prevailing in the late *ius commune*. With the introduction of the French civil code all the old sources of law in its field of application — Roman laws, ordinances, general or local customs, statutes or regulations — ceased to be in force, as mandated by art. 7 of the law enacting the code.³⁴

The reduction of the sources of the law to the law of the State was the hallmark of the new regime, and it had lasting consequences on the arguments that could be overtly made in legal arguments.

It is often remarked that the reading of the code centered on the monopoly by the State of the sources of law — close as it is to a variety of legal absolutism — does not do justice to the articulated views of J. M. Portalis, the most brilliant and learned of its drafters, as he expressed them in his famous *Preliminary discourse over the first project of the Civil code*.³⁵ Unfortunately, one cannot learn what the fate of a code shall be by reading the words pronounced on the occasion of its presentation. The history of the code in Italy during the nineteenth century was by and large a protracted, albeit quiet, attempt to get rid of the straitjacket imposed by the restrictive norm about what was to be the ‘law’ under the code. This is already evident from the works of the first Italian commentators on the Code, who often continued to work in the shadow of the tradition of the *ius commune*, despite their proclaimed adhesion to the new regime.³⁶

³⁴ Loi du 30 ventôse an XII (21 March 1804), contenant la réunion des lois civiles en un seul "corps de lois, sous le titre de code civil des Français: art. 7 "À compter du jour où ces lois sont exécutoires, les lois romaines, les ordonnances, les coutumes générales ou locales, les statuts, les règlements, cessent d'avoir force de loi générale ou particulière dans les matières qui sont l'objet desdites lois composant le présent code".

³⁵ *Discours préliminaire du premier projet de Code civil* (1801).

³⁶ See, e.g., Ferrante, R., "Ambrogio Laberio e i suoi Razionali sopra il codice Napoleone (1808)", in Varnier, G. B., (ed.), *Giuristi liguri dell'Ottocento, Atti del Convegno, Genova 8 aprile 2000*, Genova, 2001, p. 161; Tarello, G., *La scuola dell'esegesi e la sua diffusione in Italia*, 1969, repr. In Tarello, G., *Cultura giuridica e politica del diritto*, Bologna, 1988, p. 69 ff.; Cavanna, A., "L'influence juridique française en Italie au XIXe siècle", *Revue d'histoire des facultés de droit et de la science juridique*, 1994, 87 ff.; L. Moscati, "Insegnamento e scienza giuridica nelle esperienze italiane preunitarie", in Liotta, F. (ed.), *Studi di storia del diritto medioevale e moderno*, Bologna, pp. 199, 277; Masciari, F., *La scienza giuridica meridionale della Restaurazione: codificazione e codici*

Despite concessions to the past, which were of some weight, especially in family law matters, the question was not how to turn the clock back, however. If an initial reaction to the Napoleonic code was manifested, the lasting question was how to avoid falling prey to the ideology that would leave no space for the development of the law in the absence of legislative change.

In the period of the restoration, the Civil Code for the States of the King of Sardinia, which was in other respects an Italian version of the French code, provided a first formal answer to this crucial question. Art. 15 of this Code explicitly allowed reasoning by analogy and the application of general principles of the law in case of legislative lacunae. Inspired by a similar provision of the Austrian civil code, this device was essentially a concession to the permanence of natural law thinking which had been the best ally of enlightened reformism.³⁷

A more robust answer to the fundamental question mentioned above was provided only by renewal of legal methods and university teaching in the last quarter of the nineteenth century under the influence of German legal scholarship (see below).

From a different point of view, the preference expressed for the written text over custom and other alternative sources of law expressed by the French code and by the codes patterned after it opened, *inter alia*, the problem of what to do with all the forms of property that were customary, but not feudal.³⁸ The notion of property written in the code was clearly at odds with the unwritten laws governing the use and possession of common lands enjoyed by peasants in vast parts of Italy. Sometimes the attempt to convert the one into the other deprived peasants from one day to the next of the means to securing subsistence.³⁹ The question of the non recognition of these

nell'opera di Giuseppe Amorosi, Soveria Mannelli, 2003; Ferrante, R., "Cultura giuridica e codificazione", *Clio@Themis, Revue électronique européenne d'histoire du droit*, num. 2, 2009, .

³⁷ Cp. Ferrante, R., "Un ruolo per l'interprete: la scienza giuridica italiana tra Code Napoléon e ABGB", in Caroni, P., and Dezza, E., *L'ABGB e la codificazione asburgica in Italia e in Europa, Atti del convegno Internazionale Pavia 11-12 ottobre 2002*, Padova, 2006.

³⁸ Cp. Xifaras, M., "L'École de l'Exégèse était-elle historique ? Le cas de Raymond-Théodore Troplong (1796-1869), lecteur de Friedrich Carl von Savigny", in Kervégan, J. F. and Monhaupt, H. (eds.), *Wechselseitige Beeinflussungen und Rezeptionen von Recht und Philosophie in Deutschland und Frankreich - Influences et réceptions mutuelles du droit et de la philosophie en France et en Allemagne*, Frankfurt a. M., 2001, pp. 177 ff., 188.

³⁹ Note, however, that even before the introduction of the civil code reforms aimed at introducing forms of individual property ownership resulted in abuses committed against peasants and their rights of collective ownership over lands. This was definitely the case the case in Sardinia, after the so-called *editto delle chiudende* (decree on enclosures) promulgated in 1823 by Vittorio Emanuele I. See: Mattone, A., *Assolutismo e tradizione statutaria: Il governo sabaudo e il diritto consuetudinario del Regno di Sardegna (1720-1827)*, *Rivista storica italiana*, 2004,

rights remained by and large a thorny problem for legal science. The whole question became the object of a lively debate after the unification of Italy, in the last decades of the nineteenth century, when discussions about the social conditions of the peasants became part of the political debates of the newly unified country, and jurists like Filomusi Guelfi and Venezian drew attention to the gap between the code and the normative structure of the rules governing collective land ownership.⁴⁰

Considering the substance of the law written in the code, even in the period of the restoration, the parts of Italy where feudalism had been abolished did not re-instate it. Transition to the codes enacted by the Italian pre-unitary States was eased by this political choice.

Divorce was of course a matter of disagreement, but even in France divorce was abolished in 1816, after the restoration of Catholicism as a state religion under Louis XVII. The proclamation of Catholicism as a State religion during the restoration in Italy went hand in hand with its suppression. The evidence about divorce proceedings in the Napoleonic period is still anecdotic, but in any case the numbers were definitely very low.

The jurisdiction of the State over the records concerning civil status was also abolished but, in some States, like the Grand Duchy of Tuscany, parishes were soon required to communicate data resulting from their registers to the State authorities. Other issues that posed problems were the introduction of a marital property regime based on community property,⁴¹ which was unusual in Italy, and the prerogatives of the father as *pater familias*, possibly one of the clearest signs of the authoritarian structure of the unreformed family of old regime.⁴²

Despite these frictions, the governing elites soon realized that, far from being a genuine product of the revolutionary spirit, the French code could be an instrument to consolidate a monarchical government, and it was appreciated as such both in the Kingdom of Sardinia and in the Kingdom of the Two Sicilies. To de-potentiate the obstacles towards the adoption of the

926 ff.; Da Passano, M., *Le discussioni sul problema della chiusura dei campi nella Sardegna sabauda*, Materiali per una storia della cultura giuridica, 1980, p. 417; Birocchi, I., *Per la storia della proprietà perfetta in Sardegna. Provvedimenti normativi, orientamenti di governo e ruolo delle forze sociali dal 1839 al 1851*, Milano, 1982.

⁴⁰ On this point see the masterpiece by Grossi, P., *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century*, Eng. tr., Chicago, 1991.

⁴¹ Di Renzo Villata, M. G., "Tra codice e costume: le resistenze", Cappellini, P. and Sordi, B. (eds.), *Codici. Una riflessione di fine millennio, op. cit.*, pp. 351 ff.

⁴² See on this point the provisions of the Civil Code for the States of the King of Sardinia, art. 210-213, 215-216. These provisions are in stark contrast with the more liberal provisions of the Austrian civil code.

civil codes of the restoration the solution was to accentuate the conservative elements that were already present in the code, and to present the code as a national product, even when the variations between the Napoleonic code and the local code enacted after were marginal or modest, to say the least.⁴³

IV. THE FIRST CIVIL CODE OF UNITED ITALY (1865), AND THE FRENCH LEGACY IN ITALY UNTIL THE END OF THE NINETEENTH CENTURY

When the time of national unification arrived in 1861, the preparation of a national civil code for the Kingdom of Italy became a hotly debated question.⁴⁴ The debate was closed with the enactment of the civil code of the new Kingdom of Italy in 1865. This was once more a legislative product that closely resembled its French ancestor in terms of organization and content, since most of its provisions are a translation from the original. The commercial code of the same year was a faithful reproduction of the code of commerce enacted by the Kingdom of Sardinia in 1842, which was also largely indebted to the French model.

In the eyes of the politicians of the newly formed Kingdom of Italy, the decision to proceed swiftly to the enactment of a civil code (and of the parallel codes of commerce, civil procedure and criminal procedure) was justified by the need to show the world that the new country was unified from the legislative point of view as well. In this atmosphere, the code of the Kingdom of Sardinia was quickly amended and revised in the light of the other codifications that had in been in force in other parts of Italy and of the original content of the French code to produce the text that eventually entered into force. Projects that would have led to a more advanced code were set aside when the decision to transfer the capital of the Kingdom from Torino to Florence in 1864 determined a sudden acceleration of the codification process.

In the parliamentary debates over the law delegating the power to enact the code to the government, the relationship between the French code and the new Italian codification was emphasised. This helped to dispel the impression that the code of unified Italy was following the steps of the more conservative codifications of the restoration. During these debates, the French code was extolled as a code containing the great principles of modern times. These principles could surely not be considered foreign to Italy. The choice to look at France once more was justified also by recalling that the

⁴³ Solimano, S., *L'edificazione del diritto privato dalla restaurazione all'unità*, *op. cit.*

⁴⁴ Solimano, S., "Il letto di Procuste. Diritto e politica nella formazione del codice civile unitario", *op. cit. L'ABGB e la codificazione asburgica in Italia e in Europa, Atti del convegno Internazionale Pavia 11-12 ottobre 2002*, Padova. *op. cit.*, with further references.

French code had been in force in several parts of Italy, and by highlighting the debt of the French code to Roman law, which was surely part of the legal heritage of Italy. A completely different path was followed with respect to the penal code. In 1865 the new Kingdom of Italy simply adopted the penal code of the former Kingdom of Sardinia, but this code was not applicable in Tuscany because the legislation in force in the Kingdom of Tuscany did not allow the death penalty. . This contrast delayed the unification of the penal legislation for the entire Kingdom. Eventually the abolitionists, who were the majority at the universities, prevailed. Executions were de facto abandoned after 1877, and the first Italian penal code of united Italy of 1889 ruled out the death penalty.⁴⁵

Some innovations of the civil code of 1865 mark it off from the codifications of the restoration. The code introduced civil marriages to affirm the secular character of the State. Since the Italian State was unified against the resistance of the church, the code introduced civil marriages to affirm the secular character of the State. Marriage according to the canon law could not therefore substitute civil marriage, contrary to the rules prevailing under the pre-unitary codes. The marital property regime was based once more on the principle of the separation of the property of the spouses (and allowed for dowry). They could choose the application of the regime community property if they wished. The rules on paternal power and on the right to bring an action to establish paternity also reflected more closely the French code than the codes of the restoration. The new Italian code recognised to married women a certain role in the exercise of prerogatives over children, although the unequal regime of paternal power was maintained, so that these prerogatives were, in effect, subordinated to that of the father, who was the head of the family.⁴⁶ Other innovations cured defects of the original version of the French Code, which were, by then, apparent, e.g. with respect to the land registry and the land records. The source of inspiration in this respect was the Belgian legislation on the land registry). The drafters of the code also inserted some rules deriving from the Austrian civil code, such as those concerning possession and co-ownership, but they did not need to present them as acquisitions from that code, because they had been already inserted in other pre-unitary codes. The desire to deny intellectual debts to the Austrian codification owed much to the political motives of the Risorgimento, despite the fact that on several points it was more forward looking than the new Italian code, so that in parts of the country (like

⁴⁵ Da Passano, M., “La pena di morte nel Regno d'Italia, 1859-1889”, in Various Authors, *I codici preunitari e il Codice Zanardelli*, Padova, 1993. The same Code also provided a limited recognition of the right to strike.

⁴⁶ Di Simone, M. R., “La condizione femminile dal codice del 1865 al codice del 1942: spunti per una riflessione”, in *Cinquant'anni del Codice Civile. Atti del Convegno di Milano, 4-6 giugno 1992*, II, Milano, 1993, pp. 561 ff.

Veneto) where the Austrian codification had been in force the change of codes was not greeted with enthusiasm.⁴⁷

The historical events mentioned above help to understand how it happened that the first civil code of unified Italy was essentially an amended version of the French code, just like the code of commerce of 1865.

If we look at the larger picture of legal culture, the influence of French legal writing on the elaboration of the law by legal authors in those parts of Italy which had been closer to France until the 1870's and the relatively minor importance of French judicial cases as a source of inspiration for Italian courts in the period of the restoration and afterwards are the most remarkable aspects of the Italian situation.

The diffusion of French literature on the civil code in Italy in the period up to the enactment of the civil code of 1865, and in its aftermath was massive.⁴⁸ It is attested by the holdings of original French works in Italian public and private libraries, as well as by the numerous translations of the works on the French civil code into Italian by French or Francophone authors. The diffusion in Italy of these works shows that, in the period of the restoration and during the Risorgimento, the French civil code – also in the light of its relationship with some of the civil codes enacted in restoration – must have been considered as an element of the local legal culture, at least in those regions of the country that were neither governed by the *ius commune*, nor by the Austrian civil Code.

To be sure, the literature on the French code also became the source of inspiration for commentaries on the civil code written by Italian authors, who sometimes displayed a degree of erudition that was absent from the works of the French authors of the *école de l'exégèse*, but most often were not really remarkable. These publications represent the Italian side of the same jurisprudential school, and they are now receiving fresh attention by legal historians.

The importance of French judicial cases as a source of inspiration for Italian courts in the same period is less certain, at least if we look beyond the

⁴⁷ Cp. Di Simone, M. R., *Percorsi del diritto tra Austria e Italia, secoli 17-20*, Milano, 2006, pp. 223 ff.

⁴⁸ The inventory in three volumes prepared by Napoli, M. T., *La cultura giuridica europea in Italia: Repertorio delle opere tradotte nel XIX secolo*, Napoli, 1986-1987, offers a complete list of translations of foreign works in Italian showing that French works were by far the most popular; Ranieri, F., "Le traduzioni e le annotazioni di opere giuridiche straniere nel secolo XIX come mezzo di penetrazione e di influenza delle dottrine", *La formazione storica del diritto moderno in Europa. Atti del III Congresso internazionale della Società italiana di storia del diritto, Firenze 25-29 aprile 1973*, III, Firenze 1977, pp. 1487 ff.

initial phase of the transplant of French institutions in Italy. Collections of French judgments were surely available through French law reviews that regularly arrived in Italy. The *Jurisprudence générale du Royaume en matière civile, commerciale et criminelle* edited by Dalloz was even translated into Italian in 1826-33⁴⁹. But it has been rightly observed that Italian authors generally cite Italian cases rather than French cases, possibly because of the cryptic style of French judgments.⁵⁰ Although Italian judgements were sometimes written in the style of French judicial decision, this style was not uniformly followed in the period in question. Quite often, nineteenth century Italian judgments continued to reproduce the judicial style of the various Rotae, Tribunals and Senates of the old, pre-unitary States, and to cite the *ius commune* sources.

The relationship between academic commentators and the courts could not be the same in Italy and in France anyhow. After the unification of Italy, the government did not try to abolish the *Corti di Cassazione* which had been established in each of the Kingdoms of pre-unitary Italy under the French rule. This meant that Italy lived with five *Corti di Cassazione* until the creation of a single *Corte di Cassazione* in 1923.⁵¹ Given this situation, these Courts could not enjoy the same degree of influence over the doctrinal development of the law in Italy that the French Court of Cassation had on the development of French law, so that the path of Italian law was different from that of France in this respect at least.

The ultimate consequence of this fundamental difference is that, while French legal theories evolved in a dynamic way thanks to a constant dialogue between judge and jurist, the intensity of that dialogue in Italy was much lower, because no court in Italy occupied the central position that the Court of Cassation had in France until the above mentioned reform which provided Italy with a single *Corte di Cassazione*. The Italian exegetic school was also more timid than its French counterpart in providing a solution that could keep the code in touch with socio-economic changes. The circumstance of legal authors being confronted with codes which were more recent than the French code was also probably a factor accounting for less creativity in the interpretation and the application of the law.⁵²

⁴⁹ *Giurisprudenza generale di Francia in materia civile commerciale e criminale*, 16 volumes, Tipografia di Gennaro Palma, Napoli, pp. 1826-1833.

⁵⁰ Gambaro, A. and Guarneri, A. *Italie*, in *La circulation du modèle juridique français*, *op. cit.*

⁵¹ Meccarelli, M., *Le Corti di cassazione nell'Italia unita. Profili sistematici e costituzionali della giurisdizione in una prospettiva comparata, (1865-1923)*, Milano, 2005, pp. 16-42, Taruffo, M., *Cassazione e revisione: un problema nella storia delle istituzioni giudiziarie*, (1982) repr. in Id., *Il vertice ambiguo*, Bologna, 1991, pp. 27 ff.

⁵² For this general evaluation see Gambaro, A. and Guarneri, A., "Italie", in *La circulation du modèle juridique français*, *op. cit.* They also note a more marked tendency to rely on the sources of the late *ius commune*.

Although French law was the primary component in the set of foreign materials that Italian jurists consulted and utilised, it was definitely not the only one, not even in this period.

Apart from the legacy of the Austrian civil code, which was mostly appreciated from the technical point of view, since the resistance of Austria to the Italian unification project deprived it of any political appeal, some member of the legal elites turned to the German historical school for jurisprudential inspiration, but also to oppose codification in general and the French code in particular.

The leading light of the historical school, Friedrich Carl von Savigny, had been in contact with Italian jurists, first by correspondence, and then in person, visiting Italy several times.⁵³ Many of his works were translated into Italian. He had made clear that Roman law could be rescued as a technical alternative to codification. Hence, his authority could be used to resist codification. Despite the great fame he enjoyed in Italy, this move – reliance on the Roman law to forestall the codification movement – contrary to what happened in Germany, obtained some success only in Tuscany. Elsewhere, the appeal to his authority did not convince, despite the fact that his works were generally greatly admired.

In post-restoration Piedmont, a key figure like Federigo Sclopis, later to become one of the fathers of the *Codice civile albertino*, published in 1833 a confutation of Savigny's *Vocation of our Age for Legislation and Jurisprudence* arguing that the principles of justice were immutable, and that custom was too variable to offer a firm foundation for civil legislation, which should instead be grounded on reason.⁵⁴ Natural law thought – so close to the throne – felt no need to buy the argument against codification, and warned against it.⁵⁵ When the time of the Italian codification arrived in 1861, it had transpired that Savigny himself had moderated his first judgment on codification as a legal technique, as it was noted in the parliamentary debates.⁵⁶ The option to drop codification as a project seemed them to be

⁵³ Moscati, L., *Italianische Reise. Savigny e la scienza giuridica della Restaurazione*, Roma, 2000.

⁵⁴ Sclopis, F., “Della vocazione del nostro secolo alla legislazione ed alla giurisprudenza”, in Sclopis, F. (coord), *Della legislazione civile, discorsi del conte Federigo Sclopis*, 2nd ed., Torino, 1835, 150 ff. A modern edition of this work has been made available by Pene Vidari, G., Torino, 1996.

⁵⁵ Ranieri, F., *Savigny e il dibattito italiano sulla codificazione nell'età del Risorgimento - Alcune prospettive di ricerca*.

⁵⁶ Pisanelli, *Atti della Camera dei Deputati*, 14 February 1865, nr. 1193, p. 4665: “Ma è a maravigliare che l'onorevole Cantù il quale ha accennato a Savigny non fosse informato delle ultime opinioni di Savigny intorno a questo punto. Il Savigny stesso dichiarò che se la contraddizione colla scuola filosofica lo aveva condotto ad esagerare la repugnanza per la codificazione egli stesso riconosceva che quando si è giunti ad un determinato periodo di civiltà quando il diritto si è compiutamente esplicato la codificazione sia un fatto necessario.

only a nostalgic and dangerous view, decried by the leading lights of the codification movement.⁵⁷

To be sure, the Italian universities of the first half of the nineteenth century could not be compared with those of Germany, so that Italy lacked the forces that, in Germany, had joined to uphold Savigny's programme. A different world began to take shape only after the unification of the country, once university life in Italy attracted a new generation of scholars who were conscious of the national mission that the University had in the life of the nation. This generation turned to Germany to provide a systematic treatment of the law, which was to replace exegetic coverage of the code, and to renovate the jurisprudential vision of the law.

V. THE SEARCH FOR A NATIONAL LEGAL SCIENCE AND THE TURN TOWARDS GERMAN LEGAL SCIENCE AFTER THE ITALIAN CIVIL CODE OF 1865

Quite paradoxically, the promulgation in 1865 of a civil code that owed so much to the French codification did not therefore secure French authors and cases with a place of honour in Italy, but rather marked the beginning of a new epoch, in which German legal scholarship as a whole rapidly grew in influence in Italy.

The discussions over the establishment of a national legal system and the foundation of a national legal science brought the Italian professoriate to re-evaluate the role of the Roman law as the foundational element of Italian law and to condemn the exegetical methods commonly associated with the French legal writers commenting upon the code. These methods now seemed to be unequal to the tasks of authentic legal science, built upon the foundations of the Roman law sources.

The arguments made to this effect in recently unified Italy were far from being original. A representative sample would include at least some of the following statements. Codes by themselves do not create a national legal culture. The shallow idea that when the code is written the work is done, is a mystification. A legal culture is the product of a historical tradition and such tradition in Italy goes back to Roman law. Roman law is what makes the identity of the national legal system in Italy. Roman law has the virtue of

Ed in vero se per più tempo il diritto si studia nei casi singolari e si manifesta nelle sentenze dei magistrati quando questo lavoro conduce la mente umana alla contemplazione dei principii generali si sente il bisogno di raccogliarli di ordinarli insieme di avere un Codice che protegga ed assicuri ogni diritto. – Il giorno in cui la società è abile a distinguere il potere giudiziario dal potere legislativo nasce necessariamente un Codice”.

⁵⁷ Mancini, P. S., *De' progressi del diritto nella società, nella legislazione e nella scienza durante l'ultimo secolo in rapporto coi principii e con gli ordini liberi*, Torino, 1859, p. 48.

perfecting the technical means that every lawyer must possess in order to master the law. Only a modern, robust science such as that built upon Roman law foundations can keep the national tradition alive so that it can bear fruits, etc., etc.⁵⁸

These were the same ideas that Savigny himself had advanced first to oppose codification of German law, and then to develop the theoretical stance supporting his *System of the modern Roman Law*, translated into Italian in the same epoch by Vittorio Scialoja, one of the leading light of the University of Rome.⁵⁹

Despite the enactment of a civil code for the entire country, they were still appreciated in Italy because the local university system had known nothing comparable to the flourishing of law studies at the German Universities until then.⁶⁰ The unification of the country and the University raised new ambitions, fuelled by the notorious achievements of German universities in the field of law, as well as in other fields. To rescue the (by then weak) tradition of Roman law studies at the universities, the best course was to take the lead from the Germans, and to try to rival their excellence in the subject. The torch of Roman law could shine once more in Italy once the methods of study were perfected by profiting from their lessons.⁶¹ Brilliant graduates thus went to Germany to learn law from the German masters, and several of them became professors at a young age upon their return to Italy.⁶²

⁵⁸ These motives are the gist of the inaugural lecture delivered by F.Serafini, *Del metodo degli studi giuridici in generale del diritto romano in particolare* (1872) repr. in *Opere minori – I, Scritti vari*, edited by E. Serafini, Modena, 1901. This marks the beginning of an ideology, which will have profound effects on the itinerary of Roman law studies in Italy: A. Schiavone, *Un'identità perduta: la parabola del diritto romano in Italia*, in A. Schiavone, (ed.), *Stato e cultura giuridica in Italia dall'unità alla repubblica*, Roma-Bari, 1990, pp. 275 ff.

⁵⁹ See below foot note 60.

⁶⁰ For apt reflections on this point: Weiss, O., *Das deutsche Modell. Zu Grundlagen und Grenzen der deutschen Wissenschaft in Italien in der zweiten Hälfte des 19. Jahrhunderts*, in Mazzacane, A. and Schulze, R. (eds.), *Die deutsche und die italienische Rechtskultur im „Zeitalter der Vergleichung“*, Berlin, 1995, pp. 77 ff.

⁶¹ Grossi, P., *Scienza giuridica italiana. Un profilo storico 1860-1950*, op. cit., p. 40 ff., illustrates how the new ambitions ended up in bringing the civil code itself within the compass of the Roman law, pursuant to the model provided by German legal science. For the problems that such a methodological programme posed for the study of Roman law in Italy see Schiavone, A., “Un'identità perduta: la parabola del diritto romano in Italia”, *Stato e cultura giuridica in Italia dall'unità alla repubblica*, op. cit., p. 275 ff.

⁶² Marin, F., *Germania docet? Modello tedesco e scienza italiana nell'opera di Biagio Brugi*, in *Annali dell'Istituto storico italo-germanico in Trento*, t. XXVIII, 2002, pp. 133-159. Mazzacane, A., “Die italienische und die deutsche Rechtskultur in 19.jahrhundert: Wege des Austausches”, in Mazzacane, A. and Schulze, R. (eds.), *Die deutsche und die italienische Rechtskultur im Zeitalter der Vergleichung*, op. cit., p. 139.

Once more foreign works were translated into Italian, this time to spread the verb of a science that was disconnected from the provisions of the civil code in force, and that was openly conceived as a sort of antidote to the tendency to think that all that lawyer could aspire to know or discover was already written in the code.⁶³

As a consequence of these aspirations, the conceptual tools and the vocabulary of Italian legal scholars were enriched. The above mentioned translations provided a new language with which to speak of the law, and new concepts which broke with the tradition represented by the *ius commune*. Mastery of both, up until the end of the Second World War, was necessary to produce academic publications worthy of recognition as such. At the same time, however, the new learning had to come to terms with the fact that the civil code in force in Italy reflected a different mindset, was organised around different principles, and employed a different language, although Roman law materials were its basis to a great extent. This mismatch was seldom explicitly addressed or discussed in the publications of this period, but it was nonetheless real. The solution to the conundrum was to proclaim adherence to the code, but then to subordinate it to legal dogma. In this way, the concepts and the organizing principles which controlled legal theory and scholarly approaches to the law were not derived from the positive law, and in particular from its rules.

The growth of this methodological attitude changed once and for all the landscape of doctrinal discourses in Italy. The impact of the new methodology on the operative rules of the law was instead more nuanced. The conceptualist revolution inaugurated in the 1880's did not demand a complete change of the rules in force. The concepts that gained currency in this period could co-exist with the rules of a code by subtle adaptations. On the other hand, whenever the code did not supply a precise rule, doctrines putting great faith in the superiority of new legal methods could lead to changes in the law that tried to match solutions attested in Germany.

An example of the first kind —i.e. adaptation of German notions to the Italian context— concerns the reception of the concept of juridical act

⁶³ Two translations stand out for their importance of all those published in this period: The first is Windscheid, B., *Diritto delle Pandette*, prima trad. it. a cura di Carlo Fadda C. e Paolo Emilio Bensa, Torino, 1887. The first edition in three volumes and five books with annotations by the translators was completed in 1902-1904, and it was reprinted in 1925-1926. One of the translators, P. E. Bensa, had attended Windscheid's lectures on the Roman law in Germany. Both translators were professors: Bensa had a chair in the University of Genova, Fadda taught in Naples. The other principal work was: Federico Carlo di Savigny, *Sistema del diritto romano attuale*, I-VIII, traduzione dall'originale tedesco di Vittorio Scialoja, Torino, 1896-1898. Scialoja held the chair of Roman law in Rome and was a key figure of Italian legal culture and political life.

(Rechtsgeschäft) by Italian authors. The code of 1865, just like the French code, required a *causa* for every contract. This requirement had no parallel in Germany, and was therefore alien to the German concept of juridical act. When the German concept was introduced in Italy under the name of *negozio giuridico* leading lights among our jurists held that the requirement of *causa* was applicable to it, although German law knew nothing of it.⁶⁴

An example of the second kind – a change of the rules applied by the Courts as a consequence of the influence of German legal thinking in Italy – concerns the rejection of the previous Court practice concerning the compensation of non-pecuniary damages for personal injuries as a consequence of the return to the Roman maxim *liberum corpus non tollit aestimationem*.⁶⁵

The code of 1865, just like the French code, did not contain any rule excluding the compensation of non-pecuniary damages for personal injuries or death and Italian courts regularly awarded them (as French courts were doing) up until the 1890's. By the end of the nineteenth century, several Italian academic writers who were familiar with the doctrines of the German *Pandektenschule* objected that the classical Roman law did not allow the pecuniary compensation of bodily harm, except under the specific rules concerning the *actio iniuriarum*. They began to argue against it, maintaining that it was the consequence of a medieval incrustation on the original sources of the Roman law. Ultimately, these restrictive arguments were accepted by most Italian courts, and the drafters of the civil code of 1942 took them into account, excluding the compensation of non pecuniary damage for personal injuries, except when otherwise provided by a specific legislative provision (art. 2059 c.c.). This restrictive rule was relaxed and virtually abandoned in the last quarter of the twentieth century, as a consequence of pronouncements by the Constitutional Court (established under the Constitution of 1948), and by the *Corte di Cassazione*, although the legislature never repealed article 2059 of the civil code.

It is difficult to say to what extent Italian lawyers were aware of case law developments in Germany, and were willing to use German judicial decisions to change the law in Italy. There is little evidence of such usage in the books by Italian authors, and this is probably enough to exclude that

⁶⁴ Scialoja, V., *Negozi giuridici, Lezioni, Corso di diritto Romano nella R. Università di Roma*, a.a. 1892-1893; cfr. Gorla, G., *Il contratto*, t. I, Milano, 1955, p. 204, note 5.

⁶⁵ For a general view of the development of tortious liability in Italy under the codifications of 1865 and 1942 I would refer the reader to: Graziadei, M., "Liability for Fault in Italian Law: the Development of Legal Doctrine from 1865 to the End of the Twentieth Century", in N. Jansen (ed.), *The Development and Making of Legal Doctrine (Comparative Studies in the Development of the Law of Torts in Europe)*, Cambridge, 2010, p. 126 ff.

they had substantial impact on our law, but a full study of this aspect is still lacking.⁶⁶

VI. A LEGAL LANGUAGE WITH MANY AFFILIATIONS

From a more general point of view, the interplay of elements having different origins, constituted by the tradition of the *ius commune*, the French and German authorities, each, in turn, operating at different levels of the law, produced a legal language with multiple affiliations. An illustrative example is offered by the transformations of the concept of ‘fault’ for the purposes of tortious liability after 1865 and up to the first decades of the twentieth century. Depending on the context, the same vernacular word ‘*colpa*’ in this epoch denoted concepts relating to the legacy of the *ius commune* and of Roman law in general, to the French civil code and to the French authors and cases and to the conceptual system inaugurated by German authors to deal with the Roman law.

‘*Colpa*’ featured in the provision of art. 1151 of the civil code of 1865 as a key element of liability. Under that article, the word ‘*colpa*’ initially denoted both negligent and intentional wrongdoing, without distinction. *Colpa* initially thus covered the same semantic field of the French notion of ‘*faute*’, which featured in the corresponding provision of art. 1382 of the French civil code. This is a notoriously polyvalent term, since it is often used to denote the dimension of wrongfulness as well. There were indeed Italian authors who warned their readers about the shifting meanings of ‘*colpa*’.⁶⁷ Though the code of 1865 did not say a word about unlawfulness and mentioned *colpa* without more, the last two decades of the nineteenth century saw the diffusion of an analytical approach to tortious liability that was clearly indebted to the treatment of the topic by German authors and eventually to the text of §823 of the German civil code (1896).

Italian authors thus resorted to the word ‘*colpevolezza*’ to denote the same concept that in Germany was first expressed by the word ‘*Verschulden*’ (usually translated in English by the term ‘culpability’). At this point, the word ‘*colpa*’ acquired a restricted meaning. For the first time it was consistently employed to mean lack of due care only, along the lines of the German notion of *Fahrlässigkeit*. The intention to do wrong was then univocally labelled as ‘*dolo*’. The concept of ‘*dolo*’ thus became mutually exclusive with that of ‘*colpa*’.

⁶⁶ For an enlightening analysis of the impact of German legal doctrine on contract doctrines in the courts in Italy: Chiodi, G. (ed.), *La giustizia contrattuale: itinerari della giurisprudenza tra otto e novecento*, Milano, 2009.

⁶⁷ Cp. Cazzetta, G., *Responsabilità Aquiliana e Frammentazione del Diritto Comune Civile: 1865–1914*, Milano, 1991, p. 221 ff.

The element of wrongfulness (formerly associated to the indistinct concept of *colpa*) was also singled out as a separate concept that deserved its own name: *antigiuridicità* (or *illiceità*). Once more, the first was a loan word deployed to clarify concepts related to the previously indistinct notion of ‘fault’. Following the example provided by German legal scholarship, which employed the expressions *Rechtswidrigkeit* \ *Widerrechtlichkeit* to denote unlawfulness, Italian authors began to speak of *illiceità*, *antigiuridicità*, or of *ingiustizia*, to denote unlawfulness as an element of tortious liability distinct from ‘*colpevolezza*’, ‘*dolo*’, ‘*colpa*’. A precondition to a finding of *dolo* and *colpa* was in any case the free moral agency of the individual. The notion of *imputabilità* (‘imputability’) was therefore employed to capture this aspect of the liability issue. *Imputabilità* translated into Italian the Latin terminology coined in the epoch of natural law (‘*imputativitas*’) to refer to the same concept. But the concept itself became popular among Italian commentators also because it was widely employed by the German authors of the nineteenth century, to whom Italian jurists were indebted.

A similar set of transformations occurred in the field of contract law and of the law of obligations more in general. The pervasive effects of these transformations created a new intellectual climate, and ultimately a communicative obstacle between the new and the old school.⁶⁸

VII. THE TURN OF THE LATE NINETEENTH CENTURY AND THE TWENTIETH CENTURY UP TO THE CIVIL CODE OF 1942

Although the reception of German legal doctrines often represented the high watermark of legal conceptualism, openness towards the German and European cultural world in this epoch favoured also the development of tendencies of an altogether different type.

This is the period in which social and antiformalistic doctrines attacking the individualistic foundations of the law enacted by the civil code (and its exclusionary consequences in terms of social policy for the working classes) began to be formulated and to gain ground. At the same time, this is the period in which evolutionary social thought began to exert its short lived influence on the law.⁶⁹

⁶⁸ Sacco e Gambaro, *Sistemi giuridici comparati*, *op. cit.*, p. 282 ff.

⁶⁹ Grossi, P., *Scienza giuridica italiana. Un profilo storico 1860-1950*, *op. cit.*, p. 13 ff.; Alpa, G., *La cultura delle regole*, *op. cit.*, p. 224 ff.; cp. Cazzetta, G., “Critiche sociali al codice e crisi del modello ottocentesco di unità del diritto”, in Cappellini, P. and Sordi, B. (eds.), *Codici. Una riflessione di fine millennio*, p. 309 ff. For a discussion of the mechanisms of social exclusion operating in this period: Rodotà, S., *Libertà e diritti in Italia: dall’Unità ai giorni nostri*, Roma, 1997, p. 16 ff.

In this intellectual climate commercial law developed its own reform program and intellectual profile. The enactment of the commercial code of 1882 marked a milestone along the road to the modernisation of commercial law. The awareness of the limits inherent in the program of renewal of Roman law studies in Italy among commercial law professors explains why, in the literature of this period, the choice to abandon the old way represented by the French code of commerce and its Italian replica did go hand in hand with the choice to open up commercial law to wider perspectives on the law, so that this field of studies was more cosmopolitan and less indebted to the influence of German legal theory on the Roman law than civil law studies in general.

Even among the students of civil law the search for doctrinal purity that characterised many contributions of this period was not shared by everybody with the same enthusiasm, however. Slavish imitation could not satisfy authors who had been in touch with the legacy of the *ius commune*, like Biagio Brugi, or vigorous personalities like Emanuele Gianturco, with a keen eye for practical questions, or leading legal minds like Giacomo Venezian (who had a first hand knowledge of English law, and was by far the most original thinker of the age) or, in the first decades of the twentieth century, Nicola Coviello, Francesco Ferrara, and many others. The enactment of the German Civil Code in 1900, on the other hand, by putting on a different basis the foundations of German law did not increase the influence of German legal thought in Italy, but possibly weakened it, since the interpretation of the German Code failed to attract the same attention in Italy as that which had been devoted to the studies of German authors on Roman law.

In the first decades of the of the twentieth century and until the end of the second world war the panorama of Italian legal scholarship in the field of civil law shows authors that are conversant with both French and German legal theorists, but are not inclined to follow either in their efforts to dethrone strict legalism as the central pillar of legal change. The influence of German legal writing in this period - although considerable - is essentially technical, more than philosophical, and the echo of the German *Freirechtslehre* in Italy is weak, conquering only the adhesion of marginal figures. On the other hand, this is a period of renovation, since the end of the First World War marks the end of classical liberism, the raise of social doctrines of private law, and the beginning of a new era in which the presence of the State in the economy and more in general in the life of the country becomes much more visible.⁷⁰

⁷⁰ See: Bonini, R., "Dal Codice civile del 1865 al codice civile del 1942", *I cinquant'anni del codice civile - Atti del Convegno di Milano, 4-6 giugno*, 1992, t. I, Milano, 1993, pp. 27 ff., 36 ff.; Salvi, C., "La giusprivatistica tra codice e scienza", in A. Schiavone, (ed.), *Stato e cultura giuridica in Italia dall'unità alla repubblica, op. cit.*, pp. 232 ff., 238 ff., with further references.

Discussions over the reform of the codes in this new climate were also linked to efforts aimed at building bridges with other legal experiences.⁷¹ In 1927 the French-Italian Committee that had privately begun to prepare a joint code of obligations for the two countries in the two languages delivered its final product. Despite the great names who had participated in the redaction, this text was never enacted either in France or in Italy. The obstacles on the way to its success were both political and technical. The international relations between fascist Italy and France were becoming increasingly tense in the same years. The code was drafted along the lines of the French civil code, having regard also to contemporary French legal theory (Gény, Josserand) and to case law developments. The project thus contained provisions on the abuse of rights, and on no-fault liability, as well as other provisions that increased the discretionary power of judges. This ran contrary to the convictions of most Italian jurists of the time, including Vittorio Scialoja the eminent personality who had launched the project of unification in 1916 while Italy was an allied of France.

Scialoja, however, knew all too well that the civil code of 1865, still in force in Italy, was essentially based on the French code, so that the similarities between the project of the Code, and the French civil code could not be a serious objection to the codification project in itself.

Despite this fact the project was attacked in fascist Italy by Emilio Betti on the grounds that it was too conservative, being too close to liberal ideas which were not in touch with the far more advanced conquests of fascist legal science.⁷²

This muddled critique was rejected in harsh terms by Vittorio Scialoja himself, who had presided over the works of the joint French-Italian commission and who had launched before the end of the First World War the initiative leading to the creation of UNIDROIT.⁷³ Scialoja stigmatised the vocal position expressed by Betti as fundamentally flawed⁷⁴ Nonetheless, this controversy showed at least why advancing codifications projects under the regime involved some political risks as well, which could not be taken too

⁷¹ Alpa, G. and Chiodi, G. G., (eds.), *Il progetto italo-francese delle obbligazioni (1927). Un modello di armonizzazione nell'epoca della ricodificazione*, Milano, 2007.

⁷² Betti, E., *Il progetto di un codice italo-francese delle obbligazioni e dei contratti*, Riv. dir. comm, 1929, i, p. 665.

⁷³ The Unidroit Institute was founded by a decision of the Council of the League of Nations on 3 October 1924, following a proposal by the Italian Government. As mentioned in the text, the Italian proposal had been occasioned by an initiative of Vittorio Scialoja.

⁷⁴ A first reply to Betti was published by D'Amelio, M., first president of the Court of Cassation, Riv. dir. comm., t. I, 1929, p. 669; Betti wrote a reply to the reply, *ibidem*, 1930, I, 184, and Scialoja published his piece as a comment to the latter: Scialoja, V., *Sul progetto di un codice italo-francese delle obbligazioni e dei contratti*, *ibidem*, 190.

lightly even by major figures who did not owe their entire career to the regime.⁷⁵

Despite these attacks, in fascist Italy the leading jurists engaged in codification projects clearly did not intend to have a code that would turn in the direction of the Nazi *Volksgesetzbuch*. When the codification process began to progress, the projects which were prepared were, in technical terms, far from revolutionary. This explains why, despite ample concessions to the proclamations of fascist ideology in the Labour Charter of 1927, which was subsequently prefixed to the civil code of 1942, and despite the enactment in that code of rules which enforced an authoritarian vision of society, and made reference to the laws allowing the persecution of the Jews, much of what was written in the code was not new, albeit in form.⁷⁶

The civil code of 1942 does not contain a “General Part” as the BGB does, contracts require a *causa* (art. 1325 c.c.); transfer of property under the code is by consent (1376 c.c.), the key provisions on tort law do not set out a list of protected interests (cp. art. 2043 c.c.), etc... In all these matters the Italian code is still closer to the French civil code than to the German civil code. In terms of technique, the codification of 1942 does not reproduce the divisions and the rigorous conceptual approach of the German civil code. Having said this, the architecture of French civil code must also have had little appeal for the Italians who were active in the codification committees of this period. The French code was defective from a systematic point of view and its style was often too elliptic and imprecise to be satisfactory for jurists who had learned their law on the basis of German texts.

In terms of legislative technique, the greatest innovation introduced by the Italian code was probably the decision to unify the civil and the

⁷⁵A. Gambaro, *Vicende della codificazione civilistica in Italia*, *op. cit.*, pp. 424 and 425.

⁷⁶ For an overall assessment of the Code, see: *Cinquant'anni del Codice Civile. Atti del Convegno di Milano, 4-6 giugno 1992*, II, *op. cit.*; The reconstruction of the last phase of the making of the code is the object of the work of Rondinone, N., *Storia inedita della codificazione civile*, Milano, 2001. The attitude of the principal review in the field of private law – the *Rivista di diritto civile* – towards the racial laws of 1938 confirms the diagnosis according to which leading figures among private law scholars deployed legal formalism to limit as far as possible the damage done by fascism to the notion of legality inherited by the tradition of the liberal State: Speciale, G., *Giudici e razza nell'Italia fascista*, Torino, 2007; Falconieri, S., *La Costruzione del 'diritto razzista' I decreti antiebraici attraverso le riviste giuridiche (1938-1943)*, 2008. Calabresi, G., “Two Functions of Formalism: In Memory of Guido Tedeschi”, *University of Chicago Law Review*, num. 67, 2000, p. 479; Somma, A., *I giuristi e l'asse culturale Roma-Berlino*, Frankfurt am Main, 2005, finds fault with this diagnosis, in the light of the slogans of the period. For the broader picture: Various Authors, “Continuità e trasformazione: la scienza giuridica italiana tra fascismo e repubblica”, *Quaderni fiorentini per la storia del pensiero giuridico*, t. I and II, Milano, 1999.

commercial codes (a move which allowed to bring into the civil code much of the content of the commercial code of 1882) and to introduce into the fifth book of the code a separate set of rules for enterprises, partnerships companies, and labour contracts marks also an innovation, bringing together the rules on land records, security rights over corporeal movables and immovables (pledge and hypothec), and some evidence law. In the field of family law, the concordat with the Catholic Church (1929) led to the introduction in the code of a form of religious marriage with civil effects.

VIII. FROM THE END OF THE SECOND WORLD WAR TO THE BEGINNING OF THE TWENTY-FIRST CENTURY

The fall of the fascist regime and the end of the Second World War followed by the proclamation of the Republic and by the enactment of a new Constitution, brought with them the restoration of legality. The provisions of the civil code that were manifestly indebted to the fascist rule were quickly repealed. But after cleansing the stable, the restoration of legality produced little innovation both in terms of philosophical outlooks on the law and of concrete reformist action, despite the enactment of the Constitution of 1948 and of the proclamations of rights that it contained.⁷⁷ The Constitutional Court itself was established only in 1958, and it took a while to dismantle the provisions of law which sanctioned social mores that were connected to a vision of society by then out of touch with a forward looking constitution.

Up to the 1960's, with few exceptions, the dominant view of the law was characterised by a reprisal of that legal formalism that later on was admirably captured by the harrowing portrait offered by J.H. Merryman's contributions on the Italian style.⁷⁸

In the immediate aftermath of the end of the war hostilities, the most important piece of legislation enacted in Italy was the so-called agrarian reform. This is one of the few chapters of legislative history illuminated by clear evidence about the role that the United States played in the process of legal change in Italy.⁷⁹

Contrary to what had happened after the First World War, in the post World War II period the US adopted a policy based on resolved intervention in European matters. The US government was convinced that

⁷⁷ Cp. P. Grossi, *Scienza giuridica italiana. Un profilo storico 1860-1950*, cit., 277.

⁷⁸ J.J. Merryman, *The Italian Style*, 18 *Stanford L. Rev.*, 39, 396, 583 (1965-1966). These articles were translated into Italian and appeared almost simultaneously in the *Rivista trimestrale di diritto e procedura civile*.

⁷⁹ Bernardi, E., *La riforma agraria in Italia e gli Stati Uniti: Guerra fredda, Piano Marshall e interventi per il Mezzogiorno negli anni del centrismo degasperiano*, Bologna, 2006.

obstacles to free trade, spread after the 1929 slump and reinforced by Nazi and Fascist autarchy, had been largely responsible for the international tensions culminating during the Second World War. Furthermore, the threat posed by communism in Europe required prompt action. The adoption of a free trade policy and of land reforms thus became the requisites to get American economic aid under the Marshall plan.

Leaving all other considerations apart, the desperate socio-economic conditions of the peasants especially - but not solely - in the Southern regions of the country called for such reform.

Nascent Italian political parties had discussed reform even before the fall of fascism. Despite its necessity, however, the Christian Democracy government that had won the elections over the leftist front in 1948 and their successors were divided about it. Under the pressure of large landowners the reform was at first postponed. Furthermore, the proposals advanced within the Christian Democrat's government by the Minister of Agriculture – the conservative Antonio Segni nicknamed 'white bolshevik' by his opponents on the right - created not only frictions within the Italian government, but also within various branches of the US administration that had a stake in its outcome and the lobbies connected to them.

The U.S. Marshall Plan experts, who were involved in the proposals for agrarian reform, were technocratic New Dealers who advocated irrigation, mechanization, farmers' training, and a free competitive marketplace. They had in mind the model of development experimented with the creation of the Tennessee Valley Authority, i.e. relatively large agricultural landowning units producing cash crops through the use of intensive agricultural methods. The Central Intelligence Agency and the U.S. State Department, connected to the Italian aristocratic landowning interests, formed a strong conservative lobby opposing the reform in the name of anticommunism. Italian American communities, lobbied by the Italian reformers, on the opposition, pressured the Truman administration to support the cause of the South. Segni - contrary to the new dealers supporting the reform in the administration carrying out the Marshall plan - favoured expropriations of lands in the hands of large estates - including his own - and their redistribution to peasants' families. He thought that the "Americans ... do not understand the problem",⁸⁰ meaning his vision of small peasants ownership of land that would be sustainable on the basis of self-sufficiency, solidarity, and social stability. It was an altered version of his vision of the reform that eventually prevailed, although the legislature limited the application of the reform to the entire country, so that it involved about half of the lands comprised in the original plans.

⁸⁰ *Ibidem*, 184.

As to its social and economic outcomes, the project that Segni had in mind turned out to be too optimistic, because modern industrial agriculture had not really been taken into account in its design, , but also because the result of the reform was quite unequal across the country, due to the intervention of regional laws (Calabria and Sicily), and to different local conditions across the country, not to mention sheer resistance to the reform, corruption, and manipulation of the reform boards.⁸¹

Once the years of national reconstruction ended, and the older generation of jurists left the place to a new generation, the inward-looking attitude of the Italian academic world was replaced by a more cosmopolitan outlook on the law. This became a feature of the legal scholarship produced in the following decades by jurists like Pietro Rescigno, Stefano Rodotà, Pietro Trimarchi, Guido Alpa.

The turn in this direction was the outcome of several concurrent factors. First of all, there was the will to operate a clean break with the asphyctic atmosphere that dominated the intellectual life under fascism and the perceived need to re-establish contacts with the wider world of legal culture. As the civil code was beginning to grow old, academics ceased to ignore how judges addressed problems that the code did not cover. A new awareness of the weight of the judicial contribution to the development of the law in the late 1960's caused the final collapse of the myth that, under a codified system of law, the code answers every question.

In due time, the re-evaluation of the creative contribution of professors and judges to the evolution of the law opened also the way to a more favourable appreciation of all the legal methods that promised a cure of (or an escape from) legal formalism, the dominant note in our legal literature and in our practice of the law. This brought about a new appreciation of the contribution of judicial decisions to the development of the law.

Comparative law played a part in this story by addressing explicitly the theme of the competing models to which Italian law responded and of the insufficiency of the formalistic jurisprudential vision that had but little to offer in the post war period. The protagonists of this phase of Italian legal comparative law which grew of important in the 1970's were Gino Gorla, Mauro Cappelletti, and Rodolfo Sacco.⁸²

⁸¹ See Ginsborg, P., *A History of Contemporary Italy: Society and Politics 1943-1988*, London, 2003, pp. 121 ff., 131 ff. Apart from structural defects of the legislation, in the South reform boards were often in the hands of great landowners, and in Sicily corruption was rampant.

⁸² Gorla's and Sacco's rejection of legal formalism was first declared in their books on interpretation. Gorla, R., *L'interpretazione del diritto*, Milano, 1941 (re-issued in 2003, with an

To provide a counterpoint to the opacity and dogmatism of some chapters of civilian law treaties English and American cases begin to be read, appreciated, and proposed as a valuable term of comparison. They were thus added to the stock of materials that could enrich the means available to elucidate legal problems.

American legal thinking (and to a lesser extent English academic literature) entered the jurisprudential debates concerning specific fields of the law (e.g. tort and contract law, consumer law).

By the 1970's the intellectual landscape of private law studies had definitely changed. The introduction of divorce and the reform of family law to realise the principle of equality between spouses – with the introduction once more of a community property regime - are the milestones of this period, together with legislation in the field of labour law aimed at expanding industrial democracy (*Statuto dei lavoratori*).

With increasing frequency, in the 1980 and in the 1990's private law scholarship looked with curiosity at what was being studied abroad. The desire to keep Italian law abreast of developments taking place elsewhere becomes manifest in this period. This is also the period in which Italian law faculties introduced comparative law as a compulsory course for first or second year students, which remains a significant feature of Italian legal education.⁸³ To be sure, one can still detect some traces of the opposition between French and German learning in the area of private law. By now, these debates are pale ghosts of the past however, and both languages loose ground under the pressure of English: once more we witness a wave of foreign legal terms and concepts arriving in Italy. The possibility of misunderstandings is not to be excluded.⁸⁴ The dominant mode of thought is characterised by a high degree of eclecticism.⁸⁵

Introduction by Rodolfo Sacco); Sacco, R. *Il concetto di interpretazione del diritto*, Torino, 1947 (re-issued in 2003 with a preface by A. Gambaro, 2003); Mauro Cappelletti's battle against legal formalism – now continued by Vincenzo Varano and Niccolò Trocker - dominated his entire career (although the field of civil procedure in Italy remains by and large the preserved of it).

⁸³ Sacco, R., "L'Italie en tête (à propos de l'enseignement du droit comparé)", *Rev. int. dr. comparé*, 1995, 131; Id., "La formation au droit comparé. L'expérience italienne", *Rev. int. dr. comparé*, 1996, 273.

⁸⁴ See Ferreri, S., *Falsi amici e trappole linguistiche. Termini contrattuali anglofoni e difficoltà di traduzione*, Torino, 2010

⁸⁵ In 1994, Prof. Paolo Cendon wrote an essay providing a first map of foreign words featuring in Italian private law works. The result was an amazing variety of loans that showed that Italian law was looking in many different directions: Cendon, P., "Oltre I confine: parole straniere nell'indice analitico del Codice Civile", *Scritti in onore di Rodolfo Sacco*, t. I, Milano, 1994, p. 173 ff.

In the 1970's the legislation on banks and the financial services sectors was modernised, by introducing the first regulatory framework for stock-exchange transactions entrusted to the care of a rather timid regulator, and for collective investment schemes. First steps in the direction of rules on consumer protection were also made. The whole field is now regulated at the European level as well. Between the creation of the European Economic Community and 1990 the only antitrust legislation working in Italy was that established under community law. Antitrust legislation in Italy arrived late⁸⁶ because in the post war period (and beyond) the structure of Italian capitalism was not based on an open, competitive market.⁸⁷ Of course, knowledge of business and financial practices having their roots in the Anglophone world, especially in the fields of financial markets, contracts and corporate law, has produced legal innovation in recent years in Italy. In evaluating it, one should keep in mind that, owing to the previous history of the country, intellectual autarchy has little appeal in the law as in other fields of Italian social life. In other words, the diffusion of these business practices in Italy is not always dependent upon the presence of foreign business in the country, or of a high level of integration between the national and the international market. It often is simply a symptom of the willingness of the Italian legal profession to expand its repertoire of legal techniques that are supposed to have a competitive edge over what is already available, and more generally to adapt to a changing international landscape. This is the case, for example, of recourse to foreign trust laws under the Hague Convention of 1985 on the law applicable to trusts and on their recognition.⁸⁸

On the academic side, after the pioneering works of Pietro Trimarchi,⁸⁹ attention to scholarly trends in the US in the last thirty years has produced a certain amount of contributions in the field of law and economics. Economic analysis of law has thus been eagerly and sometimes addictively received in Italy by a select group of lawyers and economists who were clearly conscious of the dominance of the US academic experience

⁸⁶ Legge 10 ottobre 1990, n. 287. Norme per la tutela della concorrenza e del mercato.

⁸⁷ Cp. Ricolfi, M., *L'impresa e il mercato*, in L. Nivarra (ed.), *Gli anni settanta del diritto privato*, Milano, 2008, 99 ff.

⁸⁸ In this respect, the Italian experience with trusts is different from that of France, which hosts one of the key financial markets of Europe.

⁸⁹ Trimarchi, P., *Rischio e responsabilità oggettiva*, Milano, 1961; Id., "Sul significato economico dei criteri di responsabilità contrattuale", *Riv. Trim. dir. proc. civ.*, 1961, p. 512; see Pardolesi, R. and Bellantuono, G., *Law and Economics in Italy*, in *The history and methodology of law and economics*, edited by B. Bouckaert and G. De Geest, Cheltenham, 1999, pp. 244 ss.

in the field.⁹⁰ Once more, translations and adaptations of foreign books have paved the way to the diffusion of the discipline in Italy.⁹¹

Despite the development of master and PhD programs in this field, the foundation of an Italian society of law and economics, and the publication of Italian journals dedicated to the economic analysis of law, the attention paid to the subject by law schools and more generally by lawyers is still marginal. In any case, this is probably the last current of thought having a precise foreign affiliation to gain ground in Italy. So far, judgements of civil courts paying homage to it with respect to the decision of cases involving general civil law doctrines have been rare. The importance of the subject is, on the other hand, obvious in the field of antitrust law, with respect to the regulation of public utilities and of consumer law.

Italian courts do sometimes make use of foreign and comparative law arguments to motivate the adoption of a certain solution in the civil and commercial field.

Both the Constitutional Court and the *Corte di Cassazione* have, on several occasions, resorted to arguments based on foreign laws to decide a case.⁹² This has been sometimes facilitated by books or essays of Italian authors on the topics raised by litigants before the courts. The literature on the foreign laws available in Italian has thus been one of the means through which judges have been informed about foreign experiences.

⁹⁰ Pardolesi, R. and Arcuri, A., *Analisi economica del diritto*, in *Enciclopedia del diritto. Aggiornamento*, t. VI, Milano, 2002. The Società Italiana di diritto e economia- Italian society of law and economics holds regular annual meetings since 2005.

⁹¹ See, e.g., Calabresi, G., *Costo degli incidenti e responsabilità civile. analisi economico-giuridica*, Milano, 1975; Cooter *et al.*, *Il mercato delle regole: Analisi economica del diritto civile*, 2nd ed., Bologna, 2006 (1st ed. 1999); Polinsky, A. M., *Una introduzione all'analisi economica del diritto*, Bologna, 1992 (1st ed. 1986). There are by now several Italian handbooks on law and economics as well.

⁹² Taruffo, M., *The Use of Comparative Law by Courts*, in *Italian National Reports to the XIVth Congress of Comparative Law*, Milano, 1994, p. 51; Somma, A., "Le corti italiane e l'uso complementare dei modelli normative extratestuali nel processo di armonizzazione del diritto comunitario, in L'uso giurisprudenziale della comparazione giuridica", *Quad. riv. trim. dir. proc. civ.*, t. VII, Milano, 2004, p. 25; Zeno-Zencovich, V., "Il contributo storico – comparativo nella giurisprudenza della Corte Costituzionale italiana: una ricerca sul nulla?", *Dir. pubbl. comp. eur.*, 2005, p. 193; Pegoraro, L., "La Corte Costituzionale e il diritto comparato nelle sentenze degli anni '80", *Quad. cost.*, t. III, 1987, p. 601; Pegoraro, L. and Damiani, P., "Comparative law in the Judgements of Constitutional Courts", in Rabello, A. M. and Zanotti, A. (eds.), *Developments in European, Italian and Israeli Law*, Milano, 2001, p. 131; Pegoraro, L., "L'argomento comparatistico nella giurisprudenza della Corte Costituzionale italiana", in Ferrari, G. F. and Gambaro, A. (eds.), *Corti nazionali e comparazione giuridica*, Napoli, 2006, p. 477 ff.

It has been rightly observed that the Italian decisions adopting arguments based on foreign laws are the expression of an open, cosmopolitan attitude that is quite widespread in Italy.⁹³ According to this way of thinking, Italy, as a Western liberal democracy, shares in a wider tradition constituted by a common core of fundamental values. The cultures belonging to this wider tradition are, to a degree, coevolving, and the convergence of several legal systems on a solution is taken at least as a clue that such solution mirrors the evolution of underlying cultural and social values. When the case before the court involves the application of general principles of the law requiring the balancing of interests and values there is therefore an opportunity to consult the laws of other Western legal systems concerning the same matter.

An instance of this form of consciousness is the judgment rendered by *Corte di Cassazione* in 2007 to determine the conditions to authorise removal of medically supplied life-sustaining treatment provided to Eluana Englaro, a patient in a permanent vegetative state for seventeen years.⁹⁴ In this case the *Corte di Cassazione* cited French law, English and American cases along with international conventions and national law sources to reach the conclusion that the removal of such treatment could be authorized under the circumstances specified in the judgment.

Presently, the main factors of change influencing the evolution of Italian law in civil and commercial matters are the European Union Treaty, the regulations and the directives issued under it, and the jurisprudence of the European Court of Justice. To a more limited extent, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights sitting in Strasbourg have also significantly contributed to the evolution of Italian law, as well as to the law of the other European countries belonging to the EU or to the Council of Europe.

To pick a concrete example, the jurisprudence of the European Court of Human Rights has been the cornerstone of the judgment of the Constitutional Court fixing the compensation due for the expropriation of land in line with its market price.⁹⁵ Neither EU law nor the European Convention on Human Rights can properly be considered foreign law sources, however. To the same effect, the role of international treaties and

⁹³ Caterina, R., *National Traditions and Historical Backgrounds* (unpublished type script, on file with the author).

⁹⁴ Cass., 16 ottobre 2007, 21748, *Foro it.*, 2007, I, 3025. Note, however, that some members of Parliament challenged this decision before the Constitutional Court, arguing that the *Corte di Cassazione* had encroached upon the prerogative of the legislative power. The Constitutional Court held that the challenge was inadmissible: Constitutional Court, 8 October 2008, n. 334, *Foro it.*, 2009, I, 35.

⁹⁵ Corte Costituzionale, 24 ottobre 2007, n. 348, *Foro it.*, 2008, I, 47 ff.

conventions that are in force in Italy are not, properly speaking, foreign law sources.

Nonetheless, it is well known that non-national sources of law are vehicles for the introduction of principles and rules that may be unfamiliar to the municipal law.⁹⁶ In this sense, they operate as exogenous factors of change that may be embraced or resisted by the national legal order. This is more in general the dynamic activated by the acceleration of globalization which took place since the fall of the Berlin wall in 1989. In Italy such dynamic was at the centre of a number of academic contributions dealing with its impact of on the sources of law,⁹⁷ on democracy and the regulatory capacity of the State,⁹⁸ and on the relationship between globalization and the law in the field of economic relations.⁹⁹ With respect to developments in the field of private law in Europe, several Italian scholars have been in the front line, either as leaders or members of various research groups (Common Core of European Private Law Project,¹⁰⁰ Acquis group,¹⁰¹ Study Group for a European Civil Code),¹⁰² or as members of research institutions sponsored by the EU,¹⁰³ or as champions of wider projects.¹⁰⁴

To touch upon the latter point- i.e. the role of non-national sources of law on the local environment - it is well known, for example, that Italy has a bad record in terms of a reasonable duration for legal proceedings, and it is therefore constantly convened for this reason before the European Court of Human Rights. This is so despite the constitutional amendment of 2001 that enshrined the right to a reasonable duration of judicial proceedings in our Constitution. To make an educated guess about the causes of this situation, one could point to a lack of managerial culture, which in Italy has no deep roots, and a fear that efficient judicial procedures would not allow for political intermediation among the competing claims of citizens, enterprises, and various political actors.

⁹⁶ Cp. S. Ferreri, *Le fonti di produzione non nazionale*, in *Le fonti del diritto italiano 1, Le fonti scritte, Trattato di diritto di diritto civile diretto da R. Sacco*, Torino, 1998, 191 ff.

⁹⁷ A. Pizzorusso *et al.*, *Comparazione giuridica e sistema delle fonti del diritto*, Torino, 2005.

⁹⁸ Most recently: Cassese, S., *Il diritto globale : giustizia e democrazia oltre lo Stato*, Torino, 2009. The author is now a constitutional judge.

⁹⁹ Gambaro, A., "Common law e Civil Law : evoluzione e metodi di confronto", in Carpi, F. *et. al*, *Due iceberg a confronto: le derive di common law e civil law*, Milano, 2009, 9 ff.; Musy, A. M., *La comparazione giuridica nell'età della globalizzazione: riflessioni metodologiche e dati empirici sulla circolazione del modello nordamericano in Italia*, Milano, 2004.

¹⁰⁰ The project is lead by Mauro Bussani and Ugo Mattei.

¹⁰¹ Gianmaria Ajani, Silvia Ferreri, Michele Graziadei, Barbara Pasa.

¹⁰² Guido Alpa, Anna Veneziano.

¹⁰³ This is the case of European University institute in Florence, where Fabrizio Cafaggi is based.

¹⁰⁴ I need only to mention in this respect the name of M. J. Bonell, who has been the man behind the UNIDROIT Principles of International Commercial Contracts.

IX. CONCLUDING REMARKS: TOWARDS A THEORY OF CULTURAL CONTROL

The question of what is original and what is imported with respect to the law surveyed in the previous paragraphs turns out to be, to a degree, a chicken-and-egg question. Was the Napoleonic Code an original piece of legislation? Of course it was, and yet legal historians today are quick to point out how much it owed to a great variety of pre-existing sources. Both before and after the downfall of Napoleon, some of its supporters in Italy made the same point —the code is not *really* new— to support or defend its introduction in Italy.

The history appraised in the previous pages shows the limits of any reconstruction based on the deceptively simple dichotomy between what is new and what is old, or between what is original and what is derivative.

Every turn of the story unfolding in the previous pages tells how multiple affiliations, different commitments, and above all different expectations and interests went into the making of Italian private law in the last two centuries. True, it is possible, for example, to follow step by step the march of the Napoleonic Code in Italy, or that of the literature accompanying it, just like one can map the diffusion of literary motives from one country to another with philological precision. And yet this type of exercise, grounded as it is in solid historical evidence, provides only a first aid remedy to the conviction - going back to the romantic age - that local genius is the sole source of all that is authentic.

Beyond this level of historical analysis lies the question of how these elements engaged the local ambience, and how they were, in turn, transformed and appropriated, or why they were, instead, ignored or set aside.

At this level of the inquiry it appears that legal cultures are the product of multiple factors of change pointing in different directions. They are far from being composed of homogeneous elements, connected somehow in a 'natural' way. This is why legal transplants in Italy, as elsewhere, unveil different attitudes and reactions about what is being received or borrowed.

To return to the history of the Napoleonic Code in Italy, there were Italians who enthusiastically supported its introduction in the country, while others firmly opposed it. And that opposition was sometimes formulated on the basis of means which were also drawn from abroad, such as those furnished to Italian jurists by the German historical school. The same can be said of all the movements that after 1865 brought to Italy materials and

methods from abroad. To be more precise, during the entire period under consideration, legislators, judges and professors did not all share the same preoccupations, or look in the same directions, or listen to each other, so that any diagnosis concerning our topic with respect to Italy must take into account these multiple dimensions of the law, which comparative law in Italy labelled 'legal formants', after the lesson of Rodolfo Sacco.

Over a substantial period of time, the code in force was therefore approached through the lenses provided by legal methods and conceptual tools which did not mirror those that had given birth to it. This situation cannot be taken as proof that foreign legal models had no bearing upon the development of the law in my country. On the contrary, it shows how the quick succession of different modes of thought and legal techniques – often indebted to what could be learnt by working on foreign materials, or through contacts with foreign experiences - shaped as well as responded to new mindsets.

Ultimately, these are the elements that established the boundaries of the field in which the various players of this game made their moves, transforming their language: a new legal consciousness was then formed.

To be sure, a primary factor of change beyond sheer military, economic, or political power has been the conviction shared by the legal elites that the law regulating society must be the expression of some lasting truth, radiating from a source of law possessing higher qualities.

In the nineteenth century, jurists first held that this was the rational law generated by a tradition crystallised in the code, and then that it could be identified system of principles and concepts that served to reorganise the study of the monuments of Roman jurisprudence. Later on, the dominant form of legal consciousness was informed by the conviction to have found the rules that could govern a mass society, eventually emancipated from fascism and returning to democracy.

Around such pillars there was always enough room for tactics accommodating bargaining over different interests and for political influence and compromise. The relation between the State and the Catholic Church over marriage and divorce in the period under consideration belongs essentially to the latter dimension.

Open revolt against the Napoleonic code was out of question during the period examined in this paper, although the Grand Duchy of Tuscany and the Papal States returned to the *ius commune* in the restoration period, and other pre-unitary Italian States did not immediately enact a new code after

repealing the Napoleonic Code. Codification eventually enjoyed a permanent success, firstly because it was the symbol of a new kind of autocratic power, then because it represented the making of national unit and ultimately because it confirmed the positivist dogma that the State had the monopoly over the law.

Although the code commanded enough attention by jurists, lawyers and judges alike, even in the halcyon days of codification and legal positivism they did not consider this piece of legislation as the repository of ultimate truths. When the code appeared to be an imperfect incarnation of a higher ideal of law, our interpreters looked for alternative sources of principles and rules either overtly, or covertly, while still – incredibly - professing their faith in the primacy of legislation over alternative sources of law. The clearest example of this dynamic is linked to the diffusion in Italy of the systematic methods of nineteenth century German legal scholarship after the unification of the country up to the 1950's, while a civil code strongly indebted to the French code was in force.

Those methods in Italy were first applied to Roman law, but they were soon also adopted in the study of positive law. This drift occurred despite the fact that the text of civil code in force in Italy, and Roman law sources consulted in Germany were clearly not the same both in terms of form and of substance.

Today, the number of factors influencing the evolution of the law in civil and commercial matters has greatly increased as a consequence of the participation of Italy in the European Union and in the Council of Europe. At a different level, there is the question of the global dimension of legal change and of its impact on Italy. Quite often, these global aspects of legal innovation are taken to be a consequence of the expansion of economic power on a world scale, corresponding to an Americanization of European and Italian law. A more sober assessment of this dynamic should take into account the deep differences that still exist between these areas of the world, in legal, as well as in socio-economic terms, beyond the recurrent, mesmerizing image of a transatlantic convergence modelled after the US experience.¹⁰⁵

¹⁰⁵ Archives de philosophie du droit, 45, *L'américanisation du droit*, 2001. Several authors in this remarkable collection of essays (e.g. Mitchel de S.-O. l'E. Lasser, Horatia Muir-Watt, Mathias Reimann) show how one should distinguish between myth and reality while approaching this theme. Despite certain fundamental differences, which are still there, there is much to be said for the observation that on the two sides of the Atlantic as far as culture is concerned: "We are all basically in the same boat, at this moment in history, and no one has a good idea of where we're going." (Kennedy, D., "Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute", in Id., *Sexy Dressing etc.: Essays on the Power and Politics of Cultural Identity*, Boston, 1993, pp. 1 ff, at 11).

After reviewing the evidence, one may ask what type of analysis of the relationship between legal transplants and legal culture it sustains?

The tendency to selectively appropriate and assemble in new formats the legacy of the past, as well as cultural materials with various provenances, highlights a degree of eclecticism in Italy which may surprise more than one observer, both here and abroad.

Confronted with this situation, the key question for the comparative lawyer is not simply whether foreign elements were transplanted in the local law. It is rather who is able to exert control over those elements, and ultimately who owns the projects advancing or resisting their use. Legal elites in Italy have seldom given up the idea of controlling those elements, and of using them for their own purposes, even where they were first brought to their attention by the use of force. To make the same point in a different way, Italy had the intellectual capital to look beyond its borders not just once, in a single direction, but at every turn of its history, and in different directions. Having made this point, one should avoid thinking that this dynamic is an example of free trade in ideas. For the period considered, most of the time the trade was one way, from the centre to the periphery, although that periphery was not a desert.

Pursuing this theme further, let us not ignore that the cleavage existing between the learned law of a country and the law by which a great part of its population lives may be so deep that these two normative worlds are truly alien to one another.

This may happen even when the first of these laws rests on the foundations of an intellectual tradition that proclaims to be firmly rooted in the history of the country, while the second relies on what are often presented as local practices receiving little or no official recognition.

Once more, the issue here is not what is foreign and what is not, but rather who controls the law, and who instead is confronted only its application. To understand the landscape of agrarian landholding prevailing in most parts of Italy until the middle of the twentieth century and beyond, an analysis of this cleavage of capacities and means is what makes the difference, although, to pick the case of the movements for more equality in the agrarian sector of the economy discussed in the previous paragraph, both foreign and local elements were part of the reform process. Today one could make the same point with a number of different areas of the law, areas belonging to the core of a market economy, where the distance between law in books and law in action is painfully evident.

A last point concerns what comparative law has to do with the general subject of legal transplants and legal culture.

I have tried to address this question in general on other occasions.¹⁰⁶ Here my task is more limited, and I will only take the opportunity to briefly discuss the topic with regard to the Italian experience in the field of comparative law.

In Italy, as elsewhere, comparative law has been a vehicle for receptions and transplants. Nonetheless, the history of law in the last two century shows that, more often than not, transplants and receptions take place anyhow, with or without the assistance of the comparative lawyer.

On the other hand, comparative law has no rivals as a tool to investigate how the local dimensions of the law are related to the wider scene of the world's legal systems. No other subject can replace comparative law in this task. Comparative law in Italy eagerly applied itself to it by analysing how, in the course of its history the making of Italian law resulted from the interaction of a variety of sources. Comparative law showed how reference to these sources could explain variations in the style and substance of Italian law. Comparative law showed also how the various segments of the Italian legal community engaged with them, quite often following a logic that, to an anthropologist, would have seemed that of the *bricoleur*.

To reconstruct this dynamic, comparative law in Italy resorted to the methodological tools mentioned in the opening section of this piece. By providing an open reconstruction of the tangled adventures of Italian law over the last two centuries, comparative law offered Italian legal culture – or at least those sectors of it who were willing to listen – an opportunity to think critically about itself, and thus to clear the air.

If I am not wrong, this is an experiment with liberating effects that has been carried out elsewhere too. Whether it is going to receive universal applause is, of course, an altogether different story.

¹⁰⁶ Most recently in Graziadei, M., “Legal Transplants and the Frontiers of Legal Knowledge”, *Theoretical Inquiries in Law*, vol. 10, num. 2, Article 15, 2009. In this essay, I argue that the notion of tool as applied in the domain of culture plays a central role in understanding certain features of legal transplants.