This book is the first in a series of volumes describing the Italian legal system. The plan of the work involves separate volumes dedicated to the "Italian style" and to sources of the law, the analysis and description of the fundamental elements of the system, and the critical exposure of specific institutes of private law. The choice to use English language with a simple and plain presentation of subjects, is justified by the desire to disseminate this work to Italian and especially foreign students of the new university courses in cooperation and development, international relations, economic and political sciences as well as law courses. With this first opening volume (which holds the updated results of earlier researches) the Author describes the historical-cultural background of the Italian legal system and the contemporary legal thought.

ANTONELLO MIRANDA, is Full Professor of European and Comparative Law and former Dean of the Faculty of Political Science of the University of Palermo where he has been teaching since 1983. Fellow of the Society for Advanced Legal Studies of the University of London he has carried out extensive researches abroad and particularly at the I.A.L.S. of London (Visiting Fellow 2001 and Visiting Senior Research Fellow 2003-2006). Member of the Board of External Examiner of the SOAS, he is also General Secretary of the Italian Association of Comparative Law. He is the General Editor of "Family Law" of the Common Core of European Private Law Project, coordinator of the E.U. project "Emedi@te" and member of the International Committee of the Child and Family Law Quarterly Review.

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2

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Historical Background and Modern Legal Thought

Vol. I

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a Fabrizio,
perché sa quanto può essere "dura" la "scienza";

a Fulvio,
perché progetti con la sua fantasia ed ironia,
ma con la serietà delle sue radici;

a Ellina,
per la gioia e l'orgoglio
della sua e della loro compagnia.

Foreword

Strictly speaking, this study does not cover all various aspect of the Italian legal system. This study was considered a first exercise to familiarise English speaking legal scholars and students with the evolution of the Italian legal thought from its early origins to our days. Italian law is a very rich one. But its importance is very neglected outside Italy. Nevertheless it is one of the most ancient and eminent legal systems of the world gaining the best juice out of Roman law and jus commune and out of leading legislations such as French and German law.

This first volume strives to describe the evolution of the Italian system outlining the absolute relevance of legal scholarship. Of course the Italian legal literature is so rich of various contributions that it is impossible to draw up an almost complete and exhaustive list of authors. Thus the study prefers to outline the fundamental guidelines of each school of thought, only with some very essential reference.

Accordingly the study is planned to serve as a basic reference tool, as a first impression book, and it is hoped to be suitable as preliminary or supplementary reading for those requires an introduction to the Italian legal order or for law students and scholars who – I hope – will be interested in further, and more complete, studies on such an interesting, modern legal system.

Institute of Advanced Legal Studies, London, June 2014

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I

The origins of Italian law

The modern Italian legal system was properly born on 17 March 1861, day of Proclamation of the Kingdom of Italy, when the codifications and laws of the Kingdom of Sardinia became applicable to all of the new State following the annexation process of the conquered territories of the peninsula.

Despite its relatively young age – about 150 years – the Italian legal system is materially bound up with the law of ancient Rome. It assumed a specific individuality around the eleventh century, although we may take into a certain consideration its developments from the fifth century onward.

The evolutive process had no lack of continuity: the Italian legal system is, therefore, one of the most ancient and eminent legal system of the world.

Certainly the modern Italian legal system is still indebted to Roman law which constitutes its background and basis and which it only gradually departed from.

An evolution of more than a thousand years has greatly changed its substantive and procedural rules and the rule and concept of law since the time of Justinian [483-565 A.D.].

Accordingly we may regard the modern Italian system as a perfected evolution of Roman law but not as a mere copy of it: indeed, many of its elements come from sources other than Roman law.

According to the majority of Authors it is traditionally considered as combining the legal tradition of the *Jus commune* – like the other members of the European family of legal systems, Italian law first received the heavy influence of the Roman, Germanic, Canon

and Local or Customary law particularly as developed in the Middle Ages – and "the ideology of the French Revolution and German legal scholarship around the nineteenth century" [1].

This process of evolution started just after the fall of the Western Roman Empire in 476 A.D., when Roman law entered a period of deterioration and underwent the German-barbaric influence as

[1] The Italian legal literature is so rich of contributions that it is quite impossible to draw up an almost complete list of works and Authors.

A very useful tool (similar to the *Index to Legal Periodicals*) is the *Dizionario Bibliografico delle Riviste Giuridiche Italiane* by V. NAPOLETANO (ed.), published by Giuffrè, Milan, which reports the contributions (articles and books) of legal scholars year by year.

Of course the list of authors suggested here, in the book, is only illustrative and not exhaustive while further detailed references are to be found within the quoted works.

The following references are also merely illustrative:

G. ASTUTI, *La formazione dello Stato moderno in Italia*, Vol. I, Torino, 1967; E. BESTA, *Storia del diritto italiano: Fonti legislazione e scienza giuridica*, Milano, 1923-1925; IDEM, *avviamento alla storia del diritto italiano*, Milano, 1946; R. BONINI, *Disegno storico del diritto privato italiano (dal codice civile del 1865 al codice civile del 1942)*, Bologna, 1980; B. BRUGI, *Come conoscere facilmente il diritto comune per il suo uso odierno*, in *Per la storia della giurisprudenza e delle Università italiane. Nuovi saggi*, Torino, 1921; F. CALASSO, *Medio evo del diritto, I: le fonti*, Milano, 1954; C. CALISSE, *Storia del diritto italiano*, Firenze, 1902; C.A. CANNATA, *Lineamenti di storia della giurisprudanza europea*, Turin, 1971; M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System - An Introduction*, Stanford, 1967. A. CAVANNA, *Storia del diritto moderno in Europa*, Vol. I, *Le fonti e il pensiero giuridico*, Milano, 1979; G.L. CERTOMA, *The Italian Legal System*, London, 1985, p. 3 (quoted passage); C. GHISALBERTI, *Unità nazionale e unificazione giuridica in Italia*, Roma-Bari, 1979; ID., *La codificazione del diritto in Italia. 1845-1942*, Bari, 1985; A. MARONGIU, *Storia del diritto italiano*, Milano, 1927; J.H. MERRYMAN, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford, 1969; A. PERTILE, *Storia del diritto italiano*, Torino, 1890-1902; V. PIANO MORTARI, *Gli inizi del diritto moderno in Europa*, Napoli, 1980; T. RAVÀ, *Introduzione al diritto della civiltà europea*, Padova, 1982; G. SALVIOLI, *Trattato di storia del diritto italiano*, Torino, 1922; A. SOLMI, *Storia del diritto italiano*, Milano, 1930; G. TARELLO, *Storia della cultura giuridica moderna*, Vol. I, Bologna, 1976; M. TARUFFO, A. ACQUARONE, *La giustizia civile in Italia dal '700 ad oggi*, Bologna, 1980.

Many useful references are in E. CORTESE, *Esperienza scientifica, storia del diritto italiano*, in *Cinquanta anni di esperienza giuridica in Italia*, Milano, 1981, p. 787 ss. and in B. PARADISI, *Gli studi di storia del diritto italiano nell'ultimo cinquantennio*, in *Apologia della storia giuridica*, Bologna, 1973.

a consequence of the Goths' invasions of 528-552 A.D. and the last one of the Langobards in 568 A.D.

Indeed, after the fall of the Western Roman Empire Italy was deprived of a central Authority and divided into a number of barbaric kingdoms with a small area controlled by Bisanzio.

Notwithstanding the stressful invasions of the Goths and Langobards the great majority of the local population maintained its customs and habits, applying in a relatively genuine form the traditional Roman law.

While the Byzantine areas continued to be bound by legislation enacted by the authority of the Eastern Empire, the Langobards introduced in their new dominions the old Germanic principle of personality of the law. According to this principle different people under the same sovereignty may maintain and apply their own legal system.

Furthermore a great number of late Roman texts, such as the *Breviarium* of Alaricius [promulgated in 506] and the *Interpretationes*, both of them from the *Codex Theodosianus*, and as the Justinian's *Corpus Juris Civilis* – a restatement of law ordered by the emperor [527-565 A.D.] or, in other words, a consolidation of all the existing Roman laws – the *Digesta seu Pandectae* and the *Institutiones* of Gaius (one of the most important Roman legal authors, who wrote in an elegant way a profile of classic law)- were studied and used, representing the law in force on the whole Italian territory and for all the Italian people, not imposed by a unique or central power, but because it was the law naturally and effectively applied by the people.

Of course, this law became very soon both out dated and too difficult to be understood, especially in absence of an authority capable of applying and construing it correctly and in a sound way with the growing needs of the population, while the legal uncertainty was exacerbated by the introduction of barbarians customs, by appeals to the supernatural and by a system of non rational proof such as the oath of the parties, the judgement of God, the wager of law or compurgation and the battle and ordeals.

Furthermore, each group of barbarians enacted its own rules that, while improving their old customs, in some way were set up against the Roman laws.

The oldest of them were the *Lex Wisigothorum* [506 A.D.], the *Lex Burgundionum* [early sixth century], the *Lex Salica*, the *Lex Ripuaria*, and the national laws of Alemans and Bavarians.

In the Langobard kingdom, in 643 A.D., King Rothary gave his people a complex of laws known as *Edictum* and regarded as the almost complete statement of the customary law of all Germanic tribes (among others. it was repealed the appeal to ordeals). His successors Grimoaldo, Liutprando, Rachi and Astolfo, made their own additions to the *Edictum* enforcing a body of rules, the *Edictum Regum Langobardorum*, that was applied in North Italy.

In this way the Germanic rules were able to cohabit and interact with the Latin ones in a mutual interpenetration of experiences.

Public law and criminal law was clearly affected by the individualism and lack of civilization of Barbarians: a new and decentralized administrative structure was established, while trial (once formalistic solemn and accusatory) became both easy and inquisitory.

But civil matters too were influenced by Germanic thinking: strictness of *patria potestas* was clearly allayed while status and economic freedom of the individual members of the family were greatly improved; the narrow formalism in contracts produced more certainty in legal relationships and commerce; the ownership and the factual and concrete exercise of ownership over some a thing (*possessio*) were revised and the relevant remedies greatly improved.

All national laws of Germanic tribes were applied in Italy, even after the Frankish conquest of Langobards' territories [774 A.D.], under the rule of the law of personality.

After the coronation of Charles the Great as Holy Roman Emperor [800 A.D.] a collection of laws (*Capitulare Italicum*) were enacted and permanently joined to the Rothari Edict of which it was thought to be a continuation. This compilation, commonly known as the *Liber Papiensis*, was enriched with the *Expositio ad Librum Papiensum*; an enormous collection of glosses arising from the studies of jurists and legal scholars of Pavia, the capital of the Italian kingdom on the eleventh century.

Drawing near to the new millennium, differences among Byzantine and Germanic areas became progressively less numerous, while in the courts and in the law schools of Pavia and Ravenna there was room for registering, harmonising and construing the mixture of Roman and barbarian law.

In the meantime Roman law became more and more unknown and neglected by ordinary people, who preferred to develop and apply a customary law system which worked by interacting with the written (Roman and Germanic) law. This customary system was not Germanic nor Roman but arose from Latin tradition and the increased need for commerce. Indeed, its best influence was in those fields in which the Roman law was underdeveloped or non-existent such as company law or the credit instruments and so on.

From the end of eleventh century, the medieval Italian cities originally governed by bishops appointed by the Emperor, strongly asserted their own authority and; sometimes, independence from the Holy Roman Empire, refusing the rustic feudal system, appointing their own consuls, asking for more freedom and new laws, organising independent corporations of "masters of crafts" and enacting their own statutes originally based upon local customs.

Those towns were transformed into commercial centres "new lands were put to plow commerce flourished: the great markets, fairs and banks were born; the ships of the Italian maritime Republics (Venice, Genoa. Pisa, Amalfi) took to the sea to find new markets" [2].

The Italian merchants formed guilds and established pragmatic rules for the conduct of commercial affairs according to their

[2] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System*, cit., p. 14; G.L. CERTOMA, *The Italian Legal System*, cit., p. 5. But see generally the Authors listed on note 1.

needs and interests, creating a system whose influence soon spreaded worldwide even reaching and penetrating into England, becoming a real common European commercial law.

The statutes of each guild or corporative organization, and of each independent town, and the statutes enacted by the different kingdoms which the Italian peninsula was divided into, were complementary with the Roman and Germanic law, each one of them being influenced by the other.

During this creative process the Church and the canon law "acquired either an exclusive or a concurrent jurisdiction in many subjects, as well as over certain categories of persons, and many of the principles developed by the Ecclesiastical courts in these areas were to survive the later divestiture of the courts' civil jurisdiction" [3]. The moral authority of the Church and of Canon law (not excluding the historical contingency that only monks and churchmen could read and write and for that reason could know the law) was particularly massive in the field of personal and family relationships but was also high in commercial transactions and in regulating the running of the interest on money loans.

Canon law was based on the principle that all laws and all human relationships should be harmonized by Christian precepts of charity, respect and universal love.

Canon law consisted of "canons" or enactments of councils and "decretals" or normative provisions issued by the Popes, with the temporal and spiritual authority to which the whole body of Church laws was directly associated.

The first canonical collection appeared at the end of the fifth century, in Italy, edited by the monk Dionysius who collected, in a new order, the old *canones* and *decretales* of Popes. It is interesting to note that the Collectio Dionysiana, in 774 A.D. was sent by the Pope Hadrian II to the Frankish king Charles the Great, so that it was

[3] G.L. Certoma, *The Italian Legal System*, cit., p. 5. See note 1.

adopted, with new canons and decretals, as a guide for the legislative activity of the future Emperor.

In the middle of the ninth century the Roman law was progressively drawn on the Church's sphere of action, firstly by the *Lex romana canonicae compta*, which selected from Justinian's compilation (*Codex, Novels, Institutes*) all materials applicable to the Church's legal system, and then, at the end of the century, by the *Collectio* made by the archbishop of Milan, Anselmo, who arranged in a systematic form Roman and canonical texts.

The collection and arrangement of canon and Roman laws went on until the great systematic collection of Gratian of Chiusi who, in the years 1139-42, reorganized all the body of canonical sources, removing theological matters and contradictions, adding his own comments and illustrations. The work of Gratian, named *Concordia discordantium canonum* will be best known as *Decretum Gratiani* that was, in its turn, subject to new studies and improvements.

These four elements (Roman law, Germanic law, Customary or Local law, Canon law) merged into a unique mixture representing the "law in action" in all Europe, helped by the establishment and strengthening of the Holy Roman Empire and the Papacy as temporal and spiritual authority.

In the first part of the new millennium there was a powerful rebirth of commerce, craftsmanship, industry, art and culture, giving rise to a "need for legal institutions and rules that were less rough and more adapted to the emerging complexities of society resulting in a renewal of interest in the study of law" [4]. This "flourishing of economic life called needs for a new managerial class that was cultured and learned ... especially in legal matters. ... The knowledge of legal texts and of *Digesta* by each syndicus, defensor, notary, lawyer, was constantly employed as background in the practice of their duties": the school of Bologna, the first University in

[4] M. Cappelletti, P. Rescigno, *Italy*, in *International Encyclopedia of Comparative Law National Reports*, Vol. I, p. 98.

the world, will be founded in 1088 just as school of artes liberales i.e. "to form officials and lawyers shortly became a school of Roman law" [5] and the center of all legal studies.

Roman law, indeed, in the face of the diversity and primitiveness of local customs, was readily available as an almost complete background, as a basic structure which was easy to improve, but immediately applicable.

[5] A. CANNATA, *Lineamenti ...*, cit., pp. 16-17.

II

The Glossators

At the end of the eleventh century, *Irnerius*, the first and the most important teacher of the University of Bologna, established the law school of Glossators (so called from the Latin word *Glossa* a hand written explanation between the lines and on the margins of the text).

The Glossators must be regarded [1] as "the promoters of our continental legal methodology ... even if this is a result of their work and not a consequence of their original disposition". As we have already seen the school of Bologna was originally founded to form a ruling class widely and deeply learned in law. The Glossators hold as starting point the *Corpus Juris*, "a faultless book ... which was complete and free of contradictions (*ratio scripta*) and supplied them with the dogmatic foundations, the immutable elements to which they may apply their philological and logical instruments" [2].

Accordingly, the first attempt of Glossators was that of restoring the original text of the *Corpus Juris* "by eliminating the various compendia, summaries and extracts that had been used in the earlier middle Ages" [3] and rediscovering the Digestum. They regarded the *Corpus Juris civilis* and the other Roman texts as universal source of law [4].

[1] A. CANNATA, *Lineamenti ...*, cit., p. 18.

[2] A. CANNATA, *o.l.u.c.*

[3] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 18.

[4] See: M. CAPPELLETTI, P. RESCIGNO, *Italy*, cit., p. 98. Generally see: F.C. SAVIGNY, *Geschichte des romischen Rechts*, in *Mittelalter*, 2nd ed., I-VIII, Heidelberg, 1834-1851; P. KOSCHAKER, *Europa und das romische Recht*, Berlin, 1953; F. WIEACKER, *Privatrechtsgeschichte der Neuzeit unter besonderer Berucksichtigung der deutschen Entwicklung*, Gottingen, 1967.

Their method was that of the gloss or concise literary exegesis of the text. This explanatory interpretation of the text later evolved into more elaborate systematically connected interpretations [5] that were the consequence of a careful collecting and collating of manuscripts aimed to "eliminate the errors of the copyist, explain the expressions which had become unfamiliar, or passages which were obscure, and then to assemble passages bearing on the same or similar problems where these did not already appear together in the *Corpus*, and finally to suggest solutions to contradictions or to attempt to show that there was no contradiction" [6].

The Glossators considered the *Corpus Juris* still in force as an imperial enactement on the basis of a well known idea, spreaded after the *renovatio imperii* (983-1002 A.D.) according to which the Holy Roman Empire must be regarded as continuing, with no lack or repeals of laws, the Roman Empire.

But the existence of Local law could not be ignored: "the Glossators were men involved in the practical politics and legal administration of their time, and interested in having their teaching applied in practice, and there was a widespread demand from princes, city governments and the Church, for their services and the services of their students" [7]. Thus they applied what they thought to be the true Roman law trying to adapt it to the practical needs of daily transactions or actions, to the needs of town-dwellers and of monetary economy. "Once involved in the problem of practice they soon found themselves compelled to accept much law which was not contained in Justinian, because the interest to be served and the disputes which arose were new, or to extrapolate principles which Justinian merely adumbrated so as to cover these cases, or even accept different rules because the people concerned would not accept a Justinian rule" [8].

[5] G.L. CERTOMA, *The Italian Legal System*, cit., p. 6.

[6] G. SAWER, *The Western Conception of Law*, London, 1986, pp. 21-22.

[7] G. SAWER, *The Western Conception of Law*, cit., p. 22.

[8] G. SAWER, *o.l.u.c.*

Thus the second important problem the Glossators faced and resolved was that of the contemporary enforcement of Roman law and Local law. They resorted to the Roman "principle of speciality" according to which Local law must be regarded only as an exception to Roman law or to the *ratio scripta*; local law could only apply to matters not yet regulated by the *Corpus Juris*.

As a consequence the Glossators construed local law restrictively and adapted it to the concepts and terminology of Roman law.

The school of Glossators became famous worldwide, attracting students from all over Europe "while the Emperor, Fredrick I of Swabia, during the years 1130-1170, appointed four disciples of *Irnerius* (the "Four Doctors" i.e.: *Bulgarus, Martinus, Iacopus, Ugus*) as supreme judges and Crown's counsellors.

It is interesting to note that another consequence of the continuity of the Roman and the Holy Roman Empire was that the rules enacted by the Emperor were regarded as improvement of the old Roman laws and inserted in the *Corpus Juris Civilis*. The statutes (*Constitutiones*) enacted by the Emperor were sent to the jurists of the school of Bologna, which provided for their arrangement within Justinian's compilation and thus assured their greatest diffusion.

Emperor Fredrick I sent to Bologna the *Constitutio de Regalibus* of 1158 and the *Pax Constantiae* of 1183 (which was a direct consequence of the defeat of the Emperor in his war against the Italian towns) while the Emperor Fredrick II enacted in 1220 a great number of acts on feudal matters which were collected by Ugolino de' Presbiteri, a glossator, into the *Corpus Juris* as *Libri Feudorum* and *decima collatio* of the *Authenticum*. The statutes enacted by the two Emperors were resumed and inserted into the *Corpus Juris* as *Authenticae Federicianae*. Thus the Germanic feudal law was regarded as an appendix of Roman law.

In the second half of the twelfth century two were the leaders of the school of Bologna: *Bulgarus*, who argued that Roman law rules had to be narrowly construed; *Martinus* who deemed it necessary to construe the law with regard to equity and the practical prob-

lems of life. Their disciples *Rogerius*, who also taught in the South of France, *Albericus* from Porta Ravennate, *Pillius* from Medicina, helped with the diffusion of the glossators' ideas, while other disciples of the school went all around Europe founding more Universities based on the style of the University of Bologna. *Placentinus* founded in 1150 a Roman law school in Montpellier while *Vacarius* (from Mantua) founded the Roman law school of Oxford [twelfth century] and Spanish students founded the first law schools in Spain. In Italy the universities of Padua [1222], Perugia [1308], Pisa [1348] were founded.

At the beginning of the thirteenth century *Azo* from Bologna [1150-1230] wrote the *Summa Codicis*, a fundamental text in legal literature which even extended its influence over the English *Bracton*. But the methodology of the school passed through a crisis: "the accumulation of glosses had suffocated the text, which was no longer studied directly but only through its glosses" [9].

Thus *Accursius* of Florence, probably the greatest and last glossator, between the years 1220 and 1250, attempted to collect, select and order the best among the glosses already produced by the University scholars. The final work of *Accursius*, called *Glossa Ordinaria* was best known as *Magna Glossa* containing about 96,000 selected glosses which replaced the original ones.

Thanks to the great diffusion of the results of the School of Bologna Roman law as held in the *Corpus Juris Civilis* became the *Jus Commune* of all the countries subject to the Empire: a law system applied by the Courts and taught in the schools as the law of all European people; a general law system which only suffered the exceptions of Local law; a law system that grew in the various European countries until the modern era of national codifications.

[9] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 20.

III

Commentators and Humanists

It must be remarked that the *jus commune* was received in a wide variety of situations [1]: while in northern France Roman law was applied only in areas not regulated by Customary law and local statutes, in southern France, in Italy (excluding the Republic of Venice), as well as in areas that had been part of the Empire and in which the Romans had ruled for a long time, Roman law prevailed, while local law and statutes were regarded as exceptions.

Nevertheless, the law of mercantile corporations or guilds and maritime law [2] (*jus proprium*), regarded as a necessary supplement to the *jus commune*, grew out of the need to regulate new commercial activities and, in general, to regulate life in the almost independent Italian mediaeval cities and in the new kingdoms in which the peninsula was divided (*jus provinciale* or *jus regni*).

Thus, each town and guild enacted powerful and wide acts or statuta from the twelfth century onward. This originally happened on customary basis as in the *Constitutum* of Pisa in 1142, the *Usus Venetorum* in 1172, the *Liber consuetudinem Mediolani* in 1216, or in

[1] On reception of the *Jus Commune* in Europe and elsewhere see: M. CAPPELLETTI, J.H. MERRYMAN, J.N. PERILLO, *The Italian Legal System ...*, cit., pp. 29-36 and T. RAVÀ, *Introduzione ...*, cit., p. 52 ss.; G. ASTUTI, *Recezione teorica e applicazione pratica del diritto romano nell'età del rinascimento giuridico*, in *Université de Varsovie, Le droit romain et sa reception en Europe*, Warsaw, 1978. See, also authors cited on note 1.

[2] On *Statuta* see note 1 and: E. BESTA, *Fonti: Legislazione e scienza giuridica dalla caduta dello impero romano al secolo decimosesto*, in *Storia del diritto italiano*, Milano, 1925; M. CAPPELLETTI, *Alcuni precedenti storici del controllo di costituzionalità delle leggi*, in *Riv. Dir. Proc.*, 1966, p. 52 ss.

the other restatements of northern Italian customary law (Brescia in 1225; Lodi in 1230-40; Bergamo in 1268-77; Como in 1281; Ferrata in 1266; Reggio Emilia in 1242) and of southern Italian customary law (Corneto in 1189; Naples in 1306; Amalfi in 1274; Messina, Palermo and Catania in the thirteenth century). Then, local legislation was enacted in the written form of *Brevia*[3] and of *provisiones, consulta, postae, ordinamenta, decreta, bandum, crida, carta bannorum*, etc.

From the second half of the twelfth century the enactement of *Statuta* was greatly increased and at the beginning of the thirteenth century almost each town had its own law such as Benevento in 1202, Treviso in 1207, Verona in 1228, Padua in 1236, Vercelli in 1241, Bologna in 1250, Parma in 1255, Siena in 1260, Novara in 1280, Ferrara in 1288, Pistoia in 1292 and Milan in 1330.

The *Statuta* enacted by the Italian maritime Republics were extremely important too, especially the legislation issued by Pisa in 1298 and 1305 with the *Breve curia maris*, a consolidation restating all rules relating to maritime matters.

At the end of the thirtheenth century in Amalfi a restatement of customs was draught and rules named *Capitula et ordinationes Curiae marittimae nobilis civitatis Amalphae*, while in 1272 the *statuta of Ragusa* were issued and in 1363, in Trani, the *Ordinamenta et consuetudo maris edita per consules civitatis Trani* were enacted.

It is interesting to remark that all these restatements of maritime customs and statutes will be the ground of the *Consulat del mar* enacted in Barcelona in 1370 which in the fiftheenth century became

[3] The *Breve*, may be regarded as an intermediate form between the *statutum* and the custom. It arises from the practice of drawing up a written report of the oath of each citizen or official or judge. The oldest were the *Breve consulum* of Genoa (1143 A.D.); of Pisa (1162); of Piacenza (1167) and the *Sacramenta consulum* of the towns of northern Italy (twelth century) and the *Promissione* of Venetian Doges (1192, 1229). Other examples were the *iuramentum compagnarum* of the citizens of Genoa (1162), the *iuramentum sequendi* or *cittadinus* of Siena (1179) and Pisa (1198).

the ultimate text restating all the laws applied in the whole Mediterranean sea.

In the meantime the monarchies, especially in southern Italy, were also enacting legislation. From the early Norman laws (*Assise* of Ariano Irpino in 1140; *Assise regum regni Siciliae* in 1262) to the greatest enactments of the *Liber Constitutionum Regni Siciliae* or *Constitutiones augustales* in 1231 and of *Novellae Constitutiones* in 1224; from the *Capitula* enacted by the Angevin kings in 1282-1283 in Naples, to the *Capitula* enacted in Sicily by the Aragonese kings in 1286, 1296-1337; from the *Constitutiones Sanctae Matris Ecclesiae* in 1357, to the *Statuta Generalia* enacted in the County of Savoy by Pietro II in 1263-69, by Amedeo VI in 1379 and by Amedeo VII in 1430; all over the peninsula there was a flourishing of local laws that "often were irreconciliable with the *lex*, and despite this fact they prevailed in the practice of the legal system in which they had been enacted" [4].

Indeed, starting from the second half of the thirteenth century, when the work of *Accursius* was completed, the jurists of his school were involved not only in the analysis of Roman texts but also in the study of statutory and local law[5]. This was in the work of *Dino Mugello, Guido Srezzara, Jacopo D'Arena* and especially on the works of *Rolandino Passegeri* who wrote the *Summa artis notariae* or *Summa Rolandina* on practical matters involving notaries; of *Gug1ielmo Durante* who in 1276 wrote *De ordine judiciorum* a great compendium on procedural law; and of *Alberto Gandino* who in 1290 wrote *De ordine maleficiorum* a long life text on criminal law.

[4] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System* ..., cit., p. 26 where in note 69 they asserted: There is an extraordinary similarity here with the development of English law. The *jus commune* of Europe claimed to be superior to, and not derogable by, statutory law. This view, firmly held in theory, failed in practice. In England, before the "glorious revolution" of 1688, it was commonly held that statutes "contrary to the laws and customs of the realm" should not be applied. (...) At the time of Coke the tradition that common law was fundamental law and prevailed over statutory law was at least four centuries old".

[5] A. CANNATA, *Lineamenti* ..., cit., p. 23.

The process of unification or reciprocal influence of Roman and Local law was, at the end of the fourteenth century, the starting point of the school of Commentators. Commentators (or Post-Glossators) superseded the study of the literal text of the *Corpus Juris Civilis*, searching "through a process of synthesis and abstraction, for the general principles and rationale of the law ... Jurists no longer sought to discover Roman solutions but rather used the Roman texts to iustify rules adopted in contemporary society" [6].

In other words they dropped the literal interpretation of law, trying to set up the structure of the legal system as an analytic one. In so doing they justified customs and local statutes construing Roman law in such a way that it was heavily modified, disfigured and dilated.

Their method was the "comment", a free interpretation and construction of old Roman precepts that consisted firstly of a literal analysis of the legislative text; then of a subdivision of the same text according to its provisions; then of a summary explanation of the content of the text, followed by a statement of examples and practical cases to which the rule could be related to; and, at least, of the reports of the observations, arguments pro and against, and the problems which might be suggested by the law [7].

Using this method, historically known as *mos italicus* [8] "the Commentators created a good part of ... the analytic structure that still differentiates the style of modern continental legal system from their Roman antecedent" [9].

Furthermore the Commentators developed their roles as judicial consultants, solving disputes and setting a case law with a progressive refinement of these concepts and their logical instruments.

[6] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 23.

[7] G.L. CERTOMA, *The Italian Legal System ...*, cit., p. 6.

[8] See: P. KOSCHAKER, *Europa und das romische Recht*, cit., p. 91; C.A. CAVANNA, *Lineamenti di Storia della giurisprudenza europea*, cit., p. 22.

[9] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 22.

The responses of jurists to questions of law were given binding authority in courts so that there was an increasing tendency to supine acquiescence to the opinions of the principal jurists: accordingly, each law question must be decided by first analysing Commentators' opinions and then trying to find a common one's (*communis opinio doctorum*). This methodology will be known as *Usus modernus Pandectarum*.

Cino da Pistoia [1270-1336] – the founder of the school of Commentators –, *Bàrtolo da Sassoferrato* [1314-1357] – the greatest jurist of that time, who wrote a comment on the *Corpus Juris Civilis*, several legal treaties and was the real leader of the school –, *Baldo degli Ubaldi* [1327-1400] – who commented on the *Decretals* of Pope Gregory IX, and wrote indifferently on civil and canon matters, practically putting an end to the old distinction between civil and canon lawyers – were the most influential of Commentators as well as *Paolo di Castro, Raffaele Fulgosio, Filippo Decio, Bartolomeo da Capua, Giason del Maino, Andrea d'Isernia* and many others whose thought and works spread all around Europe, heavily affecting legal reasoning in Spain, Portugal, Poland, Holland and Germany. Their work will be continued and applied in practise by *Jacopo Menochio* [1532-1607], Francesco Mantica ldied 1614], *Filerio Deciani* [1509-1581], *Benvenuto Stràcca* [1509-1578], *Sigismondo Scaccia* [XVIth-XVIIIth century] and first of all by *Giovan Batista De Luca* [1614-1683] lawyer, judge and cardinal who accomplished in his *Theatrum veritatis et iustitia* a very wide, vivid and almost complete report of forensic law.

Nevertheless legal scholarship very soon became both rigid and pedantic. As we have already seen "both among the scholars and the courts there was an increasing tendency to cite the opinions of the principal jurists, especially Bartolo and Baldo ... As a result the work of the legal scholars and the courts was rigidly bound by the authoritarian pronouncements of their predecessors" [10].

[10] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 37.

As a consequence, in the sixteenth century took place a "reaction against this excessive attachment of the Post-Glossatots to the doctrine and the mechanical procedure requiring adhesion to the *communis opinio doctorum* that gave rise (...), to a legal humanism that affirmed the liberty of interpretation" [11].

The first jurist, leader of' the movement, was *Andrea Alciato* [1492-1550] who must be regarded as founder of the *Scuola dei Culti* (School of Culted Men). *Andrea Alciato*, following in the footsteps of *Angelo Poliziano* [1454-1494], *Lorenzo Valla* [1406-1452], *Pomponio Leto* [1425-1497] and *Lodovico Bolognesi* [1447-1501] tried to obtain an historical scientific knowledge of Roman law, reconstruing the classical texts, freeing them from all the interpolations and glosses added by Glossators and Commentators in the course of centuries.

Alciato's ideas were not followed in a massive way in Italy. *Scipione Gentili* [1565-1616], *Lelio Torelli* [1489-1576] were the most influenced among the Italian jurists. But the ideas of Alciato were followed to a greater extent in France and in Germany by *Jacobus Cuiacius* [1522-1590], *Dionysus Gothofredus senior* [1549-1622] who published a critical review of the *Corpus Juris*, *Jacobus Gothofredus* [1587-1652] who commented the *Codex Theodosianum*, *Antonius Faber* [1557-1624] and especially by *Hugo Donellus* [1527-1591] and *Francois Hotman* [1524-1570] who in 1567 wrote the *Antitribonianus* "an indictement of Justinian and his chief scholar, Tribonianus, and a plea for the codification of French law" [12].

As a consequence of the persecution against the Huguenots, the school of Culted Men moved from France to Holland where it influenced in a massive way the school of Humanists which emphasised university studies and teaching shifting back to the scientific analysis of the Justinian texts, and developed historical considerations (rediscovering older texts) as well as critical evaluation [13].

The Humanists "'while justly criticising the monstrous bulk and inconvenient shape of the bartolist commentaries, realised that the Justinian writings were likewise open to strong criticism on grounds of arrangement and style" [14]. They thought Roman law as a historical and no longer existing body of rules (being not possible to apply it in a modern society with new and peculiar exigencies). They purpoted to construe a new social order, reliying upon the natural rights of individuals, asserting that law proceeds from human will [15]. As a consequence they regarded the empirical method of natural sciences as fundamental in legal reasoning and jurisprudence, affirming "the validity of a universally rational and absolute law, that is to say, a perfect legal model to which it was necessary to conform. This would enable the transformation of the then confused and uncertain law into certain and rational positive legal norms conforming to the universal and patent dictates of reason" [16].

So, from the seventeenth century, the king or the central authority – who in the Middle Ages and the Renaissance could only legislate if *jus commune* had to be improved or modified but not replaced overall – must enact the laws according to "a judgement of consistency to human nature, of truth or justice ... and in the best way" [17].

On these grounds, during the French revolution, the idea of a fair law arising from reason [18] will grow opening the way to codification.

[11] G.L. CERTOMA, *The Italian Legal System*, cit., p. 6.

[12] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 38; A. CANNATA, *Lineamenti ...*, cit., p. 26.

[13] G. SAWER, *The Western Conception of Law*, cit., p. 22.

[14] G. SAWER, *o.l.u.c.*

[15] R. DAVID, *I grandi sistemi giuridici contemporanei*, Italian translation of O. CALLIANO, directed by R. SACCO, Padova, 1978, p. 39.

[16] G.L. CERTOMA, *The Italian Legal System*, cit., pp. 7-8.

[17] T. RAVÀ, *Introduzione al diritto della civiltà europea*, cit., p. 73.

[18] See: T. RAVÀ, *Introduzione al diritto della civiltà europea*, cit., p. 74; T. ASCARELLI, *L'idea di codice nel diritto privato e la funzione dell'interpretazione*, in *Studi di diritto comparato e in tema di interpretazione*, Milano, 1952, pp. 165 ss.

According to a dominant idea in the Middle Ages "the law is in force indipendently of the enactment by a central or unique Authority; the king cannot establish nor modify a legal system. He can only administrate and organize justice ... but, strictly speaking, the king cannot legislate" [19].

The school of Humanists, Grotius [1583-1645], Pufendorf [1632-1694] and Hobbes [1588-1679] first, Locke [1632-1704] and Rousseau [1712-1788], trying to produce a written system of Roman based law which would have immediate and universal application – putting the emphasis on internal consistency and logical coherence- recognised "the doctrine of sovereignty and the existence of nation states" [20] and justified and supported "the substantially political speculation concerning the basis of government in the newly arising nation states" [21] reversing the old medieval principle: they saw "the king as an absolute legislator" [22] who can modify old laws and enact new ones, although only accordingly to the principles of "reason".

The growth of absolutism (from the sixteenth century onward) first based on the idea of a feudal state – the king is the "owner" of the State – and then on the theory of social contract helped to develop the conception of a "fair law" enacted by the king.

It must be emphasized that from this conception of natural law arose the opposite conception of positive law: the king (or central authority) has the power to legislate, i. e. he can modify, restate, improve, abolish and create the law not according to reason's principles but only according first to his will – that represent the will of God – and then according to the effect of the fundamental guarantees of human rights or of the distributions of power in the few cases in which these exist in legal form – which represents the will of

[19] R. DAVID, *I grandi sistemi giuridici contemporanei*, cit., pp. 52-53.

[20] G. SAWER, *The Western Conception of Law*, cit., p. 34.

[21] G. SAWER, *o.l.u.c.*

[22] R. DAVID, *I grandi sistemi giuridici contemporanei*, cit., p. 54.

the Nation –. As a consequence only legislation, i.e. the will of the legislator, could produce valid law representing the will of the State.

From the sixteenth century onwards the production of new pieces of legislation began to increase reaching a high point between the second half of the seventeenth century and the first half of the eighteenth century with the enactment, in France, of a great number of ordonnances ending with a legislative unification of normative precedents (e.g. the code Savary of 1673 or Commercial Ordinance, the 1681 Maritime Ordinance, the 1731 Ordinance on Gifts, the 1735 Ordinance on Wills and the 1747 Ordinance on Remainders).

In Italy, as a consequence of the fragmentation of the peninsula, each of the numerous states had its own legal system, took place a great movement of economic, administrative and juridical reforms based on the ideas of the Enlightenment.

Alberico Gentili [1552-1611] was "the influential father of the European natural law school" even if while teaching law at Oxford, he strongly reacted against the ideas of Alciato and his scholars, while Ludovico Antonio Muratori [1672-1750] was the founder of the Italian historiography of law and in his work of 1742 *Dei difetti della giurisprudenza* he asserted the absolute uncertainty of legislation asking for a consolidation of the existing law [23].

A. Sabini [in 1751], Pompeo Neri [in 17451, Pasquale Cirillo [in 1751], Michele de Jorio [in 1751] were some of the most influential jurists which helped to accomplish the first Italian consolidations, while Cesare Beccaria, in 1764, with his book *Dei Delitti e delle Pene* contributed to a restatement of criminal laws, the indictment of torture and the death penalty, and G. Filangieri with his *La scienza della legislazione* claimed ardently for reforms denouncing the abuses of his time [24].

[23] A. CANNATA, *Lineamenti ...*, cit., p. 107; A. MURATORI, *Dei difetti della giurisprudenza*, Milano, 1958.

[24] C. BECCARIA, *Dei delitti e delle pene*, Milano, 1965 (reprinted); G. FILANGIERI, *La scienza della legislazione*, Napoli.

But the enactement of new laws was only a consequence of precise royal grants, or single concessions of the king to the people (e.g. in Piedmont the "Laws and Constitutions of His Maiesty" of 1723, the "Criminal Rules" of 1751, the "Feudal Code" of 1780 and the "Code of Merchant Navy" of 1786 on the "*Serenissima*" Republic of Venice, and so on) and was not complete or organically arranged in a systematic way with any formal rupture with the past or abrogation of ancient common law. These pieces of new legislation must only be regarded as preludes to codification.

Indeed, between the end of the eighteenth century and the beginning of the nineteenth century the summing up of all these elements, firstly the intellectual demand for the definition and stabilisation of the law and the enormous bulk of legislative production, yielded the codification of legal systems.

IV
The Codification

The idea of collecting legal rules in written form is not a modern or new one. But, in the nineteenth century, lawyers and legal scholars opened their mind to the hope of making "law readily intelligible to the average citizen, and thereby facilitate either the abolition of a specialised legal profession, or at least a great reduction in its importance" [1], by means of a code which contained a complete and readily intelligibile systematic statement of the existing law.

In other words a reaction occurred against "the obscure, uncertain, contradictory and arbitraty state of law, a state of affairs which arose out of both the inability of the *jus commune* to adapt to new conditions and the continuing existence of feudal law, individual sovereign states, local custom and legislation, and a series of privileges and autonomies" [2]. But a demand of this sort cannot "effectively be made unless there exists a legislative authority whose competence – both in the sense of sovereign power and in the sense of technical fitness – is generally accepted" [3].

Notwithstanding the great legislative production of the French Revolutionary Constituent – aimed at an unification of the existing laws according to the principles of the Revolution (*droit intermédiaire*) – which erased the most of the feudal system, and the institution of the *référé legislatif* which established the judge had to

[1] G. SAWER, *The Western Conception of Law*, cit., p. 28.

[2] G.L. CERTOMA, *The Italian Legal System*, cit., p. 8.

[3] G. SAWER, *The Western Conception of Law*, cit., p. 29.

construe the law according to all legislative body[4], only when Napoleon got the power (november the 9th 1799) the described conditions for the codification were fulfilled.

On 21 march 1804 the French Civil Code (from 1807 *Code Napoléon*) was enacted, followed by the Code of Civil Procedure in 1806, the Commercial Code and the Code of Criminal Procedure in 1808, and the Criminal Code in 1810.

Owing to its situation Italy was ready to receive both the ideology of the revolution and the French Codes: "the French occupation from 1796, and its foundation of several Italian republics and vassal kingdoms, brought French legislation, which was readily received, both because it satisfied new socio-economic needs, and because of the common legal tradition which, for the most part, had been absorbed into Napoleonic Codes"[5].

The Code Napoleon represents a new legal system which will supplant the old. The code "is not only a law or a consolidation or a restatement of laws, but a new, complete and ultimate body of law"[6].

A formal rupture with the *jus commune* took place; the *jus commune* could no longer be considered a general residual law, while the code was regarded as representative of a complete, self-sufficient and systematic legal order containing no lacunae.

As a consequence the Code prevented the judges from resorting to any source of law other than legislation or from resorting to equity or customs in cases of legislative silence, obscurity or insufficiency[7]. Nevertheless the judge had to give a (exclusively legislative) solution in each submitted case, according to the intent of the legislator, the will of whom was considered as the one and only source of law. The code is the law, i.e. a system of rules that constitutes the fundamental pattern of the legal order and in relation to which every subsequent statute may be only a specification or an exception leaving its principles untouched[8].

The French exegesis school of the nineteenth century drew up the principle of completeness of the legal system, and consistently affirmed that all law takes the form of legislation, which represent the will of the State.

According to this school of thought "the literary interpretation of the Code would furnish the answer to any problem ... any reference other than that to the law imposed by the State (was excluded), and the only canon of interpretation was the search for the intent or will of the legislature"[9].

Italy, notwithstanding the attempt of the Restoration Regime to preserve some of previous rigths of the old legal system, followed the French example and enacted its own codes. The first was the *Codice per lo Regno delle Due Sicilie* enacted in Naples in 1819 and which was essentially a translation of the *Code Napoléon*. In 1821 was enacted in Parma the "Code of Civil Laws", the Code of Criminal Procedure, the Code of Criminal Law, the Code of Civil Procedure; in Modena this happened in 1851-1859; in Piedmont, in 1837, was enacted the Civil Code, while in 1839 was enacted the Criminal Code and in 1842 the Commercial Code; in 1847 and in 1854-59 were respectively enacted the Code of Criminal Procedure and the Code of Civil Procedure of Piedmont which, side by side with the *Statuto Albertino* or Constitution of the Kingdom of Sardinia conceded by Carlo Alberto of Savoia in 1848, were going to constitute the background of unitary Italian legislation.

Indeed, after the unification of Italy (1861), on July 25th 1865, King Vittorio Emanuele II enacted the Italian Civil Code, Commercial Code, Code of Civil Procedure and Code of Criminal Procedure,

[4] T. RAVÀ, *Introduzione al diritto della civiltà europea*, cit., pp. 39-40.

[5] G.L. CERTOMA, *The Italian Legal System*, cit., p. 9.

[6] T. ASCARELLI, *L'idea di codice nel diritto privato e la funzione dell'interpretazione.*, cit., p. 173.

[7] See: T. RAVÀ, *Introduzione al diritto della civiltà europea*, cit., p. 82.

[8] See: T. RAVÀ, *Introduzione al diritto della civiltà europea*, cit., p. 85.

[9] G.L. CERTOMA, *The Italian Legal System*, cit., p. 11.

all coming into force on January the 1st 1866; in 1882 a new Code of Commerce, in 1889 the Penal Code and in 1913 a new Code of Criminal procedure followed, while the *Statuto Albertino* became the new Italian Constitution which – although flexible, enacted as ordinary legislation and containing general provisions easily subject to quite different interpretations – was going to remain in force until January the 1st 1948.

In spite of the fact that all these Italian codes were influenced by the French models, of which they reproduced the structure, the normative content of each institution and, above all, their individualistic philosophy – quite evident in the rules relating to the right of property –, we have to emphasize that "it is a frequent mistake to regard the national codifications of the nineteenth century, led by the Code Napoléon, as the historical beginning of present Italian Civil Law.

It cannot be denied that the Napoleonic Code was based upon ideological and social principles in complete contrast to those dominant in the preceding era – the idea of equality in contrast with the hierarchichal structure of the Feudal Age; the concept of private property in contrast to Feudal conception of property as a manifestation of political domination, etc. Nevertheless, no one would deny that national codifications, even that of Napoleon, maintained very evident connections with the past. They were nothing more than a natural evolution, prompted by the rise of new social and economic ideals, of legal institutions and concepts inherited from the preceding era, so that in the national codes there always remained the community which was at the root of the European *Jus commune* [10].

Only by keeping in mind all this and the historical continuity of Italian-law, can we understand all subsequent developments of this system, affected by French thought only till the advent of the Historical School, Pandectists and Positivists.

[10] M. CAPPELLETTI, P. RESCIGNO, *Italy*, cit., p. 98.

V

Pandectists' thought, Formalism and Legal Science

During the first half of the nineteenth century F. C. Savigny, the leader and founder of the Historical School reacted, in his works [1] against the unhistorical assumptions of natural law theorists asserting the need for a more realistic investigation into historical truths.

It was his thesis that the nature of any particular system of law was a reflection of the spirit of the people who evolved it, all law being the manifestation of common consciousness (*der Volkgeist*). As a consequence law can only be understood by reconstruing its history.

Historical researches were therefore the indispensable means to the understanding and reform of the present.

It was his idea "that Roman law had been received into Germany so long ago that its legal soul became a mixture of Roman and local laws [...] [so] the essential prerequisite to the reform of German law was a deep knowledge of its history" [2].

Starting from Roman law, rivisiting it on the basis of Roman classical jurists' methodology and studying the German legal system in its historical context, in Savigny's view, legal scholars would have been able to draw out "those historically derived principles that were an essential part of it. These essential features of the law can then be individually studied, or studied in relation to other such principles, and eventually systematically restated.

[1] F.C. SAVIGNY, *VomzBeruf unsrer Zeit fur Gesetzgebung und Rechtswissenschaft*, Heidelberg, 1814; ID., *System des heutigen romischen Rechts*, Berlin, 1840-1849.

[2] R.W.M. DIAS, *Jurisprudence*, London, 1970, p. 428.

The result is a reconstruction of a historically derived German legal system according to its basic principles and features" [3]. This, in turn, would provide the construction of a system of interlocking concepts the reseatch and the correlation of which would lead to the solution of every legal question, according to the needs of the German people [4].

From this starting point in the middle of the nineteenth century the German Pandectist school developed through the works of *G.F. Puchta* (*Pandekten and Cursus der Institutionen*) – considered the founder of Conceptual Jurisprudence (*Begriffjurisprudenz*) – *Vangerow, Brinz, Arndts, Bekker, Regelsberger* and *Dernburg* [5].

Their aim was to extrapolate from Justinian's Pandects and by utilizing the historical knowledge of old Roman law "pure concepts and principles pitched at an appropriate conceptual level and to combine them into a systematic legal structure or system that could then be utilised in resolving every conceivable problem arising in a modern society" [6].

According to this school every legal system is a close and complete system of institutes, concepts, principles and rules: there is no room for gaps (only legislative gaps are, in any case, conceivable) the system beeing capable of filling it by means of its logical structure based upon the reality of concepts and dogmas.

Pandectists' thought has been embodied into the German National Civil Code of 1900 while the top of this abstraction process was represented by *Windscheid*'s work *Lehrbuch des Pandektenrechts*.

[3] J.H. MERRYMAN, *The Civil Law Tradition. An Introduction to the Legal System of Western Europe and Latin America*, cit., p. 32.

[4] See: T. RAVÀ, *Introduzione al diritto della civiltà europea*, cit., p. 165.

[5] See: F. WIEACHER, *Privatrechtsgeschichte der Neuzeit unter besonderer Berucksichtigung der deutschen Entwicklung*, cit., p. 400; R. ORESTANO, *Introduzione allo studio storico dal diritto romano*, Torino, 1963, p. 218 ss.; C.A. CAVANNA, *Lineamanti di storia della giurisprudenza europea*, cit., p. 146.

[6] G.L. CERTOMA, *The Italian Legal System*, cit., p. 11.

Pandectist's thought strongly affected the Italian legal studies; "the German juridical school [...] transformed the Romanistic schemes into an admirable intellectual construction, and created a general doctrine that for a long time has dominated legal thought and that only recently has begun to show its insufficiencies and limits. Everyone knows about the influence exerted on the Italian doctrine at the turn of the century by the elaboration of the *pandettistica* [7].

In their studies Pandectists payed attention to the law rather than to social and economic problems: they thought "the law was like other phenomena of nature, and merited careful study in order to discover and explain its inherent principles and their natural relationships.

The thing studied was the law, to the exclusion of other materials; the thing sought was its scientific reconstruction according to its inherent properties" [8].

In Italy Pandectists' ideas were summed up as "Formalism" and "Dogmatism", the theoretical structure of which "consists of general concepts and istitutions of a high order of abstraction, arranged and interrelated in a systematic way" [9] capable to be discovered by a scientific study of the law.

The study is "of legal phaenomena – the rules of law – typically legislative norms.

The purpose is to draw from them general legal principles, of which it is assumed the phenomena are concrete representations" [10].

As a consequence the structure of the law system proceeds through different and descending levels of abstraction, moving from the

[7] R. NICOLÒ, *Diritto civile*, in *Enciclopedia del diritto*, Vol. 12, 1964, p. 918.

[8] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 169.

[9] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 171.

[10] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 171, n. 20.

particular to the general, and logically interlocking "so that the more particular fits within and is comprised by the more general and so on" [11]. The aim of the scientific study of law is the disclosure of the components of the structure itself and their relationship. The components of that structure are exclusively legal, their purity and their validity beeing destroyed by the introduction of non-legal elements: "the norms are the law material, the phenomena, [...] the facts" [12] that jurists must study.

The analysis of the existing legal norms is the first step in construing general legal concepts. But, according to the theory of the separation of powers – "for a number of historical reasons, much more sharply conceived in Italy than in common law countries" [13] – and to the law-making monopoly of the State, only formally valid norms can be considered; purism is the ideal, rejecting all but formally legal data in order to collect and arrange those data into a system [14], leaving out moral considerations: "the purpose of the science of law is to consider the law that is, and not that which ought to be.

At the basis of this theory of legal science is the assumption of a clear separation between the validity and the value of law, between the rules that can be valid, even without being just (those which legal science is only concerned with), and those that may be just without being valid; only the first are the obiect of the scientific study of law" [15].

Some interest in law and sociology was developed starting from the second half of the nineteenth century (e.g. by Cesare Lombroso

[11] G.L. CERTOMA, *The Italian Legal System*, cit., p. 12.

[12] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 171.

[13] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 173.

[14] See: G.L. CERTOMA, *The Italian Legal System*, cit., p. 14.

[15] N. BOBBIO, *Giusnaturalismo e positivismo giuridico*, in *Riv. Dir. Civ.*, 1962, I, p. 508.

and Enrico Ferri), and a reaction against formalism and dogmatism took place in the early twentieth century with Giorgio Del Vecchio who "reabsorbed tha fundamental legal concepts of the general theory of law into philosophy, combining them with the phenomenological and deontological aspects of law" and, then, with the "institutional" approach of Santi Romano according to which within the state there are a number of legal orders (considered as entirety or as a unit) in addition to that of the state itself: "every legal system is an institution and every institution is a legal system" assuming as institution "every social entity or corpus which is effective, concrete and objective in the legal world" [16].

Nevertheless, in Italy dogmatism reached its highest expression in the systematisation effort of the fundamental legal concepts extrapolated from the narrow analysis of the positive legal system's general principles [17], finding the criterion for identifying the juridical character of a norm in the statutory nature of the norm itself: "for this reason formalism became synonymous of legal positivism" [18] in the sense of legislative positivism (*Gesetzespositivismus*), a quite different conception from the original methodology of Pandectists (*Rechtswissenschafticher Positivismus*) [19].

[16] G.L. CERTOMA, *The Italian Legal System*, cit., p. 14. See: G. DEL VECCHIO, *I prtesupposti filosofici nella nozione del diritto*, Bologna, 1959; *Sui principi generali del diritto*, Modena, 1921; *La verità nella morale e nel diritto*, Roma, 1954; *Studi sul diritto*, Milano, 1958; *Storia della filosofia del diritto*, Milano, 1958; *Lezioni di filosofia del diritto*, Milano, 1958; *Studi sullo Stato*, Milano, 1959; *La giustizia*, Roma, 1959; *Presupposti, concetto e principio del diritto*, Milano, 1962; *Contributo alla teoria del pensiero filosofico giuridico*, Milano, 1963; *Lo Stato moderno e i suoi problemi*, Torino, 1967; *Nuova silloge di temi giuridici e filosofici*, Torino, 1967. See: S. ROMANO, *L'ordinamento giuridico*, Firenze, 1951; *Principi di diritto costituzionale generale*, Milano, 1947. *Frammenti di un dizionario giuridico*, Milano, 1953.

[17] See: G.L. CERTOMA, *The Italian Legal System*, cit., p. 14.

[18] G.L. CERTOMA, *The Italian Legal System*, cit., p. 15.

[19] See: C.A. CAVANNA, *Lineamenti di storis della giurisprudenza europea*, cit., ch. VI, pp. 139-162; P. KOASCHAKER, *L'Europa ed il diritto romano*, Ital. transl. By A. BISCARDI, Florence, 1962; F. WIEACKER, *Privatrechtsgeschichte der Neuzeit unter besonderer Berucksichtigung der deutschen Entwicklung*, cit., 1967.

VI

Developments after the First Italian codification

According to P. Rescigno "the German civil code supplied the Italian legal scholars with the apparatus of legal concepts and expressions which they used, and are still using, in drawing the "general theory" of private law and its principles relating to legal subjects or persons, things or property and real rights, acts in law, private autonomy in constituting freely legal relationships and acts" [1] and so on.

As a consequence Italian jurists preferred to establish a legal concept in their reasoning: "the elaboration of a legal rule is the direct result of the elaboration of a concept" [2].

In Italy, nevertheless, passing from the exegesis to the systematic school and consequently from the old codification of 1865 to the new one of 1942 was not only a bare reception of German legal thought, but the result of a complex evolution plainly showed by Italian legal scholars' works. Indeed, it must be kept in mind that the school of exegesis strongly dominated Italian legal life during a period of twenty years after the first unitary codification of 1865: from France, with the architecture and the ideological contents of Code Napoleon, it reached Italy both in the method and the style of the authors.

Typical of this period was the compilation of "commentaries": jurists followed the internal division of the code with absolute fi-

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[1] P. RESCIGNO, *Manuale del diritto privato*, Napoli, 1973, p. 47.

[2] R. SACCO, *Introduzione al diritto comparato*, Torino, 1980, p. 182.

delity, while their studies were limited and related just to a single article that was considered only in its literal meaning. The rule was analysed and construed in a very sharp and narrow way, while explained by a lot of practical examples and by a large exposition of judicial precedents. As a consequence the "commentaries" were "not organic but fragmentary never showing a very strong conceptual pattern" a systematization being offered by the same object of study i.e. by the code itself.

The civil law system was thought as plainly coincident with the one of the civil code[3]. As Cogliolo said "the civil code was previously organized in accordance to a certain system"[4]. Jurists must follow this immanent order of the code identifying the system of legal science with it: "law logic is nothing more or less than legislative logic"[5].

An interesting corollary is the assertion of the binding force of legislative definitions to jurists; as a consequence any of them can modify, improve or replace such a definition, even if more sharp and correct, with another one[6].

[3] N. IRTI, *Scuole e figure del diritto civile*, Milano, 1982, p. 35; see: G.P. CHIRONI, *Il diritto civile nella sua ultima evoluzione*, in *Studi e questioni di diritto civile*, I, Milano-Torino-Roma, 1914, p. 32 ss.; ID., *Il metodo nello studio del diritto civile*, ivi, p. 6; ID., *L'opera di E. Pacifici-Mazzoni e lo studio del diritto civile in Italia*, in *Atti della R. Accademia delle scienze di Torino*, XLII, 1907, in *Studi e questioni ...*, cit., p. 77 ss.; ID., *L'opera scientifica di Giorgio Giorgi nel diritto italiano*, ivi, p. 96 ss.; F. FERRARA, *Un secolo di vita del diritto civile (1839-1939)*, in *Riv. dir. comm.*, 1939, p. 249 ss.

On the exegetic methodology see: M.A. CATTANEO, *Illuminismo e legislazione*, Milano, 1966, p. 143 ss.; D. CORRADINI, *Il criterio della buona fede e la scienza del diritto privato*, Milano, 1970, pp. 93-95; ID., *Garantismo e statualisrno*, Milano, 1971, p. 41 ss.; PANUCCIO, *Concetti e principi nella scienza del diritto*, Padova, 1969, p. 10 ss.; TARELLO, *La scuola dell'esegesi e la sua diffusione in Italia*, in *Scritti per il XL della morte di P.E. Bensa*, Milano, 1969, p. 239 ss.: ID., *Scuola dell'esegesi*, in *Noviss. dig. it.*, XVI, Torino, 1969, pp. 821-822.

[4] F. COGLIOLO, *Saggi sopra l'evoluzione del diritto privato*, Torino, 1885, p. 87; ID., *Scritti vari di diritto privato*, Milano, 1940.

[5] N. IRTI, *Scuole e figure ...*, cit., p. 35.

[6] N. IRTI, *Scuole e figure ...*, cit., p. 35.

In Italy, as we have said, the methodology of exegesis was carefully followed between 1865 and 1881. The most interesting features of the "Italian branch" of the school can be summarised as:

I) the absolute closeness to the legislative text and to French originals and authors;
II) the great number of judicial authorities referred to;
III) the strictness to the internal order and structure (or topography) of the code;
IV) collecting single norms in a wider group going up in an analytical way to general concepts that may deal with cases not yet filling in gaps left by statutory provisions and that may be extended to other, different branches of legal knowledge[7].

In 1873 a first reaction against the exegesists methodology took place. F. Filomusi Guelfi in his *Enciclopedia Giuridica* – a tipical exegesetic work – wrote: "if law is a living organism, Science must thoughtfully reproduce it. The highest reproduction of this organism is the system [...]; scientifically reconstruing all rules and relationships is the aim of systematic research on law. The prevalent methodology regarding the system is the dogmatic construction [...] (while) in Italy the old method showed by commentaries is (still) prevalent, while the code order and structure are followed in institutional works. Nevertheless there are some Authors who, explaining in their work the law actually in force, are now turning to the system; Science is setting its own hopes on the fact that this kind of analysis too, will be accepted in Italy by as many learned jurists as in Germany"[8].

[7] N. IRTI, *Scuole e figure ...*, cit., p. 35; see: E. GIANTURCO, *Gli studi del diritto civile e la questione del metodo in Italia - Considerazioni*, in *Filangieri*, 1881, reprinted as *Opere giuridiche*, I, Roma, 1947, p. 5 ss.

[8] F. FILOMUSI-GUELFI, *Enciclopedia giuridica ad uso di lezioni*, Napoli, 1875, p. 35; 1917, p. 120.

Nevertheless, according to Filomusi's ideas, law was based upon the absolute, universal and substantial general concepts and organic connections which setting out positive law: "once drawn up as a superior doctrine they are superimposed to the material historical elements" [9]. The positive study of law rests upon philosophy which supplies universal and everlasting categories to the jurist.

Accordingly, in reconstruing the system, speculation prevails on the historical element.

In 1881 E. Gianturco, E. Cimbali, G. Brini and others strongly reacted against the method of exegesis.

According to Gianturco, Italian legal authors, having secluded themselves from the international scientific community, should refuse and avoid any servile imitation of French models. A way that should be followed only by a reform of methodology in order to replace the deadening and dull exegesis with the bold, daring, free construction of the legal system.

Thanks to the reception of foreign legal studies, especially German ones, "the great superiority of systematic methodology as research instrument and means of exposition or explanation of the law" [10] will be asserted. But it will be the need for a new relationship now aimed at the specification of a normative system which will go very far from the letter of the law, through explanation, connection, discovery of affinities between rules and formulation of more and more general theories.

The described evolution of Italian legal thought was accomplished in 1884 when Chironi could assert the absolute necessity of following "the process of critical inquiry and dogmatic exposition which renewed the old studies on Roman law, by searching for civil law in the civil code; by collecting principles according to the different institutes they relate to; by emphasizing and fixing the concepts around which you should construe a general theory of law" [11].

As a consequence of the assertion that "reducing law to a system is a pure work of logic" [12] – even if its dogmatic reconstruction does not rule out of consideration an initial exegesis of positive rules as rules extending themselves in a stated space and for a stated time – Italian legal authors, especially and once again those in the Universities, dropped commentaries turning to specialized monographs, treaties and institutional handbooks.

Following in the footsteps of Emanuele Gianturco and his *Sistema di diritto civile Italiano* of 1884, Coviello, Ferrara, Messina, De Ruggiero, Polacco, Pacchioni, tried to construe an original Italian legal theory rivisiting and improving the German conceptualization as Fadda and Bensa in 1902 with their notes on the Italian translation of Windscheid's *Lehrbuch des Pandektenrechts*, while G. Chiovenda, P. Calamandrei and E. Redenti "stimulated Italian procedural scholars toward a research for the historical origins of procedural

[9] N. Irti, *Scuole e figure del diritto civile*, cit., p. 44; but see: F. Filomusi-Guelfi, *Enciclopedia giuridica ...*, cit., pp. 132-133; Id., *Filosofia del diritto ad uso di lezioni*, 1887, in *Lezioni e saggi di filosofia del diritto*, (Del Vecchio G. ed.), Milano, 1949, pp. 12-16; Id., *Del concetto della enciclopedia del diritto*, 1876, now in *Lezioni e saggi ...*, cit., pp. 155-180; Id., *La codificazione civile e le idee moderne che ad essa si riferiscono*, 1886, now in *Lezioni e saggi ...*, cit., p. 206.

[10] E. Gianturco, *Gli studi di diritto civile ...*, cit., p. 10; Id., *Sistema di diritto civile italiano*, 1884, now in *Opere giuridiche*, II, Roma, 1947, p. 3 ss.; E. Cimbali, *Lo studio del diritto civile negli stati odierni*, Prtolusione, Roma, 1881; Id., *La nuova fase del diritto civile nei rapporti economici e sociali*, Torino, 1895, p. 7; G. Brini, *Saggio d'istituzioni del diritto civile italiano Introduzione e programma*, Bologna, 1881; Id., *L'obbligazione nel diritto romano*, Bologna, 1905.

[11] G.P. Chironi, *Il metodo ...*, cit., p. 9.

[12] F. Cogliolo, *Saggi ...*, cit., p. 89. See: B. Brugi, *Giurisprudenza e codici*, in *Cinquant'anni di storia italiana*, Milano, 1911, Vol. II, pp. 1-42; A. Rocco, *La scienza del diritto privato in Italia negli ultimi cinquant'anni*, in *Riv. dir. comm.*, 1911, I, p. 288; F. Carnelutti, *Scuola italiana del diritto*, in *Discorsi intorno al diritto*, I, Padova, 1937, p. 110; Id., *Profilo del pensiero giuridico italiano*, in *Discorsi ...*, cit., II, Padova, 1953, p. 163; E. Allorio, *Scienza giuridica europea*, 1952, now in *Problemi di diritto*, III, Milano, 1957, p. 59.

institutions and the rediscovery of the Roman, Italian and Germanic traditions behind exsisting rules" [13].

In 1921 F. Ferrara in his *Trattato di diritto civile italiano* outlined the fundamental rules of systematic methodology asserting that a real "juridical education" could be joined only by becoming aware of the intimate unity of the law: this is an organism ruled by superior logical categories, susceptible of "an infinite series of concrete

[13] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System - An Introduction*, cit., p. 50, and note 129.

See: P. CALAMANDREI, *Studi sul processo civile: Teoria generale e metodo - Questioni di dottrina e di giurisprudenza - Legislazione comparata (1938~1943)*, Padova, 1947; ID., *Istituzioni di diritto processuale civile secondo il nuovo codice*, Padova. 1944; ID., *Studi sul processo civile: Dottrina - Ricordi di giuristi*, Padova, 1957; N. COVIELLO, *Del caso fortuito. Estinzione dalle obbligazioni*, Lanciano, 1895; ID., *La successione nei debiti a titolo particolare*, Bologna, 1896; ID., *Della trascrizione*, in *Il diritto civile italiano*, (P. FIORE and G. BRUGI ed.), Torino, 1914-1915; ID., *Corso completo del diritto delle successioni*, Napoli, 1914-1915; ID., *Manuale di diritto civile italiano*, Milano, 1915; G. CHIOVENDA, *Principi di diritto processuale*, Napoli, 1923; ID., *Saggi di diritto processuale*, Roma, 1930-31; R. DE RUGGIERO, *Introduzione alle scienze giuridiche e istituzioni di diritto civile*, Napoli, 1911; ID., *Istituzioni di diritto civile. Vol. I, Introduzione e parte generale. Diritto delle persone. Diritti reali e possesso*, Napoli, 1921, Vol. II, *Diritti di obbligazione. Diritti di famiglia. Diritto ereditario*, Napoli, 1923; ID., *I dogmi del diritto privato e la loro revisione*, in *Arch. giur.*, 1927. pp. 133-153; ID., *Istituzioni di diritto privato*, (F. MAROI ed.), Milano, 1937; C. FADDA, E. BENSA, *Note a Windscheid, Diritto delle pandette*, I, 1, Torino, 1902; G. MESSINA, *La promessa di ricompensa al pubblico nel diritto privato*, Agrigento, 1899; ID., *Scritti giuridici*, Vol. I, *Negozi fiduciari*, Vol. II, *Contributo alla dottrina della confessione*, Vol. III, *Scritti di diritto del lavoro*, Voll. IV, V, *Scritti giuridici*, Milano, 1948; G. PACCHIONI, *Delle leggi in generale*, Torino, 1933; ID., *Il contratto a favore di terzi*, Milano; ID., *Della gestione degli affari altrui*, Padova, 1935; ID., *Diritto civile italiano*, voll. 5, Padova, 1937-1941; V. POLACCO, *Della divisione operata da ascendente fra discendenti*, Verona-Padova, 1884; ID., *Della dazione in pagamento*, Padova-Verona, 1888; ID., *Le obbligazioni nel diritto civile italiano*, Padova-Verona, 1898; ID., *La scuola di diritto civile nell'ora presente*, in *Riv. dir. civ.*, 1919; ID., *Opere minori*, Modena, 1928-1929; ID., *Delle successioni*, Napoli, 1937. E. REDENTI, *Dei contratti nelle pratica commerciale: dei contratti in generele*, Padova, 1933; ID., *Diritto processuale civile*, voll. 3, Milano, 1957; ID., *Legittimità delle leggi e Corte Costituzionale*, Milano, 1957; ID., *Il giudizio civile con pluralità di parti*, Milano, 1960; ID., *Breve storia semantica di "causa in giudizio"*, Milano, 1961; ID., *Scritti e discorsi giuridici di un mezzo secolo*, Milano, 1962.

applications" [14], i.e. the "means of resolution" or general concepts synthetically implying the standard for analysing, regulating and settling every material case [15].

As a consequence the general theory of law becomes of the greatest importance becoming common knowledge for all jurists. The starting point of Ferrara's thesis is that the object of the law, as of other sciences, may be expressed by concepts and that the same concepts may be composed in a systematic unity [16].

To reach this result the jurist must use his own ability in juridical analysis, logical concentration and construction of norms in order to make a synthesis of the whole positive material.

As pointed out by Irti, "Ferrara's view of a juridical science as a conceptual system simplifying and ordering all different legal rules, selies upon positivism and historism of law" [17]: any juristic construction of the law system "must respect the contents of legal rules" because any change of a juridical principle "is faced with a change of positive material, each principle being, in every law system, linked to a certain historical era" [18].

Juridical concepts are not invariable but precarious and changeable since they are simple means of making easier the understanding of an historical system. The general theory of law is the theory of a system in time and space limited, neverthless neither firm nor absolute but in continuous, steady evolution.

Another group of legal scholars leaded by M. Allara, S. Pugliatti and their disciples (or *neosistematici*) asserted, from 1925 onwards, the need for a preventive checking of conceptual elaborations re-

[14] F. FERRARA, *Trattato di diritto civile italiano*, Roma, 1921, Pref., VI. See: F. FERRARA, *Le persone giuridiche*, in *Trattato di diritto civile italiano*, (F. VASSALLI ed.), Torino, 1938, *Scritti giuridici*, (voll. 3), Milano, 1954.

[15] F. FERRARA, *Trattato ...*, cit., Pref. V and pp. 244-245.

[16] F. FERRARA, *Trattato ...*, cit., p. 240.

[17] N. IRTI, *Scuole e figure ...*, cit., p. 62.

[18] F. FERRARA, *Trattato ...*, cit., p. 242.

fusing to use the system "as jurists' meeting point" [19], while, in 1929, Nicola Coviello in his *Manuale di diritto civile italiano* wrote that "the legal framing beeing nothing but the research and the determination of fundamental principles and concepts that are the basis of statutory rules, it is the indispensable instrument in order to elaborate a legal science; there is no science without conceptual systematization or logical building ..." [20].

In the same year C. Vivante and M. Ghiron published two large studies on commercial and industrial law "making the first scientific organization of the matters related to" [21].

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[19] R. SACCO, *Introduzione al diritto comparato*, cit., p. 186. See, also: M. ALLARA, *La teoria del prelegato nel diritto civile italiano*, Cortona, 1926; ID., *La prestazione in luogo di adempimento*, Palermo, 1927; ID., *Il testamento*, Padova, 1936; ID., *Il primo libro del nuovo codice civile con particolare riguardo al matrimonio*, Torino, 1940; ID., *Corso di diritto civile con particolare riguardo al matrimonio*, Torino, 1941; ID., *La successione legittima*, Torino, 1944-45; ID., *Le fattispecie estintive del rapporto obbligatorio*, Torino, 1948-52; ID., *La revoca delle disposizioni testamentarie*, Torino, 1950-51; ID., *La successione familiare suppletiva*, Torino, 1954; ID., *La teoria generale del contratto*, Torino, 1955; ID., *Principi di diritto testamentario*, Torino, 1957; ID., *Le nozioni fondamentali del diritto civile*, Torino, 1958; ID., *Corso di diritto civile. La vendita*, Torino, 1963; ID., *L'elemento volitivo nel negozio testamentario*, Torino, 1964; ID., *Pagine di teoria delle vicende del rapporto giuridico*, Milano, 1983; ID., *Dei beni*, Milano, 1984; S. PUGLIATTI, *La pubblicità nel diritto privato*, Messina, 1944; ID., *Diritto civile (Metodo, teoria, pratica)*, Milano, 1951; ID., *La proprietà nel nuovo diritto*, Milano, 1954; ID., *La trascrizione*, in *Trattato di diritto civile e commerciale*, (A. CICU, F. MESSINEO, editors), Vol. XIV, t. 1, Milano, 1957; ID., *Conoscenza e diritto*, Milano, 1961; ID., *Beni e cose in senso giuridico*, Milano, 1962; ID., *Il trasferimento delle situazioni soggettive*, Milano, 1964; ID., *Studi sulla rappresentanza*, Milano, 1965; ID., *Beni immobili e beni mobili*, Milano, 1967; ID., *Responsabilità civile*, Milano, 1968; ID., *Esecuzione forzata e diritto sostanziale*, Napoli, 1978; ID., *Grammatica e diritto*, Milano, 1978.

[20] N. COVIELLO, *Manuale di diritto civile italiano*, Milano, 1929, p. 91.

[21] The quoted passage is of FERRARA Fr. Jr., *Gli imprenditori e le società*, Milano, 1975, p. 12, n. 11.

See also: C. VIVANTE, *Del contratto di assicurazione*, in *Il codice di commercio commentato* (L. BOLAFFIO, C. VIVANTE eds.), Vol. VII, Torino, 1922; ID., *Istituzioni di diritto commerciale*, Milano, 1925; ID., *Trattato di diritto commerciale*, Milano, 1929; M. GHIRON, *Corso di diritto industriale*, Milano, 1929; ID., *L'imprenditore e l'azienda*, Torino; ID., *La concorrenza e i consorzi*, in *Trattato di diritto civile* (F. VASSALLI ed.), Vol. X, tomo I, fasc. II, Torino, 1949.

According to G. Ferri [22] Vivante's idea of the law was based on the natural, collective and spontaneous development of legal rules: "the law is the living and not the codified one. Because [...] the essential and innate elements of an institute don't have any need of an express, conventional or legal declaration in order to be recognized and applied". So, while it is the jurist's duty to extrapolate legal rules and principles according to the socio-economical needs and practical exigencies, it is the scientist's duty to organize and systematize those rules and principles.

This was a conception of the law opposite to A. Rocco's one, according to whom [23] "law is order, it is a principle of evaluation, it is an ideal discipline imposed on factual reality [...] in the State the only relevant legal order is the order of the State itself: other kinds of rules are merely functional to it".

In such a conception of the law there is not any room for an internal distinction between commercial and civil law, or private and public law. It must be underlined that this interesting unitary conception will be followed in the 1942's civil code joining commercial subjects too.

In 1940 Francesco Carnelutti wrote his *Teoria generale del diritto* and in the 1943 Emilio Betti his *Teoria generale del negozio giuridico*: the first was the expression of "the fundamental unity of different branches of the legal science" while the second "by moving from the narrowness of dogmatism to the discovery of private autonomy" outlined "the topics of good-faith, construction, and socio-economic interests" [24].

Other very interesting old works on commercial law were: U. NAVARRINI, *Trattato teorico pratico di diritto commerciale*, Torino, 1920; L. MOSSA, *Diritto commerciale*, Milano, 1937; ID., *Trattato del nuovo diritto commerciale*, Milano, 1941.

[22] G. FERRI, *Esperienza scientifica diritto commerciale*, in *Cinquanta anni di esperienza giuridica in Italia*, Milano, 1981, p. 80.

[23] G. FERRI, *Esperienza scientifica diritto commerciale*, in *Cinquanta anni ...*, cit., p. 80.
See too: A. ROCCA, *Principi di diritto commerciale*, Torino, 1928; ID., *Principi di diritto commerciale ed altri scritti giuridici*, Roma, 1933.

[24] N. IRTI, *Scuole e figure del diritto civile*, Milano, 1982, p. 121.

In his works F. Carnelutti moves from a starting point opposite to Ferrara's one. Carnelutti assumes the identity of natural and juridical law and, As a consequence, the existence of an eternal, intrinsic order; in choosing a methodology and investigating the rules that allow us to construe the legal concepts behind each legislative command, Carnelutti maintains that "the sharpness and goodness of the legal concept is tested by its ability to form, togeter with other concepts, a symmetrical complex" [25]. The jurist, like a botanist, may only find out (but not create) what already is present in nature, he may only find out the juridical concepts that are still behind the rules.

Two are the instruments of the general theory: the abstraction and the comparative method. The first, starting from the analysis of positive rules, proceeding step by step "by depurating and turning the phenomena into a more simple form" [26], is aimed at the extrapolation of wider and wider theories.

The second is based on comparison between two or more different institutes in order to apply "juridical concepts beyond their place of origin" [27].

Following this way legal science became positive and mystic: positive because as arose from the analythic field of exegesis.-. mystic because as researched the supreme and immanent order of the law system, drawing up universally applicable concepts.

The studies of Italian authors who adopted the dogmatic meyhodology resulted in setting up a strong pattern of systematically interacting concepts, common to all branches of law: this was the case of «act in law» or «juristic act» (*negozio giuridico*) "which from its original private form spread to administrative law and,

[25] F. Carnelutti, *Metodologia del diritto*, Padova, 1939, p. 95. See: G. Fassò, *Storia della filosofia del diritto*, vol. III: *Ottocento e novecento*, Bologna, 1970, p. 389.

[26] T. Perassi, *Introduzione alle scienze giuridiche*, Padova, 1953, pp. 25-26.

[27] See: F. Carnelutti, *Scuola italiana del diritto*, cit., p. 126; Id., *Metodologia del diritto*, cit., p. 75 ss.

then, to civil procedure, becoming an universally applicable technical instrument [28].

In spite of the outlined influence of German methodology, the new Italian Civil Code of 1942 does not include any "general part", not really because "the Italian legislature, in accordance with Latin tradition, preferred not to incorporate abstract principles into the code" [29] – we can find a certain degree of abstractness in a lot of the legal rules –, but because the French model was more useful and suitable according to the historical evolution of the Italian system and the natural evolution of the new social and economic needs.

Furthermore in the 1942 Italian Civil Code (art. 1 and art. 12 of the "preliminary provisions") we can find the expression of the absolute power and the supremacy of the legislator, which was (and is) a peculiarity of the French Code, while the "philosophy of codification always remained that of natural law" [30] and rationalism, showed by French Humanism and Enlightenment.

Most drafters of the 1942 Italian Civil Code were legal scholars who used their classical "legal education and experience [...] preserving the contribution of tradition, utilizing doctrinal constructions and often transflowing the most important judicial decisions in some articles of the code" [31], while in other parts "departures were made from the 1865 Code in order to right inadequacies, weaknesses and hiatuses, that time had brought to light. In so doing, the Italian compilers had the advantage of the post-Napoleonic codifications, particularly the German Civil Code and the Swiss Code. The new Code has not stuck rigidly to the Napoleonic formulations, so that, in some degree, it represents a blend between the French and German families of Civil law codes, interlaced with certain native trends" [32].

[28] N. Irti, *Scuole e figure ...*, cit., p. 117.

[29] G.L. Certoma, *The Italian Legal System*, cit., p. 16.

[30] G.L. Certoma, *The Italian Legal System*, cit., p. 11.

[31] R. Nicolò, *Codice civile*, in *Enciclopedia del diritto*, Vol. VII, p. 240 ss.

[32] M.A. Millner, *Note on Italian Law*, in *Int. And Comp. L. Q.*, p. 52.

As a consequence the new Italian Code was a blend of the strong doctrinal trend toward systemization, the respect of historical tradition and the pragmatic dogma of the supremacy of State legislation, with its corollary that the Code itself, because it represents the legal order is complete, self-sufficient and contains no lacunae.

If the French and German codifications "reflect contrasting attitudes towards the nature and functions of codification, constituting the extremes of the European codification movement" the Italian Code of 1942, by combining "legal tradition and many of the historically derived concepts and institutions of the *jus commune* and the quite different French and German contributions of the nineteenth century [...] is more than any other, a kind of paradigm of the civil law systems" [33].

[33] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System - An Introduction*, cit., p. 52.

VII

The New Italian codification of 1942

It is misleading to think of the Italian Civil Code of 1942 as a "fascist" one or politically linked to a particular ideology other than the "liberal" one. Notwithstanding "the most active elements of the (fascist) party (were) desirous of the solemn affirmation of so-called «general principles of law», which could be nothing but the consecration of more or less defined" fascist ideology [1], it should be emphasized that the new code fundamentally had its origin in the work of the doctrine and the judges who, thanks to their "enlightened technicism", "prevented political ideology ... from prevailing in the reform [...] by neutralizing (all the) ill-conceived and obviously contradictory attempts that would have resulted only in the statement of abstract demagogic formulas, good for a political manifesto but not for a serious work of legislation" [2].

According to the liberal ideology, Italian legal authors kept clear of political, sociological and economical contamination, protecting the "purity" of the legal method and the freedom of thought. While "formally subservient to the regime", authors such as R. De Ruggiero, G. Messina, L. Barassi, F. Vassalli, A. Cicu, G. Osti and others wrote their works "in conformity with old criteria, defining concepts, settling institutes, going from the particular to the general theory of law" [3].

[1] F. VASSALLI, *Motivi e caratteri della codificazione civile*, in *Studi Giuridici*, II, Milano, 1960, p. 613, n. 2.

[2] R. NICOLÒ, *Codice civile*, in *Enciclopedia del diritto*, Vol. VII, p. 246.

[3] N. IRTI, *Scuole e figure ...*, cit., p. 120.

Furthermore, it must be kept in mind that the work for the new codification began in 1917 when a commission leaded by Vittorio Scialoja was established, which in 1924 and again in 1937 was followed by a Royal Commission on the Reform of the Codes, which accordingly to the statute of 30 December 1923 delegated the Government to amend the 1865 Civil Code and to enact the new Codes of Civil Procedure, Commerce and Navigation.

The Royal Commission planning the project of the first three books of the Civil Code (Persons and Family, Property and Real Rights, Succession) and the project of Commercial Code, "outlined the pattern and the skeleton of the 1942 code [...] following in tradition's steps" [4], probably because its components were appointed by recognized legal scholars.

Successive developments, first made by a Ministerial Commission acting on the advice of university professors, judges and lawyers, and secondly by a Committee acting on the advice of an inter-Parliamentary Commission, improved the project not only "under the technical but also under the political point of view, didn't modify its fundamental lines and patterns" [5] so that rules relating to persons, family and succession drafted by the Reform Commission "were enacted, without substantial changes, as books one and two of the new code" [6].

In other words, fascist ideology had very little influence on the new Civil Code, which reflected "positions [...] that had emerged before or independently of the fascist political doctrines" [7] thanks to the "resistance of the legal sciences to the intrusion of non-legal or non-scientific elements, and thanks to their insistence on the preservation of legal values" [8], following the traditional path and utilizing doctrinal constructions with "a few, frequently simply verbal, concession to the ideology of the moment" [9].

A result that was obtained was "the use of more careful definitions and schemas, with a logic, more organic and close, pattern". The new code does not break the continuity with the past but, on the contrary, instils new life into old works of civil lawyers and authors, "assuming them as an essential workroom of concepts and legislative technique" [10].

As a consequence, after the fall of fascism, the *Charter of Labour* of 1927 – used as a kind of prologue to the code, as "general principles of the legal order of the state" guiding the interpretation and application of its provisions and representing "the real political, economical and social constitution of Fascism, while depriving the provisions of the *Statuto Albertino* (formally in force until 1 January 1948) "of all its practical content" [11] – and the references to the

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See: L. BARASSI, *Teoria della ratifica del contratto annullabile*, Milano, 1898; ID., *Istituzioni di diritto privato*, Milano, 1933; ID., *La famiglia legittima nel nuovo codice civile*, Milano, 1940; ID., *I diritti reali nel nuovo codice civile*, Milano, 1943; ID., *I diritti reali limitati, in particolare l'usufrutto e la servitù*, Milano, 1947; ID., *Proprietà e comproprietà*, Milano, 1951; A. CICU, *L'offerta al pubblico*, Sassari, 1902; ID., *Lo spirito del diritto famigliare*, Macerata, 1914; ID., *Il diritto di famiglia*, Roma, 1915; ID., *Il testamento*, Bologna, 1932; ID., *La filiazione*, in *Trattato di diritto civile italiano*, (F. VASSALLI ed.), Torino, 1938; ID., *Successione legittima e dei legittimari*, Milano, 1943; ID., *Successione per causa di morte*, in *Trattato di diritto civile e commerciale*, (A. CICU, F. MESSINEO eds.), Milano, 1961; G. OSTI, *Contratto*, in *Noviss. digesto it.*, Vol. IV; ID., *Scritti giuridici*, Milano, 1973; F. VASSALLI, *Lezioni di diritto matrimoniale*, Padova, 1932; ID., *Lineamenti del nuovo diritto delle persone nel nuovo codice civile*, Milano, 1939; ID., *Studi giuridici*, Milano, 1960. Relating to G. MESSINA and R. DE RUGGIERO please see note 80.

[4] R. NICOLÒ, *Codice civile*, cit., p. 244. See also: V. SCIALOJA, *Diritto romano, la proprietà*, Roma, 1908; ID., *Diritto ereditario romano, combcetti fondamentali*, Padova, 1934; ID., *Scritti e discorsi politici*, Roma, 1936; ID., *Studi giuridici*, (voll. 5), Roma, 1936; ID., *Negozi giuridici*, Roma, 1950.

[5] R. NICOLÒ, *Codice Civile*, cit., p. 244.

[6] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 219.

[7] R. NICOLÒ, *Codice Civile*, cit., p. 246.

[8] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 220.

[9] R. NICOLÒ, *Codice Civile*, cit., p. 246.

[10] N. IRTI, *Scuole e figure ...*, cit., p. 121.

[11] P. RESCIGNO, *Manuale del diritto privato italiano*, Napoli, 1973, p. 61.

"corporative norms" (included among the sources of law) or the racial provisions, were abrogated and removed from the code by a simple "stroke of the pen": "these expressions of fascist policy never became organic parts of the code. They were superficial blemishes on it and the surgery that removed them was clean and painless" [12].

Of course the outlined attitude of the doctrine towards legal conservatism and "enlightened technicism", the influential expansion of the role of the State and the reception of the French form and style of codification, while on one side prevented the code from contamination with fascist ideologies and the spreading of such dangerous tendencies, on the other side produced "a certain conservative spirit toward the privatistic legislation that was being elaborated" [13].

Nevertheless it is also true that the 1942 Code is, in some ways, also the result of the influence exerted by German legal thought and particularly by dogmatism and legal positivism: an assumed visible influence on the general provisions on contracts (articles 1321-1469) [14], conceived not so much as a general theory of contracts (there was a similar general theory in both French code and English Law) but as a statutory expression of the general doctrine on the *negozio giuridico* (act in law) [15] at the time of the codification, which was plainly evident in the article 1324, asserting that "the provisions on contracts in general apply, up to the compatible extent, to unilateral *inter vivos* acts having patrimonial content".

In the meantime, the new code showed its attitude towards "the interests of increased national production, more adequate distribution of wealth and greater social justice" [16], reflecting some of the prominent trends in the thought of that time, i.e. recognizing the importance of labour, creating new limits on contractual freedom, promoting the formation of associations of individuals with social and economic activities, and so on.

Thus, on the one hand the new code had no consideration of the "new and different attitude of women in the family [...] and in society" [17] or the problems arising from the natural filiation, or preferred following in the footsteps of tradition with "some anachronistic going back to the past e.g. relating to the *sostituzione fedecommissaria* (articles 692-699) or to *retratto successorio* (article 732)", on the other hand a substantial effort to modify the individualism characterizing the old code of 1865 was made: the interest of the owner was redefined by asserting (article 832) his "right to enjoy and dispose of things fully and exclusively, within *the limits and with observance of the obligations established by the legal order*, while the State was authorized to take property "in the interest of national production" (article 838); the parties no longer had a complete contractual autonomy but only a limited one (to make an

[12] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 221.

In spite of the legislative decree of November 23, 1944 no. 369, "the corporative norms were, however, continued in force. These were, for the most part, officially recognized collective bargaining agreements ... which had, as a result of such recognition, *erga omnes* effect. It was clear that to deprive these agreements of such effect would result in economic chaos, since they were an integral part of the economic structure of Italy. Hence article 1 or the *Provisions on the Law in General*, listing corporative norms as a source of law, was left standing. No new corporative norms could be created, but the great range of those in existence, which provided the economic fabric of the nation, were continued in force". M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 221, n. 89.

[13] R. NICOLÒ, *Codice Civile*, cit., p. 246.

[14] See: M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 223; E. BETTI, *Teoria generale del negozio giuridico*, Torino, 1955; F. GALGANO, *Negozio giuridico*, in *Enciclopedia del diritto*, Vol. XXVII, Milano, 1977.

[15] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 223, n. 96.

[16] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 221.

[17] R. NICOLÒ, *Codice civile*, cit., p. 245.

agreement, to choise the counterpart or contractual terms and statements) within the framework outlined by the law (article 1322) – so, for instance, the parties may arrange a contract that is not one of those specifically enumerated and recognized in the code (usually the so-called "typical contracts"), only when "the contract is directed towards the realization of interests meriting protection by the legal order" –.

Moreover, the new Italian Civil Code of 1942 put into practice the old and often questioned (in Italy and abroad) idea of merging "the discipline of civil matters and the discipline of commercial matters [...] founding, in the meantime, the discipline of every economic activity on the concept of «entrepreneur» – from the subjective point of view – and on the concept of «enterprise» and «business» (*azienda*) – from the objective point of view –, taking into a greater consideration the subordinate labour relationship (master-servant relationship)" [18].

As a consequence, the old Commercial code was repealed in 1942 and its content included in the new Civil Code enacted the same year. The result was a "commercialization" of private law i.e. a tendency to prefer the commercial point of view instead of the civil one in modifying an institution, according to the "increased importance of the economic sector in the life of the nation" [19].

One of the most important consequences was that the enterprise, as relating to the entrepreneur, was placed at the centre of the private law system, side by side with property: "for the first time ... property and enterprise, as parallel categories, set up [...] the main streams of our code, and from this point of view they sharply represent the main aspects of our social organization and economic structure [...]. It is not an ending but a starting point" [20],

[18] R. NICOLÒ, *Codice civile*, cit., p. 246.

[19] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 227; see, also: R. NICOLÒ, *Codice civile*, cit., p. 219.

[20] R. NICOLÒ, *Codice civile*, cit., p. 249.

which is the real reason for the unification of private law and, at the same time, which draws the guidelines for further developments and improvements, the paramount item of the actual relevance of the code [21].

[21] R. NICOLÒ, *Riflessioni sul tema dell'impresa e su talune esigenze di una moderna dottrina del diritto civile*, in *Riv. dir. comm.*, 1956, I, pp. 177-182; A. ASQUINI, *Dal codice di commercio del 1865 al libro del lavoro del codice civile del 1942*, in *Riv. dir. comm.*, 1967, 1, p. 1 ss.; G. CIAN, *Diritto civile e diritto commerciale oltre il sistema dei codici*, in *Riv. dir. civ.*, 1974, I, p. 523 ss.; G.B. FERRI, *Antiformalismo, democrazia. codice civile*, in *Riv. dir. comm.*, 1968, I, p. 347 ss.; P. RESCIGNO, *Per una rilettura del codice civile*, in *Giur. it.*, 1968, IV, p. 209 ss.; S. RODOTÀ, *Ideologie e tecniche della riforma del diritto civile*, in *Riv. dir. comm.*, 1967, I, p. 83 ss.

VIII

Developments after the Second World War

Just after the fall of Fascism and at the end of the Second World War, in Italy there were "learned and qualified men [...] who called loudly, but without adequate serious arguments, for the immediate abrogation of the civil code and a return to the pre-existing legislative system" [1]; L. Mossa, in 1945, wrote that "the spirit of codification, conflicting to freedom, must be destroyed. We cannot maintain in force a code that represents the time of a disaster, when the Nation was dishonoured, with the sole object we don't fade away any of its good and sound institutions" [2].

Eventually, the new code was not repealed, but there was room for a strong reaction against the absoluteness of its dogmatic approach. So, while in 1945 F. Santoro-Passarelli wrote his *Le dottrine generali del diritto civile* – a book that "by collecting and ordering in a clear way the last results reached by the Italian legal scholars, wound up an era of our scientific history" [3] – A.C. Jemolo [4] objected against the general theory by asserting that legal concepts, when expressed in general

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[1] R. Nicolò, *Codice civile*, cit., p. 248.

[2] L. Mossa, *Per il diritto dell'Italia*, in *Riv. Dir. Comm.*, 1945, I, p. 3.

[3] N. Irti, *Scuole e figure ...*, cit., p. 123.

See also: F. Santoro-Passarelli, *Le dottrine generali del diritto civile*, Milano, 1945. See of the same Author: *Rischio e bisogno nella previdenza sociale*, Milano, 1948; *Saggi di diritto civile*, Napoli, 1961; *La disciplina transitoria del rapporto di lavoro*, Roma, 1961; *La transazione*, Napoli, 1963; *Nozioni di diritto del lavoro*, Napoli, 1972; *Libertà e autorità nel diritto civile e altri saggi*, Padova, 1977.

[4] A.C. Jemolo, *Ancora sui concetti giuridici*, in *Riv. dir. comm.*, 1945, I, p. 130; but see of the same Author: *I concetti giuridici*, in *Atti Acc. Scienze di Torino*, 1940, II, p. 246.

terms and derived from a more punctual and real nomenclature, are only a mere tautology, true legal concepts being only legislative ones [5].

According to Jemolo it was misleading to think of the law as an harmonic and perfect system ruled by a logical and formal order, since the legislator has never been obliged to comply with the previous system but has only been concerned with actual practical ends. As a consequence "continuous enactment of statutes claims for a continuous drafting of legal concepts [...] From the historical point of view their importance varies in accordance with times [...] legislative freedom from legal conceptualism is plainly evident not so much in the code as in special legislation" [6]. Thus, it is possible to create legal concepts only on the basis of positive (i.e. "statutory") rules [7], but "taking into account their historical and socio-political background" [8].

This polemic view dates back to 1941, when S. Pugliatti [9], while granting validity to the equation "legal concepts as legislative will" [10], reaffirmed his "own belief in legal science as a systematic one, on the basis of immutable logical principles" [11]. According to Pugliatti there were no absolute legal concepts at all. Yet he set out that:

a) the relativity of legal concepts does not mean their devaluation till "reaching the chaos coming out of the unsystematic plurality of legal positive rules";
b) it is not the duty of a legal scientist to make only the "punctual exegesis of each single and aloof legal rule";

[5] See: A.C. JEMOLO, *Ancora sui concetti giuridici*, cit. p. 140; C. MORTATI, *Istituzioni di diritto pubblico*, Padova, 1969, p. 51, n. 2.

[6] A.C. JEMOLO, *Ancora sui concetti giuridici*, cit., p. 132; ID.: *I concetti giuridici*, cit., p. 246 ss.

[7] A.C. JEMOLO, *Ancora sui concetti giuridici*, cit., p. 139.

[8] A.C. JEMOLO, *Ancora sui concetti giuridici*, cit., p. 147.

[9] S. PUGLIATTI, *La logica ed i concetti giuridici*, in *Riv. Dir. comm.*, 1945, I, pp. 197-214.

[10] See: G. CALOGERO, *La polemica sui concetti giuridici*, in *Riv. dir. comm.*, 1945, I, p. 115.

[11] S. PUGLIATTI, *La logica ed i concetti giuridici*, cit., p. 212.

c) both the jurist and the law-maker must not give up "the technical instruments moulded, in the course of centuries, by several generations of jurists" [12].

From another point of view, P. Calamandrei and G. Calogero asserted that the jurist is in a middle course between "historical critic of law" and the "a pure political law-maker", gathering "all material from the whole of the law actually in force, even if historically determined, helping judges and the Administration to construe legal rules coherently" for their real application, offering both a systematically correct interpretation [13]. Furthermore Calogero asserted the duty, imposed upon each lawyer or jurist, to modify a certain legal order if his moral conception asks him to do so [14].

W. Cesarini Sforza objected that "when a law system – or a legal concepts system – is fading away, in the meantime, another system grow up, even if using pieces of the first [...] The irrationality of the second system, from the point of view of the first one, really is only a different kind or degree of rationality" [15], while Gino Gorla [16] was against the abstraction of general concepts of law: he did not believe that legal concepts are the only means to understand and explain in a full way the positive rules of law.

The fundamental tenet of Gorla is the assertion that legal concepts, not yet existing *in rerum natura*, are only a pale reflection of historical facts. As a consequence, it is misleading to think of pos-

[12] S. PUGLIATTI, *La logica ed i concetti giuridici*, cit., pp. 204-205.

[13] See: G. CALOGERO, *La polemica sui concetti giuridici*, cit., p. 119; P. CALAMANDREI, *Il nuovo processo civile e la scienza giuridica*, in *Riv. dir. proc.*, 1941, I, pp. 53 ss., especially at p. 68 ss.; ID., *La certezza del diritto e la responsabilità della dottrina*, in *Riv. dir. comm.*, 1942, I, p. 341 ss.

[14] G. CALOGERO, *La polemica sui concetti giuridici*, cit., p. 129.

[15] W. CESARINI-SFORZA, *Il destino dei concetti giuridici*, in *Bollettino dell'Istituto di filosofia del diritto della R. Università di Roma*, 1940, p. 169 s. (ascribed to Cesarini-Sforza by A.C. Jemolo in An cora sui concetti giuridici, cit., p, 148); See again W. CESARINI-SFORZA, *Fatto e diritto*, in *Bollettino dell'Istituto di filosofia del diritto*, 1942, pp. 105-108.

[16] G. GORLA, *L'interpretazione del diritto*, Milano, 1941.

itive law, of each statute as yielded to a supreme logic and rational law; even if it is possible to study the law as a natural science looking for empirical concepts: but the legal concepts, even if historically determined, are not the historical reality.

Accordingly, those concepts are only formally variable schemes or normative contents. A scientific concept is not like a legislative one, the first being based "upon the reality or each different rules or law and representing their standard or model; the second being produced by a concrete normative activity which determines its peculiar content.

According to Gorla, construing and applying the law is a quite different activity from the scientific study of law. The one who has to construe or apply the law (*interprete*) is looking for new developments or a legislative concept, while the scientist is framing (or is trying to frame) a certain legislative concept or rule in a model or standard abstractly conceived: he is the one who has to systematise the law, to extract and expound principles [17].

Gorla, in the '50, was going to demonstrate, in his work on *Contratto* [18] that "a series of theorical problems, questioned for years, have no practical relevance" [19], asserting the "need for concreteness and effectiveness, i.e. the need for a control over that a methodology rich of abstraction, conceptual constructions and generalizations, which masks a certain gius-naturalistic inheritance" [20].

[17] G. GORLA, *L'interpretazione del diritto*, cit., pp. 39-42.

[18] G. GORLA, *Il contratto*, Milano, 1954.

[19] R. NICOLÒ, *Esperienza scientifica, diritto civile*, in *Cinquanta anni di esperienza giuridica in Italia*, Milano, 1981, p. 69.

[20] G. GORLA, *Il contratto*, cit., p. V.

Gorla, Cappelletti and Sacco were the leaders and the founders of modern school of Italian comparatists. Gorla's works on comparative law are listed by L. MOCCIA, *Bibliografia degli scritti storico-comparativi di Gino Gorla*, in G. GORLA, *Diritto comparato e diritto comune europeo*, Milano, 1981.

See: G. GORLA, *Esperienza scientifica, diritto comparato*, in *Cinquanta anni di esperienza giuridica in Italia*, cit., p. 467 551.

Pugliese [21], distinguishing between legislative (empirical) and scientific concepts, objected the law was complied with rationality, even if each positive rule is aimed at the resolution of conflicts and at the realization of a certain model of society. The "juridical character" of all positive laws is independent of the peculiarity of their origins; the scientist's duty is the individuation and evaluation of a constant juridical character in each positive legal system, legal concept being "a true expression of reality" [22].

This "polemic on legal concepts", as pointed out by Irti and Nicolò [23], was not aimed at a mere replacement of traditional methodology with a new or different one, or at higher regard of social science, but at a specification of the empirical and peculiar nature of law analysis, by fixing its limits and real usefulness.

Legal authors, in those years, outlined the empirical and essentially historical nature of the law, but their historical methodology was not dealing with idealism any more: it became material and concrete, "singling out its subject not as a rational idea anymore, but as an economical and social Man" [24].

In this background, in 1946 G. Stolfi published *Teoria del negozio giuridico* – perhaps the last work plainly based on liberalism – the protagonist of which was man and his freedom [25]. Stolfi, reacting against the State intervention, asserted that "the act in law is the realization of individual freedom [...] the man commands, while

[21] G. PUGLIESE, *Diritto romano e scienza del diritto*, in *Annali R. Università di Macerata*, XV, Milano, 1941.

[22] See: A.C. JEMOLO, *Ancora sui concetti giuridici*, cit., p. 152.

[23] N. IRTI, *Scuole e figure ...*, cit., p. 122; R. NICOLÒ, *Esperienza ...*, cit., p. 66.

[24] R. NICOLÒ, *Esperienza ...*, cit., pp. 65-66.

[25] G. STOLFI, *Teoria del negozio giuridico*, Padova, 1946.

See also: N. IRTI, *Scuole e figure ...*, cit., p. 93 ss.; P. BARCELLONA, *Diritto privato e processo economico*, Napoli, 1973, p. 248 ss.

Some more works by Stolfi are: G. STOLFI: *Studi di diritto privato*, Milano, 1980; *Note di giurisprudenza e saggi di vario diritto*, Milano, 1981.

the law picks up his command when it is complying with all legal requisites" [26].

Stolfi, following tradition, analysed positive law rejecting all those data which appeared to be narrowly drawn by statual supremacy over the individual.

E. Betti [27] opposed that individual freedom does not include an absolute economic liberty: "the autonomy of private persons is not psychological or individual in its occurrence [...] but it is a social event in which the private person's will is a very important occurrence but only a occurrence" [28]. According to Betti's thesis, "the supremacy of the individual is not a positive ideal of a new order in private law, not a useful test of construction of a civil code addressed to modern society [...] The only undoubted datum arising out of the late development of this society, not only in Italy but in all continental Europe too, is the growing achievement of social solidarity needs by fixing many limits up to individual freedom" [29].

This polemic (which will dominate the doctrinal debate in Italy for a period of about twenty years) was going to lead to the assertion of the need for a statual intervention to limit private autonomy in reaching social ends [30], stressing the relevance of new constitutional provisions (especially the ones relating to ownership and labour) and giving rise to the increase of special legislation.

In the meantime, the work of legal scholars was continued in all Italian Universities – by, for instance M. Allata, who planned a system built on the original conception of "legal relation" [31]; or by A. Asquini and T. Ascarelli, who asserted that the law order is not unnatural nor is the law itself exhausted by positive rules as collective autonomy was showing up: "side by side the code there is a living law, a whole complex of rules conceived and planned by people's conscience" [32]; or by M. Rotondi and E. Redenti, asserting the "commercialization" of civil law and again Asquini, speaking of the "historical change of commercial law", or by F. Messineo, who "used the complementary character of civil and commercial law" in his studies [33] – on January 1st 1948 the new Italian Constitution, the "greatest legislative accomplishment after the war" [34], came into force.

[26] G. Stolfi, *Teoria del negozio giuridico*, cit., p. 11.

[27] E. Betti, *Il negozio giuridico in una pubblicazione recente*, in *Giur. It.*, 1947, IV, p. 137.

[28] See: P. Barcellona, *Diritto privato e processo economico*, cit., p. 252.

[29] E. Betti, *Il negozio giuridico ...*, cit., p. 144.

[30] See *infra* p. 69 ss. S. Rodotà, *Le fonti di integrazione del contratto*, Milano, 1970.

[31] See: N. Irti, *Scuole e figure ...*, cit., p. 123.

[32] G. Ferri, *Esperienza scientifica, diritto commerciale*, in *Cinquanta anni di esperienza giuridica in Italia*, Milano, 1981, p. 5 off-print.

See also: A. Asquini, *Scritti giuridici*, Padova, 1936, 1939, 1961; *L'unità del diritto commerciale ed i moderni orientamenti corporativi*, in *Studi di diritto commerciale in onore di C. Vivante*, Roma, 1931; *Sulle nuove posizioni del diritto commerciale*, in *Riv. dir. comm.*, 1942, p. 62 ss.; *Dal codice di commercio del 1882 al libro del lavoro del 1942*, in *Riv. dir. comm.*, 1968, p. 155.

See: A. Ascarelli, *Appunti di diritto commerciale*, Roma, 1933; *Studi di diritto comparato e in tema di interpretazione*, Milano, 1952; *Saggi di diritto commerciale*, Milano, 1955; *Problemi giuridici*, Milano, 1959; *Corso di diritto commerciale*, Milano, 1962.

[33] P. Rescigno, *La codificazione del diritto privato italiano*, in *Trattato di diritto privato*, Vol. I, *Premesse e disposizioni preliminari*, Torino, 1982, p. 14.

See of M. Rotondi: *La riforma della legislazione commerciale*, Milano, 1941; and: *Trattato di diritto dell'industria*, Padova, 1931; *Studi di diritto industriale*, Padova, 1957; *Studi di diritto commerciale e di diritto generale delle obbligazioni*, Padova, 1961; *Istituzioni di diritto privato*, Milano, 1962; *Profili di giuristi e saggi critici di legislazione e di dottrina*, Padova, 1964; *Inchieste di diritto comparato*, Padova 1970-76; *Studi di diritto comparato e teoria generale*, Padova, 1972.

See F. Messineo: *Teoria dell'errore ostativo*, Roma, 1915; *La natura giuridica della comunione coniugale dei beni*, Roma, 1920; *Contributo alla dottrina dell'esecuzione testamentaria*, Padova, 1931; *Operazioni di borsa e di banca*, Padova, 1931, Milano, 1954: *I titoli di credito*, Padova, 1934; *Studi di diritto delle società*, Milano, 1949; *Le servitu'*, Milano, 1949; *Dottrina generale del contratto*, Milano, 1952; *Manuale di diritto civile e commerciale*, Milano, 1957.

Messineo is the editor, with A. Cicu, of the well-known *Trattato di diritto civile e commerciale*, in 46 volumes, published by Giuffrè in Milano.

[34] M. Cappelletti, P. Rescigno, *Italy ...*, cit., p. 99.

It is appropriate to remark that the new constitution was drawn up by a Constitutional Assembly elected on the same day (June the 2nd 1946) monarchy was abolished through a popular referendum.

In accordance to Irti, "to a foreign audience it must be remarked" [35] that:

a) our Constitution, a rigid one, is above legislative rules; as a consequence, every new enacted rule or statute will be compared with the constitutional precepts, while a Constitutional Court has been established with the power to review the validity of legislation;
b) our Constitution is not a consolidation of old liberal principles but "a project stimulating the foundation of a new social order" based upon soliciting and programming rules binding the law-maker in the future;
c) our Constitution does not only recognize old political or civil liberties and rights, but, taking a great deal of the new socialist and Christian-democratic ideology, "penetrates private law asserting the original and independent function of the family and of intermediate communities, imposing on ownership a particular social function, and leading the exercise of economic enterprise"; as a consequence, a civil lawyer "must take the Constitution as a constant datum and a check-point in his work" [36].

Moreover the planning provisions of the Constitution will stimulate the enactment of special legislation and the reform or, at least, a new construction of typical institutes of civil law such as "family", "ownership", "private autonomy", "entrepreneur", "civil liberties and personal rights" and so on, thus the civil code may apparently be "deprived of its constitutional function [...], which has been transferred from the most private of private law fields to the most public

[35] N. Irti, *Scuole e figure ...*, cit., p. 124.

[36] N. Irti, *Scuole e figure ...*, cit., p. 124.

of public law. In a sense this might be described as a «depublicization» of private law, as purifying it of a primarily public function" [37].

According to P. Barcellona [38], the Italian Constitution, while asserting the fundamental rights of the individual, on the other hand introduced a system of social rights and statual intervention into the law. Article 3 of the Constitution affirms that "all citizens have equal social standing and are equal before the law, without distinction of sex, race, language, religion, political opinion, or social and personal conditions", asserting the "principle of formal equality".

In the same article, however, we can also read: "it shall be the task of the Republic to remove obstacles of economic or social nature which, by restricting in practice the freedom and equality of citizens, inhibit the full development of human personality and the effective presence of all workers in political, economical and social organization of the Country" or, in other words, the assertion of the *principle of material equality*. There are a great number of material inequalities in the frame of formal equality, while it is one of the duties of the State to "remove obstacles" in order to realize a – near – perfect identity between formal and material equality.

Beside the principle of material equality (which informed all Constitutional rules) we can find the acknowledgement of social rights, that is, the "subjective power vested upon certain categories of subjects against third parties or the State".

Article 36 of the Constitution, by establishing that "all workers have the right of being remunerated proportionately to the quantity and quality of their work, and in any case sufficiently enough to provide a free and dignified existence for themselves and their families", affirmed "a right because it is vesting a power on a subject [...] but from a social point of view because that right has not acknowledged to each citizen in a generic way but [...] taking to in

[37] M. Cappelletti. J.H. Merryman, J.M. Perillo, *The Italian Legal System ...*, cit., p. 210.

[38] P. Barcellona, *Diritto privato e processo economico*, cit., p. 120 ss.

account his specific social status (i.e. that of a worker) [...] or vested on a certain category of subjects (i.e. workers)" [39].

Next to social rights there is the principle of State intervention in economic fields, i.e. the planning power vested upon the State "which is responsible for economic development, which will coordinate all economic, either public or private, activities by imposing the main lines of programming in order to realize its social ends" [40].

As a consequence Italian legal scholars, no longer dogmatically but in a new way paying attention to the historical and socio-economical background, perceived the civil code and private law restructuring them from a constitutional perspective, "beginning a new and not yet ended period of individuation and elaboration of a «civil constitutional law» [41].

This is, for instance, current in the studies, dating from the early 50's onward, of P. Calamandrei [42] who was concerned with the construction and real application of constitutional rules, passing over the thesis of "evolutive interpretation of law". According to this theory which "finds its most [...] effective expression in the work of E. Betti, probably its most resourceful and sophisticated promoter" [43] it is always possible for a judge to give a statutory pro-

[39] P. BARCELLONA, *Diritto privato e processo economico*, cit., p. 121.

[40] P. BARCELLONA, *Diritto privato e processo economico*, cit., p. 121.

[41] P. PERLINGIERI, *Scuole civilistiche e dibattito ideologico: introduzione allo studio del diritto privato in Italia*, in *Riv. dir. civ.*, I, p. 407, 414; see P. UNGARI, *Storia del diritto di famiglia in Italia*, Bologna, 1974, p. 230.

[42] P. CALAMANDREI, *La funzione della giurisprudenza nel tempo presente*, in *Riv. trim.*, 1955, p. 252 ss.

For a biographical sketch of Calamandrei see M. CAPPELLETTI, *In memoria di Piero Calamandrei*, Padova, 1957.

[43] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 260.

See also: E. BETTI, *L'interpretazione della legge e degli atti giuridici*, Milano, 1949; ID., *Teoria generale dell'interpretazione*, 2 voll., Milano, 1955 part. at Vol. II, p. 789 ss.; ID., *Interpretazione della legge e sua funzione evolutiva*, in *Jus*, 1959, p. 197; N. BOBBIO, *Teoria della scienza giuridica*, Torino, 1950; L. CAIANI, *I giudizi di valore nell'interpretazione giuridica*, Padova, 1954; ID., *La filosofia dei giuristi italiani*, Padova, 1955; G. GORLA, *L'interpre-*

vision a different meaning from the one it seems it would have in connection with its literal significance, even if in so doing the judge himself is not a law-maker.

The starting point of this theory is the construction of article 12 of the Provisions on the Law in General which, by asserting that "in applying a statute no other meaning may be attributed to it than that made clear by the actual significance of the words and their interconnection and by the intention of the law-maker", is believed to affirm that statutes may be interpreted by other means than that of resorting to the literal text and the original law-maker's intent: the judge has to look for the *ratio legis* and not for the *occasio legis*, the statute lying "not only a specific norm but also a larger content of which the legislative form is only a partial representation [...]. Latent in the text are legislative considerations and evaluations of conflicting social interests" which, "being part of the norm, must be found by the judge" [44] who, following indifferently a historical, logical or teleological criterion, "must extract from the entire order all excess of content, not only logical but especially axiological (*value content*), that is inherent in the general principles of law and in all those supreme values which have only partially found expression in individual norms" [45].

In the meantime, R. Sacco [46] argued that the words of a norm have not a real and objective meaning or one that arises from its

tazione del diritto, cit.; R. SACCO, *Il concetto di interpretazione del diritto*, Torino, 1947; S. ROMANO, *Interpretazione evolutiva*, in *Frammenti di un dizionario giuridico*, 1947, p. 119.

[44] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., pp. 260-261.

[45] E. BETTI, *Interpretazione della legge e sua funzione evolutiva*, cit., p. 215.

[46] R. SACCO, *Il concetto di interpretazione diritto*, cit.; ID., *Introduzione allo studio diritto comparato*, Torino, 1981. See of the same author: *La buona fede nella teoria dei fatti giuridici di diritto privato*, Torino, 1949; *L'ammortamento dei titoli di credito all'ordine*; Milano, 1950; *Il potere di procedere in via surrogatoria. Parte generale*, Torino, 1955; *Possesso. Denuncia di nuova opera e di danno temuto*, in *Trattato di diritto civile*, (G. GROSSO, F. SANTORO PASSARELLI editors), Vol. III, f. 7, Milano, 1960; *Il contratto*, in *Trattato di diritto civile italiano*, (F. VASSALLI, ed.), Vol. VI, t. 2, Torino, 1976.

historical milieu, but have the significance which, from time to time, is assigned to them by the interpreter who is rethinking and reading them again; N. Bobbio [47] characterized a jurist's work as a strictly logical activity reconstructive of statutory rules: a work that must be considered «scientific» – legal science being the study of the validity, rather than of the value, of law, while legal sociology is the study of the effectiveness of law – only as far as it makes the language of the law-maker strictly rigorous thanks to a full explanation of the initial legislative propositions and to a definition and an integration of these rules in order to construe and organize them in a coherent system; C. Magni and F. Carnelutti [48] identified mathematics as the "rigorous language" of the jurist, as a useful methodology to explain juridical phenomena; T. Ascarelli [49] denied the univocally of norms, which is merely a text which the judge must construe, which in origin is only a "normative proposal", becoming a norm, a binding rule, only by interpretation and application to a concrete case: in its turn this application becomes a new text or starting point for new and extended constructions of the legal rule.

[47] N. Bobbio, *Teoria della scienza giuridica*, Torino, 1950.

See by this author; *Teoria della norma giuridica*, Torino, 1958; *Teoria dell'ordinamento giuridico*, Torino, 1960; *Giusnaturalismo e positivismo giuridico*, Milano, 1965; *Studi per una teoria generale del diritto*, Torino, 1970; *La teoria delle forme di governo nella storia del pensiero politico*, Torino, 1976; *Dalla struttura alla funzione - Nuovi studi di teoria del diritto*, Milano, 1977; *Le ideologie e il potere in crisi*, Firenze, 1981.

[48] C. Magni, *Teoria del diritto ecclesiastico civile*, Padova, 1948, pp. 15-16, p. 64, p. 150 ss.; Id., *Logica giuridica e logica simbolica*, in *Riv. dir. proc.*, 1952, I, p. 117, 120; F. Carnelutti, *Matematica e diritto*, in *Riv. dir. proc.*, 1951, I, p. 201. See by this author: *Studi di diritto civile*, Roma, 1916; *Studi di diritto processuale*, Padova, 1928; *Metodologia del diritto*, Padova, 1939; *Teoria generale del diritto*, Roma, 1940; *Istituzioni del nuovo processo italiano*, Roma, 1941; *Discorsi intorno al diritto*, Padova, 1953-1961; *Diritto e processo*, in *Trattato del processo civile*, (F. Carnelutti, ed.), Napoli, 1958; *Principi del processo penale*, Napoli, 1960.

[49] T. Ascarelli, *Giurisprudenza costituzionale e teoria dell'interpretazione*, in *Riv. dir. proc.*, 1957, p. 351; Id., *In tema di interpretazione ed applicazione della legge (lettera al prof. Carnelutti)*, in *Riv. dir. proc.*, 1958, p. 14; Id., *Studi di diritto comparato e in tema di interpretazione*, Milano, 1952, particularly at pp. XXV-XXXVIII.

Ascarelli by asserting that "it is vain to deny the weight of the interpreters' values, being them in fact the people who determine possible new interpretations, new norms, genuine developments in the law, even if texts remain literally unchanged, because the law changes [...] in an endless process in which lawmaker, judge and jurist all participate" [50], noticed that the "interpreter begins with an inevitably equivocal text and achieves a norm which is the confluence of his value judgements, traditions, hopes, prejudices, and general conceptions, under the directing influence of the "vectors" of general principles and legal categories", believing that "efforts should be directed toward making the judge more aware of what he is in fact doing, so that he may consciously examine and more objectively and explicitly evaluate the presuppositions and values that actually influence his interpretation" [51].

According to Ascarelli, "the criteria of interpretation are concerned with the constitutional structure of the legal system [...]. The general principles, set in the Constitution [...], acquire a general leading value by determining the position and value of other legal rules", even if "the construction of the legal system, being the expression of contrasting powers and trends, may react against a normative translation of constitutional leading principles [...]. One of the modern aspects of the Italian legal system is [...] the need for some legislative "end and inference". Indeed the Constitution [...] is widely "programmatic" in its content and requires legislative accomplishment [...], the enactment or repeal of ordinary laws [...] which on one side, makes Constitutional provisions useless, but on the other side, strengthening the view according to which Constitutional precepts are only programmatic or non-self-executing

[50] T. Ascarelli, *In tema di interpretazione ed applicazione della legge (lettera al prof. Carnelutti)*, cit., p. 17.

[51] M. Cappelletti. J.H. Merryman, J.M. Perillo, *The Italian Legal System ...*, cit., p. 263.

rules or, even, principles quite insusceptible of complete and adequate normative expression" [52].

In this landscape, in 1955, Calamandrei, on one side agreeing with Ascarelli, while asserting that "only a part of constitutional provisions, perhaps less than a half, have been actuated", so that "since law, like nature, dislikes a vacuum, old laws have been left in force to fill the place of those provisions still non actuated [...] in an uneven panorama where" some norms of the democratic and socially-oriented modern constitution, some liberal laws and some fascist or strongly statually-oriented laws live together. "The jurist who goes in search of the road in this landscape [...] on the one hand encounters provisions that seem to exalt free private initiative: on the other hand discovers provisions that place the accent on social solidarity. Here, he comes across the needs of regional autonomy and of decentralizated administration, and there, the reaffirmation, by way of old organs still in force, of a traditionally centralized system. On the one hand he reads the program of a rigid Constitution, where individual rights are granted under the armour of the principle of legality; on the other hand, he encounters in full effect the pre-eminence of those discretionary powers by which rights of liberty were transformed into flaccid rights, reduced in substance to desires without any legal guarantee" [53].

But, on the other hand, Calamandrei went beyond Ascarelli's thesis, while asking himself about the real possibilities for judges and jurists "to confront themselves with such [...] contrasting conceptions" finding remedies for "that clash between the old and the new" [54].

[52] T. ASCARELLI, *Studi di diritto comparato e in tema di interpretazione*, cit., pp. XXXIV-XXXV and n. 24; on distinction between "programmatic" and "preceptive" norms see P. BARILE, *La costituzione come norma giuridica*, Firenze, 1951.

[53] P. CALAMANDREI, *La funzione della giurisprudenza nel tempo presente*, cit., p. 254.

[54] P. CALAMANDREI, *o.l.u.c.*

According to Calamandrei the principal hope of correction of the outlined state of Italian law is in the judicial process, until then – and opposite to the English approach, according to which "the fact is what counts; justice is justice to the extent it is adequate to the case; the solution for the case is sought not in general criteria but in equity which is better adapted to concrete circumstances, not in abstract logic but in social values" [55] – traditionally viewed as "essentially conceptual [...] where everything is a question of abstract logic [...] and where the judge only has mere interpretative functions to perform such as research, among general and abstract statutes for something that is already there by intention of the law-maker to be discovered and recognized, not created". In fact "even though it is claimed that the legal order is complete, the statute cannot foresee all cases that reality brings before the judge, even in a system of legality, every law leaves the judge a certain degree and margin of discretion within which he becomes, even if he does not realize it, a law-maker" [56].

Even if "statutory provisions are as precise or minute as possible" – as for instance certain English Acts are – the judge (and the jurist) has "not only when re-construing the facts but also when looking for a relationship between the material facts and abstract legal precepts, a certain degree of freedom to make his own choice [...] the positive legal system not being aimed at the abolition but at the control and rationalization of a judicial choice into legislative general precepts" [57].

Even in a positive system, statutory provisions offer judges (and jurists) opportunities to construe the law in a "creative way". Thanks to evolutive interpretation, analogy and general principles, judges

[55] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 265.

[56] P. CALAMANDREI, *La funzione della giurisprudenza nel tempo presente*, cit., p. 260.

[57] P. CALAMANDREI, *La funzione della giurisprudenza nel tempo presente*, cit., pp. 260-261.

(and jurists), by using them, can keep the law in pace with times: "the conspicuous immobility of the judges [...] applying to the very letter decrepit old laws that no longer correspond to the changed needs of society - is incompatible with the useful and trustful co-operation that should exist between powers in a democratic regime [...]. But in a free regime, in the presence of a Constitution in which the judiciary is a power placed on the same plane as the legislative, this agnostic jurisprudential attitude, this great pleasure taken in pointing out the inadequacy of the statutes and of making all the blame fall on the inertia of the law-maker, is no longer consistent with the constitutional duty of the judiciary" [58].

As already pointed out, Calamandrei, by rejecting the questioned distinction between programmatic norms, i.e. "those held to require govermental action in order to produce effect" and "preceptive norms", i.e. the ones that "establish operating rules" or "self-executing" ones [59], asserted that Constitutional provisions are not addressed to the legislature only to transform it into statutes but are also addressed *directly* at the judges, so that "through the openings provided by general principles and evolutive interpretation, they can immediately bring to their decisions the new social demands that the Constitution embodies and consecrates into effect", *without waiting for the intervention of the law-maker* [60].

Accordingly, Constitutional provisions, programmatic or not, perceptive or not, may serve as orienting principles in judicial practice so that "even if legislature remains inactive, the judges can make live the spirit of the Constitution in their decisions [...] This does not mean abandoning the spirit of (statutory) law and the narrow interpretation of rules of law but mean to be inspired by the

[58] P. CALAMANDREI, *La funzione della giurisprudenza nel tempo presente*, cit., pp. 266-267.

[59] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 268, n. 61.

[60] P. CALAMANDREI, *La funzione della giurisprudenza nel tempo presente*, cit., p. 271.

Constitution in order to refuse applying old formulas and construing the rules in a new way as the true democratic legalitarianism by which a free and autonomous judiciary ought to be courageously inspired" [61].

Thus "Calamandrei goes on to encourage the deliberate utilization of the Constitution as a source of analogy and general principles. Not only are traditional attitudes about interpretation brought into question, but the whole dogmatic doctrinal structure, with its assumptions about the nature and functions of law, its methodology of logical expansion, and its paraphernalia of abstract concepts, is accused of inhibiting judges from the proper performance of their true role" [62].

The new attention paid by Italian legal scholars to the historical and socio-economical background, and the new analysis of the civil code and private law from a constitutional perspective may be found in the works of Pugliatti on property [63], in which by "destroying the myth of singleness and unity of property, the passage from the property of neutral and indistinct goods to properties addressed at specific economical applications" is outlined [64], while R. Nicolò [65]) asserts that the older conception of property, "as the relation between an individual and a thing, typically land, has had to be modified as the importance of other forms of property, with different characteristics, has grown, and as the separation between power and property associated with investments in corporate securities has been recognized" [66].

[61] P. CALAMANDREI, *o.l.u.c.*

[62] M. CAPPELLETTI, J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 269.

[63] S. PUGLIATTI, *La proprietà nel nuovo diritto*, Milano, 1954.

[64] N. IRTI, *Scuole e figure ...*, cit., p. 125.

[65] R. NICOLÒ, *Diritto civile*, cit., pp. 248-249.

[66] M. CAPPELLETTI. J.H. MERRYMAN, J.M. PERILLO, *The Italian Legal System ...*, cit., p. 211.

T. Ascarelli points out the need for revision and control of traditional concepts' validity with reference to a new economical reality and asserts that "the identity of the problems arising out of an economy marked by a massive industrial production, in its turn, determines a progressive approaching of civil law systems to common law ones" [67].

M. Giorgianni outlined the evolution and extent of the new private law, by analysing the «*pubblicizzazione*» or growing importance of public aspects prevailing over the private ones, and the «*socializzazione*» or social trend of institutes [68], both of them thought of as a consequence of the "economical changes arising from the development of industrialism and capitalism, and the interference, more and more marked, of public powers in people's economic life" [69], while the civil code seemed to be deprived of its traditional "constitutional" significance as "asserting the «statute» of citizens and, then, the limits to the powers of the State" [70].

General principles of law were no longer and not only seen as expressed or deducible from rules of the code: "the structure of each institute and the interests supported by, it must be harmonized with the basic constitutional ends and provisions" while "private law was no longer the kingdom of unlimited private will and autonomy as related to the economic freedom; public law was no longer the expression of an unlimited power of the State or of an absolute private subjection" [71].

[67] T. Ascarelli, *Ordinamento giuridico e processo economico*, in *Problemi giuridici*, I, Milano, 1959, p. 37, at p. 47; Id., *Norma giuridica e realtà sociale*, in *Problemi giuridici*, cit., p. 67 ss.

[68] M. Giorgianni, *Il diritto privato ed i suoi attuali confini*, in *Riv. trim. dir. proc.*, 1961, I, p. 392, at pp. 404-413.

[69] M. Giorgianni, *Il diritto privato ed i suoi attuali confini*, cit., p. 392.

[70] M. Giorgianni, *Il diritto privato ed i suoi attuali confini*, cit., p. 399.

[71] P. Perlingieri, *Scuole civilistiche e dibattito ideologico ...*, cit., p. 415.

According to authors like T. Ascarelli [72], S. Pugliatti [73] and M. Giorgianni [74] there is room for a unitary reconstruction of the legal order, by passing over the old patrimonial point of view and recovering the original function of the law: that of regulating private relations as "civil" law, i.e. not as a public law opponent but as a fundamental and peculiarly functional aspect or element of the legal system.

As a consequence on one side there is the need for a more punctual and evolutive reconstruction of the positive principles "which have in the general context acquired a quite different sense and content from the original ones" [75]; on the other side there is the need for the formulation or proposal of "new conceptual arguments linked in a closer way to the modern legal order and aimed at the persuasive function of law" [76].

By refusing old traditional ideas and notions, Authors like M. Allara [77], S. Romano [78] and A. Levi [79] suggested a new way to test the private law system by "improving the formulation of old tra-

[72] T. Ascarelli, *Norma giuridica e realtà sociale*, in *Problemi giuridici*, I, Milano, 1959, p. 71 and *passim*.

[73] S. Pugliatti, *Diritto pubblico e privato*, in *Enc. Dir.*, Vol. XII, Milano, 1964, p. 696 ss.

[74] M. Giorgianni, *Il diritto privato ed i suoi attuali confini*, cit., p. 401 ss.; see: A. Trabucchi, *Significato e valore del principio di legalità nel moderno diritto civile*, in *Riv. dir. civ.*, 1975, I, p. 20; P. Perlingieri, *Profili istituzionali del diritto civile*, Camerino-Napoli, 1976, p. 3 and *passim*.

[75] P. Perlingieri, *Scuole civilistiche e dibattito ideologico ...*, cit., p. 417.
See S. Romano, *Ordinamento sistematico del diritto privato*, I, *Diritto obiettivo, diritto soggettivo*, 2nd ed., Napoli, p. 15 ss. and *passim*; G. Lazzaro, *L'interpretazione sistematica della legge*, Torino, 1965, p. 127 ss.

[76] P. Perlingieri, *Scuole civilistiche e dibattito ideologico ...*, cit., p. 417.

[77] M. Allara, *Le nozioni fondamentali del diritto civile*, I, 3rd ed., Torino, 1958, p. 191 ss.; Id., *La teoria delle vicende del rapporto giuridico*, Torino, 1950, p. 3 ss.

[78] S. Romano, *Introduzione allo studio del procedimento giuridico nel diritto privato*, Milano, 1961, *passim*; Id., *Ordinamento sistematico ...*, cit., p. 138 and *passim*.

[79] A. Levi, *Teoria generale del diritto*, Padova, 1967, p. 310 ss., 410 ss.

ditional concepts in a new evaluative dimension", as, for instance, in the works of "the school of catholic giusnaturalism" [80].

In the 'sixties this evolutive process resulted in a quite cautious approach to the general theory and dogmatic analysis, while a new methodology inspired by relativism spread, not simply by reacting against the old view according to which law was a system but by trying to "rebuild the whole legal order and a more punctual analysis [81] of the basis of each new institute".

[80] P. PERLINGIERI, *Scuole civilistiche e dibattito ideologico ...*, cit., p. 418. See also: D. BARBERO, *Sistema del diritto privato italiano*, I, Torino, 1961 and II, Torino, 1965.

[81] P. PERLINGIERI, *Scuole civilistiche e dibattito ideologico ...*, cit., p. 418.

IX

The reform era

In the years between the 'sixties and the 'seventies, there was a proliferation of contributions no longer on the general theory of «*negozio giuridico*» (act in law, juristic act), but on peculiar aspects of contract law and interest was paid to the relation between private autonomy and State intervention.

Some clear examples were the works of R. Scognamiglio on the law of contract and of G.B. Ferri on the concept of «*causa*» [1], A. Cataudella on the content of contract [2], A. Di Majo on the performance of contract [3], L. Mengoni – who asserted that the State should rule on economy, in order to realize a real economic democracy and not a formal one – and P. Barcellona on private autonomy and State intervention [4], Mario Bessone on the discharge by performance and the allocation of the risks of contract [5], and the work of S. Rodota [6] on the inference of unexpressed terms.

[1] G.B. FERRI, *Causa e tipo nella teoria del negozio giuridico*, Milano, 1966; R. SCOGNAMIGLIO, *Contratti in generale*, in *Trattato di diritto civile* (G. GROSSO, F. SANTORO PASSARELLI, editors), Vol. IV, Milano, 1961 (with an exaustive list of references).

[2] A. CATAUDELLA, *Il contenuto del contratto*, Milano, 1966.

[3] A. DI MAJO GIANQUINTO, *L'esecuzione del contratto*, Milano, 1967.

[4] L. MENGONI, *Forma giuridica e materia economica*, in *Studi in onore di A. Asquini*, III, Padova, 1965. p. 1077 ss.; ID., *Programmazione e diritto*, in *Iustitia*, 1966, p. 92 ss.; P. BARCELLONA, *Intervento pubblico ed autonomia privata nella disciplina dei rapporti economici*, Milano, 1969.

[5] M. BESSONE, *Adempimento e rischio contrattuale*, Milano, 1970.

[6] S. RODOTÀ, *Le fonti di integrazione del contratto*, Milano, 1970.

In Rodota's approach the contract was not yet "the privileged instrument moulded for the expression of the self-determination of private individuals but on the contrary, it was an open structure, i.e. an instrument which was able to realize not only every personal interest of the parties, but also the interest of the society [...] by agreeing with the requests forwarded by the various sources, particularly by the legal and judicial ones" [7] aimed at strengthening the bargaining power of the weaker party.

In the same years, P. Rescigno [8] turned his attention to "the family and intermediate communities [...] which the catholic ideology [...] opposed to the totalitarism of modern State" [9]; while R. Sacco, U. Natoli, M. Costantino, P. Perlingieri [10], among the others, and again S. Rodotà, paid attention to property, asserting the importance of its "social function".

Rodotà reacted against the well known idea, which was exposed in a work of L. Cariota-Ferrara [11] according to which "ownership is essentially an absolute power vested on a man in order to satisfy his own interest with no limits", while its "social function" is not an intrinsic or essential element of property and is not linked to the relationship between the owner and his property; the only ratio of that statutory provision is the imposition

[7] P. Barcellona, *Diritto privato e processo economico*, cit., p. 255.

[8] P. Rescigno, *Persona e comunità*, Bologna, 1966.
See by the same author: *L'interpretazione del testamento*, Napoli, 1978; *Incapacità naturale e adempimento*, Napoli, 1982 and the well-known *Manuale del diritto privato italiano*, Napoli, 1987.

[9] N. Irti, *Scuole e figure ...*, cit., p. 126.

[10] U. Natoli, *La proprietà*, Milano, 1965; M. Costantino, *Contributo alla teoria giuridica della proprietà*, Napoli, 1967; R. Sacco, *La proprietà*, Torino, 1968; P. Perlingieri, *Introduzione alla problematica della proprietà*, Napoli, 1971.

[11] Cariota-L. Ferrara, *Crisi della proprietà*, in *Riv. giur. edil.*, 1961, II, p. 217.
See by the same Author: *Il negozio giuridico nel diritto privato*, Napoli; *I negozi sul patrimonio altrui*, Padova, 1936; *L'enfiteusi*, in *Trattato di diritto civile*, (F. Vassalli ed.), Vol. IV, tomo IV, Torino, 1950; *Le successioni per causa di morte*, Napoli, 1977.

of functional limits within which the owner is always an "absolute owner" [12].

In the contrary, Rodotà [13], by analysing the whole context of constitutional provisions on property matters, outlined that the powers vested on the owner are not yet absolute, unlimited and exclusive, but are limited by the existence of a social community (and its collective ends) to which the owner must answer for the use of his property.

The use of property should realize the "*utile sociale*" (social utility) or "the maximum welfare and benefit of the community" as the increase of production and wealth or the achievement of a fair relationship among the members of the community.

Accordingly, there is a need to increase judges' powers and the importance of each judicial decision: if the duty of the law-maker is to determine the "social benefit content, it is the judge's duty to translate a legislative proposition into a factual and real dimension", acting as an intermediary between the opposite interests of the owner and of the community [14].

The growing importance of case law analysis, traditionally foreign to the Italian jurists' mind, was asserted, in those years, by G. Gorla, not only by outlining the formal relevance of judgements [15] but also by applying case law methodology in his studies [16], by revaluing the concreteness of a fact instead of the ab-

[12] P. Barcellona, *Diritto privato e processo economico*, cit., p. 197.

[13] S. Rodotà, *Note critiche in tema di proprietà*, in *Riv. trim. dir. proc.*, 1960, pp. 1252-1341.

[14] P. Barcellona, *Diritto privato e processo economico*, cit., p. 204.

[15] G. Gorla, *Raccolte di saggi sull'interpretazione e sul valore del precedente giudiziale in Italia. Introduzione*, in *Quad. Foro it.*, 1966, p. 5.

[16] G. Gorla, *Il contratto ...*, cit.; Id., *Lo studio interno e comparativo della giurisprudenza ed i suoi presupposti: le raccolte e le tecniche per la integrazione delle sentenze*, in *Foro it.*, 1964, V, c. 73 ss.
See the collection of Gorla's studies *Diritto comparato e diritto comune europeo*, Milano, 1981.

stractness of a positive rule: the existence of a conceptual system should not lead the judge or the jurist to misunderstand the "peculiarity" of a fact; every new case necessarily involves a reconstruction of that system of concepts in the light of historical and social events.

This revaluation of the factual profile firstly led to think of the positive rule as a paradigm, as a starting point for further developments in accordance with social values, historical background, political and economic needs of the community and, finally, for the same interpreter.

Thus in the years between 1966 and 1972, while Rodotà [17] asserted the necessity of a more agile system based on informing and general legislative principles such as, for instance, constitutional precepts and human rights, giving, as a consequence, greater importance to judicial decisions and to judicial power, N. Lipari [18] argued that the legal rule was the result of the construction of a positive rule which was not really in itself the law in action: a jurist has the duty to construe the positive rule by being "called to develop an evolutive and dialectic process from the letter of the legal rule social reality", by renewing the immanent rationality, not abstractly but historically, of the whole legal system" [19], by paying attention to the new juridical and social values of the rule as expressed by the community.

Just turning into the 'seventies, P. Barcellona asserted the importance of an "alternative use of the law" [20], i.e. of a more progressive construction of positive rules, thanks to which "it is possible to

[17] S. Rodotà, *Ideologie e tecncihe della riforma del diritto civile*, in *Riv. dir. comm.*, 1967, I, pp. 83-125.

[18] N. Lipari, *Il diritto civile tra sociologia e dogmatica (riflessioni sul metodo)*, in *Riv. dir. civ.*, 1968, I, p. 323; Id., *Il problema dell'interpretazione giuridica, in diritto privato. Una ricerca per l'insegnamento*, Bari, 1974.

[19] N. Lipari, *Il problema dell'interpretazione ...*, cit. pp. 82-83.

[20] P. Barcellona, *L'uso alternativo del diritto*, (vol. I - *Scienza giuridica e analisi marxista*; vol. II - *Ortodossia giuridica e analisi marxista*), Bari, 1973.

transform their significance in order to protect a different and, sometimes, opposite interest in respect of the original one" [21].

According to P. Perlingieri, it is possible "to frame into such a definition a great number of different aspects" [22].

Thus, the "evolutive interpretation" of F. Russo [23], who asserts that "the jurist has the duty to follow with attention, and in the meantime anticipate, the evolutive trends showed by the judiciary [...] not simply with the elaboration of a new system of absolute legal categories or concepts, but also by moulding the instrument required and necessary [...] to understand reality [...] now socially and historically determined".

This "new dogmatic approach" must proceed through three moments:

a) a special attention payed to facts and their effective construction;
b) the valutative and politic function of the jurist asked to construe the facts;
c) a critical approach to the conception of the unity of the legal system, leading to "an effective substitution of idealism [...] with a more modern empirism" [24].

Then, the "free creation of law" which was in a peculiar way asserted by N. Lipari, who linked the interpretation of positive rules – seen only as operative models – to a judgement of their effective social values singled out by "a concrete (spread and not of an elite) way of understanding the reality of law" [25].

[21] N. Irti, *Scuole e figure ...*, cit., p. 128.

[22] P. Perlingieri, *Scuole civilistiche e dibattito ideologico ...*, cit., p. 424.

[23] F. Russo, *Linee di una nuova dogmatica*, in *L'uso alternativo del diritto*, cit., II, p. 101 ss.

[24] F. Russo, *Linee di una nuova dogmatica*, in *L'uso alternativo del diritto*, cit., II, p. 118.

[25] N. Lipari, *Scelte politiche e determinazione storica dei valori realizzabili*, in *L'uso alternativo del diritto*, cit., II, p. 37, 43-44.

Thus, the "classist interpretation" of A. Di Maio [26] and F. Galgano [27] holding that "the debate about an alternative use of private law acquires significance only if related to different social classes, which are the «alternative users» of private law". The jurist is concerned about reaching "an hypothesis of balance between opposing social classes" when he starts "a wide and systematic work of analysis – in the meaning of a classist analysis – of modern private law, a work aimed at realising [...] the transformation of the cultural values of legal science" [28].

Despite the interest and, in some a way, the enthusiastic assent of a large part of Italian legal authors, the "alternative use of law" era practically ended in 1977 when P. Barcellona, revisiting his own ideas, asked for a proper analysis of law not simply or exclusively pointed at a generically "blasting of the system" [29], while P. Perlingieri [30] outlined a revaluation, in the light of constitutional precepts, of the intimate content and validity of the legal order, with growing interest in "ethic positivism" which is composed "on one side of the respect of the constitutional principle of legality and, on the other side, of a nonevaluative attitude toward the study of law" [31].

In this perspective we should frame the suppletive function of the jurists and, in a special way, of the judges who are asked to fill in the lack of the statutory law. The *Corte Costituzionale* and the judiciary, indeed, in the years between 1948 and 1975 operated in a massive way, influencing most important change and improvement of statutes thank to its, sometimes, courageous interpretations of the positive rules of law.

Thus, it is plainly evident in matters related to family law – especially in the discrimination between spouses [32], the protection of an illegitimate child [33] – sex discrimination [34] and labour law [35].

Just in 1975, the double evolutive process – the constitutional rethinking of private law and the described "alternative use of the law" proposed by legal authors and, on the other side, the constructive new interpretation of old positive rules operated by the judiciary – led to one of the most important Italian statutory reforms, i.e. the well-known reform of all family law.

According to Irti, from 1975 onwards, Italian legal scholars just "stimulated by the reform of family law [...] analysed those new rules not only paying great and productive attention to their exegesis, but also studying, in a general way and as principles, the legal aspects of the person.

Thus, M. Bianca, F. Busnelli, P. Perlingieri and P. Schlesinger (among the others) contributed to construing a law of the human

[26] A. Di Majo Gianquinto, *Proposta per un avvio di un discorso teorico nell'uso alternativo del diritto privato*, in *L'uso alternativo del diritto*, cit., I, p. 151 ss.; see: U. Cerroni, *Il problema della teorizzazione dell'interpretazione di classe del diritto borghese*, *ivi*, p. 3 ss.; L. Ferraioli, *Magistratura democratica e l'esercizio alternativo della funzione giudiziaria*, *ivi*, p. 113.

[27] F. Galgano, *Uso alternativo del diritto privato*, in *L'uso alternativo del diritto*, cit., I, p. 137 ss.

See, for a slight different approach, by the same Author: *Degli amministratori di società personali*, Padova, 1963; *Le istituzioni dell'economia capitalistica*, Bologna, 1974; *Delle persone giuridiche*, in *Commentario al codice civile*, (A. Scialoja, G. Branca editors), Bologna, 1969; *L'imprenditore*, Bologna, 1971; *Delle associazioni non riconosciute e dei comitati*, in *Commentario ...*, cit., Bologna, 1976; *Le istituzioni dell'economia di transizione*, Roma, 1978; *Il diritto privato fra codice e costituzione*, Bologna, 1980; *Diritto privato*, Padova, 1981; *Trattato di diritto civile e commerciale*, Milano, 1982.

[28] F. Galgano, *Uso alternativo del diritto privato*, in *L'uso alternativo del diritto*, cit., I, p. 137.

[29] P. Barcellona, *I magistrati la politica e lo Stato*, in *Rinascita*, 1977, n. 18, p. 4 s.

[30] P. Perlingieri, *Scuole civilistiche e dibattito ideologico ...*, cit., p. 423.

[31] P. Perlingieri, *Scuole civilistiche e dibattito ideologico ...*, cit., pp. 425-426. But see: N. Bobbio, *Sul positivismo giuridico*, in *Riv. Fil.*, 1961, p. 145 s.; M.A. Cattaneo, *Positivismo giuridico*, in *Noviss. digesto it.*, XIII, Torino, 1968, p. 316; A. Baratta, *Il positivismo e il neopositivismo in Italia*, in *La filosofia del diritto in Italia nel secolo XX. Atti dell'XI Congresso nazionale*, (Napoli, 4-7 ottobre 1976), II, Milano, 1976, p. 21 ss.

[32] See: Corte Cost. 1964, n. 9; 1966, n. 46; 1968, n. 127; 1970, n. 128; 1970, n. 133.

[33] See: Corte Cost. 1965, n. 70; 1969, n. 79; 1970, n. 205.

[34] See. Corte Cost. 1970, n. 205; 1973, n. 91.

[35] See: Corte Cost. 1963, n. 66; 1966, n. 63; 1968, n. 75; 1969, n. 68.

person, as an individual, valuable not only in respect of the State but especially in respect of family, associations and companies, political parties, trade unions" and so on[36].

It is interesting to note the "new approach to the private aspect of life" will be translated, just turning to the 'eighties, into a growing attention payed by Italian legal authors to the typical values of industrialism or mature capitalistic society, moving from the old values of continuity, certainty and dogmatism of law to the new ones of change, business risks, pragmatism and transnational attitude.

[36] N. IRTI, *Scuole e figure ...*, cit., p. 130.

The following references are merely illustrative (see note 1): C.M. BIANCA, *Regimi patrimoniali della famiglia e attività d'impresa*, in *Dir. fam.*, 1976, p. 1239; ID., *Commento dell'art. 1, Sez. I e III della L. 22 maggio 1978, n. 194*, in *Leggi civ. comm.*, 1978, p. 1595; ID., *L'impresa familiare nella locazione per uso non abitativo. La famiglia di fatto*, in *Atti conv. locaz. non abit.*, Milano, 1979, p. 115; F. BUSNELLI, *La comunione legale nel diritto di famiglia riformato*, in *Riv. notar.*, 1976, p. 32; ID., *Imprese familiari e aziende gestite da entrambe i coniugi*, in *Riv. trim. civ.*, 1976, p. 1397; ID., *Sui criteri di determinazione della disciplina normativa della famiglia di fatto*, in *Atti conv. famiglia di fatto*, Pontremoli, 1976, p. 133; ID., *Linee di tendenza della dottrina nei primi due anni di applicazione della riforma del diritto di famiglia*, in *Dir. fam.*, 1979, p. 412; ID., *Tutela della salute e diritto privato*, in *Studi tutela salute*, 1979, p. 1; ID., *Diritto alla salute e tutela risarcitoria*, in *Studi tutela salute*, 1979, p. 515; ID., F. GIARDINA, *La protezione del minore nel diritto di famiglia italiano*, in *Giur. it.*, 1980, IV, p. 196; ID., *Il diritto civile tra codice e legislazione speciale*, Napoli, 1983; P. PERLINGIERI, *Introduzione alla problematica della proprietà*, Napoli, 1971; ID., *Scritti*, Napoli, 1972; ID., *La personalità umana nell'ordinamento giuridico*, Napoli, 1972; ID., *Il fenomeno dell'estinzione nelle obbligazioni*, Napoli, 1972; ID., *Sulla costituzione di fondo patrimoniale su beni futuri*, in *Dir. fam.*, 1977, p. 265; ID., *Sulla famiglia come formazione sociale*, in *Dir. giur.*, 1979, p. 775; ID., *Tendenze e metodi della civilistica italiana*, Napoli, 1979; ID., *Norme costituzionali e rapporto di diritto civile*, in *Rass. civ.*, 1980, p. 95; ID., *Il diritto civile nella legalità costituzionale*, Napoli, 1980; ID., *Rapporti personali nella famiglia*, Napoli, 1981; ID., *Profili istituzionali del diritto civile*, Napoli, 1983; ID., *Forma dei negozi e formalismo dell'interprete*, Napoli, 1987; P. SCHLESINGER, *Il regime patrimoniale della famiglia*, in *Atti conv. dir. fam.*, Milano, 1975, p. 65; ID., *Problemi e prospettive del leasing come strumento di investimento del risparmio*, in *Atti conv. leasing risp.*, Milano, 1981, p. 161; ID., *Il nuovo regime patrimoniale tra coniugi. La contrattazione e la pubblicità immobiliare*, in *Atti conv. not. dir. fam.*, Milano, 1977, p. 29.

By A. TORRENTE and P. SCHLESINGER is the well-known *Manuale di diritto privato*, Milano, 1987.

As a consequence, from 1980 onwards the academic approach to law will be directly related to the resolution of material problems arising from growing State intervention, the needs of capitalism and industrialism, and the needs of a most functional and concrete defence of the individuals: "works on business risk, on consumer protection, new contracts or new economic organizations, will be made by jurists such as G. Alpa, M. Barcellona, U. Carnevali, F. Realmonte and many others" [37].

It is also interesting to note too, that "the last decade (1970-1980) was a period of most intense legislative Parliament activity" [38].

Thus, we may remember from 1970 the act regulating divorce; the act regulating the relationship between workers and employers – known as *"Statuto dei lavoratori"*–; the new rent discipline of rural lands; the fiscal reform; the new procedural rules operating on labour disputes; the reduction of the majority age from 21 to 18

[37] N. IRTI, *Scuole e figure ...*, cit., p. 131.

See note 1 and the following merely illustrative references: G. ALPA, *Il problema dell'atipicità dell'illecito*, Napoli, 1979; ID., *L'interpretazione del contratto*, Vol. I, *Orientamenti e tecniche della giurisprudenza*, Milano, 1982; ID., *Compendio del nuovo diritto privato*, Torino, 1985; ID., *Diritto privato dei consumi*, Bologna, 1986; G. ALPA and M. BESSONE, *Poteri dei privati e statuto della proprietà*, Vol. I, *Oggetti, situazioni soggettive, conformazione di diritti*, Vol. II; *Storia, funzione sociale, pubblici interventi*, Padova, 1980, Vol. III; *La nuova disciplina della proprietà edilizia ed urbanistica*, Padova, 1982; G. ALPA, M. BESSONE (editors), *Danno da prodotti e responsabilità dell'impresa*, Milano, 1981; G. ALPA, M. BESSONE, *La responsabilità civile*, Torino, 1987; M. BESSONE, *Adempimento e rischio contrattuale*, Milano, 1969; ID., *Leasing, regime delle clausole penali, tutela del contraente debole*, in *Riv. notar.*, 1979, p. 1085; ID., *Contratti standard, strategie di impresa e l'equivoco delle formule sulla tutela del consumatore*, in *Riv. società*, 1979, p. 1303; ID., *Saggi di diritto civile*, Milano, 1979; ID., *Contratti standard, clausole di garanzia e norme di ordine pubblico*, in *Giur. it.*, 1980, IV, p. 1; ID., *Nuovi saggi di diritto civile*, Milano, 1980; U. CARNEVALI, *La donazione modale*, Milano, 1969; ID., *La responsabilità da prodotto in Italia*, in *Foro pad.*, 1978, II, p. 51; ID., *La responsabilità del produttore*, Milano, 1979; ID., *Diritto commerciale ed industriale*, Milano, 1981; ID., *Patto commissorio*, in *Enc. del diritto*, Vol. XXXII Milano, 1982, p. 502 ss.; ID., *Appunti di diritto privato*, Milano, 1986; F. REALMONTE, *Le condizioni generali di contratto*, Milano, 1975.

[38] V. CRISAFULLI, *La legislazione del cinquantennio*, in *Cinquant'anni ...*, cit., p. 33, 48, 49.

years; the reform of family law; the reform of share societies; the new discipline of abortion; the new fair rent act; the new legislative provisions on sex discrimination, etc.

A consequence of this overproduction of statutes, that sometimes appear inconsistent with the system of the civil code, was the need for studies related to each single rule, each particular problem arising from the living appliance of statutory provisions.

This kind of "statutorification", by Irti suggestively named *"decodificazione"* (decodification), depriving the civil code of its primary systematic and central role in the legal order [39], first of all asks for a "new exegetic" analysis of each positive rule, starting from "its naked historic significance [...] absolutely independent in its singularity" [40].

Accordingly there are two possible developments.

[39] N. IRTI, *L'età della decodificazione*, in *Diritto e Società*, 1978, p. 633 ss.; ID., *L'età della decodificazione*, Milano, 1979; ID., *Leggi speciali - Dal monosistema al polisistema*, in *Riv. dir. civ.*, 1979, p. 141 ss.

Two more interesting works (with references) and different emphasis and point of view on this problem are: L. MENGONI, *Problema e sistema nella controversia sul metodo giuridico*, in *Jus*, 1976, p. 3 ss.; C. CASTRONOVO, *L'appassimento dello stato moderno e un libro sull'obsolescenza delle leggi*, in *Jus*, 1983, p. 219 ss.

The last one work firstly refers to the work of G. CALABRESI, *A Common Law for the Age of Statutes*, Cambridge-London, 1982, who, as it is known, realised a nice analysis on "statutorification" and legal obsolescence on common law systems.

For a reaction to Irti's ideas see: F. SANTORO-PASSARELLI, *Il codice civile e il mantenimento dei valori essenziali*, in *Temi della cultura giuridica contemporanea. Prospettive sul diritto privato - Il tramonto del codice civile - Il giurista nell'età industriale*, Padova, 1981, p. 135 ss.; F. PIGA, *Tramonto del codice civile? (Codice civile e istituti del diritto pubblico nella realtà del nostro tempo)*, *Ivi*, p. 72 ss.; M. GIORGIANNI, *Intervento*, *Ivi*, p. 113; P. SCHLESINGER, *Il tramonto del codice civile*, *Ivi*, p. 74 ss.; G. CARLI, *Il codice e il processo di sviluppo economico*, *Ivi*, p. 14 ss.; F.D. BUSNELLI, *Tramonto del codice civile?*, in *Legge, giudici, politica. Le esperienze italiana e inglese a confronto*, Milano, 1983, p. 218 ss.; R. SACCO, *Codificare: modo superato di legiferare?*, in *Riv. dir. civ.*, 1983, I, p. 117 ss.; A. DE CUPIS, *A proposito di codice e di decodificazione*, *Ivi*, p. 1979, II, p. 47 ss.; S. PATTI, *Il diritto civile tra crisi e riforma dei codici*, in *Riv. dir. comm.*, 1984, I, p. 85 ss.; G. AZZARITI, *Codificazione e sistema giuridico*, in *Pol. dir.*, 1982, p. 547 ss.; G. REBUFFA, *Servono ancora i codici?*, in *Soc. dir.*, 1981, p. 87 ss.

[40] N. IRTI, *La proposta della neo esegesi*, in *Scuole e figure ...*, cit., p. VI.

On one side, we can note the passing of legal literature from dogmatism to the *"problematica"* or "a new way of analysing juridical problems: a way not targeted at their concrete so1ution or overcoming [...] but only at a deeper study of all the possible consequences and peculiarities of each question [...] a kind of open [...] suggestively unfinished work" [41], while legal authors are extremely interested in sectorial analysis of old problems "attending in a not plainly satisfying way to marginal aspects of law" [42]).

On the other side this, in a broader sense, means that Universities and legal schools are, once more, playing a fundamental role as principal interlocutor of Parliament, as first interpreter of law, leading to a logic reconstruction of positive rules, starting from their first literal knowledge: "from the literal significance of a statute, from its sequence of sections and subsections, articles and commas, from the discovery of new close connection or new logical links arising from the *verba* of positive (statutory) rule" [43], legal authors try to explain the contents of law by putting, in some way, a minimum of order into the, sometimes, confused amount of new statutes.

According to Irti, this "neo-exegetic methodology" does not means a refusal of the whole systematic approach to law, but only the awareness that the unity of law is operating in a plurality of interdependent micro-systems: "the civil code no longer represents, «the system» of civil law, but only, «one» of the possible systems, i.e. the one that, thanks to its extent to, the extreme technicism and subtlety of its provisions, holds the technique of studying, the ordering instruments and the logical categories that apply to all other statutes too" [44].

The mono-system of law, by reproducing the general interests and needs of society is changing into a poly-system of laws repro-

[41] N. IRTI, *Inquietudini della dottrina civilistica*, in *Scuole e figure ...*, cit., p. 98.

[42] R. NICOLÒ, *Diritto civile*, in *Cinquant'anni ...*, cit., p. 73.

[43] N. IRTI, *La proposta della neo esegesi*, in *Scuole e figure ...*, cit., p. VII.

[44] N. IRTI, *La proposta della neo esegesi*, in *Scuole e figure ...*, cit., p. VIII.

ducing the particular needs, the singular interests of a plurality of economical and social groups of pressure that are asking for and obtaining a favourable legislative intervention of the State [45].

As a consequence, the new and relevant approach to law "is not moving from the system built on the skill of the civil code to other laws, but that of starting from this manifold group of new statutes (other than the code), then moving to the system, trying to discover in each new statute or group of statutes an internal unifying and ordering criteria [...], hoping to frame just in the system those new statutes that, otherwise, may be only a mere representation of episodically, singular and irrational interests of each pressure group" [46].

In this perspective we should frame the publication of a series of commentaries to the civil code like the one by G. Cian and A. Trabucchi [47] or the others, more articulated, edited by P. Rescigno, P. Schlesinger, P. Perlingieri [48] and the outcome of the periodical "Le Nuove Leggi Civili Commentate", which expresses the thoughts and first impressions of universities schools (professors and scholars) on reading new statutes on civil matters.

Nevertheless we can note that the growing of such a great number of "Encyclopaedias, Digests, Epitomes, Commentaries, Surveys in which, as it seems to us, the same air ... is always beaten, and the increasing of legal journals and reviews, if they showing a commendable care for their results, are also remarkable more as quantity than as quality" [49].

[45] See: N. BOBBIO, *Contratto sociale, oggi*, Napoli, 1980, p. 30.

[46] N. IRTI, *La proposta della neo esegesi*, in *Scuole e figure ...*, cit., p. X.

[47] G. CIAN, A. TRABUCCHI, *Commentario breve al Codice civile*, Padova, 1983.

[48] P. RESCIGNO, *Trattato di diritto privato*, Torino, 1982; P. SCHLESINGER, *Il codice civile. Commentario*, Milano, 1987; P. PERLINGIERI, *Codice annotato con la dottrina e la giurisprudenza*, Torino, 1980.

[49] G. CRISCUOLI, *Relazione introduttiva dell'VIII convegno dell'Associazione Italiana di Diritto Comparato (A.I.D.C.)*, in *In iure praesenzia*, 1985, p. 250.

Probably, even if "the last years may be thought of as a not particularly happy season for law studies, it is excessive to think them in a complete decline or fall" [50].

Certainly contemporary Italian society is passing through a period of transition full of conflicts aimed at reaching a new social and political settlement, more adequate to the needs of a mature economy operating in a European and international context; but this is not a negative crisis, it is a positive symptom of new change and future developments, which Italian legal doctrine must face up to.

Thus, as pointed out by G. Alpa [51], the 'eighties are marked by progressive increasing of the legal liberties area, a growing relevance of the private autonomy – which gives rise to new contracts such as "leasing", "franchising", "merchandising", "know-how", "computer services" and so on –, a relevance of new individual rights – such as the protection of health and welfare, the preservation of the amenity of the environment, the protection of privacy against the trans flow of computerized data, etc. – and a new relevance of self-regulation in many fields such as the press and media, advertising, informatics, labour etc.

Passing through this rediscovery of private autonomy and self-regulation, contemporary Italian legal thought, especially if it is open, by means of comparative methodology, to foreign suggestions and it is plainly conscious of its European dimension, as outlined by G. Criscuoli and R. Nicolò [52] seems to be able to recover its systematic role, its reconstructive function and "its traditional qualification to mould instruments of knowledge and to make new proposals for progress and civil improvement".

[50] R. NICOLÒ, *Diritto civile*, in *Cinquant'anni ...*, cit., p. 76.

[51] C. FARALLI, *Crisi dello stato e sociologia del diritto*, in *Riv. dir. proc. civ.*, 1986, p. 739.

[52] G. CRISCUOLI, *Relazione introduttiva ...*, cit., p. 250; R. NICOLÒ, *Diritto civile*, in *Cinquant'anni ...*, cit., p. 76.

See also: G. CRISCUOLI, *Comparazione e prospettive del diritto*, in *Dir. giur.*, 1979, p. 721 ss.; ID., *Introduzione allo studio del diritto inglese. Le fonti*, Milano, 1980.

X

New trends and developments: Family Law as a paradigm

Notwithstanding the rich international and European context of studies and the reckless development of modern Italian society, we should admit that the legal thought in Italy seems to be clogged to the law schools and movements of the "formidable seventies" [1].

Italy contemporary political, institutional, economical and moral weakening seems to keep pace with the failure of younger researchers to forsake old fields of study and look for new arguments nearest to the real needs of population. Or, maybe, it is more correct to say that the influence of (young) legal Authors on the institutions and the system is nowadays practically useless.

As R. Orsi said: "future historians will probably regard Italy as the perfect showcase of a country which has managed to sink from the position of a prosperous, leading industrial nation just two decades ago to a condition of unchallenged economic desertification, total demographic mismanagement, rampant "thirdworldisation", plummeting cultural production and a complete political-constitutional chaos" and with the unprecedented level of brain drain, with tens of thousands young researchers, scientists, technicians emigrating to Germany, France, Britain, Scandinavia, as well as to North America and East Asia" [2].

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[1] L. Nivarra (Ed.), *Gli anni settanta del diritto privato. Atti del Convegno. Palermo, 7-8 luglio 2006*, Milano, 2008. This book describes the birth and development of the different "schools" of thought and their impact on the society and politics.

[2] R. Orsi, *The Demise of Italy and the Rise of Chaos*, in Euro Crisis in the Press. The politics of public discourse in Europe, LSE, http://blogs.lse.ac.uk/eurocrisispress/2013/10/08/the-demise-of-italy-and-the-rise-of-chaos/

Even if this catastrophic vision is not entirely corresponding to the reality, it is necessary to admit that, regardless of the economic crisis that has affected all western countries and that has in any case a strong influence on society and therefore on the legal system too, it is now clear that Italy is a suffering country with an involution that dates back to the years 1970/80. There are many factors that have resulted in the current situation and, often, in the opinions of commentators the analysis of the problems is clear. Unfortunately, what it is not clear is the possible solution (if any) of the problem.

This is not the context for a socio-political analysis[3] but it must be pointed out that since the beginning of the Nineties' and up to the blast of the economic crisis, the Italian society, almost without understanding it, has "suffered" the change of the international political setting, the development of the free market and competition (not only at European level but also globally), the migratory flows (both incoming and, again as long-ago, out-coming), and the resulting change in the composition, not merely quantitative[4], of the population. This goes alongside the stagnation of politic, and the almost total depletion of the function of Parliament for the benefit of the oligarchs and the so-called "castes" or lobbies.

[3] See: A. PALUMBO, *La polity reticolare. Analisi e critica della governance come teoria*, Roma, 2011. For an interesting "glocal" point of view and a description of the decadance of contemporary Sicilian society and institutions: P. VIOLANTE, *Come si può essere siciliani? Sicilia (in) Felix: una cultura politica, un eccesso di identità, un'isola non isola*, Roma, 2011, in particular chapters II and III.

[4] In 2012 according to Eurostat regular migrants in Italy are near 5,500.000 i.e. around 10% of population. The number of irregular migrants maybe double. In the meanwhile the population of Italy is diminishing: Palermo is a town that lost around 250.000 inhabitants in ten years and today over a population of around 700.000 inhabitants, more than 10% are immigrants. This means that at least a "contamination" of habits and rules shall be taken in count even if not "officially" recognised by statutory law.

The most part of groups of interest and the majority of professional categories reacted to globalisation "closing in itself", looking for the defence, according to protectionist logic, of their field of action and their revenues of position. This was particularly evident, for example, in the case of the legal professionals that, instead of expanding their ability to compete, opening up to the global and European market and the international competition have preferred to "limit the damages" trying to maintain market shares "ensured by law".

Thus, for example, "notaries" have demanded and obtained that their intervention in the drafting of company contracts was maintained as mandatory by law, without understanding however, that in the face of European competition, the obligation was easily and simply by-passed taking advantage of plainer European rules on companies and using the cheaper "legal services" offered in other countries of the E.U.

Moreover, even the legal profession has not managed to modernize itself in the face of a different and new market and of new and different needs of the Italian and European society; furthermore the number of lawyers has grown in a disproportionate manner in front of a stable market (in fact, sometimes decreasing) being responsible of situations such as in Palermo, fifth town in Italy, with around 700,000 inhabitants and nearly 5,000 lawyers.

The disproportionate increase of legal professions is also due to the wholly Italian phenomenon of the free access to university education, which in its turn is vitiated by a sort of protectionism and closed in itself, that has led to the creation of a law study curriculum which is "compulsory" for all the universities and mainly limited to the national context with a basically theoretical aptitude but no practical at all.

The university open to the masses has requested, obviously, an increase of teaching that, even if has been in some way filled numerically, simultaneously produces, in many cases, a lowering of the quality of teaching and of the ability to research. In its turn the lowering of the quality of teaching produces the lowering of the quality of

graduates[5] and the lowering of the quality of graduates on legal matters has produced the lowering of the quality of the professionals, of the judges[6] and also of the political, managerial and ruling class that once had been composed of the best minds; the lowering of the quality of the ruling class in its turn has resulted, like in a sort of endless loop, in lowering of the quality of the laws and the decrease of the influence and authoritativeness of the legal and political thought.

Unfortunately, the lowering of the average level of studies in the pre-university schools (caused in its turn by the lowering of the level of university training of teachers) does not hope for an improvement in the situation. The Italian university certainly has a need of reform[7]. The excess of reforms (often only of facade) and the succession of reform and reform of the reforms were, unfortunately, a

[5] If, for example, you should examine (mostly "orally" because in Italy, the written examination in the law degree courses is almost unknown) 100 students in a day and the examiners are only two ... it is easy to understand how much time you can dedicate to each student for the evaluation of his training ...

[6] The public competition for the access to the courts, is practically the same as 50 years ago (three written dissertation on topics of criminal, civil and administrative law) with the enormous and crucial difference that 50 years ago there were only very few candidates (around 50 or a few more) as very few had been graduated while today for the selection of 130 judges the applicants are more than 5,000.

[7] The most severe of which would be the abolition of the legal value of the title of study (in practice it is no longer necessary to achieve a degree in order to practice a profession or to be admitted to a public selection (of course with the exceptions of "regulated professions", according to the U. E. regulations). In this way only who has genuine interest will attend a university course of study; this abolition of the legal value of the title of study would also allow a virtuous competition between universities forced to offer the best courses to attract the best students. Unfortunately, in this case, it is difficult for the Italian universities, especially the ones "surviving" with a large numbers of students (often waiting to complete their studies in a time equal to twice or three times the effective duration of courses), to give up a comfortable "income": it offers little quality at low prices, and it counts on the need for students to acquire whatsoever a degree, independently from their real interest to the study.

See: V. ZENO-ZENCOVICH, *Ci vuole poco per fare una università migliore*, Fagnano Alto, 2011; A. BELLAVISTA, *Abilitazione scientifica nazionale e reclutamento dei professori delle università dopo la legge n. 240/2010*, in *Il lavoro nelle pubbliche amministrazioni*, 2012, p. 307 ss.

cure that is worse than the evil that you wanted to treat: the case of the constant changes of recruitment methods and evaluation of professors (and universities) is evocative (and is one of the reasons) of "decadence" of scientific and contemporary legal thought.

I would like to return in a forthcoming volume on this point, but now, admitting that this is obviously a generalization that does not exclude commendable and even numerous exceptions, I have to say that it is a fact that contemporary Italian "legal thinkers and Authors" have produced no more results equal to those obtained during the "formidable seventies" and eighties.

Schools of thought and the so-called *Maestri* i.e. Mentors, have been remained essentially the same, suffering the "doctrine" of the same disease of which still suffers the Italian politic dominated mostly by people older then seventy years. This is not in itself a bad thing: just think of the lucidity of "old masters" (some of them over 90) such as Norberto Bobbio, Angelo Falzea, Rodolfo Sacco, Sabino Cassese, Stefano Rodotà or Pietro Rescigno, Natalino Irti and Francesco Donato Busnelli and of the many scholars mentioned in the previous paragraph. However the fact remains that few young people were heirs to this tradition and very few have been the new studies produced. So it happens that all the great themes studied in the seventies[8] i.e. property (ownership), the autonomy of the private sector, company and the market, civil liability and, generally, the protection of the rights, are still today the themes of researches, however often ending, in that studies, for beating the same air without any particular new results it almost seems that in this century, other than the History, has been also ended the role of the lawyer, at least the "municipal" lawyer strongly compelled to the mere legislative datum.

This does not mean that there were no choices of subjects and no innovative schools of thought: along with new books on "sys-

[8] L. NIVARRA (Ed.), *Gli anni settanta del diritto privato. Atti del Convegno. Palermo, 7-8 luglio 2006*, cit., p. 99 ss.

temology" i.e. the study and comparison of different legal systems and of a specific legal system (including the works of Giovanni Criscuoli [9], Antonio Gambaro, Rodolfo Sacco, Ugo Mattei, Pier Giuseppe Monateri, Gian Maria Ajani, Attilio Guarneri, Guido Alpa, Vincenzo Varano and Vittoria Barsotti, Alessandro Somma, Gabriele Crespi Reghizzi, Marina Timoteo, Renzo Cavalieri, Giorgio Colombo, Gian Maria Piccinelli and Massimo Papa) there are studies on property by Antonio Gambaro, Ugo Mattei, Albina Candian, Maria Donata Panforti, Anna De Vita and Barbara Pozzo, the ones on trust and on "legal flows" of Maurizio Lupoi, the ones on contract of Giorgio De Nova and Aldo Frignani, on commercial law of Diego Corapi and Joachim Bonell, those on civil liability of Giulio Ponzanelli and Pier Giuseppe Monateri, alongside studies on European Law (Luigi Moccia and Gian Antonio Benacchio), on environmental protection (Barbara Pozzo), on new types of contract (Mauro Bussani), on reliance and the enforceability of promises (Giovanni Marini), on legal profession and the companies (Aldo Berlinguer), on agency (Michele Graziadei) on family law (Maria Donata Panforti, Gabriella Autorino, Pasquale Stanzione and Virginia Zambrano), on gender law (Maria Rosaria Marella), on succession (Andrea Zoppini), on the right of information and media law (Vincenzo Zeno Zencovich, Salvatore Sica, Giovanni Comandè), on the economic analysis of law (Roberto Pardolesi, Ugo Mattei, Antonio Cucinotta), on law of new technologies and the cyberlaw (Giovanni Pascuzzi and Roberto Caso), are all representative of the vitality of contemporary legal thought.

[9] G. Criscuoli was the founder of the Palermo school of comparative law that since 1970 researched on specific subjects of private comparative law (property and land law, family law, contract, torts, right of information, succession law) especially directed to a comparison with the English and common law experience. The "school" is very active in the European and international scenario publishing essentially in English and abroad. Members of the school are, among others: Salvatore Casabona, Giuseppe Giaimo, Antonello Miranda, Alessandra Pera, Mario Serio and Guido Smorto.

However, it is not a case that the massive majority of these scholars are expert in comparative law, have a formation in common law countries and involvement in British and North American universities. The area of the Italian legal thought that nowadays is well renowned in the world is that of the comparison.

This does not mean that there are no "purely" Italian scholars of absolute prestige in their specific field of interest (like "Roman law", Jurisprudence, Criminal Law, Administrative law, Labour law, Commercial law and so on) but simply that the field of researches of comparatist scholars are more successful because, thanks to their training and knowledge of the legal systems, their studies cover areas of research of transnational significance and are read and appreciated outside the narrow national borders.

In particular, the ability to keep relations with the foreign Academia allows these scholars to spread their thesis [10] and to influence the development of the European law (as in the case of the research project on the Common Core of European Private Law) and the evolution of different aspects of the law within international academic organisations and associations like the International Academy of Comparative Law, the Association Henri Capitant, the American Society of Comparative Law, the Société de Legislation Comparée [11] or the International Society of Family Law [12], and thanks to the efforts and works of the A.I.D.C. Associazione Italiana di Dirit-

[10] A very good and complete reconstruction of the works and influence of the Italian Schools of Comparative Law is: E. GRANDE, *Development of Comparative Law in Italy*, in The Oxford Handbook of Comparative Law, Reimann M. e Zimmermann R. (Eds.), Oxford University Press, 2006, p. 107-130.

[11] Académie Internationale de droit comparé www.iuscomparatum.org
American Society of Comparative Law www.ascl.org/
Association Henri Capitant www.henricapitant.org
Société de Legislation Comparée www.legiscompare.com/

[12] The Italian group of the I.S.F.L. is particularly appreciated for its contribution and is composed by at least 25 researchers; among them M.D. Panforti, A. Miranda, A. Fusaro, F. Giardini, S. Casabona, A. Pera, C. Valente, I. Ferrari.
ISFL website: http://www.isflhome.org/home

to Comparato [13] (Italian Society of Comparative Law) founded on 1958, promoter of 22 international biennial symposia, 4 innovative "young comparatists" international biennial conferences and producer of the "Comparative Law Review" [14] published in English with international standards and contributions.

Several were the initiatives and proposals on comparative law. Since 1995, for instance, Pier Giuseppe Monateri has directed the on-line review The Cardozo Electronic Law Bullettin [15]. In 2001 the "Associazione di Diritto Pubblico Comparato ed Europeo" [16] was founded. Since its foundation, the association has published the Review of Public Comparative and European law [17] (Rivista di Diritto Pubblico Comparato ed Europeo). Moreover, thanks to Giovanni Comandè, since 2009 was published in English the on-line review with international standards Opinio Juris in Comparatione [18] devoted at enhancing the dialogue among all legal traditions and "diffusing contributions on national law as well, expanding access to foreign legal materials and ideas to those who do not already

[13] The Associazione Italiana di Diritto Comparato http://www.dirittocomparato.org/index.htm is very active in each field of comparative law. Mauro Cappelletti, Rodolfo Sacco, Pietro Verrucoli, Giorgio Bernini, Giuseppino Treves, Vittorio Denti, Stefano Rodotà, Gabriele Crespi Reghizzi, Maurizio Lupoi, Mario Rotondi and Gino Gorla, had been the founders. The AIDC represented Italy at the quadrennial International Congress of Comparative Law since 1974 and publishing the Italian National Reports. The AIDC is very active not only on promoting young researcher but also in developing researches on comparative law without any distinction between "public" and "private" law, in all the innovative fields of studies like "law and literature", "law and languages", "law and economics", "law and biotechnologies" and so on.

[14] Comp. Law Review: http://www.comparativelawreview.com/ojs/index.php/CoLR.

[15] http://www.jus.unitn.it/cardozo/Review/home.html

[16] DPCE http://www.dpce.it/index.php/l-associazione

[17] Diritto pubblico comparato ed europeo http://www.dpce.it/index.php/la-rivista.

[18] Opinio Juris in Comparatione. Studies in Comparative and National Law http://www.opiniojurisincomparatione.org/

have access to the traditional avenues (such as journals in the language of the explored legal system)".

In 2010 from an idea of Pasquale Stanzione started the publication of the on-line review "Comparazione e Diritto Civile" [19] that is the western correspondent of *China Legal Science*.

Raffaele Torino, Andrea Buratti, Oreste Pollicino, Alberto Alemanno and a group of young researchers of European law and constitutional and comparative law opened the interesting blog "Diritti Comparati" (diritto.typepad.com) aimed to the study and debate of transnational and transcultural arguments and problems of law.

On the same year 2010 a group of former associate and co-founder of the AIDC created the SIRD - Italian Society for the Research on Comparative Law [20] publishing the Annuario di diritto comparato e studi legislativi.

All these initiatives prove the interest and vitality of comparative law studies in Italy and the capability of Italian scholars to work in the international and European context and to lead group of researchers in a great number of wide and influential projects. As, for instance, the Common Core of European Private Law project, now in its 20th years, that in the words of Ugo Mattei, "is a very promising hunt for analogies hidden by formal differences. Such common core should be unearthed in order to obtain at least the main lines of one reliable geographical map of the law of Europe. What the use of this map will be is not concern for the cartographers that are drafting it, although we may all agree that this kind of research should be very useful for and deserve more attention from official institutions that are encharged to draft European legislation (directives, regulations etc.). For the transnational lawyer the present situation is like that of a traveller compelled to use a number of different local maps each one containing misleading in-

[19] http://www.comparazionedirittocivile.it/

[20] SIRD - Società Italiana per la Ricerca nel diritto Comparato www.sirdcomp.it/

formation. We wish to correct this misleading information; we do not wish to force the actual diverse reality of the law within a map to reach uniformity. We are not drafting a city plan for something that will develop in the future and that we wish to affect. We are neutral in front of future developments. This project only seeks to describe the present complex situation in a reliable way. While we believe that cultural diversity in the law is an asset, we do not wish to take a preservationist approach. Nor we wish to push in the direction of uniformity. This is possibly the most important cultural difference between the Trento project and other very publicized enterprises such as the Unidroit Principles (and probably also the Lando commission) which are doing city planning rather than cartographic drafting" [21].

[21] U. MATTEI, http://www.common-core.org/node/8

17 books have been published until now, 7 are forthcoming.

R. ZIMMERMANN, S. WHITTAKER, *Good Faith in European Contract Law*, "The Common Core of European Private Law", Cambridge University Press, 2000; J. GORDLEY, *The Enforceability of Promises in European Contract Law*, "The Common Core of European Private Law", Cambridge University Press, 2001; M. BUSSANI, V.V. PALMER, *Pure Economic Loss in Europe*, "The Common Core of European Private Law", Cambridge University Press, 2003; E. KIENINGER, *Security Rights in Movable. Property in European Private Law*, "The Common Core of European Private Law", Cambridge University Press, 2004 and 2009; F. WERRO and V.V. PALMER, *The Boundaries of Strict Liability in European Tort Law*, "The Common Core of European Private Law", Stämpfli-Carolina Academic Press, 2004; R. SEFTON-GREEN, MISTAKE, *Fraud and Duties to Inform in European Contract Law*, "The Common Core of European Private Law", Cambridge University Press, 2005; M. GRAZIADEI, U. MATTEI, L. SMITH, *Commercial Trusts in European Private Law*, "The Common Core of European Private Law", Cambridge University Press, 2005; B. POZZO, *Property and Environment - Old and New Remedies to Protect Natural Resources in the European Context*, Stämpfli-Carolina Academic Press, 2007; M. BUSSANI, U. MATTEI, *Opening Up European Law*, The Common Core Project (Bern, Staempfli, 2007); T. MÖLLERS and A. HEINEMANN, *The Enforcement of Competition Law in Europe* "The Common Core of European Private Law", Cambridge University Press, 2008; M. HINTEREGGER, *Environmental Liability and Ecological Damage in European Law*, "The Common Core of European Private Law", Cambridge University Press, 2008; M. BUSSANI, F. WERRO, *European Private Law: A Handbook*, "The Common Core of European Private Law", Stämpfli-Carolina Academic Press, 2009; G. BRÜGGEMEIER, A. COLOMBI CIACCHI and P. O'CALLAGHAN (eds), *Personality Rights in European Tort*

The aim of the Common Core of the European Private Law is to start from the creation of questionnaire based on real cases and situation looking for answers from each researcher not limited to "statutory law" or "case law" but also based on the praxis, reconstructions, alternative decisions, etc. In other words it is a "bottom up" approach.

Thus, for instance, in the case of "the family obligations between patrimonial duties and duties of care" (this "common core" group has been leaded since 2010 by Antonello Miranda and Maria Donata Panforti) applying the common core method, the research group developed a questionnaire based on real situations that may happen in different countries and legal systems.

The starting point is that if we observe the dynamic of family life, «family» meaning any relationship recognized by law as juridical relevant and worthy of protection, without any reference to a specific legal system and tradition nor a particular kind of "family" (natural, legitimate, de facto relationship, same-sex relationship, and so on), we are able to point out some constant and denotative relational concrete elements that need juridical – legal or ju-

Law, Cambridge University Press, 2010; J. CARTWRIGHT and M. HESSELINK, *Precontractual Liability in European Private Law*, "The Common Core of European Private Law", Cambridge University Press, 2011; E. HONDIUS, H.C. GRIGOLEIT (eds), *Unexpected Circumstances in European Law*, "The Common Core of European Private Law", Cambridge University Press, 2011; C. VAN DER MERWE, A.-L.VERBEKE (eds), *Time Limited Interests in Land in European Law*, "The Common Core of European Private Law", Cambridge University Press, 2012; M. BUSSANI, F. WERRO, *European Private Law: A Handbook*, Volume II, "The Common Core of European Private Law", Stämpfli-Carolina Academic Press, 2014.

Forthcoming publications are:

S. BANAKAS and A. MULLIS (eds), *Personal Injury Compensation in European Law*; C. GODT, G. VAN OVERWALLE, L. GUIBAULT and D. BEYLEVELD (eds), *Boundaries to Information Property in European Law*; A. MIRANDA, D. PANFORTI (eds), *Duties of Care and Duties of Cash in European Family Law*; N. COHEN, R. STEVENS and G. DANNEMANN (eds), *Restitution in Contractual Context in European Law*; P. PICHONNAZ (ed), *Set-Off in European Law*; P. GILIKER and B. GSELL (eds), *Remedies in Contract Law in Europe*; E. COOKE, L. MARTINEZ and A. PRADI (eds), *Transfer of Immoveable Property in European Law*; J. BAAIJ, L. MACGREGOR, D. CABRELLI (eds), *The Interpretation of Commercial Contracts in European Private Law*.

ridical it is not important – answers. More precisely, as S. Casabona observed [22], the fact that the concept of family involves the participation of more than one person implies that there are a lot of interconnected and reciprocal duties and rights, in one word «obligations», which bind one person to each other: man and woman, husband and wife, parents and children and so on.

Notwithstanding the difficulties of a general common approach we must ask what is the nature, the extension, the ratio, the enforceability of these «obligations»; and if the law should sit softly, shyly at the feet of family life, or if differently it has to intervene imposing untouchable and enforceable principles and rules which reflex a certain society and consequently the culture and morality of its majority. We must ask again if it is possible detaching some common trends in the countries of the so-called Western Legal Tradition and in Europe [23].

In other words, in observing family law we note at least three peculiarities, which make any comparative analysis particularly problematic.

The first one is the resistance of the social reality of the family to be regulated by law. Considering that, the traditional classifications, taxonomies and ideas regarding family law, seen as a branch of law totally separated from others [24], and comparative method seen as a mere confrontation of different legal solutions, are to be deeply reconsidered.

In fact, only a comparison of law opens to the other sciences like sociology of law and anthropology, ethnology of law, legal and social history and political science, can enlighten the real nature and extension of differences among various legal solutions in family law: a "multilevel" methodological approach in dealing with the field of family law appears consequently more than a hermeneutic choice but a real scientific and due necessity.

Secondly, if it is true – as professor A. Watson taught us criticizing the traditional so called «mirror thesis of law» [25] – that the evolution and differentiation of law and regulation in the countries do not only depend on their different social structure but overall on a never ending circle of legal transplant (by means of imitation or imposition of legal models), nevertheless one fundamental datum cannot be either denied or neglected: family law presents one of the most impressive percentage of differentiation; a real constellation of ideas of «family» and consequently a great diversification of legal solutions descending from various types of societies living in a certain historical moment.

Said that, it is self evident that the role of comparison in detaching, not only the differences but also the common trends and elements – or, as we like to say, a «common core» [26] – in family law, and in particular in family obligations, is full of traps of unilateral and dogmatic points of views if one approaches this matter in a traditional way analysing only the different legislations or the different abstract reconstructions of legal systems.

Finally, with express reference to the theme of «family obligations», it is necessary to outline that there is a strong contiguity among different plans: legal, moral and social.

[22] See *passim:* S. Casabona, *Il dovere di assistenza verso il genitore in stato di bisogno*, Napoli, 2009.

[23] A. Pera, *Il diritto di famiglia in Europa. Plurimi e simili o plurimi e diversi*, Torino, 2012. See, also, M.R. Marella, G. Marini, *Di cosa parliamo quando parliamo di famiglia*, Bari, 2014.

[24] Also the description of family as the archetypal «private» institution is today outmoded, being possible describing it also in terms of «public». See J. Eekelaar, *What is "critical" family law*, Law Quarterly Rev. 1989, p. 254.

[25] See in particular A. Watson, *Comparative law and legal change*, in *Cambridge Law Journal*, 1978, p. 313; A. Watson, *Legal transplants: An approach to comparative law*, 1993, University of Georgia Press; Id., *Comparative law and legal change*, in *Camb. L. J.*, 1978, p. 313; Id., *Legal change: sources of law and legal culture*, in *Un. Pen. L. Rev.*, 1983, p. 1121.

[26] M. Bussani, U. Mattei, *The common core approach to European private law*, in *Columbia J. Eur. L.*, 1997-1998, p. 339; M. Bussani, *Current trends in european comparative law: The common core*, in *Hasting's Int'l & Comp. L. Rev.*, 1997-1998, p. 785.

While the development of family law – in the form of codified rules, case law, other national and transnational statutory tools – means a more advanced commitment of legal systems to family issues, the different legal answers and instruments have to settle with the ontological closeness of family and its relational dynamic respect to an imposed external rules. Indeed, it is a strong and widespread idea that the family members can or should self regulate their ménage and self restrain their behaviours according the common and best interest of "family life".

Considering that, the problem of the existence, enforceability, efficiency and efficacy of family obligations depends on the fact that people "feel" those rules as something which expresses what everyone "ought" to do without this osmotic process between the legal norms and the correspondent social[27] and "moral"[28] commands, every attempt to impose external rules will clash, causing a high level of no compliance. It might further materialise a risk of outmoded legal principles and statements, while having the «legal irritant» effect[29] of a top down decision.

Thus, any comparative study on family law has to confront with deeply different national ideas and definitions of family as socio-legal entity: it could be defined as a group of people related by blood or as members of the same household, or as a group of parents and children, as nuclear family (father, mother and children) or as extended family (grandparents, aunts, uncles and cousins), founded or not on marriage, composed by heterosexual couple or also by homosexual one.

Moreover, family law has an increasing international dimension: not only because national judges have to deal every days with matters such as recognition of foreign marriages and divorces, but also because some family matters are not longer regulated exclusively by national law, but also by international conventions and principles: first of all those of European Convention of Human Rights and the relative case law of the Strasbourg Court.

Finally, with reference to European Union law, an important body of European Court of Justice case law and of EU legislation have defined – not always coherently[30] – what is to be a family member and delineating the level of social entitlement available to them[31].

This multitude of points of view and definitions (national, European, international) not only hide different policy choices on what a family should be and do (in other words the «target» which fam-

[27] We read in M. MACLEAN, J. EEKELAAR, *The parental obligation*, Hart Publishing, 1997, p. 6-7: "(...) we could ask people why they act in certain ways and whether one reason is that they "feel" they "ought" to do what they do? But Janet Finch (*Family obligations and social change*, Polity Press, 1989, p. 146) has pointed out that «the matter is quite complex because one of the grounds upon which people justify their own actions is that they are only doing (or not doing) the same the most other people». Does this mean they are doing it because everyone does it, or because they think everyone *ought* to do it? Even if they think everyone ought to do it, is this because it is a tenet of their personal morality, perhaps shared by few others, or because they believe (rightly or wrongly) that most people also feel it should be done? These matters are hard enough to grasp conceptually, and Finch has explained how difficult it is to ascertain empirically whether, in familiar relations, a person's actions towards another were grounded, even partially, in the belief that «there is a social rule» requiring those actions. They may have no clear idea what the «socially approved» position is, or think there is such a position when this is unlikely, or act because «that's the way the world is» rather than on a normative belief".

[28] As Tony Honorè has observed moral principles and obligations are "incomplete" guides to conduct because they do not always indicate who owes which obligations to whom, when, and what extent, see T HONORÈ, *The dependence of morality of law*, Oxford Journal of Legal Studies, 1993, p. 1.

[29] G. TEUBNER, *Legal irritants: good faith in British law or how unifying law ends up in new divergences*, in *Modern L. Rev.*, 1998, n. 61, p. 11.

[30] On the relationship between european and national law see: A. MIRANDA, *Stirring the European legal systems: the Italian perspective in a comparative overview*, in *Les échanges entre les droits, l'expérience communautaire* (S. Robin-Olivier, D. Fasquelle Eds.), Bruxelles, 2008, pp. 299-306.

[31] H. STALFORD, *Concepts of family under EU law - Lessons from the ECHR*, in *Int'l J. L. & Pol'y & Fam.*, 2002, p. 410; E. CARACCIOLO DI TORELLA, A. MASSELOT, *Under construction: EU family law*, in *European Law Rev.*, 2004, p. 32. See also: A. PERA, *Il diritto di famiglia in Europa. Plurimi e simili o plurimi e diversi*, Torino, 2012.

ily law has to pursue) but also significantly conditions the number, the typology, the extent of the family obligations multiplying options and denominations and consequently making the work of researchers really difficult.

Furthermore, beside a mere normative element of family obligation, it is possible to detach a *contextual* element made by social and cultural norms, by historical conditionings and policy trends, by cryptotypes and not verbalized or implicit rules[32].

The consequence is that any attempt of a general classification of these obligations is born with a sort of «*vestimentum*», a heavy and cumbersome dress which is the result of the not objective point of view of the observer accustomed to a particular national legal system and legal tradition[33].

At this point the question is whether it will be possible to draw some fundamental and common guidelines and principles generally valid, and consequently whether it is possible and useful to have a transnational and not conditioned scheme on family obligations.

The answer depends on the point of view of the observer. We should not take into consideration a «packaged» idea of family, but we have to consider that every time the legal system recognises a certain unit as a family worthy of protection, there will be as a consequence family obligations. As a result we could try to make a very general and not conditioned classification of these obligations, following the facts and not the general taxonomies.

[32] R. SACCO, *Legal formants: a dynamic approach to comparative law*, in *Am. J. Comp. Law*, 1991, p. 387: "Normally, a jurist who belongs to a given system finds greater difficulty in freeing himself from the cryptotypes of his system than in abandoning the rules of which he is fully aware. This subjection to cryptotypes constitutes the «mentality» of the jurist of a given country, and such differences in mentality are the greatest obstacle to mutual understanding between judges of different systems. Cryptotypes may be identified and explored only through the use of comparison at a systematic and institutional level".

[33] J. H. MERRYMAN, *The civil law tradition: an introduction to the legal systems of western Europe and Latin America* (2nd ed. 1985).

Family obligations could be divided in two main categories: a) *duties of care*, meaning that the bulk of duties relating to moral and psychological assistance and sustenance (including mutual comprehension, fairness and solidarity); b) *patrimonial duties* (or *duties of cash*), meaning financial and economic support (using the term "support" widely: income payments, lump sum, property transfer and alimony). Of course this also means to consider property concept (succession or transfer or management of wealth) and tort law aspects.

Besides, considering the relational element of the obligations, paying so attention to the subjects involved in the duties it is possible to distinguish: a. *inter spouses/cohabitant obligations;* b. *parental obligations*; c. *other obligations inside the «extended family»* and so on.

Finally, considering the means by which pressure may be brought upon individuals to comply with these obligations[34], it is possible to recall the distinction "between obligations which impose a direct duty on the duty-holder, enforceable by or on behalf of the beneficiary against the duty holder, and those which are not legally enforceable by the beneficiary but where a third party, by visiting consequences on either the duty holder or beneficiary, is able indirectly to secure or promote their performance".

With the "family law" questionnaires two important objectives are achieved: firstly, to obtain a sort of evergreen scheme where to arrange the diversity and complexity of reality: a sort of a «naked» classification (stripped from legal, historical and sociological conditionings) where it is possible to insert – and to find in a unitary background – different models and institution coming from more or less distant legal experiences. Secondly, to demonstrate the existence of an essential framework of reference which represents a common «grammar» for scholars to «read» and understand the foreign legal solutions beyond peculiar taxonomies and municipal classifications.

[34] M. MACLEAN, J. EEKELAAR, *The parental obligation*, Hart Publishing, 1997, p. 27.

Of course in order to obtain comparable answers from different legal systems, the answers have to refer to identical practical questions interpreted as identically as possible by all researcher. But the answers cannot be "synthetic" needing more additional explanations especially in order to distinguish the answer following the strict "rule of law" (statutory rule or the interpretation of the Courts) from the answer following the "reality". This is the most problematic point because it is obviously difficult for a "civil lawyer" to "remove" the "Statutory rule" approach in favour of a most "social" (or customary or practical and real even if "border line", or alternative) approach[35].

Thus, for instance, if we have a statutory rule that admit only the "legal marriage" with no possibility of divorce and we have to answer what happens if "Ciro and Margherita" (each of them married with other partners) live together e.g. if they have to contribute to the ménage, we can obviously answer saying that the law doesn't recognise any right to "engaged couples" but in this case the answer may be very far from the reality: on the contrary, according to the common core approach, we should effort to look behind the rule of law and following some possible interpretation by the Courts, or some possible interpretation by the Authorities, or (better) the "customary" solution that is consolidated in a certain social group. The refore, if in the hypothetical "Republic of Pizzaland" Ciro and Margherita even if not married usually regulated their relationship at least from economic point of view stipulating a "contract" or "agreement" (maybe not enforceable but possibly useful as element of proof in a judgement) or expressly dividing their duties, we should answer that it is a possibility to regulate their relationship even if the statutory law doesn't recognise it.

[35] On this specific point see: A. MIRANDA, *Tra Moglie e Marito non Mettere il Dito*, in *Il Massimario. Proverbi annotati di diritto comparato. Liber amicorum in onore di Gabriele Crespi Reghizzi*, R. Cavalieri and G. Colombo (Eds.), Milano, 2013, p. 165 ss.

At the end of the day, the result of the project is the reconstruction of the "common real and effective rule" regulating each situation detachedly from the single national legislation or single legal system.

* * *

Even if the common core approach and the richness of the studies of the Italian School of comparative law have been internationally appreciated it is sad to admit that inside Italy their influence on Politics and on the legislation is still weak as weak is the influence of the legal thought in general. The reasons of this weakness are complex and not easy to deduce: one of the reason may reside in the too "static" and rhetorical analysis of the jurists, sometimes unable to go further than a mere "positivistic" reconstruction of "abstract even if impeccable logic" model; or, maybe, in the prominence of the economic approach to the problems; or in the indifference of politics towards problems of complex solution (and not appealing in terms of image and ... votes); and so on.

Italian "family law" seems to me as the symbol of this gap between society, "intellectuals" and politics. Indeed, notwithstanding the consequence of the strong influence of social habits and a sort of "path dependency", notwithstanding the ability of our academics and the interpretative and reconstructive effort of the judiciary, family law seems almost very old and out of date facing to the reality. Family lawyers are talking of «anarchy», «chaos» and «incoherence» of rules, with the new ideas and techniques proving fragmented and uncoordinated, and in any case not entirely displacing the original model, facing "an uneasy transition from a known past to an uncertain future" [36], being it almost impossible

[36] J. DEWAR, *Family Law and its Discontents*, in *Intern. Journ. Law, Pol and the Family*, 14, (2000), 59-85, at 60.

to talk of a global transformation where one body of rules, thought, structures and institutions will be replaced by another.

Even the expression "family law", in consideration of the developments of the contemporary society, sounds today misleading seeming better to speak at least of a "law of families". But this, as we can see in a few moments, in a country as Italy were only the "traditional" family (the one with "mama and papa" as English said) has a strong constitutional and legal protection is, even today, a very difficult question.

The real problem of "family law" is the fact that the "law", intended in a positive way as Statutory Law, has not changed at all being *"immobilis in mobile"* [37]. It has rather been crystallised, acquiring a short-sighted confined vision, thus accentuating day after day its disconnection from real life.

In Italy, indeed, family law appears to be the field in which the fire of doctrinal debate is still brightest and in which, more and more often and in a painful way, judges have been called upon to make decisions in the absence of precise, exhaustive and up-to-date rules of law or, and this is even worse, in presence of statutory rule absolutely not comprehensible and plenty of technical mistakes (like the infamous statute on artificial insemination enacted on 2004 and after 10 years completely transformed by judiciary) [38].

[37] The "immobility" of law is evident also in the field of succession law: A. MIRANDA, *Immobilis in mobile: the Italian law of succession in a changing family and society*, in *Essays in honour of Penelope Agallopoulou*, Athens, 2011, pp. 957-963.

[38] A. MIRANDA, *Surrogate Motherhood in Italy*. In *Gestation pour autrui: Surrogate Motherhood*. Paris: Société de législation comparée, 2011, pp. 187-197. See also: L. PALUMBO, *The borders of legal motherhood: rethinking access to assisted reproductive technologies in Europe*, in *Bodies and borders: negotiating motherhood in the 21st century* (S. Michel, J. Jenson, Y. Ergas eds.), N.Y., Forthcoming.

Apart from the critics to this Act expressed unanimously by Authors, it is particularly interesting to note that the general implant of the Act has been completely transformed by decision not only Italian but also European. According to the European Liberties Platform "Step by step, the courts have dismantled the law, considering it too restrictive and in violation of the freedoms of those couples in need of other help to have children. Now, after the (last) decision of the

Moreover, this is a field in which the legislator's work appears more and more lacking in influence, if not harmful, also in consideration of the inability, for obvious internal reasons of ideological contrast, of the national legislator himself to intervene.

This first characteristic aspect of family law makes the subject unique within Italian's (perhaps within the whole of civil law's) juridical panorama, because we witness a substantial overthrow of the "positive" superiority of the legislative formant (which is typical of civil law) in favour of the doctrinal and juridical ones: in other words, in contemporary family law, what takes on particular importance are not so much the rules of law (which are too complex and out of step with modern times and needs of the society), as second readings, reconstructions and, most of all, the interpretation and the concrete implementation of the law by jurists and judges.

In short, we find ourselves facing a field in which, today, cases end up being the main source for rules; but if, on the one hand, this is natural, functional and reassuring in Common Law Systems, on the other hand it becomes incongruous and therefore disruptive in a Civil Law System, in which, like it or not, the judge and the jurist are, no matter what, always subject to the Statute Law and may only "move" within its narrow confines. So much so as to even force them to distort and overthrow the *ratio legis* in order to reach a decision of some sort.

The second characteristic element of family law, tightly bound to the first, is the intimate connection between legal aspects and society's developments and needs: in other words, family law (or,

Constitutional Court, heterologous artificial insemination is permitted. In just over three weeks, many couples have applied for access to the procedure: the roughly twenty private centres that guarantee artificial insemination procedures have already received 3,400 requests for heterologous insemination. In the past, couples turned to foreign centres, most of which were in Spain, Switzerland, or Belgium - all counties with more liberal legislation than Italy. According to the Italian private centres, the number of Italian couples requesting the procedure will soon surpass 10,000."

Corte Costituzionale, sentenza n. 162 9/4/2014 http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=162

better, family matters) differ from the other areas of Private Law (i.e. property law, contract law, succession law and even torts and civil liability), because it suffers more the consequences of society continuously changing and it depends more on the conditions and circumstances in which it has to operate[39].

If we examine the history of the concept of property for example, we will note how, in spite of social and technological evolution, in this field the terms of the problems remain the same and how the solutions adopted and the legislative choices made are firmly bound to millenary conceptions and institutions; all of this without causing (too many) traumas and without society or, better, "common people", dissenting or refusing the traditional model. The idea of property may be different in the way it actually articulates itself from one country to another and from one time to another, but it remains an idea based on universal concepts.

We could risk a similar statement for contracts, even though in this field differences are more relevant and depend on the differences among the societies in which the contract is required to work. However, certain juridical phenomena appear to be the same regardless of the context in which they operate or of local history: if I need to buy some bread (you'll excuse the triviality of this example), I will need to exchange something against a price and to settle an agreement; whether you call it *contratto*, contract or *contrat* or in any other way, the essence of the phenomenon does not change, no matter what the time or place may be[40].

Now, all of this cannot, on the other hand, be said of family law. It would, in fact, be enough to think of the different conceptions of

[39] See: D. BRADLEY, *Family law and political culture*, London, 1996; ID., *Convergence in family law: mirror, transplants and political economy*, in *Oxford Un. Comp. Law Forum*, 2001. ouclf.iuscomp.org/articles/bradley.shtm

[40] Obviously all law changes and changes continuously. R. Sacco has vastly demonstrated this point maintaining, amongst other things, that mutations often do not depend on history, evolution, socio-economical circumstances and so on. Sacco moreover specified mutations may have different and sometimes com-

"family" which have followed one another in human history or which today exist in different cultures and even within the same country, to understand how, in this field, legislative choices are tightly bound and functional to their different contexts.

We find ourselves facing an area of Private Law in which "legal rules" remain mere "proposal of rules", if they cannot precisely reflect the "applied rules": the rules spontaneously created and followed by society. In this field, the divergence between the "declamation" of the rule and its ability to operate runs the risk of being extreme, given the speed and the depth of social mutations and also given the presence of formants, often hidden or cryptotypical, which greatly influence each model's evolution.

The point is that family law represents a kind of "traditional law", therefore spontaneous and far from the idea (typical of jurists belonging to technologically advanced societies) of a "law created through some artful procedure", be it a bill, or a sentence which sets a precedent, or an essay by a prestigious scholar; family law is, for the most part, a "spontaneous law of advanced societies" which excludes "any decisional intervention by any authority, and any requisite which would limit society's power to choose" [41].

As we have seen before all experiments and researches somehow directed towards the harmonisation or unification of national laws deal with property, contracts, torts, civil liability, consumers' protection, environment protection, maybe human rights, but no one, other then the "common core project", has ever wanted or been

plex origins and causes but, "some of the main, cardinal, mutations of systems are definitely related to equally cardinal social mutations. In other words: the most radical of social mutations – and only those – impose a correspondent mutation of the law". See A. GAMBARO, R. SACCO, *Sistemi Giuridici Comparati*, Torino, 1996, p. 34; A. WATSON, *Legal Transplant and Law Reform*, in 93 *LQR*, p. 79.

[41] R. SACCO, *Introduzione al diritto comparato*, Torino, 1994, p. 26, who suggests how "the study of ethno-law could induce us to study the spontaneous law of advanced societies again". A translation in English of Sacco's essay is: *Legal Formants: a dynamic approach to comparative law*, in *The Am. Journ. Comp. Law*, XXXIX, 1991, p. 1-34 and 343-402.

able to face the quest of imposed general and uniform family law. Nevertheless its problems are often common, as common are the solutions, as universal is (even if within its different meanings and institutions) the theme of the family.

Supposing, then, what changes is not family law but family itself, let's see what the situation is in Italy. It is a good idea to immediately mention that in Italy, as well as in many other Western countries (for example England or Australia or USA), more or less in the middle of the 70s, the need was felt and acted upon for a act, which would profoundly reform family law. The presence of a civil code and the arrangement of legal rules concerning the family in a specific book of the code itself, as well as in a myriad of provisions scattered in its various sections dedicated to single specific institutions, made it possible for the Italian "Family Law Reform Act 1975" to be a proper "global" reform of the subject.

The reform appeared necessary because, according to the doctrine, "on the plot of the civil code the provisions of the Constitution were to insert themselves, causing profound changes" [42]; our Constitution was, in fact, subsequent to the civil code and founded on particularly intense principles of equality, personal freedom and respect for social groups. Consequently, in order to give effectiveness to the provision of art. 29 of the Constitution, which acknowledges "the rights of the family as a natural society founded on marriage", which, in turn, "is based on the moral and juridical equality of husband and wife", it was necessary to update the old code model of patriarchal family dominated by the husband-father, by emphasising equality between husband and wife and among the single components of the family and, moreover, by protecting the custody and care of the children (of natural ones as well), in accordance with their "best interest".

[42] P. Rescigno, *Il diritto di famiglia a un ventennio dalla riforma*, in *Riv. Civ.*, 1998, II, p. 109.

With the "Family Law Reform Act 1975" great part of the civil code was rewritten, taking care of respecting Constitutional principles and consequently introducing the new regime of legal communion of goods (i.e. a kind of joint ownership); abolishing the prohibition to make donations between husband and wife; establishing the new regime of patrimonial conventions, with the consequent abolition of the "dowry" and the contemporary introduction of the "patrimonial fund" (a kind of "trust for families"); and modifying successions, first of all in favour of the surviving consort and secondly in favour of the children, without discriminating between legitimate and natural ones.

Moreover, it has to be said that this new law provides for the intervention of a judge in the case of controversies on "essential affairs" [43] between husband and wife and in the case of problems concerning the children.

Nevertheless, in matrimonial and family matters there was a strong influence of the Church and (in a some way) of Canon Law. Even if alongside the existing traditional marriage system, strongly linked to a State run set of legal rules, we can observe the development, in a small way, of a liberal conception of the family as a private sphere beyond the reach of the State interference, the family law reform act assumed that the marriage would be an indissoluble relationship – not only or simply "private" as a contract but to a certain extent "public" – and interfering in family life by laying down expectation of behaviour, i.e. the so called "obligations of marriage" not only from an economic point of view but also imposing the duty to cohabit, the duty of be faithful and loyal, the duty to give moral and material assistance, and the duty to sort out

[43] Essential affairs, according to the logical interpretation of the combined texts of artt, 144 and 145 of the civil code, should concern "family life's direction".

Frankly speaking it is really difficult to consider as the majority of Authors, the "agreement for life's directions" as not contractual. On this specific point see: A. Miranda, *Tra moglie e marito ...*, cit. and the forthcoming volume dedicated to Italian family law.

and deal with the rules regulating the ordinary daily common life of the family.

Two relevant innovations come to the support of our law reform: the introduction, in 1971, of divorce and the adoption laws (in 1967 and, then, in 1974); the last innovations were seen with a certain degree of superficiality not only as a «remedy» for situations of deserting of minors but even as possible alternative way to satisfy wish for having children. But our legislator (and often the jurists) following only the footpath of traditional family, was not able to foreseen what will be happened thanks to the new possibilities arising out the artificial insemination that make the effective application of those Statutes absolutely marginal and residual.

From his side, the first innovation in particular, indelibly and irreversibly marked Italian society which, since then, has had to change its attitude and way of thinking, as far as the concept of "legitimate family" is concerned, since it was traditionally founded on marriage or, in other words, on a stable, indissoluble and indefinite affective union and on a mutual sharing of duties, projects and moral values between two individuals of different sex. Unfortunately – maybe because of the closeness in time of the two laws [44] –, of this desirable change the legislator of the 1975 reform was not able to seize almost anything. For example, there was no time to anticipate that admitting a "no fault" divorce would have implied the possibility for divorcees who married again of forming new legitimate families – known as "step-families" [45] – which would have joined the original legitimate ones (with all the easily imaginable consequences: births of "legitimate" children from different parents, cohabitation and relations among children – all of them legitimate – from different biological parents, etc.). Without mentioning patrimonial problems

[44] It has to be mentioned that the Divorce Act was submitted to *referendum* in 1974 and only after that date may be considered effective.

[45] See S. MAZZONI, *Le famiglie ricomposte: dall'arrivo dei nuovi partners alla costellazione familiare ricomposta*, in *Dir. fam. e pers.*, 1999, p. 369 ss.

caused by legal communion and successions which, in Italy, provide for a substantial protection of the "closest relations", especially descendants, ascendants and consorts.

In conclusion, it has to be taken into consideration that the law family reform act operated a real and proper split between wedding – seen essentially as a (juridical) relationship between two individuals – and filiation, which is protected in it, both in and out of the legitimate family. However, even if it recognized harmony between husband and wife as the foundation of matrimonial union (possibly with the other components of the nuclear family taking part in it), the reform act has expressly provided for and essentially regulated those aspects of marriage which have a patrimonial nature, such as conventions, especially those stipulated when getting separated or divorced. In these cases, except for the impossibility to derogate from the rules protecting children, it is at least acknowledged that the couple may, by resorting to negotial autonomy, avoid reaching an incurable contrast, which would force the courts to intervene and not just to supervise. In this perspective we should also frame all matters relating to parents' authority, which the reform establishes should be exercised by mutual consent of the father and mother (previously it was only exercised by the father) and which, rather than consist of a controlling and managing power over the minor during his development and education, in effect, is explicitly considered a controlling and managing power over minor's patrimony. With regard to this, it is enough to note how art. 330 of the civil code provides for the forfeiture of parents' authority for "abuse of power" or, in other words, of the powers of usufruct, representation and administration of the child's goods, capitals and patrimonial interests.

There is, we could say, a sort of fear or modesty in wanting to accept within our system the idea that also "life" choices and not only patrimonial matters may be subject to express agreements (and proper *juristic act*) on behalf of the couple, even if, on the other hand, the law itself takes for granted that family life should be founded

on the couple's agreement (and, therefore, on their personal wills and mutual benefit)[46]. As it has been noticed, if, on the one hand, it appears possible, according to art. 144's reformed text, to extend "negotiability" to matters which "used to be characterised by authoritative power and submission" (in other words to the decisions which give a marriage its direction), on the other hand that does not necessarily imply that "only the *negozio* (juristic act), as a complete act, with its own lasting juridical effects, is an instrument to determine an «agreed» direction"[47].

Since 1975 thirty-nine years have gone by, a period of time almost double to that which went by between the issuing of the Italian civil code and the Family Law Reform Act. But social traditions, the material conception of family and of "legitimate" family, relationships within it, even the idea of filiation, are much more distant today from those of 1975's society, than the latter were from those of 1942's society, thus making legislation today still in force totally obsolete[48]. Accordingly, it is not only a question of minor amendments or small improvements, but rather of a general re-

[46] P. RESCIGNO, *Il diritto di famiglia* ..., cit., p. 112, after maintaining that "the reform marked, amongst other things, the confirmation of the supremacy of negotial autonomy within the family", acutely observes that, by moving away from the prevailingly institutional conception of the group, we moved onto or at least revealed a tendency to accept an idea of family founded on mutual consent". But only a tendency, since the consensual element and the expression of private autonomy have been praised, by doctrine and jurisprudence, for all intermediate social groups (art. 2 of the Constitution) and most of all for *de facto* familiar relationships.

[47] P. ZATTI, *Diritti e doveri del matrimonio*, in P. RESCIGNO (Cur), *Trattato di diritto privato* (UTET, Torino) *Persone e famiglia*, Vol. 3, t. II, p. 74.

[48] For an extremely interesting comparative statistical study see: J. VAN ZANDEN et al. (Eds:), *How was life? Global weel-being since 1820*, OECD Publishing, 2014. One more interesting publication is: *Italia in cifre 2014* (a statistical survey on Italy), published by ISTAT (Italian Statistical Institute).
www.istat.it/it/files/2014/10/italiainCifre2014.pdf
From this data we learn that separations were 19,132 in 1975 and 88,288 today while divorces were 10,618 in 1975 and 51,319 today. Civil marriages are nowadays 41% of the total of marriages.

thinking of the role of family law in a modern and complex society such as that which prevails in present day Italy.

John Dewar has identified four ways in which, "somewhere in the late 1980s or early 1990s", changes in Australian (but also in other common law systems) family law began to take effect: a) the displacement of marriage as the central concept linking law to families and the growth in importance of other concepts such as cohabitation or parenthood; b) a reduced reliance on discretionary decision-making in favour of more rule-like statutory provisions; c) a diversification in the sources of family law norms; and d) the fragmentation of the family law system itself[49].

I think it is interesting to note that these ways can be also identified in Italy where Authors[50] speak about the crisis of the family as a unitarian institution and about the displacement of family itself as the central concept of law, probably with the relevant exception of point b) – I understand that the neighbour's grass is always greener ... but since common law systems are usually demanding more rule-like statutory provisions, civil law systems are demanding for a more discretionary decision-making –.

In the last 25 years, in Italy, both the statutory framework of family law, and, to a greater extent, the traditional conception of mono-nuclear and legitimate family (based on indissoluble or stable and permanent marriage), have been put under pressure from:

a) strong social forces that want to obtain major equality of roles and a real parity between the sexes;
b) recognition of the paramount importance of children's rights and interests;

[49] J. DEWAR, *Family Law and its Discontents*, cit., p. 61.

[50] V. SCALISI, *La «famiglia» e le famiglie*, in *La riforma del diritto di famiglia 10 anni dopo. Bilanci e prospettive*, Atti del Convegno di Verona del 14-15 giugno 1985, CEDAM, Padova, 1986, p. 274 ss.

c) development of new technologies, particularly in the field of artificial fertilisation;
d) the increasing number of de facto and same-sex relationships;
e) the increasing number of divorces (reinforcing the need to protect the rights and interests of the weaker partner);
f) the increasing number of births "outside marriage" and the growing number of families incorporating children with different blood parents and/or one-parent families.

Furthermore family law, in Italy, has an increasingly international dimension, largely because of greater worldwide mobility. The courts have to deal with matters (a novelty recognised in a 1995 Statute) such as marriages and divorces of mixed couples or of foreigners (with different religions, traditions and customs) living in Italy.

Until now these problems have been only partially confronted, with some piecemeal intervention, by means of specific statutes or through judicial interpretation and application of old law rules and the Civil Code.

For example we:

a) have sought to simplify the procedures to grant divorce (in consequence of the changing demands to protect the legitimate family and its unity and indissolubility);
b) have issued new rules to safeguard the rights of separated partners (use of the matrimonial home, right to alimony and maintenance) and the interests of children (right to education, care and maintenance);
c) have simplified the rules on adoptions (including international ones) to try to favour adoption and simultaneously reduce resort to artificial fertilisation;
d) have, furthermore, enacted rules which apply the European convention for protection of human rights and fundamental freedoms;
e) have to take in count the decisions of the European Courts and the new European rules.

Nevertheless these legal developments have not been sufficient, because in many cases they have called into question fundamental aspects of our legal system like, for instance, the idea of the "legitimate family" established on marriage as the fundamental nucleus of society; or the concept of marriage as a "juridical act" (rather than a contract); or the similar notion of "legitimate filiation" – that is to say, the legitimate child is one who is generated by a mother and procreated by a father who are united (to each other, of course!) in marriage – which, whilst no longer corresponding to the ancient Roman Law model, is still followed by the Civil Code today.

As I have already said, the gap between legislation and society resulted in a massive decision making on behalf of judges. The courts (and often also the doctrine) faced with the absence of explicit statutory rules, gaps in the law, have tried to answer the newest and most different of demands. This has obviously happened with no coherent strategy, sometimes even ending up distorting the *ratio* and the common sense of the rules dictated by the legislator.

If, on the one hand, the work of the courts has contributed to discipline, albeit in a limited way, phenomena such as *de facto* families, by extensively interpreting the Constitution (particularly its art. 2) and the code and by taking advantage of the gaps left by the legislator, on the other hand it has contributed to feed uncertainty, since the courts must anyhow formally comply with statutory rules dictated in the presence of circumstances and concepts which today have not only disappeared, but sometimes even overturned. That is, for example, the case with legitimate filiation which, as I mentioned, in Italy, is regulated by a series of legislative dispositions that, today as in ancient Rome's time, presume the impossibility of tracing paternity (*mater semper certa est, pater nunquam*) and which consequently no longer have reason to exist, at least in their present formulation, in a society which, thanks to technology's development, is absolutely able to ascertain an exact genetic descent.

The cumbering presence in this field of legislative limits (think about their consequences on succession rights) has induced more than one of our judges to decide on the practicability of artificial insemination contracts with reasoning which is at least unusual. In one case [51] in which a woman asked the execution of a contract for an assisted insemination stipulated with a medical centre in order to implant in her uterus some ovules fecundated by her dead husband, the court accepted the woman's request, recognising the right "of the aspirant surviving parent not to see the process of life initiated with the contribution of their own gametes interrupted, at least not without their own explained assent". That right would be in agreement with what is established by the Constitution (articles 2 and 32), with a woman's right to physical integrity and with the laws on abortion, which also protect the embryo's right to life, to integrity and to health (L. 22.5.1978 n. 194).

What I observe is only that, in this case, the judges followed a line of interpretation which substantially distorted the meaning of the above mentioned legislation and particularly the meaning of law 194 which, far from acknowledging a "right to maternity" at all costs (one should then ask oneself who the obliged subject would be), has instead permitted a "non maternity", if the right to life of the unborn child (however already implanted in the uterus) were to be sacrificed, in order to grant the mother's right to physical and psychological integrity. In other terms, the legislator has acknowledged a woman's right not to be a mother and not, on the other hand, as the Court said, her right to be it anyway.

[51] Palermo's Court decree 8.1.1999, for which see: A. MIRANDA, *"Tragic Choice" in Italy: brevi note in tema di esecuzione post-mortem del contratto di procreazione medicalmente assistita*, in *Dir. fam. e delle Persone*, 1999, I, p. 226 ss.; see in more detail on the subject: A. MIRANDA, *The Legal Status of the Pre-Embryo: Some Comparative Considerations Prompted by Davis v. Davis*, in J.W. HARRIS (Ed.), *Property Problems. From Genes to Pension Funds*, Kluwer, 1997, p. 39 ss. and, again, A. MIRANDA, *Surrogate motherhood ...*, cit.

This is obviously only an example, and a rather unfortunate one at that, of how, today, as far as family matter goes, judges (and interpreters) are called upon to operate according to a proper praetorial living law. In other cases, particularly the ones concerning *de facto* couples, the acknowledgement of the rights of the weak partner in the *more uxorio* cohabitations, such as, for example, the right to succeed in the family house leasing contract also in the case of a partner's death, the acknowledgement of the right for the live-in partner to obtain compensation for both patrimonial and moral damage and the acknowledgement of some rights deriving from homosexual unions, the courts have provided more or less adequate and coherent answers to single questions "from which a solution is not so much inferred from principle options, as pragmatically looked for by giving prominence to the specific needs and interests relating to each specific relationship examined", obviously operating within the often narrow confines set by the law and constantly endeavouring to refer to the "legitimate and worthy of protection exercise of the private autonomy for the regulation of patrimonial aspects of cohabitation" [52].

However, in spite of this interpretative work, many remain the positions devoid of protection or of an albeit partial acknowledgement, like, for example, when it was refused that a living-in homosexual couple could adopt a minor (recently, in certain circumstances and according to the ECHR may be permitted [53]) or like when any possibility of analogical application of the rules relating to legitimate families was refused to a *de facto* family as far as successions go.

[52] E. QUADRI, *Problemi giuridici attuali della famiglia di fatto*, in *Fam, e diritto*, 1999, p. 507.

[53] But see: Trib. Roma, 31/7/2014. http://www.aiaf-avvocati.it/files/2014/09/sentenza-TM-Roma_art_44.pdf See also the decision of ECHR 19/2/2013: http://www.neldiritto.it/public/pdf/CEDU%20-%2019%20febbraio%202013.pdf

In the face of these problems, the academic debate has divided itself into two factions:

a) one camp has proposed a stronger State intervention through the enactment of laws, in order to reduce certain phenomena or support others (e.g. extending the application of matrimonial rules to de facto relationships); this solution does not, however, appear to work and has been unable to produce concrete results (it doesn't prevent problems arising and furthermore may provoke major litigation);
b) the other camp has suggested limiting the same State intervention to cases of necessity (e.g. where there is a need to safeguard children's interests or the economic and personal interests of separated partners, etc.); allowing individuals the freedom to self-regulate their own relationships (both economic and personal, familial and/or pertaining to couples by, for example, stipulating pre-matrimonial, post-matrimonial and para-matrimonial agreements). In this direction legal scholarship has also suggested the desirability of an increased sort to alternative dispute resolutions, such as Mediation[54] and Conciliation.

The idea of a strong State intervention certainly has its appeal and can also count on some good reasons. In our system (and generally in French-Germanic derived systems) statutes are the only source of law and therefore, the issuing of an Act on the subject appears structurally necessary. However, it has to be taken into consideration that "family matters" are so complex and peculiar they cannot be subjected to a predetermined "standard" regulation and imposed by law, which is strict by nature.

The peculiarity of family positions requires an extremely high degree of flexibility and adaptability, which statutory law does not

[54] An interesting "compendium" of information, lectures and training on line on mediation and a multicultural approach is on the European Project "Emedi@te": http://www.emediate-justice.eu/

seem to be able to guarantee: it is not possible to regulate in a general and abstract way what is by nature far too peculiar and real. Moreover, it has to be taken into consideration that, as it has been said previously, modern social reality and technological innovations have caused a crisis within traditional family institutions, which today, in Italy, in real life are very far from the code's model.

If we add that the extreme easiness of movement within and especially without the boundaries of the country often makes "national" law effectively inapplicable – as, for example, it was observed with artificial insemination[55] –, or, anyhow, makes problems transnational (how was the case with trusts set up abroad and through which people tried to cheat on the limits imposed by the law regarding successions), it is easily understood that the solution cannot but be that of issuing a new reform act, which would globally reconsider the subject and which, while not limiting itself to a simple deregulation, would recognise the need to only establish basic rules, leaving, where possible, space to the privatisation of relationships rather than to their autonomous determination on behalf of single individuals.

The choice in favour of privatisation of family relationships, even if included within a wide "frame-legislation", appears preferable for at least three sets of reasons. First all it is worth considering the extreme difficulty, as it has been said, implied in the work of micro-juridification of family matters.

Strictly related to this first observation is the consideration that a family, as a juridical institution, is born and justifies itself according to the single participants' individual interests, and, more than

[55] It is hardly the case to recall how in the Artificial Insemination Bill until recently debated there was provision for a heavy criminal sanction against doctors who operated outside the boundaries of that same law. And if the doctor is not an Italian citizen, it will certainly not be easy to sanction his behaviour. Also think of the simple need to adapt to the EU Blood decision and the picture of the inapplicability of national laws concerning artificial insemination will be complete.

that, that the law has the function of protecting the individual against the prejudice that family relationships or their coming to an end may cause him. Those interests would necessarily be sacrificed by a massive legislative intervention, which would inevitably place a specific conception of family relationships over specific realities [56]). But, if this position could perhaps have appeared justifiable until recently, today it becomes less and less acceptable, considering the absence, noted above, of a uniform social model of family. As Italian doctrine has observed [57], it is totally contradictory, even if inspired by our best intentions, to want to extend marriage discipline and ties to someone who, by definition, has decided not to bind himself according to the rules established by marriage discipline, being it on the one hand inconvenient to wish for a minimum statute of living-in couples, which would end up institutionalising an inferior rank of families, and, on the other hand, totally useless, considering that, once we make *de facto* couples and legitimate ones equal, there would not be any reason not to resort to marriage. That obviously cannot mean giving up protecting the weaker parts in the relationship (think not only of a partner, but also of the children born from the *de facto* couple), as much as resorting to the development of self-regulation and the protection of positions specific to any individual relationship examined. Without, therefore, abandoning the weaker part to the will of the stronger one, but favouring each subject's responsibility in a circumstance that, by nature, is founded on a manifestation of unity and equality.

[56] For example, see the problem of transmission of wealth within a family, on which the essay by M.D. PANFORTI, *A comparative study of the transmission of family health: from privilege to equality*, in *Family law: processes, practices and pressures* (J. Dewar, S. Parker, Eds.), Oxford, 2003, vol. I, p. 422-440; M.D. PANFORTI, C. VALENTE, *Rapporti familiari ed esigenze abitative*, Modena, 2011.

[57] On the point, more in detail, see: E. QUADRI, *Rilevanza attuale della famiglia di fatto ed esigenze di regolamentazione* in *Dir. fam.*, 1994, I, p. 288; and even more recently, QUADRI, *Problemi giuridici attuali della famiglia di fatto*, in *Famiglia e diritto*, 1999, p. 502 ss.

In conclusion, the creation of a "light" family law, ready to intervene only if necessary, otherwise leaving individuals free to decide, but always within a common agreement, in other terms on a "contractual" basis, how to manage their own affective relationships, would represent a healthy acknowledgement of legislation's limits to intervention in such a delicate field and, most of all, could limit the occurrence of controversies, also guaranteeing sufficient protection to who, for the most various reasons, cannot or will not resort to State regulation of the relationship (i.e. homosexual couples).

According to this meaning, the "privatistic" choice seems to be preferable, thanks to its evident ability to support the real demands of individuals, without nevertheless compromising protection for situations that need to be safeguarded.

Now, that resort to private agreement is by now consented as regards de facto relationships it seems to me a consolidated point.

Either the case-law or legal doctrine, also taking advantage of the lack of legislation, have granted several times (and also sometimes stimulated) the stipulation of such agreements, not only limited to the regulation of patrimonial matters, during cohabitation but also for hypothesis of interruption of relationship.

And now this seems also to be the direction taken in questions of division and divorce for legitimate families for which, as I said before, the stipulation of "preventive" agreements is allowed.

It is more difficult to say if, also following some suggestions coming from other legal systems, in particular from those ones of Common Law – whose models and solutions circulate in any case in our country too – it is possible to stipulate conventions concerning aspects which differ from patrimonial matters like the agreements on education of sons, or on right to visit them, or more simply on the direction and organization of family life.

Also in this case, as it concerns de facto relationships, it seems to be possible to conclude such agreements, except for the impossibility to derogate from fundamental rights (rules protecting children, for example). In any case such solution is logical and consistent with

the same idea of the "de facto family" where subjects, as we have seen, shrink from authoritative ties in favour of self-regulation.

It seems to be different, at least up to now, the problem of legitimate family.

Certainly the same general planning of 1975 reform law has emphasized the role of will and the effective parity between husband and wife in the marriage but, as we have seen, this shifting has not produced a real and complete avowal of self-determination.

This because we consider that marriage (that it is the foundation of legitimate family) unlike de facto union, involves also the granting of the *status* of "married couple" and that this status, in its turn, behaves a whole series of rights and duties, of not exclusively patrimonial nature, intended to stay for ever and protected by law.

The Court of Cassazione and the Constitutional Court have confirmed [58] that matrimonial relationship is marked by "steadiness and certitude and from reciprocity and correspondence of rights and duties" and that legitimate family is "stable superindividual institution" protected as such by law.

Nevertheless this distinction appears really weak and frankly denied by facts. Today, in fact, it seems to me that, with introduction of no-fault divorce, with specific statutory provisions on filiation and on guardianship duties, with the emphasis on equality between the parties of matrimonial relationship, the same marriage has become an "engagement" without a definite time that continue up to the parties will to continue.

Further rights and duties are in the marriage also delegated to reciprocal agreement that will establish the real content, leaving out consideration the abstract prevision of law.

Let's think, for example, the obligations and rights arising from marriage, that are today only abstractly outlined from the legislator. Obligations of cohabitation, of fidelity and of reciprocal moral

[58] Cass. 4/4/1998, n. 3503; Corte Cost., 18/1/1996, n. 8.

and material assistance, with the evolution of customs and need of modern life, have been practically deprived of their meaning; or better they have been entrusted to the will and the agreement of the parties which have to carry them into effect, in the same way as it happens in the de facto relationships.

It has became in the meanwhile more and more important the mutual consent on the *menage* that is to say the direction that husband and wife intend to give to their family life, with reciprocal and constantly renewed engagement day after day and on limits and in respect of the individual rights.

In my opinion, the difference between marriage and de facto union seems to rest more than on a real difference of substance and content on the intention of the parties to create, or not, a legal (binding) relationship so as it happens in contractual matters, more or less.

In conclusion it seems to me that we can deduce from operative reality that today, in Italy, more than a «privatisation» of de facto relationships – by now given for granted – and a «privatisation» of patrimonial relationships of legitimate family – this one in broad part given for granted too – we could also talk of «privatisation» of matrimonial relationship with an evident upsetting of the traditional view.

This trend, though not yet consolidated, adds arguments in favour of the need of a completely new revision of statutory law in family matters. But, obviously, this law reform must consider the disappearance of worn out traditional conceptions and allow the maximum of private autonomy putting limits only to protect collective superior interests, laying down a discipline of general principles leaving wide space to the necessarily variegated choices of the individuals.

Doing so this desired reform will envisage to new realities and consequently will keep pace with times.

I am strongly convinced that this could be an ideal solution, which also perfectly corresponds with patterns, and models adopted in so many others legal systems all over the world.

Unfortunately, once more again, Politics seems not to be interested on it.

Index

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