A BRIDGE TO CROSS. LEGAL EDUCATION, THE CIVIL LAWYERS AND THE COMMON LAW: AN ITALIAN PERSPECTIVE*

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I'll cross that bridge when I get to it.
Popular saying

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.
T.S. Eliot

1. Introduction

Why should lawyers based in a civil law country study the common law? Is this study important for the formation of jurists who will mostly practice the law in a civil law jurisdiction? These are important questions that have no obvious, ready-made answers.

In the following pages, I will offer a personal point of view on these matters drawing from my experience as a comparative law professor based in Italy. As such, I have dedicated enough time to studying and teaching the common law to generations of law students, both as a stand-alone subject, and as part of comparative law courses that make up part of the core law school curriculum in Italy.

What follows will not necessarily be persuasive for scholars and educators based in South America, who may have an entirely different view of the matter, of course. I simply hope that my remarks may be helpful in this context, if for no other reason, for the sake of discussion and reflection about how to better educate and train jurists and legal professionals to meet new, contemporary challenges that are located both at the national and at the transnational level.

To begin, let me illustrate what change occurred in the last decades in Italy—as well as in other continental European countries—concerning the study of the common law at the universities.

As a matter of fact, more attention is now paid to the common law both as a tradition and as positive law throughout Europe than ever before, by professors and students alike. To my knowledge, no systematic study of this trend has been published, therefore the phenomenon cannot be described on the basis of precise data. Nonetheless, it is no less real. It was not so when

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I began my law studies in the late 1970s. In those years, there was very little teaching involving the common law tradition at all at European universities, and there were very few courses in which students had an opportunity to learn how the law of a common law jurisdiction covered certain subjects. Learning the law essentially meant studying the national law, with few exceptions indeed. In Italy this approach, which was clearly a legacy of nationalism, was abandoned in the decades following the defeat of fascism. From then on, the trend to open up legal education to a broader view of the learning needs of students became vigorous, and Italy eventually became a leader in the offer of comparative law as an academic subject in the last two decades of the XX century (Sacco, 1981, p. 77; Pizzorusso, 1995, p. 383; Sacco, 1995, p. 131).

This fundamental trend shall not be reversed in the foreseeable future. Although the United Kingdom may soon leave the European Union, and the United States will be a rather inward looking country for a while, in the next decades the common law will remain a topic for research and study at the universities in Italy (and in other continental countries in Europe as well). Why will research and study dedicated to the common law not be marginalized in my country and in Europe, despite recent political developments? Essentially, for epistemological and practical reasons.

From the first angle, the study of the various aspects of that tradition opens up a new way of thinking about the law for any student who is familiar with the civil law tradition only, as discussed below. Furthermore, at the international level, the development of the law is influenced by the presence of major players that transact on the basis of the law they are most familiar with, which is quite often the common law. And one may wonder which kind of lawyer is best equipped to operate at the transnational level, in a globalised world (cp. Reimann, 2018; Reimann, 2014, Graziadei, 2017a).

To be sure, there is a great deal to say about how the classical common law and civil law approaches have been transformed and altered, both in Europe and elsewhere, as a consequence of the ongoing circulation of ideas and legal integration, through the process of cross-fertilization and exchange taking place across national borders in the field of law, as well as in other fields (see, e.g., Wiegand, 1991, pp. 229-248; Kelemen & Sibbitt, 2004, pp. 103-136; Kennedy, 2006, pp. 19-53; Wiener, Rogers, Hammitt, Sands, 2011; Graziadei, 2019). Nonetheless, certain institutional features of these two traditions are still very much alive, and deserve attention in a comparative study of the law that aims at the education of lawyers, as many comparative law layers would argue. The way the judiciary is recruited in a common law country, for example, does not match the way it is recruited in a civil law jurisdiction. The political and legal constitution of the profession is different (for a classical study, see Shapiro, 1981). The way a criminal investigation unfolds in Italy is different from the way it is conducted in the United States, although one country may have looked for inspiration in the other when reforming its criminal procedure, with mixed effects (Grande, 2016, pp. 583-618). This is why, of course, the comparative study of law is so instructive. A lot can be learned by observing how conflicts in different societies are handled through the law, and by thinking critically about the various ways of the law.

In the following sections, I will try to explain why and how a fundamental change occurred in Italian legal education, namely how Italian legal education opened up to the study of the common law as part of a broader comparative outlook on the law. I shall also aim to cover a second, related point, that is to say what civilians learn about the law in general when

they actually go on to study the common law. I will then conclude by briefly touching a third point, namely how students in a civil law jurisdiction can best be introduced to the study of the common law by approaching it from a comparative perspective.

2. The Turn to Comparative Studies in the Second Half of the Twentieth Century

In the second half of the twentieth century, scholars in my country (and in many other continental European countries as well) experimented major changes in their approach to the law and legal methods, that had an impact on legal education as well.

These changes were brought about by the abandonment—in truth the rejection—of the conceptualistic, systematic, and dogmatic approach that prevailed by the end of the nineteenth century and in the first decades of the twentieth century, mostly under the influence of mainstream German legal science, after the dominance of the French based exegetical method up to the middle of the nineteenth century.

The conceptualistic method was the result of a highly refined intellectual approach to the law that was immensely influential for over half a century all around the world (Reimann, 1990, pp. 837-897; with regard to the Italian situation, see, e.g., Ranieri, 2015, pp. 13-43). Nonetheless, by the second half of the twentieth century that method had lost all their credibility under the pressure of various combined forces.

At the same time, the cult of the national State inspired by nationalism was also rejected, with momentous consequences for the development of democracy, a pluralistic view of society, and the role of law in society (Rescigno, 1966; Sacco, 2005; Grossi, 2017).

Although nearly forgotten by now, the first attack on conceptualism and the dogmatic method was already launched in the latter part of the nineteenth century, in the name of a socially oriented legal science. This social movement in the field of legal studies reacted against the strict individualism of the theories of law advanced by the then dominant school of thought, based on conceptualism and legal dogmatics. The father of the jurisprudence of interests, namely Rudolph von Jhering, after rejecting the mainstream approach, considered the law as social phenomenon, as a means to the realisation of social ends (Von Jhering, 1877, 1884). This was followed early on by the call for the development of a sociological jurisprudence, which endorsed a vision of law embedded in society, and highlighted the social aspects of the law. This movement was influential across many countries, including Italy, of course (Kennedy, 2006, pp. 19-73; Grossi, 2000, pp. 99-105; Stronati, 2012, pp. 405-412).

Pluralism as a key to understanding the life of the law was first famously defended by Eugen Ehrlich, with whom Roscoe Pound sympathized (Ehrlich, 1936; Pound, 1911). An approach to law as an eminently social phenomenon was embraced as well by thinkers such as Georges Gurvitch (1935, 1940). These and other attacks eroded the credibility of conceptualism and dogmatism and ultimately opened the doors to various strands of "law and…" movements that are still travelling across the world, and that in recent decades have influenced Italian legal thinking as well (Calabresi, 2003, pp. 2118-2122).

The second important factor of crisis of the classical conceptual method is the loss of authority of the State as a source of morality. The catastrophic ending of the totalitarian States that had provoked the Second World War had completely undermined the notion of an ethical State, which was a crutch of conceptualism (on this see Breccia, 1999, pp. 293-

501, on the European scene Bell, 2012; this new awareness pervades a classic like Esser, 1961 in Germany).

Constitutional norms, more ambitious than ever, for the first time mapped an entirely new ground for the law under the democratic regime of the newly established Republic of Italy. The fact that the Constitutional Court was soon at work meant that it could enforce them through the exercise of judicial review. This provided new impetus to constitutional justice as a transformative force (cf. Barsotti, Carozza, Cartabia, Simoncini, 2015; Cappelletti, 1985; on the wider picture, see Cassese, 2016, p. 84), though up to the 1960's the Italian judiciary as a whole still did not fully respond to the new constitutional climate (Bruti Liberati, 2018; Meniconi, 2012). On the other hand, beyond the Republican Constitution, the Treaties establishing the European Communities and the European Convention on Human Rights indicated that nationalism was no more a policy or a source of inspiration for the European States.

The new constitutional legislation affecting—directly or indirectly—private law and public law altered the rules of the game once and for all. There were no more only unchanging Roman law texts, or Codes to teach, but new sets of problems to work on in order to develop new law for a democratic regime which recognised universal suffrage and the necessity of broad social reforms, which eventually lead to the establishment of the welfare State. Then, the question of how to work on these problems arose. What methods were available in this completely new environment to make the law for a new society? What alternatives could one practice after the rejection of old ways and methods?

These dilemmas are still with us, as the ever-growing literature on balancing and proportionality in both private and public law shows how open-ended these questions remain. Those techniques of adjudication, in any case, combine elements of different legal traditions, which is by itself remarkable (on the wider European picture see Petersen, 2017; Hesselink, 2014, Bomhoff, 2013; Cohen-Eliya, & Porat, 2013).

Following the end of the Second World War, the collapse of conceptualism in my country provoked several reactions and new developments that went hand in hand with the return to democracy (for a mapping of these tendencies in a broader perspective, see Barberis, 2011). A first impulse was to pay homage to the return to democratic procedures in order to lay down the law. Some scholars thus embraced, more fervently than before, legal positivism, and put new faith in legislation as a motor of legal change. This move intended to affirm the supremacy of the democratic foundation of the law. Lawyers, who share a commitment to democracy, are drawn to positivism as a manifestation of democratic sovereignty. In a civil law country like Italy, positivism found favor especially on the left because it endorsed a strict separation of law and morals (among other reasons), which was constantly challenged by some currents of Catholicism. Others, although sharing the same commitment to having a democratic government, turned to a renewed, bland version of natural law, which was considered to be sanctioned by the new constitutional texts. In a society that upholds value pluralism, a ringing appeal to natural law should be resisted because democratic government is based on the rule of law, rather than on the elaboration of natural law (Zagrebelsky, 2011).[1] Nonetheless, the

1 When Parliament did not resist such appeals, the Constitutional Court had to step in in order to defend a more acceptable, rational approach, as it happened with the Italian legislation on *in vitro* fertilization (Hanafin, 2013, pp. 942-955; see, e.g., Corte Costituzionale, judgment n. 96/2015, on the right of couples affected by transmissible genetic illness to have access to assisted reproduction techniques).

new constitutional text did invite a recourse to constitutional arguments as a constitutionally inspired new approach to private law (see e.g. Perlingieri, 1984; Pino, 1998, pp. 222-224), a similar tendency now lies at the foundation of the influence of contemporary human rights law on whole fields of law. Almost inevitably, this contribution was indicated as a factor in the expansion of the role of the judiciary, possibly beyond the present constitutional framework (Pace, 1993, pp. 3-11; Guastini, 1998, pp. 185-206). A third tendency, often favored by supporters of positivism, was to turn to analytical philosophy and to the analysis of legal language as a way to respond to the fact that juristic method lacked stable foundations, which was a challenge.

The contributions to analytical philosophy and the law in Italy were many, so that it is impossible to render justice to them here. It is true that understanding linguistic and discursive practice is the gateway to understanding norms of all kinds. Contemporary Italian legal theory of the analytic kind has thus taken this approach very seriously, because it touches upon crucial aspects of the law, namely its linguistic dimensions (see, e.g., Jori and Pintore, 2014). Classical works in the field of private law have been written mostly from this perspective, such as Francesco Galgano's influential monograph on legal personality (Galgano, 1969), and Pietro Rescigno's path-breaking essays on the same topic (Rescigno, 1966).

Nonetheless, the linguistic turn defended by analytical philosophers did not focus on a central problem relating to the examination of linguistic and discursive practices, that is to say, what is the cultural formation and competence of those who are called to elaborate and apply the law?

In order to have a realistic understanding of how the law works, the first aspect to clarify concerns the cultural tools that the lawmakers, the interpreters of the law, and the various actors involved in the application of the law actually possess.

What is their learning, what is their tacit knowledge, what are their unconscious, implicit (but efficient) assumptions, what is their pre-comprehension of the context in which they operate? Clearly, these are not matters that can be decided by the texts laying down the law. However, this is also why those who defend positivism and an analytical approach to the law regularly fail to uphold a strict separation between the legal system and other evaluative systems, and that is no minor failure, as one of our former Constitutional judges rightly observed (Silvestri, 1997, p. 2).

We are all familiar with the idea that the same text can be interpreted in different ways over time and in different places. The way the Bible is interpreted today in Peru is surely different from the way it was interpreted when the Spaniards first set foot on the American continent. The civil code first adopted by Napoleon is not necessarily interpreted in the same way in France and in Belgium, even when the text in force in the two countries is still the same (see, e.g., Bouabdallah, 2014).

The cultural competence of distinct human groups is never identical. This factor alone will inevitably produce different readings of the same texts, or different reactions to the same cultural stimuli. Scholars who study the application of uniform laws know this all too well. To ensure the uniform interpretation of uniform laws is a real challenge because the cultural conditioning of interpreters based in the different national legal systems will all too often warp their interpretations in the direction of the national law, namely the law they are most familiar with (see e.g., Sturley, 1986).

Now, how can that cultural competence best be described and analyzed in its various components?

Legal philosophers concentrating on the linguistic analysis of texts overlooked this question, but the answer to it is straightforward: by drawing comparisons, one can explore which cultural dimensions are involved in the making, the interpretation, and the application of the law in distinct contexts.

Think how linguists have managed to describe and analyze human languages all around the world. They have succeeded in this difficult task essentially through comparisons. The same method has been applied over and over across different academic disciplines, from politics to religious studies. Only by going beyond the familiar cultural landscape can one learn something new about the world (and, incidentally, about oneself, as the poet says…).

Key figures of the Italian legal culture in the second half of the twentieth century practiced this choice. They put faith in the study of foreign legal systems and in comparative law as a remedy for the failures of the conceptual approach, to overcome the limitations of both positivism and natural law, and to overcome the difficulties raised by a purely linguistic approach to the law. They were essentially self-taught comparativists.

The names I have in mind with respect to private law are those of Guido Alpa, Francesco Galgano, Luigi Mengoni, Pietro Rescigno, Stefano Rodotà, Pietro Trimarchi, but one could name just as many important names for other areas of the law. Many of these scholars, who did not all share the same legal philosophy, have regularly paid attention to the common law in their writings and their contributions to the development of civil law theories. I have thus mentioned the names of Italian colleagues who are surely familiar to all the Peruvian jurists who have studied Italian law. Nevertheless, three figures stand out for the special weight they attached to comparative law as a transformative force in the contemporary legal landscape, as well as for their profound contribution to it: Gino Gorla, Mauro Cappelletti, and Rodolfo Sacco. They were the champions of comparative law in Italy, and they succeeded in bringing students in contact with the subject, until the newer generation of scholars, to whom I belong as well, was trained in the field. They did not necessarily share the same vision of comparative law in all respects, as I said, but they all agreed on one thing: the primary importance of the study of the common law for the full development of comparative law studies in the twentieth century.

None of the scholars I have just mentioned even for a moment gave up the idea that the vocation of a legal scholar is to advance legal theory by providing it with firm theoretical groundings. All of those among them who could engage with it included the common law in their field of expertise. They considered it as a proper term for comparison, to cast light on fundamental structures of the civil law, and to study special problems relating to the main fields of the law on which they were working.

The results of this approach were spectacular. I cannot imagine what the field of contract law, or extracontractual liability would be without the contributions of scholars like Stefano Rodotà, Pietro Trimarchi and Guido Alpa, who have a profound knowledge of the common law. Gino Gorla and Rodolfo Sacco, namely the most original and influential writers that Italy has in the field of contract law theory, have made great use of their knowledge of the common law. The foremost expert on the law of property in Italy—namely Prof. Antonio Gambaro—is also the co-author of Italy's most famous introduction to the study of comparative legal systems (Gambaro & Sacco, 2018).

It is also worth noting that Italians in Europe have not been the only ones to benefit from this renewed approach. Many leading scholars in Europe have secured a place of honor for comparative law as a conducive method of legal research, which works by paying adequate attention to the common law world. Still, if I may be allowed to speak for my country, Italians did more than others did in order to establish comparative law as a major subject in the education of students, and in the formation of jurists (Sacco & Gianola, 2016, pp. 175-184).

Why is it that in Italy, more than in other places in Europe, comparative law was perceived as an important subject?

In an interview, Rodolfo Sacco advanced the hypothesis that the dynamic of the local legal tradition vis-à-vis some hegemonic legal cultures explains the turn towards comparative law as an intellectual resource to build Italy's distinctive legal consciousness (Sacco, in Míguez Núñez, 2011, p. 194):

> En Italia, la imitación de la ley, de la doctrina y, en menor medida, de la jurisprudencia francesa, fue, durante gran parte del siglo XIX completamente consciente. Fue también consciente la recepción de la doctrina germánica, sobrevenida durante el período 1880-1950. Fue, asimismo, consciente, luego de 1945, el préstamo de modelos americanos en el campo del Derecho Constitucional, de los derechos humanos, del procedimiento penal, etcétera.
> El jurista italiano conoce dos verdades. Advierte que su conocimiento jurídico se forma de componentes franceses, alemanes y americanos, y sabe además que el Derecho italiano ha podido y puede crecer gracias a las ayudas provenientes desde el exterior.

Under this analysis, other legal systems, like the French, the English, the German, are different because they are perceived by their own jurists as self-sufficient and autonomous. Italians instead have something in common with jurists belonging to other legal systems that have gone through successive waves of foreign influence, like Japan, and who take an interest in comparative law as a way to critically reflect on the making of the national law.

The approach of the pioneers in the field in Italy was vindicated by subsequent developments in Europe and outside Europe. Time tells that they were right.

The world today is much more integrated than it was when those efforts were first made. The increasing recourse to comparative law by supreme courts is a telling indication of the growing appreciation of comparative law as a means of interpretation in this scenario (on the jurisprudence of the Italian Constitutional Court Passaglia, 2018; on the wider European picture: Andenas & Fairgrieve, 2015). Even the U.S. Supreme Court has on its the bench champions of this approach (see, e.g., Breyer, 2015; Bader-Ginsburg, 2005), although their approach has sparked controversy, as it is by no means shared by all the judges on the Court (Posner, 2016).

3. The Common Law: An Alternative, but Also a Supplement to the Civil Law

In Italy, the study of the common law tradition thus provided an opportunity to correct the shortcomings of the old approach, which was eventually abandoned in the second half of the twentieth century.

With few significant exceptions, the masters of the old school, who worked in the first half of the twentieth century, and who subscribed to the conceptualistic, dogmatic method, were also convinced that all law derived from the State. The codes were at the center of their

attention, as a symbol of the capacity of the State to provide a complete statement of the law. On the other hand, the codes were regularly assessed to establish their conformity with the conceptual approach preferred by each author.

Even when nationalism ruled, Italian scholars actually drew heavily on foreign literature to perfect their theories. The footnotes of Italian monographs in this period are full of references to German, or German speaking authors. This literature is cited as if it were directly relevant to Italian interpreters in the interpretation of Italian sources. Quite paradoxically, Italian scholars refrained from using it instead to openly develop comparisons that would highlight the differences existing on many points between German and Italian law. The academic literature of this period made references to judicial decisions even more rarely.

The validity of this approach was challenged a first time when the consequences of the social crisis exploded after the First World War. By the end of the Second World War, the search for an alternative approach also inspired pioneering efforts to approach the common law tradition as an object of study and comparison. Perhaps it was inevitable that this should happen: among the democratic countries, the United States and Great Britain—two nations that are champions of the common law tradition—had lead the coalition that defeated Nazism and fascism in the name of democracy and social reforms.

At first, few scholars had first-hand access to common law sources (but prestigious names of the old generation such as Walter Bigiavi and Cesare Grassetti were among them). Nonetheless, the names I have mentioned above have had an impact on both legal methodology, and on the substance of the law.

Concerning methodology, it is well known that lawyers trained in civil law countries must at first work their way through a written constitution, the codes and legislation, and the scholarly contributions of legal authors, though now everybody agrees on the fact that judicial decisions too are an important component of the law. In Italy, students prepare most university examinations relying heavily on lecture notes and textbooks. Little room is left for the first hand study of judicial decisions, with few notable exceptions. Even very important judicial decisions are mostly mentioned in the classroom as an illustration of doctrines that were first announced from the lectern. This feature of law school pedagogy is by no means without consequences. It builds a certain habit of mind or *mentalité*. Students live all too often under the myth that the legislator has set out an entire, complete and coherent *corpus iuris*, in which there is little space for controversy over what policy the law should develop. They also learn very little about facts, and how to handle them. The provisions of the constitution and of the codes or of the pertinent statutes are cited to students, but they have little opportunity to consider in the classroom actual factual patterns at the origin of a controversy. As a reaction to this state of affairs, there is now a new emphasis on clinical legal education not only in Italy, but in several civil law countries as well. Furthermore, students in my country are seldom put in the position to consider what alternatives a judge has when deciding a case. Our judicial style is not very helpful in this respect either, being usually rather muted and bureaucratic, although what goes on behind the scenes can be more exciting (see on this generally: Lasser, 2004). Lastly, students are often encouraged to think about principles and rules, but they are seldom invited to consider the dimension of litigation and of the available remedies as a very concrete justice issue. This is unfortunate, because the proclamation of rights, when left without the support of efficient remedies, is

merely aspirational. It is also paradoxical in the light of the history of the civil law tradition, considering that Roman law was at first a law of actions.

Surely this is a rather contradictory view of the law as a binding source of rules for an entire community. If the law must rule, there must be clarity about the remedies available to enforce it. It is also a rather misleading view of how civilian legal systems work. Administrative law, namely a branch of the law with immense importance for the life of both businesses and citizens, is by and large uncodified, and definitely not set in stone, but by and large developed through judicial rulings. In many other fields of the law the importance of codes and statutes is not to be denied, it is beyond doubt, but the law is as well developed by the Courts and the opinions of jurists expressed in scholarly writings.

European Union law, along with the law springing from the European Convention of Human Rights, shares a similar foundation. It is also by and large developed through judicial decisions and academic commentary, which is developed along with the secondary sources of that legal order.

Looking at the law from this alternative perspective—namely as an exercise in policy making and effectiveness—provides a formidable supplement to the way legality has been conceived in most civil law countries until relatively recent times (on this: Merryman, 1965; Merryman,1966). This supplement is extremely important to overcome the notion that legality is established only if legislation dominates.

The focus on courts as actors of legal change that is so characteristic of the common law view corrects our understanding of how judicial decision making contributes to the development of the law. It contributes to clarify how legality is compatible with judicial law making, which most often proceeds incrementally, and how judicial decisions should in turn be interpreted.

There is a wide gap between the English and the U.S. experience in this respect, due to differences in the social, political and economic life in the two countries, and the ways the legal profession is organized, judges are selected, litigation is conducted and courts work, just to mention a few factors. Furthermore, the role played by constitutional adjudication as a factor in the development of the law in the United States has simply no parallel in the United Kingdom. And yet, although English judges do not have the power to review legislation enacted by Parliament, their judgments often articulate in the clearest terms what is at stake in the case before the court in terms of policy.

The judiciary in the countries of continental Europe is also exploring, often under very different conditions, similar dilemmas, as it is called to apply constitutional law, human rights law, and EU law. The style of the judgments that are handed down by our courts is changing and it reveals, to an extent, the dilemmas confronting the adjudication of controversial issues, much has changed since the by-gone old times of formalism.

4. The Common Law: Against (Slavish) Imitation

When it comes to the content of the law, the common law apparently owes little to the legacy of the Roman law, or to the idealistic philosophy that permeates much theory of the law in continental legal systems. Nonetheless, the common law and the civil law tradition share more than it is usually acknowledged.

First of all, the old stereotype that holds the common law to be a quintessentially empirical form of law, not grounded on formal rationality, as Weber argued (see Chaudry, 2011,

pp. 249-287), is simply not credible anymore (Criscuoli & Serio, 2016; Mattei & Ariano, 2018). Although the common lawyers take pride in pragmatism, the common law is governed by principles, that have a rational foundation and govern adjudication. In common law countries eminent judges, jurists and legal philosophers have explored this dimension of the law intensively, an approach that is extremely relevant in establishing the boundaries of judicial discretion and policy making today (Goff, 1983, pp. 169-187; Calabresi, 1985, Dworkin, 1986; Nelson, 2004, pp. 795-838).

Furthermore, quite a lot of give and take has occurred across the Channel over the centuries in the field of law, as well in other fields. Legal historians and comparative law scholars have conducted studies that show how subtle and rich the contribution of continental legal learning is to the development of the common law through the ages, and how these traditions interacted over time. The series *Comparative Studies in Continental and Anglo-American Legal History,* sponsored by the Gerda Henkel Foundation, has published thirty books dealing with various aspects of this fascinating story. The Channel and the Atlantic have never been as wide as conventional wisdom would have it, both here and there. Gino Gorla was a pioneer in this field once more (Gorla, 1981; Moccia, 2013; Alpa, 2002).

Nonetheless, it is still true that legal categories and concepts in the common law world are discussed and tested not so much in the vacuum of doctrinal discussions, but rather with reference to facts that sooner or later will end up before the court.

It is extremely instructive, in any event, to compare what operative solutions are supported by a system that assumes the primacy of legislation as a source of law, and what operative solutions emerge when conflicting claims are introduced before the court in a common law country, that shall decide the case according to its precedents. In my experience this comparison helps to bring out fundamental notions, distinctions, and operative rules that quite often are not fully articulated when legal research is carried out exclusively within the civil law tradition. A major example of this type of comparison has inspired many comparative efforts in the last twenty years or so at the European level, with publications such as those collected in the series *Common Core of European Private Law*, edited by Mauro Bussani and Ugo Mattei, the *Ius Commune* casebook series, launched by the late Walter van Gerven, and others. These findings help to understand that the words through which the law is expressed are one thing, and the content of legal rules is a different thing, which is epitomized by the distinction between *ratio decidendi* and *obiter dictum*. That is the entry point to the theory of judicial precedents in a common law jurisdiction.

As I stated above, research in fields like contract law, extracontractual liability and the law of restitution, property law, in Italy has often been conducted through sustained comparative efforts. The same trend has characterized the study of various branches of public law, civil and criminal procedure, while commercial law has always been rather cosmopolitan. Research on these fields has regularly included the law of key common law jurisdictions. This approach has been stimulated by the tendency to deepen the study of the economic analysis of the law, as well as by the fact that for over thirty years the United Kingdom has been part of the European Union, and by globalization itself, of course.

However, as mentioned above, these factors have only contributed to the decision to cross the bridge, namely to study the common law.

The first impulse has rather been to uncover what is common and what is different across frontiers, to provide firmer foundations for the law, by widening the horizons of Italian jurists,

and ultimately to reconstruct a critical genealogy of our experience, an exercise that has a certain emancipatory potential under every sky (see, e.g., with respect to the Latin American experience: López Medina, 2004; Esquirol, 2014).

The fact that common law institutions have evolved outside the framework provided by the Romanistic tradition has worked as a vaccine against the temptation to passively imitate, to cut and paste, a temptation that sometimes has been strong in Italy with reference to French law and then to German law. The nature of the common law is such that more attention goes to the concrete problems and legal issues that courts and legislators are addressing than to a bookish presentation of the law. Working on common law materials essentially requires civilians to critically interrogate their own tradition in the light of the specific learning and epistemology of the other tradition (see, e.g., Legrand, 2002, pp. 21-34). This is a study that is not designed to produce slavish imitation, but that helps the development of mature legal thinking. It is impossible, for example, to imitate the doctrine of estates while developing a treatment of the law of property in a civil law country. There is no demand for this kind of exercise, simply because the two traditions are far apart, and start from very different premises. Yet, to understand how the different elements of property rights are constituted through a comparative study of them is surely an important exercise (Graziadei, 2017b, pp. 71-99).

From a broader critical perspective, one can say that the comparative study of the U.S. experience is especially formative when it comes to understanding what regulating a complex economy is, and what governing a society deeply affected by racial divisions and social inequalities is. Granted, the comparative study of common law systems may also lead to pick and imitate features of the foreign law: many countries, for example, have considered introducing the jury in criminal trials, or class actions, in their judicial systems. Although it makes no sense to try to reinvent the wheel, the shortcut of outright borrowing is often illusory.

Legal theories and doctrines as well as laws are not simply made of text on paper, and their use in a different environment is bound to yield unexpected results, unless the institutional and learning process that leads to their implementation is thoroughly and carefully governed, as the literature on legal transplants abundantly shows (e.g., López Medina, 2004; Graziadei, 2019).

On the other hand, although there *are* important differences among the laws of, e.g., Italy and England, at a deeper level civil law and common law legal systems share more than meets the eye. They are not completely alien to each other, and they have certain fundamental features in common. To begin with, what living under the rule of law is, and sharing, in great measure, the same values, which in Europe are guaranteed by the European Convention of Human Rights, and by the jurisprudence of the European Court of Human Rights.

5. In the Classroom

How should students be introduced to the study of the common law? To fully answer this question would require a more extended analysis, and yet some ideas can be advanced as first elements to foster an initial reflection.

From what I said above, it should be clear that legal education in Italy is not based on a vocational approach to legal studies.

In my country, a good number of students go through a three-year degree program (*laurea di primo livello*) with an eye to get a qualification that will quickly allow them to work in the

private or in the public sector. Nonetheless, access to the classic legal professions of lawyer, notary, or judge in Italy requires a five-year law degree (*laurea magistrale*). Most students still follow this course to get the necessary academic qualification, as they intend to have the possibility to enter one of these professions. During their studies, all students—even those who opt for the three-year degree—are required to follow courses in legal history, legal philosophy, Roman law, and on other subjects, to deepen their understanding of the law as a cultural phenomenon, and to build general capacities, as well as specific legal skills.

Within this framework, all students receive a first comparative law instruction. This is by now mandatory according to the framework for law studies set by the Ministry of Education, University and Research. In several universities (e.g., Florence, Turin, Trento), this first course covers the methodological issues relating to legal comparisons and a presentation of the major legal traditions of the world. This course is usually a first year to a second year requirement. As a minimum, it covers the civil law and the common law tradition, but quite often goes beyond them, and thus presents, at least in outline, Islamic law, and African and Asian legal systems. The law of Latin American countries struggles to find a place in this context, but it is now emerging as a relevant subject. By now several handbooks are dedicated to this general course (Gambaro & Sacco, 2018; Ajani, Francavilla & Pasa, 2018; Varano & Barsotti, 2014; Guarneri, 2016). Quite often, this first course is followed by more advanced courses covering a specific area of the world, such as Anglo-American law, Chinese law, French Law, and so on. Turin is perhaps the law school that offers more in this respect in Italy. We teach five courses that illustrate the law(s) of a particular area of the world (e.g., Chinese law, Indian law, Islamic law, law of French-speaking countries and Anglo-American law). These courses do not exhaust the options available to students in the area of comparative law. They can also choose subjects that usually focus on specific topics like comparative constitutional law, comparative private law, comparative administrative law, legal anthropology, and so on. This experience is matched by the possibility of spending a year or a semester abroad under the Erasmus scheme, or under other exchange programs with non-European countries, including Peru. Some Italian law faculties offer undergraduate law programs that are entirely taught in English (e.g. Trento), or offer double degrees with foreign law faculties (e.g., Bologna, Florence, Rome and Torino). Lastly, at the postgraduate level, several specialized master courses are entirely taught in English, and they too impart an instruction covering aspects of the common law.

Although the general introductory course mentioned above usually consists of lectures on the subject, the courses that follow it are usually taught in a more interactive way. Speaking out of my experience, the best way to proceed is, after imparting a basic comparative law instruction, to let the students play and experiment hands on, in order to learn what it is to explore the common law under the guidance of an instructor who is able to conduct comparative law research.

Of course, the purpose of the exercise is not to master completely the law of foreign jurisdiction while at the same time learning the law of the native country. Let us be open: this is not what students are looking for, nor what we intend to provide. But, having said this, there is still enough room for choice here. Each teacher can provide a critical analysis of the common law approach(es) to a variety of subjects, and from a variety of perspectives, specialising his or her work in a certain direction. As mentioned above, professors and students in Italy are more ready to engage with the common law today than they once were, and yet we are not all

common lawyers by now, of course. We are simply more aware of the evolution of the law on a larger scale. We are open to the idea of acquiring more than a vague idea of what it means to be in contact with this different legal tradition, and its various manifestations.

A gradual introduction is essential, with basic elements that can be imparted in a first course dedicated to comparative legal systems. Those students that have the appropriate linguistic skills may then be trained to study first hand a specific problem by studying the sources in the original. They can be asked questions that involve choosing among different possible approaches and outcomes, and they can be introduced to the library or to online resources in order to search for the relevant law. They will come up with answers that will surprise you for their quality and maturity, and for the fundamental questions that they will raise. Inevitably, the nature of the experiment will vary. There are several ways to practice the art, as we all know (see, e.g., Leckey, 2017, pp. 3-24).

I would like to add a last word regarding the recommendation to be sensitive about the comparative law dimensions of the exercise on which I have already insisted. The students who shall follow this educational path will be non-native speakers of English who are just beginning their careers as lawyers. It is wrong to ask them to forget who they are while learning the foreign law. Their instructors should be able to introduce them to the common law world comparatively, to help them make sense of it. This requires drawing into the discourse the elements of the local law or of other legal experiences that provide appropriate contrasts or analogies in order to help them build their own perspective on what they are studying. There must be adequate training in the translation problems that this involves, to develop a sensitivity for the linguistic dimensions of the enterprise and the methodological problems they involve. These problems are at the frontier of the comparative enterprise, and there is much to be said for a better appreciation of their nature (Jacometti & Pozzo 2018; Ferreri, 2010).

You only have to set a good example, by providing courses in which they can try their skills. They will ask you to give them this opportunity. It should not be lost: the time is ripe to seize it.

REFERENCES

Ajani, G. Francavilla, D., & Pasa, B. (2018). *Diritto comparato: casi e materiali*. Torino: Giappichelli.

Alpa, G. (2002). The British contribution to Italian legal thinking. In B. Markesinis (Ed.). *The British contribution to the Europe of the twenty-first century* (pp. 37-62). Oxford, Portland Or.: Hart Publishing.

Andenas, M., & Fairgrieve, D. (Eds.). (2015). *Courts and comparative law.* Oxford: Oxford University Press.

Bader-Ginsburg, R. (2005). "A Decent Respect to the Opinions of [Human] kind": The Value of a Comparative Perspective in Constitutional Adjudication. *The Cambridge Law Journal*, *64.3*, 575-592.

Barberis, M. (2011). *Giuristi e filosofi: Una storia della filosofia del diritto.* Bologna: Il Mulino.

Barsotti, V., Carozza, P. G., Cartabia, M., & Simoncini, A. (2015). *Italian constitutional Justice in the global context*. Oxford: Oxford University Press.

Bell, J. (2012). Continental European jurisprudence 1850-2000. In M. Lobban, & J. Moses (Eds.). *The impact of ideas on legal development* (pp. 100-126). Cambridge: Cambridge University Press.

Bomhoff, J. (2013). *Balancing constitutional rights: The origins and meanings of postwar legal discourse.* Cambridge: Cambridge University Press.

Bouabdallah, S. (2014). *La réception du modèle français en droit civil belge*. Brussels: Bruylant.

Breccia, U. (1999). Continuità e discontinuità negli studi di diritto privato Testimonianze e divagazioni sugli anni anteriori e successivi al secondo conflitto mondiale. *Quaderni fiorentini per la storia del pensiero giuridico*, *28*, 293-509.

Breyer, S. (2015). *The court and the world, American law and the new global realities*. New York: Alfred Knopf.

Bruti Liberati, E. (2018). *Magistratura e società nell'Italia repubblicana*. Roma-Bari: Laterza

Calabresi, G. (1985). *Ideal, attitudes, beliefs and the law.* Syracuse, New York: Syracuse University Press.

Calabresi, G. (2003). An introduction to legal thought: Four approaches to law and to the allocation of body parts. *Stanford Law Review*, *55,* 2113-2151.

Cappelletti, M. (1985). Repudiating Montesquieu - the Expansion and Legitimacy of Constitutional Justice. *Catholic University Law Review, 35.1*, 1-32.

Cassese, S. (2016). Sulla diffusione nel mondo della giustizia costituzionale. Nuovi paradigmi per la comparazione giuridica. In S. Bagni, M. Nicolini, E. Palici di Suni, L. Pegoraro, A. Procida Mirabelli di Lauro, M. Serio (Eds.). *Giurisconsulti e giudici. L'influsso dei professori sulle sentenze* (pp. 84-89). Torino: Giappichelli.

Chaudhry, F. (2011). The promise and paradox of Max Weber's legal sociology: The categories of legal thought as types of meaningful action and the persistence of the problem of judicial legislation. *Southern California Interdisciplinary Law Journal*, *20.2*, 249-287.

Criscuoli, G., & Serio, M. (2016). *Nuova introduzione allo studio del diritto inglese*. Milano: Giuffrè.

Cohen-Eliya, M., & Porat, I. (2013). *Proportionality and constitutional culture*. Cambridge: Cambridge University Press.

Dworkin, R. (1986). *A matter of principle.* Cambridge, Mass.: Harvard University Press.

Ehrlich, E. (1936). *Fundamental principles of the sociology of law* (W. L. Moll, Trans.; with an introduction by R. Pound). Cambridge, Mass.: Harvard University Press.

Esquirol, J. (2014). *Las ficciones del derecho latinoamericano.* México, D. F.: Siglo del Hombre Editores.

Esser, J. (1961). *Principio y norma en la elaboración jurisprudencial del derecho privado.* Barcelona: Bosch.

Ferreri, S. (2010). *Falsi amici e trappole linguistiche. Termini contrattuali anglofoni e difficoltà di traduzione.* Torino: Giappichelli

Galgano, F. (1969). Delle persone giuridiche: disposizioni generali, delle associazioni e delle fondazioni: artt. 11-35. In *Commentario al codice civile Scialoja-Branca.* Bologna: Zanichelli; Rome: Foro italiano.

Gambaro, A., & Sacco, R. (2018). *Sistemi giuridici comparati* (4th ed.). Torino: Utet.

Goff, R. (1983). The search for principle. *Proceedings of the British Academy*, *69*, 169-187.

Gorla, G. (1981). *Diritto comparato e diritto comune europeo.* Milano: Giuffrè.

Grande, E. (2016). Legal transplants and the inoculation effect. How American criminal procedure has affected Continental Europe. *The American Journal of Comparative Law*, *64.3*, 583-618.

Graziadei, M. (2019). Comparative law as the study of transplants and receptions. In M. Reimann, & R. Zimmermann (Eds.), *The Oxford handbook of comparative law*. Oxford: Oxford University Press.

Graziadei, M. (2017a). La dottrina giuridica e la sua diffusione In S. Faro & G. Peruginelli, *La dottrina giuridica e la sua diffusione*, Torino: Giappichelli.

Graziadei, M. (2017b). The structure of property ownership and the common law/civil law divide. In M. Graziadei, & L. Smith (Eds.), *Comparative property law: Global perspectives.* Cheltenham: Edward Elgar.

Grossi, P. (2000). *Scienza giuridica italiana: un profilo storico: 1860-1950*. Milano: Giuffrè.

Grossi, P. (2017). *L'invenzione del diritto*. Bari-Roma: Laterza.

Guarneri, A. (2016). *Lineamenti di diritto comparato* (7th ed.). Padova: Cedam.

Guastini, R. (1998). La "costituzionalizzazione" dell'ordinamento italiano. *Ragion pratica*, *11.1*, 185-206.

Gurvitch, G. (1935). *L'expérience juridique et la philosophie pluraliste du droit.* Paris: Pedone.

Gurvitch, G. (1940). Éléments de sociologie juridique. Paris: Aubier.

Hanafin, P. (2013). Rights, bioconstitutionalism and the politics of reproductive citizenship in Italy. *Citizenship Studies*, *17.8*, 942-955.

Hesselink, M. (2014). The new European legal culture—Ten years on. In G. Helleringer, & K. P. Purnhagen (Eds.), *Towards a European legal culture* (pp. 17-24). Munich: C.H. Beck; Hart: Oxford, Portland Or.; Baden-Baden: Nomos.

Jacometti, V. & Pozzo, B. (2018). *Traduttologia e linguaggio giuridico.* Padova: Cedam

Jori, M., & Pintore, A. (2014). *Introduzione alla filosofia del diritto*. Torino: Giappichelli.

Kelemen, R. D., & Sibbitt, E. C. (2004). The globalization of American law. *International Organization*, *58.1*, 103-136.

Kennedy, D. (2006). Three globalizations of law and legal thought: 1850-2000. In D.M. Trubek, & A. Santos (Eds.), *The new law and economic development: A critical appraisal* (pp. 19-73). Cambridge: Cambridge University Press.

Lasser, M. de S.-O.-l'E. (2004). *Judicial deliberations: A comparative analysis of transparency and legitimacy*. Oxford: Oxford University Press.

Leckey, R. (2017). Review of comparative law. *Social & Legal Studies*, *26.1*, 3-24.

Legrand, P. (2002). Alterity: About rules, for example. In P. Birks, & A. Pretto (Eds.), *Themes in comparative law: In honour of Bernard Rudden* (pp. 21-34). Oxford: Oxford University Press.

López Medina, D. E. (2004). *Teoría impura del derecho. La transformación de la cultura jurídica latinoamericana.* Bogotá: Legis, Universidad de los Andes, Universidad Nacional.

Mattei, U., & Ariano, E. (2018). *Il modello di common law*. Torino: Giappichelli.

Merryman, J.H. (1965). The Italian Style I: Doctrine. *Stanford Law Review, 18.2,* 39-65.

Merryman, J.H. (1966). The Italian Style III: Interpretation, *Stanford Law Review, 18.4,* 583-611.

Míguez Núñez, R. (2011). Comparar: conversaciones con Rodolfo Sacco. *Revista chilena de derecho privado*, *17*, 193-226.

Meniconi, A. (2012). *Storia della magistratura italiana.* Bologna: Il Mulino

Moccia, L. (2013). *La formación del derecho europeo. Una perspectiva histórico-comparada.* Madrid: Universidad Complutense.

Nelson, W. (2004). Brown v. Board of Education and the Jurisprudence of Legal Realism. *St. Louis University Law Journal*, *48*, 795-838.

Pace, A. (1993). Diritti 'fondamentali' al di là della Costituzione? *Politica del diritto*,*14.1*, 3-11.

Passaglia, P. (2018). I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016. In *Atti del 12° Convegno Nazionale della Società Italiana degli Studiosi del Diritto Civile, Napoli, 11-13 maggio 2017.* Napoli: E.S.I. 63-102.

Perlingieri, P. (1984). *Il diritto civile nella legalità costituzionale.* Napoli: E.S.I.

Petersen, N. (2017). *Proportionality and judicial activism.* Cambridge: Cambridge University Press.

Pino, G. (1998). Il positivismo giuridico di fronte allo Stato costituzionale. In P. Comanducci & R. Guastini (Eds.). *Analisi e diritto 1998*. *Ricerche di giurisprudenza analitica* (pp. 203-227). Torino: Giappichelli.

Pizzorusso, A. (1995). I «sistemi giuridici comparati» nel piano di studio della facoltà giuridica pisana. *Il Foro Italiano*, *118.1,* 383-388.

Posner, E. A. (2016). Book review: *The Court and the World: American Law and the New Global Realities*. *Yale Law Journal*, *126*.2, 504-545.

Pound, R. (1911). The scope and purpose of sociological jurisprudence. I & II. *Harvard Law Review*, *24.8*, 591-619; *25.9*, 140-168.

Ranieri, F. (2015). Hacia los orígenes del derecho civil europeo. Algunas observaciones sobre las relaciones entre pandectística alemana y doctrina civilista italiana en materia de negocio jurídico. *Revista Derecho Privado* [online], *28.1,* 13-43.

Reimann, M. (1990). Nineteenth century German legal science. *Boston College Law Review*, *31.4*, 837-897.

Reimann, M. (2014). The American advantage in global lawyering. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, *78.1*, 1-36.

Reimann, M. (2018). European Advantages in Global Lawyering. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, *82.4*, 885-921.

Rescigno, P. (1966). *Persona e comunità*: *Saggi di diritto privato.* Bologna: Il Mulino.

Sacco, R. (1981). Il diritto degli scambi transnazionali (Un nuovo piano di studi nella Facoltà giuridica torinese). *Il Foro italiano*, *104.3,* 77-80.

Sacco, R. (1995). L'Italie en tête (À propos de l'enseignement du droit comparé). *Revue internationale de droit comparé*, *47.1*, 131-133.

Sacco, R. (2005). Prospettive della scienza civilistica italiana all'inizio del nuovo secolo. *Rivista di diritto civile*, *51.4*, 417-452.

Sacco, R., & Gianola, A. (2016). The history and importance of comparative law in Italy. In C. Jamin, & W. Van Caenegem (Eds.), *The internationalisation of legal education* (pp. 175-184). Switzerland: Springer.

Shapiro, M. (1981). *Courts: A comparative and political analysis*. Chicago and London: The University of Chicago Press.

Silvestri, G. (1997). *Giustizia e giudici nel sistema costituzionale.* Torino: Giappichelli.

Stronati, M. (2012). Socialismo giuridico e il solidarismo. In *Il contributo italiano alla storia del pensiero. Il Diritto* (pp. 405-412). Roma: Istituto della Enciclopedia Italiana fondata da Giovanni Treccani.

Sturley, M. F. (1986). International uniform laws in national courts: The influence of domestic laws in conflicts of interpretation. *Virginia Journal of International Law*, *27.4*, 729-802.

Teubner, G. (Ed.). (1996). *Global law without a State*. Aldershot: Dartmouth Publishing Group.

Varano, V., & Barsotti, V. (2014). *La tradizione giuridica occidentale:Testo e materiali per un confronto civil law common law* (4th ed.). Torino: Giappichelli.

Von Jhering, R. (1877). *Der Zweck im Recht*. Leipzig: Breitkopf & Härtel.

Von Jhering, R. (1884). *Scherz und Ernst in der Jurisprudenz*. Leipzig: Breitkopf & Härtel.

Wiegand, W. (1991). The reception of American law in Europe. *The American Journal of Comparative Law*, *39.2*, 229-248.

Wiener, J. B., Rogers, M.D, Hammitt, J.K., Sands, P.H. (Eds.). (2011). *The reality of precaution: Comparing risk regulation in the United States and Europe.* Washington, D.C., London: RFF Press.

Zagrebelsky, G. (2011). Le false risposte del diritto naturale. In *Id., Lo stato e La Chiesa*. Rome: L'editoriale l'Espresso.