

THE ITALIAN LEGAL IMAGINARY – INSIDE, OUTSIDE, OR UPSIDE DOWN? LEARNING FROM THE HISTORY OF A JOURNAL**

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This article uses the anecdote of ‘Columbus’ egg’ – in its lesser-known literary version by Piero da Niccolò di Filicaia, concerning an anonymous architect and a dispute over the construction of a bridge – as a metaphor for reflecting on the ten-year journey of The Italian Law Journal.

Two major epistemological turns within the national context are explored, both of which have profoundly reshaped the discursive field of law in the Italian tradition. Although not the only such shifts, they are strategic, particularly in their impact on private law. The first is the national constitutionalization of private law, which has obliged legal scholars to confront the disruptive potential of constitutional principles, demystifying the hegemony of ‘rules’ and the Code, and opening legal interpretation to values and principle-based reasoning. The second is the rise of comparative legal studies, which has broken the isolation of national law and liberated legal thought from the constraints of authority and nationalist narcissism. Within each of these epistemological shifts, the article identifies distinct postures and critical moves, some of which aspire to even more radical transformations. Together, these turns have contributed to emancipating legal thought from the ‘legal comfort zone’ of formalism and dogmatic structures, revealing a complex and evolving Italian legal imaginary that embraces legal pluralism, cognitive openness, and cross-border dialogue.

While structural, linguistic, and disciplinary barriers persist, hindering fully dialogical and bidirectional crossings of this cultural bridge, the journal helps make the Italian legal tradition – in its diversity and plurality – less invisible and more capable of active participation in critical legal discourse, even as it remains at the margins of the global context.

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I. THE MANY TALES OF COLUMBUS' EGG: THE ROLE OF LITERARY FICTION

The tale of Columbus' egg is among the best-known anecdotes associated with Christopher Columbus. In the collective imaginary – at least in the Italian context – it represents a simple, sometimes trivial, solution to a complex or seemingly impossible challenge.

The most widely known version of the story is that told by Girolamo Benzoni who, in his work *La historia del mondo nuovo*, was the first to attribute the anecdote of the egg to the Genoese navigator. According to this account, upon his return from the voyage, Columbus was invited to a banquet (*convito*) with a number of Spanish nobles who, in a spirit of provocation, sought to belittle the discovery of the 'New World', claiming that anyone who had attempted the undertaking would have succeeded in it.¹ Columbus responded by proposing a wager. He asked the guests to try to make an egg stand upright. None of them succeeded. He then tapped the bottom of the shell to flatten it, showing that in this way the egg could indeed remain upright.

The egg anecdote, however, appears in several literary sources. In fact, the painter, architect, and art historian Giorgio Vasari² recounts a similar episode, although in his version, the protagonist is Filippo Brunelleschi. The episode takes place against the backdrop of the celebrated contest between Florence's most renowned architects, competing for the commission to build the dome of the church of 'Santa Maria del Fiore'. During consultations with his colleagues and rivals, Brunelleschi refused to reveal his models and drawings for the dome. Instead, he proposed that the commission be awarded to whoever succeeded in making an egg stand upright on a marble surface. None of the others succeeded. Brunelleschi, however, took the egg, gave it a 'blow on the bottom',³ and made it stand upright. His rivals criticized him, claiming that any one of them would have been able to do the same. The brilliant architect replied with a smile that also building the dome would pose no difficulty for any of them – once they had seen his model and drawings. The same version of the story appears in *De viribus quantitatis*⁴ by mathematician Luca Pacioli.

There is, however, another historical attribution – less well known and with none of the grandeur of the others. The anecdote, which was probably quite in

¹ L. Palmarini and R. Sosnowski, 'Ma l'uovo era veramente di Colombo? L'attestazione dell'aneddoto nel manoscritto di Piero da Filicaia dell'inizio del Cinquecento' 26 *Cuadernos de Filología Italiana*, 167, 170-171 (2019). See G. Benzoni, Girolamo [1565], *La Historia del Mondo Nuovo* (Venezia: Pietro e Francesco Tini, 1572), 12; for an English version Id, *History of the New World* (No 21) (London: Hakluyt Society, 1857), 17.

² G. Vasari (1550), *Le vite de' più eccellenti architetti, pittori, et scultori italiani, da Cimabue insino a' tempi nostri*, Firenze, Lorenzo Torrentino, ed by L. Bellosi and A. Rossi (Torino: Einaudi, 1986), 306-307.

³ L. Palmarini and R. Sosnowski, n 1 above, 171.

⁴ L. Pacioli, *De viribus quantitatis*. Trascrizione di Maria Garlaschi Peirani dal codice n. 250 della Biblioteca Universitaria di Bologna (Milano: Ente Raccolta Vinciana, 1997).

vogue during the Renaissance, is detailed in a lengthy account in a manuscript by Piero da Niccolò di Filicaia, entitled *‘Libro dicto giuochi mathematici’*.⁵ In this manuscript, the egg anecdote is attributed to a figure whose identity remains uncertain. The dispute concerned the construction of a bridge over a river in Lombardy. After unsuccessful attempts to find a suitable architect within his own region, the Duke of Milan engaged a Florentine architect who gained his trust. Thus began the building of the notorious bridge.

The Duke’s choice sparked discontent among the Lombard architects, who began to protest, boasting that they were perfectly capable of completing the work themselves. At this point, the anonymous Florentine asked the Duke to summon the Lombard colleagues and challenged them to the egg game: whoever among them could balance an egg upright would receive a financial reward (ducats). None of those present stepped forward, so the Florentine architect took an egg and balanced it upright by pressing it into a small pile of ashes on a chessboard. The Lombard colleagues mocked him, claiming they too could have made the egg stand upright in that way. To this, the anonymous architect replied: *‘omni uno sa fare a giuoco insegnato’*.⁶ Anyone is capable of building a bridge once someone has shown them the way to follow.

The egg game anecdote resists clear attribution, both in terms of subject and object. Different versions have come down to us through history. Yet precisely because it is a literary fiction, it is for the reader to decide which version of the fiction best serves their interpretative aims, and to justify that choice. So, between Columbus’s egg, Brunelleschi’s egg, and that of an anonymous figure, the preference ultimately falls on the latter.

Filicaia’s account, in fact, contains symbolic details that we can draw on strategically. Setting aside the subjective element – the protagonist of the story is of no particular significance – attention can shift to the objective features, namely the facts that construct the story’s symbolic meanings: the egg game is metaphorically linked to an object, a bridge; and the bridge itself responded to a need – that is, to a human desire;⁷ the egg – metaphor for the bridge – is set upright on a small mound of ashes atop a chessboard; the construction of the bridge has begun, but remains unfinished. It represents a pathway laid out, a pathway to walk upon – a path on which all are free to walk.

⁵ L. Palmarini and R. Sosnowski, n 1 above, 171. See the two versions of the manuscript: P. di Niccolò d’Antonio da Filicaia, *Il libro dicto giuochi mathematici*, manoscritto (Firenze, Biblioteca Nazionale Centrale di Firenze, Magl. CL XI), 15; Piero di Niccolò d’Antonio, *Giuochi matematici*, manoscritto: Kraków, Biblioteka Jagiellońska, Ital. Quart. 48. For an English version see L. Palmarini and R. Sosnowski, *Giuochi Mathematici by Piero Di Niccolò D’antonio Da Filicaia: An Edition With an Introduction* (Leiden, The Netherlands: Brill, 2025).

⁶ L. Palmarini and R. Sosnowski, n 1 above, 172-173.

⁷ *ibid* 171: *‘[P]erché a popoli sua viandanti dava grandissima incomodità questo fiume’* [‘because this river was causing great inconvenience to the people travelling through his lands’].

II. THE BRIDGE AND ITS MODELS: PATHS OF ‘VISIBILIZATION’ AND THE GERMS OF CRITICAL THINKING

So why have we recounted this anecdote and chosen Filicaia’s version? Because it is a strategic literary fiction which, in its many possible meanings, seems to us to evoke the cultural journey of the *Italian Law Journal*. It is a complex and powerful semiotic device through which to look back – after ten years – at the journal project.

Continuing the symbolic fiction, let us assume that the egg (object/bridge) is a metaphor for this, the *Italian Law Journal*, founded in 2014 with the aim of critically rethinking Italian legal culture and tradition, while building transnational networks of communication in a shared *lingua franca*.⁸ The egg is placed on a chessboard, which might be seen as symbolizing Italy’s peripheral geopolitical position.

The egg is a symbol of something that already exists in the needs and hopes of individuals. The egg-as-bridge is also the product of human intuition, grounded in scientific and cultural foundations drawn from past experience – both personal and collective – and a sense of necessity.

Hence the semiotic and metaphorical shift. The journal was not born from a new need, nor does it occupy a cultural vacuum. If we attempt a genealogical reconstruction of the process by which the Italian legal tradition has been made visible in the English-speaking world, we can, in fact, identify certain earlier domestic models. The aim is not so much to pinpoint exact historical data but to reveal moments and events where continuity and rupture come together to form a shared discourse: the construction of a bridge, serving as a visual metaphor for this process of making visible.

The first and fundamental benchmark was the yearbook ‘*Italian Studies in Law*’,⁹ edited by Alessandro Pizzorusso. This huge undertaking began in 1992, at a time marked by great enthusiasm for comparative law studies and received funding from the Ministry of Research and University Education, as well as the National Research Council. The introduction to the first volume of the yearbook already identified the deep roots of a cultural need: the pursuit of an international dialogue between domestic legal scholars and their foreign counterparts on the Italian legal system. To achieve this, the *ISL* proposed articles written by Italian authors on topics concerning Italian legal literature and case law considered as a whole, with no separation between disciplines or branches of law. It was not, therefore, a journal of comparative law in the strict sense. Nor was it a journal that could be assimilated to national journals, as it was primarily addressed to foreign

⁸ See the official website of the Journal at <https://theitalianlawjournal.it/>.

⁹ A. Pizzorusso ed, *Italian Studies in Law: A Review of Legal Problems*, I (Dordrecht, The Netherlands: Martinus Nijhoff, 1992). It should also be noted that The Italian Yearbook of International Law was established in 1975, with the aim of making the Italian contribution to the practice and literature of international law accessible to the English-speaking public.

readers.¹⁰ This is why the very selection of topics to present to an international audience, as well as their form and content, had to be filtered through foreign eyes.

The history of Italian legal literature is undeniably unique and deserved – indeed, still deserves – visibility within the international community. It is well known that the legal Renaissance gave rise to the formation and dissemination of the *ius commune* across continental Europe¹¹ and Latin America. It is equally well known that the humanism of the Italian tradition played a transformative role in shaping knowledge and influenced the development of legal humanism in France¹² notably through the teaching of the jurist Andrea Alciato at French universities, and even in England, where the exile Alberico Gentili was appointed *Regius Professor* of Civil Law at the University of Oxford.¹³

Humanism itself represented the seed of a dialectical process that shaped the entire Italian legal tradition. We will return to this point shortly.

The second volume of the *ISL* was published two years later, missing the original goal of an annual release. The project had been launched. Construction of the cultural bridge was underway. An Italian voice had begun to make itself heard. Yet by 1994, the difficulties of translating the original vision into a sustained publishing program had already begun to surface. The transition from concept to implementation brought to light significant obstacles, chief among them, the challenge of identifying contributions capable of meeting the project's cultural aims and responding meaningfully to the underlying need. It was equally problematic to translate the linguistic, syntactic, social, cultural, and legal features distinctive of the Italian context into English. Ultimately, adapting the journal's format and content for a non-Italian readership was no easy task. The editor's hope and confidence in the project's future ultimately came to nothing.

The need remained, but the bridge was gone. Fifteen years later, a new journal was founded: the *Italian Journal of Public Law*,¹⁴ greatly inspired by a well-known

¹⁰ A. Pizzorusso, 'Italian Studies in Law – Strengths and Weaknesses of an Idea', in Id, *Italian Studies in Law: A Review of Legal Problems*, II (Dordrecht, The Netherlands: Martinus Nijhoff, 1994), XII.

¹¹ F. Wieacker, *A History of Private Law in Europe*, transl. by Tony Weir and with a foreword by Reinhard Zimmermann (Oxford: Oxford University Press, 1995), 67-155; R. Zimmermann, 'Das Römisch-Kanonische Ius Commune Als Grundlage Europäischer Rechtseinheit' 47 *JuristenZeitung*, 8-20 (1992); P. Grossi (2007), *A History of European Law*, transl. by L. Hopper (Chichester: Wiley-Blackwell, 2010), 25-31.

¹² M. Cappelletti, 'Why the Yearbook *Italian Studies in Law*', in A. Pizzorusso ed, n 9 above, 3-4. See also A. Belloni, 'L'insegnamento giuridico in Italia e in Francia nei primi decenni del Cinquecento e l'emigrazione di Andrea Alciato', in A. Romano ed, *Università in Europa. Le istituzioni universitarie dal Medio Evo ai nostri giorni. Strutture, Organizzazione, Funzionamento* (Soveria Mannelli: Rubbettino Editore, 1995), 137-158.

¹³ B. Kingsbury and B. Straumann eds, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010).

¹⁴ G. Della Cananea, 'On Bridging Legal Cultures: The Italian Journal of Public Law' 11 *German Law Journal*, 1281-1291 (2010). Among the Italian legal e-journals focusing on comparative studies see: The Cardozo Electronic Law Bulletin (1995 -); Rivista di Diritto Pubblico Comparato ed Europeo (1999 -); Opinio Juris in comparatione (2009 -); Comparative Law Review (2010 -);

and highly successful German model in transnational legal discourse – the *German Law Journal*. The *IJPL* focuses on issues of public law, including from a historical perspective, and is open to general legal theory and methodological pluralism. Its declared aim is that of ‘bridging legal cultures’, at the same time disseminating the distinctiveness of Italy’s domestic public law tradition within the global and European legal arenas. The journal therefore uses the *lingua franca* and adopts the open-access e-journal format. The connection between these two academic journals has a clear historical *raison d’être*: the strong influence of German legal thought on Italian public law in the latter half of the nineteenth century. This influence overlapped with the prior dominance of the French cultural template, prompting a rethinking of the patterns of Italian public law.

The *Italian Law Journal* follows the authoritative path traced by these two national models (*ISL* and *IJPL*), aiming to add further pieces to the construction of this bridge and encouraging further crossings and cultural exchanges. The focus shifts to private law, conceived as an open discursive field, ‘which inevitably affects the structure of a society (its ‘system building’, public side)’, as Guido Calabresi wrote in his editorial.¹⁵ In fact, the private law techniques codify economic needs, but they are also powerful instruments of social engineering, shaping individuals and groups within society. Private law thus serves as a lens through which to view the Italian legal tradition – its past, its present, and its future.

The rationale behind this choice is not, or not merely, to carve out an identity within the marketplace of ideas and legal (e-)journals. To explain this trajectory, one must take a step back, and return to history. In the magnificent history of Italy, the ‘*alma mater* of modern civil law’,¹⁶ one episode in particular deserves to be recalled. It has come to symbolize a deep-seated dichotomy between the *humanae litterae* and legal science, and between distinct conceptions of law – a divide that has never been resolved within the Italian cultural context.¹⁷

In 1433, the humanist Lorenzo Valla wrote the famous *Epistola contra Bartolum*. This was a manifesto directed squarely against Bartolo of Sassoferrato and his school of thought. Bartolo was famously the emblem of the dominant legal doctrine of the time. The proverbs *nullus bonus iurista nisi sit bartolista* and *nemo iurista nisi bartolista*¹⁸ rang like sacred mantras, expressing an incontrovertible truth in the interpretation of legal texts. At that time, the Bartolists were the sole

more recently see The Italian Review of International and Comparative Law (2021 -).

¹⁵ G. Calabresi, ‘The Italian Law Journal: Challenges and Opportunities’ 1 *Italian Law Journal*, 1 (2015).

¹⁶ M.A. Millner, ‘Note on Italian Law’ 14 *International and Comparative Law Quarterly*, 1028, 1030 (1965).

¹⁷ L. Valla, *Epistola contra Bartolum* (1433), in M. Regoliosi, ‘L’ “Epistola contra Bartolum” del Valla’, in V. Fera and G. Ferraú eds, *Filologia umanistica per Gianvito Resta*, II (Padova: Antenore, 1997), 1501, 1532. On this dispute between Valla and Bartolo, see P. Femia, ‘Criticism: From the Outskirts of a World without a Centre’ 1 *Italian Law Journal*, 3 (2015).

¹⁸ S. Vogenauer, ‘An Empire of Light? Learning and Lawmaking in the History of German Law’ 64 *Cambridge Law Journal*, 481, 487 (2005).

legitimate custodians of the law's authoritative word.

Lorenzo Valla opposed this hegemony by applying humanist critical methods to the *Corpus Iuris Civilis* (CIC) and ridiculing the mainstream methods. The clash was fierce. The jurists of the University of Pavia reacted vehemently to what they considered a disrespectful attitude, condemning it as offensive and based on unfounded criticisms, such as the use of coarse and barbarous Latin, reliance on scholastic logic, ignorance of Latin, and the consequent distortion of the meanings of legal texts.¹⁹ In the end, our critical humanist was forced to leave academia,²⁰ where humanists nonetheless constituted a minority.

Valla was an 'opposition intellectual', perceived as both revolutionary and provocative. He represented 'an exemplary instance of the theory of negative dialectic.'²¹ Such a posture helped Valla promote the idea of intellectual freedom as a revival of ancient conceptions of philosophical liberty. At the same time, it enabled him to articulate a vision of modern scholarship as capable of evaluating texts, theories, and authors independently of their received or canonical status.

Dissent and critique lie at the heart of this story. The reaction against the folklore of the Italian Style,²² as John Henry Merryman, the first common-law-trained scholar who really explored our legal system, would later observe – is an essential process for innovation and growth that recurs cyclically throughout the history of the Italian legal experience. Dialectic is, not coincidentally, the means by which such an infinite process is realized within every community of thought.

The example of Lorenzo Valla, standing in direct opposition to Bartolo of Sassoferrato, symbolizes the aspiration of the *Italian Law Journal*. From its

¹⁹ P.F. Grendler, *The Universities of the Italian Renaissance* (Baltimore: John Hopkins University Press, 2002), 211.

²⁰ M. Speroni, 'Lorenzo Valla a Pavia: il Libellus contro Bartolo' 59 *Quellen und Forschungen aus italienischen Archiven und Bibliotheken*, 453-467 (1979); and M. Regoliosi, 'L"Epistola contra Bartolum" del Valla' n 17 above, 5.

²¹ W.S. Blanchard, 'The Negative Dialectic of Lorenzo Valla: A Study in the Pathology of Opposition' 14 *Renaissance Studies*, 149, 154, 182 (2000) (borrowing from the theory of negative dialectics by T.W. Adorno, *Negative Dialectics* (1966), trans. EB Ashton (New York: Seabury, 1973)).

²² 'Like the American, the Italian legal system operates in an atmosphere of assumptions that, although demonstrably un-sound, tend to persist because they are firmly rooted in the culture. This kind of folklore serves a variety of functions, some laudable and others regrettable. Although it exists in most exaggerated form in the lay mind, it tends, somewhat refined, to dominate the thinking of the profession itself; alternately idealized and caricatured, it becomes the starting point of much scholarly discussion' (J.H. Merryman, 'The Italian Style III: Interpretation' 18(4) *Stanford Law Review*, 583, 585-586 (1966)). This article is one of the 'trilogy' dedicated to the 'Italian Style' (with the subtitles 'Doctrine', 'Law', 'Interpretation'): Id, 'The Italian Style I: Doctrine' 18 *Stanford Law Review*, 39 (1965); Id, 'The Italian Style II: Law' 18 *Stanford Law Review*, 396 (1966)). The trilogy, in turn, eventually became part, in modified form, of an 'Introduction' to 'the Italian Legal System' (J.H. Merryman, M. Cappelletti, and J.M. Perrillo, *The Italian Legal System: An Introduction* (Stanford: Stanford University Press, 1967). See also a fully-updated and revised second edition: S. Livingston, P.G. Monateri and F. Parisi, *The Italian Legal System: An Introduction* (Stanford: Stanford University Press, 2015) (questioning how the Italian style of law has survived the pressures of Europeanization, Americanization and globalization of law). For Merryman's legacy, see C. Amodio, 'In Memoriam: Professor JH Merryman' 1 *The Italian Law Journal*, 207 (2015).

inception, this journal has sought to be one possible means of nurturing critical and dialectical intellectual practices – to be a discursive space of dialogic communication in which national and international scholars freely construct a two-way critical dialogue, open to methodological hybridity. It seeks to transcend the rigid boundaries between fields of law and knowledge. In this way, it is intended to become a place where internal and external perspectives converge to deconstruct the domestic legal tradition, rethink it, and transform it.

This entire cultural process is inclusive and pluralistic in nature. It aspires to be without boundaries, without sacred texts, and without unquestionable mythologies.²³ The process is itself a bridge, subject to the changes of time. Such a bridge can make the Italian legal and cultural tradition less invisible within the transnational world of the *lingua franca*, remaining a linguistic periphery nonetheless.²⁴

III. STRATEGIC CRITICAL MOVES WITHIN THE ITALIAN EPISTEMOLOGICAL COMMUNITY: THE PERFORMATIVE SEMANTICS OF CONSTITUTIONALIZATION IN PRIVATE LAW

All legal constructs, all legal theories are epistemically situated enterprises. Norms, concepts, categories, as well as their critiques, take different meanings depending on their community of reference. Any critical move must, in turn, be epistemologically situated within a reference community and within the discursive practices of that community in a given spatial and temporal context.²⁵

With this premise, we may turn to the history of the Italian legal tradition. It is a history marked by the presence of local '*juristes inquiets*,'²⁶ often little known to their contemporaries, and scarcely visible to the international community. It is not possible, in these few pages, to retrace such a long and complex trajectory,²⁷ nor to identify all its protagonists. Attempting intellectual genealogies, or trying to define forebears, founders, or schools, is not an innocent transcription of the past. It

²³ P. Grossi, *Mitologie giuridiche della modernità* (Milano: Giuffrè, 2001).

²⁴ R. Phillipson, 'The Linguistic Imperialism of Neoliberal Empire' 5 *Critical Inquiry in Language Studies*, 1-43 (2008).

²⁵ J.L. Esquirol, 'Making the Critical Moves: A Top Ten in Progressive Legal Scholarship' 92 *University of Colorado Law Review*, 1079, 1080 (2021).

²⁶ M.C. Belleau, 'The Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth-Century France' 1997 *Utah Law Review*, 379 (1997).

²⁷ See, among many others, G. Alpa and F. Macario eds, *Diritto civile del Novecento: scuole, luoghi, giuristi* (Milano: Giuffrè, 2019) (analysing the major Italian schools of civil law, including at the regional level, and some of their key figures). See also I. Birocchi et al eds, *Dizionario biografico dei giuristi italiani XII-XX secolo*, 2 vols (Bologna: Il Mulino, 2013); M. Lobbano and F. Macario eds, *Il diritto civile nel pensiero dei giuristi. Un itinerario storico e metodologico per l'insegnamento* (Padova: CEDAM, 2010); for a critical and historical approach, see P. Grossi, *Scienza giuridica italiana. Un profilo storico 1860-1950* (Milano: Giuffrè, 2000) and Id, *La cultura del civilista italiano: un profilo storico* (Milano: Giuffrè, 2002).

is an active exercise in identification, differentiation, and hierarchization – shaped by a non-random sequence of citations, but above all by silences and omissions.²⁸

We may, however, without any claim to truth, identify certain critical strategies that have marked epistemological turns within the intellectual field of domestic jurists, with particular regard to private law. Indeed, in the Italian legal imaginary, these major turns have emerged precisely within, and in opposition to, the conventional wisdom of domestic civil lawyers.

Even focusing solely on the second half of the twentieth century, we witness a period of flourishing in which more open methodologies begin to take hold. In Italian legal scholarship, some voices produced micro-fractures that gradually eroded the monolithic architecture of legal dogmatics and formalism. The deconstruction of the mythologies of positive law unfolds through the incorporation of other dimensions²⁹ into legal thought – such as history, politics, economics,³⁰ sociology,³¹ and the analysis of the social impact of legal institutions and techniques.³² Legal hermeneutics,³³ especially when combined with literary arguments,³⁴ brings to light the tensions between the interpretation of rules and justice. At the same time, it highlights the creative role of the judge, called upon to adapt the forms of law to substance, namely to economic and social reality.

All these micro-fractures, especially in the aftermath of the Second World War, gave rise to a methodological pluralism that challenged the political agnosticism of law and fostered anti-dogmatic and anti-systematic attitudes.³⁵ It is no coincidence that Mauro Cappelletti, a leading Italian jurist with a cosmopolitan outlook, saw in some of these approaches the early seeds of what would later become the

²⁸ G. Marini, 'Ripensare le dicotomie, al di là di pubblico e privato' *Rivista critica di diritto privato*, 345, 352 (2024).

²⁹ G. Alpa, 'About the Methods of Studying Private Law: An Italian Perspective' 23 *German Law Journal*, 838, 839 (2022).

³⁰ P. Trimarchi, *Rischio e responsabilità oggettiva* (Milano: Giuffrè, 1961).

³¹ N. Lipari, *Il diritto civile tra sociologia e dogmatica (Riflessioni sul metodo)* (Padova: CEDAM, 1968).

³² L. Mengoni, 'Forma giuridica e materia economica', in *Studi in onore di Asquini*, III (Padova: CEDAM, 1965), 1086, and T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici*, I (Milano: Giuffrè, 1959), 69.

³³ E. Betti, *Le categorie civilistiche dell'interpretazione* (Milano: Giuffrè, 1948) and his magnum opus, Id, *Teoria generale dell'interpretazione* (Milano: Giuffrè, 1955).

³⁴ T. Ascarelli (1955), 'Antigone and Portia', transl. by C. Crea, 1 *Italian Law Journal*, 167 (2015), and cf also C. Crea, 'What Is to Be Done? Tullio Ascarelli on the Theory of Legal Interpretation' 1 *Italian Law Journal*, 181 (2015).

³⁵ Norberto Bobbio applies the symbolic concept of 'revolt against formalism' (from M.G. White, *Social Thought in America: The Revolt Against Formalism* (New York: Viking Press, 1949)) to the Italian context, including a series on trends in domestic legal thinking: '(1) the critique of legal positivism and support of natural law; (2) the critique of the theory of law as a creation of the state in order to revive and to enlarge the institutional theory of law; (3) the critique of legalism seeking to open the way for reconsideration of the problem of the sources of law; (4) the critique of juristic conceptualism envisaging a less rigid form of interpretation and a jurisprudence more open to the empirical study of law.' (N. Bobbio, 'Trends in Italian Legal Theory' 8 *American Journal of Comparative Law*, 330 (1959)).

Critical Legal Studies movement in the United States.³⁶

These seeds of change took root around two major epistemological (methodological and semantic) turns that transformed and fractured the conventional architecture of the Italian legal style: the national constitutionalization of private law and the flourishing of comparative law scholarship.

1. *Conservative vs Progressive Strategies*

Let us start from the first major turn. The event marking a genuine structural change in the Italian legal system is the advent of the Constitution (1947)³⁷ positioned at the apex of the hierarchy of sources of national law.

Constitutionalization became one of the most powerful and subversive critical strategies to reshape, rethink and recast the entire legal reality constructed around the Civil Code of the Fascist regime³⁸ (1942). It is true that the ‘Constitutionalization of private law is a dazzling term’.³⁹ However, here we use this expression to mean the influence exerted by the fundamental and human rights enshrined in the Italian Constitution on the institutions of domestic private law.

In reality, the intellectual postures⁴⁰ in Italian Jurisprudence regarding the relationship between constitutional principles and private law have been manifold. Their genealogy reveals a not always linear timeline, as they belong to the past yet re-emerge, in different guises, even among certain contemporary domestic thinkers.

If we wish to attempt a simplification, we can describe some symbolic attitudes.

A first attitude is the denial of change through a strategy of temporal deferral. In this approach, constitutional principles exist but have a programmatic rather than a prescriptive value. They represent an ‘agenda’ of legal policy but lack operational power. They are, therefore, ‘Platonic manifestations of sometimes utopian humanitarianism’.⁴¹ This essentially means separating the discursive fields: private law and constitutional law are distinct, non-communicating spheres of language. The rules of the Code and legislation remain the custodians of governing human beings’ actions.

Such a strategy represents a sort of path-dependency from formalism, which promises (or promised) certainty and predictability in law. Indeed, formalism

³⁶ M. Cappelletti, n 12 above, 7.

³⁷ M. Cartabia and N. Lupo, *The Constitution of Italy. A Contextual Analysis* (Oxford: Hart Publishing, 2022).

³⁸ A. Somma, ‘La codificazione del diritto civile e la collaborazione italo tedesca in epoca fascista’ *Rivista italiana per le scienze giuridiche*, 58-89 (2022); R. Teti, *Codice civile e regime fascista. Sull’unificazione del diritto privato* (Milano: Giuffrè, 1990).

³⁹ H.-W. Micklitz, ‘Constitutionalization, Regulation and Private Law’, in S. Grundmann, H.-W. Micklitz and M. Renner, *New Private Law Theory: A Pluralist Approach* (Cambridge: Cambridge University Press, 2021), 166-179.

⁴⁰ G. Tarello, ‘Atteggiamenti dottrinali e mutamenti strutturali dell’organizzazione giuridica’ *Materiali per una storia della cultura giuridica*, 157 (1981).

⁴¹ A. Scialoja, ‘Nota a Cass. pen. 25 giugno 1951’ *Foro italiano*, 29 (1952).

served as a shield against the dangers of functionalism in private law during the post-Second World War period. Constitutional values (understood as social ends) were feared because functionalism had been abused to steer the law toward bad ends under the Fascist dictatorship.⁴² That same shield has persisted as a *habitus*⁴³ in some thinkers inclined toward so-called legal nihilism. The result of this approach is that constitutional duties, including solidarity, can only apply to relations between private parties if they are ‘mediated’ by statutes or administrative acts.⁴⁴

A second attitude was that of a constitutional re-reading (*rilettura*) of the Italian Law which might be described as conservative.⁴⁵ This approach adopts the new semantics of the Constitution and proposes an integration of the two legal languages: those of the 1942 Civil Code and the 1947 Constitution. The Code, its categories, and concepts undergo a cognitive expansion and are infused with new content, but respect the hierarchical primacy of constitutional principles and values which impose binding limits on the actions of private parties. The Constitution, in turn, draws upon the historical and technical value of the doctrinal lexicon and institutions developed within the tradition of the Civil Code. This approach still remains deeply shaped by formalist paradigms, ones that evolved in the sacrality of the Code’s rules.⁴⁶ Nevertheless, such a conservative attitude has paved the way for the national constitutionalization of private law.

A third stance, which may be described as *progressive*, at least in relation to the legal system of the time, involves a series of critical moves that acknowledge the constitutive, and even subversive, power of the Constitution. In this way, the rupture with the past becomes irreversible, calling into question the orthodox architecture of meaning underlying the fundamental institutions of private law: private autonomy, torts, property, the family, enterprise, and all other legal entities.⁴⁷ A constitutional culture of society and the market thus begins to take shape.

The transformative operational paradigms are manifold, and central importance is accorded to the person.⁴⁸ The person (and personalism) becomes the fundamental value within the Italian legal system; it breaks the hegemony of nineteenth-century individualism and disrupts the abstract legal subject of the bourgeois tradition. As a consequence, private law starts to shift from economic and proprietary

⁴² G. Calabresi, ‘Two Functions of Formalism: In Memory of Guido Tedeschi’ 67 *University of Chicago Law Review*, 479, 482 and 484 (2000).

⁴³ P. Bordieu, ‘Vive la Crise! For Heterodoxy in Social Science’ 17 *Theory and Society*, 773, 782 (1988).

⁴⁴ N. Irti, ‘Leggi speciali (Dal mono-sistema al poli-sistema)’ *Rivista di diritto civile*, 141 (1979).

⁴⁵ P. Rescigno, ‘Per una rilettura del codice civile’ *Giurisprudenza italiana*, 209 (1968).

⁴⁶ P. Grossi, *Introduzione al Novecento giuridico* (Roma-Bari: Laterza, 2012), 17; L. Ferrajoli, *La cultura giuridica nell’Italia del Novecento* (Roma-Bari: Laterza, 1999), 57-58.

⁴⁷ S. Rodotà, ‘Ideologie e tecniche della riforma del diritto civile’ *Rivista di diritto commerciale*, 83 (1967).

⁴⁸ P. Perlingieri, *La personalità umana nell’ordinamento giuridico* (Napoli: Esi, 1972). This volume brings together the lectures from the first Civil Law course in Italy to be entirely dedicated to the human person.

concerns to human beings. Personalism virtually reunites the Italian tradition with the humanism of Lorenzo Valla to promote a new interpretation of legal texts against the dominant traditional thinking.

Constitutional principles, substantive equality and solidarity in particular, inform social and economic relations through general clauses (or standards) such as the social function of property, good faith in contract law, the injustice of harm in civil liability,⁴⁹ and social utility. Constitutional provisions, then, do not merely speak: they act upon the legal system, constructing a performative semantics that transforms domestic legal discourse.⁵⁰ The governance of private relations is no longer entrusted solely to legislation, as is customary in civil law systems. Such a ‘jurisgenerative’ process⁵¹ becomes pluralistic, as all courts, whether constitutional, civil, criminal, or administrative, are involved in the political creation of law in accordance with the Constitution.

This progressive trend has intensified over the last thirty years. National courts apply a constitutionally-oriented interpretation to private law rules. This is because the legitimacy of all rules lies in one or more constitutional principles, and, through them, also in the principles contained in supranational charters (the EU Charter of Fundamental Rights and the European Convention on Human Rights). So, judges regularly use constitutional arguments in their legal reasoning. Their collective interpretative work is both political and legal in nature, and it upends the traditional techniques of interpreting private law.

In this way, a process of liberation begins – both from the rationalist and depoliticized logic, and from the traditional interpretative technique of subsumption – opening up legal thought to the complexity and indeterminacy of law. The result is the emergence of domestic forms of *Drittwirkung*, particularly in its indirect form.⁵² By contrast, the direct application of constitutional provisions to horizontal relationships remains a minority view.⁵³

In essence, the Constitution itself was subversive and, for some, even counter-

⁴⁹ S. Rodotà, ‘Note critiche in tema di proprietà’ *Rivista trimestrale di diritto e procedura civile*, 1252 (1960); Id (1969), *Le fonti di integrazione del contratto* (Roma: RomaTrePress, 2024); Id (1964), *Il problema della responsabilità civile* (Milano: Giuffrè, 2023).

⁵⁰ S. Rodotà, n 47 above, 96; P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, I-V vols (Napoli: Esi, 2020) (developing a holistic methodology for assessing all private law institutions in the light of the Italian Constitution). See also P. Grossi, ‘Il diritto civile nella legalità costituzionale’ *Rassegna di diritto civile*, 914 (2009).

⁵¹ R.M. Cover, ‘Foreword: Nomos and Narrative’ 97 *Harvard Law Review*, 4 (1983).

⁵² E. Navarretta, *Costituzione, Europa e diritto privato. Effettività e Drittwirkung ripensando la complessità giuridica*, (Torino: Giappichelli, 2017); P. Femia, *Drittwirkung: principi costituzionali e rapporti tra privati. Un percorso nella dottrina tedesca* (Napoli: Esi, 2018) (analyzing the German theory in dialogue with Italian legal thought); O. Chessa, ‘Drittwirkung e interpretazione: brevi osservazioni su un caso emblematico’, in E. Malfatti, R. Romboli and E. Rossi eds, *Il giudizio sulle leggi e la sua “diffusione”* (Torino: Giappichelli, 2002), 420, 425.

⁵³ P. Perlingieri, ‘Norme costituzionali e rapporti di diritto civile’ *Rassegna di diritto civile*, 95 (1980), English trans. Id, ‘Constitutional Norms and Civil Law Relationships’ 1 *Italian Law Journal*, 17 (2015).

hegemonic. It spawned an internal epistemic critique of national law. This does not imply adherence to a new legal mythology: it is not a matter of replacing the cult of codes with that of the Constitution. Rather, it is a recognition that within the domestic legal system, the Constitution remains one of the normative paths⁵⁴ to be pursued in order to give voice to antagonistic, marginalized, or disadvantaged actors in society, in the marketplace, and places where power and knowledge are produced.

2. *The ‘Lost’ Constitution: Still Searching for Emancipatory Practices*

Today, the constitutionalization of private law acts for a normative strategy that has gained a foothold in the dominant legal discourse, becoming a historical reality, albeit one still in flux. John Henry Merryman once depicted a stereotypical jurist loyal to a dominant Italian style marked by formalism and dogmatics. Yet the epistemological, (methodological, and semantic) turn brought about by the constitutionalization has generated new styles of legal thought, which, over time, have become variably orthodox within the national legal system.

Within this broader discourse, however, certain more radical strategies of opposition have remained marginal and failed to gain prominence for a variety of reasons. These strategies originated with a movement of jurists and judges inspired by Marxist thought in the late 1960s and early 1970s. The new ideas were set out in the so-called cultural manifesto of the ‘alternative use of law’⁵⁵ that questioned the existing system, its demystification, and holistic transformation.⁵⁶ The Marxist tactic of ‘contradiction’,⁵⁷ together with the categories of dialectics and totality, were the theoretical tools used to highlight the political and social conflicts embedded in the domestic legal system. In this way, the contradictions present in society, the economy, and mainstream legal orthodoxy were brought to light.

This alternative model was grounded in the idea of a new society, freed from

⁵⁴ In this context, we use the adjective ‘normative’ rather than ‘legal’, according to the meaning given by R. Cover, n 51 above, 4.

⁵⁵ This is the title of a landmark academic conference held in Catania in 1972: P. Barcellona ed, *L’uso alternativo del diritto*, vol I ‘Scienza giuridica e analisi marxista’, and vol II ‘Ortodossia giuridica e pratica politica’ (Bari: Laterza, 1973). See also Id, *Giudici Politica Democrazia. Uso alternativo o diritto alternativo: alle radici di uno scontro in un mondo che cambia* (Roma: Castelvechi, 2023); and L. Nivarra ed, *Gli anni settanta del diritto privato* (Milano: Giuffrè, 2006).

⁵⁶ This movement also resonates with analogous currents of thought that emerged in other legal contexts: G. Azzariti, A. Di Martino and A. Somma eds, *L’uso alternativo del diritto. Un confronto di prospettive critiche* (Napoli: Editoriale scientifica, 2023), and in particular the contributions of A. Somma, ‘L’uso alternativo del diritto nell’esperienza’, 3 (Germany); M. Benvenuti, ‘Il movimento “critique du droit” in Francia, visto dall’Italia’, 95 (France); M. Carducci, ‘Comparare “usi alternativi” del diritto tra America Latina e Africa’, 119 and P. Moreno-Cruz, ‘L’uso alternativo del diritto in America Latina: una possibile lettura’, 137 (Latin America and Africa); G. Marini, ‘Critical Legal Studies vs. uso alternativo del diritto: ovvero lo strano destino’, 167 (US).

⁵⁷ P. Costa (1987), ‘L’alternativa “presa sul serio”: manifesti giuridici degli anni Settanta’ *Democrazia e diritto*, 260 (2010).

class-based inequalities through an epistemic transformation in which law itself was meant to be an instrument of change.⁵⁸ It also promoted emancipatory practices both within the seats of legal production, ie, parliaments and courts, and beyond. Individual and collective emancipatory practices are those capable of realizing substantive equality (Art 3(2) of the Italian Constitution) and, from this perspective, are included within a kind of unofficial ‘reserve’ of legality.⁵⁹

The Marxist framework makes it possible to assume legal interpretation as a political activity, and judicial decisions themselves as instruments of legal policy. In this way, constitutional arguments, such as substantive equality, and human dignity become powerful tools for constructing a political, legal, and social system that is, indeed, ‘alternative’ to the bourgeois archetype of the Civil Code. The logical and historical ‘contradictions’ in society are transposed into the legal system, where they come to overlap with the traditional paradigms of legal hermeneutics, namely, lacunae and antinomies.⁶⁰ Indeed, proponents of this approach acknowledged that contradictions may also be found within the Constitution itself. If all this is true, then the task of the jurist, both in theory and practice, is to ‘choose’ a radical interpretation of the Constitution oriented toward achieving substantive equality and social justice. This is the supreme standard to be pursued in a democratic State governed by the rule of law.

This ‘alternative’ reading of the Constitution’s very use had a clearly counter-hegemonic intent.⁶¹ It was a utopian project that lost momentum with the decline of Marxist thought⁶² but never entirely disappeared. What remains is a methodological legacy, a critical interpretation of law within a national system founded on constitutional principles. This approach can, and must, draw on all available strategies that prove useful in demystifying social, economic, and legal reality. Understood in this way, the constitutionalization of private law may still be a critical strategy for present and future human flourishing.

One current example of alternative use of the Italian Constitution is the ecological interpretation⁶³ of private law institutions, based on those principles that explicitly refer to future generations, the protection of the environment, and biodiversity.⁶⁴ This new semantic framework may itself become performative,

⁵⁸ G. Cotturri, *Diritto uguale e società di classi* (Bari: De Donato, 1972).

⁵⁹ C. Camardi, ‘L’uso alternativo del diritto fra teoria e prassi’ *Jus civile*, 970 (2023). See also, for a different approach, N. Lipari, ‘L’uso alternativo del diritto’ *Rivista di diritto civile*, 144 (2018).

⁶⁰ P. Costa, n 56 above, 263-264.

⁶¹ A. Algostino, ‘L’uso alternativo del diritto: dalla Costituzione ‘eversiva’ nella democrazia borghese alla Costituzione ‘insorgente’ nell’egemonia neoliberista’, in G. Azzariti, A. Di Martino, and A. Somma, n 56 above, 497.

⁶² L. Nivarra, *La grande illusione. Come nacque e morì il marxismo giuridico in Italia* (Torino: Giappichelli, 2015).

⁶³ F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland, CA: Berrett-Koehler Publishers, 2015).

⁶⁴ Arts 9 para 3, and 41, Italian Constitution as amended in 2022 (Constitutional Law, no 1, 11 February 2022).

legitimizing generative, cooperative and redistributive practices. Such practices may indeed serve as a bulwark against extractive capitalism,⁶⁵ distortions of neoliberalism⁶⁶ and misuses of private law – ie, all uses of private law that codify⁶⁷ capital production while generating privilege and wealth for the few to the detriment of the community and of minorities.

It is also well known that European private law has, from its very inception, been shaped by the spell of the internal market.⁶⁸ The ordoliberal approach and the ‘original ambivalence of the European integration project’⁶⁹ have, in fact, underpinned the regulatory actions of the Brussels institutions. Efforts to revive the debate on social justice in Europe have, unfortunately, not yet succeeded in producing meaningful results.⁷⁰ This is why domestic strategies that can effectively advance equality and social justice within the Member States always deserve support.

This is not to suggest that the Constitution should be seen as a panacea for all ills, especially since even liberal constitutions have cognitive limits, both within and beyond the rule of law, and are open to misuses. In fact, it is undeniable that statutes are fundamental sources of law in the Italian legal system and accordingly, legislative reforms are necessary to bring about change, particularly in areas such as private law, which are governed by technical rules that define powers, duties, and freedoms. Furthermore, the constitutionalization of private law, including its more ‘alternative’ forms, can be neutralized by the production of legal norms outside and beyond both the State and the law: private orders and ‘smart’⁷¹ laws increasingly seek to establish themselves as systems of self-legitimation or self-constitutionalization. Added to this is the awareness, on one hand, of the risks associated with an authoritarian drift within constitutionalism itself, emerging even

⁶⁵ U. Mattei and A. Quarta, *The Turning Point in Private Law* (Cheltenham: Edward Elgar Publishing, 2018). See also C. Salvi, *Capitalismo e diritto civile. Itinerari giuridici dal Code civil ai Trattati europei* (Bologna: Il Mulino, 2015); and L. Bruni, *Capitalismo meridiano: alle radici dello spirito mercantile tra religione e profitto* (Bologna: Il Mulino, 2022) (showing an alternative vision of capitalism, the so-called ‘meridiano’ model, which developed in the Italian context in continuity with civil humanism and in opposition to the Nordic capitalism of Luther and Calvin).

⁶⁶ Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge-MA: Harvard University Press, 2018).

⁶⁷ K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton-NJ: Princeton University Press, 2019).

⁶⁸ D. Caruso, ‘The “Justice Deficit” Debate in EU Private Law: New Directions’ *BU Law Working Paper* (2012).

⁶⁹ M. Bartl, ‘Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political’ 21 *European Law Journal*, 573 (2015).

⁷⁰ G. Brüggemeier et al, ‘Social Justice in European Contract Law: A Manifesto Study Group on Social Justice in European Private Law’ 10 *European Law Journal*, 653-674 (2004). A welcome attempt to revive the debate on social justice and European private law was made at the ‘Symposium: Social Justice, Private Law and Europe(?) 2024-2044: Keeping the Hope Alive’, held at the University of Amsterdam in 2024. For the contributions presented at the conference, see *Transformative Private Law Blog*, at <https://tinyurl.com/4cxc3eeh> (last visited June 14, 2025).

⁷¹ U. Mattei, ‘The Legal Metaverse and Comparative Taxonomy: A Reappraisal’ 71 *American Journal of Comparative Law*, 900 (2023).

in Europe and the Western Hemisphere;⁷² and, on the other hand, the urgency of a global constitutionalism⁷³ capable of governing transnational complexity. It is equally undeniable that the normative universe is not exhausted by the semantics of national liberal constitutions. The Constitution stands at the center of the legal system but does not constitute the entire legal order, since every legal system is itself the product of an inherently unstable order.

The manifesto of the alternative use of law is a product of its time. It has faced criticism,⁷⁴ even from its own supporters, and it is a fact that the manifesto belongs to the history of the Italian legal tradition and to cultural elites of that time. In any case, what remains from that manifesto is a constructive legal hope that critical thought will continue to be a driving force for material actions of resistance and transformation to counter inequality, demystify power structures, and protect the most vulnerable.

With these objectives, any critical and creative move – including the national constitutionalization of private law – can produce micro-fractures of freedom, democracy, and justice within the traversable fortress of the great god Capital.⁷⁵ It is indeed true that the ‘contradiction’ between altruism and individualism,⁷⁶ as opposing rhetorical constructs, cannot be resolved at the theoretical level because it exists in reality. It is only in the reality of actions and decisions that a choice becomes possible.

IV. THE TRANSFORMATIVE FUNCTION OF LEGAL COMPARISON: EXIT STRATEGIES FROM THE LEGAL COMFORT ZONE

The second major epistemological turn in legal thought is embodied in the emergence of comparative legal studies.

Over the last few centuries, Italy has essentially been a context or site of legal reception,⁷⁷ and thus a periphery, or perhaps a semi-periphery.⁷⁸ Italian private

⁷² D. Kennedy, ‘Authoritarian Constitutionalism in Liberal Democracies’, in H.A. García and G. Frankenberg eds, *Authoritarian Constitutionalism* (Cheltenham: Edward Elgar Publishing, 2019), 161-184.

⁷³ C.E. Schwöbel, ‘Situating the Debate on Global Constitutionalism’ 8 *International Journal of Constitutional Law*, 611-635 (2010); A. Peters, ‘Global Constitutionalism’, in M.T. Gibbons ed, *The Encyclopedia of Political Thought* (Malden, MA: Wiley Blackwell, 2015), 1484-1487. Particular attention should be given to the proposal of G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

⁷⁴ U. Breccia, ‘L’interprete tra codice e nuove leggi civili’ *Politica del diritto*, 537 (1982).

⁷⁵ P. Femia, ‘Sperare dopo la speranza. Cosa abbiamo imparato a sperare dopo la fine delle speranze’, in N. Dimitri and A.M. Maugeri eds, *Dall’uso alternativo del diritto al diritto vivente Catania 1973-2023* (Sesto San Giovanni: Mimesis, 2024), 150-151.

⁷⁶ D. Kennedy, ‘Form and Substance in Private Law Adjudication’ 89 *Harvard Law Review*, 1685, 1775 (1975).

⁷⁷ D.E. López Medina, *Teoría Impura del derecho. La transformación de la cultura jurídica latinoamericana* (Bogotá: Legis – Universidad de los Andes, Universidad Nacional, 2004), 15-17.

⁷⁸ S. Lanni and P. Sirena eds, *Il modello giuridico – scientifico e legislativo – italiano fuori*

law, in particular, is grounded in two main archetypes: first, the French tradition, shaped by the Napoleonic Code and especially the doctrinal legacy of the *école de l'exégèse*;⁷⁹ and later, the German model, rooted in the Pandectist system. In the aftermath the Second World War, the fascination with US-American law began to permeate the domestic academic élite, following a broader European trend of *américanisation du droit*.⁸⁰

The blend of these two patterns has become embedded in Italian legal culture through a dynamic process of 'contamination', which 'is inherent in the particular selectivity of borrowing'.⁸¹ The result of this, often unconscious, contamination 'is a unique mixture of patterns'.⁸² Unlike other Western legal sub-traditions, the post-unification national legal system 'has never hidden its mixity', thanks to a kind of 'cultural modesty',⁸³ but also to curiosity and receptiveness. This helps to explain why Italy is labeled as a 'weak tradition', meaning a tradition 'widely opened to foreign 'cultural intruders''.⁸⁴

In this context of legal cross-fertilization, the early germ of comparative law studies gradually emerged in the post-unification period. A group of visionary commercial law scholars,⁸⁵ even during the years of the Fascist regime, driven by the suffering inflicted by the dictatorship and, in some cases, by forced exile under the racial laws, adopted a cosmopolitan stance that broke with the parochial approach of domestic jurists. Their gaze turned toward common law systems, which offered broader tools for commercial activities. These voices, however, remained

dell'Europa – Atti del II Congresso Nazionale SIRD (Napoli: Esi, 2013) (analysing the discontinuous trajectories of circulation of the Italian legal model, in terms of both legislation and scholarship, in the global context); M. Bussani ed, 'Il diritto italiano in Europa (1861-2014). Scienza, giurisprudenza, legislazione' *Annuario di diritto comparato e studi legislativi* (2014) (focusing on the possible influence of Italian Law in Europe).

⁷⁹ G. Tarello (1969), 'La Scuola dell'esegesi e la sua Diffusione in Italia', in Id, *Cultura giuridica e politica del diritto* (Bologna: Il Mulino, 1988), 69-101.

⁸⁰ D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D. Trubek and A. Santos eds, *The New Law and Economic Development. A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), 19, 23, 63. See also M. Reimann, 'Droit positif et culture juridique: L'américanisation du droit européen par réception. L'américanisation du droit' 45 *Archives de philosophie du droit*, 61 (2001).

⁸¹ P.G. Monateri, 'The Weak Law: Contaminations and Legal Cultures' 13 *Transnational Law and Contemporary Problems* 575, 591 (2003).

⁸² *ibid* 591.

⁸³ M. Bussani, 'Constitutional Justice in Italy and beyond: A Comparative (and Private) Law Perspective' 8 *Italian Journal of Public Law*, 12, 14 (2016); see also M. Infantino, 'The Italian Legal Recipe: Basic Ingredients and the Bustle of Time' 1 *European Journal of Comparative Law and Governance*, 4 (2013).

⁸⁴ P.G. Monateri, n 81 above, 576, fn 8.

⁸⁵ In particular, Tullio Ascarelli (1903–59), Mario Rotondi (1900–84), and Angelo Sraffa (1865–1937). For a broad critical analysis of the Italian Schools of Comparative Law and its historical development, see E. Grande, 'Development of Comparative Law in Italy', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd ed, 2019), 88-110. See also B. Gardella Tedeschi, 'Italian Comparative: A Trait of the Legal System' 18 *FIU Law Review*, 797, 802-803 (2024).

largely marginalized within academia as the selection of foreign models to emulate was conditioned by the political alliances of the time. Germany was preferred not only because of the rational and systematic style of the Pandectist tradition, which as highly valued by domestic Roman law professors, but also because the Germans were allies, whereas the United States and England were the enemy.

Thus, the German model had long since prevailed over the French one, also for political reasons. It is no coincidence that the project for a joint Italo-French Code of Obligations,⁸⁶ which aspired to be the first attempt at harmonizing the law of obligations at European level – failed miserably. The causes of this failure were both cultural and, once again, political: the German legal template and lexicon had come to dominate within Italian intellectual circles. Moreover, French patterns were considered ‘outdated’,⁸⁷ and ideologically unattractive, as they were seen as excessively liberal and individualistic.

These early pioneers of the comparative spirit had exerted little influence on the general domain of Italian jurisprudence and remained confined to the fields of commercial and industrial law. However, the path had been charted and virtually reconnects with a premodern phase.⁸⁸

The epistemological turn that marked the flourishing of comparative law was shaped, once again, by intellectuals who were unorthodox for their time. It developed gradually, layered through theoretical and cultural projects of resistance. Such projects were driven by curiosity, receptiveness, and humility toward foreign cultures, but also by a certain sense of introspection. Looking at the other is a means of understanding the self. Looking beyond one’s own legal system also entails embracing the complexity and mutability of legal phenomena.

The leading figures behind this cultural revolution, widely recognized as the fathers or masters of comparative legal studies in postwar Italy, are well known. Each pursued a distinct intellectual project⁸⁹ advancing a critical strategy that challenged the mainstream formalism and dogmatism of the Italian legal system: Gino Gorla pioneered historical analysis and the case method,⁹⁰ Mauro Cappelletti

⁸⁶ G. Chiodi, ‘Innovare senza distruggere: il progetto italo-francese di codice delle obbligazioni e dei contratti’, in G. Alpa and G. Chiodi eds, *Il progetto italo-francese delle obbligazioni (1927). Un modello di armonizzazione nell’epoca della ricodificazione* (Milano: Giuffrè, 2007), 223.

⁸⁷ R. Sacco, *Introduzione al diritto comparato* (Torino: UTET, 5th ed, 1992), 262.

⁸⁸ E. Grande, n 85 above, 89 (remembering the Sicilian jurist Emerico Amari, and his comprehensive survey of foreign legislation as the acknowledged ancestor of the discipline: ‘This allowed Italy to claim a place in the pre-modern (encyclopaedic) phase of comparative law’). See E. Amari (1857), *Critica di una scienza delle legislazioni comparate* (Soveria Mannelli: Rubbettino, 2005).

⁸⁹ V. Denti, ‘Diritto comparato e scienza del processo’, in R. Sacco ed, *L’apporto della comparazione alla scienza giuridica* (Milano: Giuffrè, 1980), 199, 205; P.G. Monateri, ‘Critique et difference: Le droit comparé en Italie’ *Revue internationale de droit comparé*, 989 (2009); G. Marini, n 28 above, 345-347.

⁹⁰ As an example of such a paradigm shift, see G. Gorla, *Il Contratto. Problemi fondamentali trattati con il metodo comparativo e casistico*. Vol I - *Lineamenti generali. Corso di diritto privato svolto secondo il metodo comparativo e casistico*, and Vol II - *Casistica e problemi*.

advanced functionalism and policy studies,⁹¹ and Rodolfo Sacco developed critical knowledge and structural analysis.

The case method and the historical-factual approach make it possible to undermine the certainty of dogmatic concepts and categories, satisfying a need for realism. They recognize that comparative law, like history, is an empirical science that seeks facts and avoids abstract constructions. Legal concepts and categories can be manipulated; facts and history cannot, or at least not to the same extent. In this approach, the empirical dimension shifts the focus of comparative law analysis to case law. Consequently, legal doctrine loses its supremacy, and the tension between *ratio decidendi* and *obiter dictum* assumes a central role in judicial decisions. The centrality of case law leads to strong comparison with common law traditions and a renewed appreciation of the *ius commune*. This comparative law approach, turned increasingly toward the ‘law in action’ in both civil and common law systems, paving the way for an early Americanization of national discursive practices.⁹²

The case method and the historical approach not only clearly opened the door to the study of the English and American common law models, but also unwittingly enabled a further rupture – one that shifted the focus from legal history to the politics of law and policy-making.⁹³ In this scenario, ‘functionalism’⁹⁴ began to penetrate legal discourse, dispelling the fears that had paralyzed the Italian style following the fall of the Fascist regime. Judges, practitioners, and scholars are called upon to act

Problemi fondamentali trattati con il metodo comparativo e casistico (Milano: Giuffrè, 1954-1955). See, among the American book reviews, C. Szladits, 69 *Harvard Law Review*, 1535-1538 (1956); and of M. Rheinstein, 4 *American Journal of Comparative Law*, 452 (1955); in Germany, that of B.G. Moursi, 46 *Archiv Für Rechts-Und Sozialphilosophie*, 597 (1960). For an attempt to produce an English version of Gorla’s book on contract law, see the volume compiling the lectures he delivered at the University of Michigan, retrieved at my request by a young Italian scholar, Rosa Parmose, to whom I express my deepest gratitude: G. Gorla, *The Fundamental Problems of Contract. Principles, Methods, and Techniques of the Civil Law as Compared With the Common Law* (1958), now republished in the English version and translated into Italian: Id, *I problemi fondamentali del contratto* (Napoli: Esi, 2017).

⁹¹ On Cappelletti’s major collective projects, ‘Access to Justice’ (1978-9) and ‘Integration through Law’ (1985) see M. Cappelletti and B. Garth, *I: A World Survey*; M. Cappelletti and J. Weisner, *II: Promising Institutions*; M. Cappelletti and B. Garth, *III: Emerging Issues and Perspectives*; K.F. Koch, *IV: Anthropological Perspective, Patterns of Conflict Management - Essays in the Ethnography of Law* (Amsterdam: Sijthoff and Noordhoff, 1978/79); see also M. Cappelletti, M. Seccombe and J.H.H. Weiler, ‘Integration Through Law: Europe and the American Federal Experience. A General Introduction’, in *Book 1 A Political, Legal and Economic Overview* (Berlin-Boston: De Gruyter, 1986), 3-68. About the legacy of Cappelletti’s thinking, see the symposium for the 10th anniversary of the passing of M. Cappelletti, published in 14 *International Journal of Constitutional Law*, Issue 2 (2016). Among the contributions to this symposium, see J.H.H. Weiler, ‘The Legacy of Mauro Cappelletti: A Preface’, 439; S. Cassese, ‘In Praise of Mauro Cappelletti’, 443; M. Cartabia, ‘Mauro Cappelletti: One of the “Precious Few” of Our Generation’, 465. See also the contributions collected in *Annuario di diritto comparato* (2016).

⁹² P.G. Monateri, n 89 above, 991-992; E. Grande, n 85 above, 92; B. Gardella, n 85 above, 806-807.

⁹³ P.G. Monateri, n 89 above, 991.

⁹⁴ M. Graziadei, ‘The Functionalist Heritage’, in P. Legrand and R. Munday eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), 100.

as translators and interpreters of existing social problems and to assess legal ends. Law thus is understood as a tool of social engineering, charged with protecting those most affected by societal and economic power imbalances.⁹⁵ It must guarantee effective access to law and justice. The instruments to achieve all this include contextualization, applied interdisciplinary research, knowledge of and openness to legal pluralism, and the centrality of human rights and constitutional values. Moreover, interest in the politics of law expanded the scope of comparative studies to public law, making room for recognizing domestic forms of economic analysis of law and, according to some, even law and society.⁹⁶

History and the case method, on the one hand, and the politics of law and functionalism on the other, have thus represented ‘irritating’⁹⁷ factors and methodologies. These critical moves, through comparative studies, have unsettled the domestic legal system, revealing the limits of the legal comfort zone of formalism and dogmatism. The demystification of legal provisions, both from within and outside, has fragmented the Italian Style, which has become increasingly plural and complex despite occasional resurgences of national neo-formalism.⁹⁸ This explains why the revival of the Italian Style, along with the rejection of the clichés and dominant stereotypes perpetuated by positivist jurists (a trend John Merryman perceived as waning)⁹⁹ has found new expression and spaces within contemporary legal discourse.

1. Critical Knowledge and Structural Analysis

Comparative law therefore came to symbolize, in Italy, a stance against conventional legal thought. This orientation was further reinforced by the third revolutionary theoretical project, which centered on critical knowledge of law and structural analysis. Its new performative language is the theory of legal formants, which has become the paradigm of the Italian theory of comparative law in the transnational context and has, often unconsciously, permeated the discursive practices of ‘parochial’ domestic scholars as well. This is not a method but a toolbox for comparative research, one that brings out the dynamic complexity of legal systems and their interaction.

The theory of legal formants develops a process of uncovering the dialectical oppositions and contradictions at work within the legal sphere. The first opposition

⁹⁵ M. Infantino, ‘Integration through Comparative Private Law: Four Lessons from Cappelletti’ 14 *International Journal of Constitutional Law*, 492, 494 (2016).

⁹⁶ S. Cassese, n 91 above, 443 (evoking this openness in Cappelletti’s thought).

⁹⁷ Borrowing from G. Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ 61 *Modern Law Review*, 11-32 (1998).

⁹⁸ See M.W. Hesselink, ‘The New European Legal Culture: Ten Years On’, in G. Helleringer and K.P. Purnhagen eds, *Towards a European Legal Culture* (Baden-Baden: C.H. Beck/Hart/Nomos, 2014), 17-24 (arguing that neoformalism is a trend in European legal culture and scholarship).

⁹⁹ G. Marini, ‘L’Italian Style fra centro e periferia ovvero Gramsci, Gorla e la posta in gioco nel diritto privato’, in E. Caterini ed, *Scritti in onore di Vito Rizzo*, I (Napoli: Esi, 2017), 1189.

acts at the hermeneutical level,¹⁰⁰ as legislative provisions are nothing more than texts, a set of ‘signifiers’ without meaning. Only legal interpretation can resolve the tension between signifier and signified. Yet each interpreter will attribute meaning to a text on the basis of a set of prejudices, aspirations, subjective and acquired sensibilities. The plurality and subjectivity of legal interpretation, and the distinction between text and norm, are historical facts.

Transposing this original ambivalence – between signifiers (the declamatory statements) and meanings (the operational rules), and between meanings produced by different interpretations within a community of interpreters and institutions – into the field of comparative research increases both the complexity and indeterminacy of law.¹⁰¹ At the same time, it finds in the theory of formants a valuable means of rationalization. Legal systems are in fact composed of a series of empirical elements, or formants (including statutory declamations, their interpretation and application by courts, and their interpretation by legal scholars and practitioners)¹⁰² whose competition and interaction ‘make’ a legal system. The set of formants – whether official (like statutes or case law) or unofficial (such as doctrinal writings) – and their relative weight vary across legal systems. Even within a single formant, internal inconsistencies may arise. For instance,

‘the headnotes of a case can be inconsistent with the actual rationale of the decision, or the definition in a code can be inconsistent with the detailed rules contained in the code itself’.¹⁰³

According to this theoretical framework, the task of comparative lawyer is to uncover the performative value of all these multiple dissociations. Only a comprehensive understanding of such dissociations makes it possible to understand the working level of each legal system (which remain invisible to the municipal lawyer), as well as the circulation of legal models from one system to another, the largely unconscious borrowing of fragments of foreign models within a legal tradition, and, more broadly, the mechanisms of legal borrowings and transplants.

This dynamic approach to comparative law also brings to light the implicit

¹⁰⁰ M. Graziadei, ‘Rodolfo Sacco’s Theoretical Contribution to Comparative Law: A Personal Account’ 37 *International Journal for the Semiotics of Law*, 471, 1472 (2024).

¹⁰¹ U. Mattei and A. Di Robilant, ‘The Art and Science of Critical Scholarship. Post-modernism and International Style in the Legal Architecture of Europe’ 75 *Tulane Law Review*, 1053, 1080 (2001).

¹⁰² R. Sacco, ‘Les buts et les méthodes de la comparaison du droit’ *Rapports Nationaux Italiens au IX Congrès International de droit comparé*, Téhéran 1974 (Milano: Giuffrè, 1974), 113; for an English version of the theory of legal formants, translated by J. Gordley, see R. Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)’ 39 *American Journal of Comparative Law*, 1 (1991); Id, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)’ 39(2) *American Journal of Comparative Law*, 343 (1991); A. Gambaro and M. Graziadei, ‘Legal Formants’, in J.L. Smith et al, *Elgar Encyclopedia of Comparative Law* (Cheltenham: Elgar, 2023), 452.

¹⁰³ M. Bussani and V. Palmer eds, *Pure Economic Loss in Europe*, The Common Core of European Private Law (Cambridge: Cambridge University Press, 2003), 168.

dimension of law. Indeed it requires taking into account even implicit formants, ie cryptotypes¹⁰⁴ that ‘reflect unexpressed cognitive styles, assumptions, expectations, and knowledge’.¹⁰⁵ Cryptotypes, in turn, may contradict the explicit rational constructions produced within a given legal system. Identifying them means ‘deciphering the latent dimension’ (*déchiffrement de la latence*)¹⁰⁶ of law.

Like any revolutionary idea, the theory of formants, has sparked an extensive debate among comparative scholars, both nationally and internationally. It has not been immune to criticism. Some have argued that structural analysis – and the theory of formants in particular – has become conventional,¹⁰⁷ insofar as it has not fully emancipated itself from the chains of legal positivism. Moreover, it has been criticized for privileging private law within comparative studies, for lacking sufficient interdisciplinarity,¹⁰⁸ and neglecting the political and ideological foundations of comparative law. These concerns are further compounded by broader critiques of traditional comparative methodologies themselves, which are often seen as shaped by ethnocentric and Western-oriented biases.¹⁰⁹

But it is also true that, if we look honestly at the arena of academic debate, the developments of this theory have opened up further avenues of research. Indeed, the criticisms can themselves be interpreted differently by shifting the perspective.

In this alternative scenario, the theory of formants entails a profound deconstruction of law and legal practices. It may be viewed as ‘a global internal critique of the legal discourse. It is beyond the task of the theory to raise external critiques, but it certainly entails an anti-formalistic appraisal, and in the field of legal hermeneutics it disfavors the metaphysics of meaning’.¹¹⁰ Moreover, this theory contains a radical potential of its own. It can be ‘labeled as a strategic decentralized approach to diffusionism’ insofar as ‘everything depends on the strategies of the borrowing systems’.¹¹¹ Adopting the selective perspective of the receiving country offers a crucial advantage: it does not eliminate, but mitigates the risks of cultural subjugation. And not only, the framework of legal formants has been further enriched over time through the inclusion of implicit dimensions of law (namely, cryptotypes and meta-legal formants) which allow a more comprehensive

¹⁰⁴ R. Sacco, ‘Un cryptotype en droit français : la remise abstraite ?’ *Études offertes à René Rodière* (Paris: Dalloz, 1981) II, 273-287.

¹⁰⁵ M. Graziadei, n 100 above, 1475.

¹⁰⁶ A. Gambaro, ‘In memoriam: Rodolfo Sacco’ *Revue Internationale de droit comparé*, 536 (2022); see also R. Sacco, *Il diritto muto. Neuroscienze, conoscenza tacita, valori condivisi* (Bologna: Il Mulino, 2015); P.G. Monateri, ‘Comparazione e latenza normativa a dieci anni dalle tesi di Trento’ *Rivista critica di diritto privato*, 453 (1998).

¹⁰⁷ G. Nicola and G. Frankenberg, *Comparative Law: Introduction to a Critical Practice* (Cheltenham: Edward Elgar Publishing, 2024), 13.

¹⁰⁸ E. Grande, n 85 above, 94.

¹⁰⁹ P. Legrand, ‘Negative Comparative Law’ 10 *Journal of Comparative Law*, 405 (2015); and G. Frankenberg, *Comparative Law as Critique* (Cheltenham: Elgar, 2016).

¹¹⁰ E. Grande, R. Míguez Núñez and P.G. Monateri, ‘The Italian Theory of Comparative Law Goes Abroad’ 5 *Italian Review of International and Comparative Law*, 27 (2021).

¹¹¹ *ibid* 27.

comparative analysis. This expanded lens encompasses not only legal norms but also social constructs, ideological patterns, and power structures embedded within legal systems. Although this structural approach does not – and arguably cannot – capture the entirety of critical comparative thought, it nonetheless represents a foundational contribution to its theoretical development.

2. Comparative Law as a Form of Institutional Design

The theory of legal formants has had considerable resonance both within the national legal system and the international and European context. One of its most notable developments is the *Common Core of European Private Law* project.¹¹² The methodological blend between structural analysis and Rudolph Schlesinger's pioneering factual approach¹¹³ has played a key role in unearthing what is already common to the legal systems of European Union Member States, and in obtaining at least the main lines of one reliable geographical map of the law of Europe. To date, the Common Core remains the longest-standing academic initiative dedicated to the study of European private law and is among the very few – if not the only – scholarly projects to have endured beyond the ebb and flow of enthusiasm for harmonizing European private law. If comparative law today is a prominent field of research and teaching in Europe, while the United States continues to hold an advantage in empirical legal studies,¹¹⁴ this is no small part due to the Italian theory of comparative law and its most distinguished scholars.

But there is more than this. The dynamic approach to comparative law embodied in the theory of legal formants is linked to a visionary figure,¹¹⁵ an intellectual who challenged conventional domestic wisdom. His comparative research and initiatives contributed to substantial reforms in the Italian legal education system, which may be understood as a form of institutional design.¹¹⁶

¹¹² M. Bussani and U. Mattei, 'The Common Core Approach to European Private Law' 3 *Columbia Journal of European Law*, 339 (1998); M. Bussani and U. Mattei, *The Common Core of European Private Law. Essays on the Project* (The Hague: Kluwer, 2002; repr. 2003).

¹¹³ R.B. Schlesinger (1968), *Formation of Contracts: A Study of the Common Core of Legal Systems*, vol 2 (Dobbs Ferry, NY: Oceana Publications; London: Stevens & Sons, 1968); R. Sacco, 'Un metodo di lavoro nuovo: il seminario di Cornell' *Rivista di diritto civile*, 172 (1972). In many ways, legal formants play the same role in Sacco's scheme that 'factual problem' does in Schlesinger's Cornell project (D. Kennedy, 'The Methods and the Politics', in P. Legrand and R. Munday, n 94 above, 399). See also U. Mattei, 'The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence', in A. Riles ed, *Rethinking the Masters of Comparative Law* (Oxford-Portland: Hart, 2001), 238.

¹¹⁴ M. Siems, 'The European Advantage in Empirical Comparative Law' 2 *European Journal of Empirical Legal Studies*, 1 (2025) (attempting to fill this transatlantic gap combining legal comparative and empirical studies in the European context).

¹¹⁵ J. Gordley, 'The Legacy of Rodolfo Sacco' 8 *Italian Law Journal*, 7 (2022); and M. Graziadei, 'Rodolfo Sacco: An Intellectual Portrait', *ibid*, 11.

¹¹⁶ R. Sacco, 'L'Italie en tête (à propos de l'enseignement du droit comparé)' *Revue internationale de droit comparé*, 131 (1995); Id and A. Gianola, 'The History and Importance of Comparative Law in Italy', in C. Jamin and W. Van Caenegem eds, *The Internationalisation of Legal Education*

Since the early 1990s, a legislative reform introduced comparative law as an autonomous subject within the curricula of Italian law schools. Since then, the number of comparative law professors has grown exponentially. This development has been a key factor behind the significant expansion of comparative legal studies nationally, and the recognition of the Italian school of comparative law as a ‘world leader in the field’.¹¹⁷ A subsequent reform took a decisive step: comparative law become not only an autonomous course but also a mandatory one.¹¹⁸ Courses on the introduction to legal systems, the fundamentals of comparative law, or the laws of foreign countries are now also offered in faculties of Economics and Political Science, thanks to enlightened groups of scholars and, at times, fortunate alignments of power dynamics within universities. This new legal education model has contributed to expand and reshape the discursive field of law and legal reasoning within the national system. It teaches acceptance of uncertainty, complexity, and contradiction as intrinsic sources of legal and cultural knowledge.

The most radical proposal, however, envisaged the duplication of all law courses: one comparative and one domestic. The aim was to provide genuine training for European and global jurists.¹¹⁹ If this proposal had been implemented in all the law schools, it might have subverted the foundations of domestic legal education, much like trans-systemic programs have done in other multicultural jurisdictions.¹²⁰

Yet such a transformation was ultimately obstructed. Internal resistance from mainstream cultural elites deeply rooted in the dominance of national positive law and the legacy of Roman law effectively blocked what could have been a counter-hegemonic shift.¹²¹ In the absence of a new ‘common sense’ within political and academic circles, the opportunity was lost.

And yet, one essential fact remains: through the institutionalization of comparative law, Italian legal education has begun forming a generation of students raised with openness to the other, free from the fetishistic mythology of a single national legal system, able to embrace the pluralism of law, methods, languages, and cultures. The mandatory teaching of comparative law in Italy is still unique in the global landscape of legal education.

(Basel: Springer, 2016), 175, 176.

¹¹⁷ U. Mattei, n 113 above, 246.

¹¹⁸ Decreto ministeriale 23 dicembre 1999, in G.U. Dec. 1, 2001, no. 18; Decreto ministeriale, 25 novembre 2005, in G.U. Dec. 17, 2005, no. 293; for some data on the teaching of comparative law in Italian universities see G. Pascuzzi, ‘L’insegnamento del diritto comparato nelle università italiane: aggiornamento dati: dicembre 2009’ *Trento Law and Technology Research Group Research Paper* (2010). See also A. Guarneri, ‘Alcune riflessioni sullo studio e sull’insegnamento del diritto comparato’ *La Nuova giurisprudenza civile commentata*, 433 (2021).

¹¹⁹ R. Sacco, ‘La formation au droit comparé. L’expérience italienne’ *Revue internationale de droit comparé*, 278 (1996).

¹²⁰ See V. Forray, ‘Le ciel et la terre. Regard outre-Atlantique sur la formation au raisonnement juridique’ *Revue de la recherche juridique*, 1537 (2021); and H. Dedek and A. De Mestral, ‘Born to be Wild: The “Trans-systemic” Programme at McGill and the De-Nationalization of Legal Education’ 10 *German Law Journal*, 889 (2009).

¹²¹ D. Kennedy, ‘Antonio Gramsci and the Legal System’ 6 *ALSA Forum*, 32 (1982).

V. LESS INVISIBLE? THE MULTIPLE ITALIAN US: TOWARD A MORE DIALOGICAL BRIDGE

The major epistemological shifts brought about by national constitutionalization and the rise of comparative legal studies have profoundly reshaped the discursive field of law in the Italian tradition. Although these are not the only such turns, they are symbolically central, as we have seen particularly looking at their impact on private law. Each, in its own way, has helped to emancipate legal thinking from the legal comfort zone of formalism and dogmatic structures.

The first turn, rooted in the national legal system, has compelled legal scholars to confront the disruptive potential of constitutional principles. It has deconstructed the myth and hegemony of ‘rules’, and the Code, opening legal interpretation to values and principle-based reasoning. Yet this internal critique remains largely confined to the domestic discursive field and continues to be underpinned by the paradigm of textual authority.

The second turn has been more disruptive still. It has reoriented legal epistemology outward, breaking the isolation of national law and releasing legal thought from the constraints of authority and nationalist narcissism. The focus shifts from texts to contexts, opening a discursive space for dynamic critical comparison with other legal systems – grounded in legal pluralism and a cognitive openness¹²² to other social sciences and the humanities.

Within each of these epistemological shifts, we have identified distinct postures and critical moves, some of which have aspired to even more radical transformations. What emerges is a complex and evolving Italian legal imaginary, shaped by perspective: internal, external, or inverted against the traditional stereotype of the formalist civil lawyer. Still, the most subversive cultural strategies have often faltered, held back by a persistent path dependence on mainstream conventions. The choice of these epistemic ruptures and critical stances reflects, in any case, the broader objective of this journal: to help build a cultural bridge and promote transnational critical conversations on the Italian legal tradition in all its pluralism and internal differentiation. Its focus on private and comparative law has been only a point of departure; one that opens onto necessary forms of ‘cultural irritation’ stemming from the interactions with other legal disciplines and fields of knowledge.

In the vast ocean of global legal knowledge, the Italian Law Journal has attempted, over these ten years, to demonstrate that, even within the competitive dynamics of intellectual and professional elites, the domestic legal context can and does generate critical, and sometimes even transformative, change. It has broadened the space for national jurists to engage in transnational legal conversations and to make the Italian legal tradition less invisible. Yet the bridge – the Journal – remains incomplete, suspended between structural and linguistic barriers.

¹²² G. Resta, “‘So Lonely’: Comparative Law and the Quest for Interdisciplinary Legal Education” 37 *International Journal for the Semiotics of Law*, 1569, 1581 (2024).

It must be recognized that significant internal obstacles continue to hinder truly dialogical, bidirectional crossings: from inside to outside and vice versa. One of the most striking barriers is the persistence of a legal education system still bounded by parochial attitudes. Many scholars have not taught or conducted research abroad; many do not speak other languages and have never experienced cultural immersion in foreign legal systems. This is especially, though not exclusively, true of civil lawyers who remain anchored to both the authority of (national) law and systematic analysis of black letter rules as a tool for resolving practical disputes. In these cases, this kind of cognitive bias is deeply internalized and often unconscious.

The fragmentation of academia into disciplinary silos constitutes a further structural barrier, for it tends to suppress critical and creative knowledge. The rigid separation between fields of law acts as a disciplinary strategy to shape academic power, knowledge, and structures. For instance, the division between public and private law, a legacy of capitalist logic, is a clear example of how academic power reproduces itself through compartmentalization. Though such divisions are increasingly being questioned in Italian legal thought, they still persist, even in comparative law, where the sharp divide between the public and private dimensions still influences the allocation of academic posts and the evaluation of research. These disciplinary straitjackets affect not only intellectual production but access to academic careers and institutional recognition as a whole. Analogous strategies of separation operate even more starkly in the relationship between law and other fields of knowledge, preventing genuine inter- or transdisciplinary research.

These internal structural barriers continue to prevent the domestic legal world from crossing the bridge outward and taking part in transnational legal conversations. At the same time, the gaze of foreign scholars toward Italian legal and cultural tradition is often paralyzed or, at best, blurred. Access to legal sources remains limited. Despite the proliferation of legal e-journals in English, even official sources are often unavailable or inaccessible owing to the lack of centralized, digitalized databases.

Beyond issues of access lies the deeper challenge of language and the conundrum of legal translation.¹²³ A legal historian and former President of the Constitutional Court once described the Italian legal language as ‘esoteric’.¹²⁴ The judicial style of national court opinions reinforces this opacity, making translation, and even comprehension, by foreign scholars proficient in Italian a serious challenge.¹²⁵

Today, only the Constitution and a few Constitutional Court rulings are available

¹²³ R. Sacco, ‘Traduzione giuridica’ *Digesto delle discipline privatistiche*, Agg I, 715-722 (Torino: UTET, 2000); B. Pozzo, ‘Comparative Law and the New Frontiers of Legal Translation’, in S. Šarčević ed., *Language and Culture in EU Law. Multidisciplinary Perspectives* (Aldershot: Ashgate, 2015), 73-87.

¹²⁴ P. Grossi, ‘Globalizzazione, diritto, scienza giuridica’ 125 *Il Foro Italiano*, 151, 152 (2002).

¹²⁵ It is worth noting that Gino Gorla made several attempts to translate his seminal books on contract law into English. These attempts failed because the Italian judicial decisions contained in volume II were too difficult to translate. For a shorter English version, see G. Gorla, *The Fundamental Problems of Contract* n 90 above.

in English.¹²⁶ Lower national court decisions remain largely inaccessible and untranslated into the *lingua franca*, with only rare exceptions.¹²⁷ Furthermore, the English translation of the Italian Civil Code and complementary legislation is outdated, out of print, and prohibitively expensive.¹²⁸ The technical lexicon of legal categories and concepts that molded the national tradition is explained in what was once an authoritative bilingual ‘law dictionary’. Yet even this canonical work now feels outdated and is in need of critical reappraisal.¹²⁹

The bridge, then, remains partially crossed. It is not, or not yet, truly dialogical, which is why this anniversary of the *Italian Law Journal* has brought together domestic scholars with international experience and foreign scholars who have established relations with Italy and its legal tradition. All of them are guided by a double epistemological lens: grounded both in the internal logic of the domestic legal system and, at the same time, external to it. The aim is for these perspectives to converge in a dialogical synthesis, capable of generating the emergence of a third, reflexive standpoint from which new fields of critical inquiry and knowledge production may emerge.

The bridge – the Journal – endures. Each of its bricks is a fragment of thought, taking form through the interplay of diverse legal discourses and imaginaries surrounding the Italian legal and cultural tradition.

The ocean of legal knowledge remains vast and open. Everything flows. And yet, the steady release of critical thought – even from the peripheries – is still essential to both national and transnational legal thinking.

¹²⁶ See <https://tinyurl.com/44kdbsvx> (last visited 14 June 2025). The *Italian Law Journal* created a section entitled ‘Constitutional Court Watch’ in 2017 and 2018, seeking to provide adequate information on the most significant judgments handed down by the Italian Court; P. Grossi, ‘Presentation’ 3 *Italian Law Journal*, 237 (2017); P. Passaglia, ‘Methods and Purposes of the Constitutional Court Watch’, *ibid*, 239. Since 2024, the Italian Constitutional Court has independently published press summaries of its decisions.

¹²⁷ See for instance, Italian Corte di Cassazione, 5 July 2017, no 16601, transl. by F. Quarta, 3 *Italian Law Journal*, 277 (2017).

¹²⁸ See the first translation: *The Italian Civil code*, transl. by M. Beltramo, G.E. Longo and, J.H. Merryman (Dobbs Ferry, N.Y.: Oceana Publications, 1969); and the last, *The Italian Civil Code: And Complementary Legislation*, transl. by S. Beltramo, M. Beltramo, G.E. Longo and J.H. Merryman (Eagan, Minnesota: West/Thomson Reuters, 2012).

¹²⁹ F. De Franchis, *Dizionario giuridico-Law Dictionary. Inglese-italiano-English-Italian* (Vol. 1) (Milano: Giuffrè, 1984); *Id*, *Dizionario giuridico-Law Dictionary, Vol. 2: Italiano-inglese-Italian-English* (Milano: Giuffrè, 1996). For a not entirely successful attempt, see I. Schraffl, *Dizionario giuridico inglese-italiano. Integrato con il lessico politico* (Milano: Giuffrè, 2011).