CONSTITUTIONAL VALUES AND PROPERTY LAW. THE *PROMOVEATUR UT AMOVEATUR IURIS* STRATEGY IN ITALY

Ugo Mattei*

The Latin expression promoveatur ut amoveatur *(be promoted in order to be removed) alludes to a human resources management practice, developed within early bureaucratic organizations such as the Catholic Church, the Military, and the Judicial System, intended to marginalize, with no conflict, an undesired member of a hierarchy. Someone who, in their office, would be an impediment to power is promoted at a higher level in order to make them happy but at the same time get rid of them.*

This practice was recently chastised as a 'cancer' by the Holy Father Francis I, while addressing the Roman Curia on the needs to reform the Holy See. However, it is very much in tune with Italian values, such as those so beautifully described in the novel Il Gattopardo *by Giuseppe Tomasi di Lampedusa:* 'Se vogliamo che tutto rimanga come è, bisogna che tutto cambi' *(If we want everything to remain as it is, everything must change). It is the aim of this paper to show how, in Italy, this strategy has promoted some legal concepts away from the Civil Code where they could, by way of direct judicial enforcement, disrupt the status quo, to the constitutional level, where their translation into actual binding provisions requires a complex process of interpretation and balancing, more of political than technical nature, that often frustrates their potential.*[1]

* Professor of Civil Law, University of Turin; Alfred & Hanna Fromm Distinguished Professor Emeritus and Ray L. Sullivan Professor of Law UC Law SF College of the Law. The Author wishes to thank Emanuele Ariano and Ryan Fisher for assistance in the research and editing of this paper.

[1] Ignazio Castellucci has shown how a very similar dynamic is at play in China where the translation from the Constitution to primary legislation is considered a purely political matter. See I. Castellucci, *Rule of Law and Legal Complexity in the People's Republic of China* (Trento: Università degli Studi di Trento, 2012). Antonio Gambaro has shown how in property law one can differentiate quite neatly the *political* (constitutional level) from the *technical* sub-tradition. See A. Gambaro et al, *Property, Propriété, Eigentum* (Padova: CEDAM, 1992).

I. THE INVENTION OF A BUREAUCRATIC ORDER AMONG THE SOURCES OF LAW

Harold Berman, in his masterpiece *Law and Revolution,* shows how the institutional organization of the Western Legal Tradition has been patterned after the early rationalization of the Church bureaucracy.[2] This bureaucratic legacy determines the English Common law as late as the Judicature Acts of 1873.[3] Today, courts of law and bureaucracies such as the police, respond to the logic of hierarchy. From early modernity, this institutional hierarchy is a postulate of every State-based legal system, expanded and abstracted in the so-called *hierarchy* of the sources of law.

It requires a significant degree of abstraction to describe a variety of legal formulations by different officials in different formal roles (legislators, bureaucrats, judges, notaries, etc) as a hierarchy of formally different impersonal 'sources of law'. However, this is the same abstraction required to describe the 'rule of law' as a system that places citizens under laws (*sub lege*) and not under men (*sub homine*) as if the laws were not the product of human decisions, interpretations, and implementations.[4]

In a 'state of nature', one could say with Hobbes, the physically stronger man has power over the physically weaker, and the unarmed man obeys the armed one. It is only after the social contract that the armed must obey the unarmed, that the weak can give orders to the strong.[5] The needed abstraction for hierarchy is then the construction of social roles, social classes, and social distinction, with a smaller number of very high officials performing the most important social roles, served by an even smaller number of highly ranked officials performing other social roles, all the way down to the large base of the pyramid. The Military illustrates this concept. Even if, with Tolstoj (and Marx), one has to recognize that material conditions of the masses are much more historically decisive than officials in high roles, even of Emperor Napoleon or Tzar Alexander in the Russian campaign,[6] the hierarchical principle assumes and produces a competition to reach the top, well captured in the military career. Every captain is happy to become a colonel,

[2] H.J. Berman, *Law and Revolution. The Making of the Western Legal Tradition* (Cambridge (Mass.)-London: Harvard University Press, 1983). For Max Weber's famous writing on bureaucracy, including its definition as a phenomenon, description of its nature, and discussion of how this concentration of power emerged and its consequences, see M. Weber, *Bureaucracy* [Bürokratie, 1921], in B. Elbers et al eds & trans, *Weber's Rationalism and Modern Society: New Translations on Politics, Bureaucracy, and Social Stratification* (New York: Springer, 2015), 73-127, available https://perma.cc/S8HK-5LC4 (last visited 30 May 2025).

[3] See U. Mattei and E. Ariano, *Il modello di common law* (Torino: Giappichelli, 5th ed, 2018).

[4] A classic discussion remains K. Llewellyn, *The Brumble Bush: On Our Law and its Study* (New York: Oceana Publication, 1951).

[5] See R. Sacco, *Antropologia giuridica. Contributo ad una macrostoria del diritto* (Bologna: il Mulino, 2007), 129-131.

[6] See L. Tolstoj, *War and Peace* (Oxford: Oxford University Press, 2010), last chapter.

and every colonel is happy to become a general, even if the lower rank is more pivotal for victory in battle or war.

If the hierarchy of roles in the military (or the clergy) is an easy abstraction to understand, things are not so simple for the *sources of law,* an idea that involves a large number of individuals performing different functions, often determined by different logics, that are themselves not easy to capture in a hierarchy. For example, in Sunni Islamic law a private scholar, the *Fiq*, has an acknowledged high role in the formal hierarchy of the sources, that being his *fatwa* binding for the *quadi* in deciding a given case.[7] In both civil law and common law traditions there is not such a formal role for the scholar, whose impact on the making of the legal system, very important in the former and but not in the latter, is only *informal*, ie outside of the hierarchy of the official sources.[8]

According to the degree of formalism (very high in civil law, more nuanced in common law) and its legitimizing function, even case law can be paradoxically excluded from the official hierarchy. Judges have been openly recognized as lawmakers quite late in both traditions in spite of the pivotal role played in the common law. Justice Cardozo, of the US Supreme Court, risked impeachment and scandalized the legal profession with his early twentieth century 'choice for candor' in a high judicial capacity.[9] In Europe, only by the second half of the twenty-first century have courts of law made shy admissions of their role in lawmaking, never daring to vindicate the top of the hierarchy, with statements such as 'we are under a Constitution but the Constitution is what the judges say it is'.[10]

Italy long displayed a highly formalistic legal culture, and Italian law students are taught that there is a strict hierarchy in which neither legal scholarship nor case law is included. At the top the Constitution, immediately below Statutes that supposedly implement the constitutional program, then below that administrative regulation that implements statutes. As statutes cannot go against the Constitution, administrative regulation cannot go against the law. Courts of law, constitutional, ordinary or administrative, are there to render the hierarchy of sources respected, not to subvert it.[11] They cannot claim a position within a hierarchy that is politically and democratically legitimized. Still today, the openly disruptive posture of some

[7] See J.N.D. Anderson, *Islamic Law in the Modern World* (New York: New York University Press, 1959).

[8] See J.P. Dawson, *The Oracles of the Law* (Ann Arbor: The University of Michigan Press, 1968); R.C. van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge: Cambridge University Press, 1987).

[9] *See* B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 166-180. See also, for a discussion of this episode, G. Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977), 72 ff.

[10] The maxim was famously uttered by Justice Charles Evan Hughes in a speech delivered on May 3, 1907, and can be read in *Addresses and Papers of Charles Evans Hughes, Governor of New York 1906-1908* (New York: The Knickerbocker's Press, 1908), 139.

[11] See J.S. Lena and U. Mattei eds, *An Introduction to Italian Law*, (The Hague-London-New York: Kluwer Law International, 2002); M.A. Livingstone, P.G. Monateri and F. Parisi, *The Italian Legal System* (Stanford: Stanford University Press, 2nd ed, 2015).

scholars and members of the judiciary, which as late as the nineteen-seventies claimed an 'alternative use of law' through subversion of the established formalism in favor of the losers of social processes, is stigmatized by the domestic legal mainstream,[12] even if the idea of judge-made law has been embraced, thanks mostly to comparative legal scholarship.[13]

II. OVERCOMING THE HIERARCHY

To be sure, comparative law has received from legal realism (or sociological jurisprudence) both in Europe and in the US, a vision of law grounded in a principle of effectiveness characterizing the *law in action* independently from what is stated by the *law in the books*.[14] According to such idea, the comparative value of the sources is determined, so to speak, by their role in the battle rather than by the formal posture in the army. The concrete courage of a sergeant can count much more than the strategy of a general. Similarly, a humble city council regulation can be much more decisive than a constitutional principle such as the 'social function of property' in determining the concrete behavior of a landlord. It has been pointed out how, in Italian property law practice, potentially unconstitutional limitations to the power of the owner introduced by regulation are much more resilient and difficult to challenge than outright violations by statutes.[15] During the pandemic, this paradox exploded under the eyes of a legal profession that gave up any professional dignity and role of constitutional control because of the fear of a disease. Italians have been locked down and denied constitutional freedom through a series of DPCM (Decrees of the President of Council of Ministers) that in the official hierarchy of sources are at the lowest possible level.[16]

Theoretically, in Italy the opposition between law in the books and law in action has been enriched by the comparative work of Rodolfo Sacco on legal formants.[17]

---

[12] On 'the alternative use of law', see P. Barcellona ed, *L'uso alternativo del diritto*, I-II (Roma-Bari: Laterza, 1973); and L. Nivarra ed, *Gli anni Settanta del diritto privato* (Milano: Giuffrè, 2008). For a recent critique of that experience, see, eg, P. Perlingieri, *Stagioni del diritto civile. A colloquio con Rino Sica e Pasquale Stanzione* (Napoli: Edizioni Scientifiche Italiane, 2021), 61-62.

[13] In criminal law the first opening on mistake of law as a subversive strategy is E. Grande, 'La sentenza n. 364/88 della Corte Costituzionale e l'esperienza di *common law*: alcuni possibili significati di una pronuncia in tema di errore di diritto' 113 *Foro Italiano*, 415 (1990).

[14] The obvious reference is to R. Pound, 'Law in Books and Law in Action' 44 *American Law Review*, 12 (1910).

[15] See A. Gambaro, 'La Proprietà. Beni, proprietà, possesso', in G. Iudica and P. Zatti eds, *Trattato di diritto privato* (Milano: Giuffré, 2nd ed, 2017), 161 ff.

[16] See U. Mattei, *Il diritto di essere contro. Dissenso e resistenza nella società del controllo* (Milan: Piemme, 2022); Id et al, 'The Chinese Advantage in Emergency Law' 21 *Global Jurist*, 1 (2021).

[17] See notably R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Inst. I)' 39 *American Journal of Comparative Law*, 1-34 (1991); Id, 'Legal Formants: A Dynamic Approach to Comparative Law (Inst. II)' 39 *American Journal of Comparative Law*, 343-401 (1991). See also, A. Watson, 'From Legal Transplants to Legal Formants' 43 *American Journal of Comparative*

Any source of law displays within itself a tension between a declamatory and an operational level, in a sense an intrinsic portrait 'in the books' different from its real functioning in a given case. This phenomenon occurs even for informal, non-recognized sources, such as legal scholarship, lower case law, or administrative regulation of the lower level. Every source of law, formal or informal, shows this scission, a tension between what it says and what it does. Sophisticated comparative research, such as that pioneered at Cornell by the late Rudi Schlesinger, is aware of this phenomenon.[18]

In a realist vision, that in comparative law has been called a structural-functional approach, there cannot be a hierarchy of sources but only a concrete competition for effectiveness. A Hayekian model, based on knowledge generated by competition between 'legal formants', thus characterizes the comparative law vision theoretically elaborated in Italy with some impact abroad.[19] For purposes of genuine comparative work, it makes no sense to consider the DPCM the lowest of the sources of law, when by using it a Prime Minister has been capable of abridging constitutional rights protected at the highest level of the pyramid, facing no legal (or even political) consequence for this usurpation.[20] Similarly, it makes no sense to exclude legal doctrine from the sources of law when entire branches of the law, for instance torts, are actually developed directly to implement its theoretical contribution.[21]

The truth of the matter is that the grand abstraction called the hierarchy of sources of law ideologically hides the actual functioning of the legal system, where in practice the Constitution is much weaker than lower sources not only those endowed with political force at any given moment, but also those that better resonate within a legal culture traditionally trained with a code-centric vision. To be sure, the higher abstraction of the Constitution places it at a different semantic level than the Code or other so-called primary legislation.[22] Many broad and vague constitutional provisions, especially on second generation rights or on rights of non-citizens (Art 11 on the repudiation of war is the clearest example now),[23] have

Law, 469 (1995); P.G. Monateri, 'Methods in comparative law: an intellectual overview', in Id ed, *Methods of Comparative Law* (Cheltenham-Northampton: Elgar, 2012), 7-24; A. Gambaro and M. Graziadei, 'Legal Formants', in J. Smits et al eds, *Elgar Encyclopedia of Comparative Law* (Cheltenham-Northampton: Elgar Publishing, 3rd ed, 2023).

[18] See R.B. Schlesinger gen ed, *Formation of Contracts. A Study on the Common Core of Legal Systems*, 2 Vols (New York: Oceana Publications, 1968).

[19] See U. Mattei, *Comparative Law and Economics* (Ann Arbor: The University of Michigan Press, 1997) (the competitive model was developed in 1991 in a forgotten paper with economist Francesco Pulitini).

[20] See U. Mattei, *Il diritto di essere contro* n 16 above.

[21] See P.G. Monateri, 'Legal Doctrine as a Source of Law: A Transnational Factor and a Historical Paradox', in *Italian National Reports, XI Congress of The International Academy of Comparative Law* (Sydney, 1986).

[22] See A. Gambaro, La proprietà, n 15 above.

[23] On how, in the light of the recent states of exception due to wartime contexts, Art 11 Const. has been interpreted in such way as to limit its operational scope and to distort its genealogy and purposes, see E. Ariano, '«Al di sopra della mischia»: Diritto e degenerazioni del Politico' 29(2)

made this document sort of a catalogue of good intentions, akin to international law in the instant age of Gaza. Many provisions have never been applied (eg Art 39). Still others have introduced reactionary counter-principles capable of voiding any constitutional plan of the resources necessary for implementation (eg, Art 97). Scholars have proposed ideas such as the constitutionally-oriented interpretation or balancing of interests with limited intellectual rigor and capacity to provide a stable guidance in the interpretation of actual binding law.[24]

Because of this state of affairs, the *promoveatur ut amoveatur* strategy seems to permeate Italian civil law, limiting its capacity to elaborate models and solutions of general interest capable of maintaining the Italian domestic legal culture at a leading level, at least in Europe.[25]

III. *PROMOVEATUR UT AMOVEATUR* IN THE SOCIAL FUNCTION OF PROPERTY

A first example is related to the famous provision of the 'social function of property' (Art 42 Const). This idea (accepted in many legal systems and one of the pillars of Duncan Kennedy's 'second globalization'), that of the 'social', especially in Latin America, the Middle East, Southern and Eastern Europe,[26] features a long, majestic *curriculum vitae*. Possibly originating in the early legal scholastic, displaying traces in the writings of the Jesuit jurists, always strong in the Catholic social tradition, being a pillar of the *rerum novarum* in 1891, the social function of property rights has garnered some sympathy even in the socialist tradition in the Second International and in most of the socialist reformist paradigms which, since the Livorno scission of the Socialist party in 1921, contrasted the 'maximalist' revolutionary ideology of the communist party in Italy.[27] The social function of property was popularized among legal scholars by Leon Duguit (1859–1928) and by Karl Renner (1870–1950), confirming the possible convergence of Catholic and socialist thought.[28]

The Cardozo Electronic Law Bulletin, 45 (2023), 75-87; G. Azzariti, 'La Costituzione rimossa' *Costituzionalismo.it*, I (2022).

[24] See P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020).

[25] See, for a discussion of the impact of Italian scholarship abroad, E. Grande, P.G. Monateri and R. Míguez Núñez, 'The Italian Theory of Comparative Law Goes Abroad' 1 *Italian Review of International and Comparative Law*, 5 (2021).

[26] See Du. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D.M. Trubek and A. Santos eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), 37-62. See also A. di Robilant, *The Making of Modern Property: Reinventing Roman Law in Europe and its Peripheries 1789–1950* (Cambridge: Cambridge University Press, 2023).

[27] See U. Mattei, 'La proprietà', in R. Sacco ed, *Trattato di diritto civile* (Torino: UTET, 2nd ed, 2015), 109-119.

[28] See L. Duguit, *Le droit Social, le droit individual et la transformation de l'état* (Paris: Alcan, 1922); K. Renner, *The Institutions of Private Law and their Social Functions* (London: Routledge, 1949).

When discussion of re-codification of private law started in the midst of Fascism in the 1930s, the idea was ripe of organizing property law along a notion capable of mediating the interests of the *haves* and *have-nots*, in a post-bourgeois multiclass society.[29] In France, Josserand was highly established in advocating the abuse of right; in Germany, Von Gierke was already dead and his sociological jurisprudence was globally influential; and even in the United States Hohfeldian relationships were overcoming the Blackstonian paradigm.

In Italy, different jurists, from a young Salvatore Pugliatti to a highly established Santi Romano, were very critical of formalism, and open to a paradigm shift away from the classic liberal tradition, still dominant among jurists in law schools.[30] The discussion whether the 'social function of property' was to be included in the civil code in the making (that was ultimately promulgated in 1942, and still in force today), occurred in the context of an important conference on the 'fascist conception of private property'.[31] Both the *abuse of right* and the *social function of property* came out defeated for technical and political reasons, and ultimately were not introduced in the Code. Traditional liberal scholars, still dominant in law schools, were not ready to relinquish the 'life jacket of formalism', to use the expression of Natalino Irti, one of the most influential contemporary Masters of Civil Law in Italy.[32] They were afraid that a system of property taking away ultimate idiosyncratic freedom from the owner, limited only by respect of equal opposite property rights, in respect of some non-specified duties to society, would provide the authoritarian social organization powerful technical tools. Ownership could remain 'the guardian of every other right'[33] only if its *function* was the maximum protection of the free *individual* rather than the *social*. Given the political conditions of the time, a codified definition of property short of clearly stating the fundamental freedom of the individual would dispossess the legal profession of its most powerful formal weapon to limit the power of the State. The social function would make property *too weak*.

That classic liberal jurists disliked the social function of property did not mean that fascist jurists would like it. While the former thought that the social function would make the property owner too weak, the latter thought it could become too

[29] See, on the Italian codification process, S. Rodotà, 'Note critiche in tema di proprietà' *Rivista trimestrale di diritto e procedura civile*, 1252 (1960) and Id, *Il terribile diritto. Studi sulla proprietà privata* (Bologna: il Mulino, 1981), 213-251; P. Rescigno, 'Per uno studio sulla proprietà' *Rivista di diritto civile*, 1 (1972); G. Alpa and M. Bessone, *Poteri dei privati e statuto della proprietà. II. Storia, funzione sociale, pubblici interventi* (Padova: CEDAM, 1980).

[30] See P. Grossi, *Nobiltà del diritto. Profili di giuristi* (Milano: Giuffré, 2008), 532-555, 669-688.

[31] See VVAA, *La concezione fascista della proprietà privata* (Roma: Confederazione Fascista dei Lavoratori dell'Agricoltura, 1939), including writings by the leading jurists of the time, amongst whom Barassi, Cariota Ferrara, Ferrara, Pugliatti, Santi Romano, Vassalli.

[32] N. Irti, *Il salvagente della forma* (Roma-Bari: Laterza, 2007).

[33] On this expression, see J.W. Ely jr, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford: Oxford University Press, 3rd ed, 2007).

strong. In the view of Mussolini's jurists, (today obscure) scholars like Carlo Costamagna or Arrigo Solmi, but also celebrated ones like Santi Romano, the social function of property ended up equating private owners to public functionaries. However, one thing is the recognition of private property as a private entitlement to enjoy certain goods, quite another is to vest the owner of a public office. The former recognition does not imply that the State needs the owner in its organization, ownership being a concession in the private interest that can always be revoked.[34] Recognizing that property has a social function, therefore, makes it *too strong* in front of the State that in the Fascist vision was to be omnipotent, even capable of incorporating class struggle (between haves and have-nots) into its corporate structure.

Thus, for classic liberals the *social function* would make property too weak, while for fascists it would make it too strong. Consequently, after rich debate, the ultimate result was that the social function of property did not find its way into the Civil Code definition of Art 832.[35] Nor did the abuse of rights, a product of the same wave of anti-formalism, substituted in Art 833 by the old idea of *aemulatio*, banning only the purely spiteful conduct of the owner.[36] Both Catholic jurists, faithful to the *rerum novarum*, and socialists, even of the most prudent reformist tradition, were defeated. The fascist conception of property, to be enshrined in Mussolini's Civil Code, would overcome any natural law legacy of liberalism (the definition of Art 832 does not even mention *ownership*, a naturalist abstraction, but only deals with the *owner*, a concrete person) but would not include the social function of property (nor the abuse of right)[37] leaving the most promising tools in the hands of progressive jurists to face the challenges of a rising industrial economy.[38]

Thus, the unlikely alliance against *the social* between fascists and liberals made Book Three of the 1942 Civil Code born already old.[39]

Months after realizing his dream of becoming, like Justinian or Napoleon, a legislator giving his name to a Code, on July 25, 1943, Mussolini was removed from power, incarcerated, and substituted by Badoglio, beginning the most dramatic and shameful two years of Italian history. On April 25, 1945, Italy was liberated, and the political forces that had most suffered under Nazi-fascist rule, the socialist-communists and the anti-fascist popular party (Christian Democracy) became the two most important political forces in the constitutional reconstruction. After the

---

[34] See, eg, C. Costamagna, 'Definizione del diritto di proprietà' *Lo Stato* (1938), 408 ff. For a good critical discussion, E. de Cristofaro, 'Giuristi e cultura giuridica dal fascismo alla Repubblica (1940-1948)' *Laboratoire Italien* 12, (2012).

[35] See S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: il Mulino, 2013), 175-271.

[36] *See* A. Gambaro, 'Il diritto di proprietà', in A. Cicu, F. Messineo and L. Mengoni eds, *Trattato di diritto civile e commerciale* (Milano: Giuffré, 1995), 472-495.

[37] *See*, generally, P. Rescigno, *L'abuso del diritto* (Bologna: il Mulino, 1998).

[38] On the disillusion after these promises were not maintained, see L. Nivarra, 'La funzione sociale della proprietà: dalla strategia alla tattica' 31 *Rivista Critica Diritto Privato*, 503 (2013).

[39] See A. Gambaro, n 15 above, 215-218; U. Mattei, n 27 above, 122-126.

popular vote of June 2, 1946, which included the referendum between Monarchy and Republic, when for the first time women were allowed to vote, the split between socialist-communists (with 219 seats out of 556) and Christian Democrats (with 207) polarized the Assembly and left to other forces, especially Liberals and Republicans, only crumbs (41 and 23 seats, respectively).[40]

The polarization was mediated by two major figures of the Constitutional Assembly, Palmiro Togliatti, secretary of the Communist Party (Minister of Justice until July 1946) and Giuseppe Dossetti, a leftist Catholic priest active in the resistance in Emilia Romagna, serving as vice Secretary of the Christian Democrats under Alcide de Gasperi before being marginalized by the Atlantic shift of the latter.

In this new political scenario, the social function of property law, defeated in the Civil codification, exacted major revenge, being promoted as the pivot of the so-called economic constitution, in Art 42.[41] The Salerno shift to a political struggle within constitutional limits, in which Togliatti abandoned the revolutionary dream and the socially-inclusive vision of Dossetti: 'Tutti proprietari e non tutti proletari' (let everyone be an owner, not a proletarian), made ripe the conditions for a progressive compromise in which private property was not conceived in the sole interest of the owner but also in the more general interests of an inclusive society organized around labor and substantial equality.[42] The very reasons and political forces that had excluded the social function from the Code were now so politically weak that they could not avoid the triumphant entry of the social function at the top of the new pyramid of the sources of Italian law headed by the Constitution of 1948.

While classic liberal jurists were a tiny political minority, they were still top dogs in the legal sweepstakes. Promoted to the top of the hierarchy, the social function was de-facto removed from being a professional legal issue. It was detoured to a different semantic level, where for years it could not affect the everyday working of the legal system in solving the nitty-gritty conflicts among self-interested owners and have-nots.[43] From the perspective of the dominant conservative legal culture, always at the service of the interests of the powerful, this was a clear *promoveatur ut amoveatur iuris* phenomenon. To begin with, the Constitutional Court that the new Constitution had introduced based on the Austrian model, with a monopoly in declaring a statute unconstitutional, was not established until 1956; moreover, for years the dominant vision remained that the Constitution would talk to legislators, not to citizens, so that the rights it enshrined, especially the social ones, were not to be directly enjoyed by citizens. In the jurist's lingo, the Constitution had only vertical, not horizontal, value. Consequently, it took years for the constitutional provision on the social function to gain practical significance, even if its potential

[40] See Senato della Repubblica, *Storia della nostra Costituzione* (2023), available online at https://tinyurl.com/f9vnhe66 (last visited 30 May 2025).

[41] S. Rodotà, 'Rapporti economici', in G. Branca ed, *Commentario alla Costituzione, sub Art 42* (Bologna-Roma: Zanichelli, 1982) now in S. Rodotà, *Il terribile diritto* n 35 above, 273-421.

[42] See S. Rodotà, *Il terribile diritto* n 35 above.

[43] U. Mattei, 'La proprietà' n 27 above, 115-119.

importance was advocated by the best part of Italian civil law scholarship of the post-war generation, intellectuals like Pietro Rescigno and Stefano Rodotà among private lawyers, and Massimo Severo Giannini among public lawyers. When finally, in the seventies and eighties, the so-called constitutionally-oriented interpretation became dominant and some *drittwirkung* recognized, Italian private law surrendered to the EU, from the Single Act of 1986, to the Maastricht Treaty of 1992, and finally to the Nizza Charter of 2000, where any social function of property was obliterated by that reactionary twist of capital order dubbed *neoliberalism*.[44]

IV. A CONTEMPORARY EPISODE: COMMONS AND FUTURE GENERATIONS

The saga of the 'social function' shows how elevating a legal idea from the Code to the Constitution can be a successful way to void its practical significance. One can argue that the dramatically different political conditions during deliberations on the Civil Code compared with those on the Constitutional Convention can exclude a strategic 'promoveatur ut amoveatur' in the case of the social function of property. Moreover, for contextual comparison of the past (social function) with the present (future generations), one should attend a peculiarity of Italian law. Indeed, a rigid constitution, wherein to promote the social function, was absent at the time of the Italian codification. The top of the pyramid was enacted only in 1948 and the Civil Code (1942), which was the product of both Fascist ideology/power and a ripe legal culture in the process of rejecting the Napoleonic legacy, was never abrogated or substituted with one more in tune with the newly established constitutional democracy.[45] Although the Fascist Code was purged of some of its most racist language, the structure, including its third book on property—perhaps the one most obsolete—was neither abrogated nor object of general reform.[46]

As for Book Three on property law, the essence of private law, where both the issue of the 'social function' and that of 'future generations' structurally belongs, an important opportunity for modernization arrived in 2007 when, after strenuous academic lobbying, a commission of reform was established at the Ministry of Justice.[47]

That Commission, well supported and organized, composed from leading academics and practitioners, worked from June 2007 to April 2008, under the chairmanship of Professor Rodotà, auditing some of the most important stakeholders. It produced a draft containing the outlines of a radical rewriting of Book Three aimed at genuine legal control of the privatization processes that occur out of political

[44] See L. Nivarra, La funzione sociale della proprietà, n 38 above.
[45] See J.S. Lena and U. Mattei, n 11 above.
[46] S. Patti, *Codificazioni ed evoluzione del diritto privato* (Laterza: Roma-Bari, 1999).
[47] See U. Mattei, E. Reviglio and S. Rodotà eds, *I beni pubblici. Dal governo democratico dell'economia alla riforma del Codice Civile* (Roma: Scienze e Lettere Editore Commerciale, 2010).

expediency, almost always in the interests of owners. The guarantees for public property were challenged as obsolete and allowing arbitrary privatizations, and the proposed reform aimed at creating a long overdue robust legal framework.[48] The draft included a new definition of "goods' (Art 812 Civil Code) focusing on utilities stemming from things;[49] a new taxonomy for public property, based on the functional characteristics of assets; the first legal definition of *the commons*, goods that can be both private and public but that produce utilities connected to fundamental personal rights to be governed 'in the interest of future generations'; and an innovative apparatus for implementing the new scheme.[50]

Shortly after conclusion of the Rodotà Commission's work, a political crisis brought Italy to new elections and the new Government abandoned the proposal. Later, in 2009, the same draft was introduced in Parliament by the Piedmont Region, exercising the prerogative of Art 120 Constitution, with no better luck. In 2018, a popular initiative amassed signatures for a popular Constitutional initiative, but the draft was never discussed.

While there was no joy with legislators, the idea of the commons, *beni comuni* to be preserved in the interest of future generations, became quite popular in academia, case law, and local administrative regulations; a national referendum against privatization of water and public services mobilized a majority of Italian voters around the idea of the 'commons in the interest of future generations', and ultimately produced a major political defeat for the Berlusconi government and, more generally, for the neoliberal mainstream.[51]

The reaction came shortly after the referendum. After the failed attempt of Silvio Berlusconi and Giorgio Napolitano, the Italian President, to unravel by decree the referendum results, a new political crisis due to international speculation arrived, forced Berlusconi to resign, and generated a technical Government led by Mario Monti that ushered in another decade of privatizations and neoliberal reforms. In 2013, at the peak of political struggles for the commons (that included occupations of theatres and other public and private buildings), Rodotà (one of the jurists most sympathetic to these struggles) was defeated as a Presidential candidate and Giorgio Napolitano, a former communist now neoliberal champion of austerity, was maintained in office for a second term. A Constitutional reform introducing a balanced budget provision was quickly approved by large majority (Art 97). The commons movement was suppressed by police measures and lawfare: in this new

[48] See M.S. Giannini, *I beni pubblici* (Roma: Bulzoni, 1963); see also, for discussions precedent to the Rodotà Commission's reform, U. Mattei, E. Reviglio and S. Rodotà eds, *Invertire la rotta. Idee per la riforma della proprietà pubblica* (Bologna: il Mulino, 2007).

[49] The confusing language of the current definition is well discussed in V. Zeno Zencovich, 'Cosa', in *Digesto delle Discipline Privatistiche*, Sezione civile, IV (Torino: UTET, 1989).

[50] See Commissione Rodotà, *Relazione accompagnamento in Senato Repubblica*, XVI Legislatura DDL 2031 Delega al Governo per la modifica del Codice Civile in materia di beni pubblici. The text is available at https://tinyurl.com/pcseyash (last visited 30 May 2025).

[51] See U. Mattei and M. Mancall, 'Communology: *The Emergence of a Social Theory of the Commons'* 118 *South Atlantic Quarterly*, 725 (2019).

mise-en-scène, discussion of rights of future generations not to be plundered through privatizations and squandering of public assets was tabled.[52]

In spite of important judicial successes, including a Constitutional Court decision declaring unconstitutional the Ferragosto Decree that attempted to unravel the referendum results (1999/2012), and two decisions of the Court of Cassation giving judicial recognition to the commons,53 the Civil Code reform to guarantee the rights of future generations against privatizations and to safeguard utilities recognized as commons never happened. No political force sitting in Parliament had any interest in limiting privatizations, possibly because the ultimate beneficiaries of this corruptive practice are crony politicians, either in power or ambitious to attain it, at national and local levels.

This is where the second episode of *promoveatur ut amoveatur* occurred. Through the second decade of this century, and in particular in the aftermath of the declared COVID-19 emergency, greenwashing became a rampant phenomenon in European politics. In part under pressure from legitimate environmental movements, in part because any declared emergency produces a significant occasion for power concentration and economic windfalls, human-generated global warming became a concern and the struggle against it gradually conquered the mainstream in the political conversation. To be sure, this concern, especially at the European level and in the US Democratic Party, exudes hypocrisy considering the impact of military operations on the environment. Moreover, the discussion about CO_2 emissions is tainted with reductionism, as if there were no other issues, such as plastic waste, electromagnetism levels, and nuclear wastes, which are of significantly more urgency to our planet's well-being.[54]

In any case, due to the old, old story of consumer manipulation, exacerbated by new communication technologies (themselves part of the problem), greenwashing has become epidemic in the current phase of capitalism.[55] Future generations suddenly became a mainstream concern in the political rhetoric, even among the architects of globalist neoliberalism such as Mario Draghi, who after a career serving the interests of global capital (he was the true executive of the privatizations of the nineteen-nineties) seized the opportunity of yet another political crisis to form another 'technical' government. Like Mario Monti before him, Draghi, an economist with roots in the Chicago School, carried on his own rushed constitutional reform, with a modification of Art 9 Const. (the provision that the Rodotà Commission used

---

[52] U. Mattei, S. Bailey and G. Farrell eds, *Protecting Future Generations Through the Commons* (Council of Europe Publishing, 2014).

[53] See Cassazione-Sezioni Unite, 14 February 2011 no 3665, *Giustizia civile*, I, 595 (2011). On this groundbreaking decision, see E. Pellecchia, 'Valori costituzionali e nuova tassonomia dei beni: dal bene pubblico al bene comune' *Foro Italiano*, 573 (2012).

[54] See F. Capra and U. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (San Francisco: Berrett-Koehler Publishers, 2015).

[55] U. Mattei, 'Smart', *Enciclopedia Italiana di Scienze, Lettere ed Arti Treccani*, X App., II, 525 (Rome: Istituto Giovanni Treccani, 2020).

together with Art 43 to ground the proposed Civil Code reform in the Constitution) that can be considered a masterpiece in greenwashing.[56]

Draghi's reform ostensibly introduced the environment and future generations as fundamental principles of Italian Constitutional law, thus promoting the interest of 'future generations' at the highest level of the sources of law. In practice, his reform downgraded the beautiful Italian landscape, originally the only interest protected by Art 9 Const, allowing a balancing test whenever a development project can be connected with the 'green economy'. Eco-monsters, such as windmills, solar panels on the ground, or so-called bio-energy plants, are thus permitted in pristine protected Italian areas, including coasts or mountains previously protected in the name of 'future generations', now promoted to the constitutional level.

A reform of the civil code, protecting the interests of future generations on certain specific commons—in private or public ownership—with legal standing allowing for diffused civil actions in the public interest would have been a genuine technical step forward into a sustainable future. It would have been an effective remedy against privatizations and other manifestations of corporate rapacity. The promotion of future generations at the constitutional level has voided their protection and eliminated their capacity to bite. On the contrary, it has transformed them into a rhetorical weapon to damage current generations in the name of green economy. The people now struggling against solar eco-monsters in Sardinia, or against gas plants in the beautiful seas of Liguria, are the only genuine forces towards any righteous change.[57]

V. CONCLUDING REMARKS

Within the 1942 Civil Code, the limitation of property rights via the social function of ownership would have provided a major weapon for have-nots to deploy civil litigation as an effective counterbalance to outrageous inequality. Today, similarly, the protection of future generations via civil code reform would empower that judiciary and citizenry concerned about the future of the commons.

On the other hand, promoting these legal concepts to constitutional level has rendered this reform not only useless but also damaging to the very interests it ostensibly protects.

Promoveatur ut amoveatur iuris.

---

[56] See G. Mercatajo, 'La riforma degli articoli 9 e 41 della Costituzione e la valorizzazione dell'ambiente' 22 *Rivista Giuridica AmbienteDiritto.it*, 1 (2022). See also U. Mattei, 'Qualche riflessione critica sulla "controriforma" ecologica della costituzione italiana' *Quotidiano legale* (2022), available at https://tinyurl.com/2s4mbmx4 (last visited 30 May 2025),

[57] See, for the commons: S. Bailey and U. Mattei, 'Social Movements as Constituent Power: The Italian Struggle for the Commons' 20 *The Indiana Journal of Global Legal Studies*, 965 (2013); see also, on the social function, U. Mattei, 'Una primavera di movimento per la funzione sociale della proprietà privata' 31 *Rivista Critica Diritto Privato*, 531 (2013).