ITALIAN STYLE, AMERICAN ADVANTAGE, EUROPEAN CULTURE

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The traditional 'Italian style', conventionally, if somewhat stereotypically, described as positivist, dogmatic and deductive, seems increasingly peripheral in a context in which law and legal culture are subject to trends of Americanisation and Europeanisation that require a more substantive and interdisciplinary approach. The question has already been asked whether the Italian style can survive or whether a new European or global style can replace the national ones. At the same time, it is well known that processes of globalisation can lead to a revival of local cultures as a form of reaction or resistance.

Against this background, the article critically reflects on the role of the Italian legal style in the face of the process of Europeanisation and the dominance of American common law. Focusing in particular on the case of European private law, it notes that traditional legal cultures retain their relevance and tend to reproduce themselves in the transnational context. But it is precisely there that a critical and more substantive engagement with law becomes all the more urgent.

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I. INTRODUCTION

In a popular book on Italian culture published for the American market in 1964, the Italian journalist and moderate politician Luigi Barzini Jr made cynical observations about the social experience of law in his homeland, highlighting a gap between formal rules and the reality of their application. Among several scathing remarks, he explained to the English-speaking reader that '[i]n Italy even the Law, any law, changes meaning and purpose according to the power of the person who applies or violates it.'[1] This and other observations in the book – which is still occasionally referred to in English-language comparative law accounts of Italy[2] – may have sounded sarcastic, but they unexpectedly resonate, at least roughly, with a point that American scholars, especially in the years that followed, would famously make, namely that the law is indeterminate and an instrument of power.[3] In Italy, and in the same period, this point was largely made outside the legal academy, since most Italian legal scholars – at least outside the then nascent field of sociology of law[4] – seemed to be preoccupied with another task. Rather than deconstructing the law in order to expose its ambiguity and the power structure behind it, the dominant approach in private law scholarship at the time, although soon to be hotly contested,[5] was to interpret the law in the pursuit of legal certainty. The aim was to find the right answer to a question by deducing it from the text of the statute – mainly the Code – or a self-contained 'system', without reference to substantive moral, economic, or political considerations[6] that were seen as external to the law itself. Since legal method was primarily focused on questions of interpretation, the possibility of interdisciplinary inquiry, substantive critique of legal policy or normative conclusions based on considerations outside the statute itself seemed beyond the methodological tools of a private law culture shaped by formalism[7]

[1] L. Barzini, *The Italians. A Full-Length Portrait Featuring their Manners and Morals* (New York: Touchstone, 1964), 216. Presenting the reality of private law disputes, Barzini then noted that '[m]ost controversies are settled privately by an agreement between the lawyers. Creditors often accept ruinous settlements' while 'poor people [...] often prefer to be the victims of an injustice, submitting to obvious wrongs, and forget the whole thing, rather than go to all the trouble and expense of litigation', 105.

[2] For example, O.G. Chase, 'Civil Litigation Delay in Italy and the United States' 36(1) *The American Journal of Comparative Law*, 41-87 (1988).

[3] R.M. Unger, *The Critical Legal Studies Movement* (Cambridge, Massachusetts: Harvard University Press, 1983).

[4] The obvious reference for twentieth-century Italy is the work of Renato Treves. The link between sociology and private law in Italy had already been explored by G.P. Chironi, *Sociologia e diritto civile* (Torino: Bocca, 1886), but this did not yet lead to a rethinking of formal legal categories.

[5] See P. Barcellona ed, *L'uso alternativo del diritto*, I, *Scienza giuridica e analisi marxista* (Roma-Bari: Laterza, 1973) and Id, *L'uso alternativo del diritto*, II, *Ortodossia giuridica e pratica politica* (Roma-Bari: Laterza, 1973).

[6] The opposition between form and substance is set out in P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law. A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Oxford University Press, 1987), 1.

[7] The term is often used with different nuances, occasionally with a negative connotation.

and positivism. To use German terminology, *Rechtsdogmatik* and *Rechtspolitik* were kept separate.

This approach, which is rooted in tradition, and which has been influenced by both French attentiveness to the statute and German sensitivity to systematisation, has attracted some attention among English-language legal scholars, particularly in the United States. In that country, in fact, legal methodology had become less concerned with issues of form and more involved in substantive or even directly political questions. From the perspective of the American scholar, the defining feature of the Italian legal culture at the time was therefore the formalism of its doctrine, the deductive style of legal reasoning, the rejection of non-legal considerations, and a particularly restrictive system of sources of law. This attitude has been labelled, most famously by John Henry Merryman, as the 'Italian style' of legal scholarship.[8] Although many of these features were common – even if declined in different ways – to the civil law family, this analysis suggested that there was something peculiar to the Italian style which, due to historical reasons connected with the emergence and diffusion of Roman law, was seen as the epitome of a continental phenomenon rather than merely one among many manifestations of it.

Over half a century later, it is open to question whether that diagnosis remains current. Even without considering the existence of substantive and critical analyses of private law that were already in circulation at the turn of the century,[9] it may be ironic that the notion of an Italian style was presented by Merryman precisely during the same period in which Italian scholarship (but not the courts) began to move away from pure formalism,[10] producing a 'break with positivism' which was the landmark of the previous generation of scholars.[11] This shift later led to interdisciplinary debates and the opening up of legal scholarship to realist, sociological, Marxist, or metaphysical perspectives. Indeed, writing in 1966, Merryman acknowledged that his portrayal of Italian law and scholarship was over-simplified and that the formalistic Italian style was 'clearly in decline'.[12] Admittedly, such decline did not lead to the sudden and complete disappearance of the formalist style, which instead continued to be fostered in many universities and significantly influenced legal education – and thus the judiciary. However, it did signify at least the establishment of more diverse schools of thought within Italian private law,[13] including dogmatist and realist, domestic law oriented and

The negative connotation is not intended here.

[8] J.H. Merryman, 'The Italian Style I: Doctrine' 18(2) *Stanford Law Review*, 39-65 (1965); Id, 'The Italian Style II: Law' 18(3) *Stanford Law Review*, 396-437 (1966); Id, 'The Italian Style III: Interpretation' 18(4) *Stanford Law Review*, 583-611 (1966).

[9] For references and discussion, P. Grossi, *Scienza giuridica italiana. Un profilo storico, 1860-1950* (Milano: Giuffrè, 2000).

[10] G. Alpa, 'About the Methods of Studying Private Law: An Italian Perspective' 23 *German Law Journal*, 838-850, 839 (2022).

[11] N. Irti, 'Gli eredi della positività' *Nuovo Diritto Civile*, 11-18 (2016).

[12] J.H. Merryman, 'The Italian Style II' n 8 above, 396.

[13] A discussion of the various developments in Italian private law scholarship, also with

internationally oriented approaches. In other words, while we can still speak of an Italian style, this cannot have exactly the same meaning today as it did over fifty years ago.

In the same period of time that separates us from Merryman's analysis, new challenges crossing national borders – from globalisation to financial crises, from the digital revolution to the demands of sustainability – have nonetheless emerged, putting new pressures on legal methodology and compelling national scholars to rethink the place of their legal culture within a broader context. In this regard, if on the one hand Italy is often presented as the core of the historical development of the civil law, on the other hand it appears to have slipped to the periphery, slowly losing its appeal in the eyes of scholars from other jurisdictions:[14] initially marginal to the French and German-dominated civil law family, and later somewhere in the suburbs of the Western legal tradition as the hegemonic role of the common law and its scholarship increased. Relegated to the periphery, the Italian style – however it is represented – may appear to be isolated, which could condemn its academic and practicing lawyers alike to an unfortunate position in an international arena where, against the background of professional and academic mobility, alternative styles of legal reasoning emerge and spread even within the civil law family itself. For example, as Giorgio Resta noted in his introduction to the Italian translation of Martijn Hesselink's book on European legal culture, an increasing number of Italian scholars,[15] after undergraduate studies in Italy, spend part of their careers in the Netherlands, acquiring a pragmatic, interdisciplinary and internationally oriented approach that could be described as the 'Dutch style'.[16]

Thus, updating Merryman's classic analysis,[17] Michael Livingston, Pier Giuseppe Monateri and Francesco Parisi problematised the nature of the Italian style and reflected on its contemporary relevance. The crucial question, they suggested, 'is no longer whether an Italian style exists but whether and to what extent it can survive in an increasingly interconnected world.'[18] Under the pressure of Europeanisation and globalisation, the related question arises whether '[a]n elite of internationally minded scholars and practitioners may even come to think of themselves as European or 'global' rather than Italian in character'.[19] On a broader look, these

relevant extracts, is provided by F. Macario and M. Lobuono, *Il diritto civile nel pensiero dei giuristi. Un itinerario storico e metodologico per l'insegnamento* (Padova: CEDAM, 2010).

[14] J.H. Merryman, 'Presentation' in J.S. Lena and U. Mattei eds, *Introduction to Italian Law* (The Hague: Kluwer, 2002), XIII, noted that, with a few exceptions, 'the attention paid to Italy by comparative lawyers in the English-speaking world continues to be modest'.

[15] Including, as a necessary personal note or perhaps a disclaimer, the author of this article.

[16] G. Resta, 'Preface' in M.W. Hesselink, *La nuova cultura giuridica europea* (Napoli: Edizioni Scientifiche Italiane, 2005).

[17] M. Cappelletti et al, *The Italian Legal System: An Introduction* (Stanford: Stanford University Press, 1967).

[18] S. Livingston et al, *The Italian Legal System: An Introduction* (Stanford: Stanford University Press, 2015), 254.

[19] ibid

difficulties are not unique to Italian scholarship, as similar concerns are shared in other jurisdictions, where international developments and more fundamentally the increasing instrumentalisation of the law by the state have led scholars traditionally well versed in legal dogmatics to interrogate themselves on the nature of legal science as distinct from other fields of knowledge.[20]

And yet, it is well known that processes of globalisation and internationalisation can unexpectedly lead to a revival of local cultures, as a form of reaction or resistance.[21] If this is the case, local legal cultures may instead find the opportunity to be rejuvenated (or, as is often the case with traditions, reinvented),[22] taking renewed pride in their allegedly incommensurable difference from, and even incomprehensibility to, the culture of the hegemonic powers, a difference which therefore cannot allegedly be suppressed by supranational impositions.[23]

This paper presents an attempt to engage with, rather than answer, the question of the relevance of traditional legal styles in the partially globalised context. It does not aim to describe the characteristics of national styles – indeed, it *prima facie* accepts their existence albeit at the cost of a certain oversimplification. Nor does it aim to argue unabashedly for the merits of one approach or the other, essentially engaging in the long-running methodological debate that pits interdisciplinarians against dogmatists, realists against formalists, or empiricists against rationalists.[24] More unpretentiously, it notes the continuing relevance of both substantive and formalist (broadly understood) tendencies in transnational legal scholarship, referring in particular to the debates on European private law. It suggests that the transnational legal space is emerging as an opportunity for the renovation (reinvention) of traditional styles of scholarship and legal cultures rather than their demise or revival. In this context, the article emphasises the importance of a comparative-critical (rather than purely interdisciplinary) and more substantive engagement with law, as well as the need to avoid the reification of styles and

[20] C. Engel and W. Schön, 'Vorwort', in Ead eds, *Das Proprium der Rechtswissenschaft* (Munich: Mohr Siebeck, 2007) IX: '*Der dominante Rechtserzeugungsprozess ist seit der Wende zum 20. Jahrhundert die förmliche Gesetzgebung. Recht ist dadurch beweglich geworden. Es kann offen an veränderte Verhältnisse, Befindlichkeiten und Wertungen angepasst werden. Positivistisches Recht muss aber vornehmlich funktionalistisch verstanden werden. Die Aufgabe des Rechts als Steuerungsinstrument überschattet seine übrigen Aufgaben immer mehr. Muss dann aber nicht auch die Rechtswissenschaft zur Steuerungswissenschaft mutieren? Und was könnte das anderes sein als eine Sozialwissenschaft? Wo liegt dann noch ihr „Proprium" im Verhältnis zu anderen Wissenschaften?*'.

[21] R. Michaels, 'Code vs. Code: Nationalist and Internationalist Images of the Code Civil in the French Resistance to a European Codification' 8 *European Review of Contract Law*, 277-295 (2012).

[22] G. Marini, 'Diritto e politica. La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione' 1 *Polemos*, 31-76 (2010).

[23] P. Legrand, 'European Legal Systems Are Not Converging' 45 *International and Comparative Law Quarterly*, 52-81 (1996).

[24] Despite the clear differences between all the approaches mentioned, the paper does not distinguish between them specifically, but deliberately uses the broad term 'formalism'. The term 'neoformalism' refers to renewed formalist tendencies.

traditions, accepting instead their ever-changing nature, contaminations,[25] and continuous reinterpretation within a socially conscious pluralist methodology.

II. THE AMERICAN ADVANTAGE

As mentioned in the introduction, while the historical centre of the so-called Western legal tradition is on the Italian peninsula, its current centre is undoubtedly in America. In this privileged position, the United States has become an exporter not only of rules but also of methods and academic fashions,[26] often facilitated by the global adoption of English as a lingua franca, which allows the assimilation of American legal concepts, either overtly or subtly.[27] The US-trained American lawyer is naturally well equipped to work with such concepts, especially those that have become the foundations upon which the international commercial and financial system is built. Among the many examples of this assertion, it has recently been noted, in an examination of the approaches of lawyers involved in devising the legal techniques that make global finance possible, that

> 'lawyers trained in the common-law tradition pride them-selves of their self-proclaimed superior ability to understand the economic fundamentals of a deal and to transpose them in a proper legal structure'.[28]

In this context, a possible 'American advantage' seems to emerge, extending beyond academia into the realm of legal practice. This advantage can be explained in terms of geopolitical considerations related to the hegemonic role of the United States, but it can also be more deeply rooted in a specific way of looking at the law. This point has been restated in particular by Mathias Reimann, who argues that the American conception of law is inherently 'pluralistic, pragmatic, and political' and therefore fits 'the contemporary global legal order better than the continental European (and more broadly: civil law) understanding'.[29] This is what would confer the US an 'advantage in global lawyering'.[30]

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[25] Discussing the contamination of legal cultures using Italy as an example, see P.G. Monateri, 'The "Weak Law": Contaminations and Legal Cultures' 13 *Transnational Law and Contemporary Problems*, 572-592 (2003).

[26] U. Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law' 42 *American Journal of Comparative Law*, 195-218, 203 (1994).

[27] This is evident in financial jargon and in the tendency to incorporate common law doctrines into civil law systems. But even within the English language there seems to be an Americanisation, with several terms being used internationally in their American rather than British English connotation, and as such being adopted by EU legal scholarship.

[28] P. Cornut St-Pierre, 'Securitisation from Mortgages to Sustainability: Circulating Techniques and the Financialisation of Legal Knowledge' 14(4) *Transnational Legal Theory*, 476-498, 490 (2023).

[29] M. Reimann, 'The American Advantage in Global Lawyering', 78 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1-36, 3 (2014).

[30] ibid 1.

The conception of law described by Reimann has been perpetrated and reinforced by all the major scholarly developments in modern American law, from the foundational contribution of legal realism,[31] which is said to have ended the formalist era of US law, to its later radical development into critical legal studies,[32] as well as the numerous variations of the quintessentially interdisciplinary law & economics movement.[33] In this sense, '[t]he founding narrative of American lawyers has the formalists as its villains'.[34] To be clear, this is not to say that the American common law cannot be studied dogmatically. Much ink has been spilled in the United States about the alleged merits and demerits of formalist analysis and of interdisciplinarity; different law schools still have different approaches,[35] and proposals are often made to change curricula that are still perceived as too dogmatic, to focus more on questions of legal reasoning[36] or to prepare debt-ridden students better – and faster – for remunerative legal work.[37] In any case, even formalist approaches in the common law diverge from those in continental Europe, as the very structure of the common law invites a style of scholarship and teaching that sees law primarily as a practice rather than a science. In this context, the more likely risk is that doctrinal approaches degenerate into 'case-law journalism'[38] rather than ascent to a distant heaven of legal concepts. In any case – and without getting bogged down in the details of comparative methodologies – it is safe to say that at least in the elite law schools that are more likely to produce the class of lawyers that populate global law firms, a relatively more pragmatic and substantive approach has become dominant, compared to what

[31] For the purposes of this paper, it is sufficient to note that an influential Italian perspective on legal realism was provided in the early 1960s by G. Tarello, *Il realismo giuridico americano* (Milano: Giuffrè, 1962).

[32] Dun. Kennedy, 'Form and Substance in Private Law Adjudication' 89(8) *Harvard Law Review*, 1685-1778 (1976).

[33] For an overview of the movements that followed legal realism, see G. Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995).

[34] D. Priel, 'The Return of Legal Realism', in M. D. Dubber and C. Tomlins eds, *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018), 457.

[35] See on the different law schools and their inspirations, L. Serafinelli, *U.S. Law Schools. Una visione alternativa della formazione del giurista negli Stati Uniti* (Milano: Giuffrè, 2023).

[36] For instance, W. Farnsworth, *The Legal Analyst: A Toolkit for Thinking about the Law* (Chicago: University of Chicago Press, 2007), VII-VIII: 'law school courses could be organized around tools rather than legal subjects, so that in the first year everyone would take a course on the prisoner's dilemma and other ideas from game theory, a little course on rules and standards, a course on cognitive psychology, and so on, and in each of those classes one would learn, along the way, a bit about contract law, a bit about tort law, and a bit about all the other major subjects. But instead law school is carved up the other way around: by legal topics, not by tools [...] Law tends to be taught, in other words, as if legal rules were the most important things one could learn, and as if the tools for thinking about them were valuable but secondary – nice to know if someone happens to explain them, but nothing urgent'.

[37] B.Z. Tamanaha, *Failing Law Schools* (Chicago: University of Chicago Press, 2012).

[38] P. Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening' 97(1) *Georgetown Law Journal*, 803-835, 821 (2009).

happens in the top European schools, where formalist approaches remain largely, but not unquestionably, dominant.[39]

From this perspective, the global legal arena would be a suitable environment for American legal scholars and practitioners, but much less so for continental European lawyers. If this were the case, one would expect globalisation to produce a certain unifying pressure towards a different type of legal methodology, more akin to the American model, and perhaps an Americanisation of European legal culture.

III. SUBSTANTIVE TRENDS IN EUROPE

Analogous trends towards a more substantive approach do indeed exist on this side of the Atlantic, albeit driven by more complex dynamics than mere – spontaneous or forced – imitation or 'Americanisation'.[40] In a lecture given in 2001 and subsequently translated into various languages, including – as mentioned above – Italian, Hesselink drew a comparison between the American and what he described as two types of European legal culture.[41] On the one hand, traditional legal scholarship – which obviously includes Merryman's Italian style – is portrayed as formalistic and dogmatic. Here, law is seen as a field of knowledge, or even a science, which is separate from other fields. The solution to any legal question must be found in a comprehensive code or in a set of more general legal principles, but in any case in the law itself. This analysis includes the law of England and Wales,[42] so that the most relevant dichotomy in comparing legal cultures within the Western legal tradition is not that between common law and civil law,[43] but between America and Europe. The difference is obviously not ontological: the substantive and value-oriented approach is by no means alien to the European intellectual tradition. Even without referring to the philosophical foundations of CLS in European postmodernism or even legal socialism,[44] celebrated antecedents of American legal realism can

[39] R. van Gestel and H.-W. Micklitz, 'Why Methods Matter in European Legal Scholarship' 20 *European Law Journal*, 292-316, 294 (2014): 'most legal researchers in Europe are still trained as 'black letter' lawyers and usually do not have a PhD in another (social) science as is increasingly the case at the elite law schools in the United States, which makes that doctrinalists still hold a much stronger position, even in European top law schools'.

[40] M. Reimann, n 29 above, 2, ft 4, refers to Hannah Arendt to underline how 'Americanisation' is often a misnomer for describing modernisation from a European perspective.

[41] M.W. Hesselink, *The New European Legal Culture* (The Hague: Kluwer, 2001).

[42] Already P.S. Atiyah and R.S. Summers, *Form and Substance* n 6 above, famously saw a difference between the English formal style and the American substantive style.

[43] The theme that the distinction is outdated is an old one, see J. Gordley, 'Common Law und Civil Law: Eine überholte Unterscheidung' 1 *Zeitschrift für Europäisches Privatrecht*, 498-518 (1993).

[44] In fact, the early reception of the scholarly output of the CLS aroused contrasting feelings among European progressive scholars, see 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*, 1053-1092, 1062 (2001).

be found in abundance on the continent,[45] while the later critical turn finds obvious equivalents in Europe as well. If a version of these approaches gained momentum in mainstream legal methodology in the US rather than in Europe, this is mainly due to the different political and institutional histories on both sides of the Atlantic: legal formalism plays different roles when positioned on the stage of a constitutional democracy, a fascist regime, or a socialist state.

On the other hand, writing at the beginning of the new millennium, Hesselink noted a development in European scholarship, which was becoming less formalistic and more substantive, moving closer to its American counterpart – what he called at the time the 'new European legal culture'. This trend towards substantivism was driven by both internal and external factors. Internally, the politicisation of the late 1960s, as mentioned above, left its mark on private law, calling into question the distinction between public and private law, which had previously been taken for granted by the lawyer and which was becoming increasingly untenable in view of the need – itself an irritant to traditional private law dogmatics – to implement the new constitutional values in interpersonal relations. To be clear, the process is not exclusively European: the politicisation of private law can be observed, albeit with different nuances, in Italy,[46] in the rest of continental Europe,[47] in England,[48] but obviously also in the US,[49] thus taking the form of a globalisation of legal thought.[50] This phenomenon has contributed more than anything else to a reduction in the degree of formalism within national doctrinal styles. During this period, and even more so in the years that followed, Italian scholars produced a number of pioneering and still socially relevant studies on private law that departed from a completely formalist approach – although it is still instructive and necessary to point out that legal scholars of a more dogmatic inspiration struggled for a long time to fully recognise the value of this line of research.[51]

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[45] Consider the Free Law movement in Germany. For a discussion of the failure of this movement compared to the success of legal realism in the US, see K. I. Schmidt, 'Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to "Life", 1903-1933' 39 *German Studies Review*, 121-140 (2016).

[46] Consider the movement of the '*uso alternativo del diritto*', (*infra*), as well as the establishment of the journal '*Politica del diritto*' in 1970.

[47] See the establishment of the journal *Kritische Justiz. Vierteljahresschrift für Recht und Politik* in 1968.

[48] On the changes intervened in contract law during that period, P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979). The development of an openly legal-critical movement in the UK is a somewhat later phenomenon, with the founding of the 'Critical Legal Conference' in 1984.

[49] J.H. Merryman, 'The Public Law - Private Law Distinction in European and American Law' 17 *Journal of Public Law*, 3-19 (1968).

[50] Dun. 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), 19-73.

[51] Guido Alpa, Maria Rosaria Marella, Giovanni Marini and Giorgio Resta, writing the foreword to a new edition of *Tecnologie e Diritti* by Stefano Rodotà, noted that, still in 1995, the book had caused a stir: '*Vi fu anche chi, tra i colleghi romani di Stefano Rodotà, espresse apertamente il*

IV. IN PARTICULAR: EUROPEANISATION

The second element identified by Hesselink in 2001, which has had a significant impact and has exacerbated (but not created)[52] the above-mentioned tendencies, is, on the contrary, typically European:[53] the process of Europeanisation promoted by the institutions of what is now the European Union. This requires us to say something more about EU (private) law.

It is, of course, common knowledge that the EU is increasingly influencing various areas of national law, including general private law.[54] It is less often remarked that Europeanisation is also relevant for legal methodology, for at least two interrelated reasons: on the one hand it obviously requires a shift of focus from the national to the inter/supranational dimension, which also invites comparative explorations; on the other hand, it prima facie requires a more substantive engagement with the law, which seemingly reduces the room for formalism. The approach of EU law differs from that familiar to scholars of domestic law: it is generally unconcerned with questions of form and systematics, being more instrumental instead. Rather than striving for systematic coherence or doctrinal accuracy, it addresses only those aspects in need of reform in order to achieve one of the EU's objectives. Obviously, the continental private lawyer was already aware of, and even concerned about, the negative effects of this kind of (national) legislative intervention on codifications.[55] EU law pushes this tendency to the extreme, forcing national laws to elaborate various and not always successful strategies for dealing with its legal material,[56] ranging from open resistance to attempts to reincorporate this legal production into the code itself.[57] The resulting private law is less comprehensive, less dogmatically precise, and more instrumental. It is constantly in need of justification in order to comply with the competences assigned to it by the Member States, and it gradually blurs the line between public

proprio disappunto all'idea che il diritto civile potesse insegnarsi su un libro del genere, che parlava di bioetica, gestione del corpo e informazioni, tutte questioni allora considerate «metagiuridiche» – per citare solo il termine più gentile usato in quelle circostanze', S. Rodotà, *Tecnologie e diritti* (Bologna: il Mulino, 2021).

[52] G. Alpa, 'About the Methods of Studying Private Law' n 10 above.

[53] Unless, of course, one characterises Europeanisation not as an endogenous process but as a phenomenon stimulated by the United States.

[54] Apart from the more or less intrusive effect on private law doctrines, the most noticeable impact of EU law has been on the 'embedding' of private law in national systems: C. Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' 3(4) *European Law Journal*, 378-406 (1997).

[55] N. Irti, *L'età della decodificazione* (Milan: Giuffrè, 1979).

[56] M.W. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' 12(3) *European Law Journal*, 279-305 (2006).

[57] Consider the reform of the German law of obligations, discussed in relation to EU law by the contributions in O. Remien ed, *Schuldrechtsmodernisierung und Europäisches Vertragsrecht* (Munich: Mohr Siebeck, 2008).

and private law, as well as between law and regulation.[58] The Court of Justice of the EU itself, instead of engaging in the careful doctrinal analysis of legal concepts that the domestic scholar might expect from the functional equivalent of a higher court, resorts to broader concepts and decides cases pragmatically on the basis of what advances certain policy objectives, such as market integration, consumer protection, or effective judicial protection.[59] One can certainly sympathise with the CJEU and its almost impossible task of providing interpretations that fit smoothly into the categories of almost thirty different legal systems; but the result remains that the legal interpreter is confronted with general – and often generic – policy objectives that become a crucial part of the legal reasoning – from harmonisation to consumer protection, from competition to sustainability.

In a sense, the EU as a 'laboratory',[60] whose precise form defies conventional categorisations rooted in legal tradition, offers even more opportunities to engage with substantive considerations than an institutionally more stable context such as the US. In this sense, and in partial opposition to Reimann's claim, Hans Micklitz provocatively spoke of a 'European advantage' (although not in global lawyering but in 'legal scholarship'):[61] not just the supposed advantage of mastering legal formalism, but rather the need and ability to deal with the law produced by a challenging institution like the EU. This requires a constant dialogue with other social sciences, especially political science, and an openness to other cultures. This characterisation responds to an often-perceived weakness of the American legal culture, as Reimann recognised:

> '[p]robably the most important disadvantage of lawyers trained in US law schools is psychological, ie, their tendency inevitably (and often unconsciously) to see American law at the center of the legal universe with all other legal cultures and systems peripheral to it'.[62]

In this sense, if the question is whether traditional formalist styles can survive the pressures of globalisation and Europeanisation, the conclusion seems to have already been reached. But this might be premature.

V. NEOFORMALIST TENDENCIES IN EUROPEAN LAW

[58] This later led to talk of European regulatory private law: H.-W. Micklitz, 'The Visible Hand of European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' 28 *Yearbook of European Law*, 3-59 (2009).

[59] M.W. Hesselink, 'The New European Legal Culture' n 41 above, 49.

[60] H.-W. Micklitz, 'A European Advantage in Legal Scholarship?', in R. van Gestel et al eds, *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge: Cambridge University Press, 2017), 262-309, 280.

[61] ibid

[62] M. Reimann, n 29 above, 4, ft 12.

About a decade after giving the lecture in which he introduced the notion of a new European legal culture, Hesselink had the opportunity to reflect on his earlier thesis.[63] If in 2001 he had proclaimed the emergence of a new substantive approach in Europe, more than ten years later, he was witnessing the opposite trend, a renewed formalistic tendency in law and legal scholarship. Although the phenomenon is not confined to that area,[64] it was clearly observable in EU private law itself. EU directives began to strive for coherence and comprehensiveness. Once considered 'pointillist'[65] and criticised for their instrumentalism,[66] these measures began to resemble national laws in their form, with increasingly limited possibilities for Member States to deviate from the general standards. This was the period in which, notably, the possibility of a Common European Sales Law was discussed,[67] as an optional and scaled-down version of earlier unsuccessful codification plans.[68] More importantly, alongside the developments in the legislative agenda, the way in which courts and legal scholars dealt with EU law became more formalistic. The meaning of European legal culture seemed even less clear and subject to a plurality of often conflicting interpretations.[69]

A further decade later (ie today), Hesselink's observations still seem relevant, as the neoformalist tendencies may have changed shape but not disappeared. The EU's neo-codification and neo-constitutionalist moment – the heyday of neoformalism – has passed, but its inspiration can be found in the EU's recent tendency to produce extensive and comprehensive regulations of specific sectors, which it somewhat pompously refers to as 'acts'. In this context, the distinction between private and public allegedly reappears, at least covertly, in EU law itself.[70] At the same time, however, the regulatory emphasis on new phenomena – especially digitalisation and sustainability – demands a new focus on substantive legal policy issues.

More importantly for national scholarship, while EU law still and significantly

[63] 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.

[64] Noting neoformalism in public law within the 'third globalization', Dun. Kennedy, 'Three Globalizations of Law and Legal Thought' n 50 above, 63.

[65] W.-H. Roth, 'Transposing "Pointillist" EC Guidelines into Systematic National Codes – Problems and Consequences' 6 *European Review of Private Law*, 761-772 (2002).

[66] C.U. Schmid, *Die Instrumentalisierung des Privatrechts durch die Europäische Union: Privatrecht und Privatrechtskonzeptionen in der Entwicklung der Europäischen Integrationsverfassung* (Baden-Baden: Nomos, 2010).

[67] On the various aspects of the Proposal, see the contributions in G. Danneman and S. Vogenauer eds, *The Common European Sales Law in Context* (Oxford: Oxford University Press, 2013).

[68] H.-W. Micklitz, 'Failures or Ideological Preconceptions? Thoughts on Two Grand Projects: The European Constitution and the European Civil Code', in K. Tuori and S. Sankari eds, *The Many Constitutions of Europe* (London: Routledge, 2010), 109-142.

[69] G. Helleringer and K.P. Purnhagen eds, *Towards a European Legal Culture* n 63 above.

[70] O.O. Cherednychenko, 'Rediscovering the Public/Private Divide in EU Private Law' 26 *European Law Journal*, 27-47 (2020).

invites a more substantive engagement with policy, it counter-intuitively expands the space for doctrinal analysis. Rather than being constrained by the boundaries of national law, national styles of scholarship can be applied to norms with a much wider scope of application. Although EU law cannot be readily regarded as the same as domestic law, the conceptual tools used to analyse national law are often applied to it. The tendency, perhaps inevitable, to produce black-letter commentaries on the provisions of the aforementioned EU 'acts' regulations, in the best tradition of article-by-article commentaries on domestic law,[71] is just one of many examples. If this is true, then EU law, rather than representing the overcoming of traditional styles, is somewhat unexpectedly becoming the terrain for their more or less successful reaffirmation or even export. The point is clearly expressed by Michele Graziadei:

> '[a]lthough the influence of EU law has been pervasive in various areas of private law, much scholarly work done under the label 'European private law' has been produced in accordance with techniques usually applied to deal with the national law. Scholars, practitioners of (national) private law alike tend to approach EU law through the lenses of the respective national laws. From this perspective EU law is still an island in a sea of national law.'[72]

In this sense, EU law may become a catalyst for a revival of traditional styles: on the one hand, it provokes resistance to the extent that it acts as a kind of irritant to national legal categories – from codifications to specific doctrines[73] – and, on the other hand, it breathes new life into formalism. It is not the legal method, but the legal discourse – now enriched by a plurality of scholars from a greater number of (European) jurisdictions – that is transnationalised, at least to some extent.

One of the consequences – and to be clear this is not at all a negative aspect, as it reveals a more pluralistic debate – is that the vast field of European private law is populated by different and sometimes self-referential schools of thought and approaches, rooted in different national traditions, understandings of the concept of 'European', or intellectual backgrounds.[74]

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[71] Of course, a commentary does not have to be dogmatic itself and can contain critique. Consider most notably the 1979 *Alternativkommentar zum Bürgerlichen Gesetzbuch* (AK-BGB) edited by Rudolf Wassermann in Germany.

[72] M. Graziadei, 'Obviously European?' *Persona e Mercato*, 231-245, 240 (2021/2022).

[73] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences' 61 *Modern Law Review*, 11-32 (1998).

[74] C. Poncibò and O. Borgogno, 'Schools of Thought in European Private Law', in M. Durovic and T. Tridimas eds, *New Directions in European Private Law* (Oxford: Hart Publishing, 2021) 61-84.

VI. THE APPEAL OF FORMALISM IN EUROPEAN LAW

The phenomenon described above can be viewed in different ways. Firstly, it could be argued that the neoformalist tendencies, in spite of premature death knells, demonstrate the continued vitality of formalism, which seems to persist beyond its national habitat. The multiplicity of connotations associated with the term 'formalism',[75] including possibly derogatory uses, and the fact that some of the features of formalism may have been exaggerated by its critics,[76] obscure some of the merits of this approach. A certain degree of formalism seems essential to modern law and, as prominent American realists themselves have long recognised, legal reasoning is simply impossible without recourse to concepts and categories – although the crucial question for a legal realist is rather how those categories are created.[77] Some of the most authoritative voices among the interdisciplinarians have in fact expressed doubts about the real merits of their own approach – as Eric Posner did in his disenchanted assessment of law & economics[78] – and openly praised classical doctrinal analysis as being intellectually demanding and necessary for a proper understanding of how the law works – as Richard Posner did.[79] A backlash against the conceptual conflation of law and politics[80] as well as against excessive functionalism can of course be observed since some time in the Anglo-American sphere, where formalism occasionally turns into a reification of categories such as contract and property.[81] Going beyond such strict formalism, scholars of the so-called 'New Private Law'[82] school more recently recoil from legal realist and instrumentalist views of the law and – while not denying the importance of policy considerations and that concepts can conflict with each other – seek to revive, at least to some extent, the merits of an analytical legal scholarship concerned with the coherence of private law. This is done not by reviving a now archaic escape into the abstractness of legal concepts, but by

[75] P. Troop, 'Why Legal Formalism Is Not a Stupid Thing' 31(4) *Ratio Juris*, 428-443 (2018).

[76] K. Preuß, 'Legal Formalism and Western Legal Thought' 14 *Jurisprudence: An International Journal of Legal and Political Thought*, 22-54 (2022).

[77] K.N. Llewellyn, 'A Realistic Jurisprudence – The Next Step' 30(4) *Columbia Law Review*, 431-465, 453 (1930).

[78] E. Posner, 'Economic Analysis of Contract Law after Three Decades: Success or Failure?' 112 *Yale Law Journal*, 829-880 (2003).

[79] R.A. Posner, *How Judges Think* (Harvard University Press, 2008), 211.

[80] E.J. Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' 97(6) *The Yale Law Journal*, 949-1016 (1988).

[81] E.J. Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 1995).

[82] Not to be confused with S. Grundmann et al, *New Private Law Theory: A Pluralist Approach* (Cambridge: Cambridge University Press, 2021) which, in a European context and in fact being initially aimed at the German market (S. Grundmann et al eds, *Privatrechtstheorie* (Tübingen: Mohr Siebeck, 2015), in two volumes), aims at interdisciplinarity and pluralism. In the German context, the American New Private Law approach has raised interest already, as shown by T. Kuntz and P.B. Miller eds, *Methodology in Private Law Theory. Between New Private Law and Rechtsdogmatik* (Oxford: Oxford University Press, 2024).

'tak[ing] private law concepts and categories seriously'.[83] Widening the perspective, one could also consider developments in other countries, where a certain, albeit in some respects imperfect, reception of the continental European dogmatic style of scholarship can be discerned.[84]

Although neoformalism and Europeanisation may appear to be poor bedfellows, the contrast between an interdisciplinary and a dogmatic approach is by no means the same as that between non-national and domestic law: a dogmatic approach to EU law remains as possible as an interdisciplinary analysis of domestic law.[85] Nevertheless, it remains questionable whether neoformalist approaches are the most appropriate for EU law, and even less so for other legal phenomena that defy traditional categorisation. In particular, it is doubtful whether the use of methods that have been refined (although not developed) for the purposes of domestic law is also the most appropriate for the study of international phenomena. For example, the use of a legal method or style that has as its primary objective the reconstruction of a system will inevitably and relentlessly reveal the shortcomings of EU law. This is, after all, the same reason why, before the spread of a more developed comparative consciousness, even English common law was often disparaged by civil lawyers as somehow deficient. Somewhat different but related considerations can be made with regard to transnational law, where challenging and highly relevant phenomena risk being viewed solely through the public/private or the state/non-state prism, thereby missing many of the substantive issues raised by this regime.[86] In other words, legal scholars may fall victim to the cognitive bias of the law of the hammer.

As far as EU law is concerned, the doctrinal critiques that point to a lack of coherence and systematic clarity have been addressed by the well-known and largely unsuccessful initiatives intended to replicate the categories of the nation state at the EU level – often indeed criticised for showing the footprint of specific national legal scholarship rather than being a genuinely transnational creature. Faced with this attempt, national scholarship can either adopt a defensive stance – trying to protect national concepts from supranational corruptions – or, on the contrary, try to promote the Europeanisation project by providing the technical instruments for the creation of these categories deliberately or inadvertently

[83] A.S. Gold et al, 'Introduction', in A.S. Gold et al eds, *The Oxford Handbook of the New Private Law* (Oxford: Oxford University Press, 2020).

[84] On the partial reception of the German *Rechtsdogmatik* in China, see Yuanshi Bu, 'Rechtsdogmatik: vom Transfer des deutschen Rechts zum Transfer des deutschen Konzepts der Rechtswissenschaft' 71(8) *JuristenZeitung*, 382-390 (2016).

[85] M. Bartl and C. Leone, 'The Politics of Legal Education', in M. Bartl and J.C. Lawrence eds, *The Politics of European Legal Research: Behind the Method* (Cheltenham: Edward Elgar Publishing, 2022) 159-176.

[86] With reference to the debate on the nature of transnational commercial law, R. Michaels, 'The True Lex Mercatoria: Law Beyond the State' 14(2) *Indiana Journal of Global Legal Studies*, 447-468 (2007), 466: 'At the moment, much of this debate is captured in the unhelpful dichotomy of state law and non-state law. Within this debate, a lex mercatoria that combines both state and non-state elements can only be explained as a hybrid. But the identification of hybrids typically suggests that the differentiating criteria are inadequate for the object under review'.

trying to steer it in a direction more compatible with the form of national law. In this sense, despite their superficial opposition, the Eurosceptic and Europhile approaches in fact share the same understanding of EU law as the reproduction of national formal categories.[87]

VII. THE NEED FOR CRITIQUE

Formalist doctrinal analyses undoubtedly offer positive aspects, as mentioned above. But there is also much that is unsatisfactory about them. One of the most notable risks, apart from the possible detachment from social reality, is that, by promoting an internal perspective on the law, they tend to stifle criticism. At most, criticism is limited to the inappropriate technical use of concepts or the misapplication of legal precedents (as traditionally in the common law), but rarely extends to the politics of the law or its social impact, somewhat limiting the scholar's ability to imagine an alternative scenario[88] and thus the possibility of law being transformative. From a formalist perspective, external criticism is relegated to other fields of study, such as the sociology of law,[89] with which the dogmatic private lawyer in particular is not expected to mix.[90] At the same time, the specialisation of legal knowledge and the compartmentalisation of disciplines, sometimes imposed by national regulations of the academic sector, discourage intersections.

Again, it would be a misrepresentation to suggest that legal dogmatism is completely divorced from non-legal considerations. These can sometimes be incorporated into the law through creative interpretation of legal concepts, and general clauses in particular plainly invite such an operation.[91] Nevertheless, the

[87] G. Comparato, *Nationalism and Private Law in Europe* (Oxford: Hart Publishing, 2014).

[88] As claimed by P. Barcellona, 'Introduzione', in Id, *L'uso alternativo del diritto, I,* 1972, IX, ' "Le categorie giuridiche, presentate come elaborazioni concettuali indipendenti dai condizionamenti storici, finiscono con l'essere uno strumento per la 'valorizzazione' dei rapporti di potere esistenti, finiscono cioè con il valorizzare la realtà così com'è, impedendo di fare qualsiasi critica del modello di sviluppo sociale'.

[89] Another area which, in Italy, has been receptive to theories developed in other contexts and which has helped to critique legal positivism, see R. Treves, *Sociologia del diritto. Origini, ricerche e problemi* (Turin: Einaudi, 2002).

[90] F. Santoro Passarelli, 'Quid jus?', in Id, *Ordinamento e diritto civile. Ultimi saggi* (Napoli: Jovene, 1988), 25: 'Spetta ad altre attività dello spirito, alla filosofia, alla politica, alla sociologia del diritto stabilire ciò che è giusto al di là del diritto, o razionale o conveniente. Il giurista può mettere a frutto la sua esperienza giuridica per contribuire alla realizzazione della giustizia o di un assetto più razionale o più conveniente, ma con la chiara consapevolezza, che va oltre il suo compito di giurista, cioè di interprete. Alla stregua di questa convinzione il c.d. uso alternativo del diritto o diritto alternativo non trova per sé una giustificazione'.

[91] A well-known example in the civil law tradition is the principle of good faith, which allows for the *Rechtsfortbildung*, thus the development of the law in the light of the needs of legal transactions or legal-ethical principles: K. Larenz, *Methodenlehre der Rechtswissenschaft* (Berlin-Heidelberg-New York: Springer, 1991), 366. In the common law tradition, the rigidity of the formalistic application of legal precedents has been mitigated by the development of the principles of equity.

influence of such considerations is still limited[92] and the starting point of dogmatic analysis in the civil law tradition remains the statute.[93] This narrow role therefore does not easily allow for radical critiques of the law by reference to non-legal considerations.

If this is true, one of the dangers of applying formalist criteria to EU and transnational law is that it reduces the potential for critique in an area where, on the contrary, it is most needed. Indeed, scholars of EU law often show a tendency to internalise the rationales of EU integration and turn them into dogmatic criteria themselves. In this regard, Micklitz has noted that such an attitude often leads either to an uncritical pro-Europeanisation stance, which assumes that every problem can be solved by further harmonisation, or, conversely, to an opposition driven by ideological motives rather than by rigorous, theoretically grounded analysis.[94] The debate about the possibility of a more critical engagement with EU law and its methods is now underway among EU lawyers.[95]

In this context, the role of the legal interpreter is in danger of being devalued as a mere repository of technical expertise needed to implement values and decisions coming from elsewhere.[96] The antidote to the perceived risks of an excess of dogmatic thinking remains, as Renato Treves argued in general terms in the 1950s, critical analysis.[97]

VIII. ITALIAN STYLE AND ITALIAN COMPARATIVE STYLE

If this contribution has begun by considering the way in which a comparative and common lawyer shrewdly observed Italian law and its style, it may be equally instructive to consider the way in which Italian scholars illustrate the place and merits of Italian law to an international audience. At the very beginning of their

[92] R.C. van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992), 151.

[93] P. Grossi, *L'Europa del diritto* (Roma-Bari: Laterza, 2011), 154, noted that '*C'è, fra i civilisti e gli storici del diritto, chi ha tentato recentemente una rivalutazione della ricca letteratura – fatta spesso di amplissimi commentarii – che fiorisce soprattutto in Francia, in Belgio, in Italia. È, a nostro avviso, una battaglia perduta. È chiaro che non si tratta di un gregge di pecore e che la letteratura esegetica, nei suoi esponenti più vivi, offre pagine pregevoli per intelligenza testuale, chiarezza, rigore logico, ma è altrettanto chiaro che essa è intrisa del clima legolatrico e che soffre di una psicologia servile che la colloca costantemente all'ombra incombente della legge. I giuristi, pur essendo le prime vittime del parossismo legalistico perché espropriati del ruolo loro consueto di fonti di diritto, sono convintamente orgogliosi di proporsi come servi legum, dominati dalla maestà indiscutibile di quel prodotto supremo del progresso umano che è il Codice*'.

[94] H.-W. Micklitz, 'European advantage' n 60 above, 275.

[95] Most recently, see the contributions in the series 'Controversies over Methods in EU Law' in the *Verfassungsblog*, available at https://tinyurl.com/46pxcved (last visited 30 May 2025).

[96] A. Somma, *Introduzione al diritto comparato* (Torino: Giappichelli, 2019), 16.

[97] R. Treves, *Spirito critico e spirito dogmatico. Contributo alla celebrazione del bicentenario della Columbia University* (Milano: Nuvoletti, 1954).

book on Italian private law in English, Guido Alpa and Vincenzo Zeno-Zencovich authoritatively list the reasons why the study of Italian law might be of interest to an international reader. In addition to the historical considerations already mentioned and the intuitive practical-economic motives, one of the reasons cited is the importance of Italian legal scholarship. However, rather than referring to the work of prominent private lawyers per se – as might be expected in a book on private law – Alpa and Zeno-Zencovich refer to Italy's comparative law tradition, clearly also with the intention of evoking names immediately familiar to an international readership. In fact, combining references to comparative law with references to history,

> 'Italian academics have lived up to this long tradition by contributing much to the discourse on comparative methodology, today set to inherit on a global scale the role played by Roman law in Europe for so long. The names of Gino Gorla, Rodolfo Sacco and Mauro Cappelletti, among many others, are well-known to those working in the field'.[98]

One could indeed go on adding names to this list, but the point here is to emphasise how this line of research relates to the Italian style as conventionally understood.

Comparative law can be thought of as the reverse of the way in which the Italian style was originally considered by Merryman in the 1960s. If the peculiarity of Italian jurisprudence was said to be its somewhat orthodox, dogmatic, abstract and positivist attitude, the comparative tradition on the contrary promotes an unorthodox, non-dogmatic, practical and interdisciplinary approach to the law.[99] There are several reasons for this. In the first sense, the comparative law tradition is transnational in nature and has historically been able to build bridges with a large number of legal systems. While Italian private law scholarship initially focused on the German and French experience, but paid considerably less attention to the common law,[100] comparative law scholarship, on the other hand, has not been immune to the influence of British[101] and American law and scholarship. This is particularly true of Gino Gorla's study of the contract,[102] which was explicitly

[98] G. Alpa and V. Zeno-Zencovich, *Italian Private Law* (Abingdon, New York: Routledge, 2007), XVII.

[99] The contrast between the dogmatic and the comparative style was already expressed by Gino Gorla in the preface to his casebook on contract: 'Non si può negare che v'è nell'aria un senso vago di insoddisfazione di fronte ai nostri metodi di studio e di insegnamento del diritto. Questo senso, se non erro, è determinato da un bisogno di concretezza, che è poi un bisogno di controllo di quei metodi, ove sono in eccesso astrazioni, costruzioni concettuali e generalizzazioni, fra le cui pieghe si nasconde anche una certa eredità del giusnaturalismo. A soddisfare quel bisogno di concretezza sembra possa giovare un metodo comparativo e casistico'. G. Gorla, *Il Contratto. Corso di diritto privato svolto secondo il metodo comparativo e casistico. I. Lineamenti generali* (Milano: Giuffrè, 1955), XXXI.

[100] This was also for ideological reasons linked to the fascist era.

[101] G. Alpa, *The Age of Rebuilding. Sketches of the New Italian Private Law* (London: British Institute of International and Comparative Law, 2007) 373.

[102] ibid

inspired by an American case-law approach, and of Tullio Ascarelli's comparative commercial law research,[103] which was again largely inspired by the experience of the United States and which, by emphasising practice as it is often the case in the commercial law tradition, was naturally more inclined to observe the link between law and social facts. More generally, comparative law scholarship is also characterised by a dialogue with other fields of knowledge – one needs only to think of the importance of linguistics and anthropology in the work of Rodolfo Sacco[104] – and thus by a degree of interdisciplinarity.

To illustrate the anti-formalist potential of this scholarship, it is worth noting that Sacco's most immediately recognisable idea, that of legal formants, represents – despite a widespread tendency to use this terminology reductively – an attack on the orthodox view inherent in the idea of non-contradiction. Thus, if the domestic law scholar does not readily accept that rules can contradict each other, comparative law helps to overcome these 'optical illusions'.[105] As Ugo Mattei and Anna Di Robilant have insightfully suggested, some of the intuitions of comparative law in Italy thus performed the same function that the CLS's indeterminacy thesis – mentioned at the beginning of this paper – performed in the US.[106] Following this approach, the Italian comparative law scholarship which shows closer ties to the postmodern tradition still prominently insists on the 'subversive function' of comparative law[107] – a point also emphasised in the French context, where the comparative method took on an analogous function vis-à-vis the dominant view.[108]

The awareness of this comparative tradition and of its function can hardly be seen as a limitation that places the Italian lawyer at a disadvantage in the interconnected world and in a transnational legal debate characterised by pluralism. Its basic aim, as Sacco explained, is indeed to undermine the nationalist premise of legal scholarship,[109] which has traditionally focused on national legal categories, and to open up legal discourse to broader perspectives. If, in the face of concerns about the peripheral role of Italian law, one were really intent on finding a supposed 'Italian advantage' as a facet of a wider European advantage in global legal scholarship, it would be precisely in this critical-comparative tradition,[110] coupled with an underlying knowledge of the formal aspects of positive law, that one perhaps could look.

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[103] T. Ascarelli, *Studi di diritto comparato e in tema di interpretazione* (Milano: Giuffrè, 1952).

[104] R. Sacco, *Antropologia giuridica* (Bologna: il Mulino, 2007).

[105] A. Gambaro and R. Sacco, *Sistemi giuridici comparati* (Torino: UTET, 1996), 4-5.

[106] U. Mattei and A. Di Robilant, 'The Art and Science of Critical Scholarship' n 44 above, 1080.

[107] A. Somma, *Introduzione al diritto comparato* n 96 above, 3.

[108] H. Muir Watt, 'La fonction subversive du droit comparé' 52 *Revue internationale de droit comparé*, 503-525 (2000).

[109] R. Sacco, *Che cos'è il diritto comparato* (Milano: Giuffrè, 1992), 19.

[110] On a more pessimistic note, however, it has been asked whether comparative law still has the potential to be critical, G. Pascuzzi, 'La comparazione giuridica italiana ha esaurito la sua spinta propulsiva?', in M. Brutti and A. Somma eds, *Diritto: storia e comparazione. Nuovi propositi per un binomio antico* (Frankfurt am Main: Max Planck Institute for European Legal History, 2018), 379.

IX. CONCLUDING REMARKS

One aspect that has emerged so far is the multiplication of approaches and schools of thought, both nationally and internationally. In this context, it may be reassuring to conclude that both dogmatic/formalist[111] and interdisciplinary/realist approaches are valuable in their own way and deserve to be cultivated, especially in legal education,[112] while the ability to combine a plurality of approaches appears to be a useful skill for the lawyer.

Nevertheless, such approaches are not exempt from the need to evolve in order to keep pace with current developments.[113] The limitations of formalism were already evident between the nineteenth and the twentieth centuries,[114] when major social changes led to a crisis of confidence in codification.[115] Today, the increased social, economic and technological complexity of our time makes a critical and substantive engagement with the law even more urgent. As Alpa noted, the very pursuit of legal certainty – the overarching goal of formalist legal interpreters as mentioned in the introduction – takes on fundamentally new meanings in an age of uncertainty.[116] The possible limitations of more modern interdisciplinary approaches, nonetheless, also become apparent – to the extent that such approaches import into legal discourse insights elaborated elsewhere without necessarily subjecting them to more critical analysis.[117] As the intersections between different approaches come to the fore and cannot realistically be disentangled by accepting only one as valid, the pressing question becomes how a plurality of legal styles and methods can be theorised and brought within a coherent framework,[118] so as to avoid methodological pluralism collapsing into a form of nihilism which, as Natalino Irti pointed out, is itself linked to formalism.[119]

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[111] C. Eckes, 'A Timid Defence of Legal Formalism', in M. Bartl and J. C. Lawrence eds, *The Politics of European Legal Research: Behind the Method* (Cheltenham: Elgar, 2022), 192-207.

[112] M. Bartl and C. Leone, 'The Politics of Legal Education' n 85 above.

[113] For a discussion of various methodological issues in the US and Europe, with an emphasis on current challenges, see the contributions by R. van Gestel et al eds, *Rethinking* n 60 above.

[114] P. Grossi, *Introduzione al Novecento giuridico* (Bari-Roma: Laterza, 2012).

[115] G. Cazzetta, *Codice civile e identità giuridica nazionale. Percorsi e appunti per una storia delle codificazioni moderne* (Torino: Giappichelli, 2012), 143.

[116] G. Alpa, *The Age of Rebuilding* n 101 above, 435.

[117] The latter risk is well known in the context of Law & Economics, which has been accused of being a formalist method. Recently, N.H. Buchanan and M.C. Dorf, 'A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism' 106(3) *Cornell Law Review*, 591-675 (2021).

[118] See M.W. Hesselink, 'Anything Goes in Private Law Theory? On the Epistemic and Ontological Commitments of Private Law Multi-Pluralism' 23(6) *German Law Journal*, 891-899 (2022), commenting S. Grundmann et al, *New Private Law Theory* n 82 above. Analogous problems are known in comparative law methodology, see M. Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research – Sense and Nonsense of «Methodological Pluralism» in Comparative Law' 79(3) *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 589-623 (2015).

[119] N. Irti, *Nichilismo giuridico* (Roma-Bari: Laterza, 2004); Id, *Il salvagente della forma* (Roma-Bari: Laterza, 2007).

This process of redefinition points to the impracticality of a reification of legal styles and cultures that sees them as immutable, undisputed, and inextricably linked to a particular national community.[120] Such a presentation, which also downplays alternative schools of thought within a tradition itself[121] and is likely to provoke nationalist reactions, would oversimplify the complexity of legal methodologies as well as the factors behind their circulation. Questions of the politics of legal method, for example, play a relevant role in explaining the success of some approaches, apart from their intrinsic merits or weaknesses: the American advantage in global lawyering itself, while certainly rooted in the characteristics of common law scholarship, is also largely the result of the political and economic dominance of the common law,[122] which is a significant trigger for legal change.[123] Similarly, there may be other motives – perhaps not the fundamental ones but not irrelevant either – behind the trends towards interdisciplinarity and internationalisation[124] of research and education.[125]

A greater critical, social, and comparative engagement with the law, untied from a purely national dimension, seems to remain the necessary condition for the revitalisation of a doctrinal legal research that aims to maintain its social impact and identity.[126] Only if this does not happen will any legal tradition run the risk of becoming insular.

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[120] G. Comparato, 'Challenging Legal Culture' 7(2) *European Journal of Legal Studies*, 5-18 (2014).

[121] The traditional method in Oxford is not the same as in Kent; that in Heidelberg is not the same as in Bremen; that in Leiden is not the same as in Amsterdam; and so on.

[122] This point is fully recognized and also alluded to by M. Reimann, n 29 above, although his explanation focuses predominantly on method.

[123] To take just one example of a more recent phenomenon: in recognition of the fact that international commercial contracts usually include a choice of law and jurisdiction of the US or England, and in order to attract international investors, some countries have recently established domestic courts with jurisdiction to hear international commercial cases, allowing foreign judges to sit on the bench. In practice, these courts are mainly composed of retired judges from England and other common law jurisdictions. M. Yip and G. Rühl eds, *New International Commercial Courts: A Comparative Perspective* (Cambridge: Intersentia, 2024).

[124] F. Halliday, 'The Chimera of the 'International University'' 75(1) *International Affairs*, 99-120 (1999).

[125] At the time of writing, the House of Lords is debating the current crisis in the UK's higher education system. Many of the country's universities are under economic pressure due to declining student numbers – a combined effect of demographics and restrictive immigration policies. One of the most commonly proposed solutions in this debate is to lift the cap on tuition fees and to attract even more international students. The debate in the House of Lords also crudely pointed out that law schools in the UK, which are cheaper to set up than other faculties, have become – and I quote – a 'cash cow'.

[126] R. van Gestel and H.-W. Micklitz, 'Revitalising Doctrinal Legal Research in Europe: What About Methodology?', in U. Neergaard and R. Nielsen eds, *European Legal Method – Paradoxes and Revitalisation* (Copenhagen: DJØF Publishing, 2011), 35-85.