ARTICLES

IN PARTIBUS ANGLIAE: IMAGES OF THE 'COMMON LAW' IN ITALIAN LEGAL CULTURE

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This paper analyses, mainly from a historical perspective, what are usually perceived as two non-convergent legal systems, namely the continental civil law system, and the Anglo-Saxon common law system. Throughout the article, the author pinpoints the numerous misconceptions that have been harboured for centuries by the legal scholars of either system, vis-à-vis the legal system prevailing on the other side of the Channel. Principal amongst such misconceptions is the idea that the common law and the civil law systems have travelled all along on parallel railroads which never met or intertwined – the notion of two legal systems each revolving in a world of its own, and not capable of being influenced by or of influencing the development of the other. The author dismantles these preconceived ideas by outlining various ways in which these two apparently isolated legal systems have in fact been in continuous contact. In particular, detailed reference is made to the enormous volume of legal works by British authors which have been translated on the continent throughout the centuries, and which have maintained their popularity among the legal scholars and intellectuals of mainland Europe ever since. The exchange between the two legal systems in question is also analysed in the context of specific fields of law, such as maritime law; commercial law; public law; and the law of contracts.

1. Foreword

A few years ago, A.W. Simpson published the findings of his accurate research on the history of common law, and dwelt upon the pre-eminent conviction, shared by many English scholars, that

"*English law is to be presented as capable of standing alone.*"[1] Research has vigorously rejected that conviction, so much so that nowadays it can be considered as a veritable prejudice. For his part, Basil Markesinis has taken it upon himself to understand the reasons that lay behind that prejudice, and has brought forward irrefutable evidence of the permeability of English notions and institutes into their continental counterparts.[2] In other words, when we speak of the British contribution (from now on I shall refer mainly to England) to the construction of Europe, and in particular to the British contribution to the European legal tradition, we cannot conceive of a process that had no contacts with continental Europe, and that matured its legal system in a region far removed from any influence whatsoever deriving from the Continent.[3] An open-minded approach is therefore *de rigeur*, particularly when dealing with the concept of "legal" contribution. This is due to the fact that when we think of the contribution provided by English common law we tend to come with a preconceived idea of what it entails.

Some scholars have underlined the fact that it is not possible to give an unequivocal definition of common law, because the way the British themselves conceive of the common law is complex.[4] Moreover, the notion of common law varies, depending on the historical periods under consideration, and therefore there exists a high degree of relativity. The perception of common law also varies depending on whether we consider it *per se*, or whether we compare it to its natural "counterpart", the concept of civil law. The notion of common law

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[1] Simpson, "Innovation in Nineteen Century Contract Law", in *Legal Theory and Legal History* (London and Ronceverte, The Hambledon Press, 1987), at p. 171

[2] Markesinis, "Our Debt to Europe: Past, Present and Future", in Markesinis (ed.) *The Clifford Chance Millennium Lectures. The Coming Together of the Common Law and the Civil Law,* (Oxford, Hart Publishing, 2000) at p. 37

[3] Among the contributions see Reimann (ed.), *The Reception of Continental Ideas in the Common Law World 1820-1920* (Berlin, Duncker & Humblot, 1993)

[4] A collection of opinions is reflected in the essays collected by Galgano (ed.), *Atlante di diritto privato comparato* (Bologna, Zanichelli, 1992); Alpa (ed.), *Corso di sistemi giuridici comparati* (Torino, Giappichelli, 1996), at p. 121 ff.; Sacco and Gambaro, *Sistemi giuridici comparati* (Torino, Utet, 1996); Losano, *I grandi sistemi giuridici* (Roma-Bari, Laterza,2000) at p. 257 ff.; Alpa, Bonell, Corapi, Moccia, Zeno-Zencovich, *Diritto privato comparato* (Roma-Bari, Laterza, 1999); Lupoi, *Sistemi giuridici comparati* (Napoli, ESI, 2001).

changes according to the cultural perspective in which it is placed. This is reflected in the different opinions on the main hallmarks of common law as expressed by modern English authors. Alan Watson, for instance, believes that the differences between civil law and common law reside neither in the Germanic customs absorbed by the latter, nor in the influx of canon law in the rules of equity, since both these sources have also exercised great influence in the formation of civil law on the continent. Nor does the difference lie in the varying degree of intake of Roman law principles recorded in the two worlds. According to Watson, what distinguishes these two legal systems from each other is historical tradition for common law, and the choice of Justinian's *Corpus juris* as an instrument for the organisation of the law for civil law.[5] On the other hand, Tony Honoré has emphasised the temporal distances as a basis for the differences in the two systems.[6] In this context, Christopher Dawson's warning,[7] also shared by Paul Koschacker,[8] is still valid: "*Europe is not a spontaneous fruit, a geographical and natural fact, but a product of history.*" Since legal organisation is an integral part of the history of a people, of a nation, of a State, it too is subject to the same law of history.[9] Therefore, although there exist deep-seated misconception in this regard, a different reading of the documents and evidence available allows us to discard them.

If we try to view the situation from the other side of the Channel, we are not faced with an entirely different landscape. As Arturo Carlo Jemolo would have said, the 'lawyer's glasses' may change, but not the substance of the matter. Indeed the continental jurist has also been raised in the same conviction and tends to believe, almost by a "natural" reflex, that common law has been afflicted by an impermeable otherness, which has guaranteed, at the same time,

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[5] Watson, *Roman Law & Comparative Law* (Athens and London, The University of Georgia Press, 1991), at p.139 ff.

[6] Honoré, *About Law* (London, 1999)

[7] Dawson, *The Making of Europe. An Introduction to European Unity* (1935)

[8] Koschaker, *L'Europa e il diritto romano* (Firenze, Sansoni, 1970), at p. 8

[9] Two Italian eminent scholars share the same views: a teacher of jurisprudence, Tarello, *Storia della cultura giuridica* (Bologna, Mulino, 1998) and a teacher of Roman Law, Orestano, *Introduzione allo studio storico del diritto romano* (Bologna, Mulino, 1978).

its identity and purity. This too, however, is a misconception, shared by many continental jurists. This misconception, which has been challenged by Simpson and Markesinis, has therefore the appearance of a two-faced Janus. Continental jurists as well tend to think that the English system, like Victorian England, is devoted to a "splendid isolation". But the history of continental legal history itself – and Italian history in particular – belies this prejudice, parallel to the previous one.

It is not easy to eradicate prejudices. We have to be armed with historical awareness in order to take stock, of the contribution that the legal culture, institutions, and practices from across the Channel have registered in the individual legal systems. It is even more difficult to imagine the process in the context of the dynamics that govern the construction of E.C. law. I shall try to follow the model proposed by Prof. Markesinis. My report will, therefore, be divided into two segments, one dedicated to the past, the other to the present and the future.

The historical perspective makes us particularly cautious, since we are moving in a linguistic and conceptual environment which is burdened with stereotypes, myths and simplifications which have become stratified through the centuries. When the Continental Jurist thinks (or used to think) of the English legal system, by "natural" implication, he ends up (or used to end up) alluding to the common law as a body of rules created by the Courts, almost as if the relations between private individuals, which come under the sphere of the civilian, were oblivious to the other sources of law such as statutes, rules and regulations and other precepts imposed by an authority different from a Judge. We, therefore, think of a law born of actual, empirical, casual reality, from time to time shaped by the Courts or by the practices and customs of commercial relations. Case law and *lex mercatoria* are, therefore, the first services which come to mind, whereas it is only in recent years that other sources of law have been considered as worthy of notice (particularly since the United Kingdom became a member-state of the European Union). This too is a stereotype, or an actual prejudice which historical analysis takes upon itself to rebut. Similarly, we tend to conceive of the English model as being in a minority position when compared to the other models taken into consideration by Continental legislators and jurists in general, who appear to be more attracted by models which are more akin to their own, such as the French and German ones. This

is another misconception which history undertakes to rebut, or at least to weaken.

2. In partibus Angliae. The common law as a receptacle of "just law" and England as "the country of liberties"

Going back to the roots of the matter, the "quest for justice" seems to be the most notable feature – and therefore the greatest contribution – that the common law could give to the Continental experience. However, the comparison between common law and civil law, which used to be identified with Roman law, has always been problematic. Sir John Fortescue, educated at Exeter College, Oxford; called to the Bar at Lincoln's Inn, who became Chief Justice in 1442, and subsequently Chancellor to Henry VI, shortly before the end of the latter's reign in 1461, demonstrated a good knowledge of Roman law, but discarded the latter in favour of municipal law. Roman law as imported by Lanfranc, a professor from Pavia, who came to England following William the Conqueror, and then cultivated by Vacarius at Oxford, was an essential component of the English jurist's culture. Fortescue, for political reasons and for personal conviction, is bent on discrediting it, because he considers it "imperial" law, and therefore a threat to the King's law. In other words Roman law does not only entail a cultural import, but may have been considered as a threat to the King's political independence. To extol the virtues of English law, Fortescue identifies the fundamental difference between common law and civil law in the *evidence of the rights claimed in proceedings*. Chapter XXIII of *De Laudibus Legum Angliae*, published in 1470, is clear in this respect. In common law, the evidence is brought before the jury, in civil law through witnesses before the judge. If the witnesses cannot be found, if the titles are not produced, the rights are unenforceable and *therefore, justice cannot be obtained.* It seems a trivial observation, a simple note of a procedural nature. Instead it strikes at the heart of the civil law system. In that same world, which claimed to be founded on three moral principles (*honeste vivere, alterum non laedere, suum cuique tribuere*), no substance is given to the precept according to which: "*justice gives to everyone their due*"[10].

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[10] *De Laudibus Legis Angliae*, ch.xxiii, at p. 78

The dividing line is traced even more clearly by Arthur Duck, LLD, for many years a Professor of Roman law at Oxford. In his work *De Usi et Authoritate Juris Civilis Romanorum, per Dominia Principis Christianorum*, published in London in 1678, he underscores neatly the differences which could be found between the Continental countries and England, as regards the influence of Roman law. In England, the common law judge is barred from applying it, and the prohibition, which implies the application of municipal law, is presented as a political victory of the Barons, who were fearful of losing internal power, and at the same time of losing their independence from the Church of Rome. The application of the rules of law, therefore, becomes an issue of entitlement of the sources: only the King, Parliament and the Judges of the Realm are entitled to establish rules. Nevertheless, the influence of Roman law cannot be discarded so easily. Duck warns us that the full picture is far more complex, because the prohibition related only to *judicia secundum merum jus anglicum* (*op.cit.* p.325); it did not apply to the formation of jurists, who had great knowledge of civil law (such as Bracton, Glanvill, Lovell, Mansell); nor to the rules applicable to the "Supreme Chancery," in which, among others, Thomas Beckett had particularly distinguished himself; nor to the "*jus Admirallus*", that is the law practiced by the Admiralty Court, where in addition to Roman law, the constitutions (Consolato del Mare) of the towns of Rome, Pisa, Genoa, Messina, Marseilles and Barcelona were applied[11].

For many centuries, Roman law, with its principles, pervades English culture. The studies of the History of English Law are very well versed on the subject, and always have pleasant surprises in store for Continental jurists. Alberico Gentili, Regius Professor, dedicates the three books of his *De Iure Belli*, published in Hannover in 1612, to Robert Devereaux, Earl of Essex. In a passage from his third book, which is complemented by Roman quotations, by quotations from medieval legal literature, and from Latin literature which, together with Greek literature, make up the background of any jurist and of any cultured person, Gentili raises the question of the observance of pacts by the Regal Authority.[12] The principle *pacta*

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[11] *De Usu & Authoritate* (sic), op.cit., at p. 343

[12] *De Iure Belli*, op.cit., at p. 616

sunt servanda applies to Monarchs as well – he believes – and therefore the law common to everybody (he refers to the civil law, but the same applies to the common law) cannot be derogated from merely because one of the parties has a particular status. This is a teaching that expresses great courage and a deep sense of liberties: the relationship among parties, when it is founded on the basis of equality, cannot but produce equality of conditions. Different is the case of a privilege, that is the concession by the King of a right which one did not possess. A privilege may be revoked by the King but a pact may never be violated. It is for this reason (the example is fitting) that when the King of France wishes to break the covenants signed with the Genoese, he maintains that he had not signed *covenants,* but granted *privileges*. The qualification is all-important, because privileges could be freely revoked. This, however subject to the precept according to which such revocations, could not be arbitrarily exercised, but had to be grounded on *iusta causa*[13].

This osmosis between Roman law and local law continues for many centuries in England, and contributes to fuel, in the Continent, the idea of an English system with peculiar traits, different from the more uniform ones which can be traced in the Continental systems; of a complex of rules, principles, concepts which, not having its foundation in Justinian's *Corpus Juris*, appears splintered, flexible, changeable, intricate, totally unintelligible to the layman and not very clear to the jurists themselves. These stereotypes are passed down through the ages and, as we shall see, are still deep-rooted in 19th century Continental Europe. Yet they do not stifle the curiosity of Continental jurists towards the common law, or, rather, towards the English system considered in all its facets and components, which nowadays, utilising the accepted categories, we can refer to in terms of constitutional law, administrative law, criminal law and "private" law.

3. The translations of the nineteenth century and the circulation of liberal ideas

Already during the first decades of the nineteenth century there appear, in Italian literature, studies and reviews that take English

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[13] *De Iure Belli*, op.cit., at p. 626

thinking and contributions to European legal culture into account. The era of translations – a period which extends from the beginning of the nineteenth century to the beginning of the twentieth – offers a delightful landscape for those interested in understanding how cultural models are circulated; how the image of foreign legal systems is constructed; how the techniques for the solution of problems which are by and large common to all the experiences of Western Europe are proposed[14]. Those who believe that England's geographical distance and natural isolation may have prevented, or at least limited, the contacts between our two worlds, will be surprised.

Of the thousands of translations of foreign legal works prepared by lawyers and professors in the different Italian States, and subsequently in unified Italy (political unification dates back to 1861, legal unification to 1865), the prize goes to the clear, lively geometrical books of our French cousins and to the weighty, thought out, architectonic tomes of esteemed German colleagues. But the translations of English books are also significant. Translations are a reliable gauge of the tastes, of the exigencies, of the curiosities of the readers. At that time, there existed a selected, restricted, homogeneous readership. In the nineteenth century a very modest percentage of Italians could read and write fluently and had the requisites to exercise active voting rights. Apart from *rentiers*, the higher social classes were engaged in the liberal professions, and therefore consisted of lawyers, doctors, engineers, University Professors, industrialists, bankers, high-ranking merchants – all these subjects made up a homogeneous cultural *milieu*, fairly uniform also from a political point of view, most of them professing liberal ideas, but also with a strong Catholic background. The works coming from England besides being formative readings, were also useful for professional practice.

However, let us proceed in an orderly manner. The researches of legal historians provide us with interesting data in this respect. It appears, in fact, that over the entire nineteenth century, translations of French books number more than a thousand; those of German books are slightly less than half that number, and that those of

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[14] Alpa, *La cultura delle regole. Storia del diritto civile italiano* (Roma-Bari, Laterza, 2000)

English books are 160: a fifth of the former and a third of the latter. I believe this to be an extraordinary result, bearing in mind that French was the language spoken by the cultured classes, in some regions even prevailing over Italian; and moreover taking into account the fact that the distance between the two systems, by structure, by institutions and in vocabulary was considered astronomical.

The places of more frequent publishing also represent clues not to be ignored. They correspond to the great capital cities: in decreasing order, by number of publications, we find Turin, for more than a third, Milan, for one fifth, Florence, Naples and Rome for the remaining part. The years of publication also provide an interesting clue. In Turin, translations from English are prevalent in the period prior to national unification, i.e. in the years during which the Savoy State aims to assume the leadership of the peninsula. These are the golden years of the Count of Cavour (1851 – 1855) a great admirer of British political institutions (besides British farming techniques). There is a second flourishing of translations towards the latter part of the century, when Turin provides a now united Italy with its free, open and combative spirit, sensitive to class struggles and to the social effects of the industrialisation of the country. In Naples, instead, translations cover the years that precede Garibaldi's venture, sustained by Piedmont and by British capital. In Milan – until 1859 an Austrian province – they appear only in the years following the unification of Italy and in Florence, in the years of consolidation of the new powers (1871 – 1875).

What could English literature offer the lawyer, the judge, the notary, the university professor, the *literato*? Prior to political union, and then up to the end of the nineteenth century, the boundaries of law, as a science and discipline, were quite blurred, and therefore we can also include in our list, books of a political and philosophical content, which certainly prevail over books of a strictly legal content. The matters dealt with regard the organisation of power, the distribution of property, the placing of individuals in their social contexts. The British contribution to the construction of the foundational values of Italian culture is varied and vast. Public law is intermingled with political philosophy and with universal values, and hence proceeds at full speed towards economics and sociology; criminal law goes alongside psychology and anthropology. At the beginning of the nineteenth century, the books on the idea of the republic and on morals by David Hume and John Locke, those on

aphorisms by John Harrington, on social organisation by John Brown, on civil society by Richard Price and Adam Ferguson, are published.

Translations, obviously, do not exhaust the cultural horizons of jurists. Locke's thinking had been introduced in France with the translations of 1724, and was also known through the works of Rousseau, especially the "Social Contract", which had been disseminated in Italy by Cesare Beccaria and Pietro Verri at the end of the eighteenth century. Thomas More's *Utopia* is translated in Milan in 1821; Francis Bacon's *Universal Law* in Turin in 1824; James Mill's *Political Economy* in Naples in 1826. Again Bacon, this time alongside André Marie (nick-named Aîné) Dupin, in Naples in 1831. In those same years, Dupin had edited a very popular manual for law students and young lawyers, which was to become an instrument for the bridging of ideas with foreign cultures.[15] In the Neapolitan edition of Bacon, the translator inserted the *Aphorisms* and excerpts of *De Dignitate et Augmentis Scientiarum*. *The principles of political economy* by William Nassau Senior, derived from his lectures at Oxford University, are rendered in Italian by the translator of James Mill in Lugano, in 1836.

James Mill, alongside Jean Sismondi, is one of the authors who are most representative of the political unrest which flares up in Milan in 1848. Borroni and Scotti's "Tipografia Patriottica" (Patriotic Press), with headquarters in Lugano, publishes his work on reality as opposed to utopia. Lugano was home to the refugees from Lombardy, under Austrian domination at the time, who professed ideas of liberty, universal suffrage, struggle against tyranny. At the end of the century it would be a haven to anarchist exiles. As regards Richard Phillips, our interest lies in his work on *Jury* (Florence, 1849); as regards Lord Henry Peter Brougham, his *Political Philosophy* (Florence, 1850); and lastly, by John Stuart Mill, the *Principles of Political Economy* (Turin, 1851). The publisher who secured the right to print the book, Pomba (who will subsequently adopt the acronym U.T.E. and thus the current UTET), inaugurates a series of books that is still renowned nowadays for its prestige. In the same year, he publishes the translation of Adam Smith's *Inquiry*,

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[15] About Dupin's contribution to the creation of the Italian legal culture see Alpa, *La cultura delle regole*, cit.(n.14)

already translated into Italian in Naples, in 1790. A few years later, in the same collection, Bentham's manual of political economy (1854), the principles of Malthus, and the works of James Mill, Scrope, Ricardo, Wately and Dupont-White appear. These represent a healthy injection of utilitarianism and individualism, which serve a dual purpose: to reinforce individual rights against an obtuse and tyrannical authority, and to limit the interference of the community in personal choices. The incipient capitalism (subsequently developing at the end of the century in its expression of brutal exploitation of the workforce) needed this nourishment. Even this aspect denotes the natural traits of common law which, as Bertrand Russell teaches, materialises in the dialectical relationship between "Authority and the individual"[16].

Neither is there lack of interest, for the history of The British Constitution by Henry Hallam (Turin, 1854). Whilst in the Neapolitan State, the studies on the interpretation of the law, and in particular the works of Bacon, are highly appreciated, Bacon's "*Aphorisms*" are greatly successful everywhere and are published again in Urbino, in 1855. Sir William Blackstone is admired for his works on the penal code, translated in Milan, in 1813.

Only private law, Roman in its roots, French in its codified structure, and then German in its conceptual framework, shows a terrain which is ploughed, but with very strict boundaries, apparently impervious to the influence of common law. Yet it is not rash to believe that the views of Blackstone on common law, even though not frequently quoted in Italian literature of the nineteenth century, were known to Italian jurists. In Paris, in fact, the translation of his *Commentaries* appears in 1822, in its fifteenth edition. In 1776, four years before the author's death, a French version had already been published in Brussels, made on the fourth English edition. This was followed by another version in 1801. The reasons for this cultural exchange are explained in great detail by Counsellor Compré: the development of trade between France and Britain, cultural, scientific and industrial exchanges; family relations and friendships; and contractual relations, in addition to successions, are a powerful incentive to bring the two worlds closer together.

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[16] Russell, *Autorità e individuo* (Milano, Longanesi), 1962

Notwithstanding all this, what is mostly underlined are the divergences rather than the convergences; the French system (interchangeable at the time with that of the pre-Unification Italian States) and the English system seem to rotate around distant orbits, as if they were planets never bound to meet, but which only occasionally come face to face.

4. Blackstone's systematic operation

In France, custom is replaced by codes, whereas in England we have general and local customs, the rules of Roman law and canon law, acts of Parliament and of the Monarch and lastly the decisions emanated by judges from time immemorial, gathered in voluminous collections in which legal writers and magistrates put forward their respective opinions. There, against the backdrop of this mass of legislative material, difficult to decipher for the common lawyer, and even more so for the civilian, stands Blackstone's work, remarkable, says the translator, because in his clarity Blackstone illustrates the history of the laws of his country, their evolution and their criticism. While appreciating Blackstone's effort in the systematic reconstruction of the subject matter, the translator and the commentator (Christian), are not too indulgent with the object of the work. They preserve their respect for English public law, for that unwritten Constitution which traces its roots way back to medieval times, and makes it probably the best Constitution among those existing at the time. This can be easily understood, since in 1822 there were very few liberal constitutions which had managed to survive the anti-Napoleonic reaction. By contrast, the continental commentators reserve lesser praises for the pages on "private law", indeed they believe that the latter is certainly not worthy of the same consideration.

It is difficult to ascertain whether the scant interest shown by translators towards private law as reconstructed by Blackstone is due to the conviction that the common law regarding relations between individuals is something different from continental private law, which therefore there was no point in discussing, or due to the acknowledgment that its evolution had led to the stratification of a medieval and mercantile law as categorised different from the continental ones. Yet Blackstone's systematic order follows closely

that of Justinian's Institutions.[17] The roots of Blackstone's thinking, the richness of values which it incorporates, and the profound culture which emanates from his pages emerge from his work according to an order not only quite familiar to continental jurists, but even structural to their culture. In the syllabuses laid down by Napoleon for the students of the Lyceums and Universities of the Kingdom of Italy (1806), Roman law and its sources, were in fact a compulsory subject, and the *Code Civil* was commented with references to Roman law[18].

One of the reasons behind the lack of interest in English common law, at the beginning of the nineteenth century, may be attributed to the image of their own law which English legal writers themselves projected overseas. A review published in Naples at the beginning of the century (*Il Giurista. Giornale di legislazione e giurisprudenza – The Jurist. Journal of Legislation and Jurisprudence*) contains several precious essays which document the construction of the idea of common law which was rooted in Italy. An article by Rathery, published in issue N. 25 of the 4th September, 1836 deals with the "*study of law and the advocate's profession in England.*" It contains a comprehensive and concise outline of the history of English law, from the Middle Ages to the beginning of the nineteenth century, an analysis of the legal profession, including the role of the Inns of Court; and a concise description of the methods of teaching of the law. The picture is drawn in grim and sarcastic terms. The foreword to the article is significant, in that the author immediately warns the readers from making blunders or harbouring false expectations. He sets off from a drastic assumption: "*Let us say it out loud: the French can be rightly proud when they compare the magnificent monument of their codes with the intricate labyrinth of English laws. Except as regards certain issues on the subject of criminal procedure, we have nothing to envy our neighbours in this respect*". Following

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[17] The discussion is open: see Kennedy, "The Structure of Blackstone's Commentaries", in Hutchinson (ed.), *Critical Legal Studies* (Totowa,N.J, Rowman & Littlefield Publ.Inc.), 1989, at p. 139 ff. and (from an opposite viewpoint) Watson, *Roman Law &Comparative Law*, cit. (n.5), at p.166 ff.; and also Boorstin, *The Mysterious Science of Law, An Essay on Blackstone's Commentaries* (Chicago and London, 1941-1996).

[18] Alpa, La cultura delle regole, cit. (n.14)

this, he recalls Hale's assumption that the source of common law "*is as difficult to trace as that of the Nile.*" He contrasts statute law with common law, and regrets that a "*science of the law*" has never developed in England. However, not every aspect of the common law is to be depreciated. What can be saved is due to: "*the spirit of practical wisdom that the English nation possesses so pre-eminently, corrects the flaws of a literal interpretation of the law, and sometimes the sublime intent of its judges makes up for the inadequacies of the law*".

Even the English judicial system falls under the commentators' axe. An article published anonymously in issue n. 29 of the 18th February, 1837 on "*judicial centralization in England*", criticizes the number of cases pending before the Courts of Westminster, and lists the frustrated attempts to introduce a legislative reform of the system. The "*Insolvency Court*", set up in 1813 in the 53rd year of the reign of George III is also subjected to criticism in another anonymous article published in the same year. On the other hand, the rules on *defamation* and the organization of the penal colonies meet with great favour, as can be seen from the articles published on several occasions in the Neapolitan review in 1836 and 1838. In other words, what is appreciated in British culture is what is akin to the continental mentality. I believe that this is one of the many reasons why Jeremy Bentham is greeted with such favour among the continental jurists, and in Italy in particular.

5. Bentham and the codification of law

A curious destiny was Bentham's, – to be criticized at home and appreciated on the continent. So much so, that his works are dissected, published in parts and extracts. His work on civil and criminal legislation is translated into Italian from the French text edited by Etienne Dumont, from Geneva, on the basis of the manuscripts entrusted to him by the author. Naples is the first Italian town to bestow this honour upon him. The year is 1818. Again in Naples, two years later, his works on parliament and on political sophisms are published from the French edition, and in Forlì in 1830 his writings on codes are published. Other editions are printed elsewhere in Italy, such as in Venice in 1836. Bentham's volume on the theory of judicial evidence is printed in Bergamo, in 1824 and 1837, and in Brussels, in Italian, in 1842 and 1843.

Bentham's opinion on codes was of particular interest for Italian

jurists, particularly to those who lived and worked in the States in which the option of codification had not yet been effected. The discussion centred on whether it was preferable to align with the codifications of the Kingdom of the Two Sicilies, of the Duchy of Parma, and of the Sardinian-Piedmontese Kingdom, or if it was more appropriate to maintain the traditional sources, which were applied. In the Grand Duchy of Tuscany, the sources brought by tradition were in force. I believe this was the reason which led the Grand-ducal Press in Florence to print Bentham's pages on the compilation of codes. In Florence, in those years, a treatise on civil law was written by a brilliant and acute legal writer, Enrico Forti, who was an admirer of conceptually systemized law, but opposed to codification. Those were the years in which the debate between Savigny and Thibaut on codification was closely followed in Italy and its echoes were not yet subdued. It was an ancient debate, which in Italian culture was rooted in Enlightenment thinking. Ludovico Antonio Muratori, in describing the failings of case law, had already brought to light how the resolution of disputes by recourse to the opinions of legal writers, to methodological fashions (the *mos italicus* was prevailing at the time), to the contradictions of precedents, led to uncertainty on the application of legal rules and scant reliance on the part of the public on the work of lawyers and judges. But was it possible to renounce to tradition and change direction? Had the Italian States which had opted for codification simply imitated the *Code Napoléon*, or were they convinced of the political reasons underlying codification?

Bentham's thinking as set out in *Law and Legislation* is crystal clear: the law must be made known to all those who have the power to preserve and apply it; for the part which relates to them to those who must obey it. For Bentham the order of exposition is the *natural* order, (it does not coincide with that of Domat since it has nothing of the superhuman). The natural order is the practical order as imposed by utility. In addition to the rules to be followed for the drafting of a penal code, Bentham also dictates the rules for civil codification, thereby arranging in sequence, things, places, times, services, obligations, rights, contracts, persons capable of acquiring, and so forth. The conclusions of his work are touching; because in their clarity they condense the dictates of a legal positivism that was well before its time, and precisely for this reason they are avant-garde and genial: the composition of a "corpus juris" must be

characterized by *purity*. Laws must be cleansed of any extraneous element, to be fully able to express the *intention of the legislator*. "*Leges non decet esse disputantes sed iubentes*", was Bacon's saying, and Bentham adds: *et docentes*.

This is a courageous and innovative approach (for an Englishman), similar to that of Beccaria. Bentham does not appreciate the Codex Fredericianus prepared by Coccejus because it exalts uncertainty and the triumph of legal scholars, but weakens the resolution of disputes. One cannot transform the intention of the legislator into the intention of others – he cautions -, one cannot think of a natural law which remains obscure, one cannot put veils over the intention of the *positive legislator*. We must not do as the Romans did for the sole sake of copying them; "*la grande utilité d'un corps de droit c'est de faire oublier le debats des jurisconsultes et les mauvaises lois des temps anterieurs*". Clarity and brevity must be the features of the law. The law must not lend itself to differing and conflicting interpretations; its clarity depends on logic and grammar. Brevity is essential so as not to lose sight of the purpose of the law, as is the case (says Bentham) with English statutes. Bentham's recommendations go well beyond a political evaluation of the procedures for the creation of rules. He also deals with enviable competence, with drafting, offering suggestions that even nowadays maintain their effectiveness. In Bentham's convincing reasoning, there is the pattern of a complete and precise legislative programme. Legislators must use terms with which the people are familiar; technical terms must be defined; definitions must be written using common expressions; and these expressions must always be used with the same meaning.

It is sad to realize that these words of warning have been thrown to the wind. Only Eugen Huber, the Swiss legislator, tried to put them into practice. But in the other systems the growing complexity of legal science and technique have rendered them useless. Only now that we are faced with the harmonisation of the rules of private law in the EU context, do we realise that uniform terminology and definitions are the only means to give actual binding force and greater certainty to regulations.

Bentham the empiricist, the practical man, the astute politicián fought against the concept of law as a science. Not, I believe, due to a particular aversion to robes, or to knowledge *per se*, but for fear of the perversions of the purposes of the law which may come from professors who comment on laws, from compilers of glossaries who

obscure their meaning, from petty litigators who fill them with useless quibbles. It was an ideal model – perhaps unattainable in practice – but it is precisely these models which the legislator needs, as does the legal scholar in general, to orient his work. The illusion that the legislator does not require a medium to reach the people is reflected in the irrepressible need for a technical exactitude which distances the language of the law from the commonly spoken language in such a way that the ordinary interpretation of the text is thereby frustrated.

6. John Stuart Mill and Herbert Spencer at the time of the industrialization of the country

John Stuart Mill too has a prominent place in any Italian lawyer's library.[19] Interest in Mill grows after the unification of Italy. In Turin his works on political representation; on the interference of the State in the Church's properties and institutions; on liberties and on utilitarianism are widely circulated. The translations are edited by lawyers, a sign not only of an ongoing cultural (whether legal or otherwise) exchange, but also of the liveliness and versatility of the profession (the "corporation" as it would have been known at the time) which, together with that of doctors, constituted, for the entire century and beyond, the main framework of the country's ruling class. These works accompany those on economics, which helped build the Italian economic thinking of the time. It is not by chance that in 1905 it is Luigi Einaudi himself, the great economist, later to become Governor of the Bank of Italy and subsequently, after World War II, the first President of the Italian Republic, who translates Bagehot's work on the government's monetary policy and on the role of the Bank of England.[20] Bagehot's book has a sub-title that illustrates its contents. The work deals with the British monetary market, but the title is highly evocative for Italians, because it recalls the trade and entrepreneurship of the medieval merchants who used to have their places of business in "Lombard Street".

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[19] See Ripoli, *Itinerari della felicità. La filosofia giuspolitica di Jeremy Bentham, James Mill, John Stuart Mill* (Torino, Giappichelli, 2001).

[20] Bagehot, *Lombard Street* (Torino, Utet, 1905).

Industrialisation and trade make great strides forward in Italy, so there also arises the need for works of a practical nature. In this regard, reference is made to manuals on English maritime cases (by William A. Oliver, in Leghorn, 1872); on the theory and practice of banks by H. D. Macleod (in Turin, 1879); on Company law (Bruce, Bologna, 1896), as well as a collection of model letters of correspondence and sample contracts, such as those proposed by Hugh Darley (Naples, 1863), and manuals on copyright with the relative international agreements, such as the one by Hawkridge (Rome, 1884). In the same period, Herbert Spencer raises great interest: his sociological philosophy, very close to reality, his analysis of social needs, of household and ceremonial institutions constitute one of the pillars of the new concept of social sciences that sweeps the country, and therefore of the renewal, also from the point of view of methodology, of legal studies. Socialism advances, together with the affirmation of women's rights. Workers' rights and labour law are studied thanks to Th. W. Thorton's book (Florence, 1875).

7. British political liberties and hospitality

There are also translations of works on the Church of Rome and the Anglican Church. This too is a sign of the absence of prejudices, indeed of the quest for knowledge on the part of Italian scholars. Britain is thus considered as the home of liberty, of freedom of opinion and freedom of criticism. In fact, it is precisely through the works of British authors (including Gladstone) that the Italians – still living in an environment marked by Napoleonic influences – are anxious to discover, what is said and done across the Channel. After unification, Italians are keen to learn what Britain thinks of the Church and of the Papacy. These are the anxieties of a culture that wishes to preserve its secular features, which longs for the free circulation of ideas, which sees in comparative studies and in the contributions of foreign scholars the way towards maturity, not an escape from reality.

It is no coincidence that London is the place where many of the "Founding Fathers" of the Italian State sought refuge – those lawyers or doctors, "carbonari", free-masons and free thinkers who had fought against the obscurantism and tyranny of the post-Napoleonic monarchs, and had established the foundations of a new society, not

only from a political, but also from an economic and social point of view. Giuseppe Mazzini was amongst them. This movement was not new, as shown by the personal history of Alberico Gentili, who sought refuge with his brother in England, in order to escape from religious persecution, and here, after laying the foundations of international law, ahead of the more famous Grotius, he offered his services as Crown Counsel to Queen Elizabeth I. Alberico Gentili was remembered by Thomas Erskine Holland in his inaugural lecture at All Souls College on the 7th November, 1874, as recalled in the translation of the lecture made ten years later by Aurelio Saffi in Rome. Saffi too was a patriot, a follower of Mazzini, who graduated in Ferrara in 1841. Being based in the Church Dominions, his aspirations to civil liberties had been frustrated by the disappointing policy of Pius IX. He had actively participated in the Roman revolution of 1849, had become a member of the triumvirate of the Roman Republic and, after its collapse, had sought refuge in England where, having married a Scottish lady, he had lived for a time, teaching Italian literature at Oxford University.

The role of British political science and public law (equally appreciated were the works of criminal law and forensic medicine, on which I shall not dwell) is underlined also by the interest raised by the country's Constitution. This is witnessed, among others, by the volume by Thomas Erskine May on democracy in Europe, published in UTET's precious collection, in Turin, in 1884. The idea of Europe is already circulating at that time; it circulates also thanks to the historical studies on medieval Europe by Henry Hallam and William Smith (Florence, 1874). The British Government and Parliament are well-known through the works of Charles Knight (Milan, 1869), Henry Latchford (Milan, 1885, Naples, 1885), George Lewis Cornerwall (Turin 1886), Alpheus Todd (Turin, 1886). Even the text that carries the reform of the regulations of the House of Commons is translated (May and Reynärt, Turin, 1888).

The dialogue is very close between intellectuals on both sides of the Channel. Count Andrea Finocchietti, a Senator of the Realm, translates the work on Giambattista Vico by Robert Flint, Professor at Edinburgh University (Florence, 1888). The major Italian scholar of public law at the end of the century, Vittorio Emanuele Orlando, edits the translation of the work by Francis Montague on the limits to individual freedom (Turin, 1890).

8. Pollock, Maine and Holmes's contribution

At the end of the nineteenth century an eclectic fervour characterises Italian legal culture. The French model: descriptive, linear and tied to the interpretation of the *Code Civil* no longer satisfies the Italian legal scholars' needs. Alongside the enormous dogmatic construction of the Pandectists, which pervades in full pomp the treatises and training manuals of students and lawyers, there are studies by those who believe that law is a social science, and that it therefore cannot exclude economics, sociology and anthropology. Two opposing concepts of the law square up face to face: one is based on the geometric purity of the system, the other on the practical function of the rules and their social effects. Hence the interest in the method for the study of law.[21] The two schools of thought confront each other but manage to set up a debating relationship.

One of the most important reviews of the time, the "Archivio giuridico – The legal archive", published in Pisa under the editorship of a master of Roman law and a supporter of the Pandectist school in Italy, does not hesitate to publish texts inspired by the opposite school of thought. In the collection of 1886, the "Archivio giuridico" carries a long article by Frederick Pollock on the "methods of jurisprudence" (*jurisprudentia, Rechtwissenschaft*). This is the inaugural lecture given at the University Conference in London on the 31st October, 1882. Again the translation is edited by a lawyer, Salvatore Sacerdote. Pollock expresses a modern concept of the law, which should be considered as a *science* and as an *art*. The legal scholar's is a multiform art:

> *"as a consultant he is called upon to form a concept on the legal effects of the facts placed before him; as a lawyer, to present in the most effective and persuasive manner the points in the case which are more favourable to the interests of his client; as a writer, to express in adequate and sufficient words the intentions of the parties who consult him".*

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[21] Alpa, La cultura delle regole, *op. cit.* (n.14)

But precisely because it is a science and an art, the terms and concepts which the lawyer uses are technical and practical terms. "*English lawyers* – observes Pollock – *for a variety of reasons anxiously avoid verbal definitions*". But there is more. In the lecture, he explains the salient features of the English model, which differs from the continental method. It is immediately clear that the comparison between the English method and the continental one must be placed in historical perspective. As the geometric and ideal study of Pandects was prevailing at the time, Pollock emphasizes the differences rather than bringing to light the similarities. It is not only the terminology which strikes the observer of the two worlds: "*there is a radical difference of concept and development.*" This difference lies in a basic legal concept, that is, the concept of "*just and unjust*". We almost seem to hear the echo of Fortescue's words, which we referred to at the beginning of this article. To understand the differences, Pollock appeals to history and logic. History teaches us that whilst the aspiration to ideal laws is one thing, quite another is the analysis of positive law. "*Ethical Jurisprudence*", however necessary, crosses into metaphysics, into *Naturrecht*, which is totally alien to the British mentality. The British concept of law concerns: "*something to be achieved, or to be approached as closely as possible in a current State for the modern citizens by the effective promulgation of legislation.*" Rules are formed through the decisions of the courts and through the principles and practices of Chancery. But what most brings out the spirit of English law is legal practice. This, according to Pollock, is the reason why Bentham and Austin's model was unsuccessful. At the same time, he heartily promotes the study of comparative law, because both the knowledge of Roman law, and the knowledge of civil law, are useful for the lawyer's formation. He is convinced that comparative studies and critique will improve the standard of English lawyers, who should behave like "*prudent travellers*", who never follow all the winding bends of the roads, nor do they cut across unknown ground, in order to avoid being confronted with impassable precipices.

The appeal to history and anthropology is the impressive and intriguing message of Henry Sumner Maine. *Ancient Law* is a successful book in Italy as well, because it shows how rules of law are not the creation of an ideal mind, but rather are rooted in the culture of a people, in tradition; in the behavioural models spontaneously observed. The American Oliver Wendell Holmes also

earns the public's favour. His *Common Law*, as with Bentham, is translated wholly, then fragmented and published in extracts, in chapters, by topics. Again in "*Archivio giuridico*", in 1889, the chapter on the "*primitive forms of responsibilities*" is published, translated by the lawyer Francesco Lambertenghi. This is an accurate reconstruction of the rules of civil liability, which sets out from Moses's law, to pass on to Greek law, to Roman law, to Germanic and Anglo-Saxon law, finally ending with English common law.

9. The Law of Commerce and of the Sea

Even commercial law and maritime law are marked by the important influence of the English experience. One of the founders of modern Commercial law, Cesare Vivante, in addition to German jurists such as Goldschmidt and French jurists such as Lyon-Caen and Renault, includes among the major references in his Treatise on Commercial Law published in 1893, also the work of John William Smith, *A compendium of mercantile law*, in the tenth edition, published in London in 1890. Thanks to the *lex mercatoria*, there emerges the legal figure of the merchant. The rules followed by merchants are transformed from subjective law to objective law, on the basis of the fiction that "*anyone should be held to be a merchant when instituting proceedings for a commercial affair.*"[22] Vivante avails himself of Smith's opinion, in addition to those of authors from older times, such as Stracchia and Ansaldo, to document this important landmark in the world of law. It is, in fact, the quotation of Smith's opinion that consolidates his conviction, where he underlines that when *lex mercatoria* ceased to be a separate branch of the law applicable to a single class of persons, whoever made any transaction regulated by that same law was held to be a merchant *quoad* such transaction.[23]

On the continent, this approach was codified, that is, it was transformed into an enforceable general rule. But also in the English experience the *lex mercatoria* – in relation to acts of trade – is made

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[22] Vivante, *Trattato di diritto commerciale* (Torino, Fratelli Bocca editori, 1902) 2nd ed., vol.I, at p.6

[23] Vivante, *op.loc.cit.(n.22)* at p.7

mandatory for all. Smith himself underlines how at the end of the nineteenth century mercantile customs were incorporated into the common law, and had become mandatory for all citizens, whether they be merchants or not.[24] However, this initial unity does not imply an identity of systems. Vivante highlights the different concepts of mercantile law in continental Europe and in England. In the continental systems, there is a tendency to build a system of commercial law separate from the general system of civil law, whilst in English law there are no general theories of commercial obligations, because these are subject to the principles of common law.

Learned and innovative, Vivante extends his analysis to the main models of comparative studies, including the English experience. Among the sources of his studies, he lists both the principles deriving from the common law and the institutes regulated by statute law. Again availing himself of Smith's work, he lists the laws of major interest to the scholar and the lawyer who practice commercial law. He therefore, reviews the Bankruptcy Act of 1883 and its subsequent amendments, translated into Italian by two of the major scholars of the time, Bensa (*Legge sui fallimenti*, Genoa, 1882) and Sacerdote (*Rassegna di diritto commerciale* – Commercial law Review, Vol II); the Bills of Exchange Act of 1882, translated again by Sacerdote (*Review*, Vol. I); the Sale of Goods Act of 1893, the Merchant Shipping Act of 1894; the legislation on commercial companies, the comments on the *Zeitschrift fuer das gesammte Handelsrecht*, of 1901, (Vol. L, p. 526.) and more. Included in the foreign literature taken into consideration for his Treatise on commercial law, precisely by virtue of the conceptual unity of commercial law and private law, absorbed in the common law, Vivante mentions the works of Anson (*Principles of the English law of contract and agency*, Oxford, 1888), of Pollock (*Principles of contract*, London, 1889), of Duncan (*The annual review of mercantile cases*, from 1886), in addition to works by foreign authors published in French, such as those by Colfavru (*Le droit commercial de la France et de l'Angleterre*, Paris, 1863) and by Lehr (*Elements de droit civil anglais*, Paris, 1885).

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[24] Vivante, *op.loc.cit.*, at p. 11

The same considerations are made when analysing the institutes and terminology of maritime law, in which we find roots from Roman law, the framework of French law (*the Ordonnace de la marine* of 1681), the collection of usages, laws and instructions of the *Consolato del mare*, in which pre-eminent are the Genoese Targa (*Ponderazioni sopra la contrattatione marittima* – Ponderings over maritime dealings, 1682) and Casaregi (see the 1707 edition of the *Discursus legales de commercio*), and "evidence" of the English experience, such as *utmost despatch, despatch money, mortgage, detention*, etc.

10. Roman law and private law

The British contribution to the formation of the law and the circulation of ideas in Italy does not stop here. To return to the legal works closest to our subject, it may be surprising how in the nineteenth century, there already emerges the refinement and the reliability of the studies on Roman law conducted in Britain. Studies that are all the more remarkable precisely because they were so greatly appreciated in the home country of Roman law. At the beginning of the century, the book by Alexander Adam on Roman antiquities and civilisation is translated (Naples, 1820). The book is a great success, and is re-printed several timės. At the end of the century, in their fervour over the dogmatic works on Pandects, even scholars who are most receptive to the German doctrine do not hesitate to lend their talent to the translation of an introduction to the study of Justinian's law by Henry John Roby (Florence, 1886). Two of the major scholars of civil law and Roman law, Pietro Cogliolo and Giovanni Pacchioni, are called upon to accomplish the task. Cogliolo again, writes the foreword to the translation of the book on the Twelve Tables by Frederick Goodwin, and the foreword to the translation of the book by James Muirhead on the history of Roman law (Milan, 1888). Italian advocates are interested in the law of property in England, translating the work by Joshua Williams, of Lincoln's Inn (Florence, 1873); they are interested in marriage and divorce, thanks to the writings of William Harris (Milan, 1885) and of Edward B. Taylor (Florence, 1889), and then the unification of the laws on Bills of Exchange, thanks to J. D. Wilson (Turin, 1888).

On the other hand, John Austin remains, unknown in Italy. His contribution has become appreciated only recently, (a few decades ago), when his intelligence, his modernity in conceiving the law and

the method for studying it become, so to speak, a "literary case". His exclusion is due to two main factors: the aversion with which his lectures were greeted in Britain; and the fact that their publication, by his wife, at the beginning of the 1860's occurred at a time in which legal scholars were distracted by other problems. In Italy it is the time of unified codification and of social unrest; in Britain, the practical concept of law is far removed from the speculations of jurisprudence, as Pollock was keen to point out.

The works of British scholars, read in the original language, or learned through translated versions and discussions in France and Germany, or translated into Italian, leave deep marks in the formation of Italy's legal culture for the whole of the nineteenth century, and move beyond the restricted circle of intellectually inquisitive persons, to enter manuals, treatises, and other miscellaneous works. We have already looked at Vivante's *Trattato*. But it is worthwhile to look at other examples. Pietro Cogliolo, in his "*Filosofia del Diritto Privato* – Philosophy of Private Law[25] quotes amply from Mill, Darwin, Spencer and Maine. Of the English method, he praises the interpretation of facts, the legal institutions based on reality; the aversion to concepts formulated "*a priori*". In the British concept which he outlines, the law is a *social phenomenon,* which requires a flexible and changeable structure. Instead "*codes stand still, while life moves on,*"[26] almost as if he wanted to say that codes bridle reality, instead of supporting its evolution. He depicts the English system based on the precedents of court decisions as "*a sort of code under another form.*"

However, the interest in the English model is not only due to the longing for techniques and solutions to new or hitherto unknown problems. It is also determined by the awareness of many that codification, though appreciated, must not constitute an obstacle when comparing problems and their solutions, or alternative ways of producing laws. At the beginning of the twentieth century, Biagio Brugi recalls the controversy on codification; he recalls Meijer's observations[27] and underlines how codes have, first of all, a political

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[25] Cogliolo, *Filosofia del diritto privato* (Firenze, Barbera, 1891), at p. 18

[26] Cogliolo, *Filosofia del diritto privato,* cit. (n.25), at p. 65

[27] Meijer, *De la codification en générale* (Amsterdam and London, 1830)

value (the Code Napoléon is the triumph of the French people, the Italian code is the symbol of the country's unity), and that it is wrong to consider codes as durable, necessarily perfect monuments. Codes cannot be completely systematic, because *"systematic unity is in the mind of the legal scholar"*. He adds: *"if codes should become in future a repertoire of general principles surrounding each legal relation, it might be more worthwhile to leave them placed in a scientific manual"*[28].

Through the analysis, even though fragmentary and unsystematic, of the contacts between the two cultures, we perceive that in the ever increasing manner of approaching, of getting to know each other, studying in detail issues and problems throughout the nineteenth, and at the beginning of the twentieth century, the cruxes and nerve centres of the law flow through Italian books and the translations into Italian. These comprise: the definition of the law, its attitudes, its manifestations, its fictions, its imitations, its evolution, its progress and its withdrawal, the phases or sectors more sensitive to social issues and the phases of its indifference to all that is meta-legal.

To conclude on this point, almost all of the books translated from English deal with works relating to public law, not private law. It is clear that the rules of common law are viewed, by those who have the good fortune or the opportunity of getting to know them, as belonging to an "other" model, different, non-repeatable and non-transplantable. But it is also common opinion that *"England and France did not lay great stock on the philosophy of private law, but rather developed the doctrine of public law."*[29] Ahrens – whose book is also very widely read in Italy – is a conservative who sometimes borders on the reactionary, as when he cautions his readers against the pages of Locke, Smith and Bentham, whom he consider too liberal and egalitarian. Even though acknowledging a debt of gratitude towards Bentham for having drawn attention to man's needs,[30] Ahrens puts forward a concept of the law which is not based on reality, but on *reason*, *"the divine light which enlightens every man*

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[28] Brugi, *Introduzione enciclopedica alle scienze giuridiche* (Milano, 4th ed., 1907)

[29] Ahrens, *Corso di diritto naturale* (Milano, 1857), at p. 64

[30] Ahrens, op.cit., *(n.29)*, at p. 68

who is born into this world". Therefore, he is indulgent with the differences of nature and critical towards those who would abolish them too light-heartedly. As for the relationship between individuals, he opposes Bentham's theory[31] according to which a contract should be complied with for utilitarian, and therefore moral, reasons. His reply to the question: "*which grounds has the principle "pacta sunt servanda?*" is that it has legal content: the observance of the bond is the *condition* for pursuing the purpose which the parties have resolved to pursue.[32]

On the subject of contracts Ahrens's social conscience urges him to affirm two modern principles that clash with Bentham's *laissez-faire* position and respond to exigencies of justice and reasonableness nowadays – *but only nowadays* – shared by legal writers. On the subject of monetary interest, criticizing Bentham's *laissez-faire* position as expressed in the latter's work, *Defence of usury* of 1787, Ahrens maintains that if natural law cannot deal with this subject, the State should attend to it instead. The State must intervene to fix a rate of interest in accordance with the teachings of economic science. As regards State intervention in the discipline of contracts, Ahrens believes that the State *must* intervene, "*establishing regulatory authorities to bring back within the limits of justice and reasonableness the demands that one party may make and which the other party may not be able to avoid.*" [33]

11. The cosmopolitanism of the first post-war period

English law becomes the constant point of reference in the cosmopolitan climate that spreads over Europe after World War I. One of the essays which is still read nowadays on the subject of common law is attributable to one of the past masters of Italian civil law, namely, Giacomo Venezian. In 1918 his *Studies on obligations*[34] were published posthumously in Rome. Contained

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[31] Ahrens, op.loc.cit., at p. 477

[32] Ahrens, op.loc.cit., at p. 478

[33] Ahrens, op.loc.cit.,at p. 488

[34] Now in Alpa and Bessone (eds.), *Causa e consideration* (1984, Cedam,Padova), at p. 27 ff.

therein is an elegant analysis of the concept of *causa*, the "heart", so to speak, of obligations and contracts. Venezian criticizes the concept of *causa* tied to the will of the individual, as put forward by the Pandectist school, and places it among the anthropological roots of any social aggregation. He avails himself of Spencer's studies; Spencer's criticism of Maine; and the works of Morgan and Mac Lennan, to demonstrate that it is the interest of the group that dominates the collective interest, and that it is the coordination of activities which renders the will of the individual worthy of protection. It is in the notion of *consideration*, as described in Pollock's masterpiece (*On Contract*), that Venezian finds the explanation of the reason for the binding nature of the promise. Thus we see how one of the classical institutions of the theory of obligations is emptied of the frills of German culture and filled with more plausible contents deriving from English culture.

This is not the only novelty of the landscape that opens up to our research. These are fruitful years, in which Italy looks to the English system as to a "corpus" of modern rules, which govern economic relations in a particularly effective way, or that offer instruments so far unknown to our experience. The task is taken on again by great scholars such as Ascarelli,[35] Sarfatti[36] and Grassetti.[37] Law reviews are once again the instruments for the circulation of ideas. Among the publications involved in the spreading of culture and techniques applied to the law, we find the *Rivista di diritto commerciale – Review of commercial law*, founded by Vivante at the beginning of the century, and, in particular, the *Annuario di diritto comparato – Yearbook of comparative law*, founded by Salvatore Galgano in 1925. Here we find not only bibliographical references and debates on individual aspects of English law, but also digests of case law, with the discussion of notable cases. P. H. Winfield

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[35] Ascarelli, "Il diritto comparato e lo studio del diritto anglo-amercano", *Annuario di diritto comparato*, 1930, at p. 493 ff.

[36] Sarfatti, *La nozione del torto nella dottrina e nella giurisprudenza inglese* (Milano, 1903); ID., "Il contratto nel diritto inglese", in *Rivista italiana per le scienze giuridiche*, 1912; ID., *Le obbligazioni nel diritto inglese* (Milano, 1924); ID., *Legislazione inglese sulle assicurazioni* (Roma, 1938)

[37] Grassetti, "Il trust nel diritto inglese", in *Rivista di diritto comparato*, 1936, 543

contributes regularly to the *Yearbook*, illustrating cases of conflict of laws, matrimonial law, law of contract and torts.

The case of Hirji Mulji v. Cheong Yue Steamship Co. Ltd. (L. R., 1926, A. C. 497) raises particular interest, as translated and commented by Mario Allara. It is one of the cases of *frustration* of the contract, determined by supervening circumstances outside the will of the parties which disrupt the economic transaction which the parties had set in place. The case is presented as similar to those, well known to the Italian experience, where the rule *pacta sunt servanda, rebus sic stantibus* is applied, drawn both from common law and from the German law of *Geschaeftsgrundlage*. Allara observes that the rule of *implied condition* as applied to war cases already exists in English maritime law in the area of contracts of carriage. Not to impose upon the parties the performance of an obligation which though still possible, has become exceedingly onerous, responds to a requirement of fairness, but also to the need for a rational treatment of the interests at stake. Here we find the difference in perspectives between English and Italian law. The English judge relies upon the fiction, openly admitted, of an interpretation of the contract which has the effect of introducing in the text a clause which the parties had never thought of, thereby permitting an objective appraisal of the situation. The legal fiction of *implied condition* does not depend on the intention of the parties at the time of entering into the contract, nor on their opinions, but on the occurrence of circumstances which prove that the event which caused the frustration of the contract is incompatible with the subsequent performance of the obligation envisaged in the contract itself. The Italian commentators – still enmeshed in the Pandectist theory of the will of the parties, and unaware of Venezian's warning – think in terms of the subjective evaluations of the parties and take refuge in the will of the parties: "*it is a problem of wills, that is the parties wanted the contract in relation to a state of affairs, that subsequently ceases to be due to supervening unforeseen circumstances*"[38].

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[38] Allara, op.loc.cit.,at p. 758. A complete discussion of these problems is offered by Bessone, *Adempimento e rischio contrattuale* (Milano, Giuffré, 1975)

History stands as witness to the success of the English perspective: objective, concrete, functional. With the end of the dogmatic approach, and having abandoned the patterns of the Pandectist theory, as centred on the will of the individual, even Italian judges, on the basis of more modern legal thinking, came to follow the reasoning of English judges and in the end it was accepted that supervening unforeseen circumstances entail the objective termination of the contract due to the modification of the economy of the deal. To contradict the idea that the English experience is solely founded on common law, the Yearbook, again thanks to Winfield, refers to the statutes that were enacted in the first decades of the century. Between 1914 and 1926 all the major statutes were amended, from those on farming to those on the electoral process, from the organisation of the civil service to family relations, to the Law of Property Act, and also to the reform of the Universities, on the basis of the recommendations by Lord Haldane and of the Tomlin Commission. Gradually, therefore, there emerges an understanding of common law which is ever more distant from stereotypes and closer to actual reality.

12. The renewal of the method of legal studies and Gorla's work

For political reasons, the English model is ignored by the Fascist reform which leads up to the civil code of 1942. The prevailing cultural model is still the French one, corrected with German concepts. However, the law of precedents, which constitutes one of the reasons for the richness of the English experience, continues to be appreciated.

In the second post-war period, the work that stands out for its absolute novelty of method, for the wealth of cases considered, and for talent, is that of Gino Gorla, at the time Professor of Institutions of Private law at Pavia University and of Comparative Private law at the University of Alexandria in Egypt. The work is entitled *'Contracts. Fundamental issues treated with reference to comparative law and case-studies.'* [39] As can be envisaged from the title and as

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[39] Gorla, *Il contratto.Problemi fondamentali trattati con il metodo comparativo e casistica* (Milano, Giuffré, 1955)

the author himself points out in the foreword, the innovation of method is determined by the need for concreteness; for control of abstract methods; for emancipation from the theories of natural law. Comparison is used in order to explain the reasons for similarities and differences among legal systems; *"comparison is nothing but history"*, it is a way to escape from abstractions and generalisation. For Gorla, comparison not only means an analysis of the French and German experiences, but above all analysis of the common law, of its contents and method. Cases are useful to reproduce the:

> *"mental process which brings judges and legislators (...) to formulate abstractions of rules and principles, to come back, in a continuous exchange or circle, to the issue of the actual case. We have to see how rules and principles (or rather the men who use them) adapt and change, faced with this problem, which is none other than that of justice, influenced by history."*

The case method used is not a mere imitation of the English and US experiences: there it is used in comparative law only to gain knowledge of foreign legal systems, whilst here it is used to understand the Italian system as well, to ascertain the ancient roots of the institutions and the models of reasoning, to verify law in action, as it results from the manipulations of its interpreters. A method, therefore, that does not disregard the merits of systematic logic, but uses them alongside those of historical and comparative analysis. The cultural environment of the time is so hostile and biased against methods other than the analytical and formalistic ones, that Gorla feels the need to justify himself: order, arrangement, the logic of the thought process, and its discipline, are not neglected; but they are no longer considered as the *sole method* for the study and representation of the law. In this way, we avoid the risk of turning into a sort of "natural law" the generalisations and abstractions which define the law into general theory, almost as if the law were nothing but a general theory and the common law were not law at all. The consequence of the application of the formalistic method is the enfeeblement of scholarship, the concept of a law which is uprooted from its history and from reality, which leads to the chasm between theory and practice.

From the point of view of teaching, the work is also *extra ordinem* for another reason: it manages to convey to the student a fundamental

key to interpretation, that is, that the rules we have to deal with are not an "*unfailing datum*"; it gives the student "*the meaning of the problem and of its varied historical development, rather than the solution.*" And thus the structure of the book reveals a masterpiece: the development of contractual obligations in civil law sets out from Roman law, moves through the intermediate law; arrives at Domat and Pothier, at canon law, at Grotius and the theorization of the principle of consent; it deals with the obligations of giving, with transfers *cum onere*, with *causa praeterita*, with promises, with *nudum pactum*, with just cause, with form; the criticism of the concept of "*causa*" as a socio-economic function of a contract is also rigorous and persuasive. In conjunction with the evolution of the doctrines and cases of *civil law*, Gorla illustrates the evolution of common law, especially with regard to *consideration*.

The material collected in the first volume would be sufficient to unsettle the theory of obligations and contract as taught up to then in Universities. But the second volume, which deals with the case-law, is even more surprising: this volume deals with donation as a formal contract in relation to other contracts, with sufficient "*causa*"; promise and sale for a "*causa praeterita*"; gratuitous obligations; and the intent to create legal relations with reference to judgements of both civil law and common law systems. The work ends with a comparison of the styles of decisions. It is impressive to note how Gorla's work went beyond the national boundaries, and those who follow methods similar to his, such as Basil Markesinis, do not fail to remember him in their works.

13. Models of legislation

We have talked a great deal about legal theory and method in these pages. It is now worthwhile to give some examples of the legislative models which Italian scholars have taken into consideration as models for the reform of our national law.

It is only in the 1970's that there arises the first debate on consumer protection in Italy. Legal scholars looked into the more advanced experiences of the United States, first of all, but also to those of France, Germany, and certainly Britain. On the subject of standard contracts, the Unfair Contract Terms Act of 1977 is considered as the model to be followed for legislation to bring back reasonableness and fairness in consumer contracts. With mass

production and contracting, the traditional tenets of the law of contract can no longer be deemed satisfactory. We are no longer concerned with guaranteeing freedom of contract, but rather to redress the balance in the "*inequality of bargaining power*". Atiyah's pages are a veritable guide to understanding that it is legitimate to restrict the freedom of the stronger contracting party – the enterprise – and equitable to ensure the protection of the weaker party. Lord Denning's dictum, pronounced in 1957 – "*we do not allow printed terms to be made a trap for the unwary*" – becomes a warning for all legislators and for the judges who are forced to apply ancient rules. Again Lord Denning, in1973, signals a break with the past: "*When a clause is reasonable, and is reasonably applied, it should be given effect according to its terms. I know that the judges hitherto have* never *confided openly to the test of reasonableness. But it has been the driving force behind many decisions*".

In an environment which is now well-versed in the study of comparative law, anything of significance that happens in Britain, certainly does not go by unnoticed. The words of Hugh Collins are therefore to be pondered upon with great attention:

> "*... under the influence of the EC harmonisation programme, UK contract law will eventually be pushed towards a fundamental division between consumer contracts and business contracts, with radically different regimes applicable to both... the assimilation of social values embodied in the European directive will lead the common law of contract, which Kahn-Freund once* described *as 'designed* for *a nation of shopkeepers', to succumb to a more communitarian ideal which balances the interests of consumers against those of shopkeepers*"[40].

However, the influence of comparative study has not been so decisive as to persuade Parliament to anticipate the EC's intervention. The reform of consumer contracts reaches Italy not from London, Paris or Bonn, but from Brussels. The civil code is amended only in 1996, following the implementation of EC Directive n.13 of 1993.

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[40] Collins, "Good Faith in European Contract Law", in *O.J.L.S.*, 1994, at p. 229

Again, to remain within the subject matters ascribed to private law, I would not wish to leave out the interest raised by the Crowther Report, of 1974, on consumer credit. And, to move on to an entirely different subject, the Warnock Report on artificial insemination, a topic which still divides Italian legal scholars – for its religious and political implications. Biotechnology, whose legal aspects are so delicate, represents one of the most controversial aspects of private law; and the English experience in this respect is one of the models to which the more sensitive scholars, such as Stefano Rodotà, do not fail to give adequate attention.[41]

14. The indirect influence of English law on EC law and thereby on Italian law

After glossing over two centuries of legal history in a few pages, we have finally reached the present. And the present is a feast of studies on common law, relentlessly investigated in every sector. A whole book would not be enough to list the manuals, the treatises, the monographs, the essays which Italian scholars have devoted, and continue to devote to English legal culture. Every "school" of comparative law proudly presents its standard bearers as well-versed in English law. In spite of the fact that English is the most widely spoken foreign language in Italy, translations, still abound. Not only are the classics, such as the treatise by Maitland on equity, or by Wade on administrative law, translated, but also essays by Hart and Twining and Meiers; Lord Wedderburn's manual on employment law, the historical analyses by Peter Stein and Alan Watson; and the translation of Roy Goode's volume on commercial law in the new millennium is under way.

Beyond this tangible indication of the debt of our legal culture to the British contribution, we should bear in mind another occurrence which is taking shape in terms of the "Europeanisation" of the law. Here the English influence is not direct, but indirect, because it is filtered through the texts of the European Regulations and Directives. A brief reference in this regard should suffice. The use of the expression "reasonable", which is not to be found in any of the

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[41] Rodotà (ed.), *Questioni di bioetica*,(Roma-Bari, Laterza, 1993)

provisions of the codes or special statutes, is gradually penetrating into our terminology, and also into our legislation. We already find an example in art. 1783, c.2, n. 3 of the civil code, on the liability of hoteliers for personal property brought into a hotel. Here the text derives from the Paris Convention, 17.12.1962, ratified by statute10.6.1978, n. 316, and enacted on 12.8.1979. It is well-known that international conventions tend to condense the various contributions from the legal models taken into account, and that the British representatives are always held in high esteem for their authoritativeness. Again, art. 5 of D.P.R. 24.5.1988, N. 224, on the definition of defective products, derives from EC Directive n. 85/374, in which the British contribution, as everyone knows, was decisive. I could quote other examples, such as the rules of guarantees in the sale of goods, or the drafting techniques now widely used in the legal profession in Italy.

15. The process of convergence between Common law and Civil law

The cultural exchanges, the loans, emphasize convergences, rather than differences. Lord Brigham underlined this fact very persuasively during a recent meeting between Italian Judges and Law Lords. To quote his words: "*we are right to continue to worry away at the unnecessary divergences which continue to divide us. But the things which unite us are greater than the things which divide us*".

The law is also pervaded with myths. We have been reminded of this fact in recent months by Christian Atias and Paolo Grossi. We must find the courage to get rid of them forever. The myth, for instance, that the common law consists only of a body of precedents with no relevant legislation, or, conversely, that the civil law consists only of statutes, with no importance attributed to the creative interpretations of the courts; or the myth according to which statutes are interpreted only according to the literal meaning of words, and, finally, the myth that sees in the law the image of a nation, and therefore appeals to history to justify divergences and oppose convergences. History cannot be denied, but the future can be built in a collaborative manner. Convergence is registered not only in written rules, but also in their interpretation. It is for this reason that Basil Markesinis speaks about the "Europeanisation" of the

English *common law*, especially thanks to the decisions of the Court of Justice in Luxembourg. The same can be said for Italian law, as for the other systems of the Member States.

It is for this reason that the efforts of those, such as the Commission coordinated by Ole Lando and Hugh Beale on the subject of contracts and the Commission coordinated by Christian von Bar on the other sources of obligations, promote harmonisation as a bridge for the unification of private law.[42] The era of stockades is over. We must remember that freedom of movement of individuals, of goods, of services and capital was *preceded,* not *followed* by the free circulation of ideas and models in the legal world. The teachings of history and the consideration of current political, economic and social needs, lead us to believe that the movement that proceeds at great speed towards the convergence of systems and cultures is by now irreversible, and has become one of the factors that make Europe stronger and ennoble its mission in the new Millennium.

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[42] Hartkamp,Hesselink,Hondius,Joustra,du Perron (eds.), *Towards a European Civil Code* (The Hague, London,Boston, Kluwer International,2nd ed., 1998); Alpa e Luccico (eds.), *Il codice civile europeo* (Milano, Giuffré, 2001). But see also the EC Communication n. 398/2001.