Italian Comparative: A Trait of the Legal System

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ITALIAN COMPARATIVE: A TRAIT OF THE LEGAL SYSTEM

Bianca Gardella Tedeschi*

I. REGIONAL COMPARATIVE LAW ................................................................. 797
II. TEACHING COMPARATIVE LAW IN ITALY ........................................ 799
III. ITALIAN COMPARATIVE LAW: THE BEGINNINGS .......................... 802
IV. ITALIAN COMPARATIVE LAW AFTER WWII: A REACTION TO
FORMALISM ....................................................................................... 804
V. GINO GORLA AND MAURO CAPPELLETTI: ITALIAN
COMPARATIVE LAW LOOKS AT COMMON LAW ............................... 806
VI. RODOLFO SACCO: A LIFE FOR COMPARATIVE LAW .................... 809
VII. SACCO’S DYNAMIC APPROACH TO COMPARATIVE LAW .......... 810
VIII. TACIT, OR IMPLICIT, LEGAL FORMANT: THE CRYPTOTYPE ....... 814
IX. LEGAL FORMANTS IN ACTION ....................................................... 815
   A. Legal Formants and Factual Approach: The Common
      Core Project .................................................................................. 816
   B. Legal Formants and Critical Legal Theory .................................. 817
   C. Comparative Law and Economics ............................................... 818
X. THE LONG WAY OF ITALIAN COMPARATIVE LAW ....................... 819

I. REGIONAL COMPARATIVE LAW

In July 1900, at the Paris Conference, the academic legal community set
the official beginning of comparative law as an autonomous discipline.1
Before that moment, there had been, visibly, comparative exercises among
jurists; the innovative take was to initiate a thoughtful debate about the goals
and methodology of the new legal discipline.2 Despite all the efforts, the

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1 See generally CONGRES INTERNATIONAL DE DROIT COMPARÉ, PROCES-VERBAUX DES SÉANCES ET DOCUMENTS [MINUTES OF SESSIONS AND DOCUMENTS] (1905) (Fr.) (publishing the minutes of the International Congress of Comparative Law held in Paris from July 31, 1900, to August 4, 1900); Xavier Blanc-Jouvan, Centennial World Congress on Comparative Law: Closing Remarks, 75 Tul. L. Rev. 1235, 1236 (2001).

debate did not reach the final conclusion neither during the Conference nor in the following decades; even today, comparatists are still debating about goals and methodology.\(^3\) However, the deep thinking about goals and methodology brought important results. As a trend, we can indicate a steady move from the search of the best methodology typical of the beginning of the discipline to a wide acceptance that comparative law confronts complexity. Actually, it is now accepted that within comparative law a multiplicity of goals and methodologies may coexist.\(^4\) Moreover, the academic community acknowledges that goals and methodology may be influenced by the cultural and legal contexts that produce them.\(^5\) Hence, we are witnessing regionally and geographically situated accounts of comparative law approaches.

In this Article, I will describe the Italian developments of comparative law that are tightly linked to the specificities of Italian legal culture. The cultural environment of Italian academia was open to suggestions that came from other legal systems and shaped an eclectic legal culture. Italy was a hybrid system that took the code from France, the legal science from Germany, and has always been receptive of foreign suggestions.\(^6\) Merryman, in the famous trilogy on the Italian legal system, showed how Italy developed its own style—the Italian Style—that took hints from France and Germany and attributed an important significance to case law and policy consideration.\(^7\) As Giovanni Marini describes Italian legal culture, the Italian Style’s true originality is “eclecticism.” In the Roman law tradition, Italian scholars have been in between French and German models and cultivated a lively curiosity for other legal experiences. The methodological apparatus so


\(^4\) See generally AMICO DI MEANE, supra note 2; COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS (Pierre Legrand & Roderick Munday eds., 2003); METHODS OF COMPARATIVE LAW (Pier Giuseppe Monateri ed., 2012).


\(^6\) Rodolfo Sacco & Alberto Gianola, *The History and Importance of Comparative Law in Italy*, in THE INTERNATIONALISATION OF LEGAL EDUCATION 175, 176 (Christophe Jamin & William van Caenegem eds., 2016).

developed was able to integrate different norms and solutions, reaching solutions that were innovative in the European panorama.\(^8\)

## II. Teaching Comparative Law in Italy

Italy is one of the few legal systems where comparative law is a mandatory course in the law degree curriculum.\(^9\) The importance given to comparative law in Italy is not fortuitous, but it is the result of the Italian history of comparative law and of an enthusiastic and cultivated law professor, Rodolfo Sacco, who struggled to achieve this result.

Sacco’s report for the 2014 Congress of the International Academy of Comparative Law opens with his testimony of the importance of teaching comparative law in a globalized world:

This chapter’s author [i.e. Rodolfo Sacco] is one of the remaining Italians who has always insisted on teaching comparative law. In Italy, the desired legal ‘globalisation’ is centred [sic] on comparison.\(^10\)

Sacco has been the main driving force behind the Italian debate on the value to introduce a comparative law course as a mandatory requirement in the law degree curriculum. Starting from the 70s, the subject was addressed at a national level by the Italian scientific society for comparative law, AIDC (Associazione italiana di diritto comparato), and at an international level by the International Academy of Comparative Law (AIDC). In Europe, the Council of Europe promoted several conferences on the teaching of European law and comparative law and proposed to the European law faculties the idea of creating a “European Jurist,” characterized by expertise both in European law and in comparative law.\(^11\)

During the 1976 congress [promoted by the European Council], the first topic entrusted to the “A Commission”

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\(^8\) Giovanni Marini, *L’Italian style fra centro e periferia ovvero Gramsci, Gorla e la posta in gioco nel diritto privato [The Italian Style Between Center and Suburbs or Gramsci, Gorla and the Stakes in Private Law]*, 7 RIVISTA ITALIANA PER LE SCIENZE GIURIDICHE [RIV. IT. SC. GIUR.] 95, 96 (2016) (It.).


\(^10\) *Id.* at 175. A note: despite the article being coauthored by Sacco and Gianola, Sacco sees himself as the only author of the article.

(President Sacco) had the title “The General Education.” The conclusions, unanimously drawn by the Commission and unanimously accepted by the General Assembly, were unequivocal: “the Commission recommend that an obligatory and introductory course in comparative law be set up . . . whose purpose would be to offer a view of the most important law systems and an initiation to the comparative method . . . . The Commission considers that, after this general introduction, the knowledge of comparative law must be developed . . . through specific teachings (according to geography, or to thematic domains, e.g., civil law, criminal law, etc.).”  

While most European member states did not answer to this appeal from the Commission, hiding behind the need to respect autonomy of universities, Italy answered positively. The Consiglio Universitario Nazionale (CUN), a public body within the Ministry for the University and the Research, played a paramount role. The CUN revised the law degree curriculum, which was conceived in 1938 and never amended, despite several attempts. In so doing, it required that every student had comparative law as a mandatory subject. That is how comparative law in 1994 became mandatory in Italy for any law degree. And, as a personal note, I very well remember Rodolfo Sacco fighting for it and rejoicing for this success.

Why has Italy been so keen to introduce comparative law as a mandatory subject for the law degree? There are many reasons that explain the positive attitude of (some) Italian jurists towards comparative law, and they all can be traced back to the development of comparative law in Italy.

Italy developed a strong taste for comparative law as it always thought that the Italian legal system could benefit from imitation and legal transplants from other legal systems.

In Sacco’s words,

A country can be legally self-sufficient: that is, the nation’s laws are the sole product of its jurisdictional history, the

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12 Sacco & Gianola, supra note 6, at 177.


14 The new law degree curricula requirements have been adopted on February 11, 1994, and published in the Official Gazette of Italy on June 27, 1994. Decreto ministeriale 11 febbraio 1994, in G.U. June 27, 1994, n.148 (It.).

15 To read the complete account, see Rodolfo Sacco, L’Italie en tête (A propos de l’enseignement du droit comparé) [Italy in the Lead (About the Teaching of Comparative Law)], 47 R.I.D.C. 131 (1995) (Fr.).
country’s scholars have elaborated on the theories conveyed in its own universities, and national judges administer justice in faithfulness to the law and in keeping with the teaching of law schools, or on the basis of their own choices. Of course, for countries in continental Europe, this is possible only since the jurists express the law in the language of the people (until then, the jurist’s knowledge was supranational).

The jurists of a self-sufficient country do not instinctively feel the need to know, study, or compare the law of others [sic] jurisdictions. Moreover, they are inclined to believe that only their own law is well-conceived, well-studied, and well-expressed. This is the case in varied jurisdictions as France, Germany, England, and the USA.

... The Italian jurist, after adopting the enlightened post-Roman law, found that neither an important national thought, nor an important national practice (save for commercial law), was in place. Italian legislators of the pre-unification period (Piedmont, Sardinia, Naples-Sicily, Parma and Modena) turned to the French models. But the Roman law professors looked to the Germans, who were themselves looking into Roman law. These professors were won over by the German scholarship and by the conceptual and dogmatic method of the German Pandectists, and this led to Italy’s replication of the German style and scholarship. Later, the failure of the political and military Mussolinian experience sparked off an acute admiration for the countries where the liberties and democracy had always been practiced, and for their law. And the Italians, following the conclusion of the Second World War, dedicated themselves to the emulation of the English and American models, especially in constitutional law matters, as well as in criminal procedure.

So, Italian jurists properly understand their own law if they know the others’ law – the French, the German, and the American laws, and have always known and studied at least one foreign jurisdiction, which they consider as more perfect
than their own law. The Italian jurist does not regard comparative law as a display of legal pathologies.\textsuperscript{16}

\section{III. \textit{Italian Comparative Law: The Beginnings}}

The comparative approach is a distinctive trait of Italian legal scholarship, despite Italy never being the center of European comparative law studies. In the nineteenth century, comparative law was important mainly in two countries, France and Germany, as both of them had the leading universities in Europe. But as Reimann acknowledges, “lasting contributions also came from Italy.”\textsuperscript{17} E. Amari (1810-1870), an eminent Sicilian jurist, escaped to Genoa when, in 1849, the Bourbons reinstated the Monarchy in Sicily. While in exile, he wrote his seminal book, \textit{La Critica di una scienza delle legislazioni comparate} (\textit{A Critique of the Science of Comparative Legislation}), where he advocated for the autonomy of comparative law and the need for a theoretical framework.\textsuperscript{18}

At the turn of the century, an important group of scholars, which included Mario Rotondi,\textsuperscript{19} Angelo Sraffa,\textsuperscript{20} and Tullio Ascarelli\textsuperscript{21} became interested in the common law tradition, both English and United Statesian. In 1903, Angelo Sraffa and Cesare Vivante\textsuperscript{22} founded the \textit{Rivista di diritto commerciale e delle obbligazioni},\textsuperscript{23} the first journal on commercial law. The law review published several articles on common law legal systems, not only the civil law tradition, such as the trust, antitrust law adopted in the USA,

\begin{itemize}
\item\textsuperscript{16} Sacco & Gianola, \textit{supra} note 6, at 175–76.
\item\textsuperscript{17} Mathias Reimann, \textit{The Legal Systems of the World/Their Comparison and Unification}, in 2 \textit{International Encyclopedia of Comparative Law} 36 (René David ed., 2020).
\item\textsuperscript{18} See Elisabetta Grande, \textit{Development of Comparative Law in Italy}, in \textit{The Oxford Handbook of Comparative Law, supra note 5}, at 107, 109–10 (recalling that during the annual meeting of the Italian society of Comparative Law held in Palermo in 1985, Emerico Amari was “officially declared” the ancestor of the discipline). On the work of E. Amari, see generally Erik Jayme, \textit{Il ruolo del diritto comparato nell’Ottocento: Carlo Mittermaier ed Emerico Amari [The Role of Comparative Law in the Nineteenth Century: Carlo Mittermaier and Emerico Amari]}, 4 \textit{Rassegna di Diritto Civile [Civ. L. Rev.]} 1279 (2015) (It.).
\item\textsuperscript{19} See, MARIO RONDI, INCHIESTE DI DIRITTO COMPARATO [COMPARATIVE LAW INVESTIGATIONS] (1970) (It.), for a collection of different studies on comparative law.
\item\textsuperscript{20} See generally ANNAMARIA MONTI, ANGELO SRAFFA: UN “ANTITEORICO” DEL DIRITTO [ANGELO SRAFFA: AN “ANTI-THEORIST” OF LAW] (2011).
\item\textsuperscript{22} See PAOLO GROSSI, SCIENZA GIURIDICA ITALIANA. – UN PROFILO STORICO 1860–1950 [ITALIAN LEGAL SCIENCE. – A HISTORICAL PROFILE 1860–1950], 51 (2000) (It.). See generally CESARE VIVANTE, TRATTATO DI DIRITTO COMMERCIALE [TREATISE ON COMMERCIAL LAW] (1893) (It.).
\item\textsuperscript{23} ANNAMARIA MONTI, PER UNA STORIA DEL DIRITTO COMMERCIALE CONTEMPORANEO [FOR A HISTORY OF CONTEMPORARY COMMERCIAL LAW] (2021) (It.); GROSSI, \textit{supra} note 22, at 94–108.
\end{itemize}
trade unions, and the role of sources of law in codified and not codified legal systems. Despite their brilliant studies, these scholars remained marginal in their contemporary legal culture for different reasons. In 1938, Vivante and Ascarelli were hit, as Jews, by racial laws. Vivante, already retired, was expelled by the Accademia dei Lincei; Ascarelli found refuge in Brazil where he became law professor at São Paulo University; and Sraffa died in 1937 and therefore was spared anti-Semitic persecution. Mario Rotondi was an antifascist, and he was among the few professors who, in 1931, did not swear their allegiance to the Fascist Party. He left the University of Pavia and began his career in the newly established Università Cattolica del Sacro Cuore. They have been therefore marginalized, together with their scholarship, by the Italian legal academia aligned with the Fascist directives and didn’t get access to any of the leading posts during the Fascist years. Italy’s preferences for foreign legal systems became highly determined by politics. Italy turned to German scholarship, not only for the importance and prestige of German legal scholars, but also because Germans were the allies while the English the enemies.

Between the two world wars, an important comparative project was launched. Italy and France tried, though without success, to have a common code on obligations. The goal of the project was twofold: on the one hand, there was the effort to renew national civil law of obligations. The French code was more than a hundred years old, and the Italian one, adopted in 1865, was drafted following almost verbatim the 1804 French Code. On the other hand, the French Italian project wanted to be a truly comparative law endeavor, as it aimed at the creation of a European common law of obligations. It was the first attempt to the harmonization of European private law in times of important changes in society, politics, and economics. Scialoja, the President of the Italian commission for the law reform, was thinking of reaching a full juridical unity, to reconstruct a common law for Europe, to have one language for the law. The times seemed to be mature

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for proposing a new code based on the new values and principles. The French-Italian project on obligations did not see the light for several reasons, the political one being the most relevant. As for legal doctrine, in the role played by the individual and the State in the economy, Italian fascism was more prone to admit a stronger State intervention than the individualistic approach of France. In a strict political way, France and Italy had parted in the 30s, Italy with the Third Reich and France with the United Kingdom. In this new geopolitical division, it was no longer appropriate that France and Italy continued to work together on this common project. Actually, Italy and Germany formed a Committee for Italy-Germany Juridical relations, in the frame of the treaty to foster cultural exchanges between Rome and Berlin.

IV. ITALIAN COMPARATIVE LAW AFTER WWII: A REACTION TO FORMALISM

In 1965, Merryman wrote three seminal articles about the Italian legal systems where he addressed the doctrine, law, and interpretation in that legal system. In these articles, Merryman recognized the special nature of the Italian legal system. He described the Italian legal system as characterized both by relevant attitude to take and mix different legal models and by a law-making power of the judiciary, which he identified like the central pillar


28 See Guido Alpa, Dal Code Civil al Codice Civile del 1942 [From the Code Civil to the Civil Code of 1942], in II. PROGETTO, supra note 26, at 30.


30 See generally Merryman I, supra note 7; Merryman II, supra note 7; Merryman III, supra note 7. The trilogy was then published as a volume: ANTONELLO MIRANDA, I. THE ITALIAN LEGAL SYSTEM: A SHORT INTRODUCTION TO THE ITALIAN LEGAL SYSTEM (1967). The original trilogy was also immediately translated into Italian. See John H. Merryman, Lo stile italiano: la dottrina [The Italian Style: The Doctrine], in RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA 1170–1216 (1966); John H. Merryman, Lo stile italiano: Le fonti, in RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE [The Italian Style: The Sources] 709–54 (1967); John H. Merryman, Lo stile italiano: L’interpretazione [The Italian Style: The Interpretation], in RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 373–414 (1968).

31 See Merryman I, supra note 7, at 39–40.
of Italian legal system. In the same trilogy, Merryman remarked that the Italian Style was dramatically changing during the time he was writing: it was dangerously leaving behind the eclectic drive and was embracing a strong formalism.

Formalism became a trait of Italian scholarship, especially in private law, during the fascist era. The decision to detach law from society and shared values, has been later read as a way for bourgeois and non-Fascist lawyers and judges to be able to be good jurists and at the same not embrace fascist values and projects. At the same time, the mainstream German legal scholarship was dogmatic, conceptual, and abstract: an important source of inspiration and imitation. Therefore, formalism has been a strong shield under Mussolini.

After WWII, jurists didn’t need formalism to survive in difficult times, but the conceptual and systematic legal science had already pervasively imbued the system and was an important part of Italian private law scholarship.

When a theory dies, when can a new methodology find some space in legal analysis? Sacco has a rather pragmatic answer: “Those who work with a method mostly do not change it. A method disappears when the last of its adherents falls silent.” Sacco lucidly describes how formal, conceptual, and abstract legal scholarship remains in the post war times. In those times, changing the discipline from within was possible but difficult. Comparative law has been for some scholars more of a personal interest. It was the right instrument to change the legal world and a necessary ally to dismantle the formalist castle, from outside. In the late forties and in the fifties, few young scholars yielded to their curiosity and wanted to know how other legal systems were shaped. They made a good use of the comparative scholarship and studies previously developed by Italian jurists and the seeds, planted before the war, blossomed. We have to note that the renewal and, hence, development of comparative law in Italy moves from persons more than

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34 Id. at 483.
35 Id. at 482.
36 See Marini, supra note 8, at 132–33.
37 See generally Merryman I, supra note 7, at 55; Merryman II, supra note 7, at 398–400; Merryman III, supra note 7; Rodolfo Sacco, Prospettive della scienza civilistica italiana all’inizio del nuovo secolo [Perspectives of Italian Civil Science at the Beginning of the New Century], 51 Riv. Dir. Civ. 417, 418 (2005) (It.).
38 Sacco, supra note 37, at 418.
institutions, and is the fruit of personal commitment and enthusiasm of few
academics. Their work only later will reverberate on legal studies curriculum
and general scholarship. The main figures in the development of Italian
comparative law as a reaction to a dogmatic approach are represented by
Gino Gorla, Mauro Cappelletti (1927–2004), and Rodolfo Sacco (1923–
2022).

V. GINO GORLA AND MAURO CAPPELLETTI: ITALIAN
COMPARATIVE LAW LOOKS AT COMMON LAW

Mauro Cappelletti and Gino Gorla were attracted by common law,
especially U.S. common law, each of them for different reasons. Mauro
Cappelletti, coming from civil law procedure, was interested by the role of
judges in a constitutional state, where Gorla became interested by the case
method applied in American law schools after spending some time at Cornell.
They were both curious and active personalities who left an important mark
in Italian law.

Mauro Cappelletti is recognized as “a pioneer of comparative legal
studies in Italy and worldwide.” He was a civil procedure law professor—
from there comes his interest for the judicial function. He taught both in Italy
and the United States, mainly at Stanford, and was a major go-between for
the two legal cultures. He took part in major research projects on an
international scale. He was attracted by U.S. law because of America’s
Constitution and federal system. Italy adopted its first Constitution in 1946
and, if Europe could become a federal state, he believed that both elements
could ward off dictatorships. As Sabino Cassese recalls, he was
“antidogmatic”; he wanted to understand ideologies and the culture of legal
systems and had a “law and society” approach to law. He deeply investigated
the role of judicial review in comparative perspective where he expounded

39 See generally Reimann, supra note 17.
40 Marta Cartabia, Mauro Cappelletti: One of the “Precious Few” of Our Generation, 14 INT’L J.
41 See Mauro Cappelletti et al., Access to Justice, Variations and Continuity of a World-Wide
Movement, 46 Jahrg., H. 4, 664 (1982) (highlighting the international research projects and reports that
Cappelletti worked on).
42 Sabino Cassese, Elogio di Mauro Cappelletti, in ANNUARIO DI DIRITTO COMPARATO E STUDI
LEGISLATIVI [Praise by Mauro Cappelletti, in YEARBOOK OF COMPARATIVE LAW AND LEGISLATIVE
STUDIES], 233, 235 (2016) (It.).
43 See generally Hanna Eklund, Judicial Review and Social Progress in the Work of Mauro
Cappelletti and Today, 14 INT’L J. CONST. L. 486; MAURO CAPPELLETTI, IL CONTROLLO DI
COSTITUZIONALITÀ NEL DIRITTO COMPARATO [THE CONTROL OF CONSTITUTIONALITY IN
COMPARATIVE LAW] (A. Giuffrè ed., 1968) (It.).
a framework to analyze the different models, based on a number of dichotomies: political v. jurisdictional systems; centralized v. decentralized systems; abstract v. concrete procedure; and so on. He was concentrated on the role of judges in making the law. Cappelletti considered the expansion of judicial power, and “judge made law,” as a “necessary move in contemporary constitutional systems.” Well aware of the implication of the political power that can be given to judges, he sees the limits to their power in the procedure.

Marta Cartabia, law professor and former President of the Italian Constitutional court, describes his comparative law methodology as:

first, pinpointing the social need or social problem that the law is expected to answer; second, exploring the legal answers to the problem provided by different among legal systems; third, inquiring into the raisons d’être of the similarities and differences; fourth, looking for trends of convergence; fifth, assessing the pros and cons of the different solutions; and, sixth, anticipating future developments. Cappelletti’s approach is multi-faceted and comprehensive: not only is it problem driven, because his analysis starts from actual social needs rather than from a purely legislative analysis; it is also phenomenological, because it requires an attentive monitoring and classification of a broad spectrum of legal solutions around the world; it is also critical and normative, because it implies a critical evaluation of alternative choices, abandoning some of them and spearheading others. Further, his approach is imbued with realism and contextualism without repudiating a value-oriented examination. In a word, his scholarship is full of history and ideals, combining the best of the two worlds—the European and the American culture—that nourished his academic life.

A different comparative law approach has been deployed by Gino Gorla. His main work, *Il contratto*, applied a new approach to the analysis of private


45 Cartabia, supra note 40, at 470.

46 Id. at 472–73 (emphasis omitted).
comparative law.\textsuperscript{47} His approach was highly influenced by his studies in the United States where he learned the case method approach. In fact, Gorla spent a full year, 1949, at Cornell Law school, where he worked with Rudolf Schlesinger, who was just appointed professor of Comparative law. For Gorla, the most striking feature of American system was the teaching method, based on case method discussion.\textsuperscript{48} The American Law School approach urged him to relinquish the dogmatic and conceptual approach and to analyze contract cases from facts. He chose to study cases from different jurisdictions, both from common law and civil law countries, namely French, English, and U.S. contract law in addition to the Italian one. In his major work on contracts, he set out the problem at the beginning of each chapter followed by the answers that common law and civil law provide.\textsuperscript{49} “Il contratto” by Gino Gorla was the first book in Europe to follow the problem and case method in addressing contract issues.\textsuperscript{50} Gorla used not only a comparative approach, but also a historical analysis of the development of the legal systems and the institutions as well. His book became an example of historical comparative analysis, as he himself stated in the introduction. He definitely believed that “comparison involves history.”\textsuperscript{51}

He saw in the case method, or “metodo della problematica” as he named it, a tool necessary to analyze the juridical problem in a direct way, sweeping away all concepts, names, or categories that frame the local jurist mindset. Moreover, the case method implies a less abstract and conceptual approach to legal issues: how can you know the law in action without the case method, affirms Gorla.\textsuperscript{52} And the case method is necessary for the common law-civil law comparison—which he called the “comparative law par excellence”\textsuperscript{53}—as common law cannot be reduced to abstract formulations and dry concepts. How can we compare civil law abstract rules with common law cases? If we want to compare the solutions that those two different systems adopt, we can only refer to cases, that provide homogeneous, and therefore comparable,


\textsuperscript{48} Gino Gorla, La scuola di diritto negli Stati Uniti d’America [Law School in the United States of America], I RIVISTA DI DIRITTO COMMERCIALE [RIV. DIR. COMM.] 320 (1950) (It.).

\textsuperscript{49} His experience is recounted in, Gino Gorla, Ricordi della Carriera di un Comparatista (Dal diritto Comparato al Diritto Comune Europeo) [Memories of the Career of a Comparatist (From Comparative Law to Common European Law)], 103 IL FORO ITALIANO [FORO IT.] 1 (1980) (It.).

\textsuperscript{50} In the United States, Rudolf Shelsinger already published COMPARATIVE LAW: CASES AND MATERIALS (1950).

\textsuperscript{51} Id. at 934, 944.

\textsuperscript{52} Gino Gorla, diritto comparato [Comparative Law], in 12 ENCYCLOPEDIA DEL DIRITTO [ENCYCLOPEDIA OF LAW], 934, 942 (Giuffrè ed., 1964) (It.).
data. Gorla’s lesson was then received by Rodolfo Sacco who developed, from the factual approach, an important methodology for the analysis of legal systems.

VI. RODOLFO SACCO: A LIFE FOR COMPARATIVE LAW

Rodolfo Sacco is known as a key comparative law scholar at the global level. He began his career as a private law academic, but his eclectic personality very soon brought him to experiment with interdisciplinarity. In his life span career, he wrote not only about contracts and possession, but also about legal anthropology and religious law; he also investigated law in Africa. During the Second World War, he was a partisan fighter and commander in Northern Italy where he contributed to liberation of Italy from Nazi-Fascism. He was Academician of the Lincei; Member of the Institut de France; dr. h.c. of Geneva, McGill, Toulon, Paris II; titular member of the International Academy of Comparative Law; and President of the International Association of Legal Science. He has always been very active in scientific societies in the name of the advancement and recognition of comparative law.

He began his academic career as a civil law professor, and from there, he approached comparative legal research where, in his view, the tools for the renewal of legal science are located. Sacco acknowledges his debts to Gorla, who applied case method to comparative law. Gorla’s works, and later his acquaintance, convinced Sacco that Italian legal science could, only through comparison, overcome formalism and the dry systematic method. Together with Gorla and Cappelletti, Sacco reflected upon the condition deemed necessary for the development of comparative law. On the one hand, it should speak to municipal lawyers, and on the other hand, Italian comparative law should reach out for a larger and international public. In addition to that, it was necessary to transform the Law degree curriculum in order to include comparative law in the jurists’ education.

54 Id. at 943.
56 SCRITTI IN ONORE DI RODOLFO SACCO, supra note 55.
Sacco contributed to many areas of comparative law, from legal transplants to legal anthropology, but he left a visible mark in the development of a peculiar comparative law methodology. Sacco elaborated a particular set of tools that can be used to analyze legal systems, track their changes and evolution, and then compare their significant features. Sacco called his methodological tool “the legal formants” approach or dynamic approach to comparative law. Legal formants are the different components that concur to build any given legal system. The comparative law scholar can understand the dynamics that shape any legal system through the analysis of their interactions. The legal formant approach is, by now, a widely accepted methodology in comparative law research.

VII. Sacco’s Dynamic Approach to Comparative Law

“Legal formants” made their appearance in Sacco’s work in the early 1970s, and have been subsequently included in his seminal book on comparative law. The legal formants theory has been available to the English reader since 1991, thanks to James Gordley’s translation. Sacco adopted the expression “legal formants” from phonetics where it indicates an element that marks a distinguishing feature in a given phonetic structure. In Sacco’s theory, “formants” include the different components that concur to build any given legal system. As law is a social activity, it is important to understand the distinct contribution that every social group brings to the shaping of the legal system.

In Sacco’s words, comparative law is the academic subject that identifies the “plurality of rules and institutions . . . in order to establish to what extent they are identical or different.” To accomplish this intellectual

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59 Roberto Sacco, Introduzione al diritto comparato [Introduction to Comparative Law] (UTET Giuridica ed. 1980) (It.).

60 Sacco, Installment I of II, supra note 57, at 1; Sacco, Installment II of II, supra note 57, at 343.

61 Gambaro & Graziadei, supra note 57, at 453.

62 Sacco, Installment I of II, supra note 57, at 5.
exercise, we need first to collect legal rules and subsequently compare them. Sacco’s theory starts from the question “what is a legal rule?” From a national point of view, the answer seems easy: national jurist in civil law jurisdictions will say that the legal rule is what a statute says, whereas jurists in common law countries would say the rule is what case law affirms. Sacco, however, considers that looking for “the legal rule” is misleading. This attitude is, in his words, “the typical view of an inexperienced jurist.” In fact, the living law contains many different elements: statutory rules, academic scholarship, and the decisions of judges. The national jurist tends to keep separate all these elements but,

> and so forth. In order to see the entire law, it is necessary to find a suitable place for statute, definition, reason, holding and so forth. More precisely, it is necessary to recognize all “legal formants” of the system and to identify the scope proper to each. 

Legal formants are connected to the community and the institutions that produce legal rules. Therefore, their number and their comparative importance may vary, even significantly, from one system to another. Constitutions, statutes, case law, and scholarship are legal formants. They are not only texts, but also include the social practices of each particular group of interpreters. The explanation of law professors in the classroom is a legal formant as teaching concurs to the modeling of the legal system. Interpretation is a legal formant: “Whatever influences interpretation is a source of law. To discover what influences interpretation, various methods can be used. For example, one can examine the sources that an interpreter uses, be the lawyer or judge, when he advocates or adopts an interpretation of a rule.”

In Sacco’s understanding, the reasons and the conclusions given by judges and scholars are also legal formants.

Strange as it may sound, the reasons that judges and scholars give are different “legal formants” than their conclusions. The reasons have a life of their own, independent from the conclusions they supposedly support.

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63 Id. at 27.

64 Sacco, Installment II of II, supra note 57, at 345.
about the law that are put forward as conclusions by scholars, legislators, or judges are another legal formant.\(^6^5\)

Sacco divides between “declamatory statements” and “operational rule.” The former designates reasons and propositions while the latter designates the legal rule as it is applied. Sometimes

[d]eclamatory statements . . . make explicit an ideology, be it the ideology that actually inspire[s] the system in question or the one that a given authority believes to have inspired it or the one this authority wishes people to think inspired it. In civil law and in common law countries, declamatory statements are often made in accordance with the background of \textit{jus naturalism}. Declamatory statements, for example, may insist that contracts are made by consent, while the operational rule requires not only consent but a reason or \textit{cause} for the enforcement of the contract . . . Or, for example, in common law countries, there are declamatory statements that property is transferred by the will of the parties while the operational rules require an additional element: . . . consideration or delivery or, for the transfer of immovable property, a conveyance.\(^6^6\)

National jurists assume that all legal formants within the same legal system have identical content. Sacco’s theory, however, shows the contrary: “Comparison recognizes that the ‘legal formants’ within a system are not always uniform and therefore contradiction is possible. The principle of non-contradiction, the fetish of municipal lawyers, loses all value in an historical perspective, and the comparative perspective is historical par excellence.”\(^6^7\)

Despite the search of unity and certainty of law, the comparative law scholar is able to show that the different legal formants are not in harmony, but rather in conflict. The dynamic approach, through the analysis of multiple legal formants, is opposed to the static approach based on dogma. The static analysis of a legal system looks for “the rule” that must exist and, if not evident, can be deducted logically from the official sources of law. The dynamic approach allows the observer to understand the whole picture, to take into account the different forces that are at work in shaping legal systems and to acknowledge the work that all the legal actors provide. The dynamic approach focuses on law as a social activity and refutes those “‘scientific’ methods of legal reasoning that do not measure themselves against practice,


\(^{66}\) Id. at 31.

\(^{67}\) Id. at 24.
but formulate definitions that are supported solely by their consistency with other definitions.”

The dynamic approach is at odds, as well, with positivism. A dynamic approach enables the observer to distinguish between the description that the legal system offers of itself (declamatory rule) and the rule that is, in fact, enforced (operative rule). A system, for instance, may grapple around the declamatory rule that affirms total and absolute “privity of contract” and then, in specific circumstances, allows compensation for interference with the contract. If the set of facts that allows compensation are recurrent, we have an operative rule that is different from the declamatory rule: in specific circumstances, the contract is relevant for third parties that are obliged to pay damages in case of interference.

Sacco’s approach to the law through legal formants is deemed a structuralist approach, as structuralism, in law, debunks the myth of the legal rule. As Gambaro and Graziadei describe:

In a structuralist vein, legal formants are an intellectual tool to look behind or beneath the visible and conscious designs (beliefs, ideas, behaviours) of human subjects. The associated theory aims to expose how in the law as well, beneath its surface, there are at work certain deep structures that are universal to the human mind or shared by its subgroup as part of its formation.

Structuralism, as well as Sacco’s dynamic approach to comparative law,

[s]how[s] that each rule is a complex structure composed of different “formants”: the rule formulated by the legislature, the rule as interpreted by courts, the implementation of the rule by administrative agencies, the discussion of the rule by law professors, etc. It also makes plain that each rule consists of both an operative prescription and a justification for that

68 Id. at 24.
70 Gambaro & Graziadei, supra note 57, at 453.

\section{VIII. Tacit, or Implicit, Legal Formant: The Cryptotype}

Besides explicit legal formants, such as statutes, case law, and scholarship, there are implicit legal formants that Sacco calls “cryptotypes.” The terminology is imported from linguistics, where it indicates an element that marks a distinguishing feature in a given phonetic structure.\footnote{72}{Legrand, *supra* note 55, at 953–55; Gambaro & Graziadei, *supra* note 57, at 453.} When we speak, we do not know the linguistics rule that we follow when we say, “three dark suits” and not “three suits dark.” The same is true for law: jurists may follow and apply rules not explicitly formulated or enforce rules they are not aware of. Customs, the social practices and rules of conduct that people follow within social groups that ultimately guide the actions of the members of a community, are what Sacco defines as “cryptotypes.” Judges, lawyers, and interpreters are equally bound to the implicit formants that, therefore, are very influential in the modeling of different legal systems. Acknowledging the presence of latent formants is in line with features of other social sciences: “[s]ocial sciences [have] stressed the importance of tacit knowledge in producing certain outcomes . . . Economists have highlighted the importance of social norms which may not be capable of precise expression.”\footnote{73}{Gambaro & Graziadei, *supra* note 57, at 456.} In law, acknowledgement of a tacit formant can uncover latent patterns that the interpreter follows without an explicit recognition.

It is not easy to identify cryptotypes. It is even harder for national jurists, as they involuntarily follow rules they are unaware of. “Normally, a jurist who belongs to a given system finds greater difficulty in freeing himself from the cryptotypes of his system . . .”\footnote{74}{Sacco, *Installment II of II*, *supra* note 57, at 387.} This is why a comparative lawyer is privileged in detecting cryptotypes, as she is an outsider who does not share the same implicit rules. “Some cryptotypes are more specific, others more general. The more general they are, the harder they are to identify. In extreme cases they may form the conceptual framework for the whole system.”\footnote{75}{Id. at 386; see Barbara Pasa & Lucia Morra, *Implicit Legal Norms*, in 14 HANDBOOK OF COMMUNICATION IN THE LEGAL SPHERE 141, 142 (Jacqueline Viconti ed., 4th ed. 2016).}
The legal formant methodology is part of the comparative jurist
knowledge and is included in the principal handbooks on comparative law.76
The legal formant theory leaves an important mark in the work of
comparative jurist:

Sacco’s discourse provides a description of a normative
world divested of moral evaluations (as scientific theories
are) that is focused on the never-ending dynamic of legal
systems. Surely in all controversial cases there will be a
plurality of conflicting interpretations advanced as to what
the law is. Still, the conventional idea is that eventually the
correct interpretation of the law shall emerge, and that it
shall then be studied and preserved. The legal formants
approach provides an internal criticism of this idea. It holds
that comparativists should consider not only that any legal
solution is temporary, but, most of all, that each element
entering the picture as a separate component does not remain
statically isolated. Each is instead connected to the others by
the agency of the actors of the legal system to whom must
be ascribed the rearrangement of the patchwork. This
approach is thus as distant from legal positivism as cubism
is from figurative art.77

**IX. LEGAL FORMANTS IN ACTION**

The legal formant approach has been adopted in different comparative
law projects. The factual approach, elaborated by Gorla and Schlesinger,
together with the legal formants theory elaborated by Sacco, have been the
pillars for the edification of the Trento Common Core Project. The legal
formants methodology was discovered and praised by Duncan Kennedy for
the internal critique of legal systems, and it was discussed by a researcher
engaged in comparative law and economics.

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77 Gambaro & Graziadei, *supra* note 57, at 453.
A. Legal Formants and Factual Approach: The Common Core Project

The legal formants theory, together with factual approach, are the pillars of the Trento Common Core Project.\textsuperscript{78} The Project was launched in 1993 in Trento, by Ugo Mattei and Mauro Bussani, who studied with Sacco. The Common Core Project, in the words of Mattei and Bussani, aims at “unearth[ing] the common core of the bulk of European Private Law, that is, of what is already common, if anything, among the different legal systems of European Union Member States.”\textsuperscript{79} The project has different groups at work on specific subjects; the participants draw a questionnaire and then give the answers according to their own legal system. The questions are not based on definitions, but are hypothetical cases (factual approach).

The factual approach was the center of Cornell seminars held by Rudolph Schlesinger in the 1960s. Schlesinger’s endeavor was to describe how the rules on formation of contracts were functioning in various legal systems.\textsuperscript{80} He didn’t ask participants to describe their own legal systems on a specific subject. Schlesinger asked them, instead, to answer questions based on specific-case scenarios. Cornell seminars are known as the foundation of “factual approach,” as Schlesinger’s work provides, starting from facts and not abstract definitions, an accurate comparative overview on how different legal systems solve identical practical problems. The factual approach is the basis of the functional approach in comparative law, where legal rules are best described by their function.\textsuperscript{81} The factual approach is at the basis of Gorla’s work on contracts and, because of Gorla, it very soon made its way into Italian comparative law academia.

The Trento Common Core identifies the dynamic approach to comparative law as the base of the project. This theory allowed national reporters, as well as editors in charge of drawing the final comparative overview, to have the full picture of the dynamics that operate within a given legal system. In the instructions given to participants about how to answer the questionnaires,\textsuperscript{82} “[o]n a first level (‘operative rules’), the national reporters are asked to indicate how the case would be solved according to


\textsuperscript{79} Mauro Bussani & Ugo Mattei, THE COMMON CORE OF EUROPEAN COMMON LAW I (2002).

\textsuperscript{80} Sacco, Installment I of II, supra note 57, at 29–30.

\textsuperscript{81} Michele Graziadei, The Functionalist Heritage, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100, 100–30 (Pierre Legrand & Roderick Munday eds., 2003).

case law, legislation, legal doctrine, custom, and usage.”

They should indicate as well whether these formants are concordant . . . from an internal point of view and from a diachronic point of view. On a second level (“descriptive formants”), the reporter is to indicate the reasons why lawyers feel obliged to adopt the solutions described at the first of the inquiry. Finally, on a third level (“metalegal formant,” [or cryptotypes]), the reporters are invited to indicate any other element that might affect the solutions mentioned at Level 1, such as policy considerations, economic factors, social context and values, and the structure of legal process.

B. Legal Formants and Critical Legal Theory

Critical legal thought highly values Sacco’s dynamic approach to the analysis of law. Duncan Kennedy, in a Critique of Adjudication, states that the legal formants approach is a formidable tool in the scholars’ hands. Duncan Kennedy shows that using the legal formants analysis, we can refute the inevitability of deduction, as Sacco clearly affirmed: “A comparative method can thus provide a check on the claim of jurists within a legal system that their method rests purely on logic and deduction.”

Duncan Kennedy bases his praise for Sacco’s work on the description of how identical code provisions can be interpreted and then differently applied. For Kennedy, this is the utmost evidence of the possibility for the interpreters to choose among various possible applications of the rule. The judge, the scholar, and the interpreter cannot hide behind the neutrality of the law nor behind the logic of the law. Any application of the rule, within any legal system, is a specific choice for the interpreter. Legal formants, therefore, are extremely effective in conducting an internal critique to debunk the neutrality of the legal system using the same devices that the various legal actors use.

At the same time, Duncan Kennedy urges the comparative law scholar to include ideology as a legal formant that operates in an implicit way,

83 John Cartwright & Martijn Hesselink, Introduction to PRI CONTRACTUAL LIABILITY IN EUROPEAN PRIVATE LAW 1, 3 (John Cartwright & Martijn Hesselink eds., 2009).
84 Id.
86 Sacco, Installment 1 of II, supra note 57, at 24.
therefore a cryptotype. The mainstream comparative law has not been particularly focused in this direction. Confronted with legal formants methodology, Kennedy acknowledges that ideology is one of the components of legal systems that implicitly influences decisions. Classic comparative law, though, never considered politics and ideology as part of the legal system because classic comparative lawyers preferred to situate themselves on a scientific level, where law is a technical and autonomous subject that has a separate life from politics.

C. Comparative Law and Economics

In the 1990s, Ugo Mattei proposed a new approach to legal research: comparative law—the science that addresses the study of “similarities and differences between legal systems, is conjugated with law and economics”; the science that evaluates legal rules and institutions from the point of view of economic efficiency. The final goal of this new academic challenge was to assess which legal system was more efficient. “[C]omparative law and economics seek[] to explain in precise terms the convergence of legal rules by using efficiency as a key metric.” The legal formants approach is paramount in this endeavor, as it takes into account all the forces at work in a legal system, not only black letter law. In addition, a dynamic approach sheds light on how, and in which measure, the rules and the community of jurists are actually working, consciously or unconsciously, to build a more efficient legal system.

Comparative law and economics, in the hope of the founder, could work both at the level of positive and normative analysis. At the positive level, comparative law and economics can provide useful insights for understanding the reasons for the differences and the peculiarities of each legal system vis-à-vis the more universally efficient model. At a normative level, the scholar can suggest policy changes that move any legal system towards efficiency every time that a distance from the universalistic model is not justified. Moreover, comparative law and economics could give important contributions to the pattern of legal change, especially through the analysis of competing legal models and their inclusion in the legal system

87 Duncan Kennedy, Political Ideology and Comparative Law, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 35, 53 (Mauro Bussani & Ugo Mattei eds., 2013).
88 Kennedy, supra note 85, at 157–79.
90 di Robilant, supra note 71, at 1327.
through the various legal formants, including path dependency and implicit legal formants (cryptotypes). It is well known that in the globalized world, legal systems are subject to changes, sometimes imposed, sometimes voluntary. Comparative law and economics can provide an understanding of which legal formant takes the responsibility for the change. The development of comparative law and economics, however, proceed at a slow pace for different reasons. The lack of a definite identity and that very few scholars are equipped for this task might be among the reasons.91

X. THE LONG WAY OF ITALIAN COMPARATIVE LAW

From E. Amari to Rodolfo Sacco, comparative law in Italy has, as we could see, a long story that is not ended. As comparative law is a mandatory course for any law degree, we are creating, every day, new generations of comparative law scholars and legal practitioners with a strong curiosity and competence for what happens in different legal systems.

In Italy, comparative law was born as Italy was a legal system that has always imported “legal models,” a very fertile humus for legal transplants, from France, Germany, and later from common law countries, especially the United States. Beside this specificity, there is a common thread that always guided Italian comparative law scholars, that could be identified as “antiformalism.”92 Comparative law was the tool in the hands of dreamers, legal scholars that wanted to change the world. Ascarelli, Sarfatti, and Rotondi were looking at England in order to find an inspiration for coping with industrial revolution and give the necessary protection to trade unions and workers, to understand how to regulate competition in a world that was still very static. They were all swept away by the Fascist regime and marginalized before being rediscovered. The project for a common code in France and Italy wanted to be the beginning of a common Europe law on obligations; it was, in the eyes of its promoters, a valid instrument for the


rapprochement of people and legal systems.\textsuperscript{93} Gorla, Cappelletti, and Sacco wanted to overcome the dry, dogmatic, and systematic approach that was still mainstream after the Second World War. They were dreaming of a law that could understand societal dynamics instead of proposing dry definitions. Italian comparative lawyers have come a long way. Though regional, Italian comparative scholars participate in the global debate.

In Italy, comparative law is not, today, a subject for few dreamers. As a mandatory subject for legal studies, it reaches a wide audience and is now mainstream. Comparative law is no longer a “subversive” discipline for visionaries.\textsuperscript{94} We still have to understand which shape it will adopt in the future.
