

# Alan Watson Foundation

UNIVERSITY OF BELGRADE  
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THE 'WEAK LAW': CONTAMINATIONS AND LEGAL CULTURES  
(BORROWING OF LEGAL AND POLITICAL FORMS)

BY

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Belgrade 2008

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This article was originally published in [2003]  
*13 Transnat'l L. & Contemp. Probs.* 575

## **I. Introduction: Imperfect Alternatives and the Weak Thought**

The subject of "legal transplants" was first proposed by Alan Watson for scholarly purposes in comparative legal studies.<sup>1</sup> But in the last decade the subject has been taken over by practical lawyers mainly involved in projects of "exporting" their own legal systems,<sup>2</sup> especially from the West, to the former Socialist countries or to the vast, exotic world of non-Westerners. These projects are normally explicit projects of governance based on a clear-cut political agenda. Sometimes this exportation is expressed in old-fashioned fifties jargon centered on the rhetoric of the multi-party democracy, the rule of law, and the free market economy.

Lawyers involved in these projects of societal governance normally share one of two opposing attitudes. The first approach tends to blur the relevance of legal culture. As an example, we can take Komesar's theory of "Imperfect Alternatives."<sup>3</sup> He presents and applies a theory of how to compare institutions as a necessity for the evaluation of their performance. In his analysis, he includes institutions that make and apply the law.<sup>4</sup> He calls his theory the "participation-centered-approach." Under this theory, an institution's competence depends on the participation of institutional actors within it, analyzed in terms of their benefits and costs. This is a non-culture bound approach which, in its strongest version, tends to be indifferent to legal histories. The second point of view emphasizes legal cultures and their role in framing national laws, and eventually in preventing or distorting borrowings, transplants, and unification.<sup>5</sup> In this second approach, the term "culture" normally remains a drop in fuzzy conception to be used to make vague reference to a fluffy dimension of the law.

What I contend in the article is that rules are not self-expressive; institutions need to communicate, and so the law is, in a way, wrapped in a narrative. Thus, I want to focus on the practice of legal discourse, by which I mean the way the world is framed in legal terms. Henceforth, rules and institutions are not my first concern. Rather, my attention is instead devoted to the way we speak about law as a particular factor in the process of definition of one legal culture, and the way legal discourses are eventually generated and maintained through borrowings and transplants. Thus, I see my contribution as an effort in comparative jurisprudence,<sup>6</sup> within the civil law,<sup>7</sup>

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<sup>1</sup> See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993) [hereinafter *LEGAL TRANSPLANTS*].

<sup>2</sup> Something which, in my view, has nothing to do with comparative law.

<sup>3</sup> See NIEL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

<sup>4</sup> *Id.*

<sup>5</sup> See Pierre Legrand, *Against a European Civil Code*, 60 *MOD. L. REV.* 44 (1997).

<sup>6</sup> Willem Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 *U. PA. L. REV.* 1889 (1995) [hereinafter *Ewald I*]; Willem Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *AM. J. COMP. L.* 489 (1995).

using Italian law as an example of the emergence of a modern legal culture from a weak tradition.<sup>8</sup> I have considered this from a neutral perspective. This analysis is *not* centered on the current political agenda connected to efforts to introduce or strengthen multi-party democracy, the rule of law, or a free-market economy. Rather, I reverse foreground and background, shifting toward non-deliberate efforts of the importing and exporting of patterns, concentrating on discourses and *not* on institutions, and focusing on history rather than on present issues.<sup>9</sup>

I focus on these aspects because of the problems raised by the process of commodification of the legal rules, as is suggested by the words import and export of legal models, especially in relation to former Socialist countries. As the job of lawyers is to produce interpretations of texts and authorities, I believe that the meaning of an imported rule or institution depends heavily on the strategies of the lawyers who belong to the borrowing system. If we define "ideology" as the processes by which meaning is produced, challenged, reproduced, and transformed,<sup>10</sup> it is fully justified to adopt ideological criticism as a proper approach to legal diffusionism, to highlight the struggle present in the production of the meaning of borrowed norms.

From this perspective, we can identify at least two strong, highly characterized models within the civil law: the French and the German. The Italian model is a combination or hybrid of the German and French systems. Thus, I approach this issue from the "borrowing" side, in particular, from the perspective of the formation of a legal culture, which is a major concern today for the emergence of a newer common European law.<sup>11</sup> In the first part of this article, I concentrate on the general aspects of the process of importing and exporting legal patterns in an effort to sketch out a model of appraisal for legal diffusionism based on my reading of Watson's theory of transplants. The purpose of the model is to show the important roles played by legal elites and intellectuals, and their strategies, in promoting borrowings from abroad. In the second part, I discuss the Italian case as an example of major shifts in the legal discourse. Finally, I try to develop some suggestions for the appraisal of the import and export of legal patterns.

## II. Part I: Comparativism, Representation, and Import

### A. Culture and Difference

I start my argument by considering comparative law as an attempt to mediate between a field and an audience, coping with the problem of self-definition of one culture within the legal world. Indeed, we can speak of import/export only when we have drawn a boundary by stating principles of inclusion and of exclusion, of

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<sup>7</sup> See ALAN WATSON, *THE MAKING OF THE CIVIL LAW SYSTEMS* 4-5 (1981) [hereinafter *CIVIL LAW SYSTEMS*] (providing a definition of civility).

<sup>8</sup> See GIANNI VATTIMO, *THE WEAK THOUGHT AND ITS STRENGTH* (Dario Antiseri & Gwyneth Weston trans., 1996). Here weak is used to emphasize a tradition widely opened to foreign "cultural intruders."

<sup>9</sup> See Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984) (examining the relevance of history in a critical appraisal).

<sup>10</sup> See MICHELE BARRETT, *THE POLITICS OF TRUTH: FROM MARX TO FOUCAULT* 97 (1991).

<sup>11</sup> See Pierre Legrand, *European Legal Systems Are Not Converging*, 45 *INT'L & COMP. L.Q.* 52, 53 (1996) [hereinafter Legrand, *Systems Not Converging*].

similarities and differences.<sup>12</sup> Culture and difference have always been central concerns of comparative law, and the first step of the conventional approach is to divide the legal world into legal families by tracing back each system's common roots, much as genealogies explain the present. Genealogies serve to define who we think we are or who we would like to think we are. They define an "us" and a "them," and they are an essential mechanism of how identities are constructed. The tracing back of legal roots is a process of representation that occupies a central place in contemporary studies of culture, especially in the practice of exhibiting cultures as "other." In these efforts of mapping cultures, systems of law are grouped together or distinguished according to a theory of what their basic units or basic structures are, and, according to the respective weights, assigned to different elements. Thus, defining an identity depends heavily on the framework assumed for the mapping. A second point of major concern for comparative law has always been the transplant and borrowing of legal models across the various systems and families. This process of transplantation is sometimes presented as evolutionary. By this, I mean they are presented without any direct project of governance, and sometimes as the result of a conscious and purposive design of reforms. Thus, we can single out two major aspects of comparativism: the "culture and difference" branch and the "import and export" branch.

In recent literature we see a renewal of interest in comparative law, which attempts to redefine its aims and methods in modern terms.<sup>13</sup> One main subject is the conscious effort to export Western legal models to the former Socialist countries, with detailed efforts aimed at institutional design and at the actual drafting of model laws, particularly in the field of corporations.<sup>14</sup> What is amazing is that such projects of governance through exports of legal patterns are carried out notwithstanding the lack of a commonly accepted theory of legal identities and legal transplants. Thus, my first aim is to try to sketch a model to cope with these problems.

From this standpoint, I think that both the definition of identities as well as import/export can be seen as interested, non-neutral, purposive projects of governance. Indeed, the rise of comparativism in early Nineteenth Century Germany has been linked with a project of defining identity and difference in order to achieve a major borrowing and transformation of patterns.<sup>15</sup> In this process, the Roman legal scholarship, as it evolved during the Middle Ages and Enlightenment, has been inserted as a whole into national German law, transforming it into the new system embodied by the *Bürgerliches Gesetzbuch (BGB)*, the new German code of 1900. The definition of identity and difference has thus been functional to a major transplant, directed toward the political goal of a common German law for the new Empire.

If we adopt this analysis to cope with comparative law as a discipline, the attempt to meet different audiences and their expectations is apparent. Comparative law has not normally been transnational at all; rather, it has grown within the frameworks of different legal traditions, responding to the needs of legal elites. From this point of view, one unexpected project comparative studies can pursue is "insulation." This strategy has been pursued particularly strongly in Britain, where the

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<sup>12</sup> David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545 (1997).

<sup>13</sup> See Mitchel Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 *YALE L.J.* 1325 (1995) (strongly challenging conventional comparative law scholarship, and expressing discomfort with the settled circles of professional comparativists). See also Ewald I, *supra* note 6; Kennedy, *supra* note 12.

<sup>14</sup> See Bernard Black & Reiner Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 *HARV. L. REV.* 1911 (1996).

<sup>15</sup> See GABOR HAMZA, *COMPARATIVE LAW AND ANTIQUITY* 34 (1991).

distinction between common law and civil law has been used to create and defend a national identity in the field of the law.<sup>16</sup> Socialist lawyers have used the same insulation project to maintain a perceived separation of socialist countries from the rest of the world.<sup>17</sup> This project is supported by Western specialists with a strong professional interest in defining Soviet studies as a distinct discipline within the Western academic world.

The strategy of marking differences with aliens while borrowing ideas from them has been adopted by French scholars, particularly Saleilles. In his French presentation of the *BGB*,<sup>18</sup> he characterized the Germans as different and "philosophical" (an insult among lawyers) while importing concepts from them.<sup>19</sup> This strategy is a form of "etherization" of the other. It is a way of assimilating while still denying the borrowing.

Opposite of this insulation strategy lies the strategy of comparative law for unification. To a large extent, contemporary comparative law is based on the search for a common core, which is used to deny differences among European traditions and to define a new identity, with practical implications. The definition of a common European legal identity furthers the goal of a massive, cross-board import/export of patterns to create a new law. Thus, once again, the two departments of comparative law work together toward one possible use of comparativism. This process draws the boundary between Western systems and non-Western ones, in the form of the exoticization of African or Asian laws<sup>20</sup> and in the identification of a number of post-socialist systems which frequently import Western models.

In both cases, the Westernization of the non-Western systems is presented to be a necessary next step for their development in a clear conventional evolutionary paradigm. It is quite interesting from a comparative point of view that this great effort by the import department is increasingly blurring the distinctions so often cultivated in the past among American and European systems. The differences between the French or the German model, for example, are quite completely forgotten, and even the sharp distinction between a common and a civil law world is softened. The blurring process emphasizes common economic and political structures and minimizes the different legal technicalities by which these common structures operate in the various institutional settings of the Western legal world.

I thus end this section affirming the purposive, non-neutral character of comparative law, even when it apparently looks neutral and unpurposive, as in mappings. By this, I mean the project of mapping the world into legal systems and families. Such "mappings," which are by definition crucial to a theory of transplants, are also efforts to define identities and to cope with the other.

### *B. Spread and Dissemination*

In this second section, I try to outline a model that accounts for borrowings and transplants, given the considerations discussed in the previous section. Watson's

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<sup>16</sup> See WILLIAM WIRT HOWE, *STUDIES IN THE CIVIL LAW AND ITS RELATIONS TO THE JURISPRUDENCE OF ENGLAND AND AMERICA* 109 (1905).

<sup>17</sup> See Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 *AM. J. COMP. L.* 93, 94 (1995).

<sup>18</sup> RAYMOND SALEILLES, *ETUDE SUR LA THEORIE GENERALE DE L'OBLIGATION D'APRIS LE PREMIER PROJET DE CODE CIVIL ALLEMAND* (1890).

<sup>19</sup> I make special reference to the conception of *Abus de droit*, which was then inserted in P226 *BGB*, and after which Saleilles became a major topic of French *doctrine*.

<sup>20</sup> See generally Kennedy, *supra* note 12.

theory of legal transplants<sup>21</sup> is normally challenged as conservative, or worse.<sup>22</sup> However, I think it can be a powerful tool for a critical theory of comparative law because of its potentially delegitimizing role, the eventual revolutionary impact of which has not been properly understood. I do not subscribe to all of Watson's assertions. In fact, I dissent on many points. Like any theory, Watson's theory is a package. We can deconstruct it, use something, and reject the rest, but we retain the bulk of it if we adopt the reading discussed below.

I advocate a radical interpretation of the theory of legal transplants, for the purpose of delegitimization and critique. If one postulates an inherently close relationship between the law and the society in which it operates, legal transplants ought to be virtually impossible. Watson rejects this postulate, asserting that the law develops mainly by borrowing. The history of law is characterized by a prodigious amount of borrowings. Legal systems are normally amalgams of patterns received from other systems. Borrowing is common throughout social life, and thus the prevalence of borrowed elements in law is hardly explicable entirely in legal terms. Legal borrowing calls for special explanation only insofar as it differs from other kinds of cultural diffusion. From this standpoint, the essence of a culture is contained in its contradictions, the inclusion of foreign elements, and the ideological presentation of them as composing a unity. Ultimately, comparative law should aim to produce a general theory about law and legal change and the relationship among legal systems and rules and the societies in which they operate.<sup>23</sup> The history of a legal system is largely a history of legal material borrowed from other legal systems. I think that this is a perfect statement of a critical view of the law and of legal tradition.

The conservative flavor normally is evident in what I call Watson's "serendipity approach" to<sup>24</sup> legal change. Chance, he argues, plays a major role in determining what law will be borrowed. Legal transplants have not usually been the result of a systematic search for the most suitable model. Social and economic factors have a much more limited and attenuated effect than those normally suppose by theories of law and society. In short, law is largely autonomous, operating in its own sphere.<sup>25</sup> In his accounts, Watson emphasizes the random and unlikely occurrence of many transplants; he aims to show that for any proposed theory there is always a mass of possible counterexamples, thereby showing that no theory can work.

I think the conventional criticisms of the law's autonomy singled out by Watson are misconceived and politically naive. Watson's premise is that the law is largely autonomous because it is a law-making elite constantly in search of legitimation, which is relatively insulated from social concerns. From this point of view, his theory of legal autonomy can be used as a strong critique of the existing, unlegitimated governing by lawyer-elites,<sup>26</sup> especially in Western countries.<sup>27</sup> The

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<sup>21</sup> See LEGAL TRANSPLANTS, *supra* note 1; ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW (1985) [hereinafter EVOLUTION OF LAW]; CIVIL LAW SYSTEMS, *supra* note 7; Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L. J. 316 (1978) [hereinafter *Comparative Law*]; ALAN WATSON, SOCIETY AND LEGAL CHANGE (1977).

<sup>22</sup> Ewald, *supra* note 6.

<sup>23</sup> See Comparative Law, *supra* note 21.

<sup>24</sup> LEGAL TRANSPLANTS, *supra* note 1.

<sup>25</sup> EVOLUTION OF LAW, *supra* note 21, at 119.

<sup>26</sup> See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIECLE] 284 (1997) (on the emphasis on the role of elites as a distinctive feature of progressive historicism in comparison with neo-Marxian analysis).

<sup>27</sup> For a use of Watson's theory pointing at borrowings as techniques of legal elites in collaboration with political leaders with reference to Islamic law, see Donald L. Horowitz, *The Qur'an and the Common*

theory portrays law as a bundle of borrowings pursued by insulated elites, who constantly deny this fact. They present highly sophisticated theories of interpretation and scholarly genealogies of evolution that are intended as strategies of self-legitimation. According to this reading, the law is a battleground of competing elites who provide legal doctrines and rules, and strategies of societal governance.<sup>28</sup> Since the use of a discourse as a technical and elaborated pattern to frame the world is a particularly relevant strategy of self-legitimation and dominance, I think that the study of how discourses evolve and become borrowed and/or transplanted is crucial to a radical comparative legal analysis.

### *C. Formants and Elites*

In this section we can try to use the previously developed reading of Watson's theory in connection with the "formants" approach suggested by Rodolfo Sacco.<sup>29</sup> The formants approach focuses on law as a social activity. A formant of the law is a group, a type of personnel, or a community, institutionally involved in this activity. From this point of view, we find an established legal profession in the Western legal tradition, and three main types of personnel within it: the practicing lawyer, the legal policymaker (for example, a legislator, an appellate court judge, or upper level administrator), and the legal scholar (law professors and the like). Courts, legislators, and lawyers are all interacting and competing formants. A model of competing formants within a particular setting of one legal tradition can be substituted for the model of the law as a more or less consistent system of interrelated propositions.<sup>30</sup> As these suggestions demonstrate, the theory is designed to cope with the different fabrics of the law and is conceived as a battleground of competing sources and professional elites.

The theory of competing legal formants has some consequences in the field of legal interpretation and legal hermeneutics. A precedent, a statute, or the like only have those meanings that competing groups of elites have attached to them when placed under different institutional constraints and within different incentive structures. From this point of view, the theory draws a distinction between the working rules, the practices of a legal system, and the symbolic set, or the discourse used by lawyers to describe, justify, and rationalize the rules, and give meaning to texts and authorities. Indeed, this distinction points to the ideology of a legal tradition best understood as the system of representations located in everyday practice<sup>31</sup> and in the struggle among formants in the production of meaning.

The theory implies that it is always necessary to deconstruct the law to reach its working level, beyond the particular legal discourse of one tradition. This deconstruction is necessary not only for the sake of comparison, but also for conducting meaningful economic analysis of the law. Deconstructivism is neither a

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*Law: Islamic Law Reform and the Theory of Legal Change (I)*, 42 *AM. J. COMP. L.* 233 (1994); Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change (II)*, 42 *AM. J. COMP. L.* 543, 570 (1994).

<sup>28</sup> If these elites are insulated from society, the law they produce will be autonomous from social needs, otherwise this will not be the case.

<sup>29</sup> Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (I)*, 39 *AM. J. COMP. L.* 1 (1991); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (II)*, 39 *AM. J. COMP. L.* 343 (1991).

<sup>30</sup> See also KOMESAR, *supra* note 3, at 101.

<sup>31</sup> See TERRY EAGELTON, *IDEOLOGY: AN INTRODUCTION* (1991).

luxury nor a philosophical intruder, but a necessity that comes from within. In these cases, the difference or similarity between two legal cultures is particularly shaped by the legal elites and their styles in discursive practice. Thus, the problem is how and why styles are selected, maintained, and transmitted. I shall try to lay out some suggestions in the next section.

#### *D. The Strategic Model*

From the previous sections we can conclude that law, at least within the Western legal family, evolved normally through transplants, and that the logic of these transplants has been directed by competing elites in search of legitimation. I concentrate on the dual aspects of giving reasons for a rule and of providing a legitimation for the jurist. If we perceive the dual nature of the process, we can see how the selection of opinions can depend on a strategy of legitimation, and *vice versa*, an elite can legitimate itself because it gives opinions. From this standpoint, there can be a basic strategy for covering cases for all the groups competing within the legal process, by which I mean to find solutions and opinions to handle still uncovered cases by filling the gaps and working out rules to cope with Dworkin's "hard cases." Thus, if the inner sources and authorities do not cover a class of cases, the basic strategy suggests finding authorities outside from which to borrow solutions. This strategy is performed, of course, while minimizing possible resistance by borrowing opinions, doctrines, and rules from known languages, rather than from unknown ones. Thus, the borrowings are taken from proximate systems, rather than from distant ones, and from prestigious patterns, rather than from discredited models. Prestige is one aspect of the strategy of covering cases to avoid resistance. It is simply much easier to propose a solution invoking a prestigious authority. Thus, the model I am sketching can be labeled as a strategic decentralized approach to diffusionism. Everything depends on the strategies of the borrowing systems; they pick up what they need, and they use what they have borrowed to cope with their own problems. A model is highly prestigious if it is borrowed by many, but this prestige depends less on the quality of the model than on the frequency and circumstances in which it meets the (possibly very different) expectations of the various borrowers. Of course, the elites of the donor system can try to design their own strategy of dominance, but as the process of borrowing is controlled by the elites of the receiving system, the donor's strategy can succeed only if it meets that of the borrower. The best strategy for transplanting elites can thus be using ideology and propaganda to induce the borrowing elites to believe that the offered model meets their expectations. Thus, the basic strategy in transplanting is the presentation of a prestigious mode, one that can easily cover important cases in a way appreciated by the receiving country. For instance, this might be done with reference to "efficiency," a magic keyword in the rhetoric of the borrowing elites.

The model I propose is thus a model of basic strategies: covering cases, and prestigious propaganda.<sup>32</sup> Of course, chance plays a major role in any strategic game, which explains many of Watson's serendipity examples, but chance becomes just a particular case covered by the theory. In my view, "prestige" is a label for complex interrelations among cultures, but certainly prestige is determined by the followers

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<sup>32</sup> It is not hard to see how much the French have been masters in this game in all comparative law conferences.



according to their strategies, which may be totally antagonistic toward the donor systems.<sup>33</sup>

From this standpoint, I shall now investigate the formation of modern Italian law in relation to borrowings from the French and the German models. For the purpose of my analysis I will use Lasser's sketch of the former,<sup>34</sup> and Ewald's account of the latter.<sup>35</sup> I will use short labels to characterize them, and I apologize for any oversimplification needed in this work. The labels I use do not represent the whole of French and German legal cultures, but attempt only to capture the aspects of these complex cultures that Italians have perceived more acutely and have tried to import to cope with its problems, whether real or invented. Thus, I describe the French model as passive interpretivism. Under this model, law is composed of principles, rules, and exceptions<sup>36</sup> embodied in legislative texts. Judges need only to give short opinions referring to the text to which a rule is attached, and legal intellectuals are expected mainly to cultivate "clarity" (*clarite*), organizing the legal field in clear cut departments and subjects. In contrast, I characterize the German model as theoretical activism. Under this model, law is composed of theories developed jointly by scholars and superior judges in a very refined conceptual language, expressing the variety of the world in a highly technical legal discourse. Intellectuals play a major role and their "theories" play a role in the legal process. Of course, I refer mainly to the classical versions of each of these models as they have been elaborated in the Nineteenth Century. My analysis is especially confined to that period in which borrowings from outside Italy formed Italian legal culture.

### III. Part II: A Portrait of Italy as a Weak Tradition

#### A. *The Love Affair with the French*

In this section, I give an initial sketch of the formation of Italian legal culture after the Napoleonic takeover of the country. As mentioned above, modern Italian law has grown as a bundle of borrowed traits since the early Nineteenth Century. In the first decades of that century, the French army conquered Italy, introducing the French Civil Code of 1804 in most of the country. France annexed the Northwest (Piedmont and Liguria), and the Civil Code was directly put in force in those regions. The Kingdom of Italy (Northeast and Center) received an Italian translation of the French Code in 1805, and the same happened in the Kingdom of Naples, grouping the Southern regions in 1808.

After the collapse of the French administration and the Congress of Vienna in 1815, Italy was divided into a number of small states for the first half of the century, each with its own legal system.<sup>37</sup> These small states can be grouped in four main regions: the Northwest, the Northeast, the South, and the Center. The Northwest and

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<sup>33</sup> E.g. the Meiji strategy in borrowing cultural traits from the West, to better prepare a counter-strategy, or that pursued by many African or Asiatic elites to get education in Europe to better prepare an alternative ruling class to Europeans.

<sup>34</sup> See Lasser, *supra* note 13.

<sup>35</sup> See Ewald I, *supra* note 6, at 1990-2094.

<sup>36</sup> See also P.G. Monateri, *Regles et Technique de la Definition en France et en Allemagne: La Synecdoque Francais* [Rules and Definitions in France and Germany: The French Synecdoche], 3 REV. INT. DR. COMP. 3 (1984).

<sup>37</sup> See Santoro Passarelli, *Dai Codici Preunitari al Codice Civile del 1865*, in STUDI IN MEMORIA DI ANDREA TORRENTE 1029 (1968).

South maintained a slight revision of the French code). The Northeast was ruled by the *Allgemeines Bürgerliches Gesetzbuch (ABGB)*, the Austrian Civil Code.

The Center of Italy was split into two main states: Tuscany, which was governed by an Austrian Grand Duke, and the Regions of Rome and Bologna, governed under the Papal administration. Both countries, after the French experience, went back to the *Jus Commune*, a form of uncodified Modern Roman Law based on Justinian's Compilation as developed in the case law.

As a result of the aggressive foreign politics of the Savoy family, rulers in the Northwest, Italy was unified in 1861 with its capital in Turin. The French government backed this political maneuvering as a counterweight to the major Austrian influence on Italy, but later Napoleon III refused further help, deciding to maintain the Pope in Rome and avoiding a unification of the country. Thus, it was not until 1870, when the Germans defeated the French, that the Italians could finally conquer Rome and dethrone the Pope, so that the Holy City became the capital of the Kingdom of Italy.

France and the Italian states had a complex relationship of rivalry and friendship,<sup>38</sup> but certainly Piedmont, which performed the forced unity of the country, was largely embedded with French culture. For example, the ruling elites and the royal family, who originated from a French fee, still spoke French. The Northwest adopted a Constitution (*Statuto Albertino*) in 1848 that was indeed a transplant from the French Constitution of 1830, which took the throne away from the Bourbons and gave it to Louis Philippe d'Orleans. In 1861, this Constitution was extended to the whole of Italy. Four years later, the Italian government decided to reshape the legal features of the new Kingdom and the 2248 (1865) Act (still in force) tailored Public Administration on the French patterns of the time.

In the field of public law, there was no real alternative for at least three reasons. First, the unity was achieved by Piedmont, which belonged to a French area of influence and which became Italianized only after 1870. Second, unity was achieved in opposition to others, for example, the Pope, the Austrians in Milan and Venice, and the southern Kingdom of Sicily, and it would have been inappropriate to adopt their patterns. Finally, Italians perceived the French model as a liberal model. France was the country of liberty and reforms, and the elites proposing the unification process shared this liberal culture.

In the field of private law, the choice was among three possible alternatives: the French code; the Austrian code, which ruled the Northeast as the more economically advanced region of the new country; or the renewed Roman law, which Italians certainly felt was rooted in national culture. A fourth alternative could have been the elaboration of a newer, uniquely Italian pattern. For the purpose of the strategic model sketched above, we can consider separately the adoption of a code, the elaboration of a model, and the importation of a complicated system such as the Roman-based case law system. The purpose of the government was to frame national unity in the short term. Thus, the real alternatives were limited to the French and the Austrian codes. I maintain that the choice was a question of self-definition much more than a matter of policy. Indeed, both codes have been designed to cope with a market-based society, and thus, no particular political issue was at stake in the choice. Both codes were based on the following principles:

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<sup>38</sup> See STORIA D'ITALIA 89-191 (Nino Valeri ed., 1965).

- . Abolition of the status-based caste system and general legal capacity of all citizens (general citizenship);<sup>39</sup>
- . Definition of property rights on land as "absolute," and abolition of perpetuities and feudal incidents;<sup>40</sup>
- . Freedom of contract and marketable property rights;
- . Right of enclosures (right of the landowner to enclose his land to keep strangers out);<sup>41</sup>
- . Egalitarian inheritance law coupled with freedom of wills.

The Austrian code is indeed widely credited to be just as liberal as the French,<sup>42</sup> but French culture was much more widespread than Austrian among the ruling elites, and the choice was in fact imposed by Piedmont as the winning state on the rest of Italy. In the same way, Italy adopted commerce and criminal codes based on liberal French conceptions. Thus, cultural feelings played an important role in the choice, and Italy became France's "Latin sister."

The adoption of a revised French code also involved the borrowing of French legal methods and organization of courts.<sup>43</sup> The method of Italian lawyers was styled after the prevailing French exegetic school.<sup>44</sup> The court system was arranged around the French pattern of the *Cour de Cassation*, but because of the recent achievement of national unity, five Supreme Courts were created at Turin, Florence, Naples, Palermo, and Rome. A single Supreme Court was created only in 1923 (Act 601 of 1923) after the fascist regime took power.

Because of the absence of a unified case law, French authors played a major role in legal education, which was heavily based on their works and translations. We can measure the impact factor of French legal culture by the translations of French law books. Merlin's *Commentaries* on the French code were translated in Naples (1824-28), and in Venice (1834-44), notwithstanding the fact that Venice was still ruled by the Austrian code. The major textbooks eventually were translated into Italian: Duranton in 1852-54; Zachariae in 1862; Aubry and Rau in 1841-49. The massive, multi-volume work of Baudry-Lacantinerie was the last French work to be translated in 1900. The end of the century marked the end of the translation process, and also, as we shall see, of the impact of French culture on Italy. In the new century, the works of Planiol, Jossierand, Geny, and others have been studied but never translated.

Thus, as we have seen, the Constitution, the Codes, the courts, the legal education, and the public administration were all created on a French template, but the most influential formant was undoubtedly French *doctrine*. Italian jurists borrowed

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<sup>39</sup> Napoleonic Code, art. 1; P17 ABGB.

<sup>40</sup> Napoleonic Code, arts. 537, 544; P308 ABGB.

<sup>41</sup> Napoleonic Code, art. 552; P362 ABGB.

<sup>42</sup> See RODOLFO SACCO, *INTRODUZIONE AL DIRITTO COMPARATO* 224, 256 (5th ed. 1992) [hereinafter *INTRODUZIONE AL DIRITTO COMPARATO*].

<sup>43</sup> See Antonio Gambaro & Attilio Guarneri, *Italie*, in *LA CIRCULATION DU MODELE JURIDIQUE FRANCAIS*, 14 *TRAVAUX DE L'ASSOCIATION HENRI CAPITANT* 77-78 (1993).

<sup>44</sup> See Giovanni Tarello, *La Scuola dell'esegesi e la sua Diffusione in Italia*, in *SCRITTI PER IL XL DELLA MORTE DI BENZA* (1969).

French case law only through the citations of the professors' books,<sup>45</sup> and had neither direct knowledge of nor real interest in French decisions. Italian books reflected the thoughts of French professors, not the content of French decisions. In one widely read law book of the time, Emilio Pacifici-Mazzoni's work on wills, the first fifty pages of the volume cite Demolombe sixty-eight times, with citations also to Marcade, Aubry and Rau, and Toullier, whereas there is just one citation to a French case. That is quite interesting because the role of the case law, and in particular, the role of the *Cour de Cassation*, has been overwhelming in all areas of French law. Indeed the Italian judicial style in writing opinions remained more influenced by the style of the courts of the old *jus commune* (mainly the courts of Florence and Rome), and not by French judges' concise style of writing opinions of just one sentence.<sup>46</sup> From this standpoint, there was a split between the culture of judges and the culture of professors. The Italian literal style preserved a national pattern, whereas the French approach introduced exegetics.

Italian legal culture borrowed French legislation and French *doctrine* much more than it borrowed French case law. But borrowing is a selective activity, and it is quite misleading to say that the French model was transplanted into Italy, because the transplanted model became quite different from the original. Once again, the theory of formants can help us understand that models are made up of different traits, and that in the borrowing process original traits can be mixed up, and even twisted around, to produce a different model. In fact, transplanting the French model into Italy reversed background and foreground, since the role of the courts was subordinated to that of *doctrine*, contrary to the original French version of power relations between these formants. In the next section we can see how this increased role of intellectuals gave birth to a major shift from the French toward the German style of legal thought within the legal profession.

### B. The Coming of the Germans

After national unification in 1870, Italian universities were reorganized based on new standards<sup>47</sup> and the law schools were entrusted to a first generation of professional legal scholars.<sup>48</sup> From the very beginning, the best developed department within the new legal academy was that of Roman law. All the leading figures of this first generation of scholars were professional Romanists. It is quite evident that they were interested in theory and Roman law, both of which were available in Germany. Within a few decades, Italy became one of the provinces where German studies exercised their strong influence.<sup>49</sup> The shift away from the French legal culture was widespread and started because of the prestige of German academic studies in the field of Roman law.<sup>50</sup> Italian professors began to borrow the German theoretical approach to law, which had a strong impact in the law schools, while the now discredited French method did not. New lawyers and judges were now educated in the

<sup>45</sup> See Gambaro & Guarneri, *supra* note 43, at 82.

<sup>46</sup> The *Circulaire du 31 Janvier 1977* allowed judges to frame their opinions in two or more sentences, a departure from the traditional one sentence style.

<sup>47</sup> See STORIA D'ITALIA, *supra* note 38, at 657-89.

<sup>48</sup> See Gambaro & Guarneri, *supra* note 43, at 82.

<sup>49</sup> See THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920 (Mathias Reimann, ed. 1993) (discussing German influences in America).

<sup>50</sup> See INTRODUZIONE AL DIRITTO COMPARATO, *supra* note 42, at 259-63.

new German mode. Thus, the style of the legal discourse changed dramatically, and a new legal jargon was tailored after German templates.<sup>51</sup>

The professionalization of legal academia was a major factor in this shift, and the leading figure in this process was Vittorio Scialoja. He was a great mentor, with many disciples in all legal fields, including Bonfante e Segre in Roman law, Filippo Vassalli and De Ruggiero in private law, and Chiovenda in civil procedure. Together with Filippo Serafini, Fadda, and Bensa, he was also one of the most activist borrowers from Germany. Indeed professional academics found in German doctrines an excellent fuel for their legitimation within the schools, and even within the legal process. Once again we can trace the translations of German works to measure out their impact. In the middle of the century, Serafini and Colgiolo translated the immense Gluck's *Pandects*.<sup>52</sup> In 1886, Vittorio Scialoja published a version of Savigny's *System*<sup>53</sup>. From 1903 to 1905, Fadda and Bensa translated Windscheid's work, which was reprinted in the 1930s.<sup>54</sup> All the major Italian jurists of the time adopted the German approach: Nicola and Leonardo Coviello, Francesco Ferrara Sr., Giuseppe Messina, Ettore de Ruggiero, Vittorio Polacco, and Giovanni Pacchioni.

In order to contrast the old French method to the newer German style, it is quite useful to cite a biographical narrative by Giovanni Pacchioni, one of the leading authors of the 1930s:

[I] remember the teachings of my two main professors: Piero Cogliolo and Pasquale Melucci. The latter, since he was a disciple of Pacifici Mazzoni, followed the French style, and that of Laurent in particular. The former having been a student of Filippo Serafini followed the methods and theories of Savigny, and of the other great German scholars as Windscheid, Brinz, Becker et al.

The two methods of teaching were in striking contrast.

Melucci was giving classes on the basis of an article of the code. He used to construe the meaning of it, and with an exercise of logic tried to derive all the possible consequences; and when these were hard, his usual *memento* to the young students was: *dura lex, sed lex*.

On the contrary Cogliolo gave lectures starting from old Roman law, reconstructing the historical evolution of legal conceptions through the ages up to the present Code, discussing solutions on the basis of analytical, as well as sociological doctrines.

Even when I was very young I could easily perceive that the German approach was quite superior. The approach credited to Filippo Serafini and Vittorio Scialoja has become prevailing.

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<sup>51</sup> *Id.* at 261.

<sup>52</sup> FEDERICO GLUCK, *COMMENTARIO ALLE PANDETTE [PANDECTS]* (Filippo Serafini & Pietro Cogliolo., trans. 1888-1909).

<sup>53</sup> CARLO FEDERICO SAVIGNY, *SISTEMA DEL DIRITTO ROMANO ATTUALE [SYSTEM]* (Vittorio Scialoja trans., 1886-1898).

<sup>54</sup> BERNARDO WINDSCHEID, *DIRITTO DELLE PANDETTE* (Carlo Fadda & Paolo Emilio Bensa trans., 1925).

I could never suffer the *dura lex sed lex*.<sup>55</sup>

This narrative captures the difference between passive interpretivism and active theory that played a key role in the German success in Italy. Indeed, the new German approach placed the intellectuals in a new context within the legal process. The law school professors, more than the judges, had to lead the process, because theory was the realm of intellectuals and law was essentially conceived as theory. Under this concept of law, the role of courts would have been to apply professors' theories to particular cases. Law was conceived not as a bundle of rules, but of conceptions. Rules were to be derived from these conceptions, which were to be refined by professors. Besides, it was quite evident that statutory provisions could only have the meaning and scope allowed them by academics. In the beginning, the prestige of professors induced lawyers and judges to accept the role and to imitate their way of writing. The theoretical mood of the legal discourse became a dominant paradigm even among practitioners. It is also quite clear that this strategy of dominance succeeded because of the lack of a single Supreme Court and because of the weak organization of the bar. The shift away from French culture became so prevalent that when, in the 1920s, the Italian and French governments decided to adopt a common code of contracts, the project was aborted because of the opposition of academic elites against a project based on "outdated" French patterns.<sup>56</sup>

The 1920s represented the height of the German prestige in Italy. In the 1930s, a new generation appointed to law faculties began to challenge the German paradigm from within. Two leading authors, Fr. Ferrara, Sr. and G. Messina, fueled a new wave critiquing the prevailing German paradigm by using the same German formalism. Salvatore Pugliatti and Mario Allara became the major representatives of this approach. In their view, intellectual honesty almost always required rethinking of law globally, producing new theories, and giving up received truths and categories to build new systems and even a new vocabulary when needed. They cultivated "mere brilliance"<sup>57</sup> as the proper academic standard and as the proper approach to law. Their unintended impact was that each professor worked to develop new theories, new concepts, new categories, and a new legal vocabulary. The common enterprise of the German pandectists became an individualistic effort to propose the best system of the law. Since this happened after the different courts had been unified into one Supreme Court, the unintended consequence was that the role of professors rapidly declined and that of judges increased. Mariano D'Amelio headed the Supreme Court, and he successfully reorganized the previous case law in a coherent way by imposing a practice of *stare decisis*, increasing the importance of the Court. Thus, the academic intellectuals lost their preeminent role when they split into different schools, each cultivating its own system. In contrast, the judiciary was reorganized around one Supreme Court. From the standpoint of cultural strategies, the overstatement of theory and brilliance proved to be a very poor move, leading to a universal discrediting of intellectuals in favor of an increased judicial role in the legal process.

All this had a further impact when the fascist regime decided to adopt a new code. The project was entrusted to law professors, but they were no longer the "oracles" of a common legal culture, but the divided exponents of different schools.

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<sup>55</sup> Gambaro & Guarneri, *supra* note 43 (citing GIOVANNI PACCHIONI, 7 IL DIRITTO CIVILE ITALIANO 86 (1937)).

<sup>56</sup> INTRODUZIONE AL DIRITTO COMPARATO, *supra* note 42, at 262.

<sup>57</sup> See James Gordley, Mere Brilliance: The Recruitment of Law Professors in the United States, 41 AM. J. COMP. L. 367 (1993).

Thus, it was quite impossible to fuse together their different definitions, categories, and vocabularies. The end result was a unified code of private and commercial law, enacted in 1942,<sup>58</sup> with some but limited influence from the *BGB*,<sup>59</sup> mainly in the fields of corporations and partnerships, and the law of inheritance.<sup>60</sup> As a result, the new Italian code was simply a rewording of the previous codes. Indeed, none of the major features of the German code embodied in the "*Allgemeiner Teil*" of the *BGB* were transplanted because the *querelles de chapelle* about general conceptions were too strong in the drafting committee. Thus, the French pattern of legislation resisted change because of the inner disharmony within academia, provoked by the exaggerations of theory and brilliance.

Once again, the borrowing system resulted in a unique mixture of French and German patterns that would have been unthinkable to either of the donor countries. This "contamination" is inherent in the particular selectivity of borrowing. From a wider perspective I maintain that this kind of contamination in legal cultures is the key feature of borrowings and transplants of legal patterns.

#### IV. Conclusion: Convergence, Divergence, and Contamination

Are there any conclusions to be drawn from this history? First of all, I maintain that the process of importing and exporting rules and institutions is an almost unconscious process of integrating them into the ideology of the borrowing system. Thus, the meaning of the borrowed institutions depends solely on the struggle among the formants of the receiving system, which almost always will produce something different from the original. But I also think that the ideology of a system is very often not merely a local product, but a contamination of several local traits by foreign ones. In more general terms, the actual legal world is more a world of contaminations than a world split into different families. The widespread cross-diffusion of French and German patterns within the civil law<sup>61</sup> and the modern influence of American models<sup>62</sup> shape a similar legal landscape all across the world, with a wilderness of local variances. I do not think that these contaminations are new, nor that they are linked with globalization. With the exclusion of particularly insulated legal systems, such as the old classical English common law, rooted in a particular organization of the legal profession,<sup>63</sup> every system, even those in antiquity,<sup>64</sup> has grown through contaminations. The practice of borrowings has always been a normal practice, and it has never been, nor will it ever be, an activity peculiar to comparative lawyers. It is a purposive practice to be carried out by government lawyers and to be studied especially from the point of view of weak borrowing systems, responding to inner strategies of governance and legitimation of legal elites involved in the conventional process of covering cases with authorities and producing meaning.<sup>65</sup> What a comparative lawyer can do, as a comparativist, is to reveal the unofficial<sup>66</sup> and to

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<sup>58</sup> CARLO GHISALBERTI, *LA CODIFICAZIONE DEL DIRITTO IN ITALIA* (1985).

<sup>59</sup> Pietro Rescigno, *Fondazione*, in *ENCICLOPEDIA DEL DIRITTO* 774 (1968).

<sup>60</sup> ANTONIO GAMBARO & RODOLFO SACCO, *SISTEMI GIURIDICI COMPARATI* 381-83 (1996).

<sup>61</sup> *Id.* at 367-70.

<sup>62</sup> *Id.* at 215.

<sup>63</sup> See Legrand, *Systems Not Converging*, *supra* note 11 (the defense of English insulation).

<sup>64</sup> See HAMZA, *supra* note 15.

<sup>65</sup> That is why I think that the best efforts in designing transplants are those directed at producing "self-enforcing institutions" as suggested by Black & Kraakman, *supra* note 14.

<sup>66</sup> See Lasser, *supra* note 13, at 1343.

critique those processes of meaning-production as social and political realities, particularly in a world of contaminations.

