ON THE ITALIAN STYLE: THE ECLECTIC CANON AND THE RELATIONSHIP OF THEORY TO PRACTICE IN ITALIAN LEGAL CULTURE BETWEEN THE 19TH AND THE 20TH CENTURIES

Luigi Lacchè*

In the 1960s the great comparativist John Henry Merryman (1920-2015) wrote three articles published in the Stanford Law Review on the "Italian style», seeking to identify specific characteristics in Italian contemporary doctrine, interpretation and law within the civil law tradition (§ 1). Merryman considered the Italian legal system to be an "archetype", more "typical" in some respects than the French and German systems. Merryman wrote that "Italy is perhaps the only one of the major civil law nations to have received and rationalized the two principal, and quite different, influences on European law in the nineteenth century: the French style of codification and the German style of scholarship" (§ 2).

My work, following some of Merryman's suggestions regarding the concept of a legal tradition and comparative legal history, aims to shed new light on Italian legal culture between the nineteenth and the twentieth century. The article seeks to identify in particular the "anthropological-cultural" dimension of the Italian jurist's experience. For this purpose I propose a new interpretative concept, namely, the "eclectic canon" (§ 3). It has to do with the general category of «eclecticism» but it is something different and more than this. It is an approach that can help us to appreciate the complexity of Italian legal culture by transcending the oft-told "tale" in two chapters (French influence first (1800-1870), German influence subsequently: 1870-1920). This scheme remains useful but it is only a part of the story, so we need to subsume it within a more complex plot.

The eclectic canon has a fundamental core, based on two founding "fathers". I refer to Giambattista Vico (1668-1744) and Giandomenico Romagnosi (1761-1835), philosophers, jurists and historians of great merit and distinction. We are concerned here with a cultural foundation pre-existing the so-called Schools (Exegèse, Historische Schule, Philosophical or Benthamit School…). The eclectic canon is not a school but rather a deep stratum. It does not produce a system or a legal order. It deals above all with the habitus, or the ways of being a jurist.The adjective "eclectic" underlines the structure of the canon, that is the aim to reconcile different orientations. The concept of stratum recalls a historical approach widely used and developed in anthropological and comparative law studies. The core of the eclectic canon is the "Historical-philosophical-dogmatic" approach. History, Philosophy and dogmatics taken alone are not sufficient to found a sound legal education and a good practice as a jurist. Only a balanced mixture could provide a correct solution. Italian style entails the tempering of different stances. In effect, another consequence of the eclectic canon - constantly noted by most Italian jurists - would be that of the combination of theory and practice in the actual design of legal culture (§ 4).

* **Luigi Lacchè**, PhD History, Full Professor of Legal History, Department of Law.

1. Introduction

In the 1960s the great comparativist John Henry Merryman (1920-2015) wrote, after a period of study in Italy, three articles published in the *Stanford Law Review* (2). In aggregate these articles invoked an "Italian style",searching for specific characteristics in contemporary doctrine, interpretation and law within the *civil law tradition*. Merryman considered the Italian legal system tobe an "archetype" (3), more "typical", in some respects, than the French and German systems (4). In recent years "Italian law" [27. P. 163-200] as a "juridical model" (5) has given rise, in Italy, to extensive research. In this essay I will identify some original characteristics and "enduring traits" underlying the style or rather the *habitus* of italian juristsin its historical development. Of course, *Italian style*consists of legal science and doctrines, laws, styles of judgement etc.– as Merryman has described in his powerful and lucid synthesis - but here I would like to shed light on a sort of "anthropological-cultural" dimension of the Italian jurist's thought and practice. I am convinced that what I call the*eclectic canon* (§ 3) - seen as an interpretative paradigm and a set of issues - can help us to understand better what is genuinely distinctive in Italian legal experience during the nineteenth and part of the twentieth century (and perhaps beyond). It is a concept that can contribute to a recasting of the traditional "tale" about the making and the evolution of Italian legal culture (§ 2). The aim of this *new approach* is also to challenge some clichés or historiographical stereotypes. According to the nowfamiliar "tale", the history of the formation of Italian legal culture assumes the guise of an *opera* in two acts giving rise to an imposing *tradition*. This representation is not an *invention*, for it has a real historical foundation but it is not sufficient to restore to usthe overall framework. At the same time, the reference to the *eclectic canon* allowsus to grasp the relationship between theory and practice as an enduring feature of Italian legal culture (§ 4). This approach cannot be based on a typically rule- or legal system-oriented procedure because, on the contrary, it impinges upon several dimensions of the law that depend on culture and societal issues. One of the many merits of John Henry Merryman has been his readiness to take into consideration *Italian style* from a more realistic point of view, one consonant with Mauro Cappelletti's methodological preoccupations [16] and Gino Gorla's comparative-legal history approach,two positions"(…) very critical of Italian legal scholarship generally and of formalism and historicism, in particular" [41. P. 17]. The structural approach that I propose here, based above all on the notion of "culture", can offer to comparative legal studies a stimulus to relativize the often-reiterated commitment to positivism. Moreover, the reference to the *eclectic canon* in terms of legal culture is a way of contributing to a realistic definition of legal tradition. For, according to Merryman,legal tradition is "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which is a partial expression. It puts the legal system into cultural perspective" [53. P. 2].

In this regard, I would like to think that this article could perhaps have attracted the attention of John Henry Merryman.

2. An Opera in two acts: the tales of Alfredo Rocco and Francesco Carnelutti

Merryman has written that "… Italy is perhaps the only one of the major civil law nations to have received and rationalized the two principal, and quite different, influences on European law in the nineteenth century: the French style of codification and the German style of scholarship"[47]. This statement corresponds to historical reality and it is, as we shall see, the principal explanation used to characterize the Italian law tradition, taking into account developments in civil law (and in particular the influence of Napoleon's civil code) and German *Rechtswissenschaft*.

In fact, the making of Italian legal science has been toldas a tale divided into two main periods [37]. It is argued that the first period is marked by French influence, a consequence of Napoleonic domination [10, 86]. The French model was organized at that time (and also afterwards) as a more organic and system-building codification with at its heart the civil code (*Code Napoléon*after 1807) and a modern and efficient system of public administration. According to this "model", legal order is based on State law [15] and on the exegetical work of juristscommenting upon legal texts. The "French period" drew symbolically to a close in the 1870s due to the humiliating defeat suffered in the Franco-Prussian war and the growing prestige of the *Modell Deutschland* in the European political arena and in many scientific fields.This second period is characterized by «German method» and the Pandectist movement. Their methods and concepts seemed more appropriate and useful to represent the private legal order and to frame

the space of political sovereignty."Consider – John Merryman wrote–German legal science; it has never taken deep root in France, butthe Italians have, in this sense, become more German than the Germans"(6).

In this article I only have the space to recall two scholars from among the many I might have mentioned. Their narratives shed a great deal of light upon the making of Italian legal culture. In 1911 Alfredo Rocco (7) traced – fifty years after political unification – a profile of private law doctrine. He quoted Savigny's remarks from the 1820s and passed a negative judgementupon French influence. The introduction of French codes had, Rocco claimed, interrupted the continuity of Italian legal tradition. The national development of private law had been paralyzed. "Therefore, scientific activity in these fields of law was almost entirely limited to the translations of French works, and bad translations for the most part; and they still reflectedthe state of the culture among Italian jurists of that period, and not only of legal culture" (8).

But the unification of Italy laid the foundations and called into being a new approach common to many legal scholars based in the Universitiesthen undergoing a process of transformation.However, before forging something new, Italian jurists had to learn. Change required a period of assimilation (9) of "German" scientific method in order "to develop the passion and the practice of scientific investigation" (10).

Roman private law and *Modell Deutschland* were two dimensions presaging a new and more hopeful era. Italian scholars began to visit German Universities oriented, according to the Humboldt model,around a strong scientific vocation. They returned to Italy determined to disseminate ascientific approachand a number of new methods. But this transition towards "Germanism" could not be immediate. Two phenomena had to coexist. "Whereas on the one handthere was a proliferation of commentaries, treatises, jurisprudence articles consisting simply of a rehearsing of the opinions of French juristsand of a pedestrian exegesis, on the other hand the Universities witnessed a complete and profoundly fruitful renewal of method" [68. P. 15-16]. The Italian school of law – Rocco noted – was born from this apparent conflict, subsequently undergoing further independent refinement.

Just as in the period of assimilation/imitation, so too in the "constructive era"Italian jurists reiterated their commitment to Roman law [13],invoking the prestige of an extraordinary civilization blessed with a "natural" scientific vocation to spread the pandectist hegemony. Another distinguished romanist,Vittorio Scialoja (11), "was perhaps the first to understand that Italian legal science had to free itself from foreign influence in order to go its own way" (12). Legal science could now address the task of recasting the legal system and formulating a general theory. Much, Rocco conceded, had been done, but much still remained to be done [68. P. 33].

In 1935 Francesco Carnelutti (13) spoke of an "legal Italian school" and recalled in a positive sense the "formidable pressure" exerted by German legal science on Italian during the nineteenth century. A century since the triple movement substitution/assimilation/construction had begun. Carnelutti's account does not differ so much from the tale told by Rocco. In 1950 Carnelutti had been commissioned to write a *Profile of legal Italian thought* for an American volume – never published - dedicated to different aspects of Italian thought. When Italy became a State "the legal hegemony, at any rate in continental Europe, belonged incontestably to France. We felt for a long time – he noted – the weight of this primacy" [18. P. 167]. The Napoleonic civil code was the model but its influence was not only about legislative reception because "the mold of law or in other words of its own conception of law, at that time and for a long period subsequently was essentially French" [18. P. 167]. Then the "second act" began. German scholars saw once again in Roman law outstanding raw materials. "German Pandectics thus arose as the original kernel of modern legal dogmatics. Thereupon a legal science that was profoundly transformed in form and content emerged. The formal alteration was most evident in the substitution of *system* for *commentary*. We began to understand the value of the concept and even more of the order of concepts (…)"[18. P. 168]. According to Carnelutti, this work was at first unknown to Italy, its discovery being due to a number of great jurists. Credit is due here to Vittorio Scialoja for Roman law; Orlando for constitutional law, Anzilotti for international law, Chiovenda for civil procedural law, Cammeo for administrative law, Polacco for civil law, Vivante for commercial law. "Thanks to these and, as I have said, to many other jurists the Italian approach has abandoned French method and adopted German method in law studies" [18. P. 169]. Already in 1935 Carnelutti was proud to stress the fact that by this date Italian scholars had no cause to envy their German colleagues. Indeed, they had founded a general, integrated, theory of law [21. P. 324]. Italian legal science (14) was in a first phase oriented towards foreign

models, but quite soon it gained full autonomy, crystallizing in the process an entirely original vision (15).

3. The eclectic canon

The tale of the "opera in two acts" is essentially a frame serving to illustrate a general trend. What then is the problem? First of all, we should not judge Italian, national, legal culture during the nineteenth century using ex-post concepts, that is to say, employing the paradigm of the «true» scientific method. In fact, we note that the essential nature and 'quality' of Italian legal culture during the nineteenth century have been assessed in terms of two major paradigms.

The first paradigm depends on Savigny's comments during the 1820's when he made a number of trips to Italy, visiting Law Faculties and colleagues, and meeting his many Italian correspondents. He was thus quite familiar with the Italian context, but he judged it in terms of his own scientific paradigm and the «Humboldt Model». To simplify, our starting point has to do with the fact that Italian legal culture would not have been, at the beginning of the nineteenth century, *Wissenschaftlich*-oriented. I use this German word deliberately because it evokes, and derives from Friedrich Carl von Savigny's vision. In *Über den juristischen Unterricht in Italien* (16) the great German scholar described the existing situation as regards Italian legal culture. Law was little studied as *Rechtswissenschaft*. Law scholars had to pursue a specific *Beruf*; they were University Professors using and developing a method in order to build a new scientific legal theory. According to this scheme, Italian legal culture did not match the «German paradigm». In Italy lawyers appeared to be too much concerned with practice; Universities were weak, their curricula old-fashioned. The consequence was that Italians should, it was argued, set about changing their approach to the organization of legal knowledge, to scholarly research and to the writing of legal studies. Savigny's judgement represented a fairly accurate picture of the Italian legal milieu, but the leader of the *Historische Schule* did not understand that in Italy there was a real pluralism in regard to the sites and circumstances of legal culture making. So overpowering was the *Rechtswissenschaft* paradigm that it served to obscure and to devalue the *Italian style*.

The second paradigm is reflected in the perspective of Vittorio Emanuele Orlando (17). We could consider his thought to be a sort of "terminus".In Palermo, in 1889, this young but confident jurist gave an inaugural lecture on *The technical criteria for the legal reconstruction of public law* (18). After political unification (1860-1870), Italy was faced with the task of building a unitary legal system. From 1870 to the 1880s a number of Italian jurists, in a handful of the better legal Faculties,had begun to follow the «German method» and the Pandectist movement. In 1889, however, Orlando declared that it was the task of his generation to entrench and strengthen the new Italian State. A new public law science was urgently needed in order to overcome the excesses of the exegetical method; a new scientific paradigm was required. According to Orlando, Public Law Scholars were too much inclined to be historians, philosophers or "sociologists" rather than jurists. In the last analysis, the main adversary was eclecticism. Orlando, at the end of nineteenth century, evoked the by then triumphant German method and the great effort made by Italian Universities and jurists to change their orientation. Universities should have a monopoly over the scientific approach, and be synonymouswith «theory». By now there had clearly emerged a conceptual constellation based on the Universities as sites characterizedmore and more bysuch words as science, system, national culture. A number of dichotomies were taking hold: theory/practice, scientific/eclectic, systematic/chaotic, national/local.

The problem is that this conceptual framework has been projected ex post on the previous sixty years, serving as the main criterion not for understanding the past but for making value judgements [45]. Even the "opera in two acts" featuring in the accounts given by Alfredo Rocco or by Francesco Carnelutti was influenced by this narrative.

For these reasons we should for our part endeavor to know and understand the evolution of Italian legal culture in its specific historical context. The «new approach» that I suggest here entails reference to what I define as the *eclectic canon*. It has to do with the general category of «eclecticism» but it is something different and more than this. It is an approach that can help us to grasp the real complexity of Italian legal culture, going beyond the "tale" divided into two chapters (French infulence first, German influence subsequently). This scheme remains useful but it is only a part of the story, so we need to integrate it within a more complex account, thereby complicating the plot. With these preoccupations in mind I have developed the concept of *eclectic canon* (19).

This canon is designed to represent and give a name to a *cultural structure* that has been

elaborated during the first half of nineteenth century in the majority of the Italian states prior to political unification. It deals also with the idea that Italian culture of the Restoration period ought not to be seen as a "crisis period" before the birth of the "scientifica era" in the second half of the century when the scientific paradigm, or so the argument went, had won against pragmatism, the exegetical approach and eclecticism.

The word "canon" evokes here the consolidation of a core of jurists and authors, principles and themes establishing a common lexicon, shared categories and issues. The canon does in fact reflect affinities between jurists working in different parts of Italy. Reading Italian jurists we can appreciate that the *eclectic canon* has a fundamental core, based on two remarkable thinkers. I mean Giambattista Vico (1668-1744) and Giandomenico Romagnosi (1761-1835), philosophers, jurists and historians. These two authors, their works but also the associated mythology and discourses form the central pivot of this canon.

Vico and Romagnosi loom large in Italian legal culture. Indeed, they represent a *cultural foundation* that was in place prior to the actual creation of the so-called Schools (Exegèse, Historische Schule, Philosophical or Benthamit School…). The eclectic canon has *national* roots and is a *deep stratum*. It does not produce a system or a legal order. It deals above all with the *habitus* [9. P. 40-44; 8], the way of being of a jurist.It has to deal with a constellation of deep images (20): the need for a genealogy, "by bridging between strong precursors and strong successors" (21). Italian jurists have eminent ancestors: Roman *iurisperiti* and medieval "glossators" and "commentators". But at the beginning of nineteenth century it is necessary to reconstitute the last "link" in the chain of time: thusVico and Romagnosi are the bridge towards a real Italian legal culture during the *Risorgimento*.

The adjective "eclectic" underlines the structure of the canon,that is, the aim to reconcile different orientations and "schools". Pellegrino Rossi (22) is perharps the first European jurist to suggest that the "solution" lies in carefully appraising and then "combining" the three "Schools", the major cultural trends in evidence at the time of the political Restoration in Europe. "Nous pensons qu'il est surtout nécessaire de ne pas perdre de vue les trois diverses écoles de jurisprudence qui règnent actuellement en Europe, c'est-à-dire l'école *exégètique*, l'école *historique*, et l'école *philosophique*. Leur réunion seule peut amener la fusion du véritable esprit philosophique avec le positif du droit, moyennant la théorie des principes dirigéans… Ces écoles restant séparées, l'une perd de vue les choses et les principes pour ne s'occuper que de mots; la seconde prend pour la vie réelle les hommes et les choses qui ne sont plus; la troisième ressemble à une jeunesse sans expérience, qui au milieu de ses riantes illusions, prend ses désirs pour ses règles et méprise ce qu'elle ne connaît pas. C'est un malheur très-réel que l'éloignement actuel de ces diverses écoles»" [69. P. 188-189].

Girolami Poggi, a talented lawyer and magistratein Tuscany, echoed Rossi's suggestion a few years later. Each scientific orientation taken on its own was defective. Each contained positive elements but only their combination [65. P. 11] stood any chance of founding "a perfect treatise of jurisprudence" [65. P. 11]. In 1832 Poggi wrote that Vico and Romagnosi – two great Italians – were respectively the inventor of the philosophy of history and the creator of a method applied to the moral and political sciences. Juridical eclecticism has been seen as a "fourth" School but for us it represents the *habitus* of the Italian jurist throughout the nineteenth century. In Italy there is discernible the influence of the French eclectic philosophy of Victor Cousin. The *eclectic canon*is clearly linked to «eclecticism» as a general category but, as I have said, it is also something more specific. In Italy the core is represented by the combination of certain aspects of Vichian and Romagnosian thought. We need a sort of *anthropological approach* in order to apprehend the eclectic canon as a deep stratum of the Italian, national, legal culture. The concept of *stratum* recalls an historical approach widely used and developed in the context of anthropological and comparative law studies [44]. It is linked to the concept of *tradition* [58. P. XIII] and implicitly to the notion of "cryptotypes"[70. P. 125] or to that of a "hidden" cultural model.

The eclectic canon is therefore a *stratum* above which schools, methods, codifications and legal orders flow in the course of time. This phenomenon helps also to account for the fact of Italian legal culture being so "open" towards other cultures, asindeed the proliferation of translations and commentaries would seem to indicate (23).But the eclectic canon is not only a *deep stratum*. It also testifies to the fact that Italian legal culture possesses a genealogy: Vico and Romagnosi as the founding fathers of a tradition. This culture has deep national roots and historical continuity. And consequently the canon can play an important legitimizing function: to bolster ideological

awareness of the "natural" propensity of the "Italian approach"to favour the *juste milieu*. This is a "political-philosophical" propensity as Cesare Balbo [4. P. 401] noted, but it is also the *Beruf* of the Italian jurist to temper excesses, to reconcile "extremes". The national "genius"- one of the central elements of the *Risorgimento* – owed much to jurists drawing upon the cultural network succeeding Vico and Romagnosi. The bond of kinship was based on an approach that may be termed «Historical-philosophical-dogmatic" (24). Giuseppe Pisanelli, one of the protagonists of Italian unification, would say in the first Chamber of Deputies that in Italy – and especially in Naples – «There was a School (…) which included at the same time the rational element and the phenomenal element, embracing both history and philosophy; it was the School arising out of the great mind of Vico! This is the real law School …» (25). Vico/Vichianism and Romagnosi/Romagnosianism are the key cultural ingredients. History, philosophy and dogmatics taken alone are not sufficient to found a sound legal education and an effective practice as a jurist. Only a balanced mixture can provide a correct solution. An Italian *Beruf* entails tempering extreme positions.The correct approach should be historical-philosophical-dogmatic.

In the eclectic canon as *stratum* we find at one and the same time history and reason, the chain of times and the *filosofia dell'incivilimento* (philosophy of civilization), the idea of progress and the spirit of moderation, the nation and the different Italian traditions, the relationship between theory and practice. "L'Italie -Victor Molinier wrote in 1842 -, cette terre toujours feconde en hautes intelligences, qui cultive la science avec amour, nous offrira des hommes trop peu connus en France, et dont les travaux peuvent être placés en face de ceux qu'a produits l'Allemagne. Pendant que l'école de Paris vulgarise les doctrines toujours exactes mais souvent sèches et nebuleuses de la Germanie, il nous conviendrait, à nous hommes du midi, d'importer en France celle de l'Italie" [57]. We could say that the speculative dimension of the eclectic canon is fragile but asa *cultural and anthropological presence*it isrobust. History and philosophy are called upon to fertilize dogmatics. The *Italian styleis* born here. We plainly cannot explain it using the *Rechtswissenschaft* paradigm and the Humboldt model.

4. Against the excesses: "The close marriage that should occur between theory and practice"

Another component of the eclectic canon is of the utmost importance, and it is the key perhaps to a deeper understanding of Italian legal tradition. A characteristic of the *Italian style* – constantly reiterated by all Italian jurists in their different ways – would be that of the combination/dilemma of theory and practice [62. P. 233], one of the enduring traits of Italian tradition connected to the anthropology of the jurist and to the idea of a law science tempered by that of "culture" (26). Starting from the 1880s no Italian author could ignore the process of scientification of the Universities characterized by the initial applications of "German method" and the *assimilation* – to use Rocco's expression – of the Pandectist mouvement. So, Pietro Cogliolo, in his unusual book *Malinconie universitarie* (1887), often contrasts the relative backwardness of the Italian University with the great strides made by the German. Nevertheless, when he comes to define an ideal conception of the jurist he deals with the theme of excesses. The "real jurisconsult" is the one who can balance theory with the reality of things. "Two opposing tendencies, the practical and the scientific, have always contended in diverse guises since the world began: happy the period in which a fruitful armistice can be enjoyed" (27). Practice and systematics by themselves succumb to excess. "But there is an enlightened practice that is capable of elevating itself and combining with science; it reconciles theorems, furnishes the facts to be observed, tests and retests in the reality of things the truth of formal principles; and the scientist must take into account this practice, while Universities must study it. Our lectures are not empirical yet nor are they metaphysical; they do not crawl along the ground, but nor do they fly in the clouds; they supply at one and the same time theories and practical notions [26. P. 143].

In the same years we find in Vincenzo Simoncelli (28), who had been a student in Naples of Emanuele Gianturco, the idea of Roman law as the "inspired creation of perfect practical and theoretical jurists…" [81. P. 43]. Indeed,Gianturco, a highly original jurist, had underlined the limits of the exegetical method when searching for a systematic order of exposition following the *Italian style*. It would be ill-advised, he reckoned, to go from the prevailing and "essentially *practical*system of theFrench School" to its polar opposite. It was against "the natural tendency of the Italian mind, abhorring excesses in every aspect of national activity" (29).

The same Simoncelli recalled how Romagnosi had taught civil law without reducing it to a mere commentary upon the code, and how for Vico, a centurybefore Savigny, the jurist

should be a philosopher in order to establish the principles of the law and a historian in order to discover the causes and conditions that determine the development of these principles, with a particular reference to the positive laws of a nation [32. P. 39-42]. According to Simoncelli we needed to enhance "the great models of Germany" but also to profit from its mistakes. Moreover, Jhering had already attacked "the so-called 'constructionists' and their method of dogmatic isolation" [32. P. 40]. Windscheid likewise observed that the legal concepts are fundamentalbut still remain hypotheses and not mathematical axioms. "It follows that the lawyer cannot stand apart, a hermit of science, but must keep a watchful eye on life" [32. P. 41].

Simoncelli was particularly concerned to quote Savigny's foreword to the *System des heutigen römischen Rechts* where he analyzed the historical experience of the separation between theory and practice (30). Here Savigny reaffirmed the heuristic dimension of the historical approach but he took care to stress the fact that the famous controversy with Thibaut in 1814 was over and done with, and that every absolutization led to error. This also applied to correct knowledge of the dual element in what is right, the theoretical (doctrine, teaching, exposition) and the practical (application of rules to real life cases). "The healing remedy lies in the fact that everyone in his special activities keeps well fixed before his eyes the original unity, so that in some way every theoretical jurist retains and cultivatesa practical sense, while every practical jurist retains and cultivatesa theoretical sense. If he does not, if the separation between theory and practice becomes absolute, there inevitably arises a danger that theory degenerates into something vain and practice into manual labor" (31).

Savigny did not speak of everyday practice, but of the "sense or the practical spirit" that had to belong to the "scientific" jurist as well as to the practical jurist, who had to take into account the "scientific criterion" [72. P. 10-11]. "So if the deadly sin of our current legal circumstances consists of an ever more marked separation of theory and practice, only in restoring their natural unity can a remedy be found" [72. P. 13]. It was finally the unity, so natural, bright and efficacious, to be found among Roman jurisconsults: "University and Court – Simoncelli exhorted in conclusion – have to meditate on this advice and implement it, working together to restore to Italy what was the most radiant glory of its genius" [81. P. 47]. They were not obliged to abdicate to the scientific paradigm because theory was the most powerful aid to practice" (32). But practice is not the "contemplative ecstasy of mystical hermits" [81. P. 55].

A few years later it was Vittorio Scialoja, "prince" of the Italian Romanists, who addressed this issue. In 1911, inaugurating the Roman Law Society,he observed that "Italian legal life [lacked] the close relationship that should obtain between theory and practice; and we wish our Society to combine thetheory and practice, of what, that is, should be the true law, because the purely practical law and the purely theoretical law are only parts, and partsthat most of the time run the risk of being mere fragments. It is absolutely necessary that theory and practice not look from a distance and with a sense of reverential respect towards each other, with a reverence that comes from lack of knowledge and unfamiliarity. It is absolutely necessary that theory and practice reconstitute their unity, not only objectively, but also in the soul of each of us. And thus we will engage in work that is genuinely Italian" [78. P. 160].

On several occasions,at least since 1881, Scialoja had dealt with the methodological problem of teaching Roman law, and more generally that of the construction and dissemination of legal knowledge "scientifically prepared" in Italian Universities (33). It is superfluous to add that in the Pandectist approach there was no place for the "exegetical method". Studies were flourishing thanks to the efforts made to assimilate "German method", "important work, crucial for the progress of our scientific spirit" [78. P. 160]. The *Beruf* of the modern jurist in the civil law tradition was to integrate the historical dimension of Roman law, the individualistic foundation of European civil law, with Savigny's idea of system.

The University in Scialoja's conception could only be that of "science", with a specific method in teaching and learning [80. P. 208, 210], supported by practical activities and the analysis "of case studies drawn from real life, examining them in relation to theoretical principles that apply to them" [76. P. 195-196]. "The University must be scientific, the University must be theoretical ..." (34).Practice, properly understood, is what we learn in the course of "practicing our profession". Consequently, Scialoja did not agree with the lawyer Mario Ghiron, who had criticized the undue value generally accorded to theory in the German universities (35), whichleft the student with a "massive ignorance of real life, and [the] inability to understand the law as a living tool for engaging in every day activities…" (36). Scialoja, for his part, while stressing the practical pur-

pose of legal studies, felt obliged to admit that the assimilation process "ran and runs the risk of becoming excessive" [78. P. 160]."We have got to a point - and I think it is worth spelling it out - in which the character given to the theoretical study of the law serves no other purpose than to bring this study into a cloudy sphere, from which only damaging hail can descend on practice and not fructifying rain" [78. P. 160].

The Italian lawyer was not to be a mere exegete; indeed, he should not be far removed from reality and practice. And once again the "core" of the *Italian style* lay in its vocation to mediate between a historical and a comparativist approach. Because "We, as Italians, that is reasonable people who do not allow themselves to be swayed by violent impulses, we can say that they are one and the same thing" [78. P. 162].

Many other scholar underlined the "eclectic" stance of Italian jurists. So, Biagio Brugi, who has written a short but comprehensive summary of Italian legal developments after unification, invoking what he judges to be the dominant feature of the "Italian approach", insisted that "no science can be closed off as in pure theory: much less Jurisprudence". "It would be superfluous –Brugi observed in 1911 - to mention here the work of our old law teachers:professors and legal practitioners: lawyers, advisers, judges. Moreover the teaching of law in our universities continued to be theoretical and practical at one and the same time, even in their heyday; we have already seen that even in a period of decline they still bore some fruit as practical schools. There has been much debate, over the last half century, as to whether the Universities should have a scientific purpose and be professional schools; the contrary view, so rigidly argued, seems repugnant to the Italian cast of mind. Our natural inclination is to put the doctrine to a practical purpose: to enlighten future lawyers, offering them a way to understand and do their duty in civil society" [11. P. 29-30].

Likewise Alfredo Rocco, on the occasion of the same fiftieth anniversary, confirmed that there was indeed a particularly Italian vocation."Using the systematic method, refined by German lawyers to an exquisite degree of perfection, the Italian civil lawyers of this period took care to avoid the excessive formalism and the abstruse metaphysics of the German doctrine; it is the merit of the Italian school to have combined the use of generalizations and of systematic method with the social element of law, thus arriving at a clearer vision of the practical function of jurisprudence" (37). However, the result was not entirely positive. Law practitioners had played almost no part in the creation of an Italian school of law. Indeed, case law had been in effect excluded, everyday practice remaining "faithful to the old exegetes". Legal doctrine, being thus too isolated, had failed to renew the legislative field of private law, except in the case of the Commercial code. The failure of the Italian school of law lay in its not yet having been able to produce "a comprehensive treatise of civil law that might serve to guide and enlighten the practitioners" [68. P. 32-33].

As we have seen, in 1935 Francesco Carnelutti recalled the role of German legal science in having raised, on Roman foundations, the columns of Pandectics destined to preside over the modern phase of legal science [17. P. 7]. But having achieved the first, necessary, assimilation, Italian science had soon reached the stage of autonomy, and even a high degree of originality while the Germans, for their part, seemed to have lost their luster (38).Concepts remained the indispensable tools of science, although the process was not without its risks. There was the danger, first of all, of "losing contact with the ground and getting lost in the clouds. There is thus some justification for the mistrust felt by practitioners. When scholars are accused of being abstracted from reality, the reproach is unfair because they can-not operate save by abstracting; but there is truth in the charge, given the imperfection of their means, which not infrequently do not so much penetrate reality as lead them off into a world of chimeras" [17. P. 8]. Only living contact with reality can overcome this problem. Rational means (the concept) must be "integrated" through intuitive means (art). Of this fact there are wonderful examples that might be cited. "The justification for this, indeed, the credit must go, and we should frankly acknowledge it, to the combination of the study of law with the practice of it which is in an intrinsic feature of the mores of Italian scholars" [17. P. 9]. The possibility (or necessity ...) of reconciling science and art, theory and practice, teaching[law] and being a lawyer is an antidote to theoretical and conceptual isolation.

Carnelutti's remarks bring to mind those dazzling observations, made almost a hundred years ago, by the great German jurist Carl Mittermaier who, unlike Savigny, had shown in a positive light one of the enduring features of the "eclectic canon".

"Thus the law professors (in Italy) are also among the greatest lawyers; and this union of the ordinary business of living with science means that there is no need in Italy for the bitter

division between theoreticians and practictioners that prevails in Germany. There, the professors, being too removed from life, advance their theories to the detriment of the practitioner; the latter therefore heaps scorn upon the theoretician at every turn. The most distinguished law professors in Rome, Naples, Pisa and Bologna are at the same time distinguished lawyers. Even the taste that Italian people have for art and poetry, exercises a salutary influence on the scientific works of the scholars and the activitiesof statesmen (...) Those who relish public debate should attend the court sessions in Naples! What manly, dignified and lucid eloquence, consisting of more than merely empty phrases, may be heard in the discourses of many Neapolitan lawyers! It is a pleasure to follow the skilled orator who knows how to get to the very heart ofa question, and analytically disentangle every implication with admirable perspicacity. By way of confirmation of the practical approach and delicate touch of Italians, I would again cite the scientific conferences that were held in Pisa, Florence, Turin, Padua, Lucca and Milan"[55. P. 27-28]. The Italians were thus practical jurists, but "guidés par la science", as Mittermaier liked to put it.

As Carnelutti recalled,"thus it was that in Italy, as perhaps in very few other countries in the world, there were formed what could be described as the great "law clinicians". The fact that the most important of them, Vittorio Scajola, came to the art of law by way of Roman law is perhaps a sign that this integral vocation comes down to us by inheritance? The art of law is assuredly more a Roman thing than it is a science (…)"[17. P. 9]. Were these "clinicians" educated in a school? Indeed, they were not, since no such school existed. It was in fact the Italian temperament that led the best lawyers to become both scholars and artists in their practice of the law (39).

Carnelutti returned to this topic on several occasions, and for the last time in the early 1960s (40). In the course of refining his argument he bolstered his conceptualism (41) with a realistic view based on the recovery of natural law and the concept of legal experience. So, in his *Profileof Italian legal thought*–originally written to offer to American readers a taste of *Italian style*, he emphasized once again Italian *Beruf*in order to circumvent the dreaded gap between science and practice.Italian legal science continued to believe in the dogmatic but less and less in dogmatism, that is to say, in the mere self-sufficiency of concepts; more "realistic" than "positivist", with, once again, atemperament that was betwixt and between: "a special ability to balance between the two extremes, the abstract and the concrete, which would be, respectively, if I am not mistaken, the Germanic temperament or the Anglo-Saxon temperament. Latin temperament is a kind of bridge between these extremes" [18. P. 177]. As in 1935 Carnelutti once again pointed out the sense of balance of the *Italian style*: "it never separates, not even in the field of law, theory from practice, so that Italian professors of law, almost all of them, do in fact practice within the legal profession (and it would be better if, as in some American countries, there was also the possibility of being a professor and at the same time a judge): eminent figures consequently emerge, *law clinicians*, entirely analogous to medical clinicians, and they are the living expression of the realism of Italian legal science" [18. P. 177-178].

It is interesting to observe that while Italian legal science was focusing (during the first half of the twentieth century) on "system-building", searching for concepts and a higher order of abstraction, seeking to avoidany confusion between legal and social, economic and historical facts, emphasizing positive law regardless of justice and nonlegal criteria, jurists such as Alfredo Rocco and Francesco Carnelutti (among others) – often cited as "system-builders" by those subscribing to the Pandectist paradigms – were referring to an "Italian way" of being a jurist, which entailed combining eclectically science and art, theory and practice.

In the mid-1960s John Henry Merryman went on to describe the evolution of the *Italian style*. The Constitution of 1948 laid the foundations for viewing legal order and system-building in a different fashion. "Legal science" was for him a synonym for "*traditional, orthodox* doctrine (…) criticized by many thoughful jurists, and some of these criticisms will be described here, but the critics are the *avanguardia*, the voice (perhaps) of the future" (42). Merryman grasped the main lines along which Italian legal science had been transformed (43). Since then many things have changed, but it is not obvious to say what the*Italian style* is now. Anyhow, that's another story (44).

Notes

1. Merryman has told Pierre Legrand why and how he began studying Italian law. He spent the academic year 1963-64 at the Comparative Private Law Institute of the University of Rome "La Sapienza", associating with "two extraordinary Italian scholars", the comparativist Gino Gorla and the romanist Giuseppe Pugliese. See Legrand 1999:15 ff. In his *Note on the Italian style* (in Merryman,1999: 175), Merryman

observed that the three articles were written "in the company and with the enthusiastic encouragement and generous assistance of the late great Italian comparatist Gino Gorla and were revised in 1964-65 in response to suggestions by Mauro Cappelletti, who later became a colleague at Stanford and a major international figure in comparative law". Merryman's intellectual affinity with Mauro Cappelletti and Gino Gorla is underlined also by Amodio 2015: 213 ff.

2. "The Italian Style. Doctrine", 18, 1, 1965;"Law", 18, 2, 1966; "Interpretation", 18, 3, 1966.These articles were soon published in italian in *Rivista trimestrale di diritto e procedura civile*, "Lo stile italiano: la dottrina", with a note by Gino Gorla, 4, 1966;"Le font"' 3, 1967; "L'interpretazione", 2, 1968. These essays were published together, in modified form, in Cappelletti, Perillo, Merryman 1967. With these articles and other works on Latin-Americaas his starting point, J. H. Merryman published a broader and more general book on *The civil law tradition* 1969; translated in italian as *La tradizione di civil law* 1973, with a preface by G. Gorla who had reviewed the original version in *Rivista trimestrale di diritto e procedura civile* 1970: 1121-1124). The Italian style articles can now be read in Merryman 1999: 177-308.

3. "Indeed the Italian style is, in a sense, a paradigm of the civil law. Much of the legal tradition of the contemporary civil law world has its origin and its principal development in Italy" (Merryman, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman, 1967: 165). See also Merryman 1969: 60.

4. This assumption has been contested by some scholarbut Merryman never changed his mind: Legrand 1999: 52.

5. See in particular Lanni, Sirena 2013; Bussani 2014; Pinelli 2015.

6. Merryman 1969:150. "The influence of the *Pandettistica* was particularly great in Italy. It affected Italian doctrine first, and through the doctrine it came to dominate the legal process, in legal education, the writings of judges, and the works of scholars" (Merryman, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman 1967: 169-170). "I think you may have seen that I say somewhere that the Italians were more German than the Germans" (Legrand 1999: 17)

7. Alfredo Rocco (1875-1935), jurist and politician, was one of the leaders of the nationalist movement,he then joined Fascism and was Minister of Justice between 1925 and 1932.

8. Rocco (1911), 5. Likewise Biagio Brugi, again in 1911:2, evoked Savigny's paradigm (on which see below).

9. Rocco's narrative would be reiterated almost word for word by Ferrara 1954: 273 ff.

10. Rocco 1911:10. "Outside the Universities commenting upon the Code article by article began quickly to seem dull, pedestrian and inadequate" (Brugi 1911: 32).

11. Vittorio Scialoja (1856-1933) was the most influential Italian scholar in Roman law studies between the nineteenth and the first part of the twentieth century as well as a prominent politician.

12. Rocco 1911: 19. Scialoja, once again in 1911, underlined the fact that Italian legal doctrine had acquired a measure of originality: 1911a, 12.

13. Francesco Carnelutti (1879-1965) has been one of the most important scholars and a very famous lawyer. He dealt with many fields of law, starting with civil procedural law. Carnelutti 1935.

14. "It is summed upin the phrase legal science, which carries with it the assumption that the study of law is a science, in the same way that the study of other natural phenomena – say those of biology or physics – is a science. The work of the legal scholar is like the work of other scientists, not the search for scientific truth, for ultimates and fundamentals; not concerned so much with individual cases as with generic problems, the perfection of learning and understanding; not, in a word, with engineering but with pure science" (Merryman, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman 1967: 170).

15. See Brugi 1911: 31-32, 144-145. Cf. on this point Marin 2002: 133 ff.

16. 1828: 201-228.For a broad reconstruction Moscati 2000.

17. Orlando (1860-1952) was the founder of the so called "Italian School of Public Law". He was a prominent jurist and an important politician (he was prime minister, as well as holding other cabinet posts at the beginning of twentieh century).

18. Orlando1889: 122. For further elements see Lacchè 1998.

19. On this theme see amplius Lacché2010: 153-228;Lacchè 2013: 317-361.

20. On this challenging idea see Banti, Ginsborg 2007: XXVIII ff.

21. "The deepest truth about secular canon-formation is that it is performed by neither critics nor academies, let alone politicians. Writers, artists, composers themselves determine canon, by bridging between strong precursors and strong successors" (Bloom1995: 487).

22. Rossi (1787-1848) was born in Italy in 1787 but lived subsequently in Geneva (1819-

1833) and in Paris (1833-1848). He was murdered in 1848 while he was in Rome heading the new Pope's government. An eclectic scholar, politician and diplomat, Rossi addressed many scientific matters,such as criminal law, economics, constitutional law. He was one of the most important European juristsof the first half of the nineteenth century.

23. See Ranieri1977: 1487-1504; Napoli1987; Beneduce 1994: 215 ff.; Alpa 2000: 126-149.

24. See Ungari 1967; Napoli 1987; Masciari 2006: 326 ff.

25. Quoted by Vallone 2005: 324-325.

26. On this point Ferrante 2015: 80-83.

27. Cogliolo1887: 88-89. Onthese reflexions see amplius Mecca 2013:184 ff.

28. Cfr. Grossi 1998: 33-68. On the 1880s and the Methodenstreit see Grossi 2000: 19 ff. Also Treggiari 1990: 119-138.

29. Gianturco1892. Cf. Alpa 2000: 178 ff.

30. On this aspect Orestano 1987: 31 ff;Mohnhaupt 1977: 277-296; Schröder 1979.

31. Savigny 1886: 10, quoted by Simoncelli 1899a: 46-47.

32. A similar vision in Gian Pietro Chironi in his inaugural lecture of 1885 Sociologia e diritto civile. Cf. Genta 2013: 307-308.

33. Scialoja 1881: 181-190. See on this aspect Cianferotti 1988: 339 ff.; Amarelli 1990: 59-69; Schiavone 1990: 283 ff.; Cianferotti 1991: 212 ff.; Cianferotti 2001:19 ff.; Nardozza 2007: 51 ff.; and above all Brutti 2013, Brutti 2014: 216 ff.

34. Scialoja 1914: 208."(…) In the universities we have always to remember that it is our task to prepare the mind of the student, and does not give him an "handbag" of practical notions, because he will procure them for itself, from time to time ... What the young man needs to know is how to find the solution of the issues; he must have the intellectual capacity to understand them and to solve them" (Scialoja 1913: 201).

35. Mario Ghiron took into account the reform proposals mooted by Zitelmann 1912: 289-324. Zitelmann proposed an alternance system between initial training, intermediate theoretical training, internshipsat a more advanced level, a further five semesters of theoretical preparation, and then professional training.

36. Ghiron 1913: 64. Scialoja criticized him in Scialoja 1914: 216-217. "(…) the theoretical education is the first preparation for practice" (p. 210).

37. Rocco 1911: 24. Rocco was speaking about the "new italian school of civil law… according to the orientation predicted by Gianturco, Chironi, Polacco".

38. The men, of course, are different; each has his own character, his qualities and his shortcomings; but it is certain that, for example, Chiovenda for procedural law, Alfredo Rocco for commercial law, De Ruggiero for civil law, Anzilotti for international law, Rocco Arturo for criminal law have, already in the field of purification and construction of concepts, a stature, that all the countries of the world, starting with Germany, might envy" (Carnelutti 1935: 7). "But while in Germany the dogmatic effort failed to reflect these divisions between major areas of legal order, it fell to Italy to carry it further and to elaborate a *real general theory of law*. There is a strong argument for speaking of an *integrated Italian theory of law*" (Carnelutti 1961: 324).

39. Carnelutti 1935: 9-10. On the methodology and the conceptual "fantasy" of Carnelutti see.Irti 2002a: 319-321; Irti 2002b: 323-338.

40. Carnelutti 1954. Carnelutti 1959, 255: "And if the mission of the jurist is to know the law, nor the exegesis nor dogmatic are enough to exhaust it. In simple words, it all comes down to the mutual implication of knowing and doing, which is beautifully expressed in the formula of Vico: *verum ipsum factum*. The gap between the theoretical dimension and the practical one can be a necessity; but a few times like this the word necessity expresses so exactly the idea of the deficiency to be".

41. See also Carnelutti 1960: 325, with some criticism of Kelsen and his reine Rechtslehre. Salvatore Pugliatti likewise called for a middle ground: Pugliatti 1950: 120.

42. Merryman 1967, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman: 167; Merryman 1969: 156-157.

43. "On the whole the most incisive and perceptive criticism of the legal science comes from Italian scholars themselves, and since the fall of fascism a number of forces have been at work which indicate that Italian legal thought is taking new directions. To some contemporary Italian jurists the traditional doctrine represents the forces of reaction standing in the way of needed legal reforms. Other see itas a useful movement that has spent itself, and think that the time has come to move on to the next productive stage in the development of Italian legal sciences (…)" (Merryman 1967, "The Italian Style: Doctrine", in Cappelletti, Perillo, Merryman: 195).

44. See above, nt.6.

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ОБ ИТАЛЬЯНСКОМ СТИЛЕ: ЭКЛЕКТИЧЕСКИЙ КАНОН И СВЯЗЬ ТЕОРИИ С ПРАКТИКОЙ В ИТАЛЬЯНСКОЙ ПРАВОВОЙ КУЛЬТУРЕ В XIX И XX ВЕКАХ

В 1960-е годы великий компаративист Джон Генри Мерриман (1920-2015) написал три статьи, опубликованные в «Stanford Law Review» об «итальянском стиле», пытаясь выявить специфические особенности современной итальянской доктрины, толкования и права в рамках традиции гражданского права (§ 1). Мерриман считал итальянскую правовую систему «архетипом», более «типичным» в некоторых отношениях, чем французская и немецкая системы. Мерриман писал, что «Италия является, пожалуй, единственной из крупнейших стран гражданского права, которая получила и рационализировала два главных и абсолютно разных влияния на европейское право в XIX веке: французский стиль кодификации и немецкий стиль научности »(§ 2).

Моя работа, следуя некоторым предложениям Мерримана относительно концепции правовой традиции и сравнительной истории права, направлена на то, чтобы пролить новый свет на итальянскую правовую культуру в девятнадцатом и двадцатом веках В статье делается попытка определить, в частности, «антропологическо-культурное» измерение опыта итальянского юриста. Для этого я предлагаю новое интерпретативное понятие, а именно «эклектический канон» (§ 3). Он связан с общей категорией «эклектики», но это нечто иное и не такое. Это подход, который может помочь нам оценить сложность итальянской правовой культуры, превзойдя часто упоминаемый «рассказ» в двух главах (сначала влияние Франции (1800-1870 гг., затем влияние Германии 1870-

1920 гг.). Эта схема остается полезной, но это только часть истории, поэтому нам нужно включить ее в более сложный сюжет.

Эклектический канон имеет фундаментальное ядро, двух «отцов»-основателей. Я имею в виду Giambattista Vico (1668-1744) и Giandomenico Romagnosi (1761-1835), достойных и великолепных философов, юристов и историков. Нас интересует культурная основа, существовавшая до создания так называемых школ (экзегетика, историческая школа, философская или Benthamit школа ...). Эклектический канон - это не школа, а глубокий слой. Он не создает систему или правопорядок. В первую очередь речь идет о габитусе (мыслительно-социальной ипостаси) или о способах быть юристом. Прилагательное «эклектический» подчеркивает структуру канона, то есть цель примирить разные ориентации. Концепция страты напоминает исторический подход, широко используемый и развитый в антропологических и сравнительных исследованиях права. Ядром эклектического канона является «историко-философско-догматический» подход. Одной только истории, философии и догматики недостаточно для того, чтобы получить хорошее юридическое образование и хорошую практику в качестве юриста. Только сбалансированный комплекс может обеспечить правильное решение. Итальянский стиль влечет за собой объединение и кристаллизацию разных позиций. Фактически, еще одним следствием эклектического канона, постоянно отмечаемого большинством итальянских юристов, было бы сочетание теории и практики в реальном оформлении правовой культуры (§ 4).

Луиджи Лакке,
доктор исторических наук, профессор Правового факультета Университета Мачераты (Италия), главный редактор научного журнала “The Giornale di Storia Costituzionale/Journal of constitutional history”.

Ключевые слова:
Италия, итальянский стиль, Джон Генри Мерриман, правовая культура, правовая традиция, эклектика, эклектический канон, глубокая страта, девятнадцатый век, история права.

Keywords:
Italy, Italian style, John Henry Merryman, Legal culture, Legal Tradition, eclecticism, eclectic canon, deep stratum, nineteenth century, Legal History.