

FRANCE AND ITALY IN THE HISTORY OF LAW:
MUTUAL CONTRIBUTIONS AND OSMOSIS *

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Abstract: Mutual influences between France and Italy in the field of law have been constantly present in both directions since the middle ages. Some examples are briefly recalled: Feudal law, born in Carolingian kingdom and settled in written form in Lombardy two centuries later; the new legal science of the bolognese Glossators of the XII Century, early adopted and developed in new directions in Provence and Languedoc; the Orléans School of Law of the XIII Century, at the origins of the Commentators School flourished in Italy in the XIV Century; the Humanistic School of Law, whose approach Alciatus helped to establish in Bourges, reaching its climax in France in the XVI Century; the new doctrines of the French philosophes and of the milanese Beccaria in the XVIII Century; the French codification and administrative order established by Napoleon and largely adopted in Italy in the XIX Century. Grafts and osmosis are constant features of the european legal history.

Keywords: Francia-Italia (diritto, influenze reciproche, sec. IX-XIX)

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1. The subject that I wish to submit to your attention concerns the relations between France and Italy in medieval and modern legal history. The theme is vast, but I think it's possible, in the short time available to me, to provide sufficient elements to show the role that these historical connections have played in every historical era of our two countries. Six examples ranging from the early Middle Ages to the 19th century will, so I hope, confirm this statement.

2. The centuries of the early Middle Ages gave customs a fundamental role among sources of law. The Roman, Frankish, Lombard and Visigothic laws and customs of the different ethnic groups of western Europe were all valid within each kingdom according to the principle of the personality of the law. Yet if we look closely at these customs, it is easy to see that very often they were transmitted in both directions, from Italy to France and from France to Italy. The Roman *formulae* for contracts of exchange (*permutatio*) were transmitted through the relations between the monasteries of Provence and those located as far away as Gaeta in southern Italy between the 9th and 10th century, as my teacher Giulio Vismara clearly showed¹. Furthermore, Italy drew on the Carolingian practices of the 9th and 10th centuries to arrive at the fundamental rules on feudalism, which are customary rules, even though it was only later, in the 12th century, that the text of the *Consuetudines Feudorum* was written in Lombardy, where for the first time the feudal rules were drawn up systematically. There are numerous further examples of mutual influence, especially if we consider that judicial procedure underwent some significant changes during the Carolingian age, such as when the *échevins* (*scabini*) made their appearance in Italy in the year 796 in Pisa², following the Frankish conquest of the Lombard Kingdom, or if we note that in Italian trials from the 9th century the witnesses were interrogated separately, as

¹ G. Vismara, *Leges e canones negli atti privati dell'alto medioevo: influssi provenzali in Italia*, in Id., *Scritti di storia giuridica*, vol. 2, *La vita del diritto negli atti privati medievali*, Milano 1987, pp. 3-47, cf. p. 37-42.

² Pisa, 5 June 796, in *I placiti del Regnum Italiae*, ed. C. Manaresi, Roma 1955-60, vol. I, nr. 9, pp. 24-28.

required by the capitulary of Thionville in 805³; in turn, the inquiry procedure – fundamental in the Carolingian trial – probably derived from the Lombard *inquisitio*, evidence of which could already be found in Italy back in 715⁴.

3. A second example of the relations that we are recalling here can be found in the new science of law that was developed in Bologna starting from the beginning of the 12th century, which was based on the texts of the compilation of Justinian. Historical research over recent decades has opened up new routes revealing very close links between the Bolognese teachers and the Midi area of France. It is well known that firstly Rogerius, a third-generation glossator of the School, and shortly after Placentinus – two important Bolognese teachers – went to Montpellier between the 1160s and 1180s, probably following academic clashes in their country (disputes between university professors are as old as the university itself). Rogerius wrote a famous *Summa Codicis* there which he left unfinished, and Placentinus in turn drafted some writings in the city. But we now know more than that.

The oldest *Summa* to the Institutions (*Iustiniani est in hoc opere*, edited by Pierre Legendre in 1960) – undoubtedly influenced by the Bolognese methods of Martinus, a pupil of Irnerius – was composed using the first part of the Digest (*Digestum vetus*) and the Code; it recalls the names of two men connected with the priests of Saint Ruf that some documents show being active in the Dauphiné town of Die in the year 1127⁵, just two years after the last document that we have on Irnerius. Furthermore, a whole series of works of utmost importance, which we know date back to around 1150 thanks to meticulous analysis by André

³ Capitulare missorum in Theodonis villa generale (a. 805), in MGH Capitularia regum Francorum, ed. Boreius-Krause, Hannover 1883-87, nr. 44, c. 11, vol. I, p. 124.

⁴ Siena, 20 June 715, in *Codice diplomatico langobardo*, ed. L. Schiaparelli, Roma 1919-33, vol. I, nr. 19, pp. 61-77.

⁵ A. Gouron, *Une Ecole juridique française dans la première moitié du XII^e siècle*, in *Mélangea Aubenas*, Montpellier 1974, pp. 1-22; 1127

Gouron, were written in the Midi of France⁶. This is the case of the work known as Book of Tubingue, as well as the *Exceptiones Petri* deriving therefrom, and particularly of the most ancient *Summa Codicis*, known as *Summa Trecensis* according to the manuscript of Troyes. It is also the case of the *Codi*⁷, a *Summa* to Justinian's Code first written in Provençal, then translated into Latin, French and Catalan.

These works are of primary importance for medieval legal science, since they inaugurated the literary genre of the *Summa*, which includes - in the systematic unitary framework of the first nine books of Justinian's Code - the summary of the whole *Corpus iuris*. The research of André Gouron, which he tirelessly continued for four decades, made it possible to show that the *Summae* of the Bolognese teachers, Rogerius and Placentin, drew from works written in Provence. He also suggested with convincing arguments that their authors were probably Pierre de Chabannes for the *Exceptiones Petri*⁸ and Géraud le Provençal for the *Trecensis*⁹.

These works demonstrate an original approach, since on the one hand they show a direct relationship with practice, while on the other hand they reveal the direct and indirect influence of canon law and its principles, which were both missing aspects in the science of the contemporary Bolognese jurists. So we have an example of a dual doctrinal stream, first from Bologna to the Midi of Provence, Languedoc, and Dauphiné, then in the opposite direction, with mutual enrichment of the methods of analysis and summary of the same sources, leading to true osmosis.

⁶ A. Gouron, *Etudes sur la patrie et la datation du Livre de Tubingue et des Exceptiones Petri*, in "Rivista internazionale di diritto comune", 14 (2003), pp. 15-39; these two works are believed to come from Valence in Dauphiné.

⁷ A. Gouron, *L'auteur du Codi*, in Id. *Pionniers du droit occidental au Moyen Age*, Variorum Reprints, Padstow 2007, nr. 11; according to Gouron, this work was written in Saint-Gilles rather than Arles.

⁸ A. Gouron, *Petrus demasqué*, in "Revue historique de droit français et étranger", 84 (2004), pp. 577-588.

⁹ A. Gouron, *L'auteur et la patrie de la Summa Trecensis*, in Id., *Etudes sur la diffusion des doctrines juridiques médiévales*, Variorum Reprints, London 1987, nr. III.

Recent research has shown that the relationships between the Italian and the French masters were no less intense in the area of canon law, particularly in relation to the school of canon law in Paris with its *summae* and *glossae* on the *Decretum Gratiani* and on the *ius novum* of the papal decrees, notably on the *Compilatio prima* developed by Bernard of Pavia around 1190 and glossed, as Anne Lefebvre-Teillard recently showed, by the Parisian master Petrus Brito¹⁰. There are further examples of these relationships.

4. A third phase revealing these relationships came half a century later, after the middle of the 13th century. Twenty years earlier in Bologna, Accursius had completed the great *apparatus* of *glossae* on the entire *Corpus Juris* and his *Glossa Magna* had become the point of reference for everyone who worked on the texts of Roman law in Europe: for the centuries that followed, Italian jurists would often repeat “*ibi firma pedes*”, recommending to adopt the solution proposed in the *Glossa* of Accursius whenever a controversial issue arose. But after the middle of the 13th century, a centre for studies of Roman law adopted a different approach in France, at the small university of Orléans: here, students of the clergy were given sound training in Roman law, which the bull of Honorius III of 1219 had forbidden from teaching in Paris.

A famous episode bears witness to this innovative approach. A well-known Bolognese professor, Francis Accursius – the son of the author of the *Glossa Magna* – had been invited to Orléans to deliver a lecture on law, a *lectio magistralis* for which he had chosen to analyse, through a *repetitio*, a constitution of Justinian’s Code (*Cod. 7. 47. 1. 1-2*). In this text the damages and interest resulting from an unfulfilled obligation were

¹⁰ Cf. A. Lefebvre-Teillard, *L’apport d’André Gouron à l’histoire des Universités, l’Ecole de droit canonique parisienne*, in *Hommage à André Gouron, 20 September 2010*, [Montpellier] 2011, pp. 53-61; Ead., *Petrus Brito auteur de l’Apparat Ecce vicit Leo ?*, in “*Tijdschrift voor Rechtsgechiedenis*” 77 (2009), pp. 1-21 ; Ead., *Du Décret aux Décretales, L’enseignement du droit canonique au sein de l’école parisienne (fin XII^e-début XIII^e s.)*, in *Les Débuts de l’enseignement universitaire à Paris (1200-1245 environ)*, *Studia artistarum* 38, éd. J. Verger et O. Wijers, Brepols [2014], pp. 319-328.

determined differently for contracts which “*habent certam quantitatem*” and for those that “*incerti esse videntur*”, with examples of the former being sale and lease. With the aim of setting out a criterion for establishing which contracts should be classified in each of the two categories, the *Glossa* of Accursius adopted the distinction between the obligations of *dare* and those of *facere*¹¹. Hence it was through this distinction that Francis Accursius answered the question that a recent graduate, Jacques de Revigny, asked him at the end of the conference. But the young interlocutor, apparently not at all intimidated by the Bolognese professor’s authority, argued that the distinction of the *Glossa* did not resolve the issue, since *locatio operarum* was an obligation for which the amount of damages for non-fulfilment was not determined nor determinable from the start. At the end of an exchange of sharp objections put forward by Jacques and attempts to respond by the lecturer, Francis Accursius was forced to agree with Revigny on the solution he proposed, which was to distinguish between a contract formula which had, or did not have, the elements allowing the quantity of damages for non-fulfilment to be established from the start¹².

Not surprisingly, shortly thereafter Jacques de Revigny became a professor of Roman law at Orléans. It has been argued that his approach was connected to the use of the categories of the *Logica nova* of Aristotle, recently rediscovered and translated into Latin around 1260¹³. In my

¹¹ Gl. qui incerti, à Cod. 7. 47. 1, de sententiis quae pro eo quod interest proferuntur, l. Cum pro eo.

¹² The lively debate between Accursius and Jacques de Revigny is reported by Pierre de Belleperche, *Repetitio* alla l. Cum pro eo (Cod. 7. 47. 1), in Petri a Bellapertica., *Repetitiones in aliquot [...] Codicis leges*, Francofurti 1571, fol. 79-80; F. P. W. Soetermeer, *Recherches sur Franciscus Accursii*, in “Tijdschrift voor Rechtsgeschiedenis”, 51 (1983), pp. 20-41 edited other passages of the *Repetitio* according to two manuscripts in Modena and the Vatican library; cf. K. Bezemer, Pierre de Belleperche, *Portrait of a legal puritan*, Frankfurt am Main 2005, p. 179.

¹³ A. Errera, *Tra analogia legis e analogia iuris: Bologna contro Orléans*, in *Il ragionamento analogico profili storico-giuridici*, a cura d C. Storti, Napoli 2010, pp. 133-181, en part. pp. 174-176. The issue, which is very interesting, is worthy of further analysis.

opinion, without denying the importance of Aristotle's *Analytici* for the development of dialectic in the field of law, in the case recalled above the solution proposed by the young graduate was in line with the Bolognese method of solving aporias of texts using the fundamental tool of *distinctio*: quite simply, Jacques' distinction was different from that proposed by Accursius and more effective, since it enabled the example given by Justinian's constitution not to be rejected (which mentioned lease by way of example but did not distinguish between *locatio rei* and *locatio operae*), while at the same time establishing a criterion for the application of the new distinction of any non-fulfilled contract.

What characterised the school of Orléans was precisely this critical attitude towards opinions received: it was open to different and new interpretations of the Roman texts. Furthermore, it was an approach which dedicated special – and increasing – attention to practical issues and new cases not considered by the Roman legal sources, which the interpreter showed to be solvable by making skilled reference to the rules of Roman law. It was for this purpose that the Commentators endeavoured to set out the *ratio* of the texts of the Digest and the Code, particularly of those texts originally drawn up in the form of *responsa* or *rescripta*, hence as decisions on an actual case.

Some time later, this new method, inaugurated in Orléans, would be adopted by the great Italian jurists of the 14th century: from Cinus of Pistoia, who introduced it in his great Commentary to the Code of 1314, to Bartolus de Saxoferrato and Baldus de Ubaldis of Perugia. The new great School of Commentators had been born.

5. Two centuries later, at the start of the 16th century, it was still this school that dominated among the European universities. But in the short space of a few years, a small number of jurists began to apply to the texts of the *Corpus Juris* the new methods and notions that some Italian humanists, including Lorenzo Valla and Angelo Poliziano, had adopted in the 15th century; having rediscovered Greek and Roman texts that had been forgotten for over a thousand years, they applied a rigorous philological approach to the texts studied. It was through the use of the new humanist culture that three jurists around 1508 published works of

law in which philology and direct knowledge of recently-discovered, non-legal Greek and Roman texts (historical, literary and philosophical sources) were used to develop uncountable corrections of mistakes made by the previous schools and to propose new interpretations. Although in different ways, Guillaume Budé in France, André Alciato in Italy and Ulrich Zasius in Germany devoted themselves to this task.

This new philological and historical method, which overturned the centuries-old foundations of the teaching of Roman law, came up against strong opposition in law schools in Italy: in the 15th century the scholar Lorenzo Valla was forced to flee from Pavia after daring to criticise the great Bartolus. But André Alciat, the most talented of the humanists/jurists at the beginning of the 16th century, found open doors precisely in France, at the University of Bourges, where he was invited in 1529¹⁴, and where his scholarly new approach to legal texts was not only appreciated, but requested by the students themselves. And it was in Bourges, according to the teachings of Alciat, that the *Ecole des Cultes* developed, later becoming established in Toulouse and elsewhere in France and in Europe, due to the work of great jurists such as François Connan, le Douaren, Hugues Doneau, François Hotman, Jacques Cujas, Pierre Pithou and the two Godefroys. They were scholars with very different approaches to law, as well as different ideas and different methods of presentation and analysis, but all characterized by the humanistic source of their culture.

Once again, the hybridisation between Italian and French culture proved to be very fertile.

6. Now let's move forward again in time, two centuries later, towards the middle of the 18th century. A new current of philosophical and political culture was deeply changing European public opinion towards the powers of the Church and the State. Montesquieu's masterpiece, which appeared in 1748, led to many public and private institutions being considered in a different light. At the start of the 1760s the poignant pamphlets of Voltaire had subjected the justice of the Parliaments and Sovereign courts to

¹⁴ P. E. Viard, *André Alciat, 1490-1550*, Paris 1926, pp.65-90; R. Abbondanza, *Alciato, Andrea*, in "Dizionario biografico degli italiani", vol. II, pp. 69-77, p. 71 s.

ferocious criticism. The dossier on the Calas Affair dates back to 1762. Two years later, in 1764, a short book anonymously published in Leghorn, entitled “*Dei delitti e delle pene*” (*On crimes and punishments*), immediately met with extraordinary success.

Numerous editions were printed. The name of the author was soon revealed: it was a young patrician from Milan, the marquis Cesare Beccaria, just twenty years old, who had graduated in law from the University of Pavia two years earlier. The book was promptly translated into French by the abbot Morellet. Voltaire himself wrote a long Commentary full of praise (certainly not a very common attitude for him...), which was published in 1766, just two years after the publication of the book. The pages of Beccaria’s book, in a very effective style, expressed clearly and passionately a series of seminal criticisms of the criminal law of the time, which was generally common to the whole of Europe. In particular, the book suggested the adoption of reforms that would completely remodel the rules of criminal justice. It proposed to establish mild but certain punishments (“*pene miti, ma certe*”), graded according to the severity of the crimes, without the possibility of recourse to the oft-abused royal pardon. Not only was judicial torture openly criticised, but the death penalty was also strongly opposed in the name of humanity, underlining the concrete risks of irreversible mistakes and its insufficient power to dissuade criminals, which had been proven by experience.

In Europe, and as far away as in the Russia of Catherine the Great, Beccaria’s book soon became the expression of a new concept of criminal justice, as an alternative to that of the old regime¹⁵. Now, if we read Beccaria, we note that, according to his arguments and quotations, his pages – and those of other Lombard Enlightenment intellectuals, in that period led by Pietro Verri in the small circle of the newspaper *Il Caffè*, which he himself had founded – would never have been conceived without the active presence of the sources of the new Enlightenment culture in France, which the small group of young nobles and “subversives” always

¹⁵ A collection of documents, letters and writings on the influence of Beccaria in the different European countries was published by Franco Venturi in C. Beccaria, *Dei delitti e delle pene*, a cura di F. Venturi, Torino 1981, pp. 310-650.

quoted in their writings: among them, and above all, Montesquieu, Voltaire, Rousseau¹⁶. This link is just as fundamental for the authors from Naples and Southern Italy, Antonio Genovesi and particularly Ferdinando Galiani, whose new ideas on the economy and society were established starting from their reception in France. Some years later the work of Gaetano Filangieri, another passionate student of the French philosophes, was also translated into French: once again we had the work of a young nobleman open to new ideas, which his Neapolitan friends and relatives gently criticized, rejecting his ideas of legislative reform, as Goethe wittingly noted in Naples during his trip to Italy in 1787¹⁷.

The great movement of ideas among the intellectuals of the Enlightenment was undoubtedly a European phenomenon, which concerned not only France and Italy but also England, Scotland, the Netherlands and Germany. But the links between our two countries were, in this context, constant and fertile.

7. I come now to the sixth and final example of these special relations: the national unification of Italy in the 19th century. It must first be underlined that the period of Napoleonic domination was fundamental in arousing the conviction that the Peninsula, politically divided for thirteen centuries, could achieve unity even in the areas of economy and political institutions. In the field of literary and artistic culture, an Italian “nation” had effectively existed since the 13th century, grounded in the towering work of Dante Alighieri. After the fall of Napoleon, the new culture of romanticism historicised and idealised this conviction even further.

Almost straight after the “miracle” that was the political unification of 1860 (as it was indeed a miracle, such as history has known from time to time) – due to the genius of Cavour, who had succeeded in implementing the essential impetus of Mazzini and the charisma of Garibaldi – it was necessary to decide what the model of the new State was to be. This was a crucial and difficult choice, since the previous eight Italian States had had

¹⁶ Beccaria, *Dei delitti e delle pene*, c. I: “l’immortale presidente Montesquieu”; c. XLV: “un grand’uomo, che illumina l’umanità che lo perseguita..” (cioè Rousseau).

¹⁷ W. Goethe, *Italienische Reise*, 12 March 1787, Naples.

very different traditions in the fields of law and institutions, despite the interlude of the Napoleonic years.

The choice made after 1860 was clear: it was the French model, on which the Kingdom of Piedmont-Sardinia had based its institutions, that was adopted. And so came administrative unity, provinces governed by prefects appointed by the government, and the abolition of the historical legal institutions and rules of the pre-unitary Italian States. In addition, a three-level jurisdiction was adopted, which had the Cassation of French origin at the top (nevertheless, for a long time there were five Courts of Cassation for civil law instead of one...); and from the French model came a clear separation between Church and State, as well as the adoption of a single Civil Code, along with unitary Commercial, Criminal and Procedure Codes within the new Kingdom. Such were the foundations of the Italian State starting from 1865¹⁸. Furthermore, if we analyse the legislative discipline adopted by the new Codes – above all the Civil Code – it is easy to note that the model of the French Codes of 1804-1810 was by far the most influential, since a great part of the articles derived directly therefrom. Even the Arrêts of the French Court of Cassation had a remarkable effect in 19th century Italy.

This was the State model that Italy would keep for a century. It was only through the Republican Constitution of 1948, still in force today, that a different State model was adopted, with strong regional independence and a Constitutional Court having the power to repeal laws that are inconsistent with Constitutional rules or principles.

8. In conclusion, it looks as if mutual contributions and osmosis between the law of Italy and that of France were not the exception but rather the rule, from the Middle Ages to the present day. What is more, these relations have played an essential role in those critical phases during which the science of law has gone through some innovative turning points. We have in fact seen that these relations reached their heights in the critical periods that constitute the foundations of the watersheds of European law culture from the 12th to the 18th century, namely the School of the Glossators, the School of the Commentators, the Ecole des Cultes

¹⁸ A. Padoa Schioppa, *Storia del diritto in Europa*, Bologna 2007, pp. 521-529; 552.

and the Enlightenment movement. It could be added that these mutual influences had just as much effect in terms of doctrine as the other two other major sources of law: legislation on the one hand, and legal practice and judgements on the other.

Let me add just one more coincidence. My own city, Milan, has given birth over the centuries to three great jurists of European standing: Obertus de Orto in the 12th, Alciat in the 16th and Beccaria in the 18th century. Now, all three of them had a privileged relationship with France. Obertus wrote a central section of the *Consuetudines Feudorum*, which became the reference text of feudal law in Europe, the feudal law that was born and developed by customary practice in ninth-century Carolingian France. In Bourges, Alciat found cultural ground that was suited to developing the humanist approach to Roman sources. Beccaria would not have written his book without direct knowledge of the philosophes of the French Enlightenment.

Over the centuries, each of our two countries has experienced countless other relations, mutual contributions and osmosis in the field of law. It has now become clear that the history of any national law in Europe, including the common law of England, cannot but adopt a point of view that extends its horizon to the whole of Europe. Alongside Italy and France, Spain, the Netherlands, Germany, England, Switzerland and other regions have played an innovative and often essential role in the field of law over the centuries, with new ideas and institutions which have, each time, transmitted their influence outside their land of origin. But relations between Italy and France have an intensity, continuity and importance that I like to recall at this phase of the European Union's path, which features a Europe that is advancing in the process of unification while at the same time maintaining those national and regional diversities that are a major wealth of our historical heritage.

Let's hope that these fertile relationships may continue for the time to come.