What Is Private Law?

Guido Alpa

Translated by
Antonio Lordi

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Series Editor Preface

Comparative Legal Thinking Series

This series is designed to give students and practitioners of law in the English-speaking world an opportunity to see how their counterparts in other legal systems also learn to "think like a lawyer." Rather than present the legal thinking of other cultures as secondary literature in the third person, this series takes representative, formative and primary works that students in other countries read during their legal education and translates these works for the English language reader. As a result, an English reader from a common law country can attain the unique inside view of the civil law student. We feel that future lawyer skills require more than passing facility with other legal systems through secondary literature, and that this approach of insider comparativism through primary texts is the only acceptable way of knowing the legal minds of one's partners or opponents in international governance, business, and litigation, or of clients' expectations from abroad.

The primary audiences for this book are law students and academics in any English-speaking country, particularly those studying Comparative Law, European Law, Civil Legal Systems, Jurisprudence or Legal Philosophy. With each translation of primary teaching texts, the English-speaking law student will gain the insight of knowing the way in which his or her counterpart in practice from another country has learned the law. This sort of insight is far more valuable to gaining understanding than the mere information that one acquires either by reading only the translations of the laws themselves or English-speakers' summaries of those laws. Using his own insights from years of experience as a practi-

tioner of law in several countries, some of which are common law jurisdictions and some of which are civil law jurisdictions, together with his impeccable scholarship, Dr. Antonio Lordi has done the English-speaker a tremendous service by providing a book that is both thought-provoking and representative of Italian legal thinking.

For this particular volume, I would like to thank Mr. Alessandro Galli for his valuable multilingual proofreading and the construction of an index.

Prof. Kirk W. Junker, series editor
Cologne, February 2010

Preface to *What Is Private Law?*

Antonio Lordi

The first time I met Guido Alpa was in May 1999 at a conference at the Bocconi University in Milan, during the final year of my Ph.D. in private economic law.

I was attending the conference because the theme of my research was "price in the exchange contract"[1] and Guido Alpa was the only person in Italy to have tackled the theme of contract price, in an essay published in the journal Giurisprudenza commerciale.[2]

Considering Professor Alpa's reputation and renown, I was amazed by his openness and availability and the encouragement he offered me in the pursuit of my research. The good fortune of that meeting became clear to me some months later when Guido Alpa was appointed president of the examination board for my doctorate. That encounter and that examination marked the beginning of a friendship and collaborative partnership that stretches beyond geographic boundaries.

Guido Alpa is indeed a lawyer without boundaries, a recipient of awards and recognitions from both legal worlds: civil law and common law. Guido Alpa is already present in the common law bibliography with several books[3] and I am confident that the ma-

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1. This work then became a monograph with a preface by Guido Alpa (Antonio Lordi, *Il prezzo nel contratto di scambio*, Naples 2001).

2. Guido Alpa, *Appunti sulla nozione di "prezzo,"* in Giur. comm., 1982, I, 62.

3. The Age of Rebuilding: Sketches of the New Italian Private Law (2007); Italian Private Law written with Vincenzo Zeno-Zencovich (2007); Tradition And Europeanization in Italian Law (2005); Compensation For Personal In-

jority of American lawyers are already familiar with the achievements of Guido Alpa.[4]

What Is Private Law? In the six chapters of his book, Guido Alpa offers a new response from a predominantly methodological perspective. The concept of private law as an immutable entity, as established legal principles and meanings, is no longer adequate. Private law must be examined as a system in continual flux, where the principles, the legal concepts and their meanings change. Reference values may change, despite the unaltered condition of the base values that provide the foundations of private law.

Alpa invites us to consider private law as a dynamic reality in continual evolution, based on and always mindful of the fundamental principles—the concepts that, originating with Roman law and common law and undergoing the nineteenth century codifications, have reached our present day, in the era of globalization of the law.

The American lawyer will appreciate the fact that the civil lawyer, and in particular the European lawyer, is open to considering the law and the private law as subjects that change continuously.

Guido Alpa begins his cultural journey with an investigation of the definition of private law. The present day scenario is that private law, though retaining its original historic connotations, is increasingly influenced by other normative systems. Consequently, the role of the private lawyer becomes more difficult, because he

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jury In English, German And Italian Law: A Comparative Outline with Basil Markesinis, and Augustus Ullstein (2005).

4. Guido Alpa is professor of civil law at the University of Rome "La Sapienza." He has been visiting professor of law in several universities (University of Oregon, University of California at Berkeley; University of London; Faculté internationale de droit comparé a Mannheim, University of Barcelona, University of Granada). In 1998 he was appointed Master of the Bench at Gray's Inn. It is very rare for a civil lawyer to receive such an appointment. He also received three JD *honoris causa* from the University Complutense of Madrid, Spain; the University of Lima, Perù and the University of Buenos Aires, Argentina. Besides his academic endeavors, Guido Alpa is President of the Italian Bar Council and he is partner of the law firm Alpa Galletto with offices in Genoa and Rome.

needs to develop new tools to describe and understand the legal system.

In Alpa's view, private law is a set of institutes that are not however immutable and not necessarily national in character, but extend also to the Community sphere. This is reflected in the methodology that leads Alpa to devote a whole chapter to "difficult cases." One of the differences commonly said to exist between civil law and common law is that the former has no case law. This myth must be debunked. The use of cases is increasingly recurrent in modern private law, both by doctrine and jurisprudence.

The centrally important chapter IV examines the fundamental institutes of private law: ownership, contract and liability.

At this juncture I feel I should caution the American lawyer who wants to set about studying Italian and European private law. It is the same kind of warning I would give to an American intent on studying the Italian language. Watch out for "False Friends"! Generally speaking, false friends are pairs of words in two languages that look or sound similar, but differ in meaning[5] [e.g., "cold" and "caldo" (warm), "actually" and "attualmente" (currently), "eventually" and "eventualmente" (in case), "addiction" and "addizione" (sum), etc.]. Property and Proprietà, Contract and Contratto, look similar but in fact they have different histories, different legal meanings, and different rules.

Of all the legal subjects, the one that perhaps presents the greatest differences for the common lawyer and therefore for the American lawyer is Property.[6] While the common law notion of property derives from English feudal law, in places influenced by the decisions of the courts of equity (which themselves having been influenced by civil law, seem to exhibit some actual similarities with civil law), the property branch of civil law developed after the French revolution and the definitive elimination of the absolute monarchy. This very different origin and tradition gives rise to

5. http://en.wikipedia.org/wiki/False_friend.

6. Another subject that is fact absent in civil law is evidence—a subject typical of the adversarial trial by jury—an English invention which then migrated to the United States.

principles, dogmas and disciplines that, being so diverse among themselves, cannot, to my mind, be subject to legal comparison (think, for example of the *rule of perpetuities*).

The concept of contract also appears to have different values and meanings, although to a lesser extent. In the United States, the "Holmesian" concept of the contract has given way to the "new spirit of commercial law" of *Alcoa v. Essex*.[7] In the "Holmesian" vision:[8] (i) the contract exists only if it involves consideration as defined by bargain theory; i.e., it is not enough to have "benefit conferred by the promisee on the promisor" or "detriment incurred by the promisee." Instead, what is necessary is the "relation of reciprocal conventional inducement, each for the other, between consideration and promise"; (ii) if it is ascertained that a contract exists, it will be disciplined only by what is written by the parties, without there being any possibility of taking into consideration any eventual contractual contingencies (this was the rigid rule of the so-called absolute contract expressed in *Paradine v. Jane*, Style 47, 82 Eng. Rep. 519, K.B. 1647, which excluded arising impossibility of performance. The theory of absolute contract remained in force until *Taylor v. Caldwell*, 3 B.&S 826, 122 Eng. Rep. 309, K.B. 1863, in which Justice Blackburn, citing Pomponio in the Justinian Digest and J.R. Pothier, imported into common law the theory of objective impossibility of performance); (iii) liability is limited to damages; there is neither execution in specific form nor a general resolution remedy for non-fulfilment; (iv) for Holmes, damages compensation is limited to cases where there has been a specific assumption of risk, thus criticism is aimed at the interpretative openings of *Hadley v. Baxendale* (9 Ex. 341, 156 Eng. Rep. 145, 1854). Grant Gilmore, in his lesson notes at Ohio State University Law School in April 1970, proclaimed the "death" of the contract, in its "Holmesian" dimension. The "death" of the contract consisted of the erosion of the consideration requisite, caused largely by the issue of the Restatements of Contracts (specifically

7. 499F. supp., 53, 1980.

8. Oliver Wendell Homes, The Common Law, Boston, 1881.

section 90) and by the Uniform Commercial Code; of the evolution of remedies for contract resolution by changes in contractual preconditions[9] and in the evolution of protection for contractual non-fulfilment, in the evolution of protection of contractual on fulfilment through the execution in specific form, and the application, also to contracts, of punitive damages. In other words, the common law jurist was somewhat mistrustful of the creation of legal bindings on the contract. From here arose the rigid assessment of the requisite of consideration; a requisite probably imported from Roman law and ironically absent in the systems of civil law. However, the contract seemed to undergo a rebirth ten years later in *Alcoa v. Essex*, in which the court contrasted the "the old spirit of the law" of *Paradine v. Jane*, with the "new spirit of commercial law" which appears in the Uniform Commercial Law and in the Restatements—in other words the legislative interventions held by Grant Gilmore to be the cause of the "death" of the contact, created, in the view of the *Alcoa v. Essex* judges, the basis of the new theory of contract.

In Italy, just as in France and Germany, the contract first appeared following the reception of Roman law which, beginning in Italy in the twelfth century and developing strongly in the sixteenth century, reached its apex in the French and German schools of the nineteenth centuries. The contract, disciplined in the Italian Civil Codes of 1865 and 1942, is the contribution of this near thousand-year period of cultural development, and presents itself to the civil law jurist brimful of theories and disciplines. So we can understand that to a US common law jurist, like Holmes or later Gilmore, the continental contract would seem to be "limping" right from the outset, being so excessively regulated from various sources, by the mere volition of the parties. By the same token, the contract in its "Holmesian" dimension appears to the civilian to be somewhat "minimalist," lacking the solid theoretical structure of the relations and the legal effects inherent in the continental experience.

9. Grant Gilmore, The Death of Contract, Columbus, OH, 1974.

A reading of *What Is Private Law?* will allow the American lawyer to start gaining a different perspective and to get to acquaint themselves with the legal institutes studied by Italian colleagues. Guido Alpa's capacity for conciseness is exceptional. The American reader will find in this book a complete and succinct picture of the status of private law in Italy today and the methodology used by Italian lawyers to address modern legal issues. But beyond the legal institutes and the rules, what emerges from Guido Alpa's response to the question "What is private law?" is that Italian private law, despite maintaining its historic identity, is now an integral part of European private law.

The American tourist traveling in Italy and Europe, in the Old World, is struck first and foremost by the history and the antiquity and richness of the monuments. Something similar happens in the sphere of law. The American jurist will find in Guido Alpa's book a marvellous and very useful guide for exploring the world of civil law. "Private law is a branch of existing law, and yet if it were depicted as a pastoral painting, it would appear as quite a multi-hued scenario, offering archeological relics from Roman law; medieval constructs deriving from common law and canon law; trees of liberty with the Phrygian cap, descended from the fundamental rights born of the French Revolution; fecund countryside governed by agrarian law, mills, mines and ports that gave rise to union rights; the monuments of the civil and commercial codes; the splendors of the republican constitution then the dense tangle of briars and brambles, the special legislation of the state and the regions. And in clear view, a spring that issues from the heart of Europe, whence flows Community legislation and the jurisprudence of the Court of Justice."

Preface to the Original

Guido Alpa

This book is neither a summary of the institutions of private law,[1] nor a compendium of the philosophy of private law,[2] but rather, a narrative in which I describe some legislative and jurisprudential tendencies, doctrinal orientations and intriguing

1. Whose function is the subject of many debates: see V. Scalisi (editor) *Scienza e insegnamento del diritto civile in Italia. Convegno di studio in onore del prof. Angelo Falzea, Messina, 6–7 June 2002*, V. Scalisi, Giuffrè, Milano, 2004; for further study see G. Alpa, *Manuale di diritto privato*, CEDAM, Padua, 2005; an essential and fascinating read is P. Grossi, *Prima lezione di diritto*, Laterza, Rome-Bari, 2006, which is a genuine introductory essay to the study of law; among the now "classic" works, P. Rescigno, Introduzione al Codice Civile, Laterza, Rome-Bari 2001.

2. Among the first compilations, in a not very philosophical but very traditionalist or technical key, see P. Cogliolo, *Filosofia del diritto privato*, Barbera, Firenze, 1891. From more recent times, L. Raiser, *Il compito del diritto privato*, edited by C. Mazzoni, Giuffrè, Milano, 1990. Terminology, concepts, topics of private law are however a point of reference in the "introduction to legal sciences": see the rigorous illustration of A. Falzea, *Introduzione alle scienze giuridiche. Vol. I. Il concetto del diritto,* Giuffrè, Milano, 1996. On the morphology of present day private law see F. Macario and M.N. Miletti (editors), *Tradizione civilistica e complessità del sistema. Valutazioni storiche e prospettive della parte generale del contratto*, Giuffrè, Milan, 2006; Società Italiana degli Studiosi del Diritto civile, *Il diritto civile oggi. Compiti scientifici e didattici del civilista. Atti del I convegno nazionale, Capri 7–9 April 2005*, edited by P. Perlingieri, E.S.I., Naples, 2006; G. Alpa and V. Roppo (editors) *Il diritto privato nella società moderna. Seminario in onore di Stefano Rodotà,* Jovene, Naples, 2005; and indeed S. Rodotà (editor), *Il diritto privato nella società moderna,* Il Mulino, Bologna, 1971.

cases that provoke reflection on *private law*. Among the various categories into which legal science is divided by longstanding tradition, private law can boast a millenary history,[3] a great cultural depth, a solid dogmatic organization, and a fundamental practical function.

From the point of view of legal practice, private law is the preeminent sector in cases handled by lawyers; credit recovery, employment relations, marital relations, disputes between neighboring owners or between owners and possessors of assets, condominial matters, road accidents, compensation of personal damages—these are the matters that "legal operators" confront on a daily basis. If private law should also include commercial law, then we must think of businesses and firms, stocks and shares, bankruptcy, the financial market, the on-line market. All professional spheres of work that constitute the prevailing mass of millions of judicial procedures launched each year or currently pending before judges of every order and grade in our country.

All these themes, which constitute the spinal cord of private law as it is *practiced*, lie beyond the treatment offered here, with the exception of some references in the treatment of more complex problems or in the "difficult" cases. They in fact find their natural home in textbooks of the literature for university students and legal professionals. Private law is in fact the most technically complex branch of law, on account of its age-old evolution and the rigor of its logical categories and its terminology; for these same reasons it is also the subject that introduces us to the study of other branches of law, as Angelo Falzea teaches us in his *Introduzione alle scienze giuridiche*.[4]

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3. In the wide range of literature see P. Grossi, *La cultura del civilista italiano. Un profilo storico*, Giuffrè, Milan, 2002; L. Ferrajoli, *La cultura giuridica nell' Italia del Novecento,* Laterza. Rome-Bari, 1999; N. Irti, *Codice civile e società politica*, Laterza, Rome-Bari 1995 (reprinted 2007); G. Alpa, *La cultura delle regole. Storia del diritto civile italiano*, Laterza, Rome-Bari, 2000; A. Schiavone, *Ius. L'invenzione del diritto in Occidente*, Einaudi, Turin, 2005.

4. A. Falzea, *Introduzione alle scienze giuridiche, Il concetto del diritto*, Giuffrè, Milano 1995.

Here the discourse is not descriptive but problematic and interlocutory. It flows and then stops, asks questions, looks back on the answers, and circles round the nubs of the arguments.

The terminology, the concepts and the institutions are used to place the reader before emblematic core issues of private law. The methods used are various, just as they are in the studies in this discipline: the exegetic method, the systematic method, the comparatistic method, the historical method, the juris-economic method.

In these pages I have attempted to give of private law an idea constructed as *the image of the society* in which the rules of private law—*our rules*—are applied: Italian society as part of the European context, that has developed a complex of rules to guarantee rights, rights held by physical persons and legal persons, in a dimension that is not only defined by the safeguard of private interests, but also aspires to appreciate the public interest against which the former must be tempered.[5] And all this in a framework of *values* in which the economy, and therefore economic relations, must take account of the needs, the expectations, the basic rights of persons; particularly categories of persons that find themselves in a *weak* position, i.e., the employee with regard to the employer, the consumer with regard to the producer and distributor of goods and services, the savers with regard to the firms that operate in the banks and finance markets, the end users with regard to the public administration, and again, *categories* that find themselves subject to *discrimination* (those who live on or below the poverty threshold, immigrants and of course, women, sexual minorities and so on). The discriminated categories are augmented by other eventualities, examined in careful and aggrieved studies in the European Commission Report on discrimination in Europe.[6]

Some jurists use the telescope to observe private law, and identify its important axes, the general objectives, the overall structure;

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5. Oppo, *Diritto privato e interessi pubblici*, in *Riv. Dir. civ.,* 1994, I, p. 25 and following.

6. European Commission, *Equality, Not Discrimination*, Annual Report 2006, Brussels, 2007.

others use the microscope, studying the single case (indeed as is still said today, the *case in point*), positioning it within the system, deciphering its meanings. Both methods are useful, because private law is at one and the same time an "erudition" law, a "technical" law, a "jurisprudential" law.[7] Besides these two instruments I have also made use of the "kaleidoscope," because private law is a variegated, complex, fascinating subject. At least this is my idea of "private law," an idea, like Proteus, that remodels itself through time, following the evolution of the system, of procedures, of the "living law," and also the methods of interpretation.

* * *

Patient and precious has been the reading of the manuscript by Giuseppe Conte and Nello Preterossi: two cultivated and dear friends to whom I extend my gratitude, though devoid of any burden of authorial responsibility.

Rome, June 2007

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7. After the representation of the system structure, theorized by R. Sacco in many papers, the most recent of which investigates the origins and evolution of the law: *Antropologia giuridica*, Il Mulino, Bologna 2007.