

## TOWARDS A CIVIL CODE: THE ITALIAN EXPERIENCE\*

First purpose of these lectures is analysing the different steps of reception of french civil code in Italy, peculiarly since napoleonic age. The reception of french civil code – as some scholar said – seemed to be the greatest event of italian legal history, after the introduction of Justinian's code, which took place twelve centuries before.

We have, so, to take a look to what happened before french civil code came in force in the Kingdom of Italy. Trying to write an italian civil code, different from french one, was perhaps the most ambitious project of Alberto De Simoni, an italian scholar. De Simoni fulfilled, between 1802 and 1803, two versions of a 'code' which could have been replacing Napoleonic civil code. First project contained a 'Preliminary Discourse' where De Simoni remarked how much Kingdom of Italy needed a unified civil legislation, in order to delete the so many different codes and

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statutes which were simultaneously in force at that time.

In his 'Discourse' De Simoni suggested also the order to be followed in writing the text: first book should have been dedicated to 'law of persons'; second book to law of property and law of obligations. Third book of the project should have been dedicated to law of succession and limitation of actions. Such project was remarkable because of its respect for ancient italian legal tradition, which was largely inspired by roman law. Family law was one of the most interesting topics in the 'project': divorce was possible only in few cases. Wife was under husband's power, and *patria potestas* kept on being perpetual, just like in roman legal tradition.

Furthermore, although it was no more in force, roman law played an important role in helping to understand the law. As soon as the Kingdom of Italy saw the light, the text written by De Simoni was left aside. All that we can say about this work is that it reached a good technical level and could have been a first example of italian civil code. By creating the so called Kingdom of Italy, Napoleon decided that also in such Kingdom his code civil should have been in force. This happened after the so called 'Terzo Statuto Costituzionale'

right has a time limitation period, if the owner doesn't bring a claim within the time limitation period itself. In such subject matter, we can find important traces of roman law, overall considering the various kinds of interruption of limitation of actions.

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(1805). The 'Statuto' sounded – with regard to enforcement of french civil code – more or less as it follows:

art. 55: There will be in force, in Italy, nothing but one and alone civil code;  
art. 56: Napoleon code will be in force and [...] will be translated into latin and italian language. Such translation shall be appreciated by the king.

art. 57: Every change in such code will be forbidden until five years have passed.

So, it was necessary to translate french code. New Minister of Justice, Giuseppe Luosi, had this mission. He created a commission (whose was a member also Alberto De Simoni) which ended his fault quickly and sent the Minister many observations about the code. The commission suggested some changes, regarding patrimonial relationships between spouses and, overall, regarding the divorce. The concept itself of divorce was opposite to religious ideas of the majority of italian people. Luosi sent Napoleon these observations regarding code's translation. But the emperor refused every dialogue and ordered the code to enforce in almost the whole Italy.

The brand new civil code of Kingdom of Italy was composed by 2281 articles. There

were three books, dedicated to law of persons, to goods and to transfer of title. As far as the Kingdom of Naples is concerned, through a decree (22.10.1808, n. 1904), Gioacchino Murat accepted the code's translation. The reception wasn't complete, because art. 9 set up that the code Napoleon, with regard to divorce, shouldn't be enforced. Napoleon, anyway, ordered his code to be enforced totally.

It is clear, then, that some peculiar aspects of the code civil haven't been appreciated by the Italian people, because opposing to Italian historical legal traditions. But – as some scholars suggest – the reception in Italy of the French civil code has to be evaluated in its complex, as an important step toward legislative unification.

So, the French civil code was in force in all parts of the Italian peninsula, which was under the power of France, except in the Kingdom of Sardinia and in the Kingdom of Sicily. And, although after the end of the Napoleonic age the code Napoleon was deleted in all Italian States during the Congress of Vienna, it is to underline that the idea of a code couldn't be put aside anymore. The Kingdom of Sicily and the Duchy of Parma were the first two Italian states to have, after Restoration, a new complex of codes, among which, of course, there was a civil code. In

as the Minister of Justice used to say – aimed to collect matters which, of course, were 'not unknown', in an 'organic order'. Such matters, before 1942, were collected in the third book of the Pisanelli code. Main topics in this book are: transcription, law of evidence, mortgage, limitation of actions.

Peculiarly, rules about evidence in civil cases are in the civil procedure code and in the civil code, mostly in articles 2697 and followings. In Italy, as well as in France, legal scholars have criticized the inclusion of rules on evidence in the civil code, maintaining that a more systematic (and, probably, exact) placement would have been in the civil procedure code. The influence of the Roman legal tradition in some articles regarding the law of evidence in Italy is remarkable. Let's read, for example, article 2697 (on the burden of proof): the plaintiff is expected to prove, in a trial, his claim. It's not difficult to find in these words a comparison with Roman sources, and, peculiarly, with D. 22.3.2 which can be freely translated as it follows: the burden of proof rests on who asserts, not on who denies.

At the end, another interesting topic, in the sixth book, is regarding the limitation of actions. There's a definition of limitation of actions itself. Reading article 2934, we find that every

brand new legal concepts were enthusiastically accepted and used by a government whose politics was aiming to increase national productivity. Scholars, in fact, underlined that the entrepreneur came to be at the center of a new national economic structure, and of the norms developed to rule that structure.

Still, italian scholars strongly believed in the idea of the 'enterprise', which was one of the most original creations of italian legal science: it is often said that property and the enterprise, as parallel categories, are meant to be, together with the complementary category of labor, the fundamental concepts of italian civil code.

An important distinction in fifth book is that between 'large' and 'small'businessmen: art. 2083 statutes that small businessmen are farmers working their land directly, artisans who pursue a mainly personal kind of activity. All the assets that the entrepreneur commits to the running of his enterprise are defined in art. 2555 of the civil code as the property of the enterprise. A great importance, in this definition, has the functional unity acquired by the assets, by being collectively destined to pursuit of the entrepreneur's activities.

Last book of italian civil code contains rules about 'protection of rights'. This book,

the Kingdom of Sicily all french codes stayed in force since 1815 until 1819 and the King ordered to abolish statutes about marriage and divorce. In 1819, King Ferdinand gave life to so called 'Codice per lo Regno delle due Sicilie'. It was composed by five parts, corresponding to five different french codes: civil code, criminal code, civil and criminal procedure rules and commercial law statutes. The so called 'leggi civili' (civil statutes) were the first italian civil code. They perfectly imitated french model, both in systematic order and in contents. But the code offered also some original topics: divorce was abolished and came back the due of endowment. Furthermore it came back the emphyteusis, which had been abolished in Napoleon Code. Duckedom of Parma, Piacenza and Guastalla was the first italian State to follow the example of Naples.

The choice was different, in order to make the statutes easier, because they were four altogether and there was no space for a commercial law code. Civil code was composed by three books, and by a preliminary title. Taking a look at its contents, the endowment was abolished. Emphyteusis, in whose regulation the jurists reminded the ancient division between *dominium directum* and *dominium*

*utile*, took place into property law. The following scholarship strongly believed in this code: it was – as it's been said – the best, and most original, among Italian codes during Restoration.

In Kingdom Lombardo Veneto the situation was different, because there was in force Austrian civil code (so called ABGB). Kingdom of Sardinia, during Restoration, abolished the whole Napoleonic legislation, bringing in force again old statutes, among which also *ius commune*. Only in 1837 a new civil code came in force. It was composed by three books and 2415 articles. As far as its content is concerned, it showed traditional tendencies: Catholic religion became the only 'statual' religion (this was a very different point of view respect to French model). Furthermore, the king was the only one who could explain the interpretation of the law (while, in France, such a function was belonging to judges). The last code to enforce, at that time, was the civil code of Duchedom of Modena and Reggio Emilia. This code was composed by four books and 2580 articles. First three books were dedicated to civil law subject matters.

So, all these civil codes were, more or less, faithful to French civil code, which was a

problems of arrangement. Certain parts of the commercial code had substantial analogies in the civil code, and hence could be merged with them. Thus, as we have seen, much of the law of commercial obligations was incorporated with the law of civil obligations in book fourth of the code. Other parts of the commercial code could not be fitted so easily into the traditional asset of the civil code. Secondly, labor law was very slow in developing in Italy, and – as many scholars underline – the earlier codes said very little about it. By the code of 1942, the legislators and the fascist government took the chance for a great reformation of the whole subject matter. Earlier, in its development, this book should have the more descriptive title 'of labor and the enterprise', but this shortened, then, to 'of labor', in the latest version which enacted. Third, the legal concepts of 'entrepreneur' and 'enterprise' were adopted as fundamental institutions under the new code.

According to art. 2082 i.c.c., the entrepreneur is 'one who professionally carries on economic organized activity aiming to produce, or exchange, some goods or services'. The enterprise has no definition as such, but this word, as used in the code, refers technically to the activity of the entrepreneur. These two

this interpretation, aiming to propose a constitutional reading of art. 2059 i.c.c., based on art. 2 of Italian Constitution. This interpretation, often accepted also nowadays, widens the extent of art. 2059, because it allows compensation of each violation of constitutionally-protected human rights. Such reasoning confirms the 'bipolar' scheme of Italian system of tort law, but aims at revisiting the extent of non-pecuniary loss rule in a modern perspective: art. 2059 may apply even in the absence of a crime, whenever takes place an infringement of a constitutional right.

The fifth book, with the somewhat misleading title 'on labor', contains matters like business associations, corporate finance, securities regulations, unfair competition, trademarks and trade names, copyright, as well as 'labor law', in a very broad sense, to be intended as a regulation of professional activity.

Here, again, we face the problem to discover the ordering criterion that has led to the inclusion of such apparently different matters within the same book of the code. Giving an answer is really hard, and would lead us too far. Anyway, in the first place, it is sure that the choice to leave apart the commercial code and combine its main contents within those of the civil code raised obvious

very important model: as it has been underlined, the French model was going to survive to the end of the Empire: its destiny was a second, and really long-lasting, life. It put its influence not only on pre-unitarian codifications, but also on the first code of united Italy, Pisanelli code.

In 1861 Italian national parliament announced the creation of Kingdom of Italy. In spite of political unity, civil law had many faces: in Italian territories there were in force five civil codes. Such different legal traditions were really difficult to harmonize. Italian scholars, at that time, aimed to unify law by a code, that was meant to be a simple 'change' of 'Albertino' code. But such idea failed, and so arose the project to write a totally renewed Italian civil code. The civil code of 1865 seemed to be the perfect goal of liberal politicians, who wanted to strengthen State's unity through legislative unity.

The code was meant to be the 'supreme and fatal political need', as Vacca, Minister of Justice, used to repeat. The scholar who named the civil code, Giuseppe Pisanelli, deeply believed that civil code could unify, and create, the Nation. But the French model – he said – which was so admirable, being largely based on Roman law, was itself Italian,

because roman law was, definitively, ancient italian law.

But, anyway, the napoleonic code became the model also for this new italian code. As far as the code's systematic order is concerned, it contained three books.

Let's take a look to its general contents. In the first book, it is remarkable the birth of 'civil'marriage, imitating french code: such choice aimed to underline the principle of state's laicality. Canonical marriage could be celebrated as an adding to civil union, but not for replacing it. Second book was dedicated to the subject-matter of intellectual property law. Third book is very similar to french code's one, as far as the law of obligations is concerned. As far as the law of property is concerned, italian code seemed to be a perfect translation of code Napoléon: for example, art. 544 of french civil code, showing the definition of property (sounds, more or less, this way: property is the right to enjoy of things absolutely, but not against statutes) is perfectly repeated in Pisanelli code (art.436).

The main differences we can find in italian civil code concern, peculiarly:

- separate ownership, which became the regular legal system regarding patrimonial relationships between spouses;

lity, which arises from non legal tradition. Those traditional kinds of tort are, for example: nuisance, inducing breach of contract, malicious falsehood, conspiracy, intimidation. These heads of tort have to be committed by intentional conduct.

Another important article, in fourth book, is 2059 which, literally, allows compensation for non pecuniary loss only in the cases stated by legal provisions. Often such article has been interpreted by italian Supreme Court, and often in comparison with art. 2043.

Infact, especially during the Nineties, its interpretation was based on the extension of art. 2043 to every kind of damages, both for pecuniary and non pecuniary loss. According to such theory, compensation for non pecuniary damages would be possible beyond the limits stated by art. 2059, which should have covered only 'pain' and 'suffering'. While compensation for non pecuniary loss, such as loss of amenities of life, should be given under art. 2043, damages for pain and suffering should be admitted only when consequences of a crime (art. 2059).

Such interpretation has been criticized by scholars. Italian Supreme Court has been correcting – especially in some sentences –



jury to another, binds him through whose fault it happened to reparation'. Fault is basis for liability, and french law had a pervasive influence in italian legal system, but also in belgian and dutch ones. Infact, articles of belgian civil code are very similar to their french counterpart.

And art. 1401 of dutch civil code is a mere repetition of art. 1382 of french civil code. Furthermore, new dutch civil code (NBW, 6:162) defines 'tort' ('onrechtmatige daad') as an infringement of a legal entitlement, an act, or omission, in violation of a legal obligation or of an unwritten rule of acceptable social behaviour, provided there is no justification for the infringement, act or omission'.

Anyway, the principle of liability in tort in the basis of a general code provision is, in Europe, non universally accepted. We don't find, for example, in BGB, a clause similar to art. 2043 i.c.c. (or to art. 1382, f.c.c.). Here one of the most important rule is § 823. It introduces a fault-based system of liability in instance of damages to life, body, health, freedom, property or other right ('Sontiges Recht') of a person.

Still, english tort law is not codified, but based on specific heads of tortious liabi-

- the emphyteusis remained in force in Pisanelli code;

What did scholars think about the Pisanelli code? Did austrian civil code (ABGB) influence civil code, somehow?

First of all, italian civil code was a code which was based – we remark once again – on french model, not only for cultural reasons, but also because of political reasons: Italy was united thanks to France, and against Austria. Furthermore, in Italy the theories of 'Ecole de l'Exégèse' were largely diffused. The cultural legacy with french scholars was deep: as an example, Troplong's *opera omnia*, regarding several aspects of civil law, was quickly translated into italian; italian scholars did appreciated the works of Dalloz, too.

Anyway, in spite of its good success, the Pisanelli code was out of date soon after its enactment. Infact, the reception, also in Italy, of german juridical science (the so called Pandectism), was about to have a deep effect on italian scholarship. It was undoubtedly an important factor in the call for reform of the much less scientific, and weak, french style of a code. And, furthermore, the later incorporation into italian States of territories once governed by austrian law may have weakened the

position and the trustworthiness of Pisanelli code.

In Italy many scholars of civil law were, first of all, also roman law scholars and shown a deep interest for the complex conceptualizations set up by german Pandectists. But the ideas of Pandectists, in Italy, couldn't be easily accepted: german dogmatics was difficult, and often opposite to contents of Pisanelli code.

Roman law scholars had a central role in developing the project of a new civil code in Italy. Among the most important jurists of that time, we may mention Vittorio Scialoja, Filippo Serafini, Pietro Cogliolo, who deeply knew also civil law. Furthermore, several roman law scholars took part to drafting of the code.

What's French, then, and what's German in Italian civil code of 1942? It's often said that Italian civil code was a French code, written by scholars studying in Germany. It enforced – we should remember – during the years of Fascism.

As in Pisanelli code, private property and liberty of contract keep on having a central position in the civil code of 1942. But we'll see the differences. Let's start making some short remarks on the structure of the code. We may take a look at the general con-

is wrongful, 'Wrongful', as many scholars believe, has a broad legal meaning: it is a general principle which has been understood in different ways, given that the article above doesn't explain what 'wrongful harm' really is meant to be. Italian civil code (in a different way, as we'll see, respect to BGB), is silent as to which kind of harms admitt of redress and as to what kinds of interest could be considered as 'deserving protection'.

This happens because system of torts are 'standard' or 'non standard', depending on whether they are based on 'general principles' (such as provided by art. 2043) or on strict delineation of those interests, whose infringement can lead to liability. 'Non standard' tort systems, as French and Italian ones, allow the courts to decide on a case-by-case basis whether the interest deserves protection and, hence, whether liability arises. 'Standard' tort systems, such as German, expressly protect only some individual interests and those not listed cannot deserve protection. So, being Italian system of liability 'non standard', there is no point in trying to list the interest protectable. Any interest is, potentially, regarded as deserving protection. French civil code dedicates art. 1382 to the topic of tort law: 'every action of man, which occasions in-

Focusing on this topic would lead us, anyway, too far. Nowadays, for art. 2043 to be applied, it is required the proof of fault (= in italian: 'colpa') or, alternatively, intention (in italian: 'dolo'), by the tortfeasor.

In italian system, such general rule of liability, without limits to damages awards for pecuniary losses or damages (in italian: 'danni patrimoniali'), lives together with special rules of 'limited reparability', for non pecuniary damages (see art. 2059): on such subject matter we'll come back later.

Let's say something more about art. 2043. Intent and fault are, in this article, subjective elements of an unlawful act. The objective element is the harm it causes, both with a causal nexus between the act and the harm. Case law could help us in explaining the true meaning of the 'fault' (*colpa*): it is any kind of imprudence, negligence or incompetence on the tortfeasor's part in performing the act, or activity from which is arising the harm. People, so, have to exercise ordinary diligence, according to art. 1176 italian civil code although there are, in art. 2043, no graded distinctions in fault.

What is quite difficult, in analysing art. 2043? Literally, the tortfeasor must provide redress for any harm he causes to other, that

tents of the new code, then we'll try to go on details. The so called 'general clauses of legal order' weren't in force in 1865: they took place only in 1942. Then, considering an example of the relationships between italian code and BGB, italian code did not accept the notion of 'legal transaction' (in italian: 'negozio giuridico'), which is entirely german. But, like we'll see, italian code was inspired by BGB with regard to some other topics.

Following the 31 articles of 'Provisions in the Law in general', which are generally treated as a part of the code, but technically are not, there are six 'books' or main divisions, containing 2969 articles. The contents of the first four books, taken together, reflect the traditional european concept of the civil law (persons and family, succession, property and obligations); books five and six are innovations. The first four books of italian code are broader in scope than the french and german civil codes to the extent that the matter on commercial obligations formerly found in a separate commercial code is now incorporated into the fourth book. Similar subject matter is still found in separate commercial codes in France and Germany.

It's useful to remind that civil and commercial law, since roman law, had differ-

ent origins, dealt with different matters and, for a large part of their histories, had separate jurisdictions and judges. Infact, commercial jurisdiction and commercial courts were abolished in Italy in 1888. Until that date, the ordinary courts have had jurisdiction in commercial matters. So, in nineteenth century many scholars wished an unification between civil and commercial law (so that it's often said that there should be a 'civilization' of the commercial law).

The first book of Italian civil code is dedicated to persons and family: contains many rules on acquisition and loss of legal capacity, on disappearance, absence, domicile and residence of the person. As far as the family is concerned, the code shows many changes respect to its predecessor and respect to ordinary idea. Infact, the family law, after 1942, has been changed in 1975, by family law reform act. Here we can just mention the main innovations. It's been changed the minimum age for marriage (from 16 until 18 years old). Joint ownership of property operates by default as a normal patrimonial regime between spouses. Spouses, anyway, may also choose a regime of separate estate, which was the system in force before statutory reform. Then, reform abolished the prohibition

Another very important topic in fourth book of Italian civil code is violation of contractual duties by one party to an agreement. It is generally disciplined in art. 1218. Here, we can find the rules for contractual liability, as opposed to non contractual (aquilian) liability, that we can find in art. 2043.

Also such article is really important, in Italian civil code. According to art. 2043, whoever causes wrongful damage to others is liable for such damage: literally, 'any intentional or negligent fact causing wrongful damage to other obliges the one who committed the fact to compensate the damage'.

Such very general rule is nothing but a modern version of the Roman *neminem laedere* principle, providing that one should not harm others and if so, the victim should be redressed for the harm incurred. Shortly, we can say that as far as tort law is concerned, since Middle Age Roman system of tort law, entirely based on *Lex Aquilia*, was accepted. Furthermore, Justinian law accepted also compensation of non pecuniary loss, according, probably, to D.17.1.54. So, this road could lead middle age scholars to admit compensation of non pecuniary damages representing *pretium doloris*.

contract. A sales contract, therefore, only binds the seller to pass the property in the sale article to the buyer, as well as bind the buyer to pay the purchase price (§ 433 BGB). To fulfill the seller's obligation, it is needed a further legal act, by which ownership is transferred to buyer: the act of disposal (§929 and ff., BGB).

2) Abstraction: the act of disposal by which a right on something is transferred, is void independently on the existence, or voidness, of the underlying obligation. Thus, the transfer of ownership doesn't depend on the existence, or voidness, of the sales contract. The transfer itself remains void and the property of the buyer unimpaired even if such contract never existed, due to a lack of agreement, for example. The seller could ask the buyer to transfer back the property, according to unjust enrichment's principles (§ 812 ff. BGB), but in the meantime the buyer is meant to be owner of the goods.

3) Speciality: each transfer of ownership is to relate to a specific thing, and not to a plurality of things, or to unspecified things.

4) Tradition: in general, the transfer of ownership needs the delivering of the goods by the seller to the buyer (§ 929, 1st. clause, BGB).

to make donations between spouses, modifying law of successions, in favour of surviving spouse.

Second books contains the whole law of succession. One of the most important topics of this book is the institution of universal succession. It has as its base the concept of succession to the obligations, as well as to the wealth, of the deceased. The heir, always subject to the *portio legitima*, may be designated by the will (*successio testamentaria*) or by the rules of intestate succession, but this design is not binding on the heir. He may either accept the status of heir, with its concomitant obligations to pay debts and legacies, or refuse it. Once, anyway, he has accepted, he becomes heir for ever (*semel heres, semper heres*). The heir can limit his liability to the extent of the decedent's property by qualifying his acceptance 'with the benefit of inventory'.

The subject of the third book is property. First of all, is to say that (like liberty of contract) private property has a central position in the civil code. And, respect to Pisanelli code, in 1942 there has been a strong effort to change the extreme individualism that characterized its predecessor. So the interest of the property owner has been redefined within 'the limits and [...] the obligations established by

the legal order' (so the art. 832). This article – in spite of Pisanelli code, art. 436 – doesn't contain a definition of 'property' but describes the contents of the powers of the owner.

It is clear, here, the influence of Pandectism: if we take, in fact, a look at the BGB (§ 903) we can see that Italian code is very similar. The full text of art. 832 of Italian civil code shows as it follows: 'the owner has the right to enjoy and dispose of things fully and exclusively, within the limits and with observance of the obligations established by the legal order'. This limitation on property is further expanded in 1948 Italian Constitution. Third book, as the whole Italian law of property, is dominated by the concept of 'ownership'. The main, and relevant, characteristic of this concept, as employed in Italian law, is that it is absolute. Such principle is foreign to common law, which is inspired by the so-called 'better title', which reminds us of medieval distinction, or fragmentation, between *dominium directum* and *dominium utile*. It is useful for us remembering that also in Austrian legal system, nowadays, (see ABGB, § 357) the property's definition simply deals with the generic idea of 'belonging' and makes no men-

tract and immediate transfer of ownership, which, according to civil code, takes place when agreement is reached by the parties. Section 1583 of French civil code provides: 'the sale is finalized between the parties, and the property is legally acquired by the purchaser from the seller once the property and the price have been agreed upon, even if the property has not yet been paid or delivered'.

Austrian law traces a difference between the title for acquisition of property and the formalities of transfer: 'movable property can, as a rule, be conveyed to another only by physical delivery' (§ 426 ABGB); 'by symbolic delivery' (§ 427); or 'by declaration' (§ 428). Ownership of immovable property may only be transferred when the deed of acquisition is entered into public registries appointed for this purpose (§ 431).

German system is more complex: under BGB the transfer of property in movables is based on four principles:

- 1) Separation: there's a deep difference between legal acts creating claims and obligations on behalf of the parties to such agreements (so called 'Verpflichtungsgeschäfte') and legal acts necessary to transfer a right 'in rem' to another party; As an example of 'Verpflichtungsgeschäfte', we may mention sales

taly, modern concept of sale of goods is meant to be a contract having immediately transfer of title.

Historically, in order to transfer the title, some activities were required, beyond the parties' agreement: in roman law, for example, we can remind *traditio*, *mancipatio*, in *iure cesvio*. In sum, the point in time at which property passed was when goods were physically handed over the buyer. But, in followings centuries, things have changed and consensualistic principle, since – as we'll see – french civil code, has been largely accepted.

Then, in italian law, putting a contract of sale (also of land, or immovable things) is enough to transfer the title from seller to buyer (art.1350 and ff.). Nevertheless, if needed, the registration of sale contract (art. 2643) in the land registry has an important meaning, because while it is neither necessary, nor sufficient for the title to pass, when registration is not effected the title to the property that the buyer receives is defeasible by the registration of a subsequent sale of the same property by the same seller to another buyer (2644). Also this system of land registration is deriving from french model.

Let's take a look, shortly, to french model. French law has adopted a system ab-

tion of the well known 'right to enjoy fully and exclusively' of something.

As far as the object of property is concerned, in Germany the object of property may only be a tangible thing (§ 80, BGB). France, Austria and Italy share a different point of view, because in these countries a property right may also have, as its object, an intangible thing such as an original idea, or energy.

Let's take a look at possession. It receives, in italian legal system, the most effective set of legal remedies available and, overall, is the protection is largely inspired by roman legal tradition. According to traditional civilian doctrine, possession comprises two elements. In italian civil code there is a definition of possession itself (art. 1140): 'possession is the power over a thing that is proved by an activity corresponding to exercise of ownership or other real right. One can possess directly or by means of another persons, who has merely detention of the thing'. So, scholars underline that detention is meant to be as a corpus without animus, while possession is corpus plus animus.

French law is similar on the point, because art. 2228 french civil code shows as it follows: 'possession is the detention or en-

joyment of a thing or of a right which we hold or exercise by ourselves, or by another who holds and exercises it in our name'. The BGB states that 'possession of a thing is acquired by obtaining actual power or control over the thing' (§ 854). So, it seems that the will to possess as owner is not an indispensable requirement for possession.

As far as judicial remedies protecting possession is concerned, art. 1168 Italian civil code says that 'one who has been violently or by stealth deprived of possession can, within one year since the dispossession, sue the guilty to recover possession.

The owner is protected against dispossession, according to *spoliatus ante omnia restitutus* principle. Well, such principle goes back, almost directly, to Emperor Constantine (C. 8.5.1pr.). Then we still find something similar in Canon law (Can. 1699, § 1: *spoliatus adversus spoliantem excipiens et probans spoliū, non tenetur respondere, nisi prius fuerit in suam possessionem restitutus*).

Also art. 2283 of French civil code shows as it follows: 'possession is protected, regardless the substance of the right, against disturbance which affects or threatens it. Protection of possession is also granted to whomever holds the thing, against all other

are contained in this book, at articles 1376 and ff. These rules regard, mainly, the contract of sale. According to art. 1470, sale of goods is a contract having for object the transfer of ownership on something or on some right, having back the price'. Such definition overcomes, finally, the misleading legislative definition of contract of sale which derived from the Pisanelli code. That definition seemed to show an (only) obligatory nature for the sale of goods. In fact, art. 1447 of Pisanelli code seemed to refer to merely obligatory effects: sale of goods was a contract by which someone is obliged to transfer a thing, while the other party has to pay the price.

Another very important rule, regarding contract of sale, is art. 1376 Italian civil code: 'in the contracts having as their object transfer of ownership of a specified thing, the constitution or transfer of a right *in rem* or the transfer of another right, such ownership, or right, is transferred and acquired by the lawfully expressed agreement of the parties' Italian civil code is inspired by the so called 'consensualistic' principle. According to article above mentioned, beyond the mere agreement any other element, as for example, the *traditio* of the thing, is unnecessary. So, in I-



general can be applied, to the extent compatible, to unilateral *inter vivos* act having patrimonial content. Thus, the great group of *inter vivos* legal transactions (or ‘negozi giuridici’) are subject to a single, uniform legislative discipline, which can be read as a statutory expression of the general (and german, as we said) doctrine of the time of codification about legal transaction.

One of the main principles inspiring, in Italian civil code, the whole subject matter of law of contract is ‘freedom’. We said it shortly before. Now it is useful saying something more. Parties have contractual autonomy, which means freedom to chose the kind of contract, or the content of contract itself. But this choice must take place ‘within the limits imposed by the law’. And if the contract does not fall into one of the enumerated classes specifically recognized into the code, it will be void only when directing ‘toward the realization of interests deserving some protection according to legal order’ (there are the words we find in art. 1322).

Sale of goods, as one of the most important contracts, allows us to make some considerations, even in a comparative perspective, on transfer of title. Infact, main rules of Italian law regarding transfer of ownership

that the one from whom he holds his right? In Germany, according to § 861 BGB, ‘if the possessor is deprived of possession through an unjust interference, he may claim for the restitution o possession’.

Furthermore, in Italy (art. 1158), and France (2229) *usucapio* as a means for acquiring property by the lapse of time needs, anyway, possession. In Germany, while anyone who has factual authority over a thing is meant to be a possessor, it is drawn a difference between the one who holds as an owner (‘eigenbesitzer’) and the one who lacks that will (‘fremdbesitzer’: § 872 BGB): prescriptive rights arise only for the possessor who holds as an owner (§§ 900 and 937).

Book four is dedicated to obligations and contains a complete discipline of contracts. First of all, it is to underline, fourth book is based on three sources of obligations (see art. 1173): such ‘ordering’ choice reminds us directly of Roman law, and, peculiarly, of Pseudo-gaian partition among contracts, delicts and other sources of obligations. So, according to art. 1173, obligations may arise from a contractual bargaining, from tort (duty to pay damages, if held liable), but may also depend on unilateral promises, or from unjust enrichment etc., which generally

are meant to be as a part of the great family of *variae causarum figurae*.

There are, in this book, many recalls to ‘correctness and good faith’ as duties for the parties. Good faith and fair dealing in bargaining is a very important topic, still nowadays: taking a look at PECL (art. 1:106), it can be read that ‘in exercising his rights and performing his duties, each party must act in accordance with good faith and fair dealing».

It is useful to mention some example: let’s consider art. 1175. Such article is inspired by BGB, § 242, according to which the debtor should behave with good faith. Something similar, about good faith, we can read in art. 1337 (duties in pre-contractual bargaining). Let’s focus on such article, ad followings: articles from 1337 until 1342 did not have a place in Pisanelli code. And, furthermore, in articles 1337 and 1338, where takes place pre-contractual liability, it’s not difficult finding traces of german legal system. Infact, the development of theories on *culpa in contrahendo*, based, in Germany, on § 242, surely influenced Italian legislators in introducing some rules on such a kind of liability.

Still, we may mention, as an example of recall to good faith, art. 1366 (‘the contract shall be interpreted according to good

faith’), or art. 1375 (‘the contract shall be performed according to good faith’). In conclusion, as far as the good faith is concerned, Italian law has been imitating BGB, where the idea of ‘*treu und glauben*’ seems to be one of the most important ‘general clauses’.

In fourth book of the code we may also find a definition of ‘contract’: according to art. 1321, contract is defined as an ‘agreement among two, or more parties, aiming to set up, regulate or extinguish a patrimonial (economically valuable) relationship among them-selves’. The choice to find the essence of the contract in the agreement has ancient foundations. If we take a look to Roman sources, Roman jurists tried in many ways to define ‘contract’, which often was meant to be a *conventio*, or a *pactum*. Here, we can mention, beyond the famous Labeo’s definition (see D.50.16.19) also Pedius’ one (D.2.14.1.3). Furthermore, in Digest, there’s another testimony, belonging to Ulpian, according to which *pactum* is meant to be (D.2.14.1.2) *duorum pluriumve in idem placitum et consensus*.

In Italian code, anyway, there are several contracts where the *consensus* is unnecessary: the clearest example is contract of donation. Furthermore, art. 1324 provides that the provisions on contracts (bilateral, or not) in