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'Law Reporting' in Europe in the Early-Modern Period: Two Experiences in Comparison

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‘Law Reporting’ in Europe in the Early-Modern Period: Two Experiences in Comparison

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This article challenges the cliché handed down to us by the European legal tradition of a marked contrast between ‘common law’, assumed as case-law/anti-doctrinal law, always opposed to ‘civil law’, seen as doctrinal/non case-law. Focusing on English and Italian legal historiography on the great tribunals and the collections of their decisions on both sides of the channel, the article attempts to show that the traditional paradigm cannot be applied tout court *to the medieval and early-modern period. In particular, the article highlights that the European continental great tribunals’* decisiones*, credited with binding force by such powerful and authoritative courts, can be considered – in a broad sense – nothing else than ‘case-law’.*

I. ‘COMMON LAW’ AND ‘CIVIL LAW’: TRADITIONAL INTERPRETATIONS AND NEW PERSPECTIVES

The European legal tradition has handed down to us the notion (or, better, cliché) of a marked contrast between common law, assumed to be an oral and exclusively jurisprudential law,[1] and civil law, seen as a written and doctrinal law rationalized and formalized through codification. Codification itself – with its legalistic, positivistic and anti-jurisprudential ideologies – and, above all, the consequent elaboration of the concepts of ‘system’ and ‘law as science’ by the German ‘Pandektistik’ have contributed to the making and the reinforcement of such a contrast, creating a substantial opposition between the legal traditions under examination.[2]

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[1]The words ‘jurisprudence/jurisprudential’ and ‘doctrine/doctrinal’ are used in this article in a continental-European sense, i.e. as synonymous respectively with ‘case-law’ and ‘academic law’.

[2]For the traditional division of the so-called ‘civil world’ into big legal ‘areas’, families or traditions see, in particular, the fundamental works by Renée David, *Les Grandes Systèmes de Droit Contemporains*, Paris, 1964; John Henry Merryman, *The Civil Law Tradition: an introduction to the legal systems of western Europe and Latin America*, Stanford, 1969; and, more recently, Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, vol.1, *The Framework*, trans. Tony Weir, Amsterdam, 1977 (2nd ed., Oxford, 1987). The distinctive features of common law and civil law have been explored by Raoul C. Van Caenegem, *Judges, Legislators and Professors: chapters in European legal history*, Cambridge, 1987, 1–65, who has synthesized/simplified the distinction between the two legal systems in ten main differences, explained by the different institutional structures and stages of political development of the countries belonging to the two legal traditions. Van Caenegem – notwithstanding the reduction of the main divergences from ten to six – has confirmed the distance between the systems under consideration in *European Law in the Past and*

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One of the drawbacks of the dichotomy between the two 'systems' of common law and civil law, destined to take deep root in the European legal consciousness,[3] has been the rise – until recent years and with some well known exceptions[4] – of a sort of mutual 'distrust' and, at the same time, of a lack of interest on behalf of the continental European legal historians in English law and on the part of their English colleagues in continental European law. The English have praised the beneficial 'resistance' of the common law to the penetration and reception of Roman law in England and, consequently, the ability of local law to remain immune from the foreign 'contamination'.[5] On the other hand, their continental European colleagues have emphasized the 'insularity' and, therefore, the atypical and eccentric character of English law in respect to the European common legal tradition.[6]

Nevertheless, in recent years Italian legal historians have begun to 'open' to the study of the history of European legal culture from a different and wider perspective that also includes the history of English law and, consequently, appears far from the traditional 'italocentric' attitude (or, at least, continental-European attitude) typical of most of the Italian textbooks and studies dating back to the twentieth century.[7] In fact, it has been recently recognized by Italian legal historians that legal history and legal comparison are strictly tied to each other,[8] and that an international and European

the Future: unity and diversity over two millennia, Cambridge, 2002, describing them as 'neighbours yet strangers' (p.38). See also on the subject, Peter Stein, 'Roman Law, Common Law and Civil Law', 66 *Tulane Law Review* (1992), 1591–1603.

[3]Van Caenegem himself (*Judges, Legislators and Professors*), never brings into question the existence of a deep and irreducible distance between the two legal traditions – 'no half measures prevailed: the differences are fundamental', p.2; 'their very substance was different', p.113; 'common law was so different', p.119; and, lastly, 'these legal systems . . . always remained alien to each other' (*An Historical Introduction to Private Law*, trans. D.E.L. Johnston, Cambridge, 1992, vii) – taking it for granted and assuming it as an undoubted given datum within which to reconstruct and tell the history of European law.

[4]I refer, in particular, to the work of Frederic William Maitland and Paul Vinogradoff.

[5]This point of view, destined to be dogmatically accepted by historiography, had already been affirmed, at the beginning of the twentieth century, in a famous essay by Frederic William Maitland, *English Law and the Renaissance*, Cambridge, 1901, repr. in Helen M. Cam, ed., *Selected Historical Essays of F.W. Maitland*, Cambridge, 1957, 135ff.

[6]Luigi Moccia, 'English Law Attitudes to the "Civil Law"', 2 *Journal of Legal History* (1981), 157–168. See also, for a criticism of the 'insularity' of common law, Richard H. Helmholz, 'Continental Law and Common Law: Historical Strangers or Companions?', 6 *Duke Law Journal* (1990), 1207–28.

[7]If already in the 1970s Adriano Cavanna, *Storia del diritto moderno in Europa: le fonti e il pensiero giuridico*, vol.1, Milan, 1979, and Carlo Augusto Cannata, *Lineamenti di storia della giurisprudenza europea*, Turin, 1971, had dedicated a section of their volumes to the history of English law, the recent works by Mario Ascheri, *Introduzione storica al diritto moderno e contemporaneo: lezioni e documenti*, Turin, 2003; Mario Caravale, *Ordinamenti giuridici dell'Europa medievale*, Bologna, 1994; Paolo Grossi, *L'Europa del diritto*, Rome-Bari, 2007; Antonio Padoa Schioppa, *Il diritto nella storia d'Europa*, vol.1, *Il medioevo*, Padua, 1995; Antonio Padoa Schioppa, *Italia ed Europa nella storia del diritto*, Bologna, 2003; Antonia Padoa Schioppa, *Storia del diritto in Europa: dal medioevo all'età contemporanea*, Bologna, 2007, share the same view. Also the works by Italo Birocchi, *Alla ricerca dell'ordine: fonti e cultura giuridica nell'età moderna*, Turin, 2002; Ennio Cortese, *Il diritto nella storia medievale*, Rome, 1995; Ugo Petronio, *La lotta per la codificazione*, Turin, 2002; Giovanni Tarello, *Storia della cultura giuridica moderna: assolutismo e codificazione del diritto*, Bologna, 1976, notwithstanding the different topics and periods covered, have in common the choice of a *European* perspective.

[8]F.W. Maitland, 'Why the History of English Law is not Written', in H.A.L. Fisher, ed., *The Collected Papers of Frederic William Maitland*, 3 vols., Cambridge, 1911, vol.1, 488, had said, many years before, that 'History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history.'

historical approach is nowadays indispensable not only to understand what the various European legal traditions have in common, but also to be able to catch the distinctive features of the law of the individual areas and, at the same time, the typical features of the European legal-historical tradition as a whole.[9]

Such a recent 'opening' is connected to a wider process which follows the most recent historical, political and cultural international developments – for instance, the breakdown of the socialist regime in the former Soviet Union and the consequent change of the balance of power in the world, the building and enlargement of the European Union, the modernization and democratization of the post-colonial countries, the information technology and commerce revolution and the consequent phenomenon of the so-called 'globalization' and, besides, the global rise of the common law of contracts imposed by the market economy – which have induced comparatists themselves to revise and reconsider the relationship between the two systems of civil law and Anglo-American law and, at the same time, to recognize a sort of 'closeness' between them.[10] Thanks to the sociological and anthropological approaches developed during the last decades of the twentieth century,[11] nowadays comparatists commonly talk of a single great 'Western legal tradition' or 'Western legal culture'[12] – including the European, north American and Australian/New Zealander cultures and opposed to the African, Asian and Islamic ones – where

[9]See, on this theme, Antonio Padoa Schioppa, 'Per una storia comparata del diritto europeo', in Onofrio Troiano, Giunio Rizzelli, and Marco Nicola Miletti, eds., *Harmonisation involves History? Il diritto privato europeo al vaglio della comparazione e della storia*, Milan, 2004, 23–36, who affirms that it is not possible to write the history of any national law unless a European perspective is adopted (p.32). See also Antonio Padoa Schioppa, 'Verso una storia del diritto europeo', in *Studi di storia del diritto*, vol.3, Milan, 2001, 1–26.

[10]A first change of perspective is in the essay by Gino Gorla and Luigi Moccia, 'A "Revisiting" of the Comparison between "Continental Law" and "English Law" (16th–19th Century)', 2 *Journal of Legal History* (1981), 143–156, who highlighted the similarities, rather than the differences between the two systems of continental European law and English law, both regarded as part of a common and unitary European legal tradition. See also the essays collected in the volume by Gino Gorla, *Diritto comparato e diritto comune europeo*, Milan, 1981. The limits of the traditional view have been pointed out by Guido Alpa, *Il diritto privato nel prisma della comparazione*, Turin, 2004; Alessandro Pizzorusso, *Sistemi giuridici comparati*, Milan, 1998; Antonio Gambaro and Rodolfo Sacco, *Sistemi giuridici comparati*, Turin, 1996, 41–59; James Gordley, 'Common Law v Civil Law: una distinzione che sta scomparendo', in Paolo Cendon, ed., *Scritti in onore di Rodolfo Sacco: la comparazione giuridica alle soglie del terzo millennio*, vol.1, Milan, 1994; Mark Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', 47 *International and Comparative Law Quarterly* (1998), 501–502, who remarked that common law and civil law 'are very close to a point where there will no longer be *paradigmatical* differences. What will be left is some difference of degree, not of a fundamental nature', and that 'the whole "legal families" division is now collapsing'.

[11]See especially the fundamental work on the interpretation of cultures by the anthropologist Clifford Geertz, *The Interpretation of Cultures: selected essays*, New York, 1973, and the studies by the sociologist Boaventura de Sousa Santos, 'Law: a Map of Misreading. Toward a Postmodern Conception of Law', 14 *Journal of Law and Society* (1987), 279–302.

[12]The notion of a common 'Western legal tradition', including English and American legal history, has been elaborated in a famous work by Harold Joseph Berman, *Law and Revolution: the formation of the western legal tradition*, Cambridge, MA, 1983. Berman, investigating the crisis of the so-called 'Western civilization', highlighted the main features and the common historical roots of its legal tradition (law autonomous from religion, politics, morals and custom; legal institutions run by professional lawyers educated in their own law schools; law strictly tied to legal science; law as an organic 'body' able to evolve historically and according to its own internal logic; pluralism of jurisdictions and legal systems; rule of law; evolution of law as a consequence of the radical and dramatic changes brought by revolutions).

the traditional opposition between common law and civil law appears to be totally meaningless.[13]

The present debate on the 'building' of a European common private law itself and the consequent invigorated interest in European legal history has not only involved both comparatists and legal historians,[14] but has also contributed to the current understanding of the relationship between common law and civil law. Some comparatists and comparative-romanists have recently ambitiously and often questionably attempted to recover a European legal tradition – Roman law, *ius commune* – in order to legitimize historically the harmonization of the European Union states' various national legal systems through the theorizing of a modern *ius commune europaeum* (or, as it has been put, of a 're-Europeanization of legal science' apt to overcome the present 'legal nationalism'[15]). On the other hand, these attempts, starting since the 1990s, have posed new questions and raised new issues: in fact, they have inevitably drawn lawyers' attention to the debate on the distance between the two legal systems of continental European law and English law, in some cases – more often – directing it towards the hypothesis of their 'convergence' and the excessive emphasizing of their similarities,[16] while in others, directing it towards a no less

[13]Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems', 45 *American Journal of Comparative Law* (1997), 5–44, underlined the need to re-map the world's contemporary legal systems and their fundamental features. The new postmodern perspectives and their influence on comparative law have been stressed by Kiel Å. Modéer, 'La comparazione come critica della cultura giuridica: un discorso tra globalizzazione e regionalizzazione', 2 *Le Carte e la Storia* (2002), 7–16.

[14]An example is the interdisciplinary conference, held in Foggia in 2003, on the relationship between European private law, legal comparison and legal history, whose papers are collected in Onofrio Troiano, Giunio Rizzelli, and Marco Nicola Miletti, eds., *Harmonisation involves History? Il diritto privato europeo al vaglio della comparazione e della storia*, Milan, 2004.

[15]Reinhard Zimmermann, 'Civil Code and Civil law: The "Europeanization" of Private Law within the European Community and the Re-Emergence of a European Legal Science', 1 *Columbia Journal of European Law* (1994–95), 63–105. See also Reinhard Zimmermann, 'Roman Law and European Legal Unity', in Arthur S. Hartkamp and Gerrit Betlem, eds., *Towards a European Civil Code*, Dordrecht, 1994, 65–81; Reinhard Zimmermann, 'Diritto romano, diritto contemporaneo, diritto europeo: la tradizione civilistica oggi. (Il diritto privato europeo e le sue basi storiche)', 47,6 *Rivista di diritto civile* (2001), 703–712. See further, on this theme, Klaus Luig, 'The History of Roman Private Law and the Unification of European Law', 5 *Zeitschrift für Europäisches Privatrecht* (1997), 405–427.

[16]Reinhard Zimmermann, 'Der europäische Charakter des englischen Rechts. Historische Verbindungen zwischen civil law und common law', 1 *Zeitschrift für Europäisches Privatrecht* (1993), 4–51, highlighted the presence of a legal tradition common to the two systems of common law and civil law. See also, just to mention some of his main contributions to the subject, Reinhard Zimmermann, *The Law of Obligations: Roman foundations of the civilian tradition*, Cape Town, 1990, chs.7–16; Reinhard Zimmermann, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science', 112 *Law Quarterly Review* (1996), 576–605. This view has been adopted by H. Patrick Glenn, 'La civilisation de la common law', 3 *Revue International de Droit Comparé* (1993), 559ff.; B.S. Markesinis, ed., *The Gradual Convergence: foreign ideas, foreign influences and English law on the eve of the twenty-first century*, Oxford, 1994; B.S. Markesinis, ed., *The Coming Together of the Common Law and the Civil Law*, Oxford, 2000; Maurizio Lupoi, *Alle radici del mondo giuridico europeo*: *saggio storico-comparativo*, Rome, 1994. See, for a strong polemic against this perspective, Pier Giuseppe Monateri, Tomasz Giaro, and Alessandro Somma, eds., *Le radici comuni del diritto europeo: un cambiamento di prospettiva*, Rome, 2005 (see, in particular, the essay by Giaro, 'Diritto romano attuale. Mappe mentali e strumenti concettuali', at 77–168). Lastly, Douglas Osler, 'The Fantasy Men', 10 *Rechtsgeschichte* (2007), 169–193, harshly criticizing Zimmermann's view, has caustically defined the theorizing of a modern *ius commune europaeum*, grounded on a European legal unity (and, at the same time, on a uniform continental and English legal culture), and embodied by the *ius commune* until the

radical re-emphasis and drastic highlighting of the differences between the legal traditions under consideration.[17]

The present initial change of perspective involving both comparatists and legal historians has led, for different reasons and along different paths, to a slow 'opening' and to a progressive 'closeness' or 'dialogue' (to use an effective and well known expression to which I will return[18]) between English and continental European legal systems, showing that the difference between them was less great than had been supposed. Nevertheless, such a new attitude has not been able – at least, not yet – to challenge some of the assumptions arising from the traditional view of the marked contrast between the two legal traditions.

In particular, understanding of the difference between common law and civil law, identified *tout court* with the difference between case-law and codified law, appears to have been focused on the topic of the different attitudes, within the two jurisdictions, towards 'precedent'. At the same time, it seems to have focused on the different weight to be given, within the two systems, to previous decisions (i.e. resort – or not – to the doctrine of stare decisis), with the consequence of putting in the shade the two legal traditions' other features. Besides, with time this difference has so deeply taken root in the European legal consciousness as to be projected backward. This has given rise to a misleading over-simplification which has generated an idea of common law *always* assumed as case-law or 'jurisprudential/anti-doctrinal law', *always* opposed to continental European law seen as 'doctrinal/non case-law'.

In summary, the 'obsession' with the presence (or not) of the observance of the authority of precedents within the legal traditions under consideration, and the consequent prevailing focus of attention on that aspect by both lawyers and legal historians, has not allowed them to fairly evaluate and entirely understand the two legal systems' peculiar features. Consequently, the (undeniable) differences have been very often overemphasized, while the (real) similarities have been very frequently overlooked. On the contrary, the more we look backward, moving away from the present time, the more the differences appear to fade away while the similarities strengthen.

nineteenth-century national codifications, as a 'historia fantástica', a 'chimaera' (23–24) which does not take into account the historical reality of the religious, political and juridical conflicts of the modern period.

[17]See Oliver Remien, 'Illusion und Realität eines europäischen Privatrechts', 47 *Juristenzeitung* (1992), 277–284; Eugen Bucher, 'Recht, Geschichtlichkeit, Europa', in Bruno Schmidlin, ed., *Vers un droit privé européen commun?: skizzen zum gemeineuropäischen privatrecht*, Basel, 1994, 7–31, and, above all, Pierre Legrand, 'Legal Traditions in Western Europe: The Limits of Commonality', in R. Jagtenberg, E. Örücu and A.J. De Roo, eds., *Transfrontier Mobility of Law*, The Hague, 1995, 63ff.; Pierre Legrand, 'European Legal Systems are not Converging', 45 *International and Comparative Law Quarterly* (1996), 52–81, who has even assumed the existence of an irreducible epistemological gulf between the two legal systems of common law and civil law – seen as the expression of opposite legal 'cultures', 'mentalities' and 'representations' – which would prevent their reciprocal knowledge and real understanding by lawyers educated within the two different traditions.

[18]See text at n.40, below.

II. ENGLISH LEGAL HISTORIOGRAPHY AND THE LAW REPORTS: A FIRST ATTEMPT TO COMPARE

We cannot deny that codification and the consequent creation of the concept of 'system' have put some distance between the legal traditions under examination. Nevertheless, the traditional paradigm of a marked contrast between the two systems of *ius commune* and common law cannot be applied *tout court* to the medieval and early-modern periods. In fact, notwithstanding the undoubted prevailing doctrinal character of the *ius commune* and the prevailing jurisprudential character of English law,[19] the study of the European great tribunals and the collections of their decisions has made the apparent difference grow weak.

The wider international historiographical renewal which started in the 1980s was marked not only by a growing and widespread interest in the early-modern period, but also by putting the supreme royal courts' jurisprudence in a *European* frame. An important result of such a new perspective was the fundamental work on the history of European private law by Professor Helmut Coing[20] – a great part of which was dedicated to the European great tribunals and legal literature – and, at the same time, the creation of the international comparative-historical collection of the *Comparative Studies in Continental and Anglo-American Legal History*.[21] Its intent, clearly stated by Coing himself in the first volume, was – and still is – to encourage researchers coming from the continental European and Anglo-American legal traditions (different but, nevertheless, sharing some common features) to exchange their views and to cooperate.[22]

It should be noted that English legal historians who have devoted their studies to the royal courts at Westminster and, above all, to law reporting during the medieval and early-modern periods have over time increasingly taken part in the *Comparative Studies* collection. In the 1980s, in fact, Anglo-American legal historians – originally

[19]J.H. Baker, 'English Law and the Renaissance', 44 *Cambridge Law Journal* (1985), 46, repr. in J.H. Baker, *The Legal Profession and the Common Law: historical essays*, London, 1986, 461, has argued for a doctrinal approach in English law in the Middle Ages, and a shift from it to a jurisprudential approach during the sixteenth century.

[20]Helmut Coing, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Munich, 1973.

[21]The first volume of the collection, Helmut Coing and Knut Wolfgang Nörr, eds., *Englische und Kontinentale Rechtsgeschichte: ein Forschungsproject* (Comparative Studies in Continental and Anglo-American Legal History (CSCALH) 1), Berlin, 1985, has been followed by another twenty-five, the most recent published in 2008. The great tribunals, the law collections and procedural law are the subject of Vito Piergiovanni, ed., *The Courts and the Development of Commercial Law* (CSCALH 2), Berlin, 1987; Antonio Padoa Schioppa, ed., *The Trial Jury in England, France, Germany 1700–1900* (CSCALH 4), Berlin, 1987; J.H. Baker, ed., *Judicial Records, Law Reports and the Growth of Case Law* (CSCALH 5), Berlin, 1989; Alain Wijffels, ed., *Case Law in the Making: the techniques and methods of judicial records and law reports* (CSCALH 17,1), Berlin, 1997; and W. Hamilton Bryson and Serge Dauchy, eds., *Ratio Decidendi*, vol.1, *Case Law* (CSCALH 25,1), Berlin, 2006.

[22]Helmut Coing, 'Common Law and Civil Law in the Development of European Civilization – Possibilities of Comparisons', in Coing and Nörr, eds., *Englische und Kontinentale Rechtsgeschichte*, 31ff. See also Helmut Coing, 'The Roman Law as Ius Commune on the Continent', 89 *Law Quarterly Review* (1973), 505–517; Helmut Coing, 'European Common Law: Historical Foundations', in Mauro Cappelletti, ed., *New Perspectives for a Common Law of Europe*, Stuttgart, 1978, 31–44, where he talks about 'a common European heritage in law' (32).

not much interested in continental law collections[23] – began to confer and to cooperate with the European legal historians who had focused their attention on the continental European collections of *decisiones*. Within a wider interest in the comparison between common law and civil law and, in particular, in the historical comparison between the two legal systems,[24] legal historians who have devoted their research to law reporting began to wonder whether the traditional opposition between continental European law and Anglo-American law was not a misleading over-simplification and whether there were not more analogies between the two legal systems than had generally been believed in the past.[25]

In fact, English legal historians have highlighted that law reporting – subject to local variation – concerned all Europe, and have even discerned four separate European 'traditions' in its history during the medieval and early-modern periods: the English reports (year books and nominate reports); the collections of the *arrêts* of the Paris parlement; the *decisiones* of the rota of Avignon; and, finally, the *decisiones* of supreme royal courts.[26] Such different 'traditions', whose peculiar features have been pointed out too (especially in respect of the function, form and contents of the reports,[27] features strictly connected also to local procedure and to the role of the judiciary in the different jurisdictions) have been considered in a wider *European* perspective.

English legal historians have started not only to pose new comparative questions – many of which will find a final answer only following further comparative-historical research on both sides of the English channel – but also to formulate some initial, although superficial, hypotheses. In particular, it has been pointed out that the continental European collections of *decisiones*, *consilia* and *arrêts*, widely circulating and quoted within the great tribunals all over Europe, can be considered – in a broad

[23]Before then, apart from a very short reference to continental European law collections in the introduction to F.W. Maitland, ed., *Year Books of Edward II, 1 & 2 Edward II, A.D. 1307–9* (Selden Society 17), London, 1903, xix, and in T.F.T. Plucknett, *Early English Legal Literature*, Cambridge, 1958, 102, English legal historians who devoted their studies to law reporting appeared not to be much interested in the civil law counterpart. Only H.D. Hazeltine, in the introduction to William Craddock Bolland, *A Manual of Year Book Studies*, Cambridge, 1925, xiv, had hoped for a comparison between English reports and continental European collections of *decisiones* which would be useful, in his opinion, also in reconstructing the history of the legal profession either in England or on the continent.

[24]See, on the subject, the pioneering comparative-historical studies by John P. Dawson, *The Oracles of the Law*, Ann Arbor, 1968, who compared the history of the development of Roman, English, French and German law up to the twentieth century; and, from the same perspective, Peter Stein, *I fondamenti del diritto europeo: profili sostanziali e processuali dell'evoluzione dei sistemi giuridici*, Milan, 1987, and Olivia F. Robinson, T. David Fergus and William Morrison Gordon, *European Legal History: sources and institutions*, London, 1994.

[25]J.H. Baker, 'Case-Law: Reports and Records', in Coing and Nörr, eds., *Englische und Kontinentale Rechtsgeschichte*, 49ff.; Baker, *The Legal Profession*, 468–476; J.H. Baker, 'Records, Reports and the Origins of Case Law in England', in Baker, ed., *Judicial Records, Law Reports*, 5, described the marked opposition between the two legal systems as a 'misleading over-simplification'. This view has been adopted by David Ibbetson and Alain Wijffels, 'Case Law in the Making: the Techniques and Methods of Judicial Records and Law Reports', in Wijffels, ed., *Case Law in the Making*, 13ff.; David Ibbetson, *Common Law and Ius Commune* (Selden Society lecture 2000), London, 2001.

[26]See Baker, 'Case-Law', 51–53.

[27]Here the word 'reports' is not used in its technical meaning, i.e. it refers not only to common law reports but, more widely, also to continental European collections of *decisiones*.

sense – nothing other than case-law. And also that such collections – characterized by an analogous great variety of style and content with English reports – had no official status as they were normally made by interested judges and advocates privately and for their own use. Furthermore, it has been stressed that during the early-modern period law students and legal practitioners had to become acquainted with the superior courts' jurisprudence on the continent as well as in England. In summary, it has been acknowledged once and for all that 'by the sixteenth century there was more law reporting on the continent than in the home of the common law'.[28]

At the same time, some of the main differences between English reports and continental European collections of *decisiones* during the early-modern period have been noted. First of all, the focus on the arguments of advocates and judges – together with the frequent omission of the final outcome of the dispute – in the reports and, in contrast, the presence of the *decisio* (nevertheless, usually reported without its ratio decidendi) in the *ius commune* collections. Then, the different space given to facts, undoubtedly smaller within the English reports and larger within the continental European ones, perhaps also in connection with local divergences in procedure: in the common law jurisdiction, in fact, fact-finding was the task of the jury, while in the *ius commune* system of adjudication it was the task of the legally-trained judge. Lastly, the different concept of authority, anchored in the observance of reason and custom in England and in contrast connected to the 'name' and authority of the *doctor*, interpreter of the monarch's will, on the continent.[29]

Such initial attempts to compare the English and continental European legal traditions, and the consequent first (general) remarks and interpretations – either those which highlighted the similarities between the two systems, or those which, on the contrary, emphasized the distance between them – have not been followed so far by any real attempt to compare the law collections circulating in England and on the continent during the period under examination.[30] The undeniable difficulties arising from the existence in every jurisdiction of a different local procedure – with the different roles of the judiciary in finding and weighing facts, obviously inseparably connected to the different 'shape' of law reports themselves – make the interesting topic of the comparison between English reports and continental European collections of *decisiones* a field of research still widely unexplored.

The initial hypotheses formulated by the latest English historiography require further investigation in order to be developed and confirmed. To that purpose it would be extremely useful – following the Anglo-American example[31] – to start searching the *mare magnum* of the great tribunals' archives in order to edit (at least some of) the courts' official records of continental *decisiones* and to compare

[28]Baker, 'Records, Reports', 6.
[29]Ibid., 9–10. For a concise, but accurate survey of the continental-European and Anglo-American traditions of 'law-reporting', see also Ibbetson and Wijffels, 'Case Law in the Making', 16ff.
[30]The continental-European law collections (with particular reference to the decisions of the Roman rota and the Sacro Regio Consiglio of Naples) were first mentioned by Baker, *The Legal Profession*, 468–471. See also the comparative-historical essay by Ibbetson and Wijffels, 'Case Law in the Making', 13–35.
[31]I refer, in particular, to the work carried on by the Selden Society, which has published more than 120 volumes on the common law sources so far.

them to the existing private and unofficial law collections:[32] this would allow legal historians to investigate the judges' legal reasoning process and the chronology and modes of the emergence of 'case-law' on the continent too. At the same time, further research on the relationship between the advent and diffusion of print on both sides of the channel and the reporting of legal cases[33] – mostly in print on the continent, in manuscript in England[34] – would help a better understanding of the needs of the legal profession both in everyday legal practice and in legal education during the early-modern period.

It is clear that comparative-historical research on law reporting – considered as a *European* phenomenon – is still at an initial stage and, before we can venture any confident assessment, the first important and interesting assumptions[35] need to be verified and deepened, taking into account the results of the research carried out so far by legal historians all over Europe. Nevertheless, credit must certainly be given to the English legal historians for having broadened the horizons of legal history, casting, for the first time in the history of law reporting, a curious glance beyond the channel.

III. ITALIAN LEGAL HISTORIOGRAPHY AND THE COLLECTIONS OF *DECISIONES*: A CONTINENTAL EUROPEAN CASE-LAW?

Extensive research on the European great tribunals and the collections of their *decisiones* has been carried out by Italian legal historians: starting from the 1970s, leading to a wider and growing interest in the early-modern period – until then overlooked and held to be subordinate to the Middle Ages[36] – Italian legal historians began to investigate the role and the function of the supreme royal courts and their jurisprudence. The topic had already found a little space in a few monographs;[37] but it was Professor Gino Gorla, a comparatist endowed with a special sensitivity to history, who – turning Maitland's famous assertion 'history involves comparison' to 'comparison involves history'[38] – through much research on the Italian great tribunals and their jurisprudence, has been a real pioneer in the field, raising new questions

[32]Marguerite Boulet, *Quaestiones Johannis Galli*, Paris, 1944, edited the *decisiones* of the Paris Parlement reported by Jean Le Coq (fourteenth-century) and compared it to the court's official records; as far as I know, on the continent the example has never been followed.

[33]The demand for legal texts by common lawyers has been investigated by J.H. Baker, 'The Books of the Common Law', in Lotte Hellinga and J.B. Trapp, eds., *Cambridge History of the Book in Britain*, vol.3, *1400–1557*, Cambridge, 1999, 411ff.; Sir John Baker, *Oxford History of the Laws of England*, vol.6, *1483–1558*, Oxford, 2003, 491ff.

[34]While the year books printed in England during the sixteenth century were numerous, only a few collections of reports were printed before the seventeenth century: Baker, *The Legal Profession*, 446, affirmed that 'for every printed volume of cases there are perhaps half a dozen or a dozen unpublished volumes'.

[35]Cf. text accompanying nn.25–29, above.

[36]Gino Gorla, 'Un Centro di studi storico-comparativi sul "Diritto comune europeo"', 5 *Il Foro Italiano* (1978), 313, had described the lack of historical research in the sixteenth to the eighteenth centuries, with particular reference to Italian and continental-European jurisprudence, as 'la grande lacuna' ('the big gap') in Italian legal history.

[37]Cavanna, *Storia del diritto moderno*, 155–171, 225–236; Tarello, *Storia della cultura giuridica moderna*, 55ff, 67ff.; Vincenzo Piano Mortari, *Gli inizi del diritto moderno*, Naples, 1980, 419–433.

[38]Gino Gorla, *Il contratto: problemi fondamentali trattati con il metodo comparativo e casistico*, *prefazione*, Milan, 1955.

and setting new research trends.[39] Professor Gorla, in particular – breaking with the Italian traditional 'italocentric' view of the law – was the first to envisage the possibility of a historical comparison (or, better, a 'dialogue'[40]) between the systems of common law and civil law. In his opinion, in fact, the study of the European great tribunals and of the collections of their decisions could represent a meeting point of the two legal traditions on the ground of their common jurisprudential character.[41]

Gorla's studies have been followed by Professor Mario Ascheri, whose research on the Italian great tribunals and their collections of *decisiones* during the medieval and early-modern periods not only confirmed the previous results in many respects, but also added new data on the role of the jurisprudence of the *rote* and *senati* in the early-modern period.[42] These first fundamental studies gave birth to quite a significant number of works dedicated to the superior courts of the Italian states[43] and, at the same time, to the conference on 'Grandi Tribunali e Rote' organized by Professor Mario Sbriccoli in Macerata in 1990,[44] where the results of the latest research were set out. During the same period and the following decade, further

[39]See, in particular, among his numerous essays, contributions and papers, Gino Gorla, 'I Tribunali Supremi degli Stati Italiani, fra i secc. XVI e XIX, quali fattori della unificazione del diritto nello Stato e della sua uniformazione tra Stati (Disegno storico-comparativo)', in Bruno Paradisi, ed., *La formazione storica del diritto moderno in Europa. Atti del III Congresso internazionale della Società italiana di Storia del diritto*, vol.1, Florence, 1977, 447–532; 'Unificazione "legislativa" e unificazione "giurisprudenziale". L'esperienza del diritto comune', 4 *Il Foro Italiano* (1977); Gino Gorla, 'L'origine e l'autorità delle raccolte di giurisprudenza', 44 *Annuario di Diritto Comparato e di Studi Legislativi* (1970), 1–23. The complete bibliography of the comparative-historical works by this eminent scholar has been edited by Professor Luigi Moccia and appended to the volume by Gorla, *Diritto comparato*, 909–914.

[40]Gorla, *Diritto comparato*, 12.

[41]See especially Gorla and Moccia, 'A "Revisiting"', 147; Gino Gorla, 'La "communis opinio totius orbis" et la réception jurisprudentielle du droit au cours des XVIe, XVIIe et XVIIIe siècles dans la "Civil Law" et la "Common Law"', in Cappelletti, ed., *New Perspectives*, 54. On the jurisprudential character of the common law system, see also the work by Luigi Lombardi, *Saggio sul diritto giurisprudenziale*, Milan, 1967, 79–199.

[42]Mario Ascheri, *Tribunali, giuristi e istituzioni dal medioevo all'età moderna*, Bologna, 1989. The existing Italian printed law collections are here accurately classified and indexed.

[43]See, in particular, Ugo Petronio, *Il Senato di Milano: istituzioni giuridiche ed esercizio del potere nel Ducato di Milano da Carlo V a Giuseppe II*, Milan, 1972; Gian Paolo Massetto, 'Aspetti della prassi penalistica lombarda nell'età delle riforme: il ruolo del Senato milanese', 47 *Studia et documenta historiae et juris* (1981), 93; Cesare Mozzarelli, 'Il Senato di Mantova: origini e funzioni', 81 *Rivista italiana per le scienze giuridiche* (1974); Pierpaolo Merlin, 'Giustizia, amministrazione e politica nel Piemonte di Emanuele Filiberto. La riorganizzazione del Senato di Torino', 1 *Bollettino Storico Bibliografico Subalpino* (1982), 35; Enrico Genta, *Senato e senatori di Piemonte nel secolo XVIII*, Turin, 1983; Rodolfo Savelli, 'Potere e giustizia. Documenti per la storia della Rota criminale a Genova alla fine del "500"', 5 *Materiali per una storia della cultura giuridica* (1975), 29–172; Giuseppe Pansini, 'La Ruota fiorentina nelle strutture giudiziarie del Granducato di Toscana sotto i Medici', in Bruno Paradisi, ed., *La formazione storica del diritto moderno in Europa*, vol.2, Florence, 1977, 533–579; Umberto Santarelli, 'L'archivio della Rota maceratese', 32 *Annali della Facoltà di Giurisprudenza dell'Università di Macerata* (1976).

[44]The conference papers, including the ones by Vito Piergiovanni, 'Una raccolta di sentenze della Rota civile di Genova nel XVI secolo'; Rodolfo Savelli, 'Una "rota di dottori cittadini". Discussioni e progetti di metà Seicento a Genova'; Angela De Benedictis, 'Ideologia e realtà della Rota bolognese nel Settecento'; Marcello Verga, 'La Ruota criminale fiorentina (1680–1699). Amministrazione della giustizia penale e istituzioni nella Toscana medicea tra Sei e Settecento'; and Giuseppe Pansini, 'Le cause delegate civili nel sistema giudiziario del Principato mediceo', have been collected in Mario Sbriccoli and Antonella Bettoni, eds., *Grandi Tribunali e Rote nell'Italia di Antico Regime*, Milan, 1993.

studies have valuably deepened and clarified some of the aspects of the previous work.[45]

Such a new interest in the superior courts' jurisprudence of the early-modern period has led legal historians to acknowledge the high authority of the decisions of the European great tribunals.[46] Created or restored – between the end of the fifteenth century and the beginning of the sixteenth – by the monarchs of European states as a part of their absolutist policy of centralization directed to unify law through the enforcement of jurisdiction,[47] they were invested with so-called 'sovereign' powers. In fact, the decisions of these supreme royal courts, attended by trained, professional judges appointed by the monarch and invested with the power

[45]For a valuable study of the Neapolitan jurisprudence, see Marco Nicola Miletti, *Tra equità e dottrina: Il Sacro Regio Consiglio e le 'decisiones' di V. De Franchis*, Naples, 1995; *Stylus judicandi: le raccolte di 'decisiones' del Regno di Napoli in età moderna*, Naples, 1998; Giancarlo Vallone, *Le 'Decisiones' di Matteo d'Afflitto*, Lecce, 1988. On the Sicilian courts see the works by Andrea Romano, 'Tribunali, Giudici e Sentenze nel "Regnum Siciliae" (1130–1516)', in Baker, ed., *Judicial Records, Law Reports*, 211–301; Andrea Romano, 'La Regia Gran Corte del Regno di Sicilia', in Wijffels, ed., *Case Law in the Making*, 111–161. See further Gian Paolo Massetto, 'Sentenza (diritto intermedio)', 41 *Enciclopedia del diritto* (1989), 1200–45, and the interesting essay by Rodolfo Savelli, 'Tribunali, "decisiones" e giuristi: una proposta di ritorno alle fonti', in Giorgio Chittolini, Anthony Molho and Pierangelo Schiera, eds., *Origini dello Stato: processi di formazione statale in Italia tra medioevo ed età moderna* (Annali dell'Istituto storico italo-germanico 39), Bologna, 1994, 397–421. Cf., more recently, on the Roman rota and the senato of Milan, Angela Santangelo Cordani, *La giurisprudenza della Rota romana nel secolo XIV*, Milan, 2001; Annamaria Monti, *I formulari del Senato di Milano: secoli XVI–XVIII*, Milan, 2001; *Iudicare tamquam Deus: i modi della giustizia senatoria nel Ducato di Milano tra Cinque e Settecento*, Milan, 2003.

[46]The most important were the Roman rota and the other *rote* of Central and Northern Italy, the Senato of Milan, the Sacro Regio Consiglio of Naples, the Paris Parlement and the other French provincial courts, the Reichskammergericht in Germany, the Spanish Audientiae of Castile, Aragon, Navarre and Catalonia, and the Grand Conseil of Malines in the Low Countries. See, among the most recent works on the French Parlements and their jurisprudence, Jean Hilaire and Claudine Bloch, 'Conaissance des décisions de justice et origine de la jurisprudence', in Baker, ed., *Judicial Records, Law Reports*, 47–68; Bernadette Auzary-Schmaltz and Serge Dauchy, 'Le Parlement de Paris', Bernadette Auzary-Schmaltz, 'Les recueils d'arrêts privés au Moyen Age', Serge Dauchy, 'Les recueils privés de "jurisprudence" aux Temps Modernes', and Michel Petitjean, 'Les recueils d'arrêts bourguignons', all in Wijffels, ed., *Case Law in the Making*, 199–224, 225–236, 237–248, 267–276; Jacques Poumarède, 'Les arrêtistes toulousains', in *Les Parlements de province: pouvoirs, justice et société du XVIIe au XVIIIe siècles*, Toulouse, 1996; Serge Dauchy and Véronique Demars-Sion, eds., *Les Recueils d'arrêts et dictionnaires de jurisprudence (XVIe–XVIIIe siècles)*, Paris, 2005. Cf., in particular, on the reichskammergerichts, Filippo Ranieri, 'Die archivalischen und literarischen Quellen aus der Judikatur des Reichskammergerichts (16.–17. Jahrhundert)', in Baker, ed., *Judicial Records, Law Reports*, 303–318; Filippo Ranieri, 'Entscheidungsfindung und Technik der Urteilsredaktion in der Tradition des deutschen Usus modernus: das Beispiel der Aktenrelationen am Reichskammergericht', in Wijffels, ed., *Case Law in the Making*, 277–298; Bernhard Diestelkamp, ed., *Das Reichskammergericht in der deutschen Geschichte: Stand der Forschung und Forschungsperspektiven*, Cologne, 1989. See, on the Grand Conseil of Malines and the collections of its decisions, Alain Wijffels, 'Legal Records and Reports in the Great Council of Malines (15th to 18th Centuries)', in Baker, ed., *Judicial Records, Law Reports*, 181–206; Robert van Answaarden and Hugo de Schepper, 'Bibliografie van de Grote Raad van Mechelen', and John Gilissen, 'De Grote Raad van Mechelen, Historisch overzicht', both in Workgroep Grote Raad von Mechelen, *Miscellanea Consilii Magni*, vol.1, *Essays on the History of Forensic Practice/Etudes d'histoire judiciaire*, Amsterdam, 1980.

[47]Adriano Cavanna, *La storia del diritto moderno (secoli XVI–XVIII) nella più recente storiografia italiana*, Milan, 1983, 76. Piano Mortari, *Gli inizi del diritto moderno*, 419–433, highlighted the instrumental role of the great tribunals in the exercise of political power by the absolute monarchs of European states, describing such superior courts as real governing bodies instrumental in the process of nationalization of law and, at the same time, authors of a creative interpretation of law able to make up for the inadequacy of the lawgiver.

to judge in his name, were normally regarded – notwithstanding the diversity of powers, competences and procedures peculiar to each tribunal – as final and incontrovertible, that is, they could not be challenged through ordinary remedies. Some of these superior courts were even invested with legislative powers: this was, for instance, true of the Paris Parlement, which had the power to endorse, review and register the ordinances issued by the monarch before they could come into force, and which, at the same time, had the power to issue the so-called *arrêts de règlement*, decisions binding *erga omnes* apt to regulate matters not already provided for by statute law or custom.

Although the *decisiones* of the great tribunals were not officially regarded as sources of law, Italian historiography has highlighted the superior courts' tendency to consider their own decisions as bearing *vis legis* in practice and, consequently, as being binding for the future.[48] Besides, their authority was so increased in case of analogous decisions in similar matters that it has been held that the supreme courts' *usus fori* was directly regarded as legally binding.[49] In fact, according to the common practice of the *binae iudicaturae* itself, a double analogous decision by a great tribunal would have led to the creation of a real *consuetudo iudicandi*.[50]

Moreover, it has been pointed out that, as some supreme royal courts were extremely powerful and authoritative (e.g. the Roman rota or the Sacro Regio Consiglio at Naples), such a tendency brought about the consolidation of coherent and constant jurisprudential trends or *stylus curiae* within individual states. At the same time the great tribunals, judging in the name of the monarch, delivered decisions which were considered binding for the inferior courts too. Furthermore, the transnational character of the jurisprudence of some of the most important superior courts (e.g. the Roman Rota again) has been stressed: their *decisiones* were widely known, reported and quoted beyond the borders of their home states in the law courts throughout the continent, leading to the creation of real European jurisprudential trends.[51]

[48]In Naples Matthaeus de Afflictis (*Decisiones Sacri Regii Consilii Neapolitani, per excellentissimum virum Matthaeum de Afflictis I.C. praestantissimum, eiusdem Sacri Consilii Regium Consiliarium collectae*, Venice, 1584), had affirmed that 'sententiae … habent vim generalis legis in Regno' ('decisions … are binding in the Realm') (dec.383, para.8), and, besides, that 'ista est nova decisio Sacri Consilii, quae habet vim legis, et sic facit jus' ('this is a new decision of the Sacro Regio Consiglio, which is binding and must be regarded as law') (dec.169, para.9), and that 'nunc est decisus per sententiam regis cum Consilio, quae facit jus universale in Regno' ('thus the Sacro Regio Consiglio has decided, and its decision is universally binding in the Realm') (dec.190, para.7).

[49]See, for another example of the discussion on the legal effect of the supreme courts' previous decisions, the work by Jorge de Cabedo, who – citing many doctrinal authorities (de Afflictis included) – answered the question 'An sententiis senatus standum sit ad similes causas decidendas' ('Whether Senato's *decisiones* are binding in deciding similar cases') in the affirmative: Jorge de Cabedo, *Practicarum Observationum, sive Decisionum Supremi Senatus Regni Lusitaniae*, Frankfurt, 1646, vol.1, dec.212, cit. by Ibbetson, *Common Law and Ius Commune*, 8–9.

[50]Gorla, 'I Tribunali Supremi', 503–504. That the courts tended, notwithstanding the reluctance to develop a doctrine of *stare decisis*, to confer a more stringent authority upon their precedents has been acknowledged by legal historians all over Europe: see, just to mention some among the most significant works, Auzary-Schmaltz and Dauchy, 'Parlement de Paris'; Ranieri, 'Entscheidungsfindung und Technik'; Alain Wijffels, 'References to Judicial Precedents in the Practice of the Great Council of Malines (ca. 1460–1580)', in A. Wijffels, ed., *Miscellanea Consilii Magni*, vol.3, Amsterdam, 1988, 165–186.

[51]The institutional function of the great tribunals to unify the law within the various states and, at the same time, between the states themselves *sub specie interpretationis*, has been held by Gorla, 'Unificazione

Last but not least, Italian legal historians have emphasized that the collections of *decisiones* of the main European supreme courts themselves – at least until the beginning of the seventeenth century privately drafted in very large numbers by judges and advocates and widely circulating all over Europe[52] – had a primary role in the development of the transnational character of the great tribunals' jurisprudence.[53] And that, most of all, these reports – credited, as we have seen, with a great authority both inside and outside their home states – were not only an indispensable case-book for judges and advocates in everyday practice and a fundamental means of learning the jurisprudential trends of the various superior courts, but also – given the crisis of the *ius commune* caused by the overgrowth of *commenta*, *consilia*, *tractatus* and *communes opiniones* which determined great confusion and uncertainty in matters of law – a valuable source of legal certainty.[54]

Therefore, according to this interpretation, the decisions of the great tribunals played the role of real sources of law, acquiring an importance equal or superior to that of the *doctores*' and treatise writers' theories and opinions. Consequently, it has been held that, in contrast to the past, when academic lawyers enjoyed most credit and authority, the new leaders in the legal field were now practical lawyers, that is, the judges and the advocates of the superior courts. At the same time, the jurisprudence of the great tribunals and the collections of their *decisiones* prevailed over the *consiliatores* and their collections of *consilia.*[55] In conclusion, the supreme royal courts have been credited, thanks to their authoritative interpretation of law, with the function of assuring in fact – within a jurisprudential legal system such as the *ius*

"legislative"', and 'I Tribunali Supremi'. This point of view has been recently criticized by Birocchi, *Alla ricerca dell'ordine*, 85ff., who, assigning to the jurisprudence of the great tribunals only the function to unify the law within the various states, has denied the supreme courts' institutional role to do it, holding that the quotations of foreign decisions contained in the law collections are nothing but the result of a common legal culture shared by lawyers all over Europe. The authority of the collections of *decisiones* both inside and outside their home states has been considered a sign of the presence of a tendency towards a jurisprudential unity within the European states during the early-modern period by Ascheri, *Tribunali, giuristi*, 96.

[52]According to Professor Ascheri, there were at least 400 printed collections of *decisiones* in Italy alone during the early-modern period (Ascheri, *Tribunali, giuristi*, 89). Cf., just to mention some of the main law collections spread across the continent, the works by de Afflictis, Capece, Grammatico and Minadoi for the Sacro Regio Consiglio of Naples, Cacherano and Tesauro for the senato of Turin, Fastolf and Bellemère for the Roman Rota, Belloni for the rota of Genoa, Le Coq, Papon and Louet for the Paris Parlement and Pape for the parlement of Grenoble.

[53]The transnational character of the jurisprudence of the great tribunals is also shown by the long list of (international) authorities mentioned by Benedict Carpzow, *Jurisprudentia Forensis Romano-Saxonica*, Frankfurt, 1650, vol.1, fo.3v, cit. by Ibbetson, *Common Law and Jus Commune*, 18–19, while Professor Ascheri describes the legal *massimari* containing the abridged decisions of the superior courts of the European states (e.g. the works by the Neapolitan lawyers Marta and Borrelli), as real 'summae' of the European jurisprudential law (Ascheri, *Tribunali, giuristi*, 135). The 'contribution' by the collections of *decisiones* to the European character of the *ius commune* has also been highlighted by Gorla, 'I Tribunali Supremi', 515–517.

[54]Gorla, 'L'origine e l'autorità', 18–20. See also Ascheri, *Tribunali, giuristi*, 90–92.

[55]The changed relationship between supreme courts and *doctores* and the growing importance and power of the judges of the great tribunals at the *consiliatores*' expense have been noted by Gorla, 'I Tribunali Supremi', 464ff.; 'Unificazione "legislativa"', 6ff.; 'L'origine e l'autorità', 8; Ascheri, *Tribunali, giuristi*, 65, 189–193. According to Professor Ascheri the rise of case-law and the decline of the *consiliatores* and their *consilia* coincided with the crisis of the Italian universities, giving place to a real 'divorce' between law teaching and legal practice (192).

commune – the consolidation, the continuity, the evolution and, lastly, the certainty of law itself.[56]

The most recent Italian legal historians have acknowledged the merits of the previous pioneering studies. Nevertheless, after further research, they have gone deep into some of the data coming from the first studies in the area, showing a few of their limits.[57] First of all, it has been pointed out that it is incorrect to use the 'great tribunals' category as a unitary category because this would tend to obscure not only the diversity of the role and functions, but also the history of the evolution of the various European supreme courts.[58] Although there is general agreement as to the undisputed jurisprudential character of the *ius commune*, the binding *vis legis* of the *decisiones* of the great tribunals in practice has been questioned.[59] In particular, the distance between the theoretical authority of judicial precedents affirmed by the *doctores* and the real judicial practice of the superior courts on the continent during the early-modern period has been noted.[60] Finally, the prevailing doctrinal character of the *ius commune* has been highlighted by the most recent studies. In fact, if they have confirmed the changed relationship between *doctores* and practising lawyers after the rise of the great tribunals, on the other hand they have stressed that doctrinal authorities (i.e. the opinions of the most credited *doctores*) continued to be a fundamental reference point for continental judges and advocates.[61]

It is true that the authority of the European supreme courts' jurisprudence was clearly based on the reasoned *opiniones* of doctors of law contained in the decisions of such authoritative courts. At the same time, the existence of a firm and official rule of stare decisis was normally denied and repudiated by their judges. Nevertheless,

[56]Gorla, 'I Tribunali Supremi', 483ff., called the supreme courts 'i principali fattori del diritto' ('the chief makers of law') from the sixteenth to the eighteenth century (532).

[57]The limits of the first studies in the subject, especially of Professor Gorla's researches, have been pointed out by Miletti, *Stylus judicandi*, 3ff., 184ff.; Vallone, *Le 'Decisiones'*, 60; Savelli, 'Tribunali, "decisions" e giuristi', 398; and, more recently, by Birocchi, *Alla ricerca dell'ordine*, 85–93. According to Mario Ascheri, 'I Grandi Tribunali e la ricerca di Gino Gorla', in Sbriccoli and Bettoni, eds., *Grandi Tribunali e Rote*, xxi–xxxiii, Professor Gorla's point of view may be regarded as somehow 'ideological' as the eminent scholar would have devoted his attention to early-modern jurisprudence being critical towards legal formalism and the idea of law understood only as the – perfect, rational, coherent and complete – 'product' by the lawgiver.

[58]Savelli, 'Tribunali, "decisiones" e giuristi', 401ff. For a criticism of the 'great tribunals' category see also Birocchi, *Alla ricerca dell'ordine*, 85.

[59]Cf. Vallone, *Le 'Decisiones'*, 58ff., who attributed only a 'persuasive' authority to the Neapolitan *decisiones* because of their unofficial status. According to Romano, 'Tribunali, Giudici e Sentenze', 259–285, and 'La Regia Gran Corte', 145–154, the judicial precedents of the Royal Great Court of Sicily also enjoyed a limited authority.

[60]Miletti, *Tra equità e dottrina*, 53–81, has highlighted the ideologic character of the Neapolitan lawyers' insistence on the authority of the judicial precedents of the Sacro Regio Consiglio – to which corresponded, in practice, the frequently contradictory content of the *decisiones*, the private and unofficial status of the collections and the usual recourse to the practice of the *révirement*. Miletti reaffirmed the presence of a gap between lawyers' theories and real legal practice in *Stylus judicandi*, 100–192, where he described the former as abstract, self-praising and continuously contradicted by judicial practice. Massetto, 'Sentenza', 1203ff., and Savelli, 'Tribunali, "decisions" e giuristi', 411, similarly noted the contradictory character of the lawyers' theories in the matter of *vis legis* of the decisions of the supreme courts.

[61]See Miletti, *Tra equità e dottrina*, 125ff., and *Stylus judicandi*, 236–242; Savelli, 'Tribunali, "decisiones" e giuristi', 406ff.; Romano, 'La Regia Gran Corte', 158. They share the point of view expressed by Ascheri, *Tribunali, giuristi*, 93, who described jurisprudence as a 'particularly qualified element' of doctrinal law.

legal historians have generally alleged the binding force of the continental supreme courts' decisions, spread across Europe by the prestigious and widely circulating collections of *decisiones*.

In particular, they have emphasized the fundamental role played, in the *ius commune* system, by the wide interpretation powers of such superior tribunals, especially taking into consideration the absence of a general duty to express the reasons (the ratio decidendi or legal grounds) of their judgments. For instance, courts such as the Sacro Regio Consiglio of Naples, the *senati* of northern Italy and the powerful and very authoritative French *parlements* were not required to give reasons for their judgments. The duty was imposed upon the Neapolitan court only in 1774, but in fact it was only in force for fifteen years; the senato of Turin was ordered to express the reasons for its judgments not before 1723; while the *parlement*s, being 'sovereign' courts, asserted that they were not bound to give account for their judgments, formally because they boasted of administering justice *in nomine principis*, who kept the law *in scrinio pectoris* – hence the sacredness of their judgments – but, as a matter of fact, to preserve their power and autonomy in order to be able to escape, in this way, from the monarch's control.[62]

The great tribunals, thanks to the large discretionary and equitable powers delegated to them by the European monarchs, were able to administer justice without a strict observance of the statute law. Nevertheless, legal historians have suggested that their discretionary power of interpretation – the 'arbitrium' against which the Illuminists fought, assigning to the word the negative meaning of 'abuse' and considering it as the expression of the 'despotism' of the great tribunals and their judges in the early-modern period[63] – was the key to making the *ius commune* system work. Such a legal system, in fact – being complicated by a plurality of sources, norms and procedures – required to be simplified and clarified by the supreme royal courts' *interpretatio.*[64]

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[62]According to Michele Taruffo, 'L'obbligo di motivazione della sentenza civile tra diritto comune e Illuminismo', in *La formazione storica del diritto moderno in Europa*, vol.2, 598–633, the duty of some of the great tribunals to express the reasons of their judgments was an instrument of control by the monarchs of European states. Ascheri, *Tribunali, giuristi*, 55–83, 99–120, with particular reference to the rota of Florence and the other *rote* of Northern and Central Italy, highlighted the political meaning of such a duty, stressing its role in widening the public support for the state's institutions in a period of serious political crisis and, at the same time, in giving place to a 're-appropriation' of the *ius commune* by the monarch; while Piano Mortari, *Gli inizi del diritto moderno*, 427–430, regarded it as a further sign of the enforcement of political power in the hands of the European absolute monarchs. See further, on this theme, Massetto, 'Sentenza', 1224–45. The problem of giving reasons for their judgments (or not) by the great tribunals has been particularly investigated by French legal historians: see, among the most recent works, Arlette Lebigre, '"Pour les cas résultant du procès". Le Problème de la motivation des arrêts', 7 *Revue d'Histoire de la Justice* (1994), 23–37; Jean Hilaire, 'Ratio decidendi au Parlement de Paris d'après les registres d'Olim (1254–1318)', in Bryson and Dauchy, eds., *Ratio decidendi*, 25–54; Véronique Demars-Sion and Serge Dauchy, 'Argumentation et motivation dans les recueils d'arrêts des cours souveraines de France. L'exemple du Parlement de Flandre (fin XVIIe–début XVIIIe siècle)', in Albrecht Cordes, ed., *Juristische Argumentation – Argumente der Juristen*, Wetzlar, 2006.

[63]Illuminists set codification against doctrinal and jurisprudential opinions and the lawgiver – intended as the sole maker of law and legal certainty – against the judges, to be regarded only as the 'bouche de la loi'.

[64]On the great tribunals' *arbitrium* the works by Raffaele Ajello are fundamental. See in particular, among his many contributions, *Arcana Juris: diritto e politica nel Settecento italiano*, Naples, 1976, 315ff. See, for

In conclusion, such assertions introduce a 'judicial' element (in a broad sense) into the *ius commune* system. In fact, if we avoid looking for the presence of a strict observance of the rule of the binding force of precedent on the continent – a rule that, by the way, was not strictly followed in the common law jurisdiction either until at least the mid eighteenth century[65] – and, at the same time, for the presence of a strict hierarchy of sources of law, the fundamental role of the great tribunals' jurisprudence and the collections of their decisions in the elaboration and development of continental European law during the medieval and early-modern periods is absolutely plain. It is clear that the *ius commune* cannot be considered only as the result of the *interpretatio doctorum* – the doctrine of the learned laws developed in the universities, the *consilia* and the *communis opinio* – but must be also seen as a complex normative entity in which the superior courts' jurisprudence, widely circulating beyond the borders of the various European states, played a role which cannot be disregarded.[66]

a general survey of the doctrines on the judicial *arbitrium* in the early-modern period, Massimo Meccarelli, *Arbitrium: un'aspetto sistematico degli ordinamenti giuridici in età di diritto comune*, Milan, 1998.

[65]See W.S. Holdsworth, *A History of English Law*, 3rd ed., Oxford, 1923, vol.12, 102ff.; W.S. Holdsworth, *Some Lessons from our Legal History*, New York, 1928, 14ff.; W.S. Holdsworth, 'Case Law', 50 *Law Quarterly Review* (1934), 180; W.S. Holdsworth, 'Precedents in the Eighteenth Century', 51 *Law Quarterly Review* (1935), 440. The theorizing of the rule of *stare decisis* has been dated back to the nineteenth century by Carleton Kemp Allen, 'Case Law: an Unwarrantable Intervention', 51 *Law Quarterly Review* (1935), 333; *Law in the Making*, Oxford, 1927, 219; Dawson, *The Oracles*, 80ff.; Arthur L. Goodhart, 'Precedent in English and Continental Law', 47 *Law Quarterly Review* (1934), 40; 'Case Law: a Short Replication', 50 *Law Quarterly Review* (1934), 196; Harold Potter, *A Short Outline of English Legal History*, 4th ed., London 1945, 28–29.

[66]Ascheri, 'I Grandi Tribunali', xvii.