Articles

Marta Infantino*

Diffusing Law Softly: Insights into the European Travels of Italian Tort Law

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Abstract: The paper examines how, where, and why Italian tort law rules have circulated within Europe since the enactment of unified Italy's first Civil Code in 1865. By tracing the fragmented historical and geographical patterns of diffusion of Italian tort law in the last 150 years, the paper offers itself as a case-study for thinking about legal transplants within and across European cultures.

I Introduction

This paper aims to place itself in the larger debate on the nature and patterns of legal transplants,[1] focusing on the impact that Italian rules on tort law have had on other European jurisdictions since the enactment, in 1865, of the first Civil Code of unified Italy. As will be shown, despite tort law being largely the product of judicial activity, the main vehicles for the circulation of Italian tort law in Europe have been statutory reforms and legal scholarship, producing a variety of results among countries and across time.

To this purpose, the obvious point of departure is a short summary of the main features of the Italian tort law model (Section II). Sketching the technical and cultural traits of the Italian tort law system will help better understand what

1 Literature on this point is extensive. Suffice it to recall here the most recent works which have explored the role, size and scope of transplants of Italian law: see eg *M Bussani* (ed), Science, Case-Law, Legislation: Italian Law in Europe (1861–2013), Annuario di diritto comparato e di studi legislativi 2014; *S Lanni*/*P Sirena* (eds), Il modello giuridico – scientifico e legislativo – italiano fuori dell'Europa (2013); *M Graziadei*, Legal Culture and Legal Transplants, in: JA Sánchez Cordero (ed), Legal Culture and Legal Transplants I (2012) 501 ff; *A Guarneri*, La circulation des modèles au cours des deux derniers siècles, in: Rapports Nationaux au XIIIe Congrès International de Droit Comparé (1990) 1 ff.

***Corresponding author: Marta Infantino,** Post-doctoral fellow, University of Trieste, E-Mail: minfantino@units.it

rules circulated, how, where, and why (Section III). As we will see, the patterns of diffusion of Italian tort law have been uneven and fragmented. In some European regions its influence never arrived (Section IV). In other countries, Italian tort law dominated the drafting process of hard law rules (Section V). In other places still, Italian law of tort constituted a source of inspiration and a point of reference for the development of legal discourse (Sections VI–VII). The final section is meant to shed light on the historical, technical, and cultural reasons underlying such a variety (Section VIII).

II The blend of Italian tort law

Let us start by briefly recalling some milestones of the Italian tort law model from 1865 on.

As is well-known, at that time the desire of the newly-born Italian State for a unified civil law took shape in a code that was French in content and form.[2] Some sixty years later, in the 1920s, a joint French and Italian commission drafted a common Code of Obligations,[3] the part on tort law (Section V, '*Atti illeciti*' – 'Wrongful Acts') of which departed from the original French civil code in many respects. Although the key provision on fault liability was still similar to the formula of art 1382 of the French *Code civil* and art 1151 of the *Codice civile* of 1865 (art 74(1) of the draft),[4] the rule was complemented by a principle making liable anyone who, in the exercise of her rights, exceeded the limits imposed by good faith or by the scope of the right concerned (art 74(2) of the draft).[5] Rules

2 *Graziadei* (fn 1) 515 f; *JH Merryman*, The Italian Style II: Law (1966) 18 Stanford Law Review (Stan L Rev) 403, 413.

3 The text of the project, with the original illustrations and comments, has been re-edited by *Guido Alpa* and *Giovanni Chiodi* in Il progetto italo-francese delle obbligazioni (1927). Un modello di armonizzazione nell'epoca della ricodificazione (2007).

4 Art 74(1) of the draft: 'qualunque fatto colposo che cagioni danno ad altri obbliga colui che l'ha commesso a risarcire il danno'/'toute faute qui cause un dommage à autrui oblige celui qui l'a commise à le réparer' ('any malicious or negligent act that causes damage to another obliges the person who has committed the act to pay damages' [my transl]).

5 Art 74(2) of the draft: 'E' [...] tenuto al risarcimento colui che ha cagionato danno ad altri eccedendo, nell'esercizio del proprio diritto, i limiti posti dalla buona fede o dallo scopo per il quale il diritto gli fu riconosciuto'/'Doit [...] réparation celui qui a causé un dommage à autrui en excédant, dans l'exercice de son droit, les limites fixées par la bonne foi ou par le but en vue duquel ce droit lui a été conféré' ('any person who causes damage to another by exceeding, in the exercise of her rights, the limits imposed by good faith or the scope of the concerned right, is equally liable for compensation' [my transl]).

about vicarious and custodial liability were distinguished and systematised (arts 79–83 of the draft). Other departures from the French model included the introduction of specific provisions aimed at: (i) excluding liability for damage caused by persons under incapacity (arts 75 and 76)[6] and for harm inflicted in self-defence and under a state of necessity (art 77);[7] (ii) regulating cases in which the victim or third parties had contributed to cause the damage (arts 78 and 84); (iii) specifying that compensation was to cover material and immaterial damages (expressly allowing compensation for the latter in cases of infringement of the victim's body, honour, reputation, personal freedom, and privacy, and entitling family members to claim non-economic damages in cases of death of their loved ones: art 85).

For lack of both political and cultural will to pursue it, the project never made it beyond the draft stage. On the one hand, internationalisation was not in line with the fascist programme of autarky. On the other hand, Italian scholars were already under the spell of German legal doctrines, and therefore less enthusiastic about the idea of a new code infused with French legal culture.[8] But the joint Italian and French project was not without consequences.

The draft circulated outside French and Italian circles, and, as we will see below, ended up influencing black letter law and scholarship in Albania, Greece, and Poland, to mention but a few countries.[9] In the 1930s, when Italian scholars engaged in a major re-codification effort, they resumed the project, revised it, gave it a German touch, and transformed it into a draft for the Book IV (on obligations) of the new Civil Code.[10]

As a result, the articles dealing with tort law in the Civil Code of 1942 essentially followed the lines of the proposed common Code of Obligations, but

6 These rules were introduced following the example of § 829 Bürgerliches Gesetzbuch (German Civil Code, BGB) and of art 54 of the Swiss Code of Obligations: *G Chiodi*, 'Innovare senza distruggere': Il progetto italo-francese di codice delle obbligazioni e dei contratti, in: G Alpa/G Chiodi, Il progetto italo-francese delle obbligazioni (1927) 43, 71.

7 In cases of damage caused under a state of necessity, the drafters took inspiration from § 904 BGB, and provided that the victim was entitled to receive an indemnity from the person who caused the damage: *Chiodi* (fn 6) 71 f.

8 *Graziadei* (fn 1) 516–522; *Merryman* (1966) 18 Stan L Rev 403, 413.

9 Cf *M Rotondi*, Il progetto italo-francese delle obbligazioni, in: idem (ed), Le projet franco-italien du code des obligations (1980) 1, 6, and *R Nerson*, De l'influence exercée sur le droit français des obligations par le projet franco-italien de code des obligations et des contrats, approuvé à Paris en octobre 1927, in: Le Projet franco-italien (supra) 21, 25 (both referring to the influence that the draft had on the Polish Code of Obligations of 1933, and on the civil codes of Albania (1927) and Greece (1940)).

10 *Chiodi* (fn 6) 137.

for some minimal, yet essential, modifications. The title of the tort law section changed from '*Atti illeciti*' into '*Dei fatti illeciti*' ('On Wrongful Facts'). No provision on liability for 'abuse of rights' was introduced. The general clause on fault liability (art 2043 Codice civile) was maintained in line with the original French model, except for an important qualification. Inspired by the German basic rule on negligence (§ 823(1) of the BGB), where liability can be triggered only by the violation of an 'absolute' right,[11] Italian drafters thought it necessary to introduce some limitations on the scope of (fault) liability. This is why art 2043 of the Italian Civil Code now reads: '*qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*' ('any malicious or negligent act that causes a *wrongful injury* to another obliges the person who has committed the act to pay damages').[12]

As to the rules on strict liability and on liability for presumed fault, two provisions, arts 2050 and 2054 CC, were introduced in the Code, being new to both the French *Code civil* and the Italian Code of 1865: art 2050 CC imposes strict liability upon one who carries out a 'dangerous activity', while art 2054 CC establishes a presumption of liability on drivers of vehicles not guided by rails. The final provisions of the chapter on tort deal with the assessment of damages. They address the equitable evaluation of lost earnings (art 2056(2) CC), the liquidation of damages for permanent personal injuries (art 2057 CC), the availability of restitution in kind (art 2058 CC), and the compensation of non-patrimonial damages (following the patterns of the then in force § 847 BGB[13]) only in the cases provided by law (art 2059 CC).

11 That is, rights opposable to the world at large – 'erga omnes'. The most typical illustrations in the tort law domain are injuries to person and to property: *J Gordley*, The Jurists. A Critical History (2013) 246.

12 All translations by the author. For an account of the history of this provision, see *R Sacco*, Legal Formants: A Dynamic Approach to Comparative Law (II) (1991) 39 American Journal of Comparative Law (AJCL) 343, 358, and esp 366; and also *Graziadei* (fn 1) 522f; *M Graziadei*, Liability for Fault in Italian Law: The Development of Legal Doctrine from 1865 to the End of the Twentieth Century, in: N Jansen (ed), The Development and Making of Legal Doctrine (2010) 126, 127–134; *M Bussani/M Infantino/F Werro*, The Common Core Sound: Short Notes on Themes, Harmonies and Disharmonies in European Tort Law (2009) 20 King's Law Journal 239–255; *M Bussani/VV Palmer*, Pure Economic Loss in Europe (2003) 133–135.

13 According to § 847 BGB, which applied only to tort law actions based on the code's provisions, damages for pain and suffering were to be awarded only for violations of physical integrity, health, or freedom (including sexual freedom of women). The paragraph was abrogated in 2001, and substituted by § 253 BGB, placed within the Section devoted to the 'Inhalt der Schuldverhältnisse', which now allows awards for pain and suffering in all (contract and) tort cases involving harm to body, health, liberty or sexual self-determination (no matter the gender of the victim).

Apart from the case of art 2054 CC, whose later applications would have followed the path laid out by the expansion of insurance services, subsequent developments relating to all the other novelties introduced by the new Code proved that the above modifications did not mark a significant departure from the pre-1942 case law. Article 2050 CC was interpreted very cautiously by scholars and judges, who were somewhat reluctant to read it as a general clause of liability for any 'dangerous' – that is, ultrahazardous – activity.[14] Article 2056(2) CC essentially codified a pre-existing practice;[15] art 2057 CC was quietly forgotten,[16] and art 2058 CC enjoyed very timid application.[17]

Over time, the limits imposed by art 2059 CC to the compensation for immaterial damages have been slowly but surely removed by liberal-oriented, pro-plaintiff scholarship and case law.[18] As a result, at the end of the 20th century the rule on compensation for immaterial damages enshrined in art 2059 CC was brought back in line with the (unwritten) rule applied under the 1865 Civil Code, which left the judge free to determine if, when and to what extent these damages were to be awarded.[19] Following the same cultural path, another illuminating example comes from the developments in the scholarly and judicial reading of the general clause for fault liability, art 2043 CC.

In the aftermath of the adoption of the new code, the majority of Italian scholars and courts followed a path which led to strict scrutiny of the plaintiff's negligence cause of action. This path was not unknown to other European traditions (including, until the 1920s, the French),[20] but it certainly represents the hallmark of the German negligence liability rule, as codified under § 823 BGB. In light of the German example, Italian scholars and judges have long interpreted the new art 2043 CC as emphasising the requirement of 'unjustified injury' and equating it to the infringement of an absolute right of the victim, in particular, the rights to ownership and property interests, liberty, life, health, name, and reputation.[21] In the 1960s, however, increasing dissatisfaction with such an interpretation erupted into heated debates in both legal literature and in the courts. The clash between the German-inspired rights-based system of liability, and the old

14 *F Werro*/*VV Palmer* (eds), The Boundaries of Strict Liability in European Tort Law (2004) 176 f.
15 *F Carnelutti*, Valutazione equitativa del danno, Rivista di Diritto Processuale (Riv Dir Proc) 1942, 53, 54.
16 *M Franzoni*, Il danno risarcibile (2nd edn 2010) 310 f.
17 *Franzoni* (fn 16) 241 ff.
18 *Franzoni* (fn 16) 391 ff, 489 ff, 515 ff.
19 *Graziadei*, Liability for Fault (fn 12) 150–152; *M Bussani*, Introduzione, in: idem (ed), La responsabilità civile nella giurisprudenza costituzionale (2006) IV, X.
20 *Bussani*/*Palmer* (fn 12) 126 f.
21 *A De Cupis*, Dei fatti illeciti, in: Commentario al Codice civile Scialoja-Branca (2nd edn 1971) 12.

French-driven doctrine of *neminem laedere*, ended with the victory of the latter. The French paradigm was deemed to be more consonant with the reservoir of legal notions and techniques that Italian scholars and judges were accustomed to, and – above all – to better support the trend of expansion of tort liability which had been growing in Italy, as everywhere else in Europe, since the second half of the 20th century. Today, despite the letter of the Code and complaints of some authors still close to German legal culture,[22] prevailing scholarship and judges interpret art 2043 CC as an open-ended clause, setting forth a system where the freedom from being injured is a right to be protected no longer as an exception, but as a rule.

III Italian tort law's transfers

As the above survey makes clear, the Italian tort law model is best understood as an original, blended and fluid system, whose cultural inspirations were drawn from the French and German models, as well as from the longstanding *ius commune* tradition which, in its earlier turn, shaped all three legal experiences.[23]

The comparative features of the Italian tort law model helps one appreciate the limited success it enjoyed in the late 19th century when Italian black-letter law, legal scholarship and case-law were heavily reliant on French sources. In that period, the only recognition received by Italian tort law derived from its capacity to act as a herald of French law, a linguistic and cultural medium between the French legal culture and that of the countries wishing to import the French model. A case on point in this regard is the 1864 Romanian Civil Code, which absorbed French rules on tort law through the intermediary of arts 1151–1156 of the so-called Pisanelli project (1863) for the Italian Civil Code of 1865.[24]

22 See *C Castronovo*, La nuova responsabilità civile (3rd edn 2006).

23 Literature on this point is extensive. Suffice it to mention here: *P Grossi*, Medioevo e modernità: le diverse fondazioni di due civiltà giuridiche, in: Il contributo italiano alla storia del pensiero, VIII, Diritto (2012) 3 ff; *idem*, A History of European Law, transl L Hopper (2010) 25–31; *JH Merryman*, The Italian Style I: Doctrine (1965–1966) 18 Stan L Rev 39, 40; *A Padoa Schioppa*, A Sketch of Legal History, in: JS Lena/U Mattei (ed), Introduction to Italian Law (2002) 2, 10 f; *H Coing*, The Roman Law as Ius Commune on the Continent (1973) 89 Law Quarterly Review (LQR) 505 f; *HJ Berman*, The Religious Foundations of Western Law (1974–1975) 24 Catholic University Law Review 492–495.

24 The circumstance explains why the 1864 Romanian Civil Code has a structure which is slightly different from that of the French civil code, and also contains some provisions (eg art 1003 CC on joint tort liability, based on art 1156 of the Italian draft) which are absent in the French code; on this matter see *I Raduletu*, Romania, in: H Koziol/BC Steininger (eds), European Tort Law 2006

Things started to change in the 20th century when Italian interpretive formants freed themselves from their exclusive fascination for French doctrines, giving rise to creative confrontations with other paradigms, primarily, the German Pandectist school whose re-interpretation of the *Corpus Juris* appeared to their eyes to be imbued with the legitimacy and authority of Roman law sources. To be sure, even in the 20th century, Italian tort law exercised little influence, if any at all, upon European countries whose legal systems either had little in common with the Italian legal tradition (such as, for instance, England and the Scandinavian countries) or, for linguistic or other reasons, had a privileged and direct contact with the French or German model (think, for instance, of Belgium with regard to France, or Switzerland and Austria concerning Germany).[25]

However, in the 20th century the Italian tort law model, as a whole or through some of its distinctive features, was able to affect, more or less profoundly, tort law rules in many Southern and Eastern European countries. In some cases, as we anticipated above, this influence was exerted through the French-Italian draft, which inspired the former Albanian Civil Code of 1927,[26] the (no longer in force) Polish Code of Obligations of 1933, and the Greek Civil Code of 1940.[27] Still in other cases, it was the Italian Civil Code of 1942 which impacted on other countries' reforms. This was the case for the 1950 Bulgarian Law on Obligations and Contracts[28] and for the 1994 Albanian Civil Code.[29] With regard to other jurisdictions –

(2008) 516. Another illustration of the circulation of Italian tort law as a herald of French law can be seen in the influence that the Italian Civil Code of 1865 had on the 1892 Bulgarian Law on Obligations and Contracts. See Section V below.

25 The case of Switzerland is particularly telling. Even though Italian is one of the four official languages of Switzerland, interaction between Italian and Swiss tort law cultures seem to be virtually non-existent. Italian tort law did not figure as a model for the drafting of the tort law provisions in the Swiss Code of Obligations (*B Winiger*, Le Code suisse dans l'embarras entre BGB et code civil français, in: J-P Dunand/B Winiger (eds), Le code civil français dans le droit européen (2005) 153–170), nor, to the author's knowledge, did it ever serve as a point of reference for the Swiss Federal Tribunal's case law on tort law or Swiss tort law scholarship (*S Gerotto*, L'uso della comparazione nella giurisprudenza del Tribunale federale svizzero, in: GF Ferrari/A Gambaro (eds), Corti nazionali e comparazione giuridica (2006) 281 ff).

26 Codice civile del Regno d'Albania (Italian version edited by *E Tedeschini*) (1939) 188–190.

27 A considerable influence was also exerted on the draft Romanian Civil Code of 1940. See the authors quoted below, fn 52.

28 *C Takoff*, Bulgaria, in: H Koziol/BC Steininger (eds), European Tort Law 2005 (2006) 614 ('the Bulgarian legal regulation of tort follows the Roman legal tradition of art 1382 ff of the French Code civil and art 2043 ff of the Italian Codice civile of the year 1942'). The text of the Law can be found at <lawoffice-bg.net/userfiles/LAW%20OF%20OBLIGATIONS%20AND%20CONTRACTS.pdf>.

29 *GF Ajani*, Codification of Civil Law in Albania, in: G Ginsburgs et al (eds), The Revival of Private Law in Central and Eastern Europe (1996) 513, 524 (which, however, specifies that another

such as Spain and Portugal – codes and written laws were unaffected by the Italian cultural wind, but Italian scholarship and case law (the latter as referred to in Italian articles, books, and manuals) offered a pattern for the development of scholarly debates and (through the mediation of scholars) judicial practice.[30] It should be noted that in most, if not all, of the above instances, Italian tort law did not spread in isolation, but was part of the wider circulation of Italian rules and teachings on the law of obligations or private law in general.

The reasons underlying such transplants obviously differed considerably. Depending on the particular case, they included: political and economic dependence on Italy (for example, pre-World War II Albania), linguistic vicinity or familiarity with Italian language (think of Albania, Spain, and Portugal), or the relative up-to-dateness of the legal solutions that were transplanted (as in the case of those occurring immediately after the adoption of the French-Italian draft and the 1942 Civil Code). Yet, common to all the above cases was the prestige attached to the Italian paradigm derived from its capacity to embody, hybridise and reinterpret the achievements of the legal traditions which had inspired it (especially those of France and Germany).

It is a prestige that, over time, has been passed on through reliance on Italian legal texts and literature by local law-makers and scholars. Evidence of such reliance can be easily highlighted with reference to the quotation of Italian rules, studies, and decisions[31], the presence of Italian materials on tort law in foreign libraries,[32] and the quantity of translation of Italian articles and books into other languages.[33] Less easy to detect are other possible means of diffusion such as those reflected in the high number of Italian-trained professors, lawyers, and judges who exercise their profession outside Italy, or, the large number of foreign

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influential model on the tort law part of the new Albanian Civil Code was the Dutch Civil Code). More difficult to trace is the Italian influence on the 1978 Yugoslav Federal Act on Obligations, which was apparently modelled on a variety of sources other than the Italian: see *O Stankovic*, La responsabilité civile selon la nouvelle loi yougoslave sur les obligations (1979) 31 Revue Internationale de Droit Comparé (RIDC) 765–776. Italian law, however, played an enduring role in developing the tort law culture in ex-Yugoslavian countries: suffice it to mention that the 'Enciclopedia giuridica' published in 1896 by the Italian law professor *Pasquale del Giudice* was translated into Serbian by *T Mijuskovic* and *E Deroko*, and published in Belgrade in 1901 as 'Enciklopedija prava – opsti deo i privatno pravo' ('The Encyclopedia of Law – general part and private law'). The Enciklopedija, which at pages 97 f dealt with tort law, was used for teaching purposes at the Faculty of Law of the University of Belgrade.

30 Below at Section VI.

31 Some examples are given below, at fns 39 and 78–83.

32 See eg the illustrations above, at fn 29, and below, at fn 85.

33 See below fns 50, 84, and 88.

jurists who came into contact with the Italian legal culture when pursuing their graduate or post-graduate studies in Italian universities. Some individual examples can be highlighted[34] but it is harder to infer major trends from such examples.

IV All quiet on the North-Western front

Before investigating the role played by Italian tort law in Southern and Eastern Europe, let us first dwell in a bit more detail on the reasons why Italian tort law did not prove influential in North-Western European countries.

As anticipated above, many factors could have prevented the spread of knowledge about Italian (tort) law in Northern Europe, including linguistic barriers, the cultural distance between Italian law and the common law and the Scandinavian legal families, and the historical and geographical affinity that Northern countries have with specific continental European jurisdictions other than Italy.[35]

More surprising is that Italian tort law had apparently no impact on the corresponding tort law debates in France and Germany. Although over time these debates shaped the content and form of Italian legal thought on tort law, Italian

34 Think, for instance, of the work of Filippo Ranieri (University of Saarland) on the European law of obligations, where special attention is devoted to the Italian notion of 'danno biologico' – that is, to that specific methodology of assessment of physical injuries developed by Italian scholars and courts – (*F Ranieri*, Europäisches Obligationenrecht (3rd edn 2009) 1600 ff), or of the studies by Aurelia Colombi Ciacchi (University of Groningen) on criminal liability (*A Colombi Ciacchi*, Fahrlässigkeit und Tatbestandsbestimmtheit: Deutschland und Italien im Vergleich (2005)), or of the research by Gregor Christandl (University of Innsbruck) on compensation for non-patrimonial damage in Italy (see eg *G Christandl*, Das italienische Nichtvermögensschadensrecht nach 2008 – eine Lektion für Europa? Urteil der Corte di Cassazione vom 11. November 2008, Zeitschrift für Europäisches Privatrecht (ZEuP) 2011, 392–405; *idem*, Zum Anspruch österreichischer Staatsbürger auf Ersatz immaterieller Schäden in Italien, Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht (ZfRV) 2005, 190).

35 There are very few exceptions, such as the scientific collaborations with some Northern European scholars by Guido Alpa (see eg *B Markesinis*/*M Coester*/*G Alpa*/*A Ullstein*, Compensation for Personal Injury in English, German and Italian Law. A Comparative Outline (2005), and the many entries on tort law in *M Andenas* (ed), Liber Amicorum Guido Alpa: Rethinking Private Law Beyond National Systems (2007)), as well as the work of Giuditta Cordero-Moss in Norway, which is mostly focused on commercial contracts and international arbitration, but occasionally also deals with tort law issues (see eg *G Cordero-Moss*, Erstatningsrett, kontraktsrett og internasjonalt preseptoriske regler – illustrert ved skadelidtes direkte krav mot forsikringsselskapet, in: Bonus Pater Familias: Festskrift til Peter Lødrup 70 år (2002) 1–15).

legal developments seem not to have particularly influenced either French or German legal systems.

As to France, the French-Italian draft of 1927 was seldom referred to by French tort law scholars in the 1930s,[36] and was subsequently almost forgotten.[37] Whilst at the beginning of the 20th century Italian articles and books on the law of obligations were sometimes quoted by French tort law authors,[38] citations of Italian works are now virtually absent from French tort law manuals.[39] Even current projects reforming the French law of obligations and/or of torts either do not consider or explicitly reject the Italian tort law model. For instance, although both the Catala and Terré projects[40] (aiming to reform the Civil Code rules on the law of obligations) contain a few proposals which would take French tort law closer to that of Italy, if adopted, they are likely to trigger the same debates that Italian scholars and judges have long had over the actual meaning of art 2043 *Codice civile*.[41] In particular, in both the projects the element of *illicéité* (wrongfulness) is added to the formula of art 1382 Civil Code. More specifically, art 1343 of the Catala project provides that 'the only compensable damage is that stemming

36 See eg *H Mazeaud/L Mazeaud*, Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle (1931) 980; *L Ripert*, La réparation du préjudice dans la responsabilité délictuelle (1933) 14, fn 1.

37 *Nerson* (fn 9) 26 f; but see also *G Alpa*, Dal Code civil al Codice civile del 1942 e ai progetti di ricodificazione, in: Alpa/Chiodi (fn 3) 1, 30 (claiming that the draft influenced French legal cultures of the 1950s).

38 For instance, *A Légal*, De la négligence et de l'imprudence comme source de responsabilité civile délictuelle (1922) 225, quotes *GP Chironi*, La colpa nel diritto civile odierno. Colpa extracontrattuale I (2nd edn 1903); *CF Gabba*, Nuove questioni di diritto civile (2nd edn 1905–1906); *G Giorgi*, Teoria delle obbligazioni (7th edn 1909); *V Polacco*, Le obbligazioni nel diritto civile italiano (2nd edn 1915); *P Cogliolo*, La legislazione di guerra nel diritto civile e commerciale (1917). However, the comparative focus of the book is mostly on German and English law: see, respectively, *Légal* (supra) 18, 18–44, and 10–11, 20, 31, 45–48.

39 The best example comes from the leading tort law manuals of Geneviève Viney and Patrice Jourdain. In *G Viney/P Jourdain*, Les effets de la responsabilité, in: Traité de droit civil (3rd edn 2011), German and English tort laws are seldom cited (see eg 7 f, 43 f, 69, 129), but no reference is made to Italian tort law at all. In *G Viney/P Jourdain*, Les conditions de la responsabilité, in: Traité de droit civil (3rd edn 2006), the most frequently cited foreign laws are those of Belgium, Switzerland, Germany, England and United States; only a few references are devoted to Italian law (see eg the quotation of Miccio at 190 and 197 and that of Bussani at 223).

40 Both projects are named after the French scholars who supervised the teams producing the drafts: Pierre Catala and François Terré respectively. For the text of the projects, see respectively the website <ladocumentationfrancaise.fr/rapports-publics/054000622/index.shtml>, and *F Terré* (ed), Pour une réforme du droit de la responsabilité civile (2011).

41 On these debates, see above at Section II.

from the infringement of a *rightful* interest',[42] while art 1 of the Chapter on Torts of the Terré project opens the draft by stating that 'any damage *wrongfully* caused to another is a tort'.[43] Yet the report accompanying the Catala project does not mention Italian tort law as an inspiring source for proposed art 1343, which is indeed presented as an effort to codify already existing domestic practices.[44] Domestic origins are also traced for art 1 of the Terré project, with the only difference that the official commentary to that article recognises that the reform would bring French tort law in line with the German, Swiss, Greek, Italian and Dutch general clauses on tort liability.[45]

The minimal relevance enjoyed by Italian tort law in France can only be partially explained with reference to the traditional limited interest of French civil lawyers in comparative law,[46] given that even the few French tort law books that attempt to engage in comparative inquiry tend to look to legal systems other than the Italian (mainly Germany and England).[47] It would appear that Italian tort law is not deemed interesting enough to deserve an extension of the (already) scant attention that French tort lawyers pay to jurisdictions other than their own.

42 'Est réparable tout préjudice certain consistant dans la lésion d'un intérêt licite.'

43 'Constitue un délit civil tout dommage illicitement causé à autrui.'

44 *G Viney*, Rapport sur l'avant-projet de réforme du droit des obligations (2005), available at <ladocumentationfrancaise.fr/rapports-publics/054000622/index.shtml>, 173. The same explanation applies to the other provisions in the Catala project which closely resemble Italian tort law rules, such as art 1362 (containing a general clause of strict liability for abnormally dangerous activities; cf art 2050 of the Italian CC), art 1368 (conferring onto the judge the power to award damages in the form of reparation in kind rather than of a money payment; cf art 2058 of the Italian CC), and art 1373 of the Catala project (allowing the judge to reduce the damages award if the victim fails to take the precautionary measures which would have prevented or minimised her loss; cf art 1227(2) of the Italian CC). According to the report, these provisions too should be seen either as a codification of already established interpretive practices, or as the result of the influence of models other than the Italian: see *Viney* (supra) 179, 181, 182; see also *G Viney*, Le droit de la responsabilité dans l'avant-projet Catala, in: B Winiger (ed), La responsabilité civile européenne de demain. Projets de révision nationaux et principes européens (2008) 141–158.

45 *C Bloch*, Définition de la faute, in: Terré (fn 40) 101, 106. In other cases, the Italian model has been explicitly rejected: for instance, the Italian notion of 'danno biologico' has not been adopted by the drafters because of the alleged problems that the introduction of such a notion into the French legal system would create (*P Remy*/*JS Borghetti*, Présentation du projet de réforme de la responsabilité delictuelle, in: Terré (fn 40) 61, 84, fn 63).

46 *JS Borghetti*, The Culture of Tort Law in France (2012) 3 Journal of European Tort Law (JETL) 158, 177.

47 See eg *Viney*/*Jourdain*, Les effets de la responsabilité (fn 39) 7f, 43f, 69, 129 (German and English tort law); *Ripert* (fn 36) 14, 92ff (German tort law).

To a certain extent, the German case is similar. Italian tort law developments are seldom cited by German tort law authors.[48] The Italian tort law model was taken into consideration neither at the end of the 19th century, by the drafters of the German Civil Code, nor at the beginning of the 21st century, on the occasion of the 2001 reform of the law of obligations, which also touched upon tort law to some marginal extent.[49] Yet, it should be noted that German scholars have recently displayed an interest in Italian theories and rules on tort law which is not comparable to (that missing in) France. It is an interest fueled by scientific collaborations between many German and Italian scholars, the training of young Italian jurists in Germany, and the (comparatively minor) influx of German students to Italian university and research facilities. The most evident by-products of such interconnections are the articles by Italian tort law scholars translated or directly published in German law reviews and books,[50] the correlative case of German scholars dealing with Italian tort law,[51] and the interest in certain Italian solutions by German-led efforts at codifying European private law (see below, Section VII).

48 *H Kötz/G Wagner*, Deliktsrecht (11th edn 2010) (where a few Austrian, French, English and United States sources are cited, but no Italian ones); *K Larenz*, Lehrbuch des Schuldrechts I (4th edn 1987) 420–466 (citing only Austrian and Swiss sources, plus Prosser in translation: ibid, 435). Yet see the authors and the works mentioned below, fn 51.

49 *J Fedtke*, The Reform of German Tort Law (2003) 4 European Review of Private Law (ERPL) 485 f.

50 See eg *FD Busnelli*, Der Personenschaden – Eine rechtsvergleichende Untersuchung zur dogmatischen Einordnung (1987) Versicherungsrecht (VR) 952–959; *idem*, Der Gesundheitsschaden: eine italienische Erfahrung – ein Modell für Europa? in: Jahrbuch für italienisches Recht 2001, 17–36.

51 *MR Will*, Rechtsvergleichende Untersuchungen zur Weiterentwicklung der deutschen Gefährdungshaftung durch richterliche Analogie oder durch gesetzliche Generalklausel (1980) 150–192; *G Hohloch*, Gli ultimi sviluppi in materia di risarcimento del danno extracontrattuale nel diritto italiano e tedesco, Rivista di diritto civile (Riv dir civ) 1986, I, 513 ff; *G Bender*, Personenschaden und Schadensbegriff. Rechtsvergleichende Untersuchung zur neueren Entwicklung des Personenschadens in Italien (1993); *M Buse*, Die aktuelle italienische Rechtsprechung zum immateriellen Personenschaden – Eine Orientierungshilfe und ein Kurzvergleich zur Rechtslage in Deutschland, Versicherungsrecht Beilage Ausland 2004, 61–64; *H Nießen*, Die Wirkung der Grundrechte im deutschen und italienischen Privatrecht (2005); *P Kindler*, Einführung in das italienische Recht (3rd edn 2015) 288–298; *G Brüggemeier*, Gemeinsamer Referenzrahmen (Entwurf), Buch VI, Außervertragliche Haftung für die Schädigung anderer – eine kritische Stellungnahme, in: H-J Ahrens et al (eds), Festschrift für Erwin Deutsch zum 80. Geburtstag (2009) 749, 753.

V The prestige of the codes

As noted above, the fate of Italian tort law in South-Eastern Europe was very different. In some jurisdictions, it was the French-Italian 1927 draft Code of Obligations which provided the blueprint for local codifications; elsewhere the same role was performed by the 1942 Italian *Codice civile*. In other jurisdictions, Italian tort law scholarship offered local academics the keys for interpreting the rules embodied in their own codes and statutes. In this section we examine the expansion of the 1927 draft Code and the 1942 Civil Code in South-Eastern Europe, while in the following section we explore the scholarly influence of Italian works in the Iberian peninsula.

Let us start with the circulation of the 1927 draft Code of Obligations. As the then most recent expression of French and Italian legal culture, the draft Code attracted the attention of many law-makers who engaged in codification efforts between the late 1920s and the 1940s. The list of legal systems whose codes were shaped after the example of the 1927 draft includes: (i) Albania (Civil Code, 1927), (ii) Poland (Code of Obligations, 1933), and (iii) Greece (Civil Code, 1940).[52] Since the legal history of these countries differs from one another, we will deal with each of them separately.

(i) Drafters of the Albanian Civil Code of 1927 essentially transplanted *en bloc* the draft Code of Obligations into arts 1149–1160 of their Code. The Albanian Civil Code remained in force throughout the Italian occupation commencing in 1939, the Second World War, and the socialist republic, until it was replaced in 1981 by a socialist-inspired Civil Code.[53] Through much of this period (including the socialist years), the tort law part of the code was, however, rarely applied.

52 The 1927 draft also inspired a 1933 Romanian project of Civil Code which, however, was never adopted. As stated above, at fn 27, Romania's first Civil Code was adopted in 1864 on the basis of the so-called Pisanelli project (1863) for the Italian Civil Code (*Raduletu* (fn 24) 516, 532). This Civil Code formally remained in force throughout the entire communist period and was then substituted, in 2009, by a new Civil Code largely inspired by the Civil Code of Québec of 1991 (*C Alunaru/L Bojin*, The Tort Law Provisions of the New Romanian Civil Code (2011) 2 JETL 103; the tort law provisions of the new Civil Code may be read in (2011) 2 JETL 107–120). Not surprisingly, the 2009 Civil Code was prepared with the aid of the Canadian Agency for International Development, which provided significant input on the Québec Code through a group of experts (professors, magistrates and lawyers) by means of regular consultation, working commissions and relevant documents: *Alunaru/Bojin* (supra) 103; *idem*, Romania, in: H Koziol/BC Steininger (eds), European Tort Law 2009 (2010) 525 f.

53 *Ajani* (fn 29) 518 f.

When, at the beginning of the 1990s, the post-communist Albanian government developed the idea that Albania needed a new civil code, Gianmaria Ajani, an Italian comparative law scholar internationally renowned for his studies on post-socialist legal systems, was charged by the International Monetary Fund with the task of leading the drafting commission. The principal models for the new civil code, whose draft was approved by the Parliament in 1994,[54] were the 1928 Albanian legislation on inheritance and the Italian Civil Code of 1942, especially as far as the law of obligations and contract law were concerned.[55] Yet, it is worth mentioning that the Italian model was not followed for the law of torts, since, in Ajani's words, 'as far as torts are concerned, ... Italian patterns are too old'.[56] The Ajani Commission therefore drew inspiration from the 1992 Dutch Civil Code,[57] on the assumption that it 'closely reflect[ed] evolving EC legislation in specialized areas of law', and 'seem[ed] to be the most up-to-date code in Europe in this area'.[58]

(ii) The Polish Code of Obligations of 1933 was a mixture of the French Civil Code, the German BGB, the Swiss Code of Obligations of 1911 and the French-Italian draft code of 1927.[59] The latter's influence was particularly evident in the tort law chapter, where 18 out of 34 articles, including the two opening clauses on liability for fault and for abuse of rights (arts 134 and 135 of the Polish Code respectively), were drawn from the draft Code of Obligations.[60] Yet, as in the case of Albania, subsequent legislative developments saw tort law rules take a different course.

Drafters of the 1964 Polish Civil Code relied on the domestic Code of Obligations of 1933,[61] but many tort law provisions were changed through hybridisation with socialist doctrines[62] and teachings from German schools of

54 An English translation of the Code is available here: <unpan1.un.org/intradoc/groups/public/documents/untc/unpan014893.pdf>.

55 *Ajani* (fn 29) 514, fn 7.

56 *Ajani* (fn 29) 524 ('the problem with the Italian model is that the Code does not reflect court decisions that, since the 1970s, have broadened the basis of liability').

57 Cf arts 6:95–6:110 and 6:132–6:196 of the Dutch Civil Code with arts 608–647 of the Albanian Civil Code.

58 *Ajani* (fn 29) 524.

59 *H Capitant*, Préface, in: S Sieczkowski/J Wasilkowski (eds), Code des obligations de la République de Pologne (1935) v, viii.

60 See arts 134–167 of the Code, in *Sieczkowski/Wasilkowski* (fn 59) 34 f.

61 *A Szpunar*, The Law of Tort in the Polish Civil Code (1967) 16 International & Comparative Law Quarterly (ICLQ) 86.

62 See eg arts 417–421 of the Civil Code on State's liability.

thought.[63] Nowadays, the 1964 Civil Code is still in force, but a project for its reform was drafted in the 2000s by a Civil Law Codification Commission, comprising Polish scholars and judges, assisted by Dutch experts and financed by the Dutch government. It was thus no wonder that many proposals to revise the tort law provisions in the Civil Code suggested taking into consideration the corresponding Dutch norms.[64] Thus far, however, the debate over the possibility and the contents of the reform remains open.

(iii) In Greece the 1927 French-Italian draft, along with other foreign provisions, provided the basis for eight out of 23 articles on torts in the 1940 Greek Civil Code.[65] The final result was a tort law approach that was autonomously developed, but closely resembled that of the Italian Civil Code of 1942. For instance, both systems are a mixture of French and German influences, and both rely on a general clause on fault liability in which a French-like, 'open blanket' norm on liability for fault is enriched by an additional, objective element for the finding of liability, that is, that the defendant's behaviour be 'against the law' in Greece, and cause a 'wrongful injury' in Italy.[66] This similarity of legal basis helps to explain why, despite relatively limited cultural interactions,[67] the development of the two legal systems have largely taken similar directions.[68]

Outside the realm of influence of the 1927 draft Code of Obligations, but still worth mentioning, is the Bulgarian approach. The 1892 Bulgarian Law on Obligations and Contracts was inspired by the French Civil Code, the rules of which were imitated through the medium of the 1865 Italian Civil

63 For instance, arts 361 and 363 of the Civil Code provided detailed rules about causation and codified the theory of 'adequate causation'; art 426 of the Civil Code, similarly to § 828 BGB, exempted from liability minors below a certain age; according to art 445 of the Civil Code, compensation for non-material damage could be awarded only in cases of injury to body or health, deprivation of liberty, and seduction of a woman.

64 Civil Law Codification Commission, Acting under the Ministry of Justice, Green Paper on An Optimal Vision of the Civil Code of the Republic of Poland, Ministry of Justice, 2006, available at <ejcl.org/112/greenbookfinal-2.pdf>.

65 *K Triantafyllopoulos*, Draft of the Civil Code, II, Law of Obligations (1935, in Greek), notes on arts 529, 532–535, 537, 538 and 554 of the draft.

66 *C von Bar/U Drobnig* (eds), The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study (2004) 27.

67 See eg *E Zervogianni*, On the recovery of non-pecuniary loss in Italy and in Greece. A comment of the joint decision 26972/2008 of the Civil Chambers of the Italian Supreme Court from the perspective of a Greek lawyer, in: Essays in honor of Prof Penelope Agallopoulou I (2011, in Greek) 1595 f. Worth mentioning is the Greek-Italian Comparative Law Meeting on Transnational Tort Law organized by Mauro Bussani in Trieste in 2004.

68 *Zervogianni* (fn 67) 1602 ff.

Code.[69] The 1892 law was subsequently repealed during the socialist period and substituted by the 1950 Law on Obligations and Contracts, which retained its distinctively French flavour though its rules were substantially derived from the German BGB.[70] In the field of tort law, however, it was the Italian Civil Code of 1942 which provided the main source of inspiration for arts 45–54 of the 1950 Law on Obligations and Contracts. The structure and contents of these articles closely resemble those of arts 2043–2059 Civil Code.[71] Subsequent interpretive developments brought the edifice of Bulgarian tort law closer to German legal culture,[72] but its normative architecture is still conceived upon the Italian model.

VI Iberian dialogues

In the Iberian peninsula, the Italian model had little or no impact on the drafting of the general legislative framework. On the one hand, the Spanish Civil Code of 1899 is very much akin to the French *Code Napoléon* and its tort law chapter (arts 1902–1910) closely follows the French model.[73] On the other hand, while the first Portuguese Civil Code of 1867 was influenced by the French *Code civil*,[74] the second Civil Code of 1966 and its provisions on tort law (arts 483–510 and 562–572) mostly followed the German pattern,[75] with two notable exceptions: arts 493 and 496 of the Portuguese Civil Code of 1966 have Italian roots. Article 493(1) (liability for guardianship of immovable or movable things or animals) and art 493(2) (liability for dangerous activities) of the Portuguese Civil Code recall articles 2051 and 2050 of the Italian Civil Code,[76]

69 *C Takoff*, Contract Law in Bulgaria, in: T Ansay/J Basedow (eds), Structures of Civil and Procedural Law in South Eastern European Countries (2008) 35.

70 *Takoff* (fn 69) 35. The text of the law is available at <promise-project.net/wp/wp/project-library/doc/03-Bulgarian-Legislation/Obligations_and_Contracts_Act.doc>.

71 *Takoff* (fn 28) 614.

72 *Takoff* (fn 28) 624.

73 *Bussani*/*Palmer* (fn 12) 135 f.

74 Other (minor) sources of inspiration were the Allgemeines Landrecht (Prussia, 1794), the ABGB (Austria, 1811) and the Sardinian Civil Code (Italy, 1837): *AG Dias Pereira*, Portuguese Tort Law: A Comparison with the Principles of European Tort Law, in: H Koziol/BC Steininger (eds), European Tort Law 2004 (2005) 623.

75 The Code also paid attention to Austrian, Swiss and Italian solutions, although this attention is not clearly evident in the context of tort law: *Dias Pereira* (fn 74) 626.

76 *Dias Pereira* (fn 74) 634, fn 44.

while art 496(1) of the Portuguese Civil Code on non-patrimonial damage adopts the same approach pursued by art 2059 of the Italian Civil Code in order to limit compensation for these losses to the cases expressly provided by law.[77]

Besides statutory similarities, what it is interesting to note from our perspective is that both Spanish and Portuguese scholars have always paid attention to foreign sources, including (not only French and German, but also) Italian literature and case law.

In Spain, where the main focus of scholarsly endeavours oscillates between French and German approaches, it has made sense to look to Italian law for compromise solutions. Spanish tort law books and manuals routinely cite (French, German, and) Italian colleagues,[78] with the Italians often taking the leading role. It is not uncommon to find (not always updated) references to the 'fundamental work' of Chironi,[79] the 'great work' of De Giorgi,[80] the 'rigorous and

77 According to art 496(1) of the Portuguese Civil Code of 1966, 'in assessing damages, consideration shall be given to all non-pecuniary harms which, in light of their gravity, warrant protection by law'.

78 Cf, amongst others, *F Puig Pena*, Tratado de derecho civil español, Obligaciones y contratos II (1947) 567–573 (quoting Chironi, Coviello, Cozzi, Giorgi, Venezian); *I De Casso/Y Romero/F Cervera/Jiménez-Alfaro*, Diccionario de derecho privado II (1954) 3420, 3423, 3441 (quoting Arangio Ruiz, Barassi, Brugi, Chironi, Dusi, Giorgi, Messineo, Ruggiero); *Á Carrasco Perera*, Art 1101, in: M Albaladejo Garcia (ed), Comentarios al Codigo Civil y Compilaciones Forales (XV(1) 1983) 375 f (quoting Barcellona, Bianca, Cian, Cottino, De Cupis, Forchielli, Giorgi, Giorgianni, Gorla, Leone, Maiorca, Mengoni, Scognamiglio); *J Santos Briz*, Art 1902, in: M Albaladejo Garcia (ed), Comentarios al Codigo Civil y Compilaciones Forales (XXIV 1984) 99 f (quoting Alpa and Bessone, Bonasi Benucci, De Cupis, Geri, Peretti Griva, Pugliatti, Trimarchi, Visintini); *JM Busto Lago*, La antijuridicidad del daño resarcible en la responsabilidad civil extracontractual (1998) 33 (quoting Busnelli, Carbone, De Cupis, Venezian, Tucci); *L Díez-Picazo*, Culpa y riesgo en la responsabilidad civil extracontractual (2000) 4 Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid (AFDUAM) 153, 156 f (quoting Salvi and Nicolò); *L Díez Picazo/A Gullón*, Sistema de derecho civil II (9th edn 2001) 548 and 555 (quoting Briguglio, Cariota Ferrara, Carnelutti, Coviello, De Cupis, Montel); *LF Reglero Campos*, Los sistemas de responsabilidad civil, in: idem (ed), Tratado de responsabilidad civil (3rd edn 2006) 211–248 (quoting Alpa, Bessone, Cannata, Cogliolo, Comporti, Ferri, Forchielli, Gentile, Pacchioni, Scognamiglio, Talamanca, Trimarchi, Venezian); *idem*, El nexo causal. Las causas de exoneración de responsabilidad: culpa de la victima y fuerza major. La concurrencia de culpas, in: Tratado de responsabilidad civil (supra) 339–459 (quoting Barassi, Bonvicini, Branca, Brasiello, Candian, Carbone, Comporti, Cottino, De Cupis, De Medio, Giorgi, Luzzatto, Pacchioni, Peretti Griva, Pogliani, Realmonte, Santoro, Trimarchi, Valsecchi, Venditti).

79 *Puig Pena* (fn 78) 567, fn 1.

80 *Puig Pena* (fn 78) 568, fn 1.

fresh Italian doctrine and case-law' on non-economic damage,[81] the 'Italian master' Busnelli,[82] and the 'very complete and already classical work of De Cupis, which was the unavoidable point of departure for the present study'.[83] Spanish attraction to Italian scholarly works is further proved (and to some extent made possible) by the great number of Italian works translated into Spanish by Spanish or Latin American publishers[84] – not to mention that one can easily find Italian legal books in Spanish libraries and bookshops in their original language.[85]

Less conspicuous, but not less evident, are the traces of Italian scholarship in the Portuguese literature on tort law. Although some authors present the Portuguese system of tort liability with no reference to Italian scholarly works and judicial decisions,[86] it is not rare that Portuguese tort lawyers discuss local

81 *D Díaz-Ambrona Bardají*, La respondabilidad por acto ilícito en el área del código civil español, con especial referencia a la jurisprudencia de la sala primera del Tribunal Supremo, in: L Vacca (ed), La responsabilità civile da atto illecito nella prospettiva storico-comparatistica. I Congresso Internazionale ARISTEC, Madrid, 7–10 ottobre 1993 (1995) 204, 206.

82 *Busto Lago* (fn 78) 33.

83 *Busto Lago* (fn 78) 33.

84 Illustrations are countless. As to Spanish publishers, see eg *A Montel*, Problemas de la responsabilidad y el daño (1955); *E Bonasi Benucci*, La responsabilidad civil (1958); *M Briguglio*, El estado de necesidad en el derecho civil (1971); *A De Cupis*, El daño (1975); *GP Chironi*, La culpa en el derecho civil moderno I (1978); *G Tucci*, Responsabilidad civil y daños injustos, in: N Lipari (ed), Derecho privado. Un esayo para la enseñanza (1980) 423 f; *P Rescigno*, Responsabilidad civil (1992). As to Latin America see eg *FD Busnelli*, Problemas de la clasificación sistemática del daño a la persona, in: M Iturraspe/L Díez Picazo (eds), Daños (1991) 35 f; see the contributions by *M Franzoni, PG Monateri, S Patti, A Procida Mirabelli di Lauro* and *A Zaccaria* – all published in: CA Calderón Puertas/CA Gonzales (eds), La responsabilidad civil (2010); *M Infantino*, El derecho comparado de la causalidad aquiliana, in: CE Moreno More (ed), Estudios sobre la responsabilidad civil (forthcoming 2015); *eadem*, ¿Hacia un derecho europeo de la responsabilidad civil? Los Proyectos, los métodos, las perspectivas, Revista de derecho privado (Universidad Externado, Colombia) 2014, 407–447.

85 The Spanish legal publisher Marcial Pons, for instance, also sells on-line tort law books in Italian.

86 See eg *LM Teles de Menezes Leitão*, Direito das Obrigações I (5th edn 2006) 281–400 (mostly relying on Portuguese sources; many German works and a few French books are also cited but, as far as Italian scholarship is concerned, only Trimarchi is mentioned: ibid 294); *MA Carneiro da Frada*, Una "terceira via" no direito da responsabilidade civil? O problema da imputação dos danos causados a terceiros por auditores de sociedades (1997) (citing a few German works, but no Italian ones); *MJ de Almeida Costa*, Noções de Direito Civil (2nd edn 1985) 92 f (only German sources are cited).

solutions through the eyes of Italian (as well as other foreign) legal scholars[87] – some of whose works have been translated into Portuguese.[88]

VII Pan-European perspectives

The picture sketched above would not be complete without mentioning the role that Italian tort law played in the recent efforts to draft a European common law of torts.[89] As is well-known, these efforts – which have thus far remained at the

87 See eg, *MJ de Almeida Costa*, Direito das Obrigações (9th edn 2005) 474–604 (eg Alpa, Angeloni, A Baldassari and S Baldassari, Bargagna, Bessone, Bianca, Bona, Bonilini, Breccia, Busnelli, Bussani, Carbone, Carnevali, Castronovo, Cazzetta, Cendon, Cricenti, D'Amico, de Cupis, De Matteis, de Strobel, Devoto, Di Gregorio, F Ferrari and G Ferrari, Forchielli, Franzoni, Gallo, Garri, Geri, Ghidini, Giannini (G), Giardina, Giuliani, Mattei, Mele, Miccio, Monateri, Oliva, Orlandi, Patti, Perulli, Petti, Piazza, Picardi, Pogliani, Giuseppe Positano and Gabriele Positano, Rodotà, Rossetti, Rubini, Sacco, Salvi, Santoro, Schipani, Scognamiglio, Stanzione, Trimarchi, Tucci, Visintini, Zambrano, Zilioli, Ziviz); *F de Quadros*, Introdução, in: idem (ed), Responsabilidade Civil Extracontratual da Administração Pública (2004) 7–37 (quoting Alessi, Bronzetti, Cannada-Bartoli, Caranta, Forti, Fragola, Merusi, Postiglione, Santi Romano, Santilli, Satta, Torchia, Venturini, Vignocchi); *J De Matos Antunes Varela*, Das obrigaçoes em geral (10th edn 2000, reprint 2004) 525–717 (quoting Bernardini, Branca, Brasiello, Carresi, Cian, Comporti, Cottino, Cozzi, De Cupis, Devoto, Ferrara, Forchielli, Galgano, Galoppini, Geri, Giorgianni, Giusana, Greco, Inzitari, Maiorca, Massetto, Minervini, Natoli, Petrocelli, Quagliarello, Realmonte, Rescigno, Romano (Salv), Rovelli, Rubino, Salvi, Scaduto, Schlesinger, Scognamiglio, Tedeschi, Torregrossa, Trimarchi, Tucci, Valsechi, Vinicio Beri, Visintini); *F Albuquerque Matos*, Comentário à obra de Massimo Franzoni, La responsabilità oggettiva (1996) LXXII Boletim da Faculdade de Direito da Universidade de Coimbra 479 f; *A Ferrer Correia*, Da responsabilidade do terceiro que coopera com o devedor na violação de um pacto de preferência, in: idem, Estudos de Direito Civil Comercial e Criminal (2nd edn 1985) 33, 34 f (quoting Barbero, Bellini, Busnelli, Carnelutti, Fedele, Tedeschi); *JF Sinde Monteiro*, Estudos sobre a responsabilidade civil (1983) (Alpa, Bessone, Busnelli, Capotosti, Cappeletti, de Cupis, Durante, Fanelli, Natoli, Rodotà, Serio, Stolfi, Trabucchi). As in the case of Spain, it is even more common to find Brasilian scholars quoting Italian authors: see eg *AI Amarante*, Responsabilidade civil por dano à honra (2001) 151 f (citing, among others, Bessone, Carnelutti, De Cupis, Ferrara, Giampiccolo, Miceli, Ondei, Ruggiero).

88 See eg *A De Cupis*, Os direitos de personalidade (1961). Other Italian works on tort law were published, in Italian or in Portuguese translation, in Brazil: see *M Bussani*, As peculiaridades da noção de culpa: um estudo de direito comparado (2000), and *M Bussani*, Causalità e dolo nel diritto comparato della responsabilità, Revista Trimestral de Direito Civil 2007, 127 ff.

89 Italian tort law also played a prominent role in the European-wide projects aiming to deepen the dialogue between European cultures, such as the 'Ius Commune Casebooks' project (ed by *W van Gerven*) and the 'Common Core of European Private Law' project (ed by *M Bussani* and *U Mattei*): see the references to Italian law in the *W van Gerven*/*J Lever*/*P Larouche*'s Casebook on Tort Law (2000) and in the Common Core volumes on tort law published to date and forthcoming

level of drafts – have been mostly carried out by two groups: the Vienna-based European Group on Tort Law, which published its 'Principles of European Tort Law' (PETL) in 2004, and the German-led Study Group on a European Civil Code, which published its 'Principles of European Law on Non-Contractual Liability Arising out of Damage caused to Another' (PEL) in 2009.

Although Italian tort law apparently did not inspire any of the provisions of the PETL,[90] it did influence the drafters of the PEL, with special regard to the notion of damage.

On the one hand, the whole of chapter 2 of the PEL, entitled 'Legally Relevant Damage', is somehow reminiscent of the Italian idea of *danno ingiusto*. As the introductory comment to the chapter explains:[91]

> without invoking the term as such, a certain orientating function of the chapter approaches the Italian image of *danno ingiusto* in so far as it expresses the points, firstly, that the concept of damage must be viewed in relation to the type of liability and the legal consequences which give it concrete form and, secondly, that there are no methods of defining damage which are applicable for all situations relevant to liability.

The comment, however, warns that 'this draft of course fashions its own concept of damage, that is to say, an autonomous concept which is not to be interpreted by particular reference to Italian legal development'.[92]

On the other hand, two specific articles of the PEL, arts 2:201 and 6:204, resort to the notion of 'injury as such', a notion which, as intended by the drafters, refers, in the matter of personal injuries, to the Italian idea of *danno biologico*, that is, to the Italian way of assessing the non-economic consequences of personal injuries on the basis of pre-fixed schemes translating into monetary terms the victim's percentage of temporary or permanent disability.[93] More particularly,

(*Bussani*/*Palmer* (fn 12); *Werro*/*Palmer* (fn 14); *M Hinteregger* (ed), Environmental Liability and Ecological Damage in European Law (2008); *J Cartwright*/*M Hesselink* (eds), Precontractual Liability in European Private Law (2009); *G Brüggemeier*/*A Colombi Ciacchi*/*P O'Callaghan* (eds), Personality Rights in European Tort Law (2010); *M Józon*/*JA Page* (eds), Product Liability (forthcoming); *M Infantino*/*E Zervogianni* (eds), Causation in European Tort Law (forthcoming)).

90 No such reference is made in the commentary accompanying the Principles: see *European Group on Tort Law*, Principles of European Tort Law (2005).

91 *C von Bar* (ed), Non-Contractual Liability Arising out of Damage Caused to Another (2009) 299 f; see also ibid, at 315 ('to date, the notion of "legally relevant damage" is not a feature of any European Civil Code. However, it would not be far off the mark to state that Italian law comes relatively close').

92 *von Bar* (fn 91) 300.

93 A more detailed account is offered by *FD Busnelli*/*G Comandé*, Italy, in: WH Horton Rogers (ed), Damages for Non-Pecuniary Loss (2001) 135, 146.

according to art 2:201(1) PEL, 'loss caused to a natural person as a result of injury to his or her body or health and the injury as such are legally relevant damage', while art 6:204 PEL states that 'injury as such is to be compensated independently of compensation for economic and non-economic loss'. As the comment clarifies, art 2:201(1) 'treats the injury as such as an independent head of legally relevant damage. That takes account of the fact that the practical results of the concept of danno biologico have found increasing pervasive acceptance, albeit in various ways and with varied intensity'.[94] Under the comment of art 6:204 PEL, one can further read that 'a rule in this form [ie about the idea of an 'injury as such'] is not found in any national civil code or other national legislation. Its substance, which has been essentially adopted from Italy, is however recognized in the laws of several Member States and in others enjoys increasing acceptance'.[95]

VIII Conclusions

As this overview shows, the diffusion of the Italian model of tort law offers itself as a case-study for theory and practice of how 'soft' legal transplants work within the Western hemisphere. Italian tort law has circulated widely throughout Europe, especially in the Southern and Eastern parts. This occurred for different reasons, through different means, throughout differing time-periods and with different outcomes. In some cases, it was Italian tort law's mixed nature that attracted the attention of the borrowing legal system. In other cases, interest was motivated by the originality and/or up-to-dateness of Italian rules. In still other cases, the borrowing was facilitated by economic, linguistic and cultural ties between the Italian legal tradition and that of the receiving country. Depending on each situation, these legal transfers engendered (enacted or draft) legislative texts, scholarly doctrines, and (much less often) judicial innovations.[96] Some specific peculiarities of the Italian legal framework – such as the notion of *danno ingiusto*, specific rules on strict liability, and the method of assessing damages for

94 *von Bar* (fn 91) 362.

95 *von Bar* (fn 91) 986.

96 This is in line with what has been observed with regards to legal transplants in general, that is, that the borrowing of judge-made rules, in civil law jurisdictions, is largely mediated by legal scholarship and legislation, the texts of which usually reframe judicial trends into clearer principles and theories. See *Sacco* (1991) 39 AJCL 343, 394–400; with specific regard to European tort law, *M Infantino*, Making European Tort Law: The Game and Its Players, (2010) 18 Cardozo Journal of International and Comparative Law 45, 85–87; *M Bussani*, European Tort Law: A Way Forward, in: idem (ed), European Tort Law. Eastern and Western Perspectives (2007) 365, 377–379.

personal injuries – circulated more widely than other aspects of Italian law. The influence of Italian law was limited, in some systems, to a few years or decades; in other cases, Italian law left a long-lasting imprint on the borrowing legal system. Especially in the past, interest in Italian tort law was fueled by the way in which the Italian framework blended together and reinterpreted the legal cultures which were deemed to be dominant in the receiving jurisdictions.[97] Yet, particularly from the second half of the 20th century onwards, the circulation of Italian tort law also became testament to the originality of Italian legislative, scholarly and judicial approaches to problems of tortious liability, and to the autonomous role that these approaches played in interactions with other legal systems.

From this perspective, the recent history of Italian tort law and of its circulation amongst European jurisdictions could be seen as a part of the wider history of Italian law. It is an articulated history of giving and taking, crafting original solutions, and reinterpreting old and borrowed approaches. It is a history, like all histories, of persistence and change, harmony and plurality, comprising different constituents, and moving at different paces and in different directions. But it is also a history of diffusion of law and of legal transplants, fragmentation and stratification of legal models, and coexistence and competition among local variations. It is a history in the present, whose end has yet to come.

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97 In general, regarding the role that a country's 'legal culture' plays in shaping who the tort law makers are, to whom they pay attention, and with whom they consult, see *M Bussani* and *M Infantino*, Tort Law and Legal Cultures (2015) 63 AJCL 301–332.