

GUIDO ALPA

FORM AND SUBSTANCE IN  
ITALIAN PRIVATE LAW  
V

WHAT IS PRIVATE LAW?

**ANTEZZA**





# WHAT IS PRIVATE LAW?

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Comparative Legal Thinking Series  
*Kirk W. Junker, Series Editor*

**What Is Private Law?**

*Guido Alpa*  
Translated by  
*Antonio Lodi*

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## SERIES EDITOR PREFACE

# Comparative Legal Thinking Series

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

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

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

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

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

## Preface to *What Is Private Law?*

*Antonio Lodi*

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

I was attending the conference because the theme of my research was “price in the exchange contract”<sup>1</sup> and Guido Alpa was the only person in Italy to have tackled the theme of contract price, in an essay published in the journal *Giurisprudenza commerciale*.<sup>2</sup>

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

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

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

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

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

majority of American lawyers are already familiar with the achievements of Guido Alpa.<sup>4</sup>

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

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

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

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

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

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

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

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

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

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

(Of all the legal subjects, the one that perhaps presents the greatest differences for the common lawyer and therefore for the American lawyer is Property.<sup>5</sup> While the common law notion of property derives from English feudal law, in places influenced by the decisions of the courts of equity (which themselves having been influenced by civil law, seem to exhibit some actual similarities with civil law), the property branch of civil law developed after the French revolution and the definitive elimination of the absolute monarchy. This very different origin and tradition gives rise to

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5. [http://en.wikipedia.org/wiki/False\\_friend](http://en.wikipedia.org/wiki/False_friend).

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

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

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

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

8. Oliver Wendell Holmes, *The Common Law*, Boston, 1881.