



*IMOLA IV and comparative law: the way
forward*

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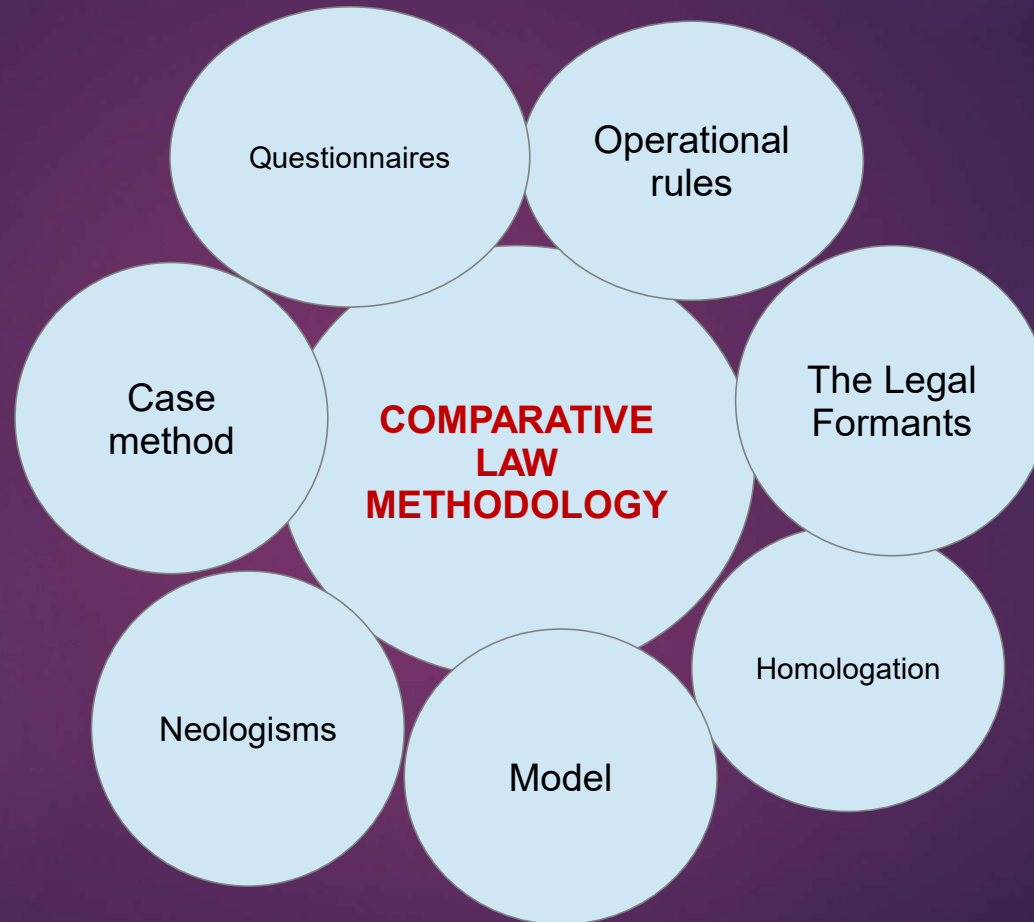
Comparative law

A **science** having the **law** as the object and **comparison** as its process

(ZWEIGERT, Konrad, KÖTZ Hein, *An Introduction to Comparative Law*, Oxford, Clarendon Press, 1998).



Comparative law methodology and IMOLA projects



The legal formants

Formants are groups of norms sharing the same characteristics in providing solutions to a specific legal problem (or legal matter, question of law).

The solution to a question of law can be found in norms enacted by the legislator (legislative formant), pronounced by a *court* (judicial or case law formant) or formulated by scholars (doctrinal formant)

The legal formants: «harmony»

Often formants are in harmony.

Example: a **person who believes himself to be heir** disposes of inherited property in favour of a third person, who is in good faith.

Is the transfer is valid in Italy?

The legal formants: «harmony»

Italy

Legislation (art. 534 Italian Civil Code) : yes (L)

Case law: yes (CL)

Doctrine: yes (D)

The legal formants: «dissociation»

A specific material fact/legal issue might be regulated differently by different formants (dissociation of formants).

Often is the case law providing a solution (norm) different from the norm enacted by the legislator (legislative formant).

The legal formants: an example of dissociation

EU: European Certificate of Succession

(Regulation 650/12 in matter of Succession and on the creation of a European Certificate of Succession)

Art. 69 Effects of the Certificate

The Certificate shall constitute a «valid document» for the recording of succession property in the relevant register of a Member State.*omissis*

The European Certificate of succession. Italy, the legislative formant

Northern Italy: **Tabular Succession Certificate**

Art. 21 of decree 499/1929 regulating the tabular system, provides: “A person cannot be qualified as heir if he/she is not in possession of a succession certificate enacted according to this decree (the **Tabular Certificate of Succession**)”.

Art. 32 Statute 161/2014 provides: “even after the enactment of the European Certificate of Succession, in territories where the Italian tabular system is in force the provisions on the **Tabular Succession Certificate** remain valid».

The European Certificate of succession. Italy, the legislative formant

In case of transborder successions:

- must the European Certificate of Succession be integrated by the (Italian) Tabular Certificate of Succession?

or

- is the European Certificate of Succession self-sufficient for a registration to be provided in the tabular register?

The European Certificate of succession. Italy, the case law formant

Tribunale (Court) Rovereto (Trento), decreto tavolare (tabular decree), G.N. 2209/2019 (Mr. Michele Cuccaro, tabular judge).

Tribunale (Court) Trieste, decreto tavolare (tabular decree), G.N. 4537/2019.

«the principle of "consistent interpretation" according to which national judges must interpret national law as much as possible in a way which ensures the **fulfilment of obligations deriving from EU law**»



***The European Certificate of succession.
Italy, the legislative formant and the case law
formant are dissociated***

The European Certificate of Succession and the Succession Certificate are fully alternative.

The **European Certificate of Succession** is a «suitable title» («titolo valido») for registration in the Italian tabular system and the enactment of the **Tabular Succession Certificate** is not required.

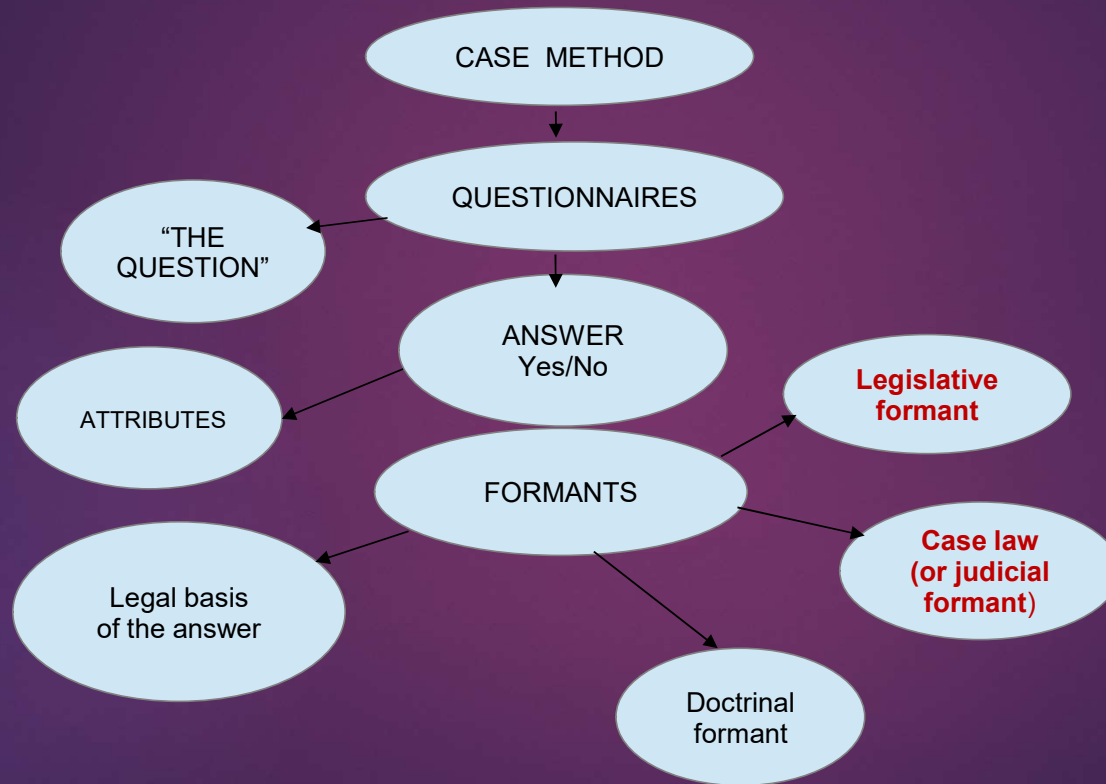
In Italy the **Case law formant** is opposite to the Legislative format and **prevails**

The legal formants and the land registry

With regard to the land registry system the legal formants are the legal basis (legal ground) of an inscription in the land registry, observed from a comparative law perspective.

In particular, in IMOLA projects the legal formants are the legal basis (legal ground) of the answers (yes or not) asked to the contact points with regard to a specific registration matter.

IMOLA III and COMPARATIVE METHODOLOGY



The Land Registry (LR) formant

Legal formants:

1. LEGISLATIVE FORMANT (L)
2. CASE LAW (CL)
3. DOCTRINE (D)
4. **LAND REGISTRY (LR) FORMANT**

The Land Registry (LR) formant: investigation

The investigation about a possible existence of a LR formant has been made during IMOLA III activity by means of questionnaires.

The Land Registry (LR) formant: investigation

Malta

Does a LR system apply or could apply **practices for registration** not specifically governed by legislation or by case law?

Yes, and certain practices become customary law

The Land Registry (LR) formant: investigation

Spain

The principle of exhaustivity of real rights is not in force, as in Italy.

As a consequence: more «discretionality» of *registradores* with regard to inscription/registrations.

If the *registradores* decides for a **registration that is not grounded on legislation or case law**, and nobody files a claim in court, the decision of the *registradores* is legal ground of the registration.

This might give rise to a LR formant.

The Land Registry (LR) formant

The **Land registry (LR) formant** is to be considered the legal ground (norm) of the answer when no other formants are at the basis of the registration (verification by subtraction)

The Land Registry (LR) formant

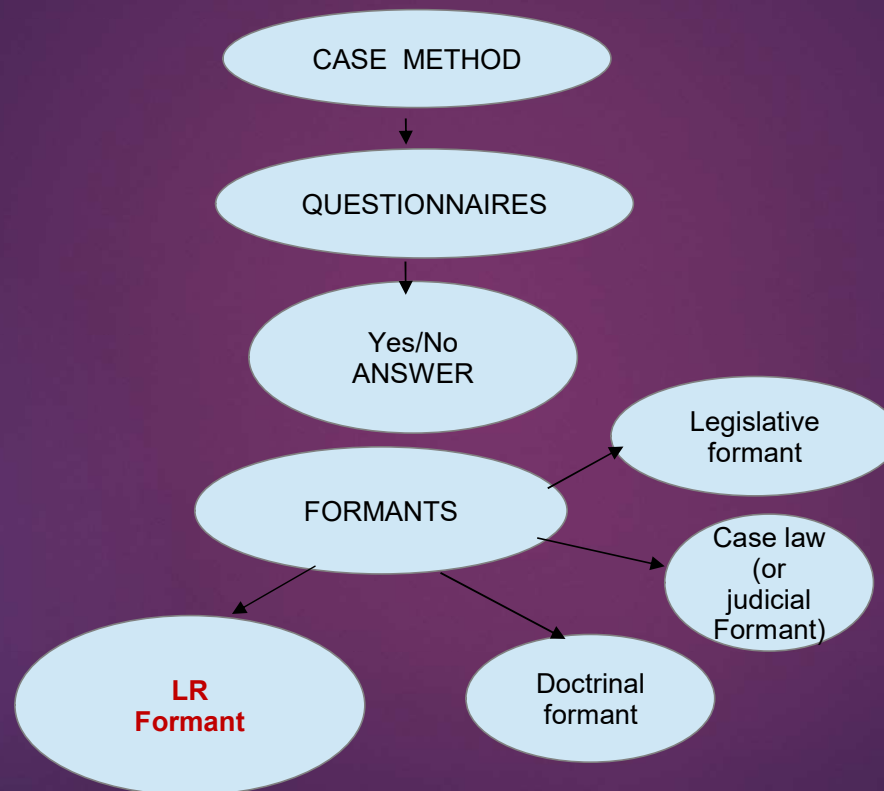
SUBSIDIARY NATURE

→ it is not conceivable in systems in which registration is always disposed by a judicial order (Grundbuch, Libro fondiario...)

→ in other systems: rare cases in which a new entry in the Land registry has been disposed without a legislative basis and the case law has not yet ruled on the subject (possible, for instance, in Spain)

IN THIS CASE PLEASE SPECIFY the LR AS THE ONLY FORMANT

The Land Registry (LR) formant



THE USE OF THE FORMANTS IN IMOLA: instructions for the Contact Points

Yes/No answers have to be completed with a description and an indication of the legal ground of the answer (formant):

- A) When the main formant (the only legal ground) is legislation, in the majority of the cases, please indicate the legislative formant (L)
- B) Please indicate legislation (L) and case law (CL) when a judicial decision, in harmony with legislation, is particularly relevant.

THE USE OF THE FORMANTS IN IMOLA: instructions for the Contact Points

C) When case law provides a norm which differs from the one enacted by the legislation (dissociation of formants) and case law is the ground of the registration: please, indicate the case law formant (CL)

D) If praxis is the only legal ground of the registration it coincides with the LR formant. Please indicate the LR formant only.

E) Scholarly opinion (doctrine) never represents the only legal ground (norm) of a registration; however, a very authoritative opinion of an author, if present, should be quoted, together with other formants (D)

EXAMPLE

Usufruct: is this property right time-limited?

ANSWER:

LEGISLATIVE FORMANT → YES (L: art. 979 Italian Civil Code)

“The duration of the usufruct cannot exceed the life of the usufructuary. The usufruct constituted in favor of a legal person cannot last more than thirty years.”)

CASE LAW → YES (no need to specify case law)

DOCTRINE → YES (no need to specify doctrine)

LAND REGISTRY (LR) Formant → YES (no need to specify praxis)

QUESTION:

Is it possible to register a transfer *mortis causa* on the basis of a European Certificate of Succession in the Italian Ilibro fondiario?

ANSWER:

LEGISLATIVE FORMANT → **NO** (written rule: you always need the Italian “Certificato ereditario”)

CASE LAW → **YES** (add the judicial decisions of the Tabular Judges/ Giudici Tavolari) Please indicate CL as the only formant

DOCTRINE → (no need to specify doctrine)

LAND REGISTRY (LR) formant → - (no need to specify LR)

The formants

Alongside yes/no answers the national **formants as the legal ground of the answer**; it gives dynamicity to IMOLA's outcomes.



Towards the future

- Research on the meta-concept (comparative law and semiotics)
- Impact of digitalization on case law formant
- Legal translation is now interdisciplinary

AI act

Article 3

Definitions

For the purposes of this Regulation, the following definitions apply:

(1) 'AI system' means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, **infers**, from the input it receives...

Articolo 3

Definizioni

Ai fini del presente regolamento si applicano le definizioni seguenti:

1) «sistema di IA»: un sistema automatizzato progettato per funzionare con livelli di autonomia variabili e che può presentare adattabilità dopo la diffusione e che, per obiettivi espliciti o impliciti, **deduce (deduces)** dall'input che riceve...

AI act

Computer scientists contest the correspondance between «**infers**», and «**deduces**» .

Legal translation and legal concepts having technical consequences must be integrated with information of other disciplines.

Towards the future

The global order and the global society:

- a new «global society» is under creation;
- the vector of the planet is the technological – capital*
- democracy and politics are still incapsulated into the States;
- The shape of the law is changing rapidly.

* See A. Schiavone, *L'Occidente e la nascita di una società planetaria*, Il Mulino, 2022.

Towards the future

In the global order where the feature of the law is changing rapidly

IMOLA projects gives a relevant contribution to the need of juridical and linguistic stability in a relevant field of law and economics:

immovable property.

IMOLA's outcomes in terms of common language, transparency and shared information form a positive message to be disseminated outside Europe too, as a European project bringing stability and reliability in times of legal uncertainty.

Toward the future, together

