HISTORICAL PERSPECTIVES
on Property and Land Law

Edited by
Elisabetta Fiocchi Malaspina
and Simona Tarozzi

Historical Perspectives on Property and Land Law

The Figuerola Institute
Programme: Legal History

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Historical Perspectives on Property and Land Law

An Interdisciplinary Dialogue on Methods and Research Approaches

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Dykinson
2019

Historia del derecho, 78
ISSN: 2255-5137

Editorial Dykinson
c/ Meléndez Valdés, 61 – 28015 Madrid
Tlf. (+34) 91 544 28 46
E-mail: info@dykinson.com
http://www.dykinson.com

Preimpresión: TallerOnce

ISBN: 978-84-1324-499-0

Versión electrónica disponible en e-Archivo
http://hdl.handle.net/10016/29290

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THE *"TRASCRIZIONE"* SYSTEM IN ITALY FROM THE END OF THE NINETEENTH CENTURY TO THE PROMULGATION OF THE CIVIL CODE (1942)

Alan Sandonà

Given its instrumental nature and the intrinsic high degree of technicality, the "*trascrizione*" system would appear, at first glance, to attract the interest of "practical" jurists or, in any case, positive law cultists.

Upon delving slightly deeper, it becomes clear, however, that this is a crucial pillar of the legal system, around which top-priority judicial and economic issues crystallise.[1]

The effects of the system for the public disclosure of transfers and property rights[2] to which the "*trascrizione*" belongs, extend beyond inter-private relationships (between contracting parties and vis-à-vis third parties). Not only is it relevant in relations with the mortgage and land register system, but it is also of significant interest to the national economy, especially in terms of credit certainty (not only in terms of land credit), and consequent growth.

The certainty of immovable property purchases and the possibility to effortlessly provide proof of rights and encumbrances pertaining to properties are prerequisites for an efficient credit system, guaranteeing the safe use of capital on the one hand and rapid debt recovery in the event of default on the other hand. The fact that these conditions can be ensured by an efficient public disclosure system makes it easy to understand why it is such an essential part of any legal system.

The study of the immovable property public disclosure in a legal system and the reform proposals arising therefrom reveals much about its founding principles, internal tensions, the essence of the society of which the system is an expression.

Unsurprisingly, the topic has since returned to the limelight. The econom-

1 Petrelli 2014, p. 103 ff.

2 Every use, in the context of this paper, of the term "property" (also in variants "real property", "immoveable property", "ownership") alludes to the juridical institution of the "*proprietà*" of the civil law tradition (area in which the property is understood as an abstract right over an asset, including the right to dispose of it and enjoy it, directly or indirectly) and not to the corresponding technical-legal terms of the law of property, that pertains to the regime of goods and rights, in common law experience.

ic crisis which has struck Europe (and beyond) since 2008[3] has determined a significant rise in non-fulfilment and insolvency. There has been a consequential rise in the number of immovable property expropriation procedures.

The Italian legislator has attempted to rectify on a number of fronts, [4] despite never extending its efforts to the realm of public disclosure. An updated reflection on the "*trascrizione*" thus acquires new operative meanings, subjecting the regulatory framework to a veritable stress test, which can reveal its strengths and weaknesses.[5]

Hence the interest in studying it from a historical and judicial perspective,[6] especially by focusing the investigation on the period spanning the late 19th century and the promulgation of the 1942 Civil Code (currently in force), which is crucial for the Italian legal system.

The "*trascrizione*", in its materiality, is a mere formality:[7] it is the entry in chronological order of a deed pertaining to real property rights in a register ordered on a personal basis. Depending on the deed requiring registration, the nature of the register in which it is entered and the effect which the system attributes to the fulfilment of the formality at hand (constitutive,[8] declarative[9]

3 Particular reference is made to the repercussions on the real economy generated by the financial crisis caused by the speculative bubble over subprime loans, which began in the United States in 2006 and subsequently infected Europe.

4 Ranging from reforms of (or affecting) the executive process (cf. Act no. 69 of 18 June 2009, Act no. 3 of 27 January 2012, art. 1, subsection 20, Act no. 228 of 24 December 2012, Legislative Decree no. 132 of 12 September 2014, converted with amendments into Act no. 162 of 10 November 2014; Legislative Decree no. 83 of 27 June 2015, converted with amendments into Act no. 132 of 6 August 2015) to the promulgation of the Code of Business Crisis and Insolvency (Legislative Decree no. 14 of 12 January 2019).

5 In 2012 these premises led the National Council of Notaries to prepare an interesting project for the reform of the Italian immovable property publicity system. Cf. Consiglio Nazionale Notarile 2012.

6 Numerous authors have focused, in historical prospective, on immovable property publicity system. These include Besson 1891; Luzzati 1889; Magnin 1896; Coviello 1907, p. 47ff; Regnault 1929; Colorni 1954; Pugliatti 1956, Liberati 1995, Petrelli 2007, 2009.

7 The issue of the qualification of "*trascrizione*" as a mere formality or a veritable "law system" is of paramount importance in determining its nature and function. Cf. Vadala-Papale 1885, p. 8.

8 "Constitutive" publicity is required for the completion of a deed. Therefore, if it is omitted, the deed is null and void and fails to generate effects between parties or vis-à-vis third parties.

9 "Declarative" publicity renders facts or legal deeds enforceable against third parties,

or informative disclosure[10]), the nature and function of this system may manifest, and historically has manifested, heterogeneous characters.

Usually, the origin of this system is identified in French Republican law, 11 Brumaire, year VII (1 November 1798) *"sur le régime hypothécaire*".[11]

Pursuant to this law and drawing inspiration from "*coutumes de nantissement*" (in force during the pre-revolutionary period in north France and Belgium), which envisaged the transcription of immovable property deeds in a public register, the revolutionary legislator forcedly compared the fulfilment of this formality to Roman *traditio* and considered the registration a condition of essence in transfers to third parties.

Whether the transcription, under the Brumaire Law, was actually effective, or held constitutive disclosure value for all, including *inter partes*, is a controversial issue.[12] I personally believe there are valid reasons to support the affirmative thesis.[13] This leads me to post-date the "modern" origin of the "*trascrizione*" system and identify a strong discontinuity between revolutionary legislation and legislation established by the 1804 *Code Civil*.[14]

The Napoleonic codifier embraced the natural law's idea, which postulated

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regardless of whether third parties are effectively aware thereof. Its omission prevents the deed from generating legal effects vis-à-vis third parties, though it does not render the deed null and void.

10 "Informative" publicity (or public notice) refers to a fulfilment limited to the mere disclosure of certain deeds or events to anyone with an interest to this effect, the omission of which would not prevent said deeds or facts from producing legal effects or rendering them null and void. All this without prejudice to any sanctions which may be incurred for the omission of the formality.

11 Cf. Loi sur le régime hypothécaire 1798.

12 Pugliatti 1956, p. 151 is doubtful, especially on p. 151, notes 728, 729; it is altogether excluded by the following: Coviello 1907, p. 45 and Petrelli 2009, p. 693 s., id. 2007. p. 591; this is acknowledged by Roggero 2013, p. 176 ff., note 2.

13 Cf. Sandonà 2011, p. 368. Also on the basis of what was stated by Merlin 1812, p. 466 ff., and in light of the broad sense of symbolic *traditio* attributable to various formalities pertaining to the framework of *devoirs des lois,* I believe it is can be sustained that said formalities determined the transfer of dominion not only with respect to third parties. For this interpretation, see also cf. Rapport Leliévre, readable in Nouvelle loi sur le régime hypothécaire 1851, p. 105 f.

14 This discontinuity was also supported by the embarrassment of commentators of the *Code* and jurisprudence itself in tackling the problems of inter-temporal law pertaining to sales which were not registered according to Brumaire law. Cf. Duvergier 1835, p. 19 ff., note 4.

the elevation of private will to legislative canon.[15] Admitting that property in general "*s'acquiert et se transmet…par l'effet des obligations*",[16] the obligation of delivering the thing should occur "*par le seul consentement des parties contractantes"* and established the creditor as *"propriétaire …encore que la tradition n'en ait point été faite"*.[17]

However, the introduction of the consensual principle[18] was incompatible with the function ascribed to the formality of "*trascrizione*" in the Brumaire system. This explains the *capitis deminutio* suffered by "*trascrizione*" – relegated to mere formal requirement for mortgage redemption purposes only – in the Napoleonic system.[19] From another point of view, the cult of the individual and their "will" required particular emphasis to be placed on the internal aspect of legal relations, relegating third-party interest to second place as well as, in a certain sense, that of the public disclosure of legal transactions.

In countries subjected to French legal influence, with some exceptions,[20] the Napoleonic system of publicity was largely carried over into the age of the Restoration, with the transcription reduced to a mere appendage of the mortgage system.[21]

It wasn't until the mid-nineteenth century, with the reinterpretation provided by the Belgian law of 16 December 1851 [22] and the French law of 23 March 1855,[23] that the "*trascrizione*" system took on its modern connotation and autonomous dignity.[24]

Hence the affirmation of a system whose legal *ratio* was to provide the

15 Cf. Cavanna 2005, p. 579ff.; Birocchi 1990, p. 654ff.; Dezza 2000, p. 77.

16 Cf. Art. 711 Code civil 1804.

17 Cf. Art. 1138 *ibidem*.

18 For a recent, detailed and in-depth analysis of the historic emergence of the consensual principle in the context of general contract theory, cf. De Cores Helguera 2017.

19 Cf. Sandonà 2011, p. 373ff.

20 For example, in the Grand Duchy of Baden (cf. Kaspers 1972, p. 152) and in the Kingdom of the Netherlands (*Cf.* art. 671, Burgerlijk wetboek 1837), the principle of the real effectiveness of transcription was restated: property rights and rights of lien were only acquired by fulfilling this formality.

21 The codes and special legislation of pre-unified Italy, especially those of the Estense states and the Papal States were no strangers to innovations with respect to the French model. Roggero 2013, p. 193-219.

22 Cf. Nouvelle loi sur le régime hypothécaire 1851.

23 Loi sur la transcription en matière hypothécaire 1855.

24 Cf. Sandonà 2011, p. 387-385.

legal system with a mechanism designed to resolve intersubjective conflicts generated by claims of contrasting rights on the same property. These conflicts were the result by a system of transfer of immovable assets, which was based on the provisions of art. 1138 of the *Code Napoléon*, and was justified in economic terms with the purpose of facilitating and stimulating mortgage loans, but whose main function was a declarative public disclosure.

With these characteristics, the "*trascrizione*" was transposed into the first Italian Civil Code in 1865.[25]

From the standpoint of coeval liberal doctrine of law, tributary of the school of exegesis,[26] the codified regulations were deemed to be in line with the times and well-formulated.[27]

At the turn of the 19th and 20th centuries, the science of law began defining the protection of third party rights as a concept laden with social significance, in terms of protection of both individuals and public economy linked to secure private trading, and began invoking reforms to the rules governing the system.[28]

Criticisms towards title XXII of the Pisanelli Code,[29] excluding the most radical ones,[30] were quantitative and qualitative in nature. The limitation of deeds and requests subject to transcription was deemed arbitrary, illogical and prevented the reconstruction of the legal history of an asset, generating uncertainty as to the claim and challenge to good title perspectives. The protection of third-party rights in good faith was not absolute, as in the case of the resolution of the registrant's right of the assignor. Registration was a burden whose omission was not sanctioned. Overall, the system did not enable the full

25 Cf. Codice civile 1865, Title XXII (articles 1932-1947).

26 Grossi 2002, p. 12.

27 Cf. Pacifici Mazzoni 1874, p. 122 and 207 ff..; Foschini 1867, p. 631 ss. Cf. also *Relazione sul progetto del terzo libro del codice civile* in Gianzana *1887,* I, p. 331ff. .

28 Cf. Gianturco 1890; Luzzatti 1891, Id. 1886; Frola 1888, p. 55. In the late seventies and the early eighties there was a significant shift in cultural convictions and methods. Cf. Cazzetta 2011, p. 46; Aquarone 1960, p. 51.

29 For a general overview on criticism of the system cf. Luzzati 1889, Bianchi 1877, *passim*.; Lozzi 1879, p. 217ff.; Vita 1880, IV, p. 14ff.*;* Vadala-Papale 1885*;* Gabba 1909, p. 23; Mirabelli 1889, p. 88*;* Simoncelli 1892, IV, p. 257ff.; Salvioli 1894, p. 196-236.

30 Vadalà-Papale even stated that the "*trascrizione*" system, due to the very fact that it constitutes a derogation of the consensual principle, was "*amorphous, hybrid, dissatisfying*" and anyone looking to prolong its existence would have to "*bleed themselves dry*". Cf. Vadalà-Papale 1885, p. 8.

reconstruction of the series of immovable property "transfers" and belittle the general disclosure function the system had since come to be expected to fulfil.

The practical consequences were significant, in both law system's consistency and economic and social terms: the uncertainty of the proof of domains and therefore, frequent legal disputes, and the lack of mortgage loan guarantees and therefore a reluctance to invest in immovable property, especially land investments. "Classical" critical issues related to immovable property publicity, whose solution was perceived as urgent.

The very circumstance that the aforementioned defects were particularly felt on occasion of the debate on mortgage loan laws was further proof that general exhortations for a reform of the public disclosure system was not merely doctrinal complaints but rather real life requirements.[31]

In the early years of the 20th century, these inconveniences increasingly attracted the attention of jurists and statesmen who strove to study and implement suitable remedies.

Many of the most critical jurists were members of the parliament. Therefore the "*trascrizione*" reform was included in the legislator's agenda, and in November 1902[32] a commission was established to study amendments to this effect.[33]

Inspired by the *Darlan project* (a bill presented to the French Senate on 27 October 1896),[34] indeed Emanuele Gianturco and Vincenzo Simoncelli[35]

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31 Cf. Ministerial report on the government project by Luzzatti (Treasury Minister) Ronchetti (Ministry of Grace, Finance, Ecclesiastical Affairs), Rava (Ministry of Agriculture, Industry and Trade), Majorana (Minister of Finances) to relieve mortgage loans, redeem rentals and other duties on properties and facilitate the formation of small properties (*09.02.1905 - 26.06.1906)*. Cf. ASCD, *Archivio della Camera Regia (1848 – 1943); Disegni e proposte di legge e incarti delle commissioni (1848-1943),* vol. 818. It contains the decree of presentation; minutes of the special eleven-member Commission; correspondence and working papers of the Commission; reports and text of the Commission; text of proponents presented at the second reading on 8 June 1905, amended by the Commission (no. 116 B); list of deputies registered for plenary discussion; result of plenary voting. Approved at the session held on 26 June 1906.

32 Cf. R.D. 30 November 1902.

33 Commissioners worthy of mention are Ippolito Luzzatti and Francesco Filomusi Guelfi, who presented autonomous bill drafts on the "*trascrizione*", but only the one submitted by Filomusi was approved by the Commission.

34 Cf. De Loynes 1897, p. 245.

35 Cf. Ministero di agricoltura, industria e commercio*, Annali del Credito e della Previdenza*, 1909, p. 216 ff.

appear to have contributed to its preparation, the commission elaborated a bill for the reform of the "*trascrizione*" (the so-called Filomusi project). It was presented to the Chamber of Deputies on 9 February 1905 within the framework (articles 1-18) of the bill for the approval of "*provisions for the relief of mortgage loans, the redemption of rent and other duties on properties and facilitation of the formation of small properties*" (*Acts of the Chamber of Deputies*, session 1904-1905, no. 116), discussed in March and April 1906 based on the Gianturco report, and finally approved by the assembly,[36] but it was then nullified due to the closure of the session.[37]

The project reflected the French-Belgian system and limited itself to increasing the number of cases subject to transcription. Therefore it failed to satisfy the *desiderata* of legal theory, which also dismissed it as devoid of harmony, and was heavily criticised mainly by Giacomo Venezian, Nicola Coviello[38] and Tommaso Mosca. [39]

The rejection of the Filomusi project led Gianturco, who had played a significant role in the initiative, to prepare his own project which was presented to the Chamber of Deputies on 8 June 1905.[40]

The project faithfully replicated articles 1932, 1933 and 1934 of the Pisanelli Code, as well as provisions of law on "methods" of registration and deeds subject to transcription, but adding to it *mortis causa* deeds (wills and testamentary dispositions), dowry deeds consisting of real rights on immovable property and mortgage loans, deeds and interruptive applications for the prescription of real rights on immovable.[41] Notaries were required to register any stipulated deeds, but only if requested by the party and upon advance payment of registration fees. This undermined the law's effectiveness.

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36 Cf. Gianturco 1909.

37 Cf. A. Ascoli, *Discorso inaugurale pavese e riforma del Codice civile*, reproduced in Bonini 1996, p. 212.

38 On the life and work of Nicola Coviello, cf. Carnelutti 1913, p. 730; Ascoli 1913, p. 499; Martone 1984; Grossi 1998, p. 409 ff.

39 Cf. Venezian 1905, p. 111ff.; Coviello 1905, p. 9-10; Mosca 1905.

40 Cf. Gianturco 1896 and for a more extensive analysis of the author's thoughts, cf. Id. 1890. In this work the author examines general principles on the subject and the German disclosure system, which at the time was unknown in Italy.

41 The project listed claims, inheritance claim action, the action of releasing bound property, the division, reduction of testamentary provisions and donations, the nullity, revocation of ineffectiveness of a testament or testamentary provision, the nullity or resolution of a contract establishing or transferring immovable property rights.

From a functional point of view, the project did not departed from the concept of registration for mere declarative public disclosure purposes.

It was heavily criticised on the grounds of its inorganic nature,[42] but it was literally reproduced in the Civil Code for the Eritrean colony promulgated with Italian Royal Decree of 28 June 1909.[43]

The last of the pre-war projects presented and discussed was though out by Vittorio Scialoja in 1910.[44] Although during works on colonial legislation, the Turin-born Romanist had supported Gianturco's proposals in form and substance and when he presented his own bill (perhaps as a tribute to his colleague who had died a few years earlier[45]) he had declared himself a tributary of those, the only element both projects had in common was that they were faithful to tradition, in order to prevent "*dangerous imitation of foreign public disclosure systems*", such as the Australian registration system (*Torrens Act)* and the Austrian one of *grundbuch*.[46] The implementation of these systems was recognised impossible due to technical and financial difficulties linked to the need for a radical overhaul of the land registry system. Clearly there were difficulties, but Scialoja's preference for a policy based on Francophile law could have had an influence.[47]

As for its contents, the project increased the number of *inter-vivos* deeds and cases subject to "*trascrizione*", improved regulations on the effects of registration,[48] required notaries to ask the contract parties whether they wished to register the deed and, in the affirmative case, pay the relevant fees

42 Cf. Luzzati 1889, p. 160, note 2.

43 Cf. This Code, published and promulgated with R.D. of 28 June 1909 addresses transcription in tit. XXVI of book III, articles 1973-2003.

44 Cf., Atti parlamentari 1910. Cf. Venezian 1910, p. 509f..; Ferrara 1910, p. 468; Galateria 1937, p. 105ff.

45 Emanuele Gianturco died on 10 November 1907.

46 Cf. Scialoja 1933, p. 58.

47 Mr. Scialoja played a major role in the *Italo-French Code of obligations and contracts* project. For an overview of doctrinal comments on the project, cf. Istituto di studi legislativi 1939. Now also published in Alpa – Chiodi 2007, p. 677ff.. Cf. Vassalli 1960a, p. 520ff.; Betti 1929, p. 665-668; Betti 1930, p. 184-189.

48 It included, among other things, the transfer of assets to benefiting heir's creditors and legatees (clearly when the inheritance included immovable goods), deeds under which the *dominus emphyteuseos* obtained devolution, or the *emphyteuta* was released from the land granted on perpetual lease, as well as deeds covering the endowment made by a woman in favour of herself.

in advance.[49] It also provided for the registration of purchases *mortis causa*,[50] with the aim of reconstructing the chain of transfers and enabling those who in good faith had registered a *mortis causa* purchase to benefit from ten-year usucaption.[51] The principle of authenticity was also strengthened, according to which the formality could only be fulfilled by means of a public deed, or an authenticated or legalized private agreement.[52]

In functional terms, Scajola underlined how his system aimed not only at providing criteria for the prevalence of one among several equally valid ownership titles, it also achieving *"in un non lontano avvenire, la completa pubblicità di tutti i trasferimenti immobiliari"*" ...ordering "*che la pubblicazione di ogni acquisto* [fosse] *subordinata all'accertamento della pubblicazione del diritto dell'autore"*.[53] Indeed, a broader disclosure function also emerged from the decision to order the publicity of provisions affecting the owner's legal capacity to transfer title to the property (in cases of incapacitation or disqualification and bankruptcy). This made it possible to transcend the inconsistent public disclosure system in force at the time regarding incapacitation or disqualification rulings and centred around magistrate's court registers; a system envisaging partial and misleading publicity.

The fact that the project also required the "*trascrizion*e" of deeds interrupting prescription and established the compulsory nature of placing a note in the margin of the mortgage entry in the event of transfer of the lien for disposal, subrogation, deferment of degree and endowment of secured credit, which resulted at the end in a clear vocation of third party protection.

Despite this project did not aim at establishing a "civil state" of immovable property and therefore not striving to reproduce the so-called German system (indeed registration wasn't still an obligation), it functionally departed from the "*trascrizione*" envisaged by the Pisanelli code. With the aim of gathering information on the legal condition of each land property, by improving the mortgage registration system, the project gave the system a prevailing general publicity function.

The promoter's authority and the general appreciation expressed within the parliament[54] were not sufficient for the approval of this project either.

49 Cf. art. 33 of the project.

50 Cf. art. 8 Scialoja project.

51 Cf. art. 8, last paragraph, Scialoja project.

52 Cf. art. 19 Scialoja project.

53 Cf. Senato del Regno 1913, p. 8.

54 In parliamentary terms, the project was defined as "*the most acute, the most bal-*

The war contingencies of the period spanning 1916-18 and the granting of full legislative powers to the Government contributed to convert the reform proposals[55] into law.

With Legislative Decree no. 1525 of 9 November 1916, schedule "H" mainly stipulated[56] the registration of property division deeds. Notaries or other notarising or authenticating public officials were required to register within one month of the deed date, and the obligation was applied to court registrars in the case of judgements and other measures subject to registration. Lastly, a sanctioning system was put in place in the event of omission.[57] Legislative Decree no. 575 of 21 April 1918, integrating the Consolidation Act on mortgage taxes, approved by Legislative Decree no. 135 of 6 January 1918, introduced further changes to the rules. More specifically, whereas art. 18 of the Consolidation Act stipulated that notarising or authenticating public officials were required to register within ninety days of the deed date, art. 19 established that the registrars are required to fulfil the obligation to register the deed within thirty days of the recording of judgements or the filing of petitions at court and registration. Article 4 of Legislative Decree no. 575/1918 summarised the list of new cases subject to registration and Royal Law Decree no. 2163 of 24 November 1919, schedule "E",[58] article 2, established the compulsory nature of certificates of reported succession pertaining to legitimate successions, including immovable assets or rights, establishing the relevant conditions and procedures. This obligation was later extended[59] to testamentary successions, in replacement of the compulsory registration of testaments set forth in art. 6 of Royal Decree no. 1802 of 20 August 1923. Subsequent amendments of a procedural nature were introduced by Royal Decree no. 2772 of 23 December 1923.[60]

The statutory relevance of the registrations ordered by these interven-

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anced and best suited", to the circumstances of the time, cf. Rossi 1923. p. 43; cf. Ministero della giustizia e degli affari di culto 1925, Annex no. 1, Sub-committee report on amendments to the Civil Code p. 69.

55 Albeit in the substantive terms of the mere extension of cases subject to registration.

56 Effective from 1 January 1917.

57 Cf. articles 1, 2, 3 and 4 of Legislative Decree no. 1525 of 9 November 1916 schedule "H".

58 Effective from 1 January 1920.

59 Effective from 24 August 1923.

60 Valid for successions for which taxes had been paid effective from 1 January 1924.

tions, incorporated in tax measures justified by budgetary requirement, was questioned.[61]

However, since 1931 the Supreme Court of Cassation established that disclosure achieved through registration undoubtedly held statutory purposes and effects.[62]

In fact, this extended the scope of application of public disclosure; requiring the compulsory intervention of public officials to guarantee the fulfilment of formalities; strengthening the principle of authenticity and reducing the hypothesis of nullity, to the benefit of the certainty of the law; creating - via the registration of purchases *mortis causa* and property divisions – the prerequisites for the introduction of the principle of continuity of public disclosure formalities, the aforementioned measures, as summarised and coordinated in articles 17 to 23 of the Consolidation Act on mortgage registration fees under Royal Decree no. 3272 of 20 November 1923,[63] highlighted new disclosure purposes of the "*trascrizione*" system.

The above purposes had since come to transcend the interests of private contracting parties as well as the general interest of good functioning of immovable property trading and credit.

At the end of the First World War, Italy had to tackle the issue of judicial unification with Trentino and Venezia Giulia provinces that were annexed as a result of the conflict and subject to the *grundbuch* system.[64] These circumstances were the occasion for further reflection, mostly by Commissions and ministerial committees set up to study the issues of demobilisation and legislative unification[65], on the opportunity to reform the Italian publicity system which, compared to the germanic one, was generally considered to be inferior.

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61 Cf. Coviello 1938, cc. 1ff.

62 Cf. Corte di Cassazione 1938, 1931.

63 Cf. Consolidation Act no. 3272 of 30.12.1923 on mortgage registration fees and compulsory registrations.

64 On legal problems regarding the annexation of Venezia Tridentina and Venezia Giulia by the Kingdom of Italy, with particular reference to the immovable property publicity system, cf. Fiocchi Malaspina 2013, p. 247-252; Ead, 2014, p. 145-166.

65 The Royal Post-War Commission (established with Lieutenant's Decree no. 1529, 16 September 1917) was succeeded by the Commission for the review of war legislation and the extension of the laws of the Kingdom to new provinces (established with Royal Decree no.1673 of 7 November 1920, which implemented Royal Decree no.1735 of 14 September 1919), in turn replaced, as stipulated by Royal Decree no. 1038 of 20 July 1922 by a "Technical committee for legislation regarding the unification of law in new provinces".

During the first two decades of the 20th century, the background on which to base a serious reform of the "*trascrizione*" could be deemed well established and the awareness of the need for action had come to maturity.

"Emergency" legislation, together with the Gianturco project, the 1910 Scialoja bill and various institutions of land register legislation of the "new provinces"[66] were the starting point of ministerial projects for the reformation of the "*trascrizione*" system, within a broader context of Civil Code renovation work.

The Scialoja project in particular was completed by the Postwar Commission, which integrated it in light of observations expressed by Coviello in the second edition of his monographic work dedicated to the "*trascrizione*" system.[67]

With law dated 30.12.1923, the Government was entrusted with the amendment of the provisions of registration laws.[68]

For the Chamber of Deputies' parliamentary sub-committee[69] entrusted with reporting on the bill for the reform and publication of new codes, the superiority of the land register system adopted in Germanic countries over the "Latin" system was obvious and the abstractly better choice would have been to unify the legislation of the new and the old provinces, extending the Austrian system to the latter. The structural deficiency of the cadastral system in force in most of Italy would have made this choice inapplicable.

On the basis of these considerations, so as *"not to remove the best whenever the best may prevail"* the Commission proposed to maintain both sys-

66 On the basis of the premise that new provinces would maintain property registers, the possibility of extending the system to old provinces was also considered, but the actual condition of the Italian Land Registry, even more so than the condition of the legislation upholding it, discouraged the initiative. Indeed, as early as in 1893 a commission established by Minister Bonacci was entrusted with the task of carrying out a preliminary feasibility study and issued a negative opinion.

67 Cf. Scialoja 1933, p. 211; Commissione Reale per il dopo guerra 1920. Coviello's work is the 1914 edition, revised and expanded with the assistance of his brother Leonardo and published posthumously in the treatise entitled *Il diritto civile italiano secondo la dottrina e la giurisprudenza…per cura di Pasquale Fiore,* Turin, 1914. Cf. also Cf. Ministero della giustizia e degli affari di culto 1925 (Report (to the Senate = by Sub-committee I. on amendments to the Civil Code), p. 305

68 Cf. Art. 1, paragraph no. 1 of Law no. 2814 of 30 December 1923 in the Official Gazette no. 6 of 8 January 1924.

69 Sub-committee I, consisting of Rossi, Riccio, Ferri, Janfolla, Rosadi, Degni.

tems,[70] but to establish that "*registration becomes an element of essence in the acquisition of property at all levels, including between contracting parties*".[71]

In order to face off probable criticisms of a provision for unification which did not unify in the slightest, the commission also stated that "*rather than two substantially different systems, these are two different ways of guaranteeing the law*".[72]

A hardly convincing argument, albeit underpinned by a major prerequisite. The conviction was that registration was, in functional terms, something more than a mere criteria for the selection of purchasers from the same assignor and represented a device of the objective right rather than the subjective right, thus acquiring full public disclosure relevance.

The Senatorial Commission,[73] appointed to express an opinion on the bill, limited itself to underlining the "unthinkability" of introducing the land registry system in old provinces and the opportunity of reforming the subject matter.

Once the delegated law was approved, in 1924 Sub-committee I of the Royal Commission for the reform of codes was entrusted with all matters pertaining to "*trascrizione*" system.

As a result of the coordination of the Scialoja project, the Pisanelli Code

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70 The speaker Luigi Rossi expressed an extremely interesting suggestion "*on a personal basis*" for the introduction of the Austrian *grundbuch* system in Italian provinces where the cadastral system was most perfect. Specifically, he proposed to establish a register at each mortgage register office in which to record, for each cadastral map (hence on a real basis), transcriptions, inscriptions and annotations of property rights referred to in the map. He also proposed to report the formalities presented to the land register map section holder and the holders of the relevant property rights, whenever their assent was not already provided in a public deed, authenticated or legally recognised deed under private seal. He suggested that the entry or transcription of a property right in the register should infer the existence of the right and deletion should infer prescription and that there should be a legal assumption of exactness of register entries regarding both the owner and the property. He also proposed that relevant rights should be deemed as acquired by usucaption after 5 years of entry in the register and any registrations and entries could be opposed by the court via a summary procedure.

71 Cf. Ministero della giustizia e degli affari di culto 1925 (Report by Sub-committee I. on amendments to the Civil Code), p. 70.

Albeit in the substantive terms of the mere extension of cases subject to transcription.

72 Cf. ibidem.

73 Sub-committee I, consisting of Scialoja, Venzi, Calisse, Del Giudice and Polacco.

and a few other "*reform proposals for the "trascrizione"* drawn up by Coviello in October 1924, which provided for the principle of the real effectiveness[74] of registration, a draft was prepared and, subjected to further amendments, it formed the text of the first "*progetto di legge della trascrizione*", consisting of 38 articles[75]. Vassalli also worked on this project, which was to become title V of book II "*Cose e diritti reali*", of 1937.[76]

Instead of a mere criteria of selection of purchasers from the same assignor, the "*trascrizione*" became a constitutive element of the *inter partes* purchase of a property right.

The proposal was radical and introduced a *vulnus* of historical significance to the consensual principle and reduced contracts for the transfer of real property rights to merely compulsory contracts, separating *titulus* from *modus adquirendi*. Nevertheless, the registration continued to be ordered according to the "personal" system.

The 1937 project made further amendments to the Pisanelli Code structure.

The most significant amendment concerned: an increase in deeds subject to registration; the requirement of the registration of deeds of a declarative nature (division and transaction), and hence effective retroactively, the indirect obligation of the inalienability of immovable acquired *mortis cause* up to the registration of acceptance; the introduction of so-called "*pubblicità sanante*", which rendered the registered deed unquestionable after 5 years, even if vitiated by and resulting from *a non domino* disposition.

The project was favourably embraced by jurisprudence, with limited observations on the form and systematics.

During the Grandi Ministry,[77] from 1939 to 1941, Filippo Vassalli was mainly entrusted with matters regarding the "*trascrizione*" system,[78] assisted by Francesco Ferrara Jr. and Emilio Albertario.[79]

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74 Every use, in the context of this paper, of phrase "real effectiveness" alludes to the suitability of the "trascrizione" to determine the transfer of ownership also with respect to third parties, which gives the completion of the formality the value of constitutive publicity.

75 This text later came to be identified as the first Coviello project.

76 Cf. Commissione Reale per la riforma dei codici 1937, p. 152.

77 Dino Grandi was appointed as Minister of Justice on 12 July 1939.

78 Cf. AFV, Lib. tutela/1-A9. Vassalli had participated in codification works from the outset. Cf. Vassalli 1960b, p. 605.

79 AFV, Lib. tutela/ 1-A10

Works on this system[80] began in November 1939[81] with a project entitled "*Della trascrizione*", which was undated (but probably dating back to September 1939[82]), consisting of 27 articles.[83]

The project developed by the committee was disclosed to some members of the Parliamentary Commission, given that in April 1940, the senator Eduardo Piola Caselli, [84] submitted, on request from the Ministry of Finance, a few observations to Vassalli, making himself available for further discussion and specifying that the title would soon be examined by the parliamentary Commission.

Although Vassalli had supported the real effectiveness of the transcription formality and underlined the need to duly acknowledge the orientations expressed by the Committee regarding Italo-German relations,[85] his project, which was completed at the end of September 1939, abandoned the proposal and attributed the "*trascrizione*" a mere public disclosure function, despite it was extensive and attentive to public interest.

It is likely that the civil law specialist, who later complained that he "*had to make and remake the project several times*",[86] was required to rethink the registration rules immediately and embrace the orientation emerged from the Commission of legislative Assemblies, supported by Eduardo Piola Caselli, according to whom the transition to real effectiveness had to be considered premature, despite the registration should have been imposed with greater rigour, in order to guarantee its public disclosure function due to its acquired value of public interest and position as a bridge for desirable transition to a system which would encompass it within a probative land register.

Minister Grandi invited the Commission to consider whether the time had come to complete the transition towards a reform which would confer actual effectiveness upon registration.[87] According to the Minister of Justice, this Reform, which was already anticipated in the provisions contained in the

80 Title V of the Royal Commission's project.

81 Cf. Letter dated 21 November 1939 from Stella Richter (on behalf of the Cabinet of the Ministry) to Vassalli (AFV, Corr. cod. civ.).

82 Cf. letter from Vassalli to Grandi on 29 September 1939, Rondinone 2003, p. 193.

83 Cf. Rondinone, p. 239f.

84 Cf. *ibidem*.

85 Cf. Comitato giuridico Italo germanico 1939. On the events of the Italo-German committee cf. Somma 2005, p. 431ff.

86 Cf. Vassalli 1960b, p. 627, note 1.

87 Cf. Grandi 1940, p. 2.

Eritrean[88] and Libyan[89] land tenure system, as well as the system in force in the new Provinces and the provisions pertaining to the transfer of aircraft,[90] would have returned Italian law to its traditional Roman Law directives from which it had moved away, under the influence of the Napoleonic Code. [91]

Indeed, in the four ministerial drafts of book VI (Tutela dei diritti) containing the title *"della trascrizione"* and in the text of the Code then promulgated, the regulations on the "*effetti della trascrizione*" made no reference to real effectiveness.

Failure to adopt a constitutive publicity system was one of the main criticisms made by jurisprudence towards the 1942 code. The decision of *conditores* to resolve in favour of the usucapient any disputes between the latter and the assignee, deriving from the previous owner, irrespective of the registration of the judgement ascertaining the acquisition of the original title,[92] generated uncertainties in purchases.

This criticism is probably well grounded, provided it is viewed in the teleological perspective of raising the public disclosure system to the highest level of abstract efficiency. It must be considered that rendering the formal entries of a register the only true instrument capable of guaranteeing the security of legal

88 Cfr. R. D. no. 37 of 31 January 1909.

89 On the Libyan legal system cf. D'Amelio 1912, p. 16ff.; more in general on Italian colonial law, cf. Martone 2007.

90 Cf. Title VI, R.D. no. 356 of 11 January 1925.

91 Cf. Padoa Schioppa 2003, p. 495ff.

92 The '37 Commission project provided for the *trascrizione* of applications and judgements for ascertaining usucaption, specifying that remain "*sempre salvi i diritti acquistati dai terzi verso il vero proprietario anteriormente alla pubblicazione della domanda od eccezione tendente a far dichiarare verificata la prescrizione acquisitiva*"" (cf. Art. 365, Commissione Reale per la riforma dei codici 1937). After all, given the functionalisation of transcription for public interest and the certainty of the objective right, it was consistent to attribute prevalence to the formal knowability as provided in public registers, with respect to the de facto relationship with the *res*.

In the first ministerial drafts of the book "Della tutela dei diritti", the transcription of direct applications for declaring the verification of usucaption was maintained, but the *dies ad quem* of the enforceability of the registrant of registered deeds or deeds entered prior to registration was not centred around the fulfilment of formalities, but rather around the "verification of usucaption" (cf. art. 11 no. 5, Ministero di Grazia e Giustizia 1940). In the last version of the book "Della tutela dei diritti", the rule on the transcription of usucaption applications disappeared and there remained only applications for interruption (art. 10, no. 5) and declarative judgements (art. 46).

circulation was incompatible with the *ratio* of the usucaption method, which consisted of privileging those who actively used the property at hand, compared to those who held formal ownership thereof. In a historical context in which the need to attribute a "social function"[93] to property strongly prevailed, reconciling the individualistic aspect with requirements expressed by the community, the decision made by the *conditores* appears far from unjustified.[94]

Returning to the configuration of the "*trascrizione*" system, which emerged from the preparatory work of the Code, considering the extension of the number of cases subject to registration, the extension of the range of judicial petitions subject to transcription, the resizing of the real retroactivity of invalidity and annulment actions, the introduction of so-called "*pubblicità sanante*",[95] the attribution of important statutory effects upon the registration of *mortis causa* purchases and the introduction of the principle of continuity,[96] on the one hand, and the notary obligation of registration, the transcending of the legal theory underpinning the conservator's passive role[97] and the reinforcement of the principle of authenticity, on the other hand; all this within a regulatory context, which required the control by public officials over the contracting parties' capacity and legitimisation and prevented them from receiving or authenticating deeds contrary to the law, public order or good practice, the movement impressed to the public disclosure system by the new code in terms of completeness of immovable property registers is quite clear, including the attribution to the registers of a property "civil state" function, aimed at generating legal certainty as to the ownership of assets.

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93 Purposes were also stated in the Report to the King which accompanied the definitive text of the third book of the Civil Code which states: « *la proprietà è riconosciuta e protetta perché è considerata come lo strumento più efficace e più utile per la produzione. [...] I beni devono essere diretti alla produzione e il proprietario non può impiegarli ai fini puramente egoistici, ma deve usarli in modo che producano la propria utilità e concorrano al raggiungimento di quei fini unitari»* (n. 23). See also Biggini 1939, p. 68.

94 Regardless of practical difficulties, expressed in the Report to the King (no.1066), which would have resulted in the adoption of a system modelled on the land registry system.

95 That, even if purely subject to the existence of other circumstances (lapse of time, good faith, onerousness of the purchase), it also introduced a principle of *public trust* in immovable property registers.

96 This was fundamental for the use of immovable property registers organised on a "personal basis".

97 With the extension of cases of legitimate refusal of registration.

Focusing on safe trade protection, viewed as a public interest objective instead of protection of the seller and the original owner in view of an increasingly greater public disclosure of events regarding assets and property rights, is tangible proof of the upturning of the principles passed down from tradition. All this, in line with the new role the law has assigned to the protection of entrustment and with the public "interest" (also) in private deed regulations, within the framework of the conception of the individual, the society, the State and their relations that have emerged since the end of the 19th century, which were reviewed during the First World War years and were adopted and completed by the Fascist government with the 1942 Code.[98]

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98 Cf. Camera dei deputati 1970, p. 1493 f.

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