
Mauro Cappelletti: One of the “precious few” of our generation

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This article discusses the contribution of Mauro Cappelletti—one of the outstanding comparative constitutional scholars of the twentieth century in Italy and worldwide—to comparative constitutional justice. Among many, three topics have been selected in this article: (i) the models of judicial review of legislation and the converging trends between the European model and the American one; (ii) the place of the judiciary in lawmaking; and (iii) the comparative method and the development of transnational law. The article reviews Cappelletti’s scholarship and explores the reasons for its lasting relevance: Cappelletti’s understanding of constitutionalism is remarkably contemporary and very inspiring for the present-day reader, notwithstanding two decades that have passed since his last book was published and the fact that the first steps of his academic activity date back to the early 1950s, i.e., over 60 years ago.

1. A “scientific prophet”

Mauro Cappelletti’s legacy is abiding and his legal thought has not lost any of its relevance. His scholarship deals with topics that are still at the center of the contemporary constitutional debate, to mention just a few among the areas addressed in his many books, articles, chapters, and lectures: the judicial review of legislation and the key role of constitutional courts and other human rights adjudicators; the place of the judiciary in lawmaking; the comparative method and the development of transnational law; the increasing importance of European law.

Not only are these topics still relevant, but Cappelletti’s understanding of constitutionalism is remarkably contemporary and very inspiring for the present-day reader, notwithstanding two decades that have passed since his last book was published¹ and despite the fact that the first steps of his academic activity date back to the early 1950s, i.e., over sixty years ago.

Consider for example that, in the first edition of *La giurisdizione costituzionale delle libertà* (1955), Cappelletti foresaw the paramount importance of fundamental rights

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¹ MAURO CAPPELLETTI, *DIMENSIONI DELLA GIUSTIZIA NELLE SOCIETÀ CONTEMPORANEE* (1994).

and their effective judicial protection as instruments of the pursuit of private as well as public interests—“I diritti fondamentali . . . sono in realtà permeati di un valore che trascende l'uomo singolo e investe tutta intera la società,” so that “se lo stato . . . compie un sopruso, fa male a me e a se stesso.”² In that book, he was pleading the case of the *ricorso diretto*, *beschwerde* or *amparo*, i.e., a procedure that eventually has proved to be very successful in the development of the human rights culture; for example, in the context of the European Convention of Human Rights.

As another example, consider also his unequivocal opinion in favor of the *judicial*—as opposed to *political*, or French-style—review of legislation. It was 1968³ when he anticipated the great success of constitutional courts and the inevitable decline of the political control of legislation: at that time, only a few European countries had already established a constitutional court, and Cappelletti could not even have imagined the second and third—and, for somebody, the fourth—wave of the constitutional justice that invaded the European continent and beyond much later in the twentieth century.⁴

Two basic features account for the longevity of Mauro Cappelletti's contribution to legal science. The first is *methodological* in nature—and I will come back later to the importance of his comprehensive method. The second, closely related to the first, involves the thinker's capacity to focus his analysis on *the basic and pivotal elements* of the problem at hand, while abandoning all secondary details: the result is scholarship *broad in scope* and *essentialist in style*, formulated in plain and simple language. Cappelletti addressed the major constitutional challenges of our time, and most of his answers have been long-lasting and valid, worth rereading today.

In his last book, Cappelletti speaks of the comparative scholar as a “scientific prophet”: “Il comparatista è il solo profeta scientifico.”⁵ The scholar is a *prophet* because, by means of comparison, he is able to highlight different trends and developments, and therefore foretell future legal evolutions; he is a *scientific* prophet, because his prophecy is not based on intuition, illumination, or personal preferences and biases, but on the practical analysis of social reality. To this purpose Cappelletti recalls Karl Llewellyn's famous saying, advocating scholarship based on “informed evaluation instead of armchair speculation.”⁶

He was right. Although not every comparative scholar is a scientific prophet, but Mauro Cappelletti was certainly one—a pioneer of comparative legal studies in Italy and worldwide.

In the following pages I would like to provide some evidence that supports this claim. I will illustrate how Cappelletti's analysis captured the spirit of his time and largely anticipated a number of future developments in the fields of judicial review of legislation and judge-made law.

² MAURO CAPPELLETTI, LA GIURISDIZIONE COSTITUZIONALE DELLE LIBERTÀ 2 and 135 (1955, repr. 1971, 1974).

³ MAURO CAPPELLETTI, IL CONTROLLO GIUDIZIARIO DI COSTITUZIONALITÀ DELLE LEGGI NEL DIRITTO COMPARATO 1–25 (1968).

⁴ An excellent overview of the diffusion of the constitutional adjudication in Europe and around the world and a reference to the fourth wave of the constitutional justice is provided by Tania Groppi, *Introduzione: alla ricerca di un modello europeo di giustizia costituzionale*, in LA GIUSTIZIA COSTITUZIONALE IN EUROPA 1, 5 et seq. (TANIA GROPPI & MARCO OLIVETTI eds., 2003).

⁵ CAPPELLETTI, *supra* note 1, at 20–21.

⁶ Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1222, (1931), *quoted in* CAPPELLETTI, *supra* note 1, at 20.

2. Judicial review of legislation: the case for a centralized model and the converging trends between the US and Europe

If there is one topic that has attracted Mauro Cappelletti's attention throughout his entire academic career, it is judicial review of legislation and the related transformation of the judiciary. These two topics constitute a veritable leitmotif in his scholarship.

Starting with the book, *La pregiudizialità costituzionale nel processo civile*, published in 1957, Cappelletti detected the rise of judicial power in post-war European countries, and then revisited the issue on a regular basis up to the 1994 *Dimensioni della giustizia nelle società contemporanee—studi di diritto giudiziario comparato*. However, whereas the first book was still informed by a procedural approach,⁷ Cappelletti's later work took a sharp constitutional and comparative turn, starting at least with his seminal *Il controllo giudiziario di costituzionalità nel diritto comparato*, published in 1968.⁸

Generations of students have been introduced to constitutional justice thanks to the beautiful chapters on the historical antecedents of the judicial review of legislation,⁹ the origins of which trace back to classical antiquity.

The “models” elaborated by Cappelletti are still a valid framework for a comparative understanding of the judicial review. Every law student and every legal scholar is now familiar with his famous classification of the systems of constitutional adjudication, contrasting political and jurisdictional systems; centralized and decentralized systems; abstract and concrete procedures; *principaliter* and *incidenter* procedures; retroactive and prospective effects; *inter partes* and *erga omnes* decisions; and so on and so forth. These dichotomies have become common currency in legal scholarship, and are often used even without being credited to Cappelletti.

Furthermore, every student and every scholar of constitutional justice now takes the convergence of the American system and the Kelsenian one for granted.¹⁰ In fact, the two archetypes of constitutional adjudication have merged in European contemporary constitutional courts to combine the main features of the Kelsenian centralized model while granting lower judges some role in the judicial review of legislation, thanks to the *incidenter* procedure—*la pregiudiziale di costituzionalità*—which attracted the attention of Mauro Cappelletti when he was still a civil procedure scholar. A similar hybridization can be noticed in the effects of the decisions of constitutional courts whose judgments have general effects as it was envisaged in the original Kelsenian

⁷ In the same vein, see also Mauro Cappelletti, *Pronunce di rigetto nel processo costituzionale delle libertà e cosa giudicata*, 1 RIVISTA DI DIRITTO PROCESSUALE 135 (1956).

⁸ The book was published in English as MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971) and later developed in MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1979).

⁹ CAPPELLETTI, *supra* note 3, 25–48.

¹⁰ See, e.g., ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLICY IN EUROPE* 34 (2000) and VICTOR FERRERES COMELLA, *CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE* 29 *et seq.* (2009).

model; nevertheless those effects are retroactive, as typically happens in the American system, according to *Marbury v. Madison* rationale.¹¹

On the other hand, in the American system, the growing authority of the Supreme Court shows a centralizing trend, so that, in many cases, it operates “like the European constitutional courts, as ‘a special organ of constitutional review’.”¹²

These “converging trends” show in fact a cross-fertilization between the two systems, where the virtues of the concrete model—linking the constitutional review of legislation to a given case or dispute—are amplified by the presence of a single centralized judge vested with the final decisional power in constitutional issues.

As a member of a constitutional court, I can testify to the importance of the concrete facts of the case in the deliberative process of constitutional review. The specific controversy offers the court an invaluable hermeneutic instrument to properly understand the law under review, especially when the court is required to balance two competing rights or principles or to apply a proportionality test. Nevertheless, a constitutional court, whose decisions have a general effect, is called to enforce the constitution as a whole, taking into consideration all the possible consequences of its decisions. That is why the constitutional court is concerned not only with the individual right of the claimant, but also with other rights and general interests that are affected by its decision. The court is inclined to interpret the constitution as a whole, as a system, avoiding the fragmented interpretation of a single provision detached from its context and its relationship with other principles, rules, and rights inscribed in the constitution.

Cappelletti has persuasively represented the rationale of the centralized model and clearly explained the cultural and structural difficulties that discouraged the transplantation of the American decentralized system to continental Europe. For sure, a more rigid conception of separation of power and the absence of the *stare decisis* principle were (and still are) obstacles to the importation of the diffused model in Europe. However, more relevant in his account, is the unsuitability of traditional civil law courts for judicial review because of the “lack of structure, procedure and mentality required for an effective control over the constitutionality of legislation.”¹³ He stressed the fact that

Continental judges usually are “career judges” who enter the judiciary at a very early age and are promoted to the higher courts largely on the basis of seniority. Their professional training develops skills in technical rather than policy-oriented application of statutes. The exercise of judicial review, however is rather different from the usual judicial function of applying the law . . . Therefore, the task of fulfilling the constitution often demands a higher sense of discretion than the task of interpreting ordinary statutes. That is certainly one of the reasons why Kelsen, Calamandrei and others have considered it to be a legislative rather than purely judicial activity.¹⁴

¹¹ 5 U.S. 137 (1803).

¹² CAPPELLETTI & COHEN, *supra* note 8, at 95.

¹³ *Id.* at 80.

¹⁴ *Id.* at 81.

The peculiarities of the functions¹⁵ of European constitutional courts explain why their composition is so different from that of any other court: the number of judges sitting on the bench is much bigger; their appointment diverse, in order to promote pluralism within the court which usually consists of jurists with academic, political, judicial, and other backgrounds; not to mention that political bodies such as the parliament or the head of the state have a say in the selection of the members of a constitutional court.

As a member of the Italian Constitutional Court, I can confirm that its diverse and balanced composition is its major strength: the court consists of a big group of professional jurists—fifteen, working as a unique body—all of whom have rich prior legal experience, and therefore speak the same legal language, although they come from different backgrounds: the academy, the bar, the judiciary, political career, bureaucracy, etc. This variety and this plurality of expertise is a necessary ingredient to a judicial function such as the constitutional one, which is called on to decide all sort of cases, concerning all sort of matters, and to issue decisions with wide-range implications.

3. The rise of the judiciary and the democratic difficulty

These remarks introduce us to another aspect of Mauro Cappelletti's legal thinking that is probably less celebrated, but is no less relevant in the contemporary constitutional debate.

To borrow Cappelletti's own words, I am referring to the *mighty problem* of the judicial review of legislation, i.e., the problem of the democratic legitimacy of constitutional justice. In fact, he says, the idea that a judge—or a constitutional court—is allowed to review a piece of parliamentary legislation poses a major challenge to democratic principles.

Although Cappelletti first addressed the issue in the context of judicial review of legislation, he later put it in a broader context of judicial creativity. In fact, he has clearly pointed out that a similar challenge to democracy derives from the increasing role of the judiciary in the lawmaking. He sees that democracy is put under stress by the growing importance of the judiciary in twentieth century's societies whatever form the judicial power takes, be it in judge-made legislation or in constitutional adjudication. Cappelletti addresses this *mighty problem* both in his writings on constitutional adjudication and in those dealing with judicial activism, such as, for example, *Giudici legislatori?*¹⁶

This kind of concern is topical in the American debate. John Hart Ely, Jeremy Waldron, Ran Hirschl are just a few names that immediately come to mind on the question of compatibility of judicial review with the very core principle of democracy.

It is no secret that, from the 1970s, Mauro Cappelletti taught on a regular basis in the US, at Stanford, Michigan, and many other top American law schools. It therefore

¹⁵ The differences between ordinary judicial function and constitutional review of legislation have been explored, for example, in MAURO CAPPELLETTI, *L'ATTIVITÀ E I POTERI DEL GIUDICE COSTITUZIONALE IN RAPPORTO CON IL LORO FINE GENERICO* (1957), repr. in 3 *SCRITTI GIURIDICI IN MEMORIA DI PIERO CALAMANDREI* 83 (1958).

¹⁶ MAURO CAPPELLETTI, *GIUDICI LEGISLATORI?* (1984); MAURO CAPPELLETTI, *LE POUVOIR DES JUGES* (1990).

comes as no surprise that he paid special attention to the problem of how democracy copes with the growing influence of the judiciary.

To be sure, in Italy, the question of the democratic legitimacy of the Constitutional Court was hotly debated at the dawn of the Republic, during the work of the Constituent Assembly, and in the first years after the new Constitution had been enacted.¹⁷ Later, this debate faded, because the Constitutional Court contributed to establishing and reinforcing the tottering Italian democratic life after the end of the totalitarian era; for example, by getting rid of all the illiberal and anti-democratic remnants of the fascist regime. Over time, the action of the Constitutional Court has contributed to elaborating a richer idea of democracy, that included not only the respect of proper procedures—the democratic parliamentary decision making process—but also of substantial values and principles. Consequently, to a contemporary European reader, some of Cappelletti’s views about the “mighty problem” of the democratic difficulty of judicial review of legislation sound a bit overstated.

What is even more remarkable is the fact that Cappelletti has, once again, foreseen that over time the judiciary would also gain in importance in the civil law countries. This is precisely what happened in the last decades of the twentieth century onwards. Once again, civil law and common law countries are converging: “a grand converging trend is apparent in Western societies,” as he put it.¹⁸

As a matter of fact, in civil law countries, the judicial function has become closer to the common law tradition, thanks to a number of factors that Cappelletti was unable to witness, such as:

- (a) the “constitutional consciousness”¹⁹ which was stimulated by the activity of constitutional courts and in particular by the *incidenter* procedure;
- (b) the *judicial empowerment* which was fostered by the European Court of Justice thanks to the principles of the supremacy and direct effect of EU legislation;
- (c) the success of new methods of interpretations oriented toward avoiding any construction that could lead to unconstitutional results (*interpretazione conforme a costituzione*) or to conflicts with the European legislation (*interpretazione conforme al diritto europeo*); and
- (d) the flourishing of a culture of human rights which stimulates a more proactive role of the judiciary.

The judicial function has undergone a sea change, and today one could hardly agree with Cappelletti’s assessment that in Europe the “judiciary seems psychologically incapable of the value-oriented, quasi-political function involved in judicial review.”²⁰ This was surely true in the 1950s, just after World War II, but nowadays this psychological impediment has been overcome. Generally speaking, courts and judges are very

¹⁷ See CARLO MEZZANOTTE, *CORTE COSTITUZIONALE E LEGITTIMAZIONE POLITICA* (1984, repr. 2014).

¹⁸ Mauro Cappelletti, *The “Mighty Problem” of Judicial Review and the Contribution of Comparative Analysis*, 53 CAL. L. REV. 409, 412 (1979–80). The article was firstly published in 6 LEGAL ISSUES OF ECONOMIC INTEGRATION 1 (1979), then as ch. 4 in MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 150 (1989).

¹⁹ CAPPELLETTI & COHEN, *supra* note 8, at 84.

²⁰ *Id.* at 81.

proactive and invested with new responsibilities: they use (and sometimes abuse) all their interpretative powers; they do not back away from pronouncing value-oriented decisions; and sometimes even compete with constitutional courts in judicial review of legislation and human rights adjudication.

Le juge as la bouche de la loi is an archaeological relic, provided it was ever real in Europe. Judge-made law has now become a reality also in countries, like Italy, that can be ascribed to the continental tradition based on written parliamentary legislation. The judiciary has gained relevance in public life; it is no longer a “null power,” as it used to be considered, but, on the contrary, it has become one of the most relevant actors in the constitutional system.

Notwithstanding this evolution, the judicial function is still performed by bureaucratic “career judges,” as described by Cappelletti. In this context, Cappelletti’s remarks on the wide gap between civil law and common law countries in terms of access to the judiciary and judicial professional training, and in terms of judges’ accountability,²¹ have become even more relevant and worth debating.

Cappelletti considers the growth of the judicial power as a necessary move in contemporary constitutional systems. He does not complain about this change, which is not good or bad *per se*; nor is he nostalgic about the old, illusory Montesquieu-style “neutral” judiciary. Instead, starting with the usual phenomenological approach, he highlights the fact that, after World War II, the growth of the role of the judiciary went hand-in-hand with the colossal expansion of the other branches of government, legislative bodies, and the administrative apparatus. Thus, the judiciary has become the “third giant” necessary to control the other oversized powers in the welfare state.²²

Cappelletti is not to be lumped together with the group of scholars who *a priori* criticize *le gouvernement des juges*²³ and the very idea of *judiciary law*, to borrow Jeremy Bentham’s famous expression.²⁴ Nevertheless, he lays bare some risks and drawbacks of, and calls for some constraints on, the judicial activism of courts.

The following constitutes the most original contributions of his scholarship. Whereas there are many books that aim at elaborating some *substantive limits* to judge-made law—insisting, for example, on the difference between legislation and interpretation, on the respect of higher written law, on *stare decisis*, and, more generally, on the judicial restraint—Cappelletti insists instead on *procedural limits* and on the *procedural passivity* of the judicial function.

In his discussion of procedural limits, Cappelletti recalls the three basic *dicta* of the Roman tradition in order to curb excessive judicial activism:²⁵ (a) *ubi non est actio ibi non est iurisdictio*: the judicial decision should always be strictly connected to the case or controversy brought before the court; (b) *audiatur et altera pars*: a fair hearing of the

²¹ MAURO CAPPELLETTI, *GIUDICI IRRESPONSABILI?* (1988).

²² *Id.* at 31 *et seq.*

²³ ÉDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS: L'EXPÉRIENCE AMÉRICAINE DU CONTRÔLE JUDICIAIRE DE LA CONSTITUTIONNALITÉ DES LOIS* (1921).

²⁴ The reference to Jeremy Bentham’s *judiciary law* is found in CAPPELLETTI, *GIUDICI LEGISLATORI?*, *supra* note 16, at 7; see also JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 8 (1970) [1789].

²⁵ CAPPELLETTI, *GIUDICI LEGISLATORI?*, *supra* note 16, 65–66.

parties should always be guaranteed in order to let the parties participate to the process; and (c) *nemo iudex in causa propria*: the judge should always maintain and show an impartial attitude, preserving his independence from all kinds of external pressure.

However, it is in *procedural passivity* that Cappelletti sees the main divide between judges and legislators: both judges and legislators take part in the law making process; both create rules and norms; however, only *the judicial function is a power on demand*: “la funzione giurisdizionale [è] esercizio di una potestà su domanda (e nei limiti della domanda) di parte.”²⁶ No court can initiate a case; a court is only required to respond to the case brought to its attention. Nor can a court broaden the scope of its decision: the boundaries of its power are delimited by the plaintiff.

Cappelletti foregrounds the notion of “case” or “controversy”: as long as courts stick to the case, they do not exceed the limits of their own mission. It is the link to the case or controversy that effectively delimits the perimeter of all creative jurisprudence. In judicial activity, it is the litigants that set the court’s agenda whereas the bench is only required to answer: this is the veritable *passive virtue* of the courts and their most effective limit—to resonate Alexander Bickel’s language.²⁷

By the same token, the connection to a case or controversy is the main source of inspiration for every judge: courts’ strength comes from a

combinazione unica di due elementi: da un lato . . . un isolamento tipico dello studioso— isolamento che è cruciale nella scoperta dei valori duraturi della società—. . . dall’altro . . . l’impegno quotidiano a trattare “con la viva realtà di controversie concrete”, diversamente dal legislatore che ha a che fare “tipicamente con i problemi generali, astratti o vagamente preveduti”.²⁸

If these conditions—i.e., the independence of judges and the strict connection of the judge-made rule to the case—are met, the judicial legislation is a challenging and risky adventure that is worth undertaking, according to Cappelletti, provided that courts stick close to the real needs of the people and to their social aspirations, and provided that a genuine participation is guaranteed in the judicial process and that the procedural standards are always respected.

No doubt, we live at a time when the judiciary is thriving. Not only have constitutional courts gained in importance in Europe and elsewhere. Supranational and international courts’ authority has increased.²⁹ At the national level, the judicial function exceeds by and large the traditional syllogistic implementation of written legal rules.

²⁶ Very relevant on this topic is Mauro Cappelletti, *Il controllo di costituzionalità delle leggi nel quadro delle funzioni dello Stato*, in 3 STUDI IN MEMORIA DI GUIDO ZANOBINI 75, 105 *et seq.* (1965); CAPPELLETTI, GIUDICI LEGISLATORI?, *supra* note 16, at 63 *et seq.*

²⁷ ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111 (1986).

²⁸ CAPPELLETTI, GIUDICI LEGISLATORI?, *supra* note 16, at 93: “unique combination of two components: on the one hand, the scholar’s typical seclusion—which is crucial in order to discover the enduring values of society—on the other hand, the daily commitment to deal with ‘the living reality of actual disputes’, contrary to lawmakers who are typically concerned with general and abstract problems.” (author’s translation).

²⁹ It is really remarkable that Cappelletti had been inquiring into the role of the supranational courts as early as 1978: see Mauro Cappelletti, *Giustizia costituzionale soprannazionale*, 33 RIVISTA DI DIRITTO PROCESUALE 1 (1978).

The number of human rights adjudicators has multiplied. Moreover, in the global context, courts are interconnected and develop transnational common principles and standards of adjudication.

Judicial bodies have become very powerful. Here, again, Mauro Cappelletti has properly identified the lines of development of the judicial function. However, there is one aspect of this development that could not have been even imagined a few years, never mind decades, ago: the number, the authority, and the importance of judicial bodies have grown to such extent that each court is limited . . . by other courts. *Le pouvoir arrête le pouvoir*; according to Montesquieu: power impinges on power. No court decides a case alone—least of all constitutional courts.³⁰ Courts are networked, their jurisdictions often overlap, and none of their decisions is really final. In a way, the question that Cappelletti asks, “Who watches the watchman?”³¹ has received the most unpredictable answer: it is first of all within the judiciary that the answer is to be found.

4. The comparative method

Mauro Cappelletti possessed extraordinary insight. He recognized the foremost transformations of our age and traced the lines of development of the legal systems. On many occasions, he anticipated future events.

What is the origin of this capacity for interpreting the signs of the times? Cappelletti’s intellect and wit, his cultural background, his capacity for work, as well as many other qualities provide a partial answer to our question. However, part of the answer lies in his methodological approach.

Cappelletti reflected on his method in a number of works and expounded this reflection in his last book, *Dimensioni della giustizia nelle società contemporanee*.³²

First and foremost, Cappelletti explicitly rejects the positivist, Kelsensian approach inspired by the *Reine Rechtslehre*, the pure theory of law.³³ Similarly, he rejects all natural-law-based approaches, because they are often devoid of any connection with the concrete social reality.

Instead, Cappelletti rather espouses a problem-driven approach that requires a number of steps: first, pinpointing the social need or social problem that the law is expected to answer; second, exploring the legal answers to the problem provided by different legal systems; third, inquiring into the *raisons d’être* of the similarities and differences

³⁰ Sabino Cassese, *Fine della solitudine delle corti, ovvero il dilemma del porcospino*, in INAUGURAZIONE DEL 232° ANNO ACCADEMICO DELL’ACCADEMIA DELLE SCIENZE DI TORINO 19 (2015), available at http://www.irpa.eu/wp-content/uploads/2011/10/99_Fine-della-solitudine-delle-corti-costituzionali-ovvero-il-dilemma-del-porcospino.pdf; repr. 1 *ARS INTERPRETANDI* 21 (2015).

³¹ CAPPELLETTI, *THE JUDICIAL PROCESS*, *supra* note 18, at 57.

³² Cappelletti, *Le sei “fasi” dell’analisi comparativa: Una proposta metodologica*, in CAPPELLETTI, *supra* note 1, at 16.

³³ HANS KELSEN, *REINE RECHTSLEHRE: EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK* (1934). The book was published in English as HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY. A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW* (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1997).

among legal systems; fourth, looking for trends of convergence; fifth, assessing the pros and cons of the different solutions; and, sixth, anticipating future developments.

Cappelletti’s approach is multi-faceted and comprehensive: not only is it *problem-driven*, because his analysis starts from actual social needs rather than from a purely legislative analysis; it is also *phenomenological*, because it requires an attentive monitoring and classification of a broad spectrum of legal solutions around the world; it is also *critical* and *normative*, because it implies a critical evaluation of alternative choices, abandoning some of them and spearheading others. Further, his approach is imbued with realism and contextualism without repudiating a value-oriented examination. In a word, his scholarship is full of history and ideals, combining the best of *the two worlds*—the European and the American culture—that nourished his academic life.

His method accounts for his extraordinary vision, making his scholarship thought-provoking and relevant to this day. It is really impressive that a scholar trained in civil law procedure was able to combine analysis and synthesis; attention to detail and capacity for grasping the big picture; discipline of legal methodology and richness of contextual reading. His multifaceted personality makes him a visionary, a scientific prophet, “one of the precious few.” In the words of Sir Jack Jacob:

In every generation, a precious few tower over their fellows in the specialist areas of their endeavour. They transcend their compeers in being immensely more active and articulate as well as more imaginative, more creative as well as more critical, more innovative as well as more inspiring

In our age one of those precious few . . . is professor Mauro Cappelletti.³⁴

³⁴ Sir Jack Jacob, *Foreword*, in CAPPELLETTI, *THE JUDICIAL PROCESS*, *supra* note 18, at xiii, xiii.