



**UNIVERSITÀ
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**Facoltà di
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Methods and Challenges in Comparative Law

Trento University, Faculty of Law (Italy)

Rethinking Comparative Law

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ABSTRACTS

First session (morning)

Panel 1: The West and the Rest: Comparative Law and Legal Traditions

I) Xue Jun (Peking University)

Strengths and weaknesses of the "Legal Model" - Inspiration from the Chinese Civil Code

The Chinese Civil Code, which was compiled on May 28, 2020, may be the latest civil code in the world. By observing some characteristics of this civil code, we can get a lot of interesting enlightenment from the study of comparative law. I will focus on several features of the structure of the Chinese Civil Code to illustrate several issues worthy of attention in comparative law.

The influence from the German Civil Code can be seen in the formation of the structure of the Seven Books of the Chinese Civil Code (General Provisions, Real Rights, Contracts, Personality Rights, Marriage and Family, Succession, Tort liability), which has been widely disseminated in Northeast Asia. The general provisions have a strong influence on the legal model as an important feature of the structural design of the Civil Code. However, the influence of the "legal model" is not absolute. In the compilation of the civil code of China, the law of obligations of the traditional civil code is dismantled, and it is treated as contracts and tort liability separately. Moreover, the quasi-contract division is established in the Book Three Contracts to deal with the system of *negotiorum gestio* and unjust enrichment. Influenced by the legislative path before the Civil Code, it is a compromise

that has to be made for practical considerations, especially in order to maintain stability at the practical level. Many Chinese civil law scholars now believe that the absence of the general provisions of the obligation law in the Chinese Civil Code is actually a reasonable choice.

In addition, the establishment of a separate personality right Book in the compilation of the Chinese Civil Code reflects the pursuit of system structure innovation. This structural arrangement is considered to overcome the shortcomings of the previous legal model (ignoring the protection of personality rights and being too property protection-oriented).

The above three factors together exert their influence and shape the system structure of Chinese Civil Code. This fact reminds the researchers of comparative law to consider the following questions: 1. What is the basis for the comparative study of comparative law? Is it a specific legal institution or a more abstract so-called legal model? 2. If it is a legal model, how do we define the essential characteristics of a certain legal model? 3. How does "comparison" unfold, and how do we define whether the two legal models are the same or different? In particular, in the case of the Chinese Civil Code, in what sense can we define whether it belongs to / does not belong to the German model? And what is the substantive significance of this definition?

II) Raúl Letelier Wartenberg (University of Chile)

The use of comparative legal concepts in constitution-making processes - The case of Chilean Constitutional Convention

On 4th July 2021, and after a referendum that took place on October 25th, 2020, a Chilean Constitutional Convention composed of 155 persons popularly elected, began its work. They had the mandate of writing a new constitution proposal, which was finished and delivered on July 4th, 2022. The final referendum, celebrated on September 4th, rejected the proposal.

Those who integrated the Convention were not necessary lawyers. There were no requirements to exhibit a professional or technical degree to participate as a conventional. Additionally, its composition was politically and ideologically varied, heterogenous from an economic and social point of view, composed equally of men and women, included people gender and sexually diverse, and had 17 reserved seats for native peoples. Nevertheless, all of them, with very different backgrounds, had to jump into the legal conceptual framework and they were forced to search for inspiration in constitutional concepts, models, and institutions from different legal systems.

This paper analyses the use of constitutional comparative law by a pluralist constituent convention, with a special focus on laypersons. Additionally, I will examine the explanation and arguments that non-lawyers gave when using these comparative constitutional concepts or institutions to defend their proposals publicly. Finally, I will evaluate the role that those concepts played in the decision of rejecting the constitutional proposal.

The hypothesis is that in scenarios of highly normative complexity, the use of new foreign legal concepts in the constitutional public debate creates resistance in the constituency, favors the *statu quo* and fosters the rejection of the proposal. Instead, the uncertainty perceived by the constituency could only be dissipated if they recognize the union of opposite political forces behind a constitutional draft.

III) Salvatore Mancuso (University of Palermo)

Africa and comparative law - A geopolitical approach

Africa is an immense continent, rich in resources and problems. If, historically, law in Africa has always been seen as linked to the legal system of the former colonial power, or – at most – in its pluralistic dimension, such an approach started to be too limiting.

A different start point sees law in Africa as an instrument in various ways useful for playing geopolitical games, as an instrument of hegemony and economic influence for the powers that play their geopolitical games in Africa. The crisis of the traditional state, and the competition of alternative subjects to it, bearers of their own regulatory systems in the global context, as well as the cultural reshuffling caused by migratory phenomena and a growing cosmopolitanism, are elements capable of influencing the speed and outcomes of the changes taking place.

The importance of this type of approach is particularly evident in today's African scenario where the traditional players are more and more challenged by new or returning actors and where supranational and transnational norms sometimes are sometimes placed side by side, some others superimposed to the national (mostly plural) legal systems, reconfiguring therefore law within and beyond the state as nation.

This different path may suggest reconsidering the methodology on the study of law in Africa to a more comprehensive observation of the legal phenomenon in sub-Saharan Africa based on the observation of law not simply as a legal phenomenon, but in a wider perspective, towards to what can be called the “contextual” method.

My paper therefore explores such new way to look at law in Africa, using the stratigraphic approach as a start point to move to the “contextual” approach, and how the geopolitical games in Africa can be the litmus paper in this respect.

Panel 2: At the Crossroad of Comparative Law: the Relationship of Law with Other Sciences

I) Roberta Aluffi (University of Turin)

Comparative law and religion

Comparative law, as any kind of comparison, provides us maps to navigate the world and make sense of it. In every period, it reflects the interests and concerns of those who compare.

This paper considers the place of religion and religious studies in comparative law in the last 70 years. In the aftermath of the Second World War, religion played a marginal role on the map drawn by comparatists, that was dominated by the opposition between East and West, between socialist law, on the one hand, and Roman-Germanic and common law, on the other.

This bipolar paradigm was challenged by religion with the Iranian revolution. Moreover, religion was instrumental in the collapse of the USSR (Soviet-Afghan war) and the disintegration of the socialist bloc (Solidarnosc). In the meantime, European societies became more religiously diverse.

Religions clearly deserved more attention from comparative lawyers. The shortcomings of their past attitude towards religions are highlighted by the specialists in ecclesiastical law (Law and religion, *Staatskirchenrecht*), who have to face the urgent and unprecedented challenges of religiously diverse societies. It is certainly limitative to consider religions only as far as they had an impact on the laws of the nation states, as comparative lawyers often did in the past. But the alternative path of a comparative law of religions may be equally state-centric, if the idea of religion is that embedded in Western state law.

Actually, comparative law frames its renewed interest in religion in an enlarged perspective. It is becoming more plurality-conscious and less Western centric, so that an important textbook on legal systems in a global context may leave out the global North (Menski). The idea itself of legal systems, closely associated to the Western legal theory, is dismissed and replaced by that of legal tradition, not linked to a specific civilisation and highly inclusive (Glenn). The Western notion of law, as well as that of religion, may have

no exact correspondence in other traditions, but their link is nevertheless relevant everywhere. To explore these territories, the comparative lawyer draws on other sciences and contributes to their development, as did Rodolfo Sacco with the pages on the supernatural and the law in his *Antropologia giuridica*.

II) Giorgio Resta (Roma Tre University)

Identity politics: the relationship of (comparative) law with other sciences

The relationship of law with other sciences is increasingly a source of controversy. The reason is not as much epistemological as practical. Among the various factors that lie behind such a debate are on the one hand the digital transformation, which forecasts a possible takeover of law by technology, and on the other hand the crisis of traditional university institutions, and of legal studies in particular, which is leading to a shortage in public funding and growing struggles as regards the allocation of resources (the ERC taxonomy is a good example on the point). As a result, law is not only slowly abandoning its quest for autonomy, but also striving to obtain recognition as a discipline more akin to the social sciences, and even to hard sciences, than to arts and humanities. This has strong implications in terms of methodology, models of reasoning, as well as type of research produced. However, the very question whether law resembles more the humanities, or the social sciences is an-ill posed one, as the very idea of a “discipline” is culturally construed and does not live in the realm of ontology, but rather in history. To reflect on the disciplinarity of law (not unlike the relationship among sciences themselves!), it seems necessary to take a retrospective, rather than a prospective regard, and investigate the way in which the law (as an academic discipline) at different points sought recognition by imitating or assimilating paradigms born or developed in other fields of knowledge (or the other way round). Only by taking such a viewpoint it seems possible to resist, or profit from criticism, and properly face the challenges raised by social transformation. Comparative law represents an excellent field-work in this regard. One of the stronger critiques nowadays raised against this discipline relates to its ‘colonial’ past: the “de-colonization” of comparative law has become a *Kampfbegriff* not only in the “Rest” but also in the “West” (see the recent MPI project). To properly address the merits of such criticism, and retain what is valuable of it, one should engage in a serious process of questioning and internal retrospection. The aim of this paper is to look at the general issue of the relationship of (comparative) law with other sciences from such a critical perspective, by highlighting not only how and when the discipline was actually ‘born’, but also what have been the major paradigm-shifts in its interdisciplinary endeavor (from linguistics to economics to data sciences), and what is at stake whenever one chooses one

or another reference point. Only by retracing such paths we may become aware of the contingent factors that define what we are and what we do as lawyers and academics. The relationship of law with other sciences will itself appear, in the end, a question strongly embedded in a certain mindset, rich of historicity and not as innocent as it is generally presented.

III) Anne Griffiths (Edinburgh University)

The demise or regeneration of comparative law? The production of knowledge

My paper discusses calls that have been made in recent years to rethink comparative law in terms of the theory, sources and methods that it employs in promoting the production of knowledge about law. This is especially the case with regard to what scholars have termed “mainstream” or “orthodox” comparative law. Critiques of this model have centred on its unitary and uniform framework for the comparison of legal systems that derives from an abstract extrapolation of data that claims to represent an ‘objective’, ‘neutral’ international ‘legal science’. This is one in which differences are subsumed in the quest to promote communalities that may pave the way for discovering the most efficient way for harmonising law in foreign jurisdictions to advance peace and security in the world. Such a vision of mainstream comparative law has been challenged for its ethnocentric, egocentric and cognitive system of control that fails to question its own methodological and culturally embedded assumptions and that divorces ‘law’ from ‘society’. It fosters the study of ideal types and adopts an evolutionary approach to the study of law. This is one that uses a monocular and self-centric theoretical lens of the Anglo-European/West to evaluate legal systems across the globe in ways that give rise to practices of hegemony and domination.

My paper then explores ways in which comparative law may be re-calibrated to deal with these flaws. A key component put forward by comparative legal scholars is that of contextualisation. Drawing on my own research on family disputes and land in Botswana, in the Global South, I explore how I engaged with the contextualisation of plural legal systems in which one, customary law, was the product of an unwritten oral tradition. Thus, I found myself drawing on a range of methods and sources derived from other disciplines associated with social science, especially anthropology, that enabled me to adopt a more socially oriented approach to law that highlighted its diversity. The need for this type of approach is particularly pertinent in today’s globalised world where transnational norms

are enmeshed in local, national, and international networks that reconfigure law within and beyond the nation-state. An example is provided by the case of humanitarian intervention that demonstrates the transgression of theoretical and methodological disciplinary boundaries in its approach to legal analysis. Following on from this, my paper explores the utility of developing the spatial and temporal dimensions of law and how they can be used to create a more plural, multi-scalar model that allows for difference and that moves beyond the domination of an Anglo-European/Western model of law.

Second Session (afternoon)

Panel 1: Globalization and Legal Systems: the Role of Comparative Law

I) Joana Mendes (University of Luxembourg)

The foundations of EU administrative law as a scholarly field: normativism, functional comparison and integration

The functional comparison of administrative laws enabled judges and scholars to establish and develop EU administrative law based on a state-matrix of general principles. They mobilised functional comparison to build a law and a polity and to ground a scholarly field. A meta-analysis of the work of Jürgen Schwarze examines the choices of object, objectives and method that grounded one prevailing way of approaching EU administrative law, as well as the respective assumptions and normative implications. Through comparison, the logic of protecting the private legal sphere from unilateral exercises of authority provided the conceptual framework for EU administrative law. But it largely ignored structural features of the EU administration (public-private collaboration and interpenetration between state and EU administrations), ill-fitting with the binary liberty-authority that grounded core principles of national administrative law. It ignored also the specificities of the functional polity in which it was inserted. EU administrative law remains imbued with this original liberal normativist approach, constructed by judges and scholars, who in different guises, contributed to fashioning the state-like characteristics of the EU. This legacy of comparative administrative law should be critically examined, 30 years later, at a very different stage of EU integration.

II) Roberto Scarciglia (University of Trieste)

Methodological pluralism and legal comparison: challenges in a post-global age

Globalization continues its transformations by significantly modifying the world's geopolitics, the economies, needs and expectations of the weakest sections of the world population, and the values on which legal systems are built. A global pandemic and Russia's invasion of Ukraine are two of the leading events that have produced adverse cascading effects in the most diverse sectors of the life of nation-states.

These events arouse, on the one hand, a great interest in legal scholars, and, on the other hand, they pose some questions: if it is strange to see an unexpected event happening, what kind of defense do we have against that? Without a doubt, it is impossible to give a reliable answer to this question. However, we can ask ourselves what value indicators have from a legal point of view and whether they can affect constitutional rights or freedoms. Experts on global phenomena have spoken about 'deglobalization,' 'globalization crisis,' and 'evolving globalization.' From this perspective, legal comparison with the increasingly complex problems deriving from global phenomena is critical, and comparative law and its scholars play an essential role.

If we consider the different reactions of national states to these global phenomena, a necessary premise concerns the relationship between comparative law and the different legal traditions. It implies considering the increasingly widespread tendency to analyze differences rather than similarities without neglecting the study of possible intersections between different legal traditions.

We have to consider that the relationship of comparatists towards globalization and global law has different orientations. It is possible to distinguish between static and dynamic comparative law, and this difference will play a decisive role in the choices of objects, methodology, and purposes of comparative research, but above all, the scientific value of the results. The time of comparative legislation, or micro-comparisons, seems to be far away for many comparatists.

Regarding comparative methodology, global phenomena direct comparative legal scholars to abandon a functionalist perspective in favor of a methodological pluralism and a new approach to quantitative methods and the study of legal problems and their solutions from a transnational and global perspective.

However, to address this path, it is necessary to move from unilateral and solitary comparison to collaboration between scholars from different areas, from national groups

to epistemic communities, and, in essence, toward developing interdisciplinary comparative law.

III) Lorenzo Casini (School for Advanced Studies, Lucca)

Taming Globalization through Comparative Law

Since 1990s the process of globalization went through a significant acceleration. The end of the Cold War and the digital revolution together also triggered the growth of international organizations, with their norms, procedures, and institutions.

Amongst the research projects and field of studies dedicated to better understand these phenomena, comparison and comparative law offer one of the most suitable toolbox.

This contribution aims at under-packing how comparative law can fruitfully help tame and frame the emergence of global regulatory regimes and networks. In particular, taking examples from both public and hybrid public/private regimes such as those related to cultural heritage, sport, and trade, to name but a few, the analysis will identify the forms comparative law adopts in favoring the development and strengthening of global regimes.

Panel 2: Comparative law and Legal Taxonomies: Is There still a Public/Private Law Divide?

I) Giacinto della Cananea (Bocconi University, Milan)

Public law and private law: *distingue frequenter*

The distinction between public and private law has generated a significant amount of comment within the literature. According to a recent strand in public law thought and in history of law, this distinction should not only be relativized, but it should be abandoned. The bottom line is that the distinction between public and private law is old fashioned and undesirable, among other things, because it is legacy of a period of the history of ideas which over-emphasized the state. It must be stressed at the outset that the first part of the argument is, historically, debatable. That said, this paper aims at contributing at the discussion not from the viewpoint of law in the books, but from that of law in action. It has three more specific objectives. The first is to analyze an area of law which has been historically quite relevant and still deserves attention; that

is, the public domain. It will be argued that the distinction between public and private law has not lost its *raison d'être*. The second objective is to consider another traditional area of public law, which relates to public finances. It will be contended that insufficient attention has been given to a norm which makes part of one of the most important and sensible parts of the EMU; that is, the criteria for determining the scope of application of the prohibition of excessive government deficits. It will be contended, moreover, that the discontents of the distinction between public and private law should file their claws with tax law and the treatment it receives within the ECHR. The third of the objectives is aimed at calling for heightened attention on administrative procedure legislation, especially as regards the individuation of administration, functionally intended. It will be argued, in conclusion, that a realization of the connection between these areas of public law can improve our understanding of the vexed question.

II) Silvia Ferreri (University of Turin)

Public and private legal fields: several shades of grey?

If, in the past, we could, in teaching, rely - safely enough - on the distinction between private and public law as characterizing the civil law tradition and opposing the common law (where the opposition was less felt), we find it harder today to hold on to the difference. A swinging movement has in time brought together both traditions (especially during the UK membership in the EU, because of the contamination with European administrative law) and then broadened the separation, after the Brexit.

Swinging motions affect also the civil law area: the distinction between what concerns the public area and the private sphere may at times seem blurred.

In civil law we have experienced an increasing participation of private parties to procedures that traditionally belong to the State: *whistle blowers* have been encouraged to denounce unfair practices in competition (assisting authorities to start proceedings against infringements), or to lift the veil on illegal procedures in the public administration; in civil procedure an intermediate step in trials consisting in a mandatory mediation has obliged private litigants to adapt their strategies in planning their trials while, in some States in the US, a peculiar entitlement to denounce people involved in abortion practices has been granted to citizens, with a money reward attached to the initiative (rather similar to a bounty), bringing us back to procedures that predated the XVIII century criminal law reform and the public prosecution of crimes. Occasionally we have the impression that the State is "outsourcing" some of its prerogatives. And the sphere of social media

bypasses national borders and State controls: sanctions such as to cut out a connection of an individual with the public affect his/her network with results comparable to an “exile”, or at least a confinement. This field is especially challenging when trying to define a line between almost sovereign qualities and private ownership.

The image we can draw today for our students has moved from a relatively black and white opposition to a more nuanced image, that may be more accurate but also more challenging to present to our audiences.

III) Vivian Curran (University of Pittsburgh)

Private law-public law taxonomies in comparative law

As law becomes more porous for the thousands of reasons that are causing our world to change, comparative law steps into this greater haziness, and escapes definition or invites multiple definitions more than ever. The very taxonomies of public and private are not universal, and at the least vary among legal orders. If one views comparative law’s primary role as that of translator between semiotic systems, then its function must be to intermingle private and public law to the extent that the law of origin and that of destination categorize differently. My presentation will offer some examples of encounters between private and public law involving comparative law which suggest that those categories may be of limited use for comparative law.