Comparative law and international law: inevitable liaisons?

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1. *Introduction*

The cue to start reflecting on the connections between comparative law and international law comes from the renewed interest in a `comparative' approach to international law. Indeed, since the end of the last century, more and more international law scholars have become engaged in shaping 'Comparative International Law' as a new field of study, focusing on the impact of national legal traditions on the construction of international law. Accurate historical accounts demonstrate that neither the term, nor the idea are new.[1] However, it is undeniable that the case for Comparative International Law is increasingly now on the agenda of international law scholars, with well-structured, in depth analysis being offered. The recent collection of essays edited in 2018 by Roberts and others is only the most recent evidence of the renewed interest in this field.[2]

The opportunity of fruitful dialogue between international and comparative law scholars, which has rarely been communicated until now, is welcome. In fact, according to the traditional view, the (assumed) universal character of the rules governing relations between states would prevent any possibility of admitting different conceptions of these rules. In other words, the universal character of international

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[1] BN Mamlyuk, U Mattei, 'Comparative International Law' (2011) 36 Brooklyn J Intl L 385. From an Italian perspective, cf F Messineo, 'Is there an Italian Conception of International Law?', Cambridge J Intl Comp Law 879 (2013).

[2] A Roberts, PB Stephan, P-H Verdier, M Versteeg (eds), Comparative International Law (OUP 2018).

law ('the law of nations') would imply that it has little to do with comparative law.

Even if it is still not unusual to find supporters of this view, there is a growing awareness that a scale of consensus about the nature and content of international law has never been achieved. Moreover, international law continues to experience the impact of centrifugal forces threatening its integrity and cohesiveness. It is not by chance that international law scholars have remarked upon the fact that the phenomenon of fragmentation is clustering international law into sub-systems or legal regimes of various types, which operate at different levels, including the level of municipal legal systems, with varying degrees of autonomy.[3]

For all these reasons, comparative international law is now felt to be 'a useful vantage point from which to approach public and private international law without there being any apprehension that the existence or nature of international law itself is being called into doubt. The fundamental issues remain for all comparative inquiries: for what purpose is comparison to be undertaken and what relationship may or should exist between the application of the comparative method to the study of municipal legal systems and the role of comparison in international law?'.[4]

Against this background, in the following reflections I will move from a survey of how international law scholars are conceptualizing Comparative International Law as a new field of study, focusing on the merits of such an approach (section 2). Subsequently, I will suggest some remarks on comparative law as a cognitive need and on the role it can play in the change of epoch we are experiencing (section 3). From this, I will argue that if the case for Comparative International Law to shape a new field of study is limited (as it seems to be), the risk is to lose the opportunity for a more comprehensive reflection about the need for comparison as an essential key to understand the legal phenomenon itself (section 4).

[3] In this sense, W. E. Butler, 'Comparative International Law' (2015) 10 J Comp L 241, at 250.

[4] ibid 254.

2. *The attempt to conceptualize Comparative International Law and its merits*

Comparative international law scholars aim at establishing a field of research that 'entails identifying, analysing and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law'.[5] While this tentative definition has fluid and contingent contours, fairly precise ways are sought in order to explain how comparative law insights might prove useful in the field of international law.

The first way is to help in identifying the substantive content of international law, for instance when one needs to ascertain a custom, or a general principle. In these cases, it is necessary to analyse state practice and to examine if certain principles are (or not) concretely common to many legal systems.

The second way relates to the interpretation and application of international law. In this respect, supporters of comparative international law realize that different interpretations of international law norms are at the origins of miscomprehensions, so that a comparative approach might help lead to an enhancement in this field.

The third way is to provide an understanding and an explanation of different approaches to international law. For instance, 'states differ in the degree and types of power and influence they enjoy, which may affect whether they function primarily as exporters or importers of international law norms. They differ in their fundamental ideological commitments, which may affect their interpretations of central international law notions such as sovereignty and human rights'.[6]

Concerning the methods of comparative international law, lessons and insights can be taken both from comparative law and from comparative politics, in order to envisage a way of looking to international law issues from a broader perspective: 'Conceptualizing comparative international law *as a distinct field* allows us to better connect the work of different scholars on different continents and across different

[5] A Roberts, PB Stephan, P-H Verdier, M Versteeg, 'Conceptualizing Comparative International Law', in A Roberts, PB Stephan, P-H Verdier, M Versteeg (eds), *Comparative International Law* (n 2) 6.

[6] ibid 8.

generations and to focus greater attention on the field's historical evolution and future trajectory'.[7]

This ambitious research project clearly aims to use comparative methods in order to achieve the result of settling a new field of studies, as a distinct branch within the areas of interest of international law scholars.

One could hardly underestimate the value of such an attempt. It surely brings to the fore the need to overcome the self-referential attitude of some international law studies and research projects. Moreover, and at the same time, it also stimulates comparativists to engage themselves to 'cross the borders' and to investigate issues that they too often neglect.

In this sense, supporters of Comparative International Law hit the mark when they stress the need for an widening of the approach to international law. Let us take a very recent example, coming from a decision of the United Kingdom Supreme Court in the case *Warner v Scapa Flow Charters (Scotland)* of 17 October 2018, concerning the interpretation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974.[8] According to this Convention, the law of the court seized of the case (in this case, Scots law) governs 'the grounds of suspension and interruption of limitation periods'. The respondent relied on an interpretation of 'suspension and interruption' in coherence with a civil law perspective. The UK Supreme Court did not accept that the words 'suspension and interruption' should have a technical meaning derived from certain civil law systems. One of the reasons was because 'it is not appropriate to look to the domestic law of certain civil law systems for a technical meaning of the words in an international convention which was designed to operate in many common law systems as well'.[9] As a result, the Court concluded that the action brought by the applicant was not time barred.

Without going into detail, it is worth noting that this example clearly shows that different interpretations of international conventions are a reality and that a comparative approach is unavoidable.

[7] ibid 31, emphasis added.
[8] [2018] UKSC 52.
[9] ibid no 21.

While this confirms the merits of the attempts to conceptualize Comparative International Law, one can however question its methodological premise, in particular the underlying assumption that comparative law and international law are two distinct fields of study and that Comparative International Law should be enhanced as a new one.

3. *Comparison as a cognitive need*

The above said paves the way for some reflections about the role that comparative law can play in our contemporary world.

This is not the place to focus on the much-debated issue concerning the aims and methods of comparative law, which has always attracted the attention of comparatists, being engaged to give reasons for the utility of their field of study. Neither is it possible to show the contribution coming from history, too often neglected, showing to what extent a comparative approach to the legal phenomenon is inherent in the development of the western legal culture.[10]

More simply, the following remarks aim at providing a reminder that Comparative law is a 'strange' subject in legal studies.[11] Unlike most other fields, it does not deal with an area of law, such as contract law, torts law, company law, civil procedure, criminal law, international law and so on. Rather, it is a way of looking at legal problems, legal institutions and entire legal systems moving from the acknowledgment that the legal phenomenon is universal and relative at the same time. Every community of human beings implies at least a minimum level of normativity, but the ways in which its rules are conceived and applied can vary, even consistently, according to the different social, historical, political, religious and economic contexts.

In this sense, comparative law is a cognitive process having a circular movement. It goes from one legal system to another and from the latter it comes back to the former, enriching the knowledge of the specific features of each of them, together with the aspects they have in

[10] See G Gorla, L Moccia, 'A "revisting" of the comparison between "Continental Law" and "English Law" (16th-19th Century)' (1981) 2 J L History 143 ff.

[11] As pointed out in the well-known textbook *Schlesinger's Comparative Law* (7th edn New York 2009) 2.

common. The study of a foreign law, being 'else' in relation to one's 'own' law, leads not only to knowledge of aspects and elements of the foreign law under scrutiny, but it also has an added value, which has been designated as the 'reflective quality of comparison'[12]. Using the comparative method, 'it becomes possible to make observations and to gain insights which would be denied to one whose study is limited to the law of a single country'.[13]

Recalling the punchy words of the outstanding Italian comparatist Gino Gorla, 'an 'individual' does not exist without the 'other''.[14]

This is a crucial remark, because it suggests that it is not only law, but every field of knowledge which needs a comparative approach for cognitive purposes. After all, one may recall what Brutus says to Julius Caesar in Shakespeare's masterpiece: 'the eye sees not itself, but by reflection, by some other things' (act 1).

Without any pretention of completeness, a useful reference comes from the studies carried out in relation to multiculturalism by the contemporary philosopher Charles Taylor. According to him, it is essential to 'take into account a crucial feature of the human condition that has been rendered almost invisible by the overwhelmingly monological bent of mainstream modern philosophy. *This crucial feature of human life is its fundamentally dialogical character*'.[15] He continues: 'we define our identity always in dialogue with, sometimes in struggle against, the things our significant others want to see in us. […] My discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others. That is why the development of an ideal of inwardly generated identity gives a new importance to recognition. *My own identity crucially depends on my dialogical relations with others*'.[16]

Even though from a different perspective, the French philosopher Paul Ricoeur illuminates a similar point in his fundamental work 'Soi-

[12] Cf L Moccia, *Comparazione giuridica e Diritto europeo* (Giuffré 2005) 95 ff.

[13] Schlesinger (n 11) ibid.

[14] G Gorla, 'Diritto comparato' in *Enciclopedia del Diritto* vol XII (Giuffré 1963) 928.

[15] C Taylor, 'The Politics of Recognition' in A Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton UP 1992) 25 ff, at 32 (emphasis added).

[16] ibid 33 ff (emphasis added).

même comme un autre'.[17] As the author points out, the title itself evokes an alterity being constitutive of the 'ipseity'. What constitutes fundamentally the being of man is not the presence of an invariable nucleus of personality but, on the contrary, the relations that he/she is able to establish with the world and the others, defining him/her in return. Therefore, the notion of 'ipseity' identifies the reflexive character of the being of man.

The German philosopher Jurgen Habermas expresses a converging viewpoint. He recalls that persons can only be individuated passing through processes of socialization, so that the integrity of a single person can be enforced if access to interpersonal relationships and to cultural traditions is guaranteed, because this is necessary in order to preserve his/her own identity.[18]

For his part, with a special regard to the European context, the Polish sociologist Zygmunt Bauman, recalling the reflections of Gadamer, observed that the outstanding merit of Europe has been its ability to live with the other, as 'the other of the other'.[19] Europe has been able to learn the art of living together, overcoming differences and alterities.[20]

Of course, these references demand a much deeper and accurate account than is possible in the context of our paper. Yet, they seem sufficient to fix a substantial issue: in order to understand oneself it is inevitable to meet someone 'else'. In every field of knowledge, the aim of comparison is specifically to develop tools and methods in order 'to put oneself in perspective'.[21] Law does not escape from this cognitive remark.

It is from this background that in the twentieth century, comparative law scholars stated that it is 'superficial and false' to conceive law simply as a set of norms in force in each state. They noticed that each legal system uses a specific vocabulary, it regroups its rules in specific categories, and it is linked to a particular conception of the social order.

[17] P Ricoeur, *Soi-même comme un autre* (Le Seuil 1990) esp 78 ff.
[18] J Habermas, *L'inclusione dell'altro. Studi di teoria politica* (Feltrinelli 2008) 220.
[19] Z Bauman, *L'Europa è un'avventura* (Laterza 2012) 9.
[20] ibid 151.
[21] As observed by M Detienne, *Comparer l'incomparable* (Le Seuil 2000) 111: 'comparer, c'est d'abord mettre en perspective, et il faut y insister, qu'on me le pardonne, en se mettant *soi-meme* en perspective'.

'Difference' in law has to do with all this and therefore it cannot be reduced to the variety of legal rules in force in a given territorial ambit.[22]

The theory of legal systems (or legal traditions) was shaped in response to the need to study law as a phenomenon that varies in time and in space. The attempt was aimed at developing a set of criteria in order to define the identity of a legal system or of a group of legal systems (a legal style), in relation to some durable elements characterizing a legal experience, beyond the differences existing in the national legal orders.

Many classifications of legal systems have been suggested. Each one is relative, rough and approximate, so it has to be taken cautiously, avoiding the risk to consider it as having anything more than a descriptive and didactical value. With this note of caution in mind, one should not underestimate the merits of the theory of legal systems. It played a decisive role against the self-referentiality of the legal discourse, accentuated by the trend of legal positivism and of its dogmas, with the result of enclosing the role of jurists in a sometimes sterile exercise of analysis and application of legal rules enacted by the legislature of each country. The consequences of this approach have not completely disappeared and still now, especially in the civil law countries, it is often taken for granted that law is to be identified from the rules enacted by the legislature.

4. *The need for a new methodological perspective. Critical remarks on Comparative International Law as a new field of law studies*

Nowadays, we live in a period characterized by new phenomena, which are increasingly complex, such as globalization and, at the European level, supranational integration.

Our epoch of changes (rather, a change of epoch) is characterized by contradictory phenomena which are difficult to interpret and to understand. Globalization is often faced with resurgent nationalism and localism, so that it seems inaccurate to deny the complexity of our contemporary society. The German sociologist Ulrich Beck notices: 'at the

[22] See R David, *I grandi sistemi giuridici contemporanei* (R Sacco trs, CEDAM 2004) 16.

beginning of the 21st century the conditio humana cannot be understood nationally or locally but only globally. 'Globalization' is a non-linear, dialectic process in which the global and the local do not exist as cultural polarities but as combined and mutually implicating principles. These processes involve not only interconnections across boundaries, but transform the quality of the social and the political inside nation-state societies. This is what I define as 'cosmopolitanization': cosmopolitanization means internal globalization, globalization from within the national societies. This transforms everyday consciousness and identities significantly'.[23]

More precisely, the contradiction of our age lies in the fact that, on the one hand, national borders and distinctions seem to weaken, altogether with the certainties and the categories that were at the base of the modern idea of state. The differences between legal systems or traditions become more and more elusive, to the point that they seem to be evanescent. Therefore, due to the ongoing reciprocal contaminations and the fast changes characterizing our age, it is now clear that it is neither possible nor useful to split the world into well-defined and static legal families. As a consequence, the theory of legal systems itself is often called into question.

On the other hand, however, it suffices to move from one's personal experience to realize that when we have discussions with jurists coming from other countries, it is easy to notice that different perceptions of law, of legal institutions and of legal concepts do continue to emerge even nowadays. Words such as 'constitution', 'judge', 'contract', 'property' almost automatically identify a content, an idea, a figure in the mind of every jurist, which can evoke a very different meaning in the mind of a jurist coming from another legal tradition.

These contradictory phenomena are a challenge for comparative law. They suggest a critical reflection about the traditional way of considering diversity in terms of geographic opposition. Roughly speaking, the theory of legal systems was built on the acknowledgment that the 'other' was necessary to understand one's legal system and law in general, but the basic assumption was that this 'other' was essentially 'out-

[23] U Beck, 'The Cosmopolitan Society and its Enemies' (2002) 19 *Theory, Culture & Society* 17 ff, at 17.

side'. Nowadays, on the contrary, the 'other' is 'inside'. It is a common experience that the 'others' are often our neighbours.[24]

Therefore, diversity and difference are a fact to face with methods needing to be compatible with this new scenario. Not by chance, legal historians also seem to be more aware of what is at stake, repeating the concept of 'entanglements' and preaching the need to stop to project 'our own categories and concepts on to realities different from the ones these categories and concepts have emerged from'.[25]

From this perspective, comparative law will have an even more important role to play. If the 'else' is unavoidable, is it possible to do without comparison in the legal field?

At the same time, the preceding remarks are a useful starting point to work out some critical observations in the attempt to shape Comparative International Law as a new field of law. They are based on the simple (but not simplistic) assumption that it is doubtful whether we really need an umpteenth field of study aiming at considering similarities and differences in the approach to international law issues.

In the actual context, characterized by a never-ending change of paradigms, what is rather essential is an involvement of every jurist in a deeper methodological and conceptual effort, aiming at paving the way for a contamination and enlargement of the approach to the 'law' itself.

It is important to realize the challenge we are facing nowadays. The German sociologist Ulrich Beck describes it as follows: 'The world is unhinged. As many people see it, this is true in the both senses of the word: the world is out of joint and it has gone mad. We are wondering aimless and confused, arguing for this and against that. But a statement

[24] As has been rightly observed: 'Behind an apparent trend to homogenization of world cultures, that brings out new macro identities, such as the one of global consumers, counter dynamics are set in motion that lead, not without tension, to the emergence, consolidation or reformulation of specific cultural and ethical values common to the various cultural areas. Increased mobility coupled in particular with migration flows have brought others very close to us. These "others" no longer live in some distant country, but right in our own town or neighbourhood' (L Moccia, 'Education to "Inter-Cultural Citizenship": A European Perspective to Global Citizenship' (2014) 11 *La cittadinanza europea* 161).

[25] T Duve, 'Entanglements in Legal History. Introductory Remarks' in T Duve (ed), *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 3, at 7.

on which most people can agree, beyond all antagonism and across all continents, is: 'I don't understand the world any more''.[26]

From this background, it seems questionable, if not radically unrealistic, to continue to mark lines and boundaries among legal fields and to create new specialisations. Academics should rather realize that their duty is to educate jurists while being conscious that they have a role and responsibilty to project their professionalism in a supranational and transnational space, where national legal systems are integrated in a society whose distinctive mark is pluralism, especially in the legal field. Neither should comparatists focus their effort to subdivide the legal globe into groups or families built on territorial boundaries, which prove to be uncertain and obsolete; nor should internationalists involve themselves in shaping another specialisation. A mixing and a contamination of knowledge is urgent.

In this sense, there is indeed and ever increasingly the need for a comparative approach to the legal phenomenon.

[26] U Beck, *The Metamorphosis of the World* (Polity Press 2016) 1.