SPECIAL ISSUE: "WHO NEEDS COMPARATIVE LAW?"

WHO DOES NOT NEED COMPARATIVE LAW?

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1. Comparison as a cognitive need.

The debate concerning the aims of comparative law has always attracted the attention of comparatists, being engaged to give reasons about the utility of their field of study. In the following brief remarks I dare participate to the debate on the question "who needs comparative law?", turning it in a different one, as the title suggests.

Comparative law is a 'strange' subject indeed[1]. Unlike most of the other fields of legal studies, it does not deal with an area of law, such as contract law, torts law, company law, civil procedure, criminal 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 common. The study of a foreign law, being "else" in relation to one's "own" law, leads not only to know aspects and elements of the foreign law under scrutiny, but it has also an added value, which has been designated as the "reflective quality of comparison"[2]. Through the use of a 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"[3].

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[1] As pointed out in the well-known textbook *Schlesinger's Comparative Law*, 7th ed., New York, 2009, p. 2.

[2] Cfr. L. Moccia, *Comparazione giuridica e Diritto europeo*, Milano, 2005, pp. 95 s.

[3] R. Schlesinger, *ibid.*

Recurring to the punchy words of the outstanding Italian comparatist Gino Gorla, "an 'individual' does not exist without the 'other'"[4]. This is a crucial remark, because it suggests to broaden the perspective far beyond the field of law.

Without any pretention to give an exhaustive account, nevertheless it is useful to evoke here some reflections showing that in every field of knowledge the cognitive need of comparison does emerge.

To begin, we can move from the studies carried on multiculturalism by the contemporary philosopher Charles Taylor, according to whom 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*"[5]. 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*"[6].

Even if from a different perspective, the same point is illuminated by Paul Ricoeur in his fundamental work "Soi-même comme un autre"[7]. As the Author points out, the title itself evokes an alterity being constitutive of the "ipseity", in the sense that 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.

A converging angle of view is expressed by Jurgen Habermas, when he remembers that persons can only be individuated passing through processes of socialization, so that the integrity of a single person can be enforced if an access to interpersonal relationships and to cultural traditions is guaranteed, because this is necessary in order to preserve his/her own identity[8].

For his part, with a special regard to the European context, Zygmunt Bauman observed, recalling the reflections of Hans-Georg Gadamer, that the outstanding merit of Europe has been its ability to live with the other, as "the

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[4] G. Gorla, voce *Diritto comparato*, in *Enc. Dir.*, vol. XII, Milano, 1963, p. 928.

[5] C. Taylor, *The Politics of Recognition*, in A. Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, Princeton, 1992, pp. 25 ss., at p. 32 (emphasis added).

[6] *Ivi*, p. 33 f. (emphasis added).

[7] P. Ricoeur, *Soi-même comme un autre*, Paris, 1990, esp. p. 78 ff.

[8] J. Habermas, *L'inclusione dell'altro. Studi di teoria politica*, Bergamo, 2008, p. 220.

other of the other"[9]. Europe has been able to learn the art of living together, overcoming differences and alterities[10].

Of course, these references would demand a much deeper and accurate account than it is possible in the context of our brief remarks. 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, comparison has precisely the aim to develop tools and methods in order "to put oneself in perspective"[11]. Law does not escape to this cognitive remark. If the 'else' is unavoidable, is it possible to do without comparison in the legal field?

2. The theory of legal systems under challenge.

In the twentieth century, moving from the assumption that it is "superficial and false" to conceive law simply as a set of norms in force in each state, comparative scholars noticed that each legal system uses a specific vocabulary, it regroups its rules in specific categories, it is linked to a particular conception of the social order. "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[12].

The theory of legal systems (or legal traditions) has been shaped in response to the need of studying law as a phenomenon which varies in time and in space. The attempt was directed to develop 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 more than a descriptive and didactical value. With this caution, 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 not infrequent to take for granted that law is to be identified with the rules enacted by the legislature.

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[9] Z. Bauman, *L'Europa è un'avventura*, Roma-Bari, 2012, p. 9.

[10] *Ivi*, p. 151.

[11] As observed by M. Detienne, *Comparer l'incomparable*, Paris, 2000: « 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 » (p. 111).

[12] See R. David, *I grandi sistemi giuridici contemporanei*, trad. it a cura di R. Sacco, Padova, 2004, p. 16.

Nowadays, we are living in a period characterized by new phenomena, more and more complex, such as globalization and, at the European level, supranational integration. National borders and distinctions seem to vanish, altogether with the certainties and the categories which were to 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.

Due to the ongoing reciprocal contaminations and the fast changes characterizing our contemporary age, it is now clear that it is not possible nor useful to split the world in well-defined and static legal families. Does this mean that the theory of legal systems is definitively outdated? More radically: has comparative law a role to play at the present time?

3. Towards a new methodologic and conceptual perspective.

The hard questions suggested above cannot be answered in abstract and general terms. Yet, they are a challenge to be faced.

As a starting point, in order to put oneself on the trail of possible answers, suffice is to move from one's personal experience. When we discuss with jurists coming from other countries, it's easy to realize 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.

This elementary remark shows that our epoch of changes (or, rather, a change of epoch) is characterized by contradictory phenomena being difficult to interpret and to understand. Only to give a simple example, globalization is often faced with resurgent nationalisms and localisms, so that it seems inaccurate to deny the complexity of our contemporary society. As it 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"[13].

Comparative scholars need to consider the new context where they are called to live and work. It has been described as follows: "at the beginning of

[13] L. Moccia, *Education to 'Inter-Cultural Citizenship:' A European Perspective to Global Citizenship*, in *La cittadinanza europea*, 2014, p. 161.

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"[14].

The cosmopolitism which characterises our contemporary society suggests a critical reflection about the traditional way of considering diversity in terms of geographic opposition. Roughly speaking, we could say that the theory of legal systems was built on the assumption that the "other" was necessary to understand one's legal system and law in general, but it was essentially "outside". Nowadays, on the contrary, the "other" is "inside": it's common experience that the "others" are often our neighbours. So, diversity and difference are a fact to face with methods being compatible with this new scenario. Not by chance, also legal historians seem to be more aware of what is at stake, recurring to the concept of "entenglements" 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"[15].

To this respect, it's worth remembering that within the western legal culture generations of comparative scholars stressed the dichotomy between the civil law and the common law traditions, describing it in terms of a territorial opposition. Now, this common view needs to be reassessed. Indeed, the study of the two traditions leads to notice some common problems, such as the relations between law and society, society and state, legislative power and judicial power, authority of public powers and individual rights and freedom, law and procedure, techniques of interpretation and of legal reasoning, the role of precedent, the organization of legal professions and of the judiciary. All these aspects can be no longer studied only in connection with a territorial dimension of the borders of the legal globe. On the contrary, their comparative study needs to abandon a schematic approach in favour of an attempt to look at the relevant issues as an expression of a way of being of law as a form of rationality, which can be recognized in relation to specific territorial scopes, but

[14] U. Beck, *The Cosmopolitan Society and its Enemies*, in *Theory, Culture & Society*, 2002, pp. 17 ss., at p. 17.
[15] T. Duve, *Entanglements in Legal History. Introductory Remarks*, in T. Duve (ed.), *Entanglements in Legal History: Conceptual Approaches*, Frankfurt am Main, 2014, p. 3, at p. 7.

foremost as a set of rules, principles and customs around which every legal experience is articulated[16].

In other words, a new observation point is needed. It is no longer possible to consider civil law and common law in terms of a geographic dichotomy, not only because both traditions are outstanding expressions of a common history of European law, but (and foremost) because their study leads to discover that some peculiar attitudes which characterized each of them in terms of separation can now be found in an integrated way. Only to give an example, the tension between statutory law and the judicial formation of law is present everywhere, both in the civil law tradition, where judges are no longer (if they ever were) the "bouche de la loi", and in the common law tradition, where legislation is growing and reaching almost every field of law. It would be "superficial and false" to draw the conclusion that common law and civil law systems are converging because in the common law countries judges are more and more solicited to interpret and apply statutes, whereas their civil law colleagues are enlarging their field of action as a consequence of the increase of legislation. This for the simple reason that the same phenomenon (increase of legislation) produces two opposite results: the bureaucratization of the role of judges in the common law systems and a more creative role in the civil law tradition[17]. At the same time, it's impossible to deny that in both legal traditions we can find evidence of new ways to conceive the role of judges and to shape the techniques of judicial interpretation and of legal reasoning. Again, the motive of an integration re-emerges.

As a tentative conclusion of these remarks, it's possible to state that there is more and more the need for a comparative approach to the legal phenomenon. An approach being not focused to subdivide the legal globe in groups or families built on territorial boundaries, which prove to be uncertain and obsolete, but being able to educate a jurist conscious to have a role and a task projecting his professionality 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.

[16] For these remarks, see L. Moccia, *Comparazione giuridica, diritto e giurista europeo: un punto di vista globale*, now in L. Moccia, Comparazione *giuridica e prospettive di studio del diritto*, Padova, 2016, p. 28 f.
[17] Cfr. L. Moccia, *Comparazione giuridica e diritto europeo*, Milano, 2005, p. 846 ff.