SPECIAL ISSUE: "WHO NEEDS COMPARATIVE LAW?"

HAS COMPARATIVE LAW IN ITALY LOST ITS DRIVING FORCE?

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SOMMARIO: 1. A book on comparative law in Italy from a quarter-century ago. - 2. Some questions, 25 years on. – 3. A few reflections on some statistical data.- 4. The lynchpin of the debate: what distinguishes the comparative approach from other branches of knowledge.-5. Comparison is a cognitive process: consequences.- 6. The driving force. -7. Future developments.

1.In Italy, the comparative method has been the means to reveal the shortcomings of more traditional ways of reflecting upon the law. Both in intention and reality, it has served, in particular, to stigmatise dogmatism and formalism by highlighting their "ideological" nature.

Some of the assertions made by one of the undisputed fathers of the Italian comparative method, Rodolfo Sacco, still resonate today: «in the field of civil law, the *birth* of a comparative method, unsatisfied by the investigative tools of domestic law and therefore anxious to replace them, dates from a period when all new proposals battled *a common enemy*. This enemy is the systematic method, also referred to as conceptual or dogmatic, with its arbitrary *a priori* positions. Both dogmatic tendencies – those faithful to the Pandectist school and to the new systematics – were influenced by them in various ways. …. Gorla, who *turned against* dogmatism from 1941 on, (he formulated his position in *L'interpretazione del diritto [The Interpretation of Law]*, Milan, 1941), set out to find a new method of interpretation … Once law is stripped of dogma, the juridical constant must be sought elsewhere: Gorla conducts research inductively, begins to disregard such legal maxims and centres on the reasons behind the decision»[1].

[1] SACCO (1980), pp. 244 and 245. Emphasis added.

Considerations of this kind have been repeated at intervals several times. Merely as an example, we can recall some excerpts, set out in a book[2], from an interview with Rodolfo Sacco. The book, published by Giuffrè in 1992, reproduces the Master's discourse with a score of comparative jurists discussing other comparative themes of great interest, from general issues to the relationship between the comparative method and history, as well as the other sciences, and so forth.

Rodolfo Sacco made several observations:

«I wanted to show that the comparative method allows legal systems to be *uncovered*, in order to reveal what lies within, hitherto concealed, because in each of these legal systems there are cryptotypical categories, which in other systems are known and proclaimed » (page 5).

«I believe at this point that third-year students are convinced of the two following obvious factors. No. 1. The dogmatic approach offers a monitoring mechanism based exclusively on the consistency of the various definitions, or various data, if you like. However, it is possible to have a system which is completely consistent and composed of wholly stupid definitions, even if they are consistent with one another. No. 2. *The comparative method* functions in the description of what is hidden in the system (uncovering cryptotypes); and, above all, without too much regard for our acquired habits of thought, discloses to us the contradictions inherent in our formulae with respect to the reality of the situation (that is, with respect to the operational rule). I perceive that the three checks on validity in the last two hundred years were, respectively, positivist, rationalist and historical-dogmatic. Today the positivist approach, which focuses on the empirical (precedent) and believes in making it absolute, is unpopular; the rationalist approach, which focuses on an abstract thought, but cannot say why the thought should be that one in particular, has no corollary; the dogmatic approach, that makes choices and deductions with little empirical support, is wearing thin. Thus the positive criterion looks for effectiveness and becomes realism. The rationalist criterion ties itself to economic-mathematical thinking and becomes a cost-benefit analysis. The historical-dogmatic one looks at empirical data, filters it through a taxonomic analysis of the surrounding reality and so becomes the comparative method» (page 13).

«At the age of 21 I witnessed the fall of National Socialism with my own eyes. At 67, on the television, I saw communism come crashing down. And now I am about to see the *nationalistic postulate in the teaching of law* collapse» (page 216).

[2] SACCO (1992b).

«The comparative approach in law has not yet been born. Or else it is in its first day of life» (page 19)[3].

2. 25 years on from the publication of the volume reproducing the interview with Rodolfo Sacco, it is worth posing some questions. What does the comparative method "uncover" today? What does it "disclose"?. Has the "nationalistic postulate" in the teaching of law really collapsed? Has the comparative approach really seen the light of day? The comparative approach in legal studies has been asserted in Italy as a "revolt" against formalism and dogmatism. And their limitations. The comparative scholars or "revolutionaries", as they once were, now seem to have become the *bourgeois*. Comparative law has perhaps become something comparable to the way dogmatism came to be viewed in the last century (that is, an approach destined to perpetuate the status quo, which conceals an ideology of power).

3. In 2000, at the start of the new millennium, there was one single comparative law association, the l'AIDC (Associazione italiana di diritto comparato [*Italian Association of Comparative Law*])[4]. There were 43 full professors in the Jus/02 area (Comparative Private Law) [5]. Conversely, there were 53 full professors in the Jus/21 area (Comparative Public Law).

Fifteen years later, that is at the end of 2015, the situation was as follows. The one comparative law association had now become three. Full professors in the Jus/02 area increased slightly, from 43 to 48, whereas the full professors in the Jus/21 area have declined noticeably, from 53 to 38.

The AIDC has been joined by the Associazione di diritto pubblico comparato ed europeo [*the Association of comparative public and European law*] (the DPCE, formed in 2001 with "the aim of promoting debate among scholars and people involved with the law in the national and International context, paying particular attention to the comparative method »)[6]; and the Società italiana per la ricerca nel diritto comparato [*the Italian Society for research into comparative law*]

[3] In the quotations from Sacco, the italics have been added. The analysis of these methodologies set out in the text can be found in the so-called "Trento theses" ["*Tesi di Trento*"], a scientific manifesto on the comparative approach to legal studies, developed in 1987 by a group of comparative law jurists (F. Castro, P. Cendon, A. Frignani, A. Gambaro, M. Guadagni, A. Guarnieri, P. G. Monateri, R. Sacco), some of whom were already lecturers in the Law Faculty of Trento. The 5 theses can be found on the following website: https://it.wikipedia.org/wiki/Tesi_di_Trento.

[4] http://www.dirittocomparato.org/.

[5] The statistics have been retrieved from the MIUR database, referring to the body of university teachers. http://cercauniversita.cineca.it/php5/docenti/cerca.php.

[6] http://www.dpce.it/.

(the SIRD, set up in 2010 for «the purpose of promoting the science of comparative law and collaboration between jurists – Italian legal scholars or those in practice – working in Italy or wishing to practise in connection with them»)[7].

I will be expanding on this dynamic evolution in another work. For present purposes, comment must be limited to a making few rapid observations.

The growth of such "scientific societies" is a trend which is a feature of the last 15 years, both within and outside the legal environment. In general, it can be said that a) there is no scientific disciplinary area today that does not have at least one «sector association»[8]; b) the driving force behind the creation of new scientific associations is fed by the desire to become interlocutors of organs such as Anvur[9] [*a national agency for evaluating universities and research*]; c) frequently the existence of different associations within the same scientific-disciplinary sector seems to be justified more by academic differences than by differing theoretical perspectives.

Italian private law specialists (scientific-disciplinary sector Jus/01) are represented by three different associations: the Associazione civilisti italiani [*Society of Italian civil lawyers*][10], the Società Italiana Studiosi del Diritto Civile [*The Italian Society of civil law scholars*][11] and the Unione dei privatisti [*Union of private law lawyers*][12]. In 2011 no less than two taxation lawyers' associations were formed (the Jus/12 scientific-disciplinary sector): the Associazione Italiana dei Professori di Diritto Tributario [*Italian Association of Taxation Law professors*][13]; and the Società Italiana Studiosi di Diritto Tributario [*Italian Society of Taxation Law scholars*][14]. To validate what was mentioned earlier on the wish to become interlocutors of institutional entities, it is worth recalling that the statute of the last association mentioned reads as follows: the SSDT «may, in representing the interests of members, and in any case in the general interest, formulate requests and opinions addressed to organs of the Public Administration, including the Minister for Universities, CUN, Anvur and any other entity with similar aims».

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[7] http://www.sirdcomp.it/.

[8] On the rise of scientific disciplinary sectors and their impact on teaching and research, see PASCUZZI (2012).

[9] *Agenzia nazionale di valutazione del sistema universitario e della ricerca*, http://www.anvur.org.

[10] ACI, founded in 2003. http://www.civilistiitaliani.eu/.

[11] SISDIC, founded in 2003. http://www.sisdic.it/.

[12] UP, founded in 2011.

[13] AIPDT, founded in 2011. http://www.aipdt.it/.

[14] SDT, founded in 2011. http://www.studiosidirittotributario.it. The Associazione dei tributaristi (http://www.associazionetributaristi.eu/) had already existed for many decades, but it does not, however, occupy the same ground as the kinds of associations mentioned in the text, whose ambit mainly overlaps the academic perspective of a discipline area.

A similar provision can also be found in the statute of taxation association mentioned earlier (AIDPT).

We can deduce from this that the increase in the number of comparative law associations (from one to three) is part of a more general phenomenon. If anything, we should be asking whether the comparative lawyers must also share the dynamic which is driving this phenomenon (i.e.: unionization of the disciplines; the rigid compartmentalisation of research with regard to immovable disciplinary sectors; deference to the dictates of evaluation bodies; indulgence towards academic disputes which have no theoretical content), or, conversely, that they should not be challenged.

Some reflections, too, on the number of professors. The analysis was limited to the number of full professors. Overall, they have become reduced over a period of five years. In particular in the Jus/21 sector. This phenomenon may have had an impact on the aging trends with regard to academic staff (the increase in the average age) and the shrinkage of funds for the financing of the universities: since 2008, the FFO [*funds for the financing of the universities*] has been relentlessly cut.

However, looking at the MUIR [*Ministry for education, universities and research*] statistics, another interesting phenomenon becomes apparent – the osmosis between disciplinary sectors.

There are few professors belonging to other disciplinary sectors who have transferred to the Jus/02 or Jus/21 sectors. Conversely, there are many comparative law professors who have migrated from the Jus/02 or Jus/21 categories to other disciplinary sectors. How has this come about? Is it an isolated case? Are there theoretical reasons for this? Is comparative law just a springboard to something else? Has the role of the comparative approach served its purpose? Or can it be attributed to the selection process or factors and/or to do with academic schools? Perhaps it is the combined effect of all these things.

4.Jurists can be differentiated from one another on the basis of their commitment to a profound exploration of one specific sector of legal knowledge. In fact, a distinction is normally made between civil, criminal and public law lawyers, taxation, constitutional, international lawyers and so on.

The discussion is quite different so far as comparative lawyers are concerned. Their name does not derive from a field of knowledge but from a cognitive process, comparison. The name "comparative lawyer" [It. *comparatista*] does not of itself imply the possession of competence in a particular area of law, but expertise in a methodology.

There are legal scholars who know *about something* (such as civil law experts, criminal law experts, etc).

And there are legal scholars who know things *in a certain way*: precisely, comparative lawyers.

At first glance, the term 'comparative lawyer' throws no light on what the scholar studies (or rather, the field of enquiry to which the cognitive process is applied) but it tells us the way he or she works. It is not by chance that the comparative approach gives rise to independent disciplines in fields other than law. One only need think of other subjects, also taught at university, such as comparative anatomy, comparative zoology, comparison of economic systems, of political systems, and so on. Comparison is a cognitive process. The application of this process is a feature of comparative lawyers.

5.The fact that comparison is a cognitive process has consequences which I will now try to list briefly.

A) If comparison is a cognitive process, it makes little sense to speak of the «perimeters of the discipline» since the discipline does not have a subject-matter but refers to a methodology[15].

Even so, there are those who strive to define the limits of comparison. For example, in some of the minutes of selection procedures, the work of young scholars is (under)rated, because it is said not to pertain to the disciplinary sector or the sector relating to the competitive selection, not because comparative methods have not been adopted, but because it relates to some topics, but not others, held to be of relevance to the sector concerned in the competition.

B) Those who define themselves, even nominally, by a cognitive and methodological approach can only look favourably upon other cognitive and methodological approaches.

It is not by chance that many comparative lawyers are also adherents of other approaches as well, such as the economic analysis of law (for example, Roberto Pardolesi)[16]; *law and literature* (for example, Pier Giuseppe Monateri)[17];

[15] Sacco writes (1992b), p. 183: «The comparative concept has only one limit, namely the homogeneity of the subject-matter governed by the law».

[16] Roberto Pardolesi is the director of the *Law & Economics LAB* (Laboratorio di analisi economica del diritto http://www.law-economics.net/). His is the author of many essays on topics connected to law and economics. See PARDOLESI (1992). See also COOTER, MATTEI, MONATERI, PARDOLESI, ULEN, (2006).

[17] Pier Giuseppe Monateri is the vice-president of AIDEL, Associazione italiana diritto e letteratura [*the Italian association of law and literature*] (http://www.aidel.it/).

law and technology (while excusing the presumption, this example refers to me)[18]; and so on.

As a discipline, the comparative approach must make room for all other innovative approaches.

C) The dialogue between fields of knowledge – law, history and much else.

The comparative method allows us to see how legal institutions originated and how they have evolved. Therefore it investigates historical aspects[19], as well as sociological and economic ones, and so forth. Comparative lawyers attack boundaries between disciplines. They are masters, among other things, of interdisciplinary skills[20].

D) Innovation (in legal terms, or otherwise).

By studying the origins and circulation of legal institutions and models, the comparative method prioritises change and innovation as the subjects of scrutiny[21]. The comparative method studies the techniques of legal innovation[22].

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[18] On the relationship between law and technology, see: Pascuzzi (2016).

[19] The second of the Trento theses on the comparative approach to legal studies, referred to above, states: «The comparative method focuses attention on various legal phenomena which have taken shape in the past or in the present, following the criterion that something concretely achieved can be considered to represent reality. From this perspective, the comparative method is based on the same evaluation criteria as the historical sciences».

[20] On the elements of interdisciplinary work, see Pascuzzi (2013), 184 ff.

[21] Gorla (1989), para. 2.3, asks himself whether the comparative scientific method can extend to an etiological investigation capable of ascertaining the reasons which cause changes in the law. According to Rodolfo Sacco (1992a, p. 18) the comparative approach has a factual and diachronic (as well as synchronic) view of the law, and therefore it deals with the realities which determine or paralyse the impulse for legal innovation.

[22] In the «Introduction to comparative law», just cited, Rodolfo Sacco (1992a) writes: «Innovations in legal models can be found at every turn. An original judgment, a daring response given by a student at an examination, contain innovation. The only innovations which count, however, are those coming from an authoritative body or, precisely, are issued by an authority, or which are imitated, become widespread and so generally diffused. With reference to synchronism, innovation which does not originate with an authority is erroneous: through judicial error, advocate error, or student error. From the diachronic perspective, the nature of the innovation is more obscure: if it is imitated, it will be a creation, a discovery; only when it fails to find imitators will it be considered an isolated opinion, an error». Sacco asks himself what the origin of innovation may be, identifying some techniques which are invented and applied to satisfy the increasingly sophisticated requirements of society (p. 134). The comparative scholar from Turin endeavours to list some of these techniques: the desire to generalise (for harmony, by analogy); assimilation (parity of treatment of cases since they share analogous elements); differentiation (differentiation of treatment because the cases have elements which distinguish them from one another); the emergence of unexpressed contents from known propositions and interpretations; the combination of basic legal institutions (p. 146 ff.).

Comparative scholars study the creativity of jurists[23].

E) The training of jurists should take more account of cognitive processes than of the disciplines themselves (declarative knowledge)[24].

More emphasis should be placed on skills development[25]. Comparative law should not be taught. Students should be taught to *undertake* comparison. The history of legal systems should not be taught, students should learn to create the history of law. Beyond this, the objective should not only be the collapse of the «nationalistic postulate», or the training of «municipal jurists»[26]. The aim is to is to produce «lawyers without law». Jurists capable of operating in any legal system.

F) A cognitive process is itself a technology. A technology of the mind.

Comparative lawyers adopt a technique to achieve cognitive objectives. The conference organisers stigmatise those who believe the law to be «an instrument of social engineering»[27]. I believe that law is a technology. However, the task of those who study a particular technology is to understand the uses (obvious or otherwise) to which the technology may be put. This is likewise the task of anyone who uses a cognitive process (such as the comparative method) in order to discover knowledge. The comparative approach reveals the dynamics of power and highlights and the values underlying the various available options.

The title of this paper is deliberately provocative: it recalls the driving force of a renowned revolution.

When it originated in Italy, the comparative approach in many respects represented a small-scale revolution. It did away with the 'old' and stood for the 'new'. The destiny of the 'new' is to become 'old' itself, merely through the passage of time.

Must the comparative method turn into (or has it already become) a "discipline" like all the others? One branch of knowledge among many? Must the comparative approach align itself with legal training which is based on

[23] Pascuzzi (2013a).

[24] Pascuzzi (2009).

[25] On the distinction between knowledge and skill, see PASCUZZI, (2013b).

[26] Sacco (1992b), p. 216.

[27] The text the letter of invitation written by the organisers of this conference (professors Massimo Brutti and Alessandro Somma) reads as follows: « There prevails a vision of the law as an instrument of social engineering, of government (but no questions are asked about what forces and interests guide the governing power or what ideology sustains it). Legal phenomena become separated from politics and de-contextualised. The comparative method becomes a question of recognising similarities and distinctions between abstract forms: the very opposite of what is required for a real comparison of given historical realities». Assertions with which I wholly agree, in the sense which I have emphasised in the text.

specific disciplinary sectors [28]? Must it fall into line with a departmental organisation which punishes inter-disciplinary research[29]? Must it adjust to this system of evaluation, which is generating conformism and killing off precisely those values of innovation and interdisciplinarity [30]? Is the comparative approach in legal studies destined to become the formalism and/or dogmatism of the twenty-first century? Is the comparative lawyers' fate to shove others aside in order to gain a few more teaching credits for their degree courses?

7. In my view, the comparative method should continue to be an engine for change:

- Eliminating perimeters;
- Welcoming the contribution made by innovative approaches;
- Cultivating interdisciplinarity;
- Indicating pathways for innovation (relating to law or otherwise);
- Scrapping the current paradigms of legal education;
- Shining a light on the political options which underlie every legal choice.

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[28] For further analysis, Pascuzzi (2009).

[29] For further analysis, PASCUZZI (2012), 111 ff.

[30] On the limitations of the Italian system for evaluating research, which is creating conformity, see: SYLOS LABINI (2016).

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