

## Situating the Debate

by Sabrina Ragone and Günter Frankenberg

**Abstract:** *Perimetrare il dibattito* - This piece serves as the background for the special issue concerning the developments in Italian legal scholarship in light of critical approaches to legal comparison. It focuses on three main features, namely, the need for interdisciplinarity, the reach beyond the West, and the openness to novel legal issues in addition to traditional constitutional topics.

**Keywords:** Comparative law; Methodology; Critical approach; Case studies; Interdisciplinarity

### 1. Background

For quite some time, conventional comparative legal studies, as carried out by the “mainstream”, would be criticized for their methodological and theoretical oversights and misconceptions.<sup>1</sup> The “usual suspects”<sup>2</sup> range from Anglo-Eurocentrism that informs a biased research and selective choice of case studies, to a formalistic understanding of law<sup>3</sup>. Such attitudes and misconceptions basically “flow” from a persistent denial of comparative law’s political and ethical dimension as well as the accompanying claim to an “innocent method”. They actually respond to a comparative legal practice oriented towards “Western law” and its hegemony<sup>4</sup>, carried out by Western-trained scholars who practise comparative law in Europe and North America. As globalization reached the shores of the “Western” citadel, ethnocentrism was confronted by a variety of critiques. Accordingly, comparative legal scholarship seems to have developed an increased awareness of foreign laws and opened-up the space of interest to different cultures, thus expanding the methodological equipment and calibrating the already existing tools<sup>5</sup>.

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<sup>1</sup> See G. Frankenberg, *Critical Comparisons. Re-thinking Comparative Law*, in 26 *Harvard International Law Journal* 411 (1985); Id., *Comparative Law as Critique*, Cheltenham, 2016; and P. Legrand, *Negative Comparative Law*, Cambridge, 2022.

<sup>2</sup> The term was introduced by R. Hirschl, *Comparative Matters*, Oxford, 2014, 205-223.

<sup>3</sup> For a critique of formalism in comparative law: P. Legrand, *The Impossibility of ‘Legal Transplants’*, in 4 *Maastricht Journal of European and Comparative Law* 111 (1997).

<sup>4</sup> R. David, J. Brierley, *Major Legal Systems of the World Today*, New York, 1985, 3<sup>rd</sup> ed.

<sup>5</sup> See S. Ragone, G. Smorto, *Comparative Law: A Very Short Introduction*, Oxford, 2023. On the importance of methodology in dealing with complex systems see, *ex multis*, L. Pegoraro, A. Rinella, *Diritto costituzionale comparato. Aspetti metodologici*, Padua, 2013; R. Scarciglia, *Metodi e comparazione giuridica*, Padua, 2018, 19; D. Amirante, *Al di là*

## 2. Rationale and Targets

Starting from these considerations, this special issue of *Diritto Pubblico Comparato ed Europeo* (DPCE) delves into critical claims through the lens of young Italian scholars' studies and interests, as they were presented at a research seminar organized at the University of Bologna in collaboration with the *scuola dottorale* of the Association DPCE in the Fall of 2023. The following selected papers have drawn inspiration from the scholarly work of various critics of comparative law's mainstream practices<sup>6</sup>. Guided by diverse critical perspectives, the seminar discussed crucial elements of comparative studies, with a focus on the following pivotal aspects: a) *positioning* the scholar and her *perspective* in carrying out an investigation<sup>7</sup>; b) the *selectivity* of case studies, with particular regard to the need to go beyond the so-called Western "usual suspects"; c) the critique of the widely presumed existence of standard "assembled" solutions for constructing constitutional texts<sup>8</sup>; d) the identification of transversal and relevant themes for comparative public law; e) the inclusion of cultural and contextual elements in the comparison; f) the advantages of multi- and interdisciplinary approaches, among others<sup>9</sup>.

The contributions were called to examine how ongoing comparative investigations can respond to methodological challenges, adopting a general or case study perspective, emphasising the contribution of critical theories and their impact on individual projects.

## 3. Differences, Similarities, and the Tool-kit of Comparativists

The never-ending challenge of comparative (public) law, in fact, beyond all phenomena of unification or harmonization, is how to accept and often emphasize the differences, in addition to similarities, among systems and within all dynamic formants<sup>10</sup>, while grasping the dissociation between formants and the cryptotypes. Even if Eurocentrism and "Westernism" have characterised the production of comparative law and, by the same token, had

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dell'Occidente. *Sfide epistemologiche e spunti euristici nella comparazione "verso Oriente"*, in *Diritto Pubblico Comparato ed Europeo*, 2015, 1, 1.

<sup>6</sup> For references see G. Frankenberg, F. Nicola, *Critical Approaches to Comparative Law*, in J. Smits (Ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham, 2023, 2<sup>nd</sup> ed., 495-502; P. Legrand, R. Munday (Eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003.

<sup>7</sup> See G. Frankenberg, *Critical Comparisons*, cit.; and Id., *Rechtsvergleichung – A New Gold Standard?*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2016, 76, 1001.

<sup>8</sup> G. Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, in 4(3) *International Journal of Constitutional Law* 439 (2006); Id., *Constitutional transfer: the IKEA theory revisited*, in 8(3) *International Journal of Constitutional Law* 563 (2010).

<sup>9</sup> M. Reimann, *Comparative Law and Neighbouring Disciplines*, in M. Bussani, U. Mattei (Eds), *The Cambridge Companion to Comparative Law*, Cambridge, 2013, 13 ff. In Italian scholarship, L. Pegoraro, *Diritto costituzionale comparato: la scienza e il metodo*, Bologna, 2014, 105.

<sup>10</sup> R. Sacco, *Legal Formants. A Dynamic Approach to Comparative Law*, in 39(1) *The American Journal of Comparative Law*, Installment I, 1 (1991); in 39(2) *Ibidem* Installment II, 343 (1991).

an impact on the progressive spread of constitutionalism, such development has not affected all fundamental structures of the various national systems. Hence, the analysis of each system requires a thorough preparatory study to grasp the *context*, in order to offer a well-informed pattern for understanding its multifaceted characteristics, before assessing them and offering — or even “sell” — risky legal transfers or borrowings. As Lucio Pegoraro and Angelo Rinella have often (and recently) recommended<sup>11</sup>, scholars are called to abandon simplistic schemes, in order to explain to what extent, the diffusion of models can backfire and lead to rejection.

As a consequence, the exploration of context, cultural immersion, linguistic knowledge, multi- and interdisciplinarity become essential instruments of a critique that may overcome the formalistic and “universalist” approaches to comparative law and, in particular, to comparing constitutional regimes<sup>12</sup>.

The philosophical or “*nomothetic*” approach, which leads to generalizing and inferring general laws from comparative data that are able to explain categories through international standards assumed as comparatively valid, seems less appealing to younger scholars for the study and comparison of geographical areas that span from Asia to Latin America. Likewise, the “*idiographic*” approach, which focuses on the peculiarities and uniqueness of social, legal and cultural phenomena, is suffering a state-of-stress fostered by the comparative aim, beyond isolated descriptions of legal systems. In other words, the long debate on “legal transplants” – with the standoff between “universalists” or rather formalists, like Alan Watson<sup>13</sup>, and anti-formalists, like Pierre Legrand<sup>14</sup>, who focus on the specific linguistic properties of laws and the cultural features of a context, may no longer be part of comparative law’s methodological dilemmas in the twenty-first century<sup>15</sup>.

#### 4. The “Italian Way”

Italian scholarship operates at the core of all these debates, thanks to the inclusion (and role) of comparative law in the legal curriculum of many universities, the variety of research centers, academic journals and book series, and also the conferences and other academic events propagating its importance as a field of study and research<sup>16</sup>. As Elisabetta Grande pointed

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<sup>11</sup> L. Pegoraro, A. Rinella, *Sistemi costituzionali*, Turin, 2024, 2nd ed., 25.

<sup>12</sup> M. Nicolini, *Methodologies of Comparative Constitutional Law: Universalist Approach*, in *Max Planck Encyclopedia of Comparative Constitutional Law*, Oxford, 2023.

<sup>13</sup> A. Watson, *Legal Transplants: An Approach to Comparative Literature*, Athens, 1993, 2nd ed., claiming that legal transplants are “socially easy”.

<sup>14</sup> P. Legrand, *The Impossibility of Legal Transplants*, in 4 *Maastricht Journal of European and Comparative Law* 111 (1997).

<sup>15</sup> G. Frankenberg, *Legal transfer*, in M.C. Foblets et al. (Eds), *The Oxford Handbook of Law and Anthropology*, Oxford, 2022, 333-351.

<sup>16</sup> See for instance the 2018 conference by AIDC “New Topics and Methods in Comparative Law Research”, or the 2017 conference by SIRD “Nuovi percorsi di diritto comparato – New Paths in Comparative Law”. Conferences and activities organised by the association *Diritto Pubblico Comparato ed Europeo* offer a picture of the contemporary state-of-the-art of Italian comparative public law studies. As an example, it is possible

out a few years ago<sup>17</sup>, there is a fruitful pluralism of approaches, spanning from policy-making and practice-oriented (functionalist and structuralist) mainstream, covering a historical understanding of legal comparison and also a critical assessment of traditional categories. She still registered a relevant attention to legal transplants and majoritarian ethnocentrism. Nevertheless, positive developments in terms of openness and inclusiveness and/or pluralism were identified in the enrichment and re-elaboration of the theory of legal formants, in the increasing analysis of non-Western traditions, as well as in the diffusion of interdisciplinary trends, among which a connection to anthropology and other disciplines is paramount.

Overall, the collection of essays included in this special issue suggests three basic points on the state-of-the art and future trajectories of Italian comparative scholarship:

1. interdisciplinarity as a key-word of comparative law, as it makes no sense to aseptically compare rules without moving from the context through a critical approach;
2. comparative law inquiries need to expand their vision beyond the western tradition(s), without falling back onto orientalism, exoticism or even the imperialist use of Western standards; and
3. comparative law combines both critical methods and theories to lay the foundations of a dynamic science that can cope with the challenges posed by foreign laws and legal cultures and that shed off the traditional ideologies.

With respect to the point *sub* 1), the contribution by Katia Laffusa examines three different types of interdisciplinarity that can be applied within comparative methods: structural, generative and critical, applicable to minorities and minority rights. Tommaso Amico di Meane's essay explores the development of and competition between the European and the American approaches to legal comparison, trying to understand the role of current scholarship from both parts of the world within a global framework. With regard to these aspects, he claims that in Europe a new generation of scholars relies on a methodological toolkit assembled by prior critical studies that pave the way for "their own manner" of doing comparison. Many of the younger scholars have worked abroad and are pursuing research beyond Italian borders and outside the Western tradition. Interestingly enough, they develop multiple affiliations: in particular, some may still opt for a North American "style" of comparison, while remaining loyal to their "hubs", such as Utah or Michigan, where they pursue more subversive studies.

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to mention "La comparazione giuridica e i suoi metodi: approcci ed esperienze" (2016), or "Alle origini della comparazione giuridica" (2017), as well as the next annual conference planned for 2025. Within the Italian scholarly publications on comparative public law, the *Trattato di Diritto Pubblico Comparato*, created by Giuseppe Franco Ferrari, translated into Spanish and English as well, offers additional insights on the evolution of the field.

<sup>17</sup> E. Grande, *Development of Comparative Law in Italy*, in M. Reimann, R. Zimmermann (Eds), *The Oxford Handbook of Comparative Law*, Oxford, 2019, 2<sup>nd</sup> ed., 88-110.

Regarding the vision (point *sub 2*), recent projects located at Italian universities, have covered various non-“Western” areas of research<sup>18</sup>. They endorse a less pronounced hegemonic understanding of legal comparison, and expand their research to Russia and Eastern Europe<sup>19</sup>, Africa<sup>20</sup>, Asia<sup>21</sup>, or Latin America<sup>22</sup>. With respect to such geographical openness, for instance, Laura Nocera’s work extends Confucian constitutionalism as a cultural parameter of interpretation by reconstructing its traditional East Asia legal roots to establish them essential components of the comparative landscape. Comparative studies of Latin America at Italian law schools demonstrate a strong and influential tradition of research that is documented by scholarly exchanges and interactions<sup>23</sup>. In her article Rosa

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<sup>18</sup> Of course, alongside recent valuable contributions to their study, such as A. Buratti, *Western Constitutionalism. History, Institutions, Comparative Law*, Berlin, 2023, 3rd ed.; C. Bassu, M. Betzu, F. Clementi, *Diritto costituzionale degli Stati Uniti d'America. Una introduzione*, Turin, 2022; or G. Caravale, *Presidente e Congresso nella recente prassi costituzionale statunitense*, Naples, 2024.

<sup>19</sup> Already P. Biscaretti di Ruffia, *1988-1990 un triennio di profonde trasformazioni costituzionali. In Occidente, nell'URSS e negli Stati socialisti dell'Est europeo*, Milan, 1991; A. Di Gregorio, *La giustizia costituzionale in Russia: origini, modelli, giurisprudenza*, Milan, 2004; Ead. (Ed.), *I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, Milan-Padua, 2019.

<sup>20</sup> M. Nicolini, *African Legal Traditions*, in G. Mousourakis (Ed.), *Comparative Law and Legal Traditions*, Berlin, 2019; S. Mancuso, *African law(s): comparative insights on the African lawscape*, Leiden-Boston, 2024; or M. Calamo Specchia (Ed.), *Le trasformazioni costituzionali del secondo millennio. Scenari e prospettive dall'Europa all'Africa*, Santarcangelo di Romagna, 2016.

<sup>21</sup> On India, D. Amirante, *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*, Naples, 2019; on Arab constitutionalism, M. Oliviero, *Il costituzionalismo dei paesi arabi*, Milan, 2003; T. Groppi, I. Spigno (Eds), *Tunisia. La primavera della costituzione*, Roma, 2015; on Islamic Law, M. Oliviero, *Il ruolo della comparazione giuridica negli studi sul diritto islamico e sul diritto dei Paesi islamici*, in *Diritto pubblico comparato ed europeo*, 2019; on Japan, E. Bertolini, *La tutela dei diritti fondamentali in Giappone. Studio storico-giuridico tra tentazioni occidentali e radicamento asiatico*, Naples, 2011; I. Castellucci, *Le grandi tradizioni giuridiche dell'Asia*, Trento, 2008; on South-East Asia, M. Mazza (Ed.), *I sistemi del lontano Oriente*, Padua, 2019; L. Antonioli, G.A. Benacchio, R. Toniatti (Eds), *Le nuove frontiere della comparazione*, Trento, 2011.

<sup>22</sup> L. Pegoraro, *América Latina como categoría y objeto de comparación*, in *Diritto Pubblico Comparato ed Europeo*, 2018, 1, 81; S. Lanni, *Il diritto dell'America latina*, Naples, 2017; S. Bagni, S. Baldin (Eds), *Latinoamérica. Viaggio nel costituzionalismo comparato dalla Patagonia al Río Grande*, Turin, 2021; or A. Mastromarino, *Processi di integrazione in America latina: il valore del formante giurisprudenziale*, in *DPCE Online*, 2022, [S.l.], 453; already two decades ago, also L. Melica, *Federalismo e libertà in America Latina. I modelli di Messico, Argentina e Venezuela*, Padua, 2002; G. Pavani, *El gobierno local. De los antiguos modelos europeos al nuevo paradigma latinoamericano*, Santiago de Chile, 2019, reversed the logic and explained the lessons the West can learn from Latin American law.

This same journal has proven to be attentive to Latin American legal developments in individual contributions and collective special issues, devoted for instance to Cuba in 2020 or Chile in 2021.

Also, there was a book series edited by il Mulino, which allotted major importance to “non-traditional” cases, such as China, India, Czech Republic, India, Iran, Turkey, South Africa, Argentina, Russia, Poland, or Mexico.

<sup>23</sup> See the assessment provided by E. Grande, R.M. Núñez, P.G. Monateri, *The Italian Theory of Comparative Law Goes Abroad*, in 1(1) *The Italian Review of International and Comparative Law* 5, 18 ff. (2021).

Iannaccone elaborates the methodological difficulties of comparative methodology posed by Latin American constitutionalism(s), their forms of state and government. She suggests a strong factual approach, able to consider the context and peculiarities of those political and constitutional systems.

Regarding critical methods of a dynamic science of legal comparison (see above *sub 3*), Italian comparatists have proven to be extremely sensitive when it comes to contributing to the study and understanding of new pressing legal issues, particularly with respect to environmental and climate issues<sup>24</sup>. Thus, Enrico Buono applies a critical approach to the study of the constitutionalisation of environmental issues. He deconstructs all too optimistic and misleading narratives and unveils the linguistic confusions around terms such as ‘environment,’ ‘climate,’ and ‘ecology’ in constitutional discourse.

In sum, the emerging trends suggest, therefore, two basic and somehow competing patterns: On the one hand, contemporary Italian scholarship is quite aware of – and respects – previous scholarly efforts to construct a solid methodological toolbox. On the other hand, although *in fieri*, young scholars venture into novel territories and try their hand at critical approaches. Which means, a direction is emerging<sup>25</sup> that may liberate our comparative legal studies from the perils of ophidian orientalism and imperialism.

Sabrina Ragone

Dipartimento di Scienze Politiche e Sociali

Università di Bologna

[sabrina.ragone2@unibo.it](mailto:sabrina.ragone2@unibo.it)

Günter Frankenberg

Fachbereich Rechtswissenschaft

Johann Wolfgang Goethe-Universität, Frankfurt am Main

[Frankenberg@jur.uni-frankfurt.de](mailto:Frankenberg@jur.uni-frankfurt.de)

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<sup>24</sup> See D. Amirante, *Costituzionalismo ambientale. Atlante giuridico per l'Antropocene*, Bologna, 2022; Id., S. Bagni (Eds), *Environmental Constitutionalism in the Anthropocene*, London-New York, 2022. More in general, see M. Carducci, *Natura (diritti della)*, in *Digesto delle Discipline Pubblicistiche*, VII Aggiornamento, Turin, 2017, 486-581 or the approach by M. Nicolini, *Legal Geography. Comparative Law and the Production of Space*, Cham, 2022.

<sup>25</sup> L. Pegoraro, *Il diritto pubblico comparato in cerca di una identità*, in *DPCE Online*, 2020, 1, 811; D. Amirante, “Una specie che si crede un genere”: *il diritto pubblico comparato e i sedimenti della post-modernità*, *ibidem*, 839.