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TEACHING COMPARATIVE LAW

A POSITION PAPER BY THE ITALIAN ASSOCIATION OF COMPARATIVE LAW

(JUNE 2015)

Comparative law is what is taught as comparative law.

Comparative law will change if and inasmuch the contents of its courses and its teaching methods change.

Over the past century and a half comparative law has affirmed itself as a discipline intrinsically characterized by a plural and open view due to:

- The presence of two or more legal systems or traditions to be analyzed;
- The growing geographical areas of interest;
- A variety of methodologies;
- The variety of contexts (teaching, law-making, adjudication, policy decisions) in which comparative law (or what is considered such) is used.

This diversity has ensured a wealth of approaches and of results. It brings with it the inherent risk of overlapping other legal disciplines, losing its identity, its focus, and its objectives.

This is why a debate on "*Teaching comparative law*" is not only important – as it is for any other field of the law – to update the methodologies through which knowledge is transferred from one generation to another, from one (the teacher) to many (the students). It is also essential in order to ascertain what are the present-day features of comparative law, which, unlike most legal disciplines, are not set by normative references.

Hypothetically, comparative law – as philosophy of law, history of law or sociology of law – might be about practically everything, or – at its opposite – about very little.

Although this remark opens the way to a very rich – and even heated – epistemological debate on the distinction between comparative law and comparative legal methodology, and between "normative approaches" and "descriptive approaches", we wish here to present some indications of a more practical nature. Assuming that it is not necessary to re-establish the

basis of comparative law but it is extremely important that the community of comparative law scholars – those who feel such and are engaged in teaching – should discuss openly and freely these topics, we wish to present the following issues as questions to which various answers may be given.

a) **Comparative law for a global world**. Is it correct to say that teaching comparative law should always take into account extra-legal factors that influence common or diverse normative solutions? What should be the role of comparative law in understanding and interpreting phenomena related to the globalization of political, economic, social and cultural (and therefore legal) factors? Is it proper to suggest that comparative law courses should have in mind this changing scenario? To what extent present-day extra-legal factors (from the fall of the Berlin Wall to the RPC's accession to WTO; from the Internet to mass migrations; from the establishment of English as a *lingua franca* to the attempt of forging new global governance institutions) should be part of comparative law classes, or should they simply be a brief introductory note? What is the equilibrium between the objective of a comparative law class of explaining the world outside the law school; and the objective of explaining some clear – but generally undisclosed – features of other legal disciplines (from the law of property to criminal retribution; from access to justice to constitutional adjudication; from gender equality to shareholder rights)?

b) **The role of comparative law in law degree curricula**. Assuming that comparative law courses play a variety of roles in law degree curricula (from fundamental to entirely elective classes), can one reasonably posit that a "*Grands systèmes juridiques*" or a "Legal Traditions" course is still – in the great majority of curricula – the starting block for introducing law students to comparative law? And if so to what extent traditional systemology (Common law, Civil law, and non-Western models) is still appropriate? What broad distinctions are fundamental in a global legal scenario? Should comparative law classes take into account the growing push towards a "global history"? From a European perspective to what extent the very strong circulation of models in EU law affects the way lawyers (and not only comparatists) see the comparison between legal systems? Is circulation and hybridization of legal models effective or more apparent than real? But the main question appears to be: what notions should students receive that they may retain as an essential part of their legal education?

c) **Comparative law partitions**. Traditionally, generations of students have been taught comparative law separating private law from public law. In the former the main divide is

between civil law traditions and common law traditions. In the latter between different forms of government. Assuming that these partitions have been widely reconsidered and limited through academic debate, are they still valid in teaching comparative law? To what extent the future generations of lawyers are receiving what might be considered a distorted first imprinting which will accompany them in their future contacts with non-domestic law? How can one reasonably – in the limited time offered by a course – bridge the gap between a private law approach and a public law approach, avoiding that students receive a very partial view of what are the distinctive aspects of a legal system? Is it appropriate to set clear boundaries between comparative law courses and fundamental private law and constitutional law courses? What is the balance between didactic efficacy of simplified partitions and complexity of a fluid and comprehensive approach? And what partitions can be successfully offered to students in countries that do not belong to the Western Legal Tradition (e.g. Arab world, Far East)? Is it too ambitious to suggest a few model-syllabi that could be appropriately adapted in the different contexts?

d) **The boundaries of the law**. Not being tied to a normative field, comparatists have often explored and expanded the province of the law, seeking for it outside its chartered waters, and attempting to import in legal research and debate notions, ideas, structures, of common use in other areas. Yet, comparatists cannot imagine that norms and normativism do not exist. What is the most productive – from a didactic point of view – approach? How can comparative law teach (not simply to depreciate but) how to read, interpret, apply norms? Further, just as not everything qualified as "comparative law" is automatically such, not everything comparatists study becomes, by the touch of the wand, a comparative law subject. To what extent the variety of "*Law and …*" courses are (or may be) the way to introduce students to comparative law or to experiment new comparative law methodologies? Or are they rather intellectual "*croissants*" given to those who are lacking the bread of comparative law? Can one assert that classes of "*Law and …*" necessarily require a non-normativistic approach typical of comparative law scholars?

e) **Comparative law for non-lawyers.** If comparatists are constantly visiting other areas of knowledge different from the law, it would appear that they are better equipped than other lawyers for teaching law to non-lawyers, in particular in business schools and political science faculties (but not only). The questions are: in what does comparative law

teaching differ when the audiences are different? Are comparatists teaching comparative law or are they teaching law *tout-court*? What lessons may be taken and brought back to law schools? Are comparatists able to compare not only within the law, but also between the law and other sciences (both "pure" and social)? Could the misunderstandings between US and European visions of the law and of government (role of the State, regulation vs judicial scrutiny, etc.) have an epistemological foundation similar to the misunderstanding between lawyers and economists or lawyers and computer scientists?

f) Comparative law for professionals. Is there a sense in teaching comparative law to professionals, typically practicing lawyers and judges? How should it be taught? Assuming that courses should be tailored to the practical needs of the specific professionals, to what extent one can – and must – lean on the *acquis* that they already possess, and use that knowledge as a constant table of comparison? How can one dispel a series of common-place truisms (in common law jurisdictions the law is only judge-made; in civil law jurisdictions the judge is '*la bouche de la loi*'; the rule of law is a clear and universal set of principle; State intervention is inevitable and necessary, etc.)?

g) Comparing comparatists. Although it may appear as a game of mirrors, is it useful to compare the contents and the methodologies of comparative law teaching? Can it be a way of reaching deeper in the essence of comparative law? Would a data-base of syllabi of comparative law courses around the world be a useful starting point? Should one start comparing the contents of comparative law handbooks? To what extent are comparatists – like other social scientist – 'path (and past) dependent'? Are current comparative law handbooks appropriate for teaching to future generations of lawyers, or are they simply a reflex of the past? What influences most comparative law teachers: their background? Their audience? Institutional constraints? The curriculum in which the course is inserted in?