Alessandra De Luca - Elena Ioriatti

Comparative Legal Systems

An Introduction

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Foreword

This book is based on our extensive teaching experience at the Universities of Trento and Florence, where for many years courses in Comparative Legal Systems have been offered to the students pursuing the single-cycle Master's degree in Law in English as an alternative to the course in Italian, as well as attending a Law Bachelor in English.

In 2017 a new course of study was provided at the Faculty of Law of Trento University, a Law Bachelor entirely taught in English. The bachelor was anticipated by two years of assessing students' interests - as well as of monitoring their performances – by means of a number of compulsory law courses offered in English (Comparative Legal Systems, International Law, European Union Law, Legal History). These courses were attended by a predetermined number of selected students, enrolled in the single-cycle Italian Master's degree in Law, but willing to experiment learning law subjects in English. The motivation for teaching law in a language different than Italian was not specifically related to the peculiar environment of Trento University, and in particular to its location at the border of the trilingual area (Italian, German, Ladin) of the Trentino Region, but to the cultural mission of the Law School, which, since its establishment, has always been educating students in comparative and transnational law. Almost ten years ago, however, teaching some of the main law subjects in English was perceived as a serious challenge in Italy, due to the intellectual posture of the legal professions, strictly identified with the use of Italian and of the national legal terminology. Somehow unexpectedly, the use of English as a teaching language not only has attracted more and more Italian students, but has rapidly turned into a teaching methodology. Nowadays this methodology is still in transition, as it is moving away from the teaching style used in classrooms when the development of the "science of law" was a priority of Italian law schools and it is gradually turning into continuing developments and transformations, following current students' agendas. In this context, the use of English as a teaching language is not connected to a specific legal system, but has become a relevant component of programs aimed at training jurists able of intellectually crossing national borders and

destined to operate in a global legal environment. Thus, developing high-quality learning materials in the form of specific legal literature proved to be, and still is, a challenge for the teachers involved in this educational adventure.

In a similar vein, in 2016 the University of Florence started offering a course on Comparative Legal Systems to students undertaking the single-cycle Master's degree in Law. This was not the first course offered in English, as International Law and European Social Law had been taught in English for a number of years, but finding a suitable textbook in English posed no particular challenge for these courses. Additionally, the School of Law had been providing a course in English on Comparative Legal Systems to the students pursuing the three-year degree in Legal Services Sciences since 2009, although the majority of participants were exchange students. Also due to the modest number of students, this course relied on the volume published by Mary Ann Glendon, Paolo Carozza, and Colin Picker titled *Comparative Legal Traditions in a Nutshell*, supplemented by excerpts from *An Introduction to the Anglo-American Legal System* by Toni Fine and several handouts. This choice, however, highlighted from the outset the lack of a comprehensive volume that could satisfy the teaching requirements of an Italian comparative legal systems course. The problem has persisted year after year, worsened by an increase in the number of students opting to take the course in English over Italian (in part because of the expansion of the pool of eligible participants to include students in the joint German-Italian law degree program, as well as the growing interest among students in the three-year degree course) and the transition from the second to the first year of the course. The selection of reference materials may have varied, but the dissatisfaction has not.

Meanwhile, on the occasion of conferences or seminars of comparative interest, we had the opportunity to discuss the peculiarities of teaching a comparative legal system course in English and our dissatisfaction with the existing textbooks. This is certainly not to say that there is a lack of introductions to the study of Comparative Legal Systems in English. On the contrary, new and interesting ones have come out in the meantime. However, we have found that none of them cover all the topics typically included in our courses in an approach suitable for first year law students.

This book attempts to fill the perceived gap. It consists of three chapters dealing with an introduction to comparative law, the Common law tradition, and the Civil law tradition. Each chapter includes an appendix that collects a set of materials that we typically utilise during our classes. We are deeply aware of the incompleteness of our work, which does not include non-Western legal traditions and other essential topics such as transnational law or the expansion of the Civil law tradition beyond Europe and the spread of the Com-

mon law in the world. Nonetheless, we have decided to publish this provisional version and submit it to our students, partly in response to their explicit requests, partly to test the work done so far and hopefully receive their feedback to improve it for a next edition, which we feel is necessary in order to complete our introduction to comparative legal systems.

Although this textbook is the result of a constant dialogue and exchange of opinions, its different parts refer to the authors as follows: Chapter I, par. 2, 2.1, 2.2, 3 and 5: A. De Luca. Par. 1, 4 and 4.1: E. Ioriatti. Chapter II: E. Ioriatti. Chapter III: A. De Luca.

Writing this textbook has been a stimulating experience, and an occasion to think back to the history of our discipline, as well as to the scientific experiences of the leading scholars who contributed to its growth. In this regard, a special memory goes to Rodolfo Sacco, the Founding Father of comparative law in Italy, together with Gino Gorla and Mauro Cappelletti. In Sacco's vision, Comparative Legal Systems has always had a fundamental role in legal education, not only as a first year course introducing students to comparative law, but to the legal phenomenon as a whole. We are honored to continue his mission.

We cannot conclude this brief foreword without acknowledging the contribution made by Alessandro Simoni, who is not only a colleague but also a friend. When Elena – following the advice of her husband, an attorney interested and fascinated by comparative law – decided to write a textbook and look for a colleague with whom to share this adventure, she initially approached Alessandro, who generously extended the invitation to Alessandra. Alessandro's many commitments, including institutional ones, soon diverted his attention from this work, but we would like to thank him for his contribution in structuring the outline of the work and the team of authors.

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Chapter I

Comparative Law: An Introduction

1. *Law and Norm. Introduction to the Legal Phenomenon*

The **legal phenomenon** is such a complex notion that even a dedicated book would not be sufficient to explain it in detail. Within the aim of this book – introducing the students to comparative law with particular focus on the legal systems – we can therefore address only the meaning of **law** as the **object** of comparative law analysis.

Looking at the social environment at large, it is easy to observe that human behaviors can be either **permitted** or **forbidden**. Every person knows the meaning of behaving according to **rules**, as rules are always present in people's lives.

This happens, for instance, in sports – such as football and volleyball – where players cannot act in complete freedom, but rather according to **rules** that are **predetermined**. In these examples, rules are prescribed by special organs, the football or volleyball federation, similarly to a rule regulating, for instance, that roles within a specific organization (such as a student association: «each member must service as the secretary of the association for one year») must be **performed** by its members.

However, not only in specific activities are some behaviors imposed while others are forbidden: this happens often in daily life too. For instance, it is a common belief that we should greet people when we meet them, or that pre-

sents should be offered to family members and friends at Christmas; similarly, **promises** must be performed, and **damages** should be **compensated**. In all these examples, possible behaviors taken by the members of a **social group** are **regulated** by rules, providing whether they are allowed or not.

There are different types of rules: **social rules** (I should greet people), **moral rules** (I am expected not to behave in a scandalous manner), **religious rules** (I should attend Sunday mass, and follow the Ten Commandments), as well as **legal rules** (damages must be compensated).

Legal rules, also called **norms**, are typical components of advanced societies. Differently from the past, people are not left to their own devices when it comes to resolving disputes or to demanding recognition of their **rights** (for instance, **right to physical integrity, right to property, right of identity** and so on). In modern societies, members of social groups, in order to regulate their own coexistence and to resolve disputes, have to formulate and enact a series of **norms**, prescribing which **behaviors are allowed and which are forbidden**. For instance, **criminal law** is a body of rules (norms) enacted by a State (social group), prohibiting certain forms of conduct (behaviors) because they **harm public safety**, and imposing punishments (**sanctions**) for the commission of such acts. **Criminal courts** (bodies authorized to impose sanctions) as well as the procedures to be followed, are established by another body or norms, the **criminal law procedure**.

At the same time, specific persons (**judges**) and institutions (**courts**) are established and have the authority of imposing sanctions in case of violation of enacted norms. In effect, it is up to judges to **interpret** and **apply** legal norms.

Paul and Alfred's story

Let us take a simple example in a hypothetical case [*].

Paul's mother is hospitalized in Rome. He lives in an area of that city that is 10 km from the hospital, and not efficiently served by public transport.

As the patient needs assistance, Paul asks his friend Alfred for the permission to use his motorcycle. Alfred kindly accepts and delivers the scooter to Paul.

One week later, Alfred's wife obtains a new academic position in Rome. Their family house is located far from her workplace, on the opposite side of the city, in a highly traffic area. Thus, Alfred asks Paul to return the motorcycle, as his wife would like use it to go to work. Paul refuses, as his mother still needs his daily presence in the hospital. The two friends start arguing and in the end Alfred decides to sue Paul in court.

According to Italian law, the agreement between Alfred and Paul is qualified as a "gratuitous loan for use" (Contratto di comodato. Commodatum).

"*A contract by which the owner delivers to a party a good (immovable and movable property), so that it can be used for a specific time or purpose, under the obligation to return it to the owner. Essentially, the contract is concluded gratuitously*" (art. 1803 of the Italian Civil code).

However, it must be noted that art. 1803 c.c. only regulates "movable" and "immovable" property as the object of this contract. As motorcycles are qualified as "registered, movable property" under Italian law, it is up to the judge to decide whether the norm is applicable to Alfred and Paul's case too.

When, according to the judge's interpretation, the object of the contract – the gratuitous loan for use – includes "registered, movable property" as well, the agreement between Alfred and Paul can be qualified as a "gratuitous loan for use" contract, orally concluded.

The Italian civil code also regulates the restitution of the object of the contract regulated ex art. 1803 c.c.

"*The party is obliged to return the good upon expiry of the agreed term or when he/she has used it according to the contract. However, if before the party has ceased to use the good, an urgent and unexpected need arises for the owner, he can demand the immediate restitution of the good*" (art. 1809 c.c. Restitution).

"*If the term was not agreed, the party must return the good as soon as the owner asks for the restitution*" (art. 1810 c.c. Contract concluded without term of restitution).

Again, it is up to the judge to decide whether a term of restitution was established or not between Alfred and Paul. It is clear that an exact day in which the motorcycle should have been returned to Alfred was not explicitly agreed by them. However, it is a matter of interpretation to define whether it was implicitly agreed that Paul would have had the permission to use the motorcycle for the entire duration of his mother's hospitalization.

Finally, the second paragraph of art. 1809 c.c. is also a matter of interpretation since it holds that "*if before the party has ceased to use the good, an urgent and unexpected need arises for the owner, he can demand the immediate restitution of the good*": thus, could Alfred's wife's need to use the motorcycle to go to work qualify as an *urgent and unexpected need*?

[*] The case and the conclusions are hypothetical and do not correspond to actual Italian case law.

A substantial part of law regulating social groups exists in the form of **legal rules** (**norms)**. These norms specify how people should behave ("Do not commit homicide", "Spouses must support one another morally and materially"). Thus, they are of a **prescriptive** nature, as they quality a specific behavior as permitted or forbidden.

Rules **describing** a specific **phenomenon** are different: for instance, an object of a certain weight takes a set time to reach the ground. These rules do not impose a behavior, but simply describe specific material facts, as they occur in the reality. They belong to the "laws of the nature", or, for instance, to disciplines like physics, economy or medicine, and are **not prescriptive** like the legal rules, as they simply describe specific circumstances (**descriptive rules**). Descriptive rules might be just **true** or **false**, according to empirical observation: if a rule proves to be false in physics, mathematics and economy, it simply **does not exist as a rule**. Differently, norms (legal rules) might be violated, but do still **exist as prescriptive rules**.

As noted already, societies are governed not only by legal norms, but also by other types of rules, like moral, social or religious ones. These rules generally arise **spontaneously**, by means of behaviors taken by the members of a social group, in the belief of preforming a relevant moral, social or religious duty. The violation of one of these rules might provoke **social disapproval** among the members of the group who believe and respect it: participating in a funeral wearing a sparkling red dress would violate, in the majority of the Western countries, a social duty to pay respect to the deceased and to the family. Similarly, a criticism to the content of a lecture expressed by professors teaching to the same group of students is highly immoral. In the majority of the cases, **negative consequences** would arise from the above-mentioned behaviors: the badly dressed person at the funeral would be stigmatized by the family of the deceased and by the people present on that day. The professor would gain a reputation as an incorrect person.

However, not all negative consequences of the violation of a rule can be qualified as **sanctions**, but only the consequences established by the **law**, with regard to the violation of a **specific norm**. In the two examples above, both negative consequences *might* happen, yet **it is not established** by any legal rules that these people acting immorally or against social rules will be actually sanctioned.

Thus, an important difference among rules qualified as moral, social, religious rules and the legal rules (norms) is that only the violation of the latter is, in the majority of the cases, **sanctioned by the law**. This is the consequence of legal rules being provided with specific sanctions, such as **incarceration**, **compensation of damages**, **administrative fees**, and so on. For instance, art. 2043 of the Italian Civil Code, regulating tort law, provides "*Any intentional*

or negligent act that causes an unjustified injury to another obliges the person who has committed the act ***to pay damages***". Similarly, par. 190 of the California Penal Code "*Every person guilty of murder in the first degree shall be punished by* ***death, imprisonment*** *in the state prison* ***for life*** *without the possibility of parole, or* ***imprisonment*** *in the State prison for a term of* ***25 years to life***".

Even if the presence of a specific sanction provided by the law is one of the most important characteristics helping people and jurists to understand that a rule qualifies as a legal norm, **not all legal norms** are effectively **sanctioned**. A clear example is art. 315-bis of the Italian Civil code, providing "*the child must respect his parents*". As it is enacted in the Civil code (Book 1. Persons and Family), this rule is definitely to be qualified as a **legal norm**. However, **no actual sanction is provided by the Italian legislators**, and consequently its violation does not allow the parents to enforce it in court. Other kinds of negative consequences *might* be inflicted personally by the parents (forbidding the son/daughter to see friends for a month; cleaning the home every week), but as in the case of a violation of moral or social rules, the negative consequences of that behavior are not actually sanctions, as they are not provided by the law with regard to that specific violation.

In comparative law terminology, the comprehensive set of legal rules of a specific social group forms a **legal system**. A legal system might correspond to a State, a region, a municipality, an African village, or even – at a supranational level – to the European Union.

The norms composing a legal system could be of a different nature. Particularly in the **Western legal tradition** law is mostly created by legislation and so the legal rules are enacted by Parliaments (statute), Governments (decrees, regulations), just to mention a few examples. However, as we will see (chapter II of this book) there are legal systems – like England, for instance – where the norms are enacted in the form of judicial decisions (**case law**), by the courts. In both these cases, the law is called **positive law**, word positive deriving from the Latin word **positus**, which literally means **laid down**: the law that "is valid here and now" (HAGE, WALTERMAN, AKKERMANS, *Introduction to Law*, p. 3).

Legal rules could be formulated by specific organs – like **parliaments** or **courts** – but created through the behavior of the members of a social group too. These norms are **unwritten**, and often even **unexpressed** (**mute law**). In order to be qualified as legal norms, these behaviors must have be taken **uniformly** and with **consistency** by the social group, and also **spontaneously** in a society (social group), in the form of **mutual expectation**. After some time, these expectations are accepted (considered) as **binding**.

In large areas of the world (Africa and Madagascar, for instance) social life is regulated in the form of positive law (constitutions, civil codes enacted on

the models of the European codifications), even if unwritten **traditional law** is definitively prevailing in villages and rural areas. However, the importance of **customary law** is increasing within the Western Legal Tradition too and at the supranational level as well, largely due to the growing importance of **international law** and of the phenomenon of **globalization**.

As noted already, in comparative law analysis, the comprehensive sets of legal rules regulating social life within specific groups are referred to as **legal systems**. Legal systems are the subject of extensive research as well. As we will see, comparative law is a science having as its first aim the research of knowledge, in the form of measuring **differences** and **similarities** among institutes and concepts, or even among legal systems.

In comparative law terminology groups of legal systems are also called **legal families**, as even if they differ, they might share the same fundamental features and often even common roots. An example are the systems in which norms are primarily enacted in the form of judicial decisions (**case law**), like England, the United States of America, New Zealand or Cyprus: because of this fundamental character, they are grouped under the **Common law legal family**, as opposed to the **Civil law family**, having legislation and the codification (**civil code**, **criminal code**) as the main source of the law.

Classifying legal systems into legal families clearly has primarily a didactical aim, as it helps students to have a general and dynamic vision of how the world of law is composed (see par. 5 of this chapter).

As dynamic as legal systems really are, and also for this reason, they are qualified as **models**. At the same time, legal systems are also composed by a large number of models; some of them originate from that same legal environment (**original models**), while others are imported (**circulated models**) or imposed for various reasons (**imposed models**). Examples are the **trust** (see chapter II), an original English model, as well as the **French *Code Civil*** (see chapter III); the latter, because of its prestige, has circulated by **imitation** in various legal systems, and was also **imposed** by the Napoleonic conquests.

Thus, legal systems are not monolithic, but rather composed of models in continuous evolution as they circulate within and among legal systems. This is the reason why different classifications of legal families do exist, and they have changes in time. For instance, René David's (DAVID, BRIERLEY, *Major Legal Systems*) proposal was originally centered on a **Western Legal Tradition** (Common law family, Civil law Family, Socialist countries) and on the **Other conceptions of the Law and of the Social Order** (Religious countries, Far East, Africa and Madagascar). After the fall of the Berlin wall, authors relying on this same classification introduced the **Nordic legal family** and **Latin America** (VARANO, BARSOTTI, *La tradizione giuridica occi-*

dentale, pp. 465 ff. and 501 ff.). In various current classifications the legal systems that used to belong to the **socialist** area are now denominated **countries in transition**, because of the huge imitation of models of the Western legal tradition, and particularly those of the Civil law family (see par. 5 of this chapter).

2. *Comparative Law, Its History and Aims*

As noted already, comparative law could, as a first approximation, be defined as the field of legal studies that aims to critically examine different legal phenomena in order to identify similarities and differences. This means that, although the denomination might suggest otherwise, comparative law is **not a branch of positive domestic law** – i.e. a set of binding rules and principles – such as private law or criminal law. Rather, it is «an intellectual activity with law as its object and comparison as its process» (ZWEIGERT, KÖTZ, *Introduction*, p. 2). For this reason, the German expression used to refer to the discipline – *Rechtsvergleichun*, which literally means "comparison of laws" – appears more appropriate than the English (or French or Italian) expression (KISCHEL, *Comparative Law*, p. 27). Although some eminent scholars have argued otherwise in the past (GUTTERIDGE, *Comparative Law*, p. 1), this does not mean that comparative law should be regarded only as a **method**. In addition to being a method (although we shall see that there is no single comparative method), comparative law is also a **science**, with its own field of investigation.

The comparison may involve entire legal systems, usually of a national character (i.e. French, Italian, English …), in which case we can speak of **macrocomparison** (ZWEIGERT, KÖTZ, *Introduction*, pp. 4-5). If, on the other hand, the comparison concerns individual legal institutions or problems, we can speak of **microcomparison** (ID., p. 5).

From what has just been said, the study of foreign law appears to be an essential element of legal comparison. What should be emphasized, though, is that comparative law does not consist in the mere study of **foreign law**. Rather, legal comparison is the result of the intellectual operation of comparing legal systems or institutions that follows the acquisition of knowledge about them. In other words, the study of foreign law is a prerequisite for comparison. On the other hand, it is true that when lawyers study a foreign legal system, they tend to make a comparison, at least implicitly, with their own legal system.

2.1. *The History of Comparative Law*

A comparative approach to the study of law has always existed, and all textbooks devoted to an introduction to comparative law usually include references to several examples of old works that apply a comparative method to the study of law, such as Aristotle's *Politics*, which examines the constitutions of 153 Greek city-states, and Montesquieu's *The Spirit of the Laws*, which reports on a wide variety of laws and practices and attempts to explain the differences with reference to geographical, institutional and social forces. (DONAHUE, *Comparative Law*).

Comparative law as a distinct academic discipline, though, has rather recent **origins**: its development is the result of the consolidation of modern nation states and the definitive demise of universalist conceptions of law with the enactment of 19th century codifications in Europe. (DAVID, BRIERLEY *Major Legal Systems*, pp. 2-3). After decades of nationalist attitudes among lawyers, who tended to focus their attention on national positive law, an interest in the law of other systems began to emerge in the last part of the century, as demonstrated by the creation of the *Société de législation comparée* in Paris in 1869 and the Society of Comparative Legislation in London in 1894. Both are still in existence and publish their prestigious law journals: the *Revue de droit comparé* (founded in 1949) and the *International and Comparative Law Quarterly* (which replaced its predecessor in 1952). The starting point of modern comparative law, however, is traditionally identified with the first International **Congress** of Comparative Law that was convened in **Paris** in **1900**, as part of the famous World Exhibition, by two French scholars: Édouard Lambert and Raymond Saleilles. Indeed, the Congress signaled the recognition of comparative law as a scientific discipline and marked the beginning of a study into theoretical and methodological issues, including the nature, functions, and object of comparative law (ANCEL, *Les grandes étapes*, pp. 23-26). In line with the then prevailing belief in progress, the proclaimed aim of comparative law was the development of a «*droit commun de l'humanité*» (ZWEIGERT, KÖTZ, *Introduction*, p. 3), i.e. a common law of humanity. Yet, the first comparatists assumed that only similar things could be compared and therefore limited their interest to the statutory law of continental European countries (ID., p. 59).

The conclusion of the **First World War** marked the beginning of a period characterized by the desire to transcend the national dimension and foster international cooperation, resulting in a flourishing era for comparative law, with the creation of the *Académie Internationale de Droit Comparé* in 1924, which has organized periodical International Congresses of Comparative Law ever since, and the establishment of the *Institut international pour l'unification*

du droit privé (UNIDROIT) in Rome in 1926 under the aegis of the League of Nations, which was re-established in 1940 on the basis of a multilateral agreement. This second phase in the development of comparative law is marked by a shift from the discussion of theoretical issues such as the nature and aims of the discipline, which were the main focus of the Paris Congress, to the study of more specific problems. On the other hand, the scope of interest widened, moving from statutory law to the whole legal system and beyond the borders of continental Europe, with the 'discovery' of the common law (ID., pp. 60-62).

After the parenthesis of the 1930s, marked by economic depression and the rise of isolationist attitudes and totalitarian regimes that led to another catastrophic world war**, the second half of the 20th century** witnessed the emergence of a more mature position among comparatists, who acknowledged the naivety and amateurism of certain aspects of the initial approach. It is also a period of expansion of comparative law. Given the increasing frequency of exchanges and interactions between individuals and growing interdependence among different countries, it was no longer possible or practical to consider law as a national phenomenon. This growth took many forms. Firstly, an increase in scholarly production, with journals and books devoted to comparative law but also a more frequent presence of comparative elements in works that are not strictly comparative. Secondly, its academic teaching has become more widespread, with an increasing presence in university curricula, albeit with significant differences from one country to another (DEMLEITNER, *Comparative Law*, pp. 333-344 and HUSA, *Introduction*, pp. 12-13). The spread of comparative law outside the field of private law, where it originally developed, is another notable feature. In this respect, the emergence of comparative constitutional law is probably the major event, but other disciplines such as labour law, criminal law, and administrative law have also witnessed similar developments (ID., pp. 14-18). It was during this period that the contribution of the United States to comparative law became particularly relevant, largely thanks to the emigration of prestigious European legal scholars who settled in American universities (ID., pp. 10-11). A reference to Rudolph Schlesinger, who left Germany in 1933 and published the first edition of what would become the best-known US textbook on comparative law in 1950, may suffice to illustrate the point (SCHLESINGER, *Comparative Law*).

The transition to the **21st century** brought no radical alterations to comparative law, although a certain shift in focus may be noted. Writings on theoretical and methodological issues are multiplying (see, e.g., ÖRÜCÜ, *The Enigma*, SAMUEL, *An Introduction* and GLANERT, MERCESCU, SAMUEL, *Rethinking*). However, while some traditional themes of comparative law, such as the de-

bate on the nature and aims of the discipline or the classification of legal families, are becoming less central, **interdisciplinarity** is gaining in importance and new approaches to comparative law, such as the numerical and the empirical, are emerging (SIEMS, *Comparative Law*, pp. 207-320). Contemporary comparative law is also characterized by the abandonment of legal positivism, which dominated the Paris Congress, and the prevalence of a **contextual approach to law**. Furthermore, there is a growing attempt to move away from the Eurocentric and colonialist approach that characterized the early years, and a greater recognition of the importance of studying **non-Western legal systems**. This is exemplified by the overhaul of Schlesinger's casebook carried out by the three scholars who took it over after his death (MATTEI, RUSKOLA, GIDI, *Schlesinger's Comparative Law*) and the publication of books such as MENSKI's *Comparative Law in a Global Context*, which centers on Asian and African legal systems, and HEAD's *Great Legal Traditions*, which places civil law, common law and Chinese law on an equal footing.

2.2. *The Aims of Comparative Law*

If it is true that comparative law no longer requires justification for its existence alongside other legal disciplines, as was the case in its early days, examining the aims of comparative law remains pertinent and valuable, especially in a textbook that serves as an introduction to the subject.

Following Mathias Siems's taxonomy, the aims of comparative law as articulated by the most eminent scholars can be grouped around three concepts: knowledge and understanding, practical use at the national level and practical use at the international level (SIEMS, *Comparative Law*, p. 2).

Firstly, when addressing this issue, most comparative lawyers initially refer to the function of increasing legal **knowledge**. The difference lies in the emphasis placed on this aim. For some scholars knowledge is the «primary aim of comparative law, as of all sciences» (ZWEIGERT, KÖTZ, *Introduction*, p. 15), so that the question of the aims of comparative law is a «false problem», since no science needs to set itself any further goal than the satisfaction of the human desire to acquire knowledge about its object. Additional aims, although «worthy of the greatest consideration», are, according to this approach, only secondary (SACCO, *Legal Formants*, pp. 1-6). An alternative perspective posits that comparative law does not solely involve neutral measurement of differences and similarities. Instead, this knowledge forms the necessary foundation for an evaluation of the existing solutions to a particular issue (CAPPELLETTI, *The Judicial Process*, p. XIX).

In any case, the knowledge acquired through comparative law is particularly valuable as it promotes a better and deeper **understanding** of one's own legal system and its workings, leading to the development of a more critical perspective.

> Our own way of doing things seems so natural to us that often it is only comparison with another way that establishes that there is something to be explained. Comparison often picks up issues or makes connections that remain invisible to other research strategies. (GLENDON, CAROZZA, PICKER, *Comparative Legal Traditions*, p. 16).

Comparative law also fosters an appreciation of other societies and legal traditions, and the **recognition of the diversity of law** worldwide:

> comparatists hold up a view of diversity as neither an impenetrable barrier to comparison nor an aberration to be ignore or reduced, but instead as an invitation, an opportunity, and a crucible of creativity and dynamism (ID., p. 13).

Turning to more practical aims, at the **national level** comparative law is, first of all, a **tool for legislators**, helping them to design and draft reforms. The circulation of legal models is an ancient phenomenon, and some classic examples such as the reception of Roman law and the diffusion of the French civil code will be examined in the following chapters. This phenomenon seems particularly apparent during periods of political transition, such as in Central and Eastern Europe following the fall of the Berlin Wall. The former socialist republics which sought to switch to a free market and democratic system turned to Western solutions to effect these changes, aided by massive programmes of legislative assistance funded by prominent foreign donors. Partly as a result of this transition, the circulation of legal models has emerged as a major topic also in the field of constitutional law. Additionally, it has attained a global dimension due to law reform programmes promoted by international and supranational institutions (GRAZIADEI, *Comparative Law*, pp. 452-456).

It was not until the 1970s that this phenomenon of circulation of legislative solutions became the object of specific scholarly attention (ID., p. 443). In particular, in 1974 Alan WATSON published a volume entitled *Legal Transplants*, according to which **transplants** were the most fruitful source of legal change along history and the study of legal transplants the main object of comparative law. This view is vigorously criticized by those scholars who believe that law reflects the culture of a particular society, so that the legal system of one society can only fit that society and cannot be transplanted elsewhere. The most

prominent proponent of this view of the impossibility of legal transplants is Pierre LEGRAND (*The Impossibility*).

It is difficult to deny that every legal system contains imported elements and that throughout history the circulation of ideas has been one of the most important sources of change in legal systems. On the other hand, the metaphor of transplant fails to convey the continuing nature of the phenomenon, as well as its complexity. In fact, the transfer is not a mechanical activity. Rather, the transplanted legal element usually undergoes a more or less deep transformation due to the adaptation to the context of reception. This is one of the reasons why alternative expressions should be considered to define it, including borrowing, transfer, diffusion or migration, which have been suggested more recently (GRAZIADEI, *Comparative Law*, p. 444).

The metaphor of transplant, however, remains useful, also because it is connected to the notion of **rejection**, which allows to highlight the possible risks and difficulties involved in legal transplants. In other terms, effective transplants are not easy to perform, because the characteristics of the context of reception may prevent the transplanted institute from producing the anticipated results or may produce unexpected effects.

The two main factors that account for this circulation and the determination of the legal solution to be borrowed are imposition and prestige. On the one hand, legal change can be the result of the **imposition** through some form of violence: military conquest, such as that which imposed the French Civil code on a large part of Europe as a result of Napoleon's victories, or colonization, such as that which led to the transfer of Castilian and Portuguese law in Latin American, are a very recurrent source of legal transplant throughout history. On the other hand, the reception of foreign solutions can be voluntary: «The desire to have what others have, especially if it is deemed superior, may be enough to trigger transplants or receptions. Thus '**prestige**' motivates imitation» (ID., p. 460). At various points in history certain legal systems have enjoyed a particularly high esteem, a cultural leadership, which favored the borrowing of their legal institutions. This account, for example, for the great success of the French Civil code despite Napoleon's defeat as well as the circulation of German scholarship also in the common law world in the latter part of the 19th and the beginning of the 20th century (MATTEI, *Why the Wind Changed*).

One final point should be clarified: it is now well established that legal transplants can involve more than just legal rules; legal ideas, such as the concept of codifying state law, and other components of a system, like the organisation of legal education, can also circulate (SIEMS, *Comparative Law*, p. 288).

In addition to being a useful tool for legislators, comparative law may be an aid for judges in the **interpretation of national law**. Obviously, the use-

fulness of comparative law does not emerge in the cases where a rule exists and its meaning is clear, but where the interpretation is doubtful or there is a lacuna or gap, (i.e. a rule is lacking) judges sometimes resort to comparative law as a tool to reach the best decision of the case. Usually, the comparative law argument is not the only ground for the decision, but it is an additional element supporting the judgement.

The willingness of judges to resort to comparative law arguments varies from one legal system to another. Historically, in the common law tradition – which is characterized by a certain degree of openness because, as we shall see, judges have always performed a law-making function – courts have been more open to referring to each other's decisions, sometimes even going so far as to make references to the civil law tradition. However, examples of use of the comparative law argument can be found also in decisions by civil law courts, especially in Germany and Switzerland, whereas in France, the peculiarly concise style of the decisions of the Court of Cassation made this type of references utterly impossible (ZWEIGERT, KÖTZ, *Introduction*, pp. 18-19).

In the last decades, this practice has undergone a significant development in the field of constitutional law, and more specifically in relation to fundamental rights, where a so called cross-border **judicial dialogue** has been developed by national, international and supranational courts such as the European Court of Human Rights and the European Court of Justice, giving rise to a considerable amount of research and debate (GROPPI, PONTHOREAU, *The Use of Foreign Precedents*).

In the light of these developments, simplifying the taxonomy suggested by MARKESINIS and FEDTKE (*Judicial Recourse*, pp. 61-62), the legal systems can be classified into three groups according to their openness to judicial dialogue.

At the one end of the spectrum, we find systems, such as those of France and Italy, which historically have been **less receptive** to the comparative law argument being openly used. This is partly due to the style of judicial decisions (ID., pp. 62-66), which – as we shall see – among other things does not allow separate opinions, and more generally to a positivistic approach to interpretation. However, there is currently a trend to pay greater attention to foreign cases.

Countries like England (Appendix I, **1**) and Germany (Appendix III, **4**) are in an intermediate position as their courts **openly** rely on the comparative law argument (ID., pp. 66-82).

At the other end of the spectrum are legal systems such as Canada and South Africa, where the recourse to foreign case law is a **regular practice**. This approach can be explained by referring to some specific characteristics of the two legal systems. On the one hand, the presence of Quebec, with its French-modelled system, has accustomed Canadian jurists – largely trained in

common law – to a more open and flexible approach. Furthermore, the adoption of the Canadian Charter of Rights and Freedoms in the mid-1980s sparked a surge of interest in foreign case law in the area of human rights (ID., pp. 83-85). On the other hand, the South African response to the apartheid-era abuses has heightened the attention to the importance of human rights, anchoring them to non-national parameters (ID., pp. 85-108). Thus, article 39 of the Constitution entered into force in 1996, establishes that

> (1) When interpreting the Bill of Rights, a court, tribunal or forum –
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.

This taxonomy does not include the **United States** because of its singular position on the issue. The practice of relying on foreign authorities, including civil law authorities, to assist in the resolution of unsettled or novel questions of domestic nature has a long tradition (Appendix I, **3**) and has even extended to constitutional law cases (Appendix I, **2**) (SCHLESINGER, *Comparative Law*, pp. 7-10). However, at the beginning of the new millennium it came under attack mainly due to its use in a few highly contentious decisions concerning the constitutionality of death penalty in cases of the mentally disabled (*Atkins v Virginia*, 536 U.S. 304 (2002)) and of minors (*Roper v Simmons*, 543 U.S. 551 (2005)), and the criminalization of consensual sexual conduct between adults of the same sex (*Lawrence v Texas*, 539 U.S. 558 (2003)) (Appendix I, **4**). Those who did not approve the substantive decisions of the US Supreme Court also challenged the recourse to foreign law as an argument for the decision of domestic cases, thus giving rise to a significant scholarly debate on the issue (MARKESINIS, FEDTKE, *Judicial Recourse*, pp. 55-61).

Finally, comparative law provides a crucial contribution to the competence of **practising lawyers** in offering sound legal advice to their clients, for instance when drafting international business contracts, and facilitating effective communication with lawyers or public officials belonging to a different legal system.

Moving from the national to the **international level**, since the late 19th century, the unification of law has become increasingly significant, especially in areas connected to international commerce, where certainty and predictability are of great worth. International organizations such as the Hague Conference on Private International Law (HCCH) – which was first convened in 1893 – and the United Nations Commission on International Trade Law (UN-