

TAKING COMPARATIVE LAW LIGHTLY. ON SOME USES OF COMPARATIVE LAW IN THE THIRD GLOBALIZATION

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I. In Duncan Kennedy's picture, the third globalization is drawn as an "*unsynthesized coexistence*" of transformed elements of CLT with transformed elements of the social"¹.

The contemporary ideal is a legal regime that is pluralist in the sense of appropriately recognizing and managing "the difference". An ethical commitment has been written into adjudication and judges can intervene if they are able to perform correctly that goal.

II. Identity/rights discourse is truly becoming a common thread in the third globalization, just as abstract individualism and class were keys to CLS and the social. It is not only applicable to fundamental rights in constitutional litigation, but also to family law and the law of the market.

A right against discrimination on the ground of sex, ethnic or racial origin has been widely recognized in every constitutional setting. Such a right has been established even in relation to a contract whose object is to provide access to or supply goods or services which are available to the public².

The same rationale is also at the core of EU intervention in consumer protection, where the "weakness" of one party calls for a wide reshaping of contract background rules (disclosure of information, implied terms) to "restore its autonomy". Thereby, some market actor is forbidden to discriminate against some identities but not

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¹ Kennedy, Du. "Three Globalizations of Law and Legal Thought: 1850-2000." *The New Law and Economic Development: A Critical Appraisal*. Eds. Trubek, D. M. & A. Santos. Massachusetts: Cambridge University Press 2006, 19-73, 63.

² Marella, M. R. "A New Perspective on Human Dignity: European Contract Law, Social Dignity and the Retreat of the Welfare State." *Constitutional Values and European Contract Law*. Ed. Grundmann, S. The Netherlands: Kluwer Law International, 2008, 123-147, 137, 144.

others. The latter is another example of the “unsynthesized coexistence” of the elements of the two past globalizations.

Legislation and intervention by the judge (through general clauses) which were the key tools of the second globalization are redeployed. Now they do not react against an exceedingly individualistic approach in the name of the public interest. They protect human rights and dignity. Their goal is to enhance autonomy. Private autonomy as self-determination becomes a value which is at the core of consumer protection. A value to be balanced eventually with others competing values.

An example of the evolution described is the use of the general clause of *ordre public*/public order by the Courts. *Ordre publique* was viably present in the first globalization as a guiding principle to tutor the liberty of contract, it was used mainly to strike down every agreement in restraint of freedom of contract or alienability of property, in the second globalization it became the strongest limit against antisocial and individualist abuse of contract law³. In the present *ordre public* strikes back to protect and enhance private autonomy.

III. The discourse on identity/rights is highly pervasive in the third globalization. It is not only applicable in the fields of the law of the market and the family, but even has made inroads into the field of comparative law. Identity/rights discourse enters comparative law in a sense very different from the identity constitutive role, emphasized by critical comparativists and postcolonial studies⁴.

A revival of culturalist trend goes through the whole area of comparative law⁵, particularly in the field of public and constitutional law and often against the methods of comparative private law⁶. The cultural argument is deployed to go

³ See Marella, M. R. “The Old and New Limits to Freedom of Contract in Europe.” *Eur. Rev. Cont. L.* 2 (2006): 257. The Italian case-law on public order (“ordine pubblico”) during the first and the second globalization is described by Guarneri, A. *L'ordine pubblico e il sistema delle fonti del diritto civile*. Padova: Cedam 1974.

⁴ Kennedy, Da. “The Politics and Methods of Comparative Law.” *The Common Core of European Private Law*. Eds. Bussani, M. & U. Mattei. The Hague, London, New York: Kluwer Law International, 2003, 131-207.

⁵ Legrand, P. *Le droit comparé*, Paris: PUF, 1999, 22.

⁶ Sacco, R. “Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II).” *Am. J. Comp. L.* 39 (1991): 1, and Id., “Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II).” *Am. J. Comp. L.* 39 (1991): 343.

beyond formalism (a charge of which private comparative law method is often accused) to attain the widest possible historical vision, to search for the typical and necessary elements which integrate the different legal systems, enabling their functioning and allowing their identification. Accordingly, respect for and preservation of the legal and cultural experience of different countries is a theme that has fundamental operative value at the EU integration process level.

Recently, the search for a common core has involved not only private law but also fundamental rights. The new trend in comparative law studies different interpretations of the meaning of particular fundamental rights in the light of European integration. Such an analysis goes well beyond national legislative texts and judicial decisions to include E. Ct. H.R. and ECJ case law, whose objective is to judge the compatibility of national legislation with the Convention of Human Rights and European law.

The transformation of the institutional framework from a full sovereignty to porous institutions which have only scraps of sovereign powers has set in motion an intricate shift in the modes with which convergence is attained. Unity is pursued no longer through the construction of a hierarchical order of common principles and rules but through a harmonization of the different contents of the fundamental rights.

In this process, a major role has been increasingly played by argumentative techniques and balancing (of conflicting considerations)⁷.

IV. In this perspective, the question of integration of different legal cultures develops in comparative law according to the minoritarian identity/rights discourse. Thus, the set of legal concepts and techniques through which identities enter law (discrimination and accommodation), now enters comparative law. Furthermore, comparative law has been increasingly used as a tool to further a “common constitutional law” dialogue among judges and concerning various forms of constitutional pluralism. Thus the comparative function is enhanced and gets a further function of integration.

⁷ On balancing of conflicting considerations see: Lasser, M. *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford: Oxford University Press, 2004; Kennedy, Du. “A Transnational Genealogy of Proportionality in Private Law.” *The foundations of European Private Law*. Eds. Brownsword, R., H. W. Micklitz, L. Niglia, S. Weatherhill. Oxford and Portland, Oregon: Hart Publishing, 2011, 185.

In the new trend, as employed jurisprudentially, comparison becomes the core of an argument, such that the European Courts now deploy comparative arguments to decide cases. Courts and interpreters have abandoned the traditional comparative technique of finding a common framework of principles and rules from which they can start to pursue the integration project.

According to the formula of an “open constitutional state”, they use comparative methods to reach forms of equilibria which closely resemble Sunstein’s “incompletely theorized agreements”⁸.

Their goal is to reach a partial and temporary equilibrium which does not exhaust the definition of the common good and leaves open the possibility for further change through a dialogic confrontation with different ways to conceive a fundamental right. Comparative law must not build a hierarchical framework of shared principles and rules. Similarly, comparative law should not be used as a technique to reach a “better rule” or a “common rule”, but, on the contrary, as an instrument to work out a series of tools and techniques to handle conflicts and to pursue at the same time unity and diversity.

An outstanding example can be found in the Delmas Marty’s theory of “pluralisme ordonné”⁹ which highlights the Courts’s technique of the “margin of appreciation” as an example of the shift from the hierarchical setting of comparative law to a different form of searching for “compatibility”.

In any case in which there is no consensus on the content of the fundamental right among the different States of the European Union, the States should be free to regulate the matter.

V. An interesting example, among many others, is a case decided by E. Ct. H. R. in 2010¹⁰.

Two same-sex partners challenge art. 44 of Austrian civil code in which marriage is a link only between two persons of opposite sex in the light of art. 12 Convention¹¹

⁸ Sunstein, C. “Incompletely Theorized Agreements in Constitutional Law.” *Social Research* 74 (2007): 1.

⁹ Delmas-Marty, M. *Le forces imaginantes du droit (II). Le pluralisme ordonné*, Paris: Seuil 2006.

¹⁰ *Schalke and Kopf v. Austria*, Application no. 30141/04, European Court of Human Rights, 24 June 2010, available at: <http://www.unhcr.org/refworld/pdfid/4c29fa712.pdf>. [accessed 8 December 2011].

and art. 9 Charter of Rights¹². Notably the Convention and the Charter do not literally require the partners of a marriage to belong to opposite sex.

In the decision the Court holds that “the Court would no longer consider that the right to marry enshrined in art. 12 must in all circumstances be limited to marriage between two persons of the opposite sex”¹³. Consequently it cannot be said that article 12 of the Convention or Article 9 of the Charter is inapplicable. As to the latter, the Court states that it “has deliberately dropped the reference to men and women”¹⁴ and that it is meant to be “broader in scope than the corresponding articles in other human rights instruments”¹⁵.

At the same time, though, the Court considers that European States – insofar as marriage regulations are concerned - do not share a common ground and this makes it impossible to reach a common standard. In absence of any European consensus, the issues come within the margin of appreciation that the Court generally considers States should enjoy in this sphere. This decision is considered starkly different from those given by French and Italian Supreme Courts¹⁶.

The holding has been endorsed by many European scholars, who have compared the E. Ct. H. R. decision with those of the French and Italian constitutional courts on the same issue, and has thus been hailed as an example of the new trend.

Whereas the former left the issue open, the latter deferred the problem to the legislator by denying - with an originalist argument - that the constitutional guarantee

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950, Art. 12 – Right to Marry: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”.

¹² Charter of Fundamental Rights of the European Union, 30 March 2010 (2010/C 83/02), Art. 9 – Right to marry and right to found a family: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights”.

¹³ *Schalk and Kopf v. Austria*, Application no. 30141/04, European Court of Human Rights, 24 June 2010, par. 61, page 16.

¹⁴ *Schalk and Kopf v. Austria*, cit., par. 60, page 16.

¹⁵ *Schalk and Kopf v. Austria*, cit., par. 60, page 16.

¹⁶ Conseil Constitutionnel, Décision n° 2010-92 QPC du 28 janvier 2011, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2011/2010-92-qpc/decision-n-2010-92-qpc-du-28-janvier-2011.52612.html>.; Italian Constitutional Court, judgement of 14 April 2010, n. 138, available at <http://www.corte costituzionale.it/actionPronuncia.do>.

can be read as to include features and phenomena that were not intended by the Framers when they wrote it¹⁷.

The European Court, on the other hand, chose a sort of temporary restraint in waiting for certain conditions - a consensus standard - to be realized.¹⁸ By leaving issues of principle open, the Court has limited the antagonism between the different institutions involved and has helped them to move to a stage where they could mutually benefit from a cooperative relationship. Thus, in any case in which, for a variety of possible reasons, it is not possible to identify a univocal content of the right, it is up to the court to play a crucial role. By resorting to the “margin of appreciation”, the Court can play a pivotal role in the process of integration through the comparative argument¹⁹. However, its operation is always flexible: It depends on the circumstances and on the nature of the claimed right.

For instance, when the protection of the privacy or private life of the individuals is at stake, the Court does not hesitate to question national legislation (for example, in some cases in which gender and sexual orientation are jeopardized, the Court struck down the North Irish criminal law without recourse to the margin of appreciation doctrine²⁰).

VI. Through comparative law, judges ought to search for consensus and stick to the civil virtue of adjudication. Judges must take into account that their solutions have to be embedded in the cultural, social and legal context of each member state. In this connection, many scholars have appreciated the concern for the legitimacy of

¹⁷ Italian Constitutional Court, judgement of 14 April 2010, n. 138, par. 9.

¹⁸ *Schalk and Kopf v. Austria*, Application no. 30141/04, European Court of Human Rights, 24 June 2010, par. 105, page 23.

¹⁹ Reference to common standards can foster a more progressive interpretation by the Court. The ECHR becomes a “living instrument” in which the plurality of cultures co-exists with the unity of the protection in an effort to reach a reasonable degree of “sustainable diversity”. See Rigaux, F. “Interprétation consensuelle et interprétation évolutive.” *L’interprétation de la Convention européenne des droits de l’homme*. Ed. Sudre, F. Bruxelles: Bruylant, 1998, 44; Kastanas, E. *Unité et diversité: notions autonome et marge d’appréciation des Etats dans la jurisprudence de la Cour européenne des droits de l’homme*. Bruxelles: Bruylant, 1996, 279.

²⁰ *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142.

jurispathic²¹ coercion and the need to ensure that a legal culture of a single national state remains open to the production of new meanings. Similarly, the Court sees itself as jurisgenerative, offering reconciliation and opportunities for dissolution of differences in the future²².

The Court is praised for its sensitivity of the values of two conflicting groups (in this case, different States) and for its effort to transform the conflictual situation by an accomodationist compromise and community (in this case, European) building decision rather than right-oriented²³.

Its techniques are more procedural than substantive. Instead of the mere implementation of coercive rules or enforcement of rights, based on historical intention or a political consensus, the goal of the Courts should be an engagement in dialogic practical reasoning; respect for the procedure legitimates courts to play the role of the decision-maker in hard cases. The procedure has been reformulated by including consideration of divergence or convergence in national legislative and judicial materials.

This trend emphasizes also a new method in which the theory of argumentation (and particularly comparative law arguments) becomes crucial and focuses on the importance to develop reasonable arguments to justify decisions, particularly in hard cases. The formalism of mechanical deduction and the instrumental character of the social has been abandoned. Therefore, the law itself presupposes a knowledge which is basically different from scientific knowledge. In law, knowledge is never concluded and is always subject to rectification. Rules of argumentation have the nature of rules of conduct. Mistakes are not only a logical error, but also an unjust act, an abuse.

²¹ On the concepts of "jurispathic" and "jurisgenerative", see: Michelman, F. I. "The Supreme Court, 1985 Term - Forward: Traces of Self-Government." *Harv. L. Rev.* 100 (1986): 4; Id., "Law's Republic." *Yale L. J.* 97 (1988): 1493; Cover, R. "The Supreme Court, 1982 Term - Forward: Nomos and Narrative." *Harv. L. Rev.* 97 (1983): 4.

²² For a careful analysis of role of the E. Ct. H. R. in this perspective, well aware of its potential but also its risk see Repetto, G. "Discrimination against Homosexuals and "Integration by Reasonableness": Suggestions from the Maruko case." *Dignity in Change. Exploring the Constitutional Potential of EU Gender and Anti-discrimination Law*. Eds. Niccolai, S. & I. Ruggiu. Florence: EPAP, 2010, and Id., *Argomenti comparativi e diritti fondamentali in Europa. Teorie dell'interpretazione e giurisprudenza sovranazionale*. Napoli: Jovene, 2011.

²³ For similar compromises See: Eskridge, W. & G. Peller, "The New Public Law Movement: Moderation as a Postmodern Cultural Form." *Mich. L. Rev.* 89 (1991): 707, the essay highlights an emphasis on progressive features and on arguments drawn from extralegal theories as feminism, hermeneutics and pragmatism.

VII. Such developments can be read in the light of the United Statesian liberal reaction to the decline of the postwar legal process consensus.²⁴

The crisis of legal process brought about two different tendencies which were bound to merge and become very influential within the third globalization. In both perspectives, the language of legal argument and judgment seemed to play a very important role.

The first one is related to the “linguistic turn” which affected every field in the humanities. In this view, the cultural practices were reinterpreted “as acts of communication in a kind of social language” developed by various “interpretive communities”.²⁵ Law was a social practice of interpretation rooted in a given community and the study of the communicative practices was crucial.²⁶

The second tendency was the critique of “right talk” which focused basically on the practice of articulating and advocating rights and emphasized the feature of rights as argument to persuade others. In this perspective, language is a mode of human action and a creative self-expression, open to new meanings and capable of communicating and persuading.

In the process whereby law was perceived as a matter of words and arguments, the autonomy of legal reasoning was restored, legal theory stepped back from instrumentalism and criticism about the internal coherence and determinacy of legal materials was sidestepped.

They recognized that judges are ideologically committed and they pursue political ends, but interactive conventions of legal profession provide the necessary constraints and avoid the mixing up²⁷.

²⁴ Hart, Jr., H. M. and A. M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, (1958), partially republished in Kennedy, Da. and W. Fisher eds. *The Canon of American Legal Thought*. New Jersey: Princeton University Press 2006, 241 ss.

²⁵ On the interpretive communities theory see: Fish, S. *Is There A Text in This Class?*, Cambridge: Harvard University Press, 1980, 147–174.

²⁶ For different approaches See. Dworkin, R. “Law as Interpretation.” *Texas Law Review*. 60 (1982): 373; Fiss, O. “Conventionalism.” *Southern California Law Review* 58 (1985): 1; White, J. B. “Law as language: Reading Law and Reading Literature.” *Texas Law Review* 60 (1982): 415.

²⁷ Kennedy, Da. “The Politics and Methods of Comparative Law.” *supra*, note 4; Cover, R. “The Supreme Court, 1982 Term - Forward: Nomos and Narrative.” *supra*, note 20.

VIII. Notwithstanding the compelling nature of these developments, they remain open to criticism.

On one hand, the approach allows tensions and conflicts in the European social order to be displayed in the very jurisdictional structure of its courts. The picture seems to highlight the open-ended struggle among legal and cultural visions in the European realm. On the other hand, its sole focus on the accommodation of States perspectives can easily lead to the diminution of other underlying conflicts.

At the same time the dual emphasis on legal language as part of a social conversation with a broad public and on the expressive functions of legal norms and arguments can easily lead one to forget other important features of the decisional process. Law may certainly be conceived as a conversation, but the focus upon the judge and the judicial interpretive act will tend to ignore that law also brings about a result in the world “of pains and death”. In any case, the choice of a rule will produce losers and winners.²⁸

The focus on the interpretive character or meaning of the event within a community of shared values will tend to underestimate the consequences on the subjects of the decision and its distributional impact and overlook opportunities for working constructively on distributional conflicts among groups and individuals that cross borders.²⁹

We expect these kinds of decisions to have no stakes in local disputes.

IX. The new trend in comparative law criticizes the formalism of the mainstream comparative method. The target of the critique is its tendency to undervalue cultural and political features of different legal systems and its search for a unity which may be attainable only through the suppression of non conforming solutions.

²⁸ Halley J. & K. Rittich, “Critical Directions in Comparative Family Law: A Report from the Up Against Family Law Exceptionalism Conference.” *American Journal of Comparative Law* 58 (2010): 753; Marella, M. R. “Critical Family Law.” *American University J. of Gender, Social Policy & Law* 19 (2011): 721; Nicola, F. “Another View on European Integration: Distributive Stakes in the Harmonization of European Law.” *Progressive Lawyering, Globalization and Markets: Rethinking Ideology and Strategy*. Dalton, C. ed. Buffalo, N.Y.: William S. Hein & Co., 2007, 233.

²⁹ Hale, R. “Coercion and Distribution in a Supposedly Non-Coercive State.” *Pol. Sci. Q.* 38 (1923): 470; Kennedy, Du. “The stakes of law, or Hale and Foucault!” *Sexy Dressing Etc. Essays on the Power and Politics of Cultural Identity*. Cambridge: Harvard University Press, 1993, 83.

The approach takes into account a pluralism that promises a celebration of differences, a dialogue that forswears dominance and aims to reach a larger consensus.

On the other hand, in the light of this reconstructive project comparative law runs the risk of losing much of its critical bite. Whereas reconstructionists write hopefully of the possibility of comparative law, they can easily fall into the same pitfall by using the comparative argument as a simple tool for increasing inclusiveness.

Certainly comparative lawyers were often lulled into the search for universal solutions to interpretative disagreements. On the same time, we cannot forget that comparative law served as often as a tool for a critique.

In the wake of the social the functional approach offered a critique of our understanding of legal categories and concepts as partial and contingent and by no means necessary.

Later, also the structural approach - by highlighting the disjunction between working rules and discourses used by lawyers to describe, justify and rationalize the rule - emphasized conflicts, gaps and ambiguities in law and underlined that the activity of a lawyer is basically an ideological one³⁰. Comparative law was used to reveal the unofficial and to critique the processes of meaning production³¹.

X. Needless to say, this approach leaves absolutely unaffected the question of the relationship between law and culture (or society)³², in particular the question of the extent to which constitutions and fundamental rights are the result of political culture or, on the contrary, it is up to constitutions and fundamental rights to shape the culture.

Culture is neither given, nor develops organically from a given point on. It is constructed by the interpreters. It is a work of representation. As with tradition, any totalizing understanding of culture fails to take into account the role of individual

³⁰ On the use of functional approach and the structural approach for critique and reconstruction see Marini, G. "Diritto e politica. La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione." *Pòlemos* 1 (2010): 31, 65-73.

³¹ Monateri, P. G. "Black Gaius. A Quest for the Multicultural Origin of Western Legal Tradition." *Hastings Law J.* 51 (2000): 479.

³² Frankenberg, G. "Critical Comparison: Re-thinking Comparative Law." *Harv. Int'l L. J.* 26 (1985): 411.

actors in generating meanings and in particular fails to account for conflicting understandings and views within every culture. It treats cultures as hermetically sealed units rather than pluralistic, intersecting hybrid entities.³³

The process through which culture is constructed is a dynamic one. A process in which culture is both reproduced and transformed by the practices it enables and the resistance it generates. Hegemonic processes' goal is to bring about an uncontested social consensus about meaning. Hegemony, however, is never total and complete and emergent elements continually threaten to disrupt the orthodoxy of dominant discourse.

XI. While contemporary legal thought shows characteristic traits by organizing claims under the rubric of (cultural) pluralism, the third globalization can still be considered an un synthesized blend of materials from the previous two waves.

It is important, however, to notice the recurrence of two basic arguments from earlier eras. If we look back we can see that the core idea of scientificity of CLT has re-emerged in the framing discourse of balancing conflicting considerations of the social. Among the conflicting considerations the judge has to take into account today also the comparative argument.

First generation comparative law connected comparison mainly with history. In the nineteenth century German historical school, there developed the idea that law was deeply rooted in local traditions and in the deepest beliefs of a people and their customs.

Comparative law was used to supersede a universalistic rational conception of the law and to lead to an alternative to the law of reason.³⁴

³³ Marini, G. "Foreword – Legal Traditions. A Critical Appraisal." *Co. L. R.* 2.1 (2011), available at: <http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/15/19>. Monateri, P. G. "Deep Inside the Brumble Bush: Complex Orders and Humanities." *Rechtsgeschichte: Zeitschrift des Max-Planck-Instituts fuer europaeische Rechtsgeschichte* 11 (2007): 172.

³⁴ Savigny, K. *Ueber den Zweck dieser Zeitschrift*, *Zt.ges. Rm.* 1815, 6, and later Kohler, *Das Recht als Kulturerscheinung*, Wuerburg 1885. According to Savigny there is an organic link between law and the essence of a nation (on Savigny's role see Ewald, W. "Comparative Jurisprudence (I): What was it Like to Try a Rat?" *Penn. L. Rev.* 143 (1995): 1189, 2012, Kennedy, Du. "Savigny's Family/Patrimony Distinctions and its Place in the Global Genealogy of Classical Legal Thought." *Am. J. Comp. L.* 58 (2010): 811.

Comparative law was conceived mostly as “universal legal history” (“Universalrechtsgesichte”). In this approach, law is an ongoing uninterrupted process that is possible to understand only by comparing different legal systems. Comparative law’s main goal was to discover the way in which law is born and develops in different societies and in different historical periods.

In that perspective Roman law was of particular importance. The perfection of Roman law was the template toward which the law evolved. This approach produced an “ideology” of Roman uniqueness which entails an almost total exclusion of the importance of other legal traditions. The distinction between Roman and German Law was gradually narrowed down, so that the latter could participate of the higher qualities of the former.³⁵

It is not hard to see already at work the theory of the renewal of the old, and the first globalization comparative law was used mainly not to bypass national views of law, but rather to create and support it.³⁶ The deployment of the historicist legal theory fits perfectly with the colonial enterprise. Within the unique normative order built and rebuilt by national legal scientists, as Duncan Kennedy aptly describes, “every country with Western legal heritage shared the Roman legacy along with Savigny’s Germans”.³⁷

XII. In the social, comparative law played a significant role in the broad methodological assault on law’s isolation from political and social life.

Legal science should study the actual problems of life rather than the abstract and conceptual constructs which seek to solve them.

³⁵ It is interesting to notice that the correspondence between German law and Roman law was kept even later by a new anti-individualist model of roman law in search of a closer adherence to the social inspiration of the nazi movement. See Monateri, P. G. “Everybody’s Talking: The Future of Comparative Law.” *Hastings Int. Comp. Law Rev.* 21 (1998): 825.

³⁶ The foundation of the Western legal mind lies in the extraordinary nature of its features as an original offspring of human spirit. Analogies among the different laws are evident because of the values, culture or close bonds of these people See Monateri, P. G. “Black Gaius. A Quest for the Multicultural Origins of the Western Legal Tradition.” *supra*, note 29.

³⁷ Every people could develop “slightly modified national versions of the Civil and Commercial Codes of the commercially, financially and militarily dominant European powers, facilitating integration into the world market, without seeing themselves as traitors to their national constituencies” (Kennedy, Du. “Three globalization of Law and Legal Thought: 1850-2000.”, *supra* note 1, at 31).

Drawing from the work of GénY and its critique of the dogmatism of the exegetic school, comparative law was promoted to criticize the static and detached autonomy of the law, to emphasize to the growing importance of case law and to pursue broad social and economic reform projects.³⁸

National law was full of gaps and ambiguities and formal legal materials provided no guidance. It was here that comparative law could make its contribution. Saleilles declared that the object of comparative law was the discovery of legal principles and institutions that revealed the “ideal” element in law, common to all “civilized nations”, leading to a “droit commun à l’humanité civilisée”. On this basis they were able to create distance - at least partly - from Roman law as a common baseline and to prompt a legal regime better suited to social needs or, according to other interpretations, on behalf of socially disadvantaged or culturally different people.

The French jurists did not give up the strategy of marking the difference. They pursued it in a subtler and peculiar way. In Saleilles’s presentation of the BGB, for instance, he labelled the Germans as different and “philosophical” while importing most of their conceptions and solutions from them. In most cases, they showed how the “new” German solutions have been anticipated by French case law. It was a way of assimilating coupled with denial of the borrowing.³⁹

At the same time the identification of a common ground which could beget multiple local features was a powerful critique of the national legal constructions and dogmas. Comparative law was an effective antidote to uncritical faith in legal doctrines. Through comparison it was possible to open new paths to critical approaches by emphasizing law’s intrinsic historicity and focusing on the dynamic definition of legal categories. Comparative law helped to realize the relativity of the intellectual frameworks with which interpreters analyze law and to focus on the evaluative assumptions underlying dogmatic constructions.

³⁸ See Saleilles, R. « Conception et objet de la science du droit comparé » *Bull. leg. comp.* (1900): 383; Id., « La fonction juridique du droit comparé. » *Festschrift J.Kohler*, Stuttgart, 1909, 164 and Lambert, E. *La fonction du droit civil comparé*. Paris 1903; Id., « L’enseignement du droit comparé, sa coopération au rapprochement entre la jurisprudence française et la jurisprudence anglo-américaine. » *Annales Lyon*, 1919, II, 32; Jamin, C. « Le vieux rêve de Saleilles et Lambert revisité. A propos du centenaire du Congrès international de droit comparé de Paris. » *Rev. Int. Dr. Comp.* (2000): 733.

³⁹ Monateri, P. G. « Comparer les comparaisons: la légitimité culturelle et le Nomos du droit. » *Op. J.* 1 (2009). paper n. 1, 1-26, also available at: <http://ssrn.com/abstract=1354055>.

XIII. The third globalization renewed methodological disputes about the object and the scope of comparative law. Comparative law distances itself from politics and the work of governance.⁴⁰ The primary aim of comparative law as of all other sciences lies in knowledge. Its goal was to generate an accurate description and analysis of legal similarities and differences among legal regimes. The new stance was built on the tradition of anti-formalism, but its objective was no longer to operate the antiformalist insights in a project of legal change. Comparative lawyers used an antiformalist conception of what law is to identify legal phenomena for comparison. In doing comparative work it was important to deal with the living law and to do so one should use a factual rather than a conceptual approach. The comparativist should get rid of any distraction concerning not only pre-existing ideas about legal rules and categories, but also preferences rooted in particular cultural needs or technical functions⁴¹.

To borrow David Kennedy's wording in describing Schlesinger's work, we might say that "instrumentalism was instrumental only to his descriptive endeavor"⁴².

In that perspective comparativists had to search either for what in a specific legal system performed the same function or for solutions to specific fact pattern. The investigation of those different units would have led to a better knowledge of the divergences and similarities in legal regimes by freeing the comparatist from the burden of the national pre-existing legal categories and concepts.

In the third globalization the most interesting turn is taken by Sacco's structural methodology. In criticizing the instrumental character of comparative law, the new approach developed a number of specific analytical tools such as formants, operative rules and cryptotypes to analyze and explain the internal dynamics of legal discourse.

⁴⁰ For the replacement of political and methodological engagement with eclectic professional judgment in the work of post-war comparatists, see Kennedy, Da. "The Politics and Methods of Comparative Law.", supra note 4.

⁴¹ See Graziadei, M. "Comparative Law as the Study of Transplants and Receptions." *The Oxford Handbook of Comparative law*. Eds. Reimann M. & R. Zimmermann. Oxford: Oxford University Press, 2006, 102, Id., "The Functionalist Heritage" *Comparative Legal Studies: Traditions and Transitions*. Eds. Legrand, P. and R. Munday. Cambridge: Cambridge University Press, 2003, 101, in his view functionalism is attractive in that it purports "to separate rules from their linguistic husk or their contextual justification".

⁴² Kennedy, Da. "The Politics and Methods of Comparative Law.", supra note 4.

The assertion of the indeterminacy of normative propositions and the dissociation between rules and discourses make up the main thrust of the Sacco's methodological approach. The theory draws a distinction between the practices of a legal system, the working rules as the rules which determine judicial decisions, and the representations and explanatory justifications, the discourse used by lawyers to rationalize the rules and to give meaning to the texts. The main idea is a critique of the law as a consistent system of hierarchically connected propositions and proposals for a different understanding of law. In Sacco's view, law is produced by competing formants – express and implicit⁴³ – within the unique setting and constraints of one legal tradition.

Comparison is no longer only a method but it is a scientific endeavour which has as its subject matter legal studies: the circulation of models, their dissociations and internal relations, their homologation and correspondences.

Comparative law operates to unpack the law. By identifying the single components, disentangling the relationship among them and understanding the interaction among formants the Sacco's approach tries to explain the way in which legal process works and to unravel the cryptic dynamics of legal change (and possibly to foresee its future change).

By assessing legal processes that are not dominated by any single obvious component but rather are the result of an amalgam of – sometimes tacit – models which transcend our control turned out to be very important to shed light on complex phenomena.⁴⁴ It is quite apparent today the great extent to which comparative law

⁴³ Within each legal tradition there are also implicit components (cryptotypes) which remain unexpressed but are crucial, tacit elements present in the judge mindset. See Sacco, R. "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)." and Id., "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)." *supra*, note 6; Id., "Mute law." *Am. J. Comp. L.* 43 (1995): 464; Kennedy, Du. "Thoughts on Coherence, Social Values, and National Traditions." *The Politics of European Civil Code*. Ed. Hesselink, M. W. The Hague, The Netherlands: Kluwer Law International, 2006, 9; Lasser, M. de S.O. L'E. *Judicial deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford: Oxford University Press, 2004; Id., "The question of understanding." *Comparative Legal Studies: Traditions and Transitions*. Eds. Legrand, P. and R. Munday. Cambridge: Cambridge University Press, 2003, 197-239.

⁴⁴ Most of the analysis notice that often identical code provisions give rise to contradictory case law or, vice versa, divergent code provisions give rise to identical case law. See Sacco, R. "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)." and Id., "Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)." *supra*, note 6; Id., *La comparaison juridique au service de la connaissance du droit*. Paris: Economica, 1991, 33; Monateri, P. G. "The 'Weak

was used to search for a “common core” on which to build a European legal identity and to handle the massive cross-board import/export of patterns needed to harmonize European law.⁴⁵

At the same time, it is possible to read the classical approach as a form of radical (internal) critique very close to American legal realism. The formant approach is not only concerned with the operation of working rules and the role of judges, but also with narratives and discourses developed by scholars. Comparative law meets critical thought and highlights the role that comparative legal discourse can play as a powerful tool in governance projects.

Comparative law is a move out from the ideological mechanisms; it is vital to reveal the unofficial and to critique processes of meaning production.⁴⁶

In this genre of studies the tracing back of the roots and the work which represents this (genealogical) process of construction or reconstruction gradually occupies a central place. It is crucial to identify the complex system of distinct and multiple elements (a common conceptual vocabulary, a set of potential rule solutions, typical arguments pro and con, organizational schemes, modes of reasoning), which are actually considered typical in each given experience and to identify the balance between forces (explicit and implicit) operating in a specific legal field on which depends the way in which the elements combine in any given period.⁴⁷

These different modes of thought are historically situated and mark the boundaries within which hegemonic and counterhegemonic struggles can take place.

Law’: Contaminations and Legal Cultures.” *Global Jurists Advances* 1 (2001), but also Kennedy, Du. “A Transnational Genealogy of Proportionality in Private Law.”, supra note 7.

⁴⁵ See Mattei, U. “The Comparative Jurisprudence of Schlesinger and Sacco: A Study in Legal Influence.” *Rethinking the Masters of Comparative Law*. Ed. Riles, A. Portland-Oxford: Hart Publishing 2001, 238; Marella, M. R. “The NON-Subversive Function of European Private Law: The Case of Harmonization of Family Law.” *Eur. L. J.* 12 (2006): 78; Frankenberg, G. “How to do Projects with Comparative Law - Notes of an Expedition to the Common Core.” *Global Jurist Advances* 6 (2006).

⁴⁶ Monateri, P. G. “Everybody’s Talking: The Future of Comparative Law.”, supra, note 33; Frankenberg, G. “Critical Comparison: Re-thinking Comparative Law.”, supra, note 30.

⁴⁷ For a critical reference to the way in which tradition works, adapts and maintains its distinctiveness, how it reworks their foundational myths, how it makes strategic use of law in relationship with other cultures in comparative law, see *The Construction of Legal Tradition. A Conference*. Spec. issue of *Co. L. R.* 2.1 (2011) supra note 31 (contributions from Marini, G., Giaro, T., Frankenberg, G., Abu-Odeh, L., Esquirol, J.). Marini, G. “Diritto e politica. La costruzione delle tradizioni giuridiche nell’epoca della globalizzazione.”, supra note 28.

“The dissemination of the discursive practices” which shapes the legal consciousness in a specific historical age becomes the focus of the comparative enterprise.⁴⁸

XIV. The same argumentative machinery that generated comparative law’s apolitical sensitivity can also now be turned to a variety of practical endeavours. Its well-established scientific pedigree and its eclectic methodology now warrant many different applications. Yet the applications of the “theory” leave much space for debate insofar as they imply a subtle reconsideration of the intellectual premises of the comparative methodology.

The pluralist structure of European law and the increasing pervasiveness of transnational normative legal networks require a revision to the approach to comparative law .

Pursuing the goal of European integration, private and public law comparison has also gained a practical function. The cognitive function of comparison is now supplemented by an argumentative function which becomes the characteristic of the ECJ and E.Ct.H.R. decisions⁴⁹. Comparative law, as an exercise of objective scientific knowledge, acquired through comparative method and academic good judgment, has been increasingly used by Courts to found a good argumentative technique in the reasoning of their more important “constitutional” decisions.

Those Courts have an ambivalent comfort with their authority and rule. They understand themselves to have a disciplinary position in broad political debate but it is a vague, tolerant, and cosmopolitan position.

The goal of comparative law is no longer to identify the stages of legal development, nor to uncover universal solutions to the interpretive disagreements, nor to retrace a model and its circulation, but to supply an argument which justifies a judicial decision.

⁴⁸ Lopez Medina, D. *Teoría impura del derecho: La transformación de la cultura jurídica latinoamericana*, Bogotá: Legis 2004; Kennedy, Du. “Three Globalizations of Law and Legal Thought: 1850-2000.”, *supra* note 1.

⁴⁹ See Vespaziani, A. “Comparison, Translation and the Making of a Common European Constitutional Culture.” *German Law Journal* 9.5 (2008): 547.

Comparative law is used to seek out the overlapping consensus taking shape in the public legal sphere and to defer to other decision-making procedures. When there is a gap or conflict, the task of the judge is to refer to the balance of solutions reached by the EU member States.⁵⁰

Comparative law becomes a topic for discussion of the meaning of statutes and their reconciliation with other statutory materials, Treaties and Conventions. The recurrence of the comparative argument shows its fundamental acceptance within the legal community as a basic idea through which disputes will be framed and debated. Comparative law enriches the catalogue or checklist to which one turns to know how to solve a problem. As an intellectual tool that can be readily shaped to solve a number of questions, comparative law does not predetermine the result but it shapes the inquiry.

By referring to legal solutions in statutory materials and holdings of the national Courts, European judicial decisions secure their neutrality. Comparative methodology is not merely being incorporated into an argument; it is being transformed in the encounter. The suggestion here is that the encounter has led to a shift in the meaning of comparative law which brings its focus back on positive sources and emphasizes the unity of law.

Comparative law as argument entails a return to a more static inquiry limited to specific provisions often with a limited reference to legal culture. Despite its positivistic features and the resulting criticisms, this kind of “comparative law by columns” or “encyclopedic comparison” is still widely performed in worldwide analysis and enjoys a global aspiration.⁵¹ As it is shown by the World Bank, the “Doing Business” approach, in which the creation and use of indicators as a form of knowledge to inform decision-making as well as the increasing supply of information, relies mostly on a formal approach.

⁵⁰ In the case of same-sex couples it seems that the Court is not interested in a more careful examination of the legal systems to understand the way in which the rights of gay and lesbian groups are actually endorsed by each national system, equal access of gay and lesbian to all the facilities connected to the marriage are guaranteed, and access to those benefits provide these groups with tangible means to assert their identities and their views.

⁵¹ Nicola, F. “Family Law Exceptionalism in Comparative Law.” *Am. J. Comp. L.* 58 (2010): 777.

Comparative law abandons not only the relentlessly critical stance toward statutory materials and reasonless “deference” to judicial decisions, but also distances its work from the result of classical comparative analysis. In place of the careful study of the fragmentation of the law, of the different components and the variety of coexisting interdependent or conflicting elements within each of them, both crucial to an understanding of similarities and differences among legal regimes, comparative argument turns to a simplistic recognition of legal texts and positive sources.

The recent trend revives the legal process’s central idea that legal analysis should describe particular procedures for reaching decisions about the terms of social life. The central question is whether the process of decision-making has been legitimate.

The “special kind of ought” of law always depends on the ability to represent the conjunction of a particular kind of question with the particular procedure that ought to be employed to resolve that kind of question. The institution “represents” the congruence of a particular procedure and the kind of issue that procedure was rationally adapted to resolving.

Law is viewed as purposive and dynamic, but its legitimacy and objectivity is protected by focusing on the process and institutions by which law evolved. The agreement lies not in substantive principles but instead in the open structures and procedures of government.

Procedure is thus separate from politics. Once all relevant (national) viewpoints are empathetically “attended to” the Court - as surrogate for community deliberation - can reach a result that gives credence to the apolitical nature of its decision.

They recognize that law does not reside in a text, waiting to be pulled out by a subject, nor is it law simply because the subject declaring it is the duly established institution. Its focus is now on the argumentative practices used to reach the decisions.

As noted above, the Courts distance their work from the distribution of wealth and power in society which happens outside their normal purview. The distributive issues happen below the line of transnational legal decision-making.

XV. Law and legal institutions play a relatively constant formative role in shaping society. Law has a dynamic, dialectical or constitutive relationship with culture.

Three globalizations is an important intervention in the field of comparative law.

Three globalizations underlines the constraints of forms of knowledge production and its engagement with governance.

Three globalizations sheds light on the subjective side of knowledge or the subjective forms we live in.

It rejects both the idea of a subject as a free and rational agent that is at the core of the first globalization and the idea of the structure as - in a varieties of modes - the core of the change in the second wave.

The reference to “historical forms of consciousness or subjectivity”⁵² emphasizes that subjects can work only within a specific cultural context which provides the language they can speak when they have to face a specific legal issue.

The consciousness is historically situated and marks the boundaries within which hegemonic and counterhegemonic struggles can take place.

The emphasis on consciousness may also be traced back to various critiques of the comparative enterprise.

They all focus on the idea that there is something more we have to consider when we compare, something other than the usual apparatus of substantive solutions to legal problems, functions, operational rules and their justificatory arguments as in the mainstream comparative analysis.

The critiques disagree, though, about what exactly the constitutive elements of this something should be.

⁵² Jonhson, R. “The Story so Far: And Further Transformations?” *Introduction to Contemporary Cultural Studies*. Ed. Punter, D. London: Longman, 1986, 280; Mezey, N. “Law as Culture.” *Yale Journal of Law & Humanities*. 13 (2001): 35; Sarat, A. - J. Simon “Beyond Legal Realism?: Cultural analysis, Cultural Studies, and the Situation of Legal Scholarship.” *Yale Journal of Law & Humanities*. 13 (2001): 3.