

Methods of Comparative Law

Edited by

Pier Giuseppe Monateri



RESEARCH HANDBOOKS IN COMPARATIVE LAW

Series Editors: **Francesco Parisi** and **Tom Ginsburg**

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University of Turin, Italy

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Edward Elgar

Cheltenham, UK • Northampton, MA, USA

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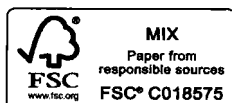
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Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2012930573



ISBN 978 1 84980 252 9 (cased)

Typeset by Columns Design XML Ltd, Reading
Printed and bound by MPG Books Group, UK

RESEARCH HANDBOOKS IN COMPARATIVE LAW

Series Editors: Francesco Parisi, *Oppenheimer Wolff and Donnelly Professor of Law, University of Minnesota, USA and Professor of Economics, University of Bologna, Italy* and Tom Ginsburg, *Professor of Law, University of Chicago, USA*

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Methods of Comparative Law

Edited by Pier Giuseppe Monateri

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Introduction

Pier Giuseppe Monateri

Comparative Law is rising up over its old horizon: a new presence is dispelling the shadows of the past to reveal a submerged bulk of buried cultural secrets.

This evocative gothic image is intended to celebrate the rebirth of Comparative Law as an autonomous discipline.

From this perspective this volume aims to fill a gap in legal scholarship by structuring an intellectual project of de-familiarization from unified and framed conventions. The main purpose is to unfold the plot that has strategically arranged dissimilar thoughts and ideas into a comforting and undisputed order: the renovation of Comparative Law feeds upon the pliable, fluid and multidimensional nature of the voices that embody it. Therefore, the use of the plural form of the noun 'method' in the title is intentional: it synthesizes and vividly recalls the research path followed through the pages of the book. In the same way the structure of the work is conscious and studied: the pattern of organization, the sequence of the chapters, the selection of the essays are designed to focus on the evolving shape of legal comparativism. Taken as a whole, the volume offers, in a comprehensive and pioneering format, an accessible manual from which scholars, students and practitioners can benefit.

Having clarified that our primary goal is to explore the new models which appear to have moved to the centre of the scene in legal comparativism, in this Introduction I will briefly outline the contents and arguments developed in the following pages.

Part I (Why 'Methods'? An Intellectual Project on the Multilayer Structure of Legal Comparativism) deals with a critical understanding of common methodologies and with a renovated comprehension of the traditions of intellectual thought. Theorizing a kind of historical consciousness in the field of law, the authors come to revise the standard appreciation of Comparative Law with the aim of shedding light on the latest ways of conceiving the proper tasks of this discipline. More specifically, what is offered to the reader is the disclosure of the unsaid potentialities of Comparative Law: as a matter of fact, it can be used as a tool of global governance, as a device apt to strategically manage and recompose clashing identities with a silent, but progressive 'etherization of the Other'; or it can be viewed as a strong means of legitimation in arbitration and litigation, as a source of law in itself which provides courts with persuasive arguments; or it can be sponsored as the better instrument to perceive and emphasize the essential relationship between culture and law. The main challenge here is to acknowledge that through the comparative exploration of national laws and national jurisdictions we really can perceive the very nature of Law: Law is not merely an empirically quantifiable sociological fact or an economic construct, but it comprises arts of imaginative reading, persuasive speech, creative writing and practical performance engaged in as living arts by living people.

2 *Methods of comparative law*

Part II (Revisiting Classical Theories and Perspectives on Comparative Legal Methodologies: A Critical Glance) makes use of the introductory arguments, discussed in Part I, to transform what can be called 'the canon of Comparative Law'. The contributors focus on an innovatory exegesis of a functionalist approach, both on a theoretical level and on a pragmatic one; scrutinize the anti-functionalist rhetoric embedded in practical experiences led by scholars who have fought for the preeminence of the factual approach; and discuss the descriptive categorization of Comparative Law in the light of harmonization projects.

Part III (Legal Transplants and Transnational Codes: Questioning on Cultural Biases and Scientific Statements) tackles epistemological issues that have remained too long unarticulated and unresolved in order to inquire into the conceptual possibility (not only the operative feasibility) of legal transplants. To solve these fundamental questions it has been suggested that we think about the common elements shared by Law and Religion in an ontological, methodological, but also epistemological perspective: the profound – even if often misconceived – analogies between the two domains and the pervasive tendency toward an harmonization goal, which characterizes both of them, could be helpful to the whole convergence debate. The premises bring us to reconsider the role of comparatists; the fruitful encounter with the Humanities to construct a powerful interdisciplinary approach (or better an interdisciplinary methodology); and the multiple ways in which jurists construct social objects and how this complex process models at the very end the act of transplanting. Considering the importance of all the issues described, Part III also employs a specific case study: a rigorous examination of the reception and historical development of legal transplants in Chinese and Hong Kong law.

Part IV (Space, Boundaries and Jurisdictions: The Choreographic Spectrality of Law) mirrors back the ontological ambiguity of Law, the subtle threshold that distinguishes Law and non-Law, or, in other words, Law and Exception. To be lived, the Law, which in itself is an abstract entity, an invisible Principle set from above, has to be re-presented: the spectral absence of Law makes claims for its 'presentification'; the originally ghostly spirit needs to become embodied. On this ground, once again the scope and method of Comparative Law are re-qualified. From one point of view, the ontological excess of Law justifies an innovative understanding of legal systemology based on the concepts of representation, signature and *dispositif*. According to this theoretical view, even the space has the function to visualize Law, to assure a concrete shape and a proper visibility. As a consequence, the rediscovered, ontological inter-essence between Law and Space motivates a different definition of Jurisdiction as a spatio-temporal device, which captures Law in history. From another point of view, strictly correlated to the first, Comparative Law studies not only the movement from invisibility to appearance, but also the agony of indistinction, the erasure of boundaries, the collapse of Law and the advent of non-Law, the repetition of the early, unsolvable ambiguity.

Part V (Legal Narratives, Judicial Interpretations and Subversive Paradigms) presents a critical interrogation of the standard conceptualization of legal hermeneutics. The idea that there is something missing, or something other than the arguments routinely used in the mainstream of comparative analysis to explain both the act of interpreting Law and the construction of legal discourses and legal narratives allows us to bring to the fore the inner projects that lie at the basis of different efforts.

Part VI (Political Economies and the Inner Policies of Law: Towards a 'Comparative Law and Economics' Assessment) reports the most interesting intellectual positions on the subtle relation between Law and Economics. Looking at the recent debates, the point at issue is: how to resist the fascination of ranking legal systems? What does it mean to measure the efficiency of the legal environments of different countries in order to establish the 'rank' of these countries according to certain variables? What specific contribution do comparative lawyers make to the critical assessment of the intersections among legal institutions, political decisions and finance? In particular, what is under scrutiny is the proper methodology used to compile the so-called 'Doing Business' Report by the World Bank Group: a new consciousness is claimed for a closer interaction between Economists and Jurists, in order to avoid the biases that derive from a holistic and auto-celebrating view. Comparative Law is presented as the elected field where the mutual cooperation among different agents can actually cooperate to verify the possibility of constructing a meaningful, universal benchmark exempted from partisan preconceptions.

In conclusion, our volume intends to reappraise the fertilizing, inner attitude of Comparative Law, both as a stand-alone discipline and as an elected field of research where the mutual illuminations of different tools and methodologies come to produce a growing body of critical understanding, a framework for thinkable thoughts and global strategies.

PART I

WHY 'METHODS'? AN INTELLECTUAL PROJECT ON THE MULTILAYER STRUCTURE OF LEGAL COMPARATIVISM

