1 Introduction. The Uses of Comparative Law in Legislative Drafting

Nicola Lupo and Lucia Scaffardi

1.1 Introduction: ‘Dialogue’ among Judges and among Legislatures

There has been a huge amount of literature, especially in the last two decades, regarding the so-called ‘dialogue’ among judges or ‘trans-judicial dialogue’. Less attention has been devoted to the ‘dialogue’ among legislators, and more specifically to the importance of ‘inter-parliamentary dialogue’ concerning the use of comparative law among parliaments, regarding legislative activity.

Comparative constitutional law scholars in particular have thoroughly examined how comparative law is used and considered by judges, and specifically by supreme courts and constitutional courts. In at least two cases, the referral to foreign law by national courts is even expressly allowed by the Constitution, while for the US Supreme Court this possibility has been strongly debated by its justices and even discussed in the US Congress.

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2 This is the case of the South African Constitution (1996), whose Section 39 states that “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” (emphasis added). See T. Groppi & M.C. Ponthoreau, Introduction. The Methodology of the Research. How to Assess the Reality of Trans-Judicial Communication?, in T. Groppi & M.C. Ponthoreau (Eds.), The Use of Foreign Precedents by Constitutional Judges, Hart Publishing, Oxford, 2013, pp. 2 et seq. (reporting, as the only other case, the 1994 Constitution of Malawi, which requires that courts make reference to "comparable foreign case law").

The fascinating topic of the ‘dialogue’ among judges has therefore been widely examined under different perspectives, and it has become an issue à la page in symposia of comparative law scholars. Even the name of this phenomenon has been the subject of lively discussions: the right word to be used in order to refer to and identify this phenomenon. The metaphor of the ‘dialogue’ has been deemed too easy and diffused and even not very accurate, as it suggests the idea of an exchange between two subjects with a mainly formal character. Therefore, for instance, some authors have rather been speaking about a ‘conversation’ – especially when referring to what takes place among constitutional courts – in order to stress the more pluralistic and informal character of the actual dynamic. However, despite the existing literature, it is still not easy to conduct first-hand research on the ‘dialogue’ among judges, even if we limit it to the use of foreign law. The excellent pieces of research coordinated by Tania Groppi and Marie Claire Ponthoreau show how difficult it is to conduct an empirical analysis of how some constitutional judges make reference to foreign law, managing nonetheless to offer a quantitative as well as a qualitative analysis of the case law of sixteen constitutional courts or supreme courts of as many states. The same applies to the very accurate study recently conducted by Elaine Mak, focused on five Western highest courts (the United Kingdom, Canada, the United States, France and the Netherlands) and based mainly on interviews. Another fascinating topic, undoubtedly less examined in depth, is the influence of foreign and comparative law in the lawmaking process: to understand if, when and how parliaments use foreign and comparative law in the process of drafting, discussing and approving new pieces of legislation.

It is not by chance that this subject has been much less addressed by scholars. On the one side, it is very hard to argue for the existence of a ‘community of legislators’, similar to the ‘community of judges’. As has been remarked, “the dynamics of legislation influencing foreign legislative initiatives should rather be described as based on inspiration without a community”. Therefore, in order to be accomplished, it needs more structured procedures and ad hoc bodies, in comparison with those supporting the ‘trans-judicial dialogue’.

4 See, critically, M. Bobek, Comparative Reasoning in European Supreme Courts, Oxford University Press, Oxford, 2013, pp. 1 et seq., registering “a veritable boom of interest in the last two decades or so”.
On the other side, the subject of analysis becomes even wider and vaguer. Although extremely hard to achieve, an analysis of the mere outcomes of the lawmaking process, that is the legislative acts, would have been clearly insufficient. It is clear, in fact, that the research needs to focus also (or even mainly) on the lawmaking process, examining how laws are scrutinized, discussed and finally approved. In many legal systems this would also require going further into the parliamentary legislative process, looking back and revisiting the drafting process that takes place within the executive (and which is not usually very transparent). In our research, however, we decided to focus essentially on legislatures, trying to see whether and with which instruments the representative bodies become aware, understand and make use of foreign law, eventually comparing legislations coming from different legal systems.

1.2 The Ancient Origins of the Phenomenon – The Recent Roots of the Research

There is certainly nothing new about this. It suffices to think, for example, of the similarities found in famous ancient codes in the Orient, and also of experiences that are closer to us and with which we are better acquainted, like that of the Napoleonic Code, which in some ways and to some extent was 'reproduced' in Italy, Spain, South America and in various African countries. That is not to mention, in this brief and certainly incomplete excursus, the transposition of the German Civil Code in Japan.

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9 With regard to this, see the description by Alan Watson, and in particular what he states, for example, as far as concerns the Code of Hammurabi and the similarities found within. A. Watson, Legal Transplants: An Approach to Comparative Law, 2nd edn., University of Georgia Press, Athens, 1993, p. 22.

10 Roundly, it can also be noted how the very drafters of the French Civil Code knew and used the comparative method. On this point, see B. Fauvarque-Cosson, Development of Comparative Law in France, in M. Reimann & R. Zimmermann (Eds.), The Oxford Handbook of Comparative Law, Oxford University Press, Oxford, 2006, p. 40. With regard to this, the establishment of the Bureau de legislation by Napoleon must be remembered, one of whose main competences was that of the translation into French of the foreign normative acts considered most important.

11 This is a clear reference to the writing of the Italian Civil Code of 1865, in which the similarities with the Napoleonic Code are particularly evident. However, Italian legal doctrine has, to a certain extent, “imported” the German conceptual apparatus, as outlined by U. Mattei & P.G. Monateri, Introduzione breve al diritto comparato, Cedam, Padova, 1997, p. 37.

12 “Japan imported its original Commercial Code (including legal rules on business corporation) from Germany in 1898 as part of a fundamental reform of its legal system and made large-scale amendments to the corporate law in the immediate postwar period by importing many specific legal rules from United States”, H. Kanda & C.J. Milhaupt, Reexamining Legal Transplants: The Director’s Fiduciary Duty in Japanese Corporate Law, in D.H. Foote (Ed.), Law in Japan: A Turning Point, University of Washington Press, Seattle, 2011, p. 437. See the last text quoted, which reproposes a broad reflection on the passages characterizing the interesting Japanese legislative drafting experience.
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The ‘transmissibility’ of knowledge and the successive use of norms coming from other legal systems by the legislator is thus a subject that has been known for a long time and, like few others perhaps, has been widely debated in literature, which focused mainly on the legislative outcomes and so far has not managed to find its own unitary interpretation.\(^{13}\) Probably the most quoted phrase with regard to this and the one which best summarizes the incipit of this vexata quaestio is “at most times, in most places, borrowing from different jurisdictions has been the principal way in which law has developed”.\(^{14}\) As is well known, the theory of the legal transplant first described by Alan Watson,\(^{15}\) as a possible and advantageous practice for the recipient legal system, was questioned by that doctrine which highlighted its possible limitations.\(^{16}\) Such limitations required that great attention be paid while ‘transferring’ institutes and legal concepts in order to avoid their complete detachment from the recipient system.\(^{17}\)

In an ideal juxtaposition to Watson’s phrase, Montesquieu affirmed that laws “doivent être tellement propres au people pour lequelle elles sont faites, que c’est un très grand hazard si celles d’une nation peuvent convenr a une autre.”\(^{18}\) It may be the clearest affirmation of the nationality of laws. After all, it is not by chance that the legislative function was always allocated by constitutions of liberal nation states exclusively at the state level: as the representative bodies of the national will as well the symbols of national sovereignty, parliaments were conceived as the place in which every piece of legislation had to be discussed and approved, right “in the name of the people”.

In this sense, the most careful doctrine,\(^{19}\) even if not generally in favour of the use of transplants, underlined how the Montesquieu sentence is in a certain sense the “daughter of its time”: that is, how Montesquieu referred to quite considerable differences at that historical moment, like geographical, economic, sociological and cultural ones, which today, however, have softened or even disappeared in many cases.

16 See P. Legrand, “The Impossibility of Legal Transplants’, Maastricht Journal of European & Comparative Law, Vol. 4, 1997, pp. 117 et seq. (maintaining that the meaning of the law “does not survive the journey from one legal system to another’). And see also the considerations by O. Kahn-Freund, On Uses and Misuses of Comparative Law, Modern Law Review, Vol. 37, 1974, pp. 1–27 (who, even though moving from positions that we could say less radical with respect to Legrand’s, expressed his doubts on the practicability of transplants in quite politically differentiated legal systems).
19 On this, see Kahn-Freund, 1974, pp. 8–13.
To further complicate the contemporary reference framework, we find new factors (often) exogenous to the systems themselves, which end up pushing the national systems towards a greater homogenization and more frequent relationships. It suffices to think of the voluntary participation in supranational organizations, in which both legislative and judicial bodies apply comparative law instruments, or the trend to standardize human rights and economic regulations. All this has brought about an unavoidable openness to comparison in the construction of increasingly more concerted transnational legal solutions.

These observations enable us to see how over the years there have been quite a considerable number of juridical contexts in which foreign law has found fertile ground for reproduction. The first of these contexts is the process of constitutional design, where the use of foreign law and the comparison are particularly relevant. Several contributions in this volume make reference to the role played by foreign law in constitutional designing, even though our main focus is not on this, in order to better understand the features of certain legal systems.


21 All this is happening not only at European level: “However, economic development, democratization and globalization have today so sharply increased the number of legal transplants that at least in developing countries, most major legislation now has a foreign component. Most countries simply cannot engage in international commerce in or expect international investment without moving their legal regimes toward common standards, and cannot claim good records in areas such as international human rights, protection of the environment and anti-corruption efforts without importing some foreign or international models. Numerous programs sponsored by governments, foundations, and international institutions have actively encouraged these processes”. J.M. Miller, A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process, American Journal of Comparative Law, Vol. 51, 2003, pp. 839–885.


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Also at sub-constitutional level, there are numerous studies in this sector that bear witness to the use of the comparative parameter in specific and somewhat varied fields of research. These refer to private law,\(^{25}\) administrative law\(^ {26}\) or public law, particularly in the context of fundamental rights.

Whether one likes it or not, therefore, the theoretical juxtaposition between Montesquieu and Watson seems – to borrow a term used by sociologists – more liquid\(^{27}\) than dichotomic, almost as if to show an evolution of law, and especially of constitutional law, which is more open to foreign values and experiences, while at the same time less able to make clear and permanent distinctions in each state between what is allowed and what is forbidden. In other terms, it is the nature of the constitutional state that has changed significantly since Montesquieu’s times: leaving aside their national roots, the Constitutions, and together with them the legislation, are becoming more and more open to global principles and values, which penetrate into the legal systems mainly through cultural channels.\(^{28}\)

For this reason, the studies collected in this volume have made an attempt to verify if and how contemporary parliaments use foreign law during their legislative process. This inevitably requires the analysis of the rules and practices involved, starting from those regulating the drafting and approval of bills and also – as will be remarked in the next paragraph – of one or more ‘case studies’, which have been selected in each contribution, in an attempt to actually see how foreign law has been used (or misused) by the legislators.

This is an extremely important research question, since, as Justice Barak-Erez states in her contribution, “legislation is not only the main, but also the ideal route for transplantation.”\(^ {29}\)

In short, the volume seeks to develop an analysis of the ‘traceability’ of the places and the procedures through which the use of foreign law and juridical comparison take place in the drafting of laws.

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26 See, for example, F. Melleray (Ed.), L’argument de droit compare en droit administratif français, Bruxelles, Bruylant, 2007, and in particular in that volume, see M.C. Ponthoreau, “L’argument de droit comparé et les processus d’hybridation des droit. Les Réformes en droit administratif français”, pp. 23 et seq.


28 See P. Häberle, Verfassunglehre als Kulturwissenschaft, 1982 (It. Trans. J. Lüther (Ed.), Per una dottrina costituzionale come scienza della cultura, Carocci, Roma, 2001). On the evolutions of the notion of state and constitution and on their influence on the methodology of comparative law, see, among many, A. Vespaziani, ‘Comparison, Translation and the Making of a Common European Constitutional Culture’, German Law Journal, Vol. 9, 2008, pp. 547 et seq. Of course, there are also some exceptions, that is examples of constitutions reacting to this trend by exacerbating their own national (or even nationalistic) features. The most recent evolution in this sense seems to have been that of Hungary: see F. Vecchio, Teorie costituzionali alla prova. La nuova Costituzione ungherese come metafora della crisi del costituzionalismo europeo, CEDAM, Padova, 2013.

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As already said, a rather limited number of studies, and especially comparative studies, have so far been dedicated to this subject.\(^ {30} \) To date, this lack of studies has not helped the construction of specific parliamentary procedures and mechanisms aimed at acquiring awareness of the relevance of foreign law and at constructing comparative methodologies for the use of foreign law.

It is perhaps also for this reason that there has been a certain interest in the works already published over recent years by the two editors, on topics connected to the aforementioned research question,\(^ {31} \) and hence, the desire on the part of the editors to develop broad-spectrum research, publishing the results in English, in order to encourage a wider comparative debate.

The analysis is carried out along fourteen different case studies, each of them being the subject of a different chapter, authored by a couple of experts – an Italian and an autochthonous scholar or practitioner\(^ {32} \) – to highlight the importance of dialogue and cross-fertilization even at the analytical level. From these premises, therefore, the question can be asked as to how a guiding thread runs through all the contributions: how in the fourteen legal systems, analysed in the context of public law and in particular in the field of sub-constitutional norms, these ‘contaminations’ take shape.

1.3 **The Legal System Analysed: A Choice of Geography and Method**

The volume is divided into two parts: the first is dedicated to the experience of parliaments in the European context, and the second focuses on the extra-European legal systems.

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\(^{31}\) This interest was surprising, especially because the works were published in Italian. The reference is, respectively, to C. Decaro & N. Lupo (Eds.), *Il ‘dialogo’ tra parlamenti: obiettivi e risultati*, Roma, 2009 and L. Scaffardi (Ed.), *Parlamenti in dialogo. L’uso della comparazione nella funzione legislativa*, Jovene, Napoli, 2011.

\(^{32}\) With the obvious exception of the opening contribution by Justice Daphne Barak-Erez, whom we would like to thank once more for her participation in the work and which represents, as well as a wide reference to the Israeli experience, the ideal starting point of the book, having been written by one of the most important if not the most important world expert on the subject. The conclusions were also entrusted to one single author: Professor Robert Tsai, chosen not only because of his qualities as observant scholar but also for his unquestioned competence on the subject of “constitutional borrowing” (see Watson, 1993). As a scholar with a broad view of the subject, he was asked to evaluate the topic of the volume more specifically by means of the contributions contained therein. Owing to requirements inside the group, only the contribution on Australia was written by three authors. For this, see Aroney, Bassu & Popp, ‘Legal Transplants in the Australian Legal System’, pp. 161-184.
All the European states examined (Italy, Portugal, Romania, Spain and the United Kingdom) are democracies with an ancient tradition of both civil law and common law. All are members of the European Union, which they acceded at different times. In particular, in the study of Romania, the referral to the European Union, which was acceded in 2007, is pivotal for two reasons: first, because it gives an example of the so-called *forced dialogue*, that is, the adaptation to the *acquis communautaire* before and after its entry into the Union; second, because the European Union is often the means whereby foreign law enters national legislation. A specific study has been devoted to the experience of the European Parliament: it is a parliamentary body with a necessarily supranational vocation, open to the influences coming not only from the different Member States but also from outside the European Union.

The second part of the volume deals with countries representing different continents and legal cultures, from Australia to Canada and the United States of America (which is extremely interesting for its self-referential character) and from South America (represented by Brazil), which on the contrary has always been open to European ‘influences’, to Africa, with the cases of Namibia and South Africa, where the colonial past has undoubtedly undergone transplants, but where the use and study of comparative law today represent an important way for the construction and development of the recent democracies. Finally, China was included to represent the Asian continent and, at the same time, a non-democratic and non-constitutional case of legislative process.

As with any research, the comparative study is inevitably partial, but the significant number of legal systems taken into consideration could nevertheless be the starting point for a further analysis of the subject, offering some examples of how this complex and often-underestimated ‘communication network’ of contemporary constitutionalism actually works.

Considering the large number of legal systems analysed, the use of a common research methodology was considered essential right from the start, so as to be able to guarantee a certain homogeneity in the interpretation of the results of the different experiences, also in the specificity of the cases examined.

Therefore, each contribution has been structured in two parts. A first one in which the research is focused on the instrument and information apparatus that the legislators

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33 See in this volume C. Dallara & I. Ionescu, ‘The EU-Driven Foreign Influences on Legislation in Romania’, pp. 73-96.
have access to. For this purpose, and also to guarantee homogeneity from the start, the various parliamentary interlocutors identified in the countries analysed were given an open-ended questionnaire. This ‘survey’ was particularly useful for the understanding of how and when foreign law is considered and how successively the information gathered affects the legislative drafting or the debates within the lawmaking process.

A second part consists in the review and study of one or more pieces of legislation, selected preferably among those approved during the last five years, in which foreign law has been taken into consideration: in an explicit or implicit way, in order to be accepted or refused, according to a mere instrumental aim or following a rigorous comparative methodology.

1.4 A Long Story of Metaphors and the Debate within the Research Group

The question that was looked into during the various meetings held by the group over the two years of research is represented by the fact that the line of reasoning in metaphors in a juridical context, evocative as they may be, risks producing distortive effects, as they are ill-suited to this science. In our own field of investigation, an example of this could be represented by the term ‘transplant’. While the recognition for the intuition of this important subject and the use of the metaphor must undoubtedly go to Alan Watson, it has lent itself to a series of misunderstandings that have kept the jurists occupied. Actually, the term is polysemic insofar as it refers to two close but quite different meanings: the first is linked to the vegetable context and the second to the medical one. Therefore, to

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36 A number of meetings and contacts were held among the members of the research group, thanks also to the use of the possibilities offered by new technologies that made possible to have a constructive contact, which otherwise would have been extremely difficult for a research involving twenty-nine scholars, many of whom working in different continents. Two workshops were dedicated to enriching the debate among the researchers, in particular thanks to the valuable contribution of lecturers not directly involved in the project. The first meeting was held in Rome on 2 July 2012 at the LUISS Guido Carli University, upon initiative of the CESP – Center for Parliamentary Studies. On this occasion, Professor Valeria Piergigli and Professor Melina De Caro discussed the first outcomes of the research, starting from the volume edited by Scaffardi, Parlamenti in dialogo (see supra note 31). An outline of the report by Valeria Piergigli is now published in Rassegna parlamentare, No. 3/2012, pp. 731–738. In the second workshop, held at the University of Parma on 9 May 2013, the single contributions to the research were presented and discussed in the presence of two special discussants: Professor Peter Leyland of the Metropolitan University of London and Professor Alessandro Torre of the University of Bari.


38 Of great interest with regard to this is the study by H. P. Glenn, ‘On the Use of Biological Metaphor in Law: The Case of “Legal Transplant”’, Journal of Comparative Law, Vol. 1, No. 2, 2006, pp. 358 et seq.


40 See supra notes 13, 14, 16, 33 and 34.
simply speak of ‘transplant’ in the field of law risks laying oneself open to a series of semantic interpretations that are ill-suited to the interpretative uniqueness that a case should evoke. The ‘cognitive carrefour’ thus becomes a place for possible misunderstandings, where the metaphor as a simple linguistic instrument becomes a cognitive metaphor. Thus, the discourse could be to a certain extent re-proposed also for other metaphors, like that of graft, pollution, cross-fertilization. Not to mention other formulas that were rejected here like that of the ‘exportation’ of norms.

An interesting debate arose also on the term “parliamentary dialogue”. The advantages of this metaphor are represented by the fact that it encouraged the parallel with the studies, which, as mentioned above, amassed with regard to the work of judges. The disadvantages could be identified in the ambiguity of the expression, able to include many different forms of inter-parliamentary relationships and connections, also different from those aimed at promoting the use of foreign law for the legislative activity, which constitute the core of this research.

Furthermore, when applied to parliaments, the notion of ‘dialogue’ tends to move away from the meaning in which it is used for trans-judicial dialogue: when one is speaking of dialogue in a parliamentary context, it is supposed that one is already in a phase following the one that in comparative law is identified with the spontaneous circulation of models. To establish a dialogue in this field means, above all, ‘to tune into’ another legal system. It means to understand the importance of the choices made by the legislators, judges and legal scholars at other latitudes and to want to evaluate them in order to be able to draw inspiration from them, to share them even if in a different socio-political context, imitate them without however being completely adhesive, even when wanting to incorporate (or refuse) them in toto (perhaps the solution that is the most difficult to find).

A last terminological clarification concerns the use made of the term “legislative drafting”, as in the title of this book. It is necessary to stress that this expression has to be intended in its broader meaning: including not only the traditional and very technical activity normally conducted by the legal drafters, but also the political activity sometimes called “legislative design”, as well as the procedures – especially in parliament, or else in the

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41 In favour of the use of metaphors in legal language, see A. Giuliani, ‘La nuova retorica e la logica del linguaggio normativo’, Rivista internazionale di filosofia del diritto, 1970, p. 382, and, more recently, A.A. Cervati, Per uno studio comparativo del diritto costituzionale, Giappichelli, Torino, 2009, pp. 207 et seq.

42 As has in fact been carefully pointed out, different terminologies bring different implications. While the success of a transplant can be judged only ex post, depending on the taking root of the new element, the success of an export is in re ipsa: no exporter would care about what happens to the exported goods. See Mattei & Monateri, 1997, p. 39.

43 See what is specified in the first paragraph of this introduction, and for details, see supra note 5.

44 See them very well described, for the Commonwealth world, in H. Xanthaki, Thornton’s Legislative Drafting, 5th edn., Bloomsbury, West Sussex, 2013.
executive, as just remarked – whereby legislation is examined and approved and which is generally called "legislative process". Behind this terminological option lies the belief that the reasoning of legal drafting rules (or legislative technicalities), without considering the lawmaking processes in which these rules are applied and the features of each system of the sources of the law, would risk bringing about a result that seems too abstract and too detached from the reality of the actual way in which legislation is produced.45

In other words, the architectural and substantial features of the outcome of the legislative activity are strongly influenced by the process it followed in order to become a law and even more by the predetermined set of formal and informal rules that govern this process. For example, the borders followed in order to define the content of a piece of legislation are often designed in a way that can ease the aggregation of a certain amount of consent (from different governmental departments, or from a coalition of parliamentary groups). Or, sometimes, the same structure of the legislative act could derive from a peculiarity followed in the procedure that led to its enactment.46

1.5 Some (Provisional) Results: Three Categories of Legal Systems, According to Their Use of Foreign Law

Despite the high complexity and many diversities characterizing the legislative activity in the various legal systems dealt with – which, as already stated, are part of all the five continents – a number of elements can be identified that make it possible to reach some concluding, although very provisional, remarks.

First of all, we would like to take up Robert Tsai’s consideration, who in his conclusion states how “culture and institutions stand in a dialectical relationship: informality can yield relatively informed, robust choices to borrow legal ideas where an encouraging culture exists [...] by contrast, where cultural resistance to borrowing prevails, increased formality may be the best antidote to surreptitious or poorly considered efforts at ideological takings”.47

46 In Italy, for instance, this is the case of the "maxi-articles", composed of hundreds of paragraphs, which derive from the (bad) practice of the so-called maxi-amendments on which the government puts a "question of confidence", bringing about a sort of vote bloqué. See N. Lupo (Ed.), Maxi-emendamenti, questioni di fiducia, nozione costituzionale di articolo, Cedam, Padova, 2010.
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What appears from this volume is therefore the need to carry out the comparative legal analysis not only at a cultural level, which is by far the most common approach among comparative law scholars, but also at the level of written and unwritten legal norms of public law, especially concerning the legislative process, without nonetheless disregarding the level of effectiveness. As always happens for the law related to parliaments, the simple “law in the book” is not sufficient to explain what is happening, also regarding the use of the comparative parameter in the legislative drafting activity.

We are aware that all the attempts of classification, per se, can only be provisional.48 In our case even more so, considering the series of variables that are highlighted in the different contributions and the fact that the main subject of study are parliaments, for which it is all too true that the political institutions and political facts carry their weight.49 Nevertheless, it seems possible to identify three different categories of parliaments and legal systems according to the reference to foreign law and its use according to a comparative methodology in the legislative activity.

A first category of legal systems, where the modalities of the use of foreign law “in the field” of the legislative process tend to assume the use stricto sensu of the concept of “transplant”, is clearly the case of China.50 Also in these cases, however, there is an a priori evaluation by the internal legislator, who has ascertained the appropriateness and the legal coherence of the foreign law for the recipient legal system. In this sense, there has been and continues to be an activity of real comparison, at least as intended as a science having a method aimed at the choice of the best possible option for the recipient legal system (even if the text then remains identical to the original one). In this category, which we could define as ‘transplant friendly’, the South African legal system can probably also be included, where the use of comparison has for some time now become no longer a choice linked to the colonial past, but a conscious modality used at constitutional level and even at the primary legislation one. Although not without some doubts, the European Parliament as well, and more generally the European Union, can be deemed as “transplant friendly”: unlike the national parliaments, the European Parliament is a parliament ‘born to be open’ and very used to comparative legislative analysis, and the European Union “is by definition a legal system open to ‘foreign influences’”51

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A second category – probably the widest one – is represented by those parliaments that we could define as “partially interested in transplanting”. In these legal systems, the activity of study and comparison is normally present above all in the first phase of the lawmaking process. The structures used for this, in most of the cases the research services in the various parliaments, but also the ad hoc committees or the use of preventive studies offered by the legal scholars, are fundamental elements for the support of the legislative choice. In some of these legal systems, moreover, the use of foreign law and the comparison among different legislation are becoming increasingly evident also in the activity of the governments, especially concerning legislative initiative. Furthermore, for example in Italy and Canada, to retrace the course whereby the comparison took shape often becomes difficult, if not impossible. In other legal systems, for example the United Kingdom, at times the main choices regarding the use of foreign law are reported in the legislative act, whether they represent even a partial adhesion to the reference model, or whether they highlight an explicit refusal of the introduction of an institute considered not producing the legal effects that were hoped for.

As said above, in most cases the study and comparative activity are not explicitly shown in the final act, thus leaving a sensation of unfinished business at the reconstruction level. The exception is represented at times by those legislative acts that involve ‘topics of general interest’, like by way of example the legislation on homosexual couples: “the flow of information between countries provides members of legislative bodies with relevant, unmediated information, and they are influenced by it directly (whether they wish to adopt or oppose the foreign model)”.

The third category, which we could define as ‘transplanting hostile’, is the one that considers that their own legislative activities must not be influenced by external elements: the United States of America is the example par excellence of this. This is real self-referentiality that presents aspects of great interest and deserves further in-depth studies in order to be able to attribute to it also all those legal systems that use the reference to foreign law, above all in the parliamentary debates, as a merely tactical or instrumental tool for the purpose of demonstrating the unique internal state experience as paradigmatic. In these legal systems there is thus to be found a negative relationship between possible borrowing and national prestige, almost as if the latter were invalidated by the use of norms coming not from internal needs but from other legal systems.

52 Barak-Erez, 2006, pp. 546 et seq.
53 See P.B. Harris & A. Vespaziani, ‘Foreign Flavours in the American Legislative Sausage?’, pp. 229-243, in this volume, from which is inferred, despite the express contrariness to foreign law, a use of this especially through researches regularly conducted by the Congressional Research Service (CRS) and the Library of Congress. This outcome challenges the fact that a state can continue to define themselves completely extraneous to the use of foreign law, at least with regards of the moment of prodromic reflection on the approval of legislative acts.
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What has been written so far shows how the use of comparison in the context of legislative activity takes place not so much because it is dictated by needs for normative ‘unification’ – which are usually deemed to be at the origins of comparative law – as rather by the recognized goodness of the model being used or by the evaluated appropriateness of the inclusion of specific norms in the historical phase that the single legal system is experiencing.

When observed together, all the pieces of this multicoloured mosaic cannot but highlight, especially in perspective, the growing importance of comparison in the legislative activity, often entrusted more to bureaucratic and professional levels rather than to the members of parliament, who at times seems to consider that otherwise their mandate would appear belittled.

In conclusion, what can be hoped for is an increasingly consistent investment by parliaments, also of an economic nature, in order to improve the professional and bureaucratic apparatus involved in the activity of possible comparison and that at the same time the legislators make the use made of these important materials intelligible, since, as Zwigert and Kotz underlined, “Legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law”.

Thus, “discussing the use of comparative law in the legislative process, it is quite intriguing to observe that the comparative legal method can function at both levels (i.e. theoretical and practical) simultaneously”. In this sense, the contributions of this research demonstrate – even if with different intensity – the growing importance of the study of foreign law and the consequent contribution of the instruments of comparison as a legal science to the decision-making processes affecting legislative choices.

Returning to our initial argument, whether or not the use of the term “transplant” is desirable, the answer, as always, depends on the meaning to be given to this word.

In the research, we have seen how foreign law and comparison are used in various institutional places, bearing witness to the practical feasibility of legal ‘transplants’. However, we have not observed ‘transplants’ without any form of ‘manipulation’: with respect to the text analysed, the legislator decides, thanks to the contribution of his own supporting services and discernment, to make use or not of the dispositions examined, modifying and integrating them to the point of adapting them to the context that is destined to receive them. In other words, we realized that any transplant is a ‘manipulative transplant’: therefore, we could continue to use this metaphor, with the awareness that it is a mechanism which always implies some form of change and adaptation.

54 “Why learning from other legal system also involves an ‘economic dimension as well’. Barak-Erez, 2006, p. 545.
56 Van Erp, 1998, p. 34.
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In our opinion, this additional, substitutive and at times partly ablative activity constitutes therefore an important function that must be recognized and studied and not left, as all too often happens, to only prodromic activity with respect to the approval of the legislative act itself, and of which there is sometimes no trace at all in the parliamentary work or in the drafting function. This activity is important from both a qualitative and quantitative point of view. It suffices to think of the significant number of people involved in the parliamentary context and often also in special internal committees or in bodies outside the parliaments. These studies are aimed at the analysis of the norms of foreign law and the contexts of the legal systems in which they are present and lastly at their possible transliteration into a different legal system.

In this complex process, different subjects come into play, not only ‘specialists’ so as to say, but also politicians, the media, interest groups and citizens themselves. Comparative law thus becomes not a mere technique, but a combination of the full awareness of the legal system of departure and arrival and its respective historical context. To deny that all this is happening, as its reconstruction is often difficult, would not be correct, at least in the light of the information gathered in this volume.

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