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Italian approaches to the comparison of religious laws

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This paper aims at exploring the Italian approach to comparative law of religions[1] by identifying the context, the issues to face in comparing religious laws, and how certain goals have been achieved in Italian legal academia.

In contemporary society, plurality is no longer a far off goal but a matter of fact that needs to be governed in an effective and efficient way. The increasing religious diversity of our societies claim for legal regulations and models from scholars in order to organize a peaceful coexistence between different cultures and religious belonging. In the last decades, Italy has faced a clear interest for religious belongings and related phenomena in legal academics who, traditionally, intended confessional dimensions too much identifying it with the law of the Catholic Church. Plural dimension of religions also in Italy has open the door to the study of other religious laws both as separate legal systems and in a comparative dimension. This work describes how comparative law of religions developed in Italy under the methodological point of view, and under the particular perspective used to approach this particular field of study.

I. REALITY AS AN AMAZING KALEIDOSCOPE

In contemporary society, plurality is no longer a far-off goal but a matter of fact that needs to be governed in an effective and efficient way.

Religion and religious communities are among the actors of our multi-societies who create bonds of belonging between individuals, bonds that are of a different nature due to the pluralistic, semantic meaning of the word "religion." From a wider point of view, religion as culture nurtures a background that reflects the interior essence of the human being in connection to everyday life, characterizing each act of his/her life in relation to a supernatural entity, a relation that shapes human life and lays claim to recognition, avoiding marginalization in society at large. This is a pure religious bond, one that is capable of giving relevance to the religious experience even outside each individual's conscience, creating – from a legal point of view – a binding effect of religious laws extra forum internum. For this reason, religion can be thought of as a kaleidoscope of reality, thanks to its capacity to describe different aspects of the human experience.

From an anthropological perspective, religion is one part of a complex cultural system and one of the signifiers of everyday life; from a theological perspective, instead, religion is a spiritual experience, whether organized or not, that gives meaning to the fundamental questions of life. Finally, from a legal perspective, religion gives life to an organized experience that, based on a non-human source, is able to manage diversity in a long time-tested, de-territorialized system.[2]

The plural nature of religion is emerging strongly in pluralistic society, which is religiously homogenous no more, and where the higher the rate of religious diversity, the greater the need for recognition of a public role for religion itself. Studying religions and their legal systems is a way to use the religion kaleidoscope to read the diversity of our societies, creating the basis for a peaceful coexistence between different groups with otherwise no apparent commonalities. In this sense, studying religious legal systems, searching for shared points can create a juridical ecumenism, identifying the "missing link"[3] between different experiences with a bottom up approach. Therefore, comparing religious laws is an ongoing effort to understand the various forms of the legal experience among all humanity, going to the core of the normative experience itself in its ancient formants (the starting point and the final goal) to create a common legal language that could foster dialogue between people and, afterwards, between the different legal systems themselves.

This is why a good comparative religious lawyer is not just a technician: competence, methodology, awareness are three keywords for the particular approach that religious laws need. Being a comparative religious lawyer means being a legal scientist who is very much aware that the final aim of a legal system shapes the system in itself, whatever it is – an immanent or a transcendent one. For sure, the transcendent system very much influences legal reality in order to find the path that better fits the divine project. Moreover, the comparative religious lawyer has to understand that the religious legal systems are the diachronic realization, the legal translation of the divine project to humanity, which is described in a particular revelation. Revelation is not itself a rule of law,[4] it's a project of a

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1 For the ancient roots of comparative law as legal discipline, see *Doris Forster*, On the methods for comparative law research in legal studies, Ancilla luris (2018), 98–109.

2 Generally speaking, faithful are not linked to a specific territory or nation. The religious legal framework is applicable to individuals because of their belonging wherever they are, with no regards to their national status.

3 *Norman Doe*, Christian Law. Contemporary principles (Cambridge 2013), 9–10. On the necessity to make religions speak to one another see *Francis Messner*, La dimension interreligieuse des droit internes des religions. L'expérience strasbourgeoise, Quaderni di diritto e politica ecclesiastica, special number (2017), 73; *Rossella Bottoni/Silvio Ferrari/Russell Sandberg*, Introduction. Religious laws and their comparison. Theoretical and methodological issues, in: Bottoni/Ferrari (eds.), Routledge Handbook of Religious Laws (Routledge 2019), 4.

4 This consideration is equally valid also for secular law as for the legislator thinks of a project of law that will be put in place by the national community in everyday life. See *Michele Graziadei*, Il diritto comparato

rule of law that must be conceived using different legal languages and different tools; legal, historical, anthropological, sociological notions help to be aware of the long-lasting marriage between religions and humankind and support in understanding the peculiarities of religious laws.

II.
METHODOLOGICAL ISSUES

Who is the observer, the object of observation, and how to observe are three main issues, at least, to be faced in comparing religious laws.

About the observer, the question is if the lawyer him or herself has to be a believer of the religion they study in order to understand the essence of that religious law. This was a common feature of the legal debate twenty or thirty years ago, which also deeply interested the study of canon law in Italy and German. In this opinion, there was a sort of opposition between reason and sentiment, assuming that an irreligious lawyer would not be able to grasp the spirit of a particular religious law because he/she was not emphatic towards the message behind the law itself.[5] In more recent times, instead, the idea of a predominant neutral and technical approach prevails, nurturing the myth of cultural neutrality as a prerequisite to investigating religious law scientifically.

The contemporary understanding of the role of the legal scientist is instead well aware of the impossibility of the perfect neutrality.[6] Each lawyer is "son or daughter of his/her culture" in a broader sense and this is unavoidable, as unavoidable as it is for each piece of law to be a vehicle for a particular notion of law, rights, and duties: each law is the product of a particular society, and so it is impossible to be culturally neutral. Each legal scientist has to be fully aware of this internal limit; the lawyer must be not a mere legal technician, especially when it comes to comparing religious laws; he/she must study the subject using a comprehensive approach (legal, historical, theological, and anthropological).

These considerations lead me to explore the second point, the object of observation. It could be easy to answer that comparing religious laws is comparing religions, but legally we are not fully sure of what religion is. Religious laws are founded in sacred text, revealed in a precise time and place to a particular group of people. However, if these were the premises, it would be virtually impossible to compare religions that are particularly linked to a language, to a nation, to a specific context.

Instead, the interest of comparative religious lawyer is not directly in the revelation itself, but rather in the organized forms of living stemming from a revealed source. In other words, comparative law of religions is not trying to establish what is the "truth," the good, the right revelation, but it is trying to understand how different spiritual dimensions, different projects of law for humankind, has generated different forms of descriptions for reality. The interest of comparative law of religions is in the diachronic evolution of the different forms of collective and organized spiritual experiences founded on a divine element, whether it comes from a divinely revealed source or from an increased neurological human ability (like in Scientology). In religious laws, what is fixed is the starting point:[7] religion as stated in the founder's will (whether divine or not) – not the legal product of religion itself as a religiously inspired organized structure; that is, religion in context and in progress interconnected with and influenced by the history of humankind.

Taking for granted that a religious law is the product of a religious community, a wider notion of law is needed. Shari'a, halacha, or dharma are always translated with the word "law," but the original meaning of those traditions is not law as understood in the secular experience. It is a mix of ethical, moral, social, ritual, and even legal bounds that has to be addressed.[8] How to explore such a complex reality in a methodologically correct way is the goal. Of course, the theological aspects cannot be neglected by the comparative lawyer, taking for granted that religious rules reflect a spiritual relation to and with the divine element that is able to direct the evolution of a religious legal system. As in secular law, the fundamental principles, often shaped in a constitution, pre-orient the legislation of a legal system, the divine sources are theological preconditions, to be understood diachronically,[9] which shapes the religious rules.

Moving from this starting point, the comparative lawyer can either describe each singular legal arrangement of each religious law and draw a comparison, or make an interconnected, transversal description of the legal institution. Both the approaches carry with them some advantages and disadvantages.

delle religioni in movimento, Quaderni di diritto e politica ecclesiastica, special number (2017), 10.

5 On this topic see *Pio Fedele*, Lo spirito del diritto canonico (Padova 1962).

6 *Mario Ricca*, Segnavia? Mete di viaggio per chi compara i diritti religiosi, Quaderni di diritto e politica ecclesiastica, special number (2017), 22.

7 The starting point is the revelation, which is peculiar to each singular religious experience, very often linked to a particular language (at least for traditional/revealed religions) that increases the difficulties in directly accessing the original sources of laws. See *Silvio Ferrari*, Lo spirito dei diritti religiosi (Bologna 2002), 109 ff.

8 See *Rossella Bottoni/Silvio Ferrari/Russell Sandberg*, Introduction. Religious laws and their comparison. Theoretical and methodological issues, cit., 10.

9 See *Silvio Ferrari*, L'insostenibile leggerezza del movimento?, Quaderni di diritto e politica ecclesiastica, special number (2017) 36.

The first choice is more traditional and could be useful to describe singular parts of a legal system, evaluating the different solutions to a common human need; meanwhile, the second approach is more fruitful when it comes to exploring and comparing the ultimate foundation of religious laws. In this second case, however, the lawyer's knowledge must be even more directed by a particular awareness of the theological environment as well as the historical, sociological, and anthropological implications.[10]

We have already underlined the growing importance of law and religion and of comparative law of religions, in particular among the legal disciplines worldwide; it is now time to explore the Italian approach to this discipline.

III. THE ITALIAN APPROACH TO COMPARATIVE LAW OF RELIGIONS

Italy has a long tradition in comparative law, in private as well in public legal disciplines. Moreover, a long tradition of studies has covered Latin canon law and singular non-Christian confessional legal systems, such as Islamic law firstly taught in Italian academia in 1913 by Davide Santillana in Rome.[11]

In the first generation of studies about religious laws, what was missing was a comprehensive approach to the phenomenon of religious legal systems: each religious law was studied per se as an autonomous legal corpus, very often in an historical perspective useful to understand the influence of some religious laws, such as canon law, on secular legal systems.

Comparative law of religions is quite a new approach to study the religious legal experience, which, in Italy, developed over the last twenty years due to the work of Silvio Ferrari, who in 2002 published *Lo spirito dei diritti religiosi*[12] and in 2001 funded *Daimon, Annuario di diritto comparato delle religioni*,[13] an annual review specialized in comparative law of religions.

From then on, many legal experts in Italy have embraced this new field of study, and at least two main approaches can be identified: the positive, legal science one led by Silvio Ferrari and the intercultural one, which can be traced back to the work of Sergio Ferlito and then that of Mario Ricca.

As to the first, *Lo spirito dei diritti religiosi* could be considered a manifesto of Ferrari's approach to the subject, based on the use of a strict legal methodology combined with the evaluation of the peculiarities of the religious legal experience. In particular, he focused on the contradictions within religious laws, starting from their internal clash between rationality and irrationality. This particular aspect, on one hand, gives the opportunity to underline the heteronomous foundation of sacred legal experience, also through the concept of religious taboo, and at the same time evaluates the legal tools elaborated by religious laws to bypass or historically overcome the inflexibility of some religious prescriptions. In this way of thinking, religion is not a mere anthropological element, but rather it builds up a proper legal system, ending in not merely ethical bounds that could be studied with a scientific legal method; instead, moving from the sources of law, all the subsequent legal institutes can be analyzed. In this sense, religious rules and their proper and peculiar origin can be compared without putting in jeopardy the essence of each revelation itself and its supposed truth.

Moreover, analyzing religious law – under the perspective of freedom of religion – can put them in dialogue with the secular legal systems, to find a common path to manage diversity in pluralistic society, especially in the human rights dimension. Finding a common language to address the human rights issue that can make it intelligible to different cultural and legal experiences outside the mainstream Western approach can be a turning point. Starting from the idea of a divine natural law, common to a good number of religions even in the peculiarities of each experience, it could be possible to share some fundamental concepts. In this perspective, religious organizations are no longer a passive actor in society; they can play a positive role, working together in multicultural society to make more and more effective religious freedom as a tool to increase human wellness, both spiritually and materially.[14]

There are two limits in this approach. First, religious actors must show a good level of awareness about the role they can play in modern society, combined with a critical reflection on religious identity. Law and Religion scholars cannot address this particular aspect without a full cooperation of the religious denominations who are the only ones that can foster a proper reflection inside religious communities in a pluralistic dimension. Second,

10 See ibid., 38.

11 On the origins of the studies of religious laws in Italy see *Vincenzo Pacillo*, The study of religious laws in the Italian university: current doubts (and certainties), Quaderni di diritto e politica ecclesiastica, special number (2017), 44 ff.

12 *Silvio Ferrari*, Lo spirito dei diritti religiosi (Bologna 2002).

13 *Daimon*, Annuario di diritto comparato delle religioni, now special number of the Italian legal review Quaderni di Diritto e Politica Ecclesiastica, Bologna.

14 The idea is that if religious freedom is adequately protected and granted, this benefits all aspects of human life, even the economic system. On this, see the activity of the Religious Freedom & Business Foundation, https://religiousfreedomandbusiness.org/, last accessed: 21 October 2021.

this conscious involvement must be fostered in the public institutions as well, in order to create an environment ready to listen, understand, and find innovative solutions to the problems of the multicultural and multi-religious coexistence.[15] Unfortunately, very often the secular legal actors do not yet have enough knowledge of the religious phenomena, still strictly adhering to a post-Westphalian way of managing religious diversity.

Keeping this gap in mind, further studies in Ferrari's path were conducted by Ferrari himself and by a group of young scholars[16] who deepened the reflections on singular religious systems, along with their relations with the secular word, to foster a fruitful debate in civil society around active citizenship and cultural-legal integration.

Coming to the intercultural approach, its origin can be found in the work of Sergio Ferlito.[17] He had the merit to have pointed out the strong relations between law, religion, and anthropology, asking the lawyers to open up to new disciplines in order to understand religious laws. He underlined the need to find new tools to enter the symbolic dimension of religion, which very often is lost in lawyerly analysis. In this sense, the lawyer has to become also an anthropologist to grasp the profound meaning of the sacred.

Mario Ricca's work[18] on the intercultural approach to comparative law of religions further developed these arguments. In his mind, giving a positive value to the religious legal experience is a way of fostering integration in multicultural society, elaborating proper responses to singular legal needs. In this bottom-up approach, understanding the cultural/legal codes used by foreigners can help also professional lawyers in giving effective and efficient answers to the legal needs of multicultural societies. In other words, religious legal systems are not studied as systems per se in a comprehensive theoretical approach, but for those aspects that can encounter the secular world in order to manage diversity. In this vision, intercultural laws are tools to understand the different human cultures of which religious legal experience is one of the formants.

Conceiving comparative law of religions as intercultural law puts the focus on religion as part of human life that shapes also economic and generally social behaviors, but it fails when it considers religion to be a totalizing element only for people coming from different cultures. The relations between believing, belonging, and believing without belonging are deeper and not connected to a particular shaping culture. If we look at the plurality of religions in Western societies, we find a good number of persons who convert to religions that are not a formant of their innate cultural environment, but they put in place belonging dynamics even deeper than foreigners have.

As a matter of fact, belonging is a matter of choice not only a matter of culture, at least in pluralistic society, and the intercultural approach fails when it considers this aspect to be secondary.

Both the approaches examined leave the floor to some questions that remain unsolved: first of all, the problem of language, undoubtedly a core issue in religious laws. Very often, the primary sources of religious laws (whether revealed or not) are not directly accessible to the lawyer who cannot read them, lacking also a proper knowledge of the exegetic method. Maybe, it is worthwhile to take into consideration that primary sources in religious law are not codes of laws, and maybe it is better to promote a deep collaboration between theology and legal disciplines, instead of pretending to transform a lawyer in an exegetist. Although the ability to read primary sources directly could represent an added value, it should not be considered a fundamental prerequisite as long as lawyer relies on accredited, scientifically funded readings of the sacred text. On the contrary, more important is the fact that in Italian academia not so many scholars are able to convey sources, even secondary ones, in a language different from their mother tongue.

The second open question is still to define what a religious law is. Ferrari's approach echoed the theory of its founder, which is based on the assumed unnecessity to define what a religious law is,[19] but

15 See *Silvio Ferrari*, L'insostenibile leggerezza del movimento?, cit., 41.

16 Among Silvio Ferrari's other books on this topic: *Silvio Ferrari/Giancarlo Mori* (eds.), Religioni, Diritto, Comparazione, (Brescia 2003); *Silvio Ferrari* (ed.), Il matrimonio. Un commento alle fonti (Torino 2003); *Silvio Ferrari/Antonio Neri* (eds.), Introduzione al diritto comparato delle religioni (Lugano 2007); *Silvio Ferrari* (ed.), Introduzione al diritto comparto delle religioni (Bologna 2008); *Myriam Di Marco/Silvio Ferrari* (eds.), Ebraismo e Cristianesimo nell'età dei diritti umani (Torino 2018); *Silvio Ferrari* (ed.), Strumenti e percorsi di diritto comparato delle religioni (Bologna 2020) (a second volume is expected in 2022). Moreover, he sponsored or collaborated on many other books edited by Routledge on this topic and fostered the activity of many scholars, among which I can put my own scientific activity and that of Alessandro Ferrari and Rossella Bottoni. He has also been part of two EU Framework Programs about managing of religious diversity, FP6 – DIALREL (2006/2009) – Encouraging Dialogue on issues of Religious Slaughter, https://www.dialrel.net/dialrel/welcome.html, last accessed: 21 October 2021, and FP7 - RELIGARE (2009/2013) - Religious Diversity and Secular Models in Europe – Innovative Approaches to Law and Policy, https://cordis.europa.eu/project/id/244635, last accessed: 22 October 2021. In Lugano, Switzerland, he actively worked and founded a master's program in Comparative Law of Religions, called DiReCom still in place, see http://www.istitutodirecom.ch/education/master-of-arts-course-comparative-law-of-religions?language=en, last accessed: 19 October 2021.

17 *Sergio Ferlito*, Le religioni, il giurista e l'antropologo (Soveria Mannelli 2005); *Sergio Ferlito*, Ai confini della libertà religiosa. Uno sguardo antropologico, in: Graziadei/Serio (eds.), Regolare la complessità. Atti del V Convegno della Società Italiana di Diritto Comparato (Torino 2017).

18 *Mario Ricca*, Pantheon. Agenda della laicità interculturale (Palermo 2012); *Mario Ricca*, Culture interdette: modernità, migrazioni, diritto interculturale (Torino 2013).

19 Silvio Ferrari explored the issue in a famous work, at least for Italian lawyers, in 1995. He relies on a pragmatic definition of religion and religious law based on some indexes, instead, to insist on a theoretical definition of what religion is, due to the fact that the concept of religion is a variable notion to be understood in relation to time and space. See *Silvio Ferrari*, La nozione giuridica di confessione religiosa (come sopravvive-

this remains a question that lingers on the discipline and to which the studies of Russell Sandberg are trying to give an answer. In the sociological functional approach to studying comparative law of religions, a mix of legal and theological methodology is needed, and religious laws are seen as a set of rules that orders a religious group based on religious sources.[20] In Italy, this way of study has been variously explored in the work of Alessandro Ferrari on the legal conditions of the Muslim communities in Italy and in Euro-Mediterranean space,[21] in a search for balance between claims of recognition in religious identity and secular approach to foster integration in Western societies.

IV. COMPARATIVE LAW OF RELIGIONS AND THE ITALIAN ACADEMIA

The active Italian debate over the core issues of comparative law of religions has resulted in many courses on this topic taught in Italian universities. Currently, there are eleven curricular courses entitled "comparative law of religions" and four called "intercultural law."

Various books and manuals have been adopted, mainly *Lo spirito dei diritti religiosi* and the manuals edited by Silvio Ferrari for those scholars who adhere to Ferrari's approach, and the works of Ferlito and Ricca for those who credit the intercultural approach.

In the last decade, comparative law of religions and law and religion in general have created a class of scholars who are aware enough of the importance of those issues in founding competences to manage religious diversity in pluralistic societies. From this perspective, quite a number of activities have been put in place.

First of all, the International Forum Democracies & Religions, or FIDR, is an inter-university center active in the field of training and research in order to create the pre-conditions to govern ethnic-religious conflicts in democratic societies, fostering a process of inclusive citizenship with a particular focus on Islam. The master's degree in "Religion, Politics and Citizenship" is a one-year multi-disciplinary postgraduate program founded by FIDR which aims at giving the students the "tools that are necessary to access the world of knowledge of philosophy and social, human and political sciences with the aim of understanding and analyzing the complex relationship between religion and politics in the modern state and its correlation with issues of citizenship, freedoms, pluralism, development and social peace."[22]

This consortium is now comprised of eight Italian universities, but it is going to be enlarged up to twelve institutions in the near future, following the experience of the project Prevention and Interaction in the Trans Mediterranean Space, or PriMED, founded by the Italian Ministry of Education, University and Research, which brought twelve Italian universities together with ten others from Organization of Islamic Cooperation states.[23] PriMED developed an intensive training program directed at students as well as personnel of the public institutions who are working day by day with diversity and Islam in Western societies from many point of views (immigration, security and prisons, schools and health services). The core idea of PriMED is that to counter radicalization you must foster first of all knowledge and learning, working together for a common goal, security, and integration.

Under this particular perspective, PriMED benefited another research project carried out by the University of Milan research group, Simurgh – Education to religious pluralism in the Lombardy prison system.[24] In this particular context, comparative law of religions methodology has been used as the main tool to trace a common picture to the various religious experiences, fostering mutual knowledge as an antidote to radicalization and marginalization in the prison system.

DiReSOM – Law and Religion in Multicultural Societies[25] is yet another research group created in 2017 sponsored by ADEC (Association of academics of the legal regulation of the religious phenomenon – Italy), which aims at stimulating dialogue and reflections between scholars, in Italy and abroad, around multicultural societies themes and comparative law of religions as tools for intercultural dialogue. During this ongoing pandemic, DiReSOM was particularly active in looking deeply inside religions and how COVID-19 affected religious freedom in the different religious traditions.

re senza conoscerla), in: Parlato/Varnier (eds.), Principio pattizio e realtà religiose minoritarie (Torino 1995), 19–47.

20 For a further knowledge of this approach, see Sandberg contribution in this issue and *Rossella Bottoni/Silvio Ferrari/Russell Sandberg*, Introduction. Religious laws and their comparison. Theoretical and methodological issues, cit.

21 See, as examples of a wider production, *Alessandro Ferrari*, Civil Religion in Italy: «A Mission Impossible»?, The George Washington International Law Review 41, 4 (2010), 839–859; *Alessandro Ferrari*, Islam in Italy: a non-religion in a religious country ?, Annuaire de Droit Comparé des Religions (2015), 147–181; *Ralph Grillo/Roger Ballard/Alessandro Ferrari/Andre J. Hoekema/Marcel Maussen/Prakash Shah* (eds.), Legal Practice and Cultural Diversity (Farnham 2009).

22 FIDR - International Forum Democracies & Religions, see https://ircfidr.it/# , last accessed: 22 October 2021.

23 For more information, see PriMED website at https://primed-miur.it/en/ , last accessed: 27 October 2021.

24 For some clues about this experience, see https://lastatalenews.unimi.it/primed-simurgh-due-progetti-statale-contro-radicalizzazione-religiosa , last accessed: 27 October 2021.

25 DiReSOM - Law and Religion in Multicultural Societies, https://diresom.net/ , last accessed: 27 October 2021.

V.
CONCLUDING REMARKS

I think that from this quick picture of the Italian situation, some clear points have emerged. In Italian academia, the debate on these topics is vivid and fruitful. Scholars are well aware of the methodological issues and are elaborating creative strategies to manage diversity to which comparative law of religions is perceived as a useful tool.

There are many ways to interpret comparative law of religions; a more legal scientific approach and an intercultural one are the two main research lines, where – in between – many bridges are still under construction.

Law and Religion studies in the Italian context are still not taken into consideration by the public stakeholders as greatly as in the Anglo-Saxon environment, but are slowly and inexorably accounted for nonetheless, helped by the many religious and cultural influences on the traditional Italian environment. Also, our politicians are learning how important knowledge of diversity is to create an inclusive and equitable society for the future ahead. Lawyers can help to find a roadmap to make compatible different behaviors and practices founded in different truths that seem on their face irreconcilable. Identities define through differences, but in our multi-everything societies it is clear that no one is an isolated island; to live together in diversity is a goal that can be achieved only together, in Italy as well as abroad, and all the social actors, included religious denominations, must collaborate. In so doing, protection of religious belief minorities is a global challenge that allows effective citizenship on equal footing for all, preserving peculiarities and finding solutions to reconcile identities in the globalized societies.

