

Comparative Law and Federalizing Processes: Methodological Insights

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1 Introduction: Comparative Federalism in Light of the Renaissance of Comparative Constitutionalism

Federalism might look like – and to a wide extent is – a promising field of research for comparative legal studies. Dissemination, institutional transformation and increasing diversity might all be mentioned as possible reasons for the great success of federalism in comparative legal studies in the last few decades. The following examples illustrate these points. First, a number of jurisdictions have embraced federalism recently, e.g. Bosnia and Herzegovina, Ethiopia, and Nepal. Second, well-established federal systems have undergone significant reform processes: this was the case both before and after the economic and financial crisis, which has deeply affected the relations between institutional layers in a number of federal and multilevel systems. Third, a growing number of legal systems cannot be defined as – and do not claim to be – federal in the narrow sense; still, they share a number of relevant features with classically understood federal orders. This is true both of states – e.g. Spain and the United Kingdom – and supranational organizations, like the European Union: they all pose a formidable challenge for traditional classifications and analyses. Finally, the startling re-emergence of discussions such as the one on the compatibility between secessionist claims and constitutionalism has led to rediscovery of interpretations of federalism, which had been somehow marginalized in recent past (see, e.g. La Pergola 1969; Elazar 1995).

In sum, federalism-related issues clearly lend themselves to comparative insights: in a way, this reflects the ‘tremendous renaissance’ of ‘comparative constitutionalism’ over the last three decades (Hirschl 2014, p. 3). Still, the apparent success of federalism and other, similar constitutional arrangements is not exempt from risks and methodological traps for researchers in comparative law. These risks

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Giacomo DelleDonne

are related both to growing conceptual indeterminacy in legal studies¹ and to the concurrence of contributions of other disciplinary fields: federalism is an object of study not only for law but also for political science, political philosophy, and economics.

This article aims at discussing the contribution of comparative law to the study of federalism. In order to do so, the article will resort to the notion of federalizing process, as elaborated by C.J. Friedrich: this concept makes it possible to encompass a great variety of federal, quasi-federal and decentralized systems and enhances the relevance of comparative law in this area. In this regard, the role of comparative law is both to show the differences between different types of territorial division to power and to point at the existence of a continuum among them. As will be shown later, its role is also to point, possibly providing some conceptual points of reference, at the increasing complexity of the notion of federation and the considerable diversity of its possible manifestations. From the specific viewpoint of the federalizing process hypothesis, federalism should not be primarily understood as 'a term for a static pattern, designating a particular and precisely fixed division of powers between governmental levels' but as 'the process of federalizing a political community' (Friedrich 1968, p. 7).

The ultimate goal of the article is to raise points about the crucial role of legal comparison in highlighting the links between federalism and constitutionalism: these may be remarkably close or somehow problematic, as the different cases of the United States and Germany respectively show. In this regard, a reflection about comparative federalism may also contribute to the general reflection about the methodology of comparative law: comparison is supposed to clarify the meaning of some fundamental legal concepts and the way(s) they interact within a legal system. Furthermore, those methodological assumptions make it possible to get a better understanding of federalism itself and its greater or smaller proximity to other types of legal integration (e.g. regional integration processes). Two of the advantages of the notion of federalizing process are its flexibility and its wide scope: meanwhile, it is possible (and necessary) to preserve a basic meaning of federalism. Thanks to its focus on similarities and elements of distinction, comparative law has a crucial role to play in this area of studies. On the other hand, there are some mistakes that comparative legal scholars writing on federalism possibly incur: a recurring one, given the interdisciplinary character of federal studies, is that they lose sight of the specifically legal dimension of the federal phenomenon.

The article is structured as follows.

First, it stresses the necessity to keep into account the possible gap between ideal types and specific cases for analysis: this has to do both with the existence of a

1 This is all the more true in constitutional and public law: the ongoing discussion of the possible decline of nation states has put in question long-standing assumptions concerning such fundamental notions as state, sovereignty and political representation and their relevance for the constitutional discourse. For the purposes of this article, it has been observed that theories of federalism 'can no longer ignore multi-tiered dynamics beyond the nation state and its impact on inter-state relationships' (Popelier 2014, p. 3).

limited number of prestigious federal models that serve as prime reference and with the distinctions between federalism as a normative ideal and federations, understood as its concrete manifestations. In this regard, scholarly debates in continental Europe offer relevant food for thought. Second, it underlines the possible flaws of too static approaches in comparative legal studies of federalism and plead in favour of a dynamic, diachronic viewpoint. Third, it stresses the necessity to preserve a basic definition of federalism in legal studies. Fourth, it focuses on the circulation of constitutional ideals and models of federalism among legal systems in the light of methodological discussions of legal transplants, grafts and irritants.

2 The Quest for Federalism: The Divide between Ideal Types and Specific Cases

Researchers in comparative law have to deal, first, with a major lexical conundrum: when looking into *federalism*, they will, most of the times, focus on a number of selected *federal systems*. This widespread habit lends itself to twofold criticism. On the one hand, improper generalization of specifically targeted analyses is possible. Furthermore, generalization is even more risky when the results of individual case studies are used in order to build up a theoretical framework. As Gamper (2005, p. 1298) has put it in a seminal piece, ‘all theories of federalism are more or less based on a small number of historic prototypes that serve as model federal systems.’ In this respect, the American federalism and federal arrangements in the three German-speaking federations in continental Europe have long served as a major reference for any comparative inquiry. It is always difficult to trace a clear distinction between the analysis of specific legal systems and the elaboration of more sophisticated interpretive frameworks: undoubtedly, the cultural and political prestige of the federal models of the United States, Germany and Switzerland has played a key role in the elaboration of concepts and theories.² These concerns clearly cross the path of the debate about case selection in comparative constitutional law (see Hirschl 2005). In more general terms, another underlying risk is typical of comparative constitutional law. The possible flaws of ‘selective ‘northern’ (or ‘western’) emphasis in comparative constitutional law’ (Hirschl 2014, p. 206) lay outside the scope of this article: still, federalism is a field of research in which it is common practice to develop general theories selecting a few specific legal orders as benchmarks. Accordingly, the characters of ‘other’ federal systems are deductively looked into and assessed in light of their closeness to more prestigious, or better-known, ‘models’. However, the success of federalism in the last few decades is related to reasons that sometimes have little common ground with the ones underlying American or German federalism: only recently has federalism been seen as a suitable institutional solution for manag-

2 See e.g. Cruz Villalón 2007, p. 768 f. (pointing out that federalism in Europe ‘speaks German,’ if not for a Swiss ‘nuance’ and the Belgian ‘exception’).

Giacomo Delledonne

ing bi- and multinational conflict, as it has been the case in Belgium or Bosnia and Herzegovina. When analysing those federal systems, a more appropriate strategy is to use their own specific features (including constitutional history, political culture, the nature of their distinctive cleavages, etc.) as the starting point: in this more inductive way of developing analyses, the main goal is to study how the notion of federalism has adapted to the peculiar characters and needs of a given jurisdiction.

A second line of criticism is closely related to the previous one. Federalism is a complex research target, in which value assumptions are no less important than institutional design. What does this mean in more concrete terms? On the one hand, in the last two decades the French constitutional theorist Olivier Beaud, building on Carl Schmitt's *Constitutional Theory*, has strongly stressed the necessity to trace a distinction between 'federalism' ('a *political idea*', *une idée politique*); 'Federation' ('an idea transformed into institutions', *une idée transformée en institutions*); and federal states (Beaud 1998, p. 85; Beaud 2007). There is a structural hiatus between the normative idea of federalism – whose origins may be traced back to 17th-century political thought – and the institutional design of federations.³ Another remark by Beaud is of the greatest relevance for a researcher in comparative law. North American legal scholarship tends to identify federalism with constitutionalism: in fact, the creation of a federal government with limited, enumerated powers – and coexisting with the states' governments – was a logical consequence of the American revolutionary attempt to limit governmental power (Bognetti 1991, p. 277 ff.; see also Verney 1995). In continental Europe, the history of *federations* and *federal states* has been quite different: as Beaud (1998, p. 194 ff.) has put it, there is no necessary link between federalism and (constitutional) democracy. The most convincing example for this claim comes from the German federal vocabulary. Throughout the constitutional history of Germany, some kind of federal institutional arrangements have been in force more often than not. Thus, *Bundesstaat* – thereby meaning a type of institutional organization – can be defined as a recurring feature in German public law. However, studies of German federalism suggest that the German *Bundesstaat* has not always come up to the standards of *Föderalismus*, defined as a 'regulating principle of liberty' (*Ordnungsprinzip der Freiheit*) (Unruh 1982). In this respect, the ill-fated Frankfurt Constitution of 1849 and the Basic Law of 1949, which both tried to bridge the gap between *Föderalismus* and *Bundesstaatlichkeit* (with the latter ultimately succeeding in doing so), are rather an exception in German constitutional history (see Dippel 1999).

A final remark can be derived from these distinctions: the law plays a major role in organizing federations and their institutional design and constitutional frame-

3 From a different perspective, Robert Schütze's works have strongly stressed another conceptual shift from early modern conception of the *foedus* as an 'international treaty' in the wake of the Treaties of Westphalia, so much so that the emergence of a strong federal government in the United States of America favoured the identification of federalism with 'a mixed structure between international and national organization.' In Europe, in turn, the very same idea was 'pressed ... into a third format: the national format of federalism' (Schütze 2009, p. 69).

work and in infusing the ‘spirit’ of federalism into them (or in failing to do so).⁴ Furthermore, one of the tasks of researchers in comparative law is to ‘locate’ institutions, norms and practices and to analyse them in light of a wider context: when it comes to federalism, this means that not only the local contexts but also the inherent tension between normative ideals and specific cases should always be kept in mind. Comparative law researchers who are interested in federalism should always raise questions on how a specific legal framework accommodates the distinctive normative claims of federalism and the specific reasons underlying the decision to embrace it. As mentioned in Section 1, (quasi-)federal arrangements have been remarkably successful over the last three decades: as a consequence, the new rationales justifying the adoption of federalism – notably, multinational conflict management – have also emerged. These developments make the task of comparative lawyers more complex and strengthen the case for contextual analyses.

3 Federalism and Law: Static and Dynamic Components of Federal Orders

In continental Europe, comparative legal studies in federalism have long been dominated by conceptual assumptions based on *Dogmatik*, i.e. an abstract system partly independent from actual cases (see Jakab 2016, p. 63 ff.). Scholarly works on federalism have not escaped this typical trend of continental European legal culture since the late 19th century.

Against this background, the greatest attention was paid to striking the differences between federations and confederations: the criterion for recognizing either of them was based on the institutional layer *where sovereign powers were located*. The starting point for those discussions was the debate on the qualification of the German *Reich* either as a *Staatenbund* (‘league of states’) or as a *Bundesstaat* (‘federal state’) in the second half of the 19th century, after the German unification. Constitutional evolution in the United States (before and after the Philadelphia Convention and the Civil War) and Switzerland (in the wake of the Sonderbund War) also provided important cause for reflection. Since the turning point of the Maastricht Treaty, the German 19th-century debate has served as a powerful source of inspiration for the scholarly debate about the European Union and the *Maastricht*⁵ and *Lisbon*⁶ judgments of the German Federal Constitutional Court (see Oeter 2009; Murkens 2013, p. 183 ff.): as the German Court has put it, it is impossible to think of the European Union as a federal polity because the unanimous consent of the Member States (the ‘Masters of the Treaties’) is required for any Treaty amendments.

4 As François Ost has aptly described it in a recent theoretical study, the law could be understood as an *‘institution seconde’* that has no monopoly on its own purposes (Ost 2016).

5 German Federal Constitutional Court, judgment of 12 October 1993 (BVerfGE 89, 155).

6 German Federal Constitutional Court, judgment of 30 June 2009 (BverfGE 123, 267).

Giacomo Delledonne

In the 20th century, constitutional provisions on *enumerated powers* were seen as the decisive criterion for tracing a distinction between federal orders on the one side, and regional states on the other. In regional orders such as 3rd-Republic Spain and Italy until 2001, the national legislature continued enjoying all the powers not explicitly delegated to the regions. The Italian constitutional reform of 2001 was said to pave the way for a full *federalization* of the country, as it replaced the previous state of affairs with two lists of enumerated powers of the State and shared competences, with legislative powers in all other matters being conferred on the Regions. Subsequent constitutional practice and implementation of the new constitutional framework have all but contradicted those expectations.

The purpose of this article is not to deny the heuristic force of those scholarly analyses based on *Verfassungsdogmatik*: they are still the starting point for some of the most important classifications of federal systems (see Aroney 2016). Still, it is possible to point at some of their methodological flaws. A distinctive feature of *Verfassungsdogmatik* is the attempt to build an abstract conceptual system whose validity goes beyond specific legal systems and specific moments in their constitutional evolution. However, it is difficult to deny that even the concepts of *Verfassungsdogmatik* were shaped by the historical and cultural context. In the case of federalism, the constitutional history of the United States, Switzerland and Germany in the 19th century did play a decisive role in influencing an understanding of federalism based on the transition from confederal to properly federal orders, for which the question of the allocation of sovereignty was crucial. The same cannot be said, however, of federalizing processes in the 20th century. An objection of this kind was raised by Konrad Hesse in his well-known study on unitary trends in post-war German federalism: before engaging in a law-in-action analysis of the state of (West) German federalism at the time he was writing, Hesse (1962) pointed at the flaws of the most influential legal theories on federalism – e.g. those elaborated by Carl Schmitt and Rudolf Smend in the Weimar period – as they were too heavily influenced by 19th-century debates and did not really encompass the subsequent developments.

Another objection can be raised with regard to the achievements of *Verfassungsdogmatik*: it tends to focus too much on a static image of federal orders. In comparative federalism, however, the dynamic aspects of federal systems also deserve the greatest attention. In general terms, this is related to the relevance of historical developments to comparative law: in this regard, vertical (diachronic) comparison is no less important than horizontal comparison (see Monateri 2012, p. 145 ff.). A typical example of diachronic analysis of federal systems is the decline of dual federalism – and the parallel emergence of cooperative federalism – in coincidence with the rise of modern welfare states (see, e.g. Corwin 1950). More recently, the increasing relevance of the principle of subsidiarity, attempts to accommodate national and cultural diversity and the emergence of a notion of ‘competitive’ federalism have all strengthened the asymmetric features of a number of federal orders (see, e.g. Watts 1999, ch. 6). Again, the decline of dual federalism and the rise of asymmetric federalism shows that contextual analyses, aptly taking into account major political, social and economic trends, are needed in order to understand how federal systems actually work. In light of these remarks the typ-

ical approach of *Verfassungsdogmatik* can be fruitfully integrated by the attempt, which is a classical component of comparative law analyses, at tracing a distinction between *variable* and *constant elements* in law (David & Brierley 1978, 17 ff.). As will be emphasized later, this makes it necessary to provide a basic definition of federalism, stressing continuity beyond historical development.

In more specific terms, a very influential interpretive framework for federal systems has been provided by the federalizing process hypothesis. As mentioned in Section 1, Carl J. Friedrich is the main proponent of a dynamic understanding of federalism, according to which '[f]ederalism should not be considered a term for a static pattern, designating a particular and precisely fixed division of powers between governmental levels'. Federalism should rather be understood as a process of aggregation of 'separate political organizations' or, *conversely*, as 'the process through which a hitherto unitary political community ... becomes differentiated into a number of separate and distinct political communities' (Friedrich 1964, p. 126 f.): 'the differentiated communities, now separately organized, become capable of working out separately and on their own *those problems they no longer have in common*' (Friedrich 1963, p. 9; emphasis added).⁷ This means, e.g. that the transition from confederal to federal arrangements, as it was the case in the United States or Switzerland, is by no way the necessary outcome of a federalizing process. Even an opposite path can be envisaged, in which a unitary order is transformed into a federal one.

For the purposes of this article, this means that not only political scientists but also comparative lawyers should understand federal orders as dynamic objects. On the other hand, legal scholars should primarily be interested in the legal manifestations of the evolution of federal systems: for instance, they should focus on such transformative factors as constitutional amendment, interpretations of constitutional clauses (as developed mainly by constitutional and supreme courts)⁸ and informal constitutional change. Similar concerns can be found in a recent contribution that reflects on the distinctive features of federalism from the viewpoint of the tension between unity and diversity in state legal orders: 'What distinguishes federalism from other forms of states, is its endeavor to find an equal balance between central government and territorial entities' (Popelier 2014, p. 5).

7 By the way, similar interpretations of the evolution of federal orders had already been developed at the beginning of the 20th century by some of the most influential representatives of classical German public law scholarship: in his handbook of public law of the German *Reich*, for instance, Paul Laband took into account the ongoing expansion of the competences of the federal government and, consequently, on the possible decline of the German *Reich* as a *federal order*: 'The Constitution allows both developments in accordance with decentralisation and federalism, and consolidation into a unitary state' (Laband 1911, p. 129; my translation).

8 Think, e.g. of the different interpretations of the constitutional Commerce Clause elaborated by the Supreme Court of the United States since the beginning of the 19th century (see Frankfurter 1937), or of the attempts that make contemporary German federalism more asymmetric by favouring a stricter enforcement of the Necessity Clause of Art. 72 of the Basic Law (see Taylor 2009).

Giacomo DelleDonne

The notion of federalizing process has become particularly relevant in the second half of the 20th century. On the one hand, that was an age in which new federal systems appeared, marked by the ‘differentiation’ (to borrow Friedrich’s words) of unitary nation states into distinct units: such was the case of Belgium, Spain, and, to a lesser extent, Italy and the United Kingdom. In top-down federalizing processes, the reasons justifying the departure from a unitary institutional design should be kept distinct from those which characterize(d) bottom-up processes: according to Stepan, the rationale underlying the creation of ‘holding-together’ federations is clearly different from the reasons for creating the more ‘classic’ ‘coming-together’ federal systems (Stepan 2001; see also Riker 1964 and subsequent discussion of his theory of ‘coming-together’ federations by Choudhry and Hume 2011, p. 366). Still, and most importantly, the specific legal tools that are used for establishing a (quasi-)federal order are often the same for both these categories (vertical separation of powers, enumerated powers clauses, participation of the component units in the activities of the federal government, etc.):⁹ in synthetic terms, they could roughly be described as a combination of self-rule and shared rule (Elazar 1987, p. 5 f.). On the other hand, some federalizing processes may not even have the establishment of a full-fledged federation as their eventual outcome: such is the case of the European Union, whose constitutional order clearly has some federal features but is unlikely to be transformed into a federation in the foreseeable future (Bifulco 2012, p. 542 f.).

In order to explain the great variety of institutional solutions that are currently analysed by making resort to the notion of federalizing process, political scientists and, to a lesser extent, constitutional law scholars have argued that a continuum exists between distinct types of decentralized political organization, ranging from unitary states to international organizations (Baldi 2003; Carrozza 2009). The idea of a continuum including multiple forms of decentralization and vertical separation of powers somehow explains the great success of federalism after the end of the Cold War as ‘the only existing matrix for developing constitutional tools able to manage current complexity both in institutional and societal terms’ (Palermo 2015, p. 508).

4 An Opposite Risk: Too Generous Approaches – The Necessity to Preserve a Basic Definition of Federalism

A different risk that is somehow inherent to dynamic approaches like the one advocated by Friedrich. Emphasizing the dynamic nature of federalizing processes might well lead to define all those systems marked by some degree of political and administrative decentralization as (more or less) federal. Comparative

9 Other features of federal orders, in turn, are unlikely to be found in holding-together federations: such is the case of the constitution-making autonomy of the component units of the federal order and, consequently, of ‘homogeneity clauses’ like the American Guarantee Clause or Art. 28 of the German Basic Law (think, e.g. of the Belgian and Spanish cases).

lawyers should try to preserve a basic definition of federalism and to use it as a starting point for their research. In a way, they should be less ambitious than public lawyers in the age of triumphant *Verfassungsdogmatik*: a basic definition of federalism should provide a working hypothesis and not aim at being valid, beyond time and space, for all possible federal orders. In this respect, federalism is a victim of its own success: the increasing diversity among federal systems makes it very likely that the definition, as inclusive as it might be, will require some update.

A very basic definition, pointing at the recurrent constitutional core of federal orders, has been sketched by Gamper (2005, p. 1299 f.):

‘The constituent units are subsumed as the constituent states, ‘*Länder*’, provinces or regions. Their powers are conceived as competences that are distributed by a federal constitution. Their right to participate at the federal level is restricted to the narrower concept of representation via the federal chamber of a national parliament.’

Many of these elements are actually subject to controversy. The example of federal second chambers suffices to illustrate this claim: leaving aside the Senate of the United States and the German *Bundesrat*, the ability of existing second chambers to represent the interests of the constituent units of a federation is a permanent object of dispute and reform attempts in most federal jurisdictions (e.g. Canada, Belgium and Austria: see Luther, Passaglia, & Tarchi 2006; Carrozza 2012). Furthermore, political scientists have shown how deeply the operation of federal second chambers is affected by the peculiar traits of a given political system, e.g. the structure and ‘federalness’ of the party system (for an example of interdisciplinary analysis, combining a comparative law approach with the results of political science analyses, see Dehousse 1990). Although they should be receptive to the achievements of other disciplinary fields, comparative law researchers should take care of preserving the specific legal and constitutional dimension of federal orders and its basic meaning. In this respect, a noteworthy element is that the abstract significance of having a ‘federal’ second chamber is hardly denied, so much so that in many jurisdictions discussions focus on how to make their own second chambers closer to the ideal of a body in which concerns of the sub-national constituent units are actually represented.

Popelier’s definition attempt tries to integrate a basic definition – based on some recurring institutional features of federal orders – with her dynamic approach to the study of federal orders. In this regard, those recurring traits, ‘rather than exhaustive qualifying criteria, are *indicators* for the positioning of states on the gliding scale’ (Popelier 2014, p. 5; emphasis added). Here the focus is not so much on the greater or lesser correspondence of a given federal system to an ‘ideal typical’ (possibly American or German) model, as on the way the problem of balancing autonomy and cohesion has been dealt with in a specific system.

Giacomo Delledonne

5 Circulation of Ideas and Models

As mentioned in Section 1, federalism, understood as an institutional solution, has been remarkably successful: a great many jurisdictions have embraced some kind of federal or federal-like arrangements when modifying their constitution or adopting an entirely new one. As noted by Friedrich (1967), the American model of federalism, much more than the presidential system, has been the most influential and widely imitated element in the Constitution of 1787.

In these constitution-making and constitution-amending processes, the circulation of constitutional ideas and practices regarding federalism has ostensibly played a major role. In this regard, comparative constitutional studies in federalism seem to offer favourable conditions for studying the circulation of legal ideas and models; more particularly, federalism is clearly a promising topic for the discussion of ‘universalists’ and ‘culturalists’ (as defined by Hirschl 2014, p. 197 f.) in comparative constitutional law. Those discussions also affect one of the classical missions of comparative law, i.e. elaborating a reliable knowledge base for legislative and constitutional reform: indeed, the already mentioned ‘renaissance’ of comparative constitutionalism has been accompanied by some doubts about the actual universality of specific constitutional models.

As Anna Gamper has recently put it,¹⁰ federalism, unlike democracy, fundamental rights and the rule of law, has not been subsumed among the key tenets of current global constitutional conversations. At the regional level, the primary law of the EU provides an interesting example for this claim: federalism and decentralization are not mentioned at Article 2 TEU among the ‘values’ of the Union that ‘are common to the Member States’: rather, Article 4(2) TEU depicts ‘regional and local self-government’ as an idiosyncratic component of specific Member States, which is entitled to protection under EU law alongside their constitutional identities. In fact, the Treaties try to strike a balance between the fundamental ‘regional blindness’ (*Landesblindheit*) of EU law and policies and the necessity to recognize the specific constitutional arrangements of some Member States (see Bengoetxea 2012).

In fact, the dialectic between universalism and local specificities has always shaped the circulation of federal ideas and models. The uniqueness of Canadian federalism is, at least in part, a consequence of the rejection of the federal experiment of the United States by the Fathers of Confederation (see Smith 2010, p. 44 f.). The American and Swiss examples played a critical role in the attempts to bridge the gap between the normative ideal of federalism and the concrete substance of *Bundesstaatlichkeit* in Germany (see Dippel 1999). The ill-fated regionalism of the 2nd Spanish Republic served as a reference for a number of ‘holding-together’ federalizing processes after 1945, e.g. in Italy and post-Francoist Spain.

In sum, federalism is an interesting example of a wider phenomenon of circulation of ideas, which has triggered lengthy discussion among comparative law

10 A. Gamper, seminar on ‘Self-Rule and Shared Rule – A ‘Global Theory of Federalism’ Revisited’, Scuola superiore Sant’Anna, Pisa, 22 May 2017.

scholars. The purpose of this article is not to reconsider the controversy on the feasibility of legal transplants (see Watson 1974; Legrand 1997; Graziadei 2006; as regards legal irritants, see Teubner 1998) or the structural differences between private law and public law and their relevance with regard to the circulation of ideas. Still, it is possible to raise some points with regard to the relevance of these topics to comparative federalism: in order to do so, the distinction between more invasive legal ‘transplants’ and less ambitious ‘grafts’ seems to offer some interesting clues (see Pinelli 2011).

In the four Latin American federations, federalism might seem, at least ‘[f]rom a distance,’ to have followed ‘general traits of the federal experience of the United States’ (Serna de la Garza 2000, p. 299); but the peculiar traits of Latin American constitutionalism have deeply shaped federalism in Argentina, Brazil, Mexico and Venezuela, so much so that a closer analysis of law-in-action profiles reveals many fundamental differences between them and the US model. In post-war Iraq, the American attempt to introduce a federal structure based on the US model as part of a massive constitutional transplant simply proved impossible (Pinelli 2010, p. 313 ff.). The Indian case is clearly different: after the Indian independence, federalism – or a quasi-federal system, according to an early classification by K.C. Wheare (1963, p. 27)¹¹ – was ‘grafted’ onto a previously decentralized polity, which had been marked by some degree of tolerance of diversity for centuries (see Elazar 1987, p. 193 f.): this explains, at least to a certain extent, the success of federalism (and democracy) in India.

The practical difficulties related to the adoption of foreign federal models are also related to an issue that has already been stressed above: the necessity of a distinction, with a possible gap to bridge, between the normative ideal of federalism and its non-legal preconditions, on the one hand, and its concrete legal manifestations, on the other. These remarks, which primarily concern federalism and federal systems, are not foreign to the discussions of the function of comparative law and the necessity to ensure a permanent link between its nature of ‘pure knowledge’ and other, more practical purposes (see extensive discussion by Vespaziani 2008): the opportunity and feasibility of transplants – or ‘grafts’ – of federal institutions and features clearly poses a challenge to comparative law and its chief task(s).

6 Concluding Remarks: The Virtues of Syncretism

As I have tried to argue in this article, comparative legal studies in federalism preliminarily demand that the complexity of the ‘F-word’ – as it has been provocatively labelled by critics and sceptics – be fully grasped. Such complexity depends on factors that are altogether typical of comparative law – e.g. the necessity of diachronic, historicizing insights and the distinctive features and risks of the

11 Sir Ivor Jennings, in turn, described Indian federalism under the Constitution of 1948 as a ‘federation with strong centralising tendency’ (Jennings 1953, p. 1).

Giacomo Delledonne

circulation of legal ideas and tools – and on specific methodological difficulties that are inherent to the federal phenomenon. Among them, the main problems are closely connected to the permanent tension between normative ideals and concrete institutional design, and to the existence of different understandings of federalism itself: the concepts and language of legal analyses might not be the same as those used by political scientists or economists (Gamper 2005, p. 1298). Furthermore, some key aspects of a federal system are inescapable for comparative law analysis, but the law, at least ‘hard’ law, rarely regulates them thoroughly: this is the case, e.g. of fiscal federalism (with the very detailed ‘financial Constitution’ of Germany being rather an exception).

The most recent scholarly contributions plead in favour of ‘syncretic’ approaches, in which the distinctive approach of legal studies goes hand in hand with contributions of other disciplinary fields (Bifulco 2012, p. 541). Within these syncretic approaches, the most important reference is provided by the federalizing process hypothesis, which emphasizes the great diversity of federal models and systems and somehow affects traditional classifications based on concepts drawn from *Verfassungsdogmatik*. From a different perspective, researchers in comparative law should not give up on using their specific disciplinary toolbox, which serves as a permanent reference and makes it possible to recognize the specifically legal elements of any kind of federal experience (in the broadest sense of the term).

Finally, researchers in comparative law should do their best to strike a proper balance between inductive and deductive reasoning when engaging with federalism and related topics. As has been mentioned in Sections 1 and 2, the current success of federal models and their increasing diversity represent both an opportunity and a challenge. In this respect, deductive reasoning allows making the best of classical theories of federalism, generally based on a few prototypical cases, and to use them in order to analyse the more hybrid solutions of the contemporary scene. Inductive reasoning, in turn, makes it possible to apprehend the specific features of lesser known cases and their potential for innovation. In a way, this corresponds to one of the defining vocations of federalism, namely trying ‘novel social and economic experiments’.¹² Moreover, inductive reasoning makes it possible to put into question well-established definition and to adapt them to more dynamic readings (see Section 4). In this respect, federalism offers favourable ground for a refinement of the methodology of comparative law, in terms of case selection and combining synchronic and diachronic approaches.

12 U.S. Supreme Court, *New State Ice Co. v. Liebmann*, dissenting opinion of Justice Brandeis (285 U.S. 262, 311).

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Giacomo Delledonne

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