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COMPARATIVE LAW AND DIALOGUES BETWEEN LEGAL CULTURES: INTERCULTURALITY AS A THEORETICAL AND PRACTICAL METHODOLOGICAL TOOL / Thiago Burckhart

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Abstract: *Given the academic and political relevance that comparative law has assumed in recent decades, alongside the ongoing debates over comparative legal methods, this article aims to critically analyse interculturality as a methodological tool for comparative law, through the lenses of "intercultural dialogues between legal cultures". The hypothesis to be analysed suggests that interculturality can serve as a tool that drives the revision of classical methods of comparative law. In this regard, it seeks to evidence that the approach of interculturality and intercultural dialogues between legal cultures can be conceived as a remarkable instrument for: 1) mutual understanding between different legal cultures and legal systems; 2) the suitability of the circulation and movements of legal sources; and, 3) to foster dialogues that can effectively enrich two or more legal systems and legal cultures. The article is methodologically inscribed in the field of legal theory, precisely on the theory of comparative law, in a fruitful and critical dialogue with cultural studies. It adopts a hypothetical-deductive methodological perspective combined with an analytical-critical approach, aiming to explore the intersections between law and culture in a nuanced and interdisciplinary manner. The research is conducted through a bibliographical and analytical approach, and is divided into three topics: I – Globalisation and comparative law methods; II – The circular movement of law; III – Intercultural dialogues between legal cultures.*

Key words: *Comparative Law; Legal Cultures; Interculturality; Methodology*

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1. INTRODUCTION

Comparative law has assumed a significant political and scientific relevance in recent decades. Economic, political, cultural and legal globalisation, in parallel with the broadening of legal sources in the most diverse "formants", has triggered the recognition of comparative law not only as a "method", or mere "academic" discipline, but also as an available instrument to be used by policymakers and legal professionals in everyday practice. In this scenario, a revision of the classical methods of comparative law –

functionalism and structuralism – is taking place due to the increasing interaction between diverse legal systems, driving the circulation, diffusion, and legal borrowings.

The academic debate over comparative law methods still lays down, to a large extent, the dichotomy "*functionalism*" vs. "*structuralism*", which can be currently understood as "*methodological fatigue*". In this regard, new methods, and new methodological perspectives – including approaches that reciprocally integrate functionalism and structuralism within "mixed" or "complex" methods – have received special attention from comparatist scholars – such as Jaakko Husa (2015), for instance. This cognitive "openness" towards methodological pluralism is a response to the increasing complexity that comparative law currently faces, integrating the understanding of comparative law with new themes.

In this context, "culture" becomes increasingly important due to its influence on legal formation and function and is viewed as a new legal "formant" (Bagni, 2014, pp. 95-96). It also highlights the mutual influences that diverse legal cultures exert on each other, serving as a key factor in analysing the current stage of comparative law. Unlike multiculturalism, which advocates for "living side-by-side", "*interculturality*" seeks deeper engagement with and immersion in diverse cultures, by learning through this experience. It emerges as a theoretical and practical method for various fields, enriching the understanding of interactions between legal systems and the role of culture in shaping legal reasoning and interpretation. This approach offers a framework to address complex legal challenges and reshape legal relations.

Taking this into consideration, this article aims to critically analyse interculturality as a methodological tool for comparative lawyers through "intercultural dialogues between legal cultures." This approach facilitates the application of common legal elements and mechanisms in entirely new systems, particularly within emerging frontier areas. The hypothesis to be analysed suggests that interculturality can serve as a tool that drives the revision of classical methods of comparative law. In this regard, it seeks to evidence that the approach of interculturality and intercultural dialogues between legal cultures can be conceived as a remarkable instrument for: 1) mutual understanding between different legal cultures and legal systems; 2) the suitability of the circulation and movements of legal sources; and 3) to foster dialogues that can effectively enrich two or more legal systems and legal cultures.

The article is methodologically inscribed in the field of legal theory, precisely on the theory of comparative law, in a critical dialogue with cultural studies. It adopts a hypothetical-deductive methodological perspective combined with an analytical-critical approach, aiming to explore the intersections between law and culture in a nuanced and interdisciplinary manner. The research is conducted through a bibliographical and analytical approach and is divided into three topics: II – Globalisation and comparative law methods; III – The circular movement of law; and IV – Intercultural dialogues between legal cultures.

2. GLOBALISATION AND COMPARATIVE LAW METHODS

In the last decades, economic, political, cultural, and legal globalisation have prompted significant shifts in legal theory. New rights and new subjects of rights, new legal and political-institutional arrangements, as well as the increasing legal relations between the most diverse nations worldwide, have driven the fertile development of comparative law (Örücü and Nelken, 2007; Glenn, 2010). This development occurs in two complementary areas: 1) the *academic field of comparative law*, marked by renewed

interest in research and studies; and 2) *political and legal practice* across the three branches of government – judiciary, executive, and legislative.

Regarding the *science of comparative law*, the last three decades have seen a true *boom* in literature, in various fields: *comparative private law* (Gordley, Jiang and Von Mehren, 2021; Portale, 2007; Gambaro and Sacco, 2018), *comparative public law* (Rosenfeld and Sajò, 2012; Pegoraro et al. 2012; Masterman and Schütze, 2019; Tushnet, 2018; Heringa, 2023), and even in new areas such as "*comparative international law*" (Roberts et al., 2018), focusing on different themes, issues, and approaches., as well as *comparative legal history* (Halász, 2022). In *political and legal practice*, the establishment of new international jurisdictions and the growth of constitutional courts globally have fostered legal exchanges, transfers, borrowings, and the migration of legal ideas. Additionally, national, and regional parliaments are progressively exploring innovative responses to legal problems through dialogue with foreign and international experiences. Similarly, several countries' executive branches have advanced comparative law studies to formulate new public policies in various areas (Tiede, 2021).

This renewed interest in comparative law, both as an academic discipline and as a practical tool for lawyers and governments, brings the classic issue of "methods" back into focus. As comparative law moves beyond its Euro-Atlantic roots – an axis to which it has historically been linked (Menski, 2007, p. 193; Twining, 2000, p. 174) –, it begins to explore new national realities, continents, and topics (Doleček and Smolík, 2022). Consequently, the discussion surrounding the classical methods of comparative law and their potential "inadequacy" re-emerges in academic and political debates (Örücü, 2007, p. 48).

In this regard, two classical methods that have shaped the development of comparative law throughout the 20th century are *functionalism* and *structuralism*.

Functionalism was originally influenced by sociological-functionalist theory (Husa, 2003, p. 431; Somma, 2015, p. 19), and emerged in the early 20th century. It states that the primary objects of comparison in different legal orders and institutions are their functional similarities. Comparatists should identify "similar functions" to inform their research (Husa, 2003, p. 431), focusing on the effects of specific norms that address common problems across legal systems. These "functions" are considered "abstract," extending beyond written norms to include jurisprudential decisions and legal literature in the research process (Zweigert and Kötz, 1996, p. 33). Due to its broad applicability, Konrad Zweigert and Hein Kötz (1996, p. 33) regard functionalism as the "only" adequate method of comparative law, emphasising that legal comparison is viable only when legal norms or sources serve the same functions across different systems.

Starting in the 1980s, criticism of this methodological approach arose, particularly concerning its presumption of similarity. This criticism includes: 1) hindering in-depth studies in comparative law (De Coninck, 2010, pp. 323-324); 2) encouraging comparatists to overlook differences between analysed legal systems (De Coninck, 2010, p. 332); and 3) posing challenges for comparing legal systems considered extremely different, such as a study between China and Panama. Consequently, several scholars have sought to rework the functional method to better fit the current context of legal globalisation (Michaels, 2002, p. 104).

Structuralism, or more broadly "contextualism," draws influence from legal positivism, particularly "legal normativism". It emphasises the comparison of the formal elements that constitute law, focusing on the architecture of modern legal structures and their possible associations and dissociations. As a method in the Human Sciences, structuralism views each object of study as a "structure" and investigates the relationships among these structures. Within comparative law, Roberto Sacco's dynamic

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legal theory (1991, pp. 21-34) significantly influenced structuralism by introducing the concept of "formant," based on phonetics theory[1] Sacco identifies three primary formants: legislative, jurisprudential, and doctrinal.[2]

Despite its contributions, this methodological perspective has faced criticism for viewing law in an "apolitical" and "non-evaluative" manner (Somma, 2015, p. 155), thus rendering it impermeable to the contextual factors influencing its analysis. Sacco's dynamic legal theory offers a fresh perspective on the legal structure by acknowledging that extra-legal formants can also affect the effectiveness of law. Nevertheless, a "closed" structural approach may overlook essential extra-legal elements crucial for understanding the formation and structure of modern legal systems.

These two methods are often regarded as paradigmatic in comparative law studies. In this context, the "irresistible pedagogical charm" of this dichotomy may signal a "*methodological fatigue*", as both approaches have been considered doctrinal "canons" and quality assurance elements for research in the field – something Amico di Meane (2019, p. 169) has termed "methodological precarity". The brief criticisms of each method above highlight their theoretical and empirical inadequacies, emphasising the need to rethink new methodological arrangements that can engage with elements of these two "classic" methods to better address the research needs of the 21st century.

As Roberto Scarciglia (2017, pp. 69-73) notes, these methods represent only two options for comparative research.[3] Comparatists seeking to deepen their understanding of the relationship between text and context will likely blend these methodological perspectives or develop new ones informed by emerging theories in social science, such as complexity, cultural theories, and decoloniality (see Zimmermann and Reimann, 2019, p. 777). Furthermore, as Werner Menski (2006) emphasises, the renewed interest in comparative law coincides with a growing focus on the cultural aspects of different societies, which has sparked the curiosity of jurists worldwide.

This shift necessitates moving beyond the methodological dichotomy towards a methodological *kaleidoscope* that can support the development of comparative law in the context of globalisation and intensified international and intercultural relations. This approach addresses the need to: 1) recognise that there is no "standard" methodology; rather than a methodological "monotheism", there's the need to embrace a methodological "polytheism" (Husa, 2015, p. 134; Ponthoreau, 2017, pp. 53-68), which could manifest as a functional-structural and/or structural-functional "mixed" method; and 2) propose new methodologies and perspectives for comparative law that can have significant practical implications, particularly for improving dialogues with Global South

[1] "The term "formant" comes from acoustic phonetics, the study of the physical consistency of vowel sounds and their diffusion through a medium such as air. In this area, the formant indicates the resonance frequency of the sounds that take place in the oral cavity and that characterise its timbre: it allows these sounds to be broken down and, above all, to reveal and identify their different components. Similarly, among iuscomparatists, the formant indicates the components of the law, potentially incoherent to the extent that they do not refer to a system devoid of gaps and antinomies, which is why their dissociation is spoken of. In this sense, they identify, among others, a legal formant, to refer to the rules produced by the legislator, a doctrinal formant, composed of the precepts formulated by scholars, and a jurisprudential formant, which coincides with the indications from the courts", my translation (Sacco and Rossi, 2015, p. 44).

[2] The formants can assume, however, several forms, insofar as internal and external elements influence the configuration of the structure of law. One can therefore speak of a "cultural", "economic", "political", and "ecological" formant, among others.

[3] It is worth noting that other methods were developed by comparatists, relating comparative law to other sciences and methodological perspectives, such as: Van Hoecke (2015); Creutzfeldt, Kubal and Pirie (2016); Moustafa and Ginbsurg (2008).

countries – those nations often excluded from modern discussions on comparative law and general interest in legal comparisons.

Criticism of comparative legal studies has increasingly emerged from post-Eurocentric and postmodern perspectives. Contemporary comparative law theory and the studies established throughout the 20th century were heavily influenced by European perspectives. Historically, few manuals and academic research extended their focus beyond the Euro-Atlantic axis. However, in the last three decades, there has been a significant increase in interest among comparatists towards the "Global South", particularly in underexplored regions such as Africa and Asia (Baxi, 2003; Amirante, 2015; Menski, 2007). This shift has led to the development of comparative methodologies grounded in postmodern and post-Eurocentric perspectives, facilitating comparisons across diverse geographic contexts, and sometimes diametrically opposed legal cultures (Menski, 2006, pp. 3-23; 2007, pp. 189-216).

In this context, it becomes evident that comparative law requires a "*flexible*" methodological approach to navigate the complexities of legal foundations. As Tommaso Amico di Meane (2016, p. 21; 2019, p. 191) emphasises, this approach is characterised by several key elements: *dynamism* (Menski, 2006, p. 184; Frankenberg, 2010, p. 570 et seq.), *tolerance*, *uncertainty, ambiguity, and hybridity* (Menski, 2006, p. 25; Frankenberg, 2010, p. 570 et seq.; Schiff Berman, 2013, pp. 11-29), *multidisciplinary collaboration* (Husa, 2006, p. 1116; Van Hoecke, 2015, p. 165 et seq.), and *inclusivity* (Van Hoecke, 2015, p. 165 et seq.). Amico di Meane (2016, p. 22) also describes "flexibility" as manifesting in two aspects: a) *between*: viewing methodology as a collection of tools available to the comparatist; and b) *within*: moving away from a "purist" perspective to embrace experimentation with mixed and new methodologies.

In this light, Amico di Meane (2016, p. 23) provides a "roadmap" for employing this flexible approach in comparative legal studies, divided into three phases. The first phase involves a critical reflection on the available methodological landscape, helping comparatists recognise the oversimplified "black and white" mindset. The second phase entails selecting a methodological approach that acknowledges the diverse shades of grey it encompasses. Finally, in the third phase, the comparatist embarks on their research journey, engaging with "legal alterity". This process can challenge not only the comparatist's own legal culture but also the methodological assumptions underlying their research. Methodology is a practice-driven activity where theory influences practice, and practice continuously reformulates theory.

This flexible approach, along with emerging methodologies in contemporary discussions on comparative law, is particularly well-suited to the current context of legal globalisation. As Amico di Meane (2016, p. 7) points out, these new perspectives facilitate a slow, deep, and progressive – layered – comparative legal path, leading to a more nuanced understanding of its subject and implications, while fostering fruitful dialogue among diverse legal cultures.

3. THE CIRCULAR MOVEMENT OF LAW

The history of law can be read through the dialogues established between different legal cultures, which have facilitated "loans", "(re)appropriations", and the "circulation" of legal models.

These dialogues arise because law *circulates* through space and time, driven by ideas, ideologies, interests, needs, techniques, and technologies. Law spreads due to various factors, including *imposition* – such as military occupations or colonisation; *prestige* – like the legal codification process influenced by Napoleon's Code; *ideological*

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choices – seen in socialist countries that adopted specific legal forms; and the *influence of religious values*, as with Islamic law, Hindu law, and the Shinto and Confucian traditions in Japan and China. Additionally, law circulates through territorial, political, or economic *integration*, exemplified by the European Union and, to a lesser extent, Mercosur and other economic blocs. Economic interests also play a role, particularly with the imposition of the common law model through international trade (Sacco and Gambaro, 2008, pp. 23-25).

The so-called circulation of models can occur either "from above", through external imposition, or "from below", via assimilation, where social and individual behaviours transform within a national context (Monateri, 2013, p. 66). The notion of legal "circulation" has emerged as a key concept encompassing fat least our distinct phenomena: circulation, transfer, diffusion, and migration of legal ideas. This classification draws from political science literature, particularly concerning the circulation of public policies (Oliveira and Faria, 2017, p. 13; Melo, 2016, p. 12). Research in this area has significantly intensified in recent years (Oliveira and Faria, 2017, p. 15). In this context, "circulation" refers to a broader process involving exchanges and dialogues between legal models, fostering mutual learning from different experiences. It represents the journey of legal elements from a starting point A to others (B, C, and D) and back to A, incorporating new elements along the way.

In contrast, "transfer" denotes a more straightforward process, involving the specific movement of a legal model from one point A to another point B, such as from one country or international organisation to another. "Diffusion", on the other hand, involves the spread of model A to multiple points (B, C, D, and others), representing the dissemination of national or international models across various countries.[4] Recently, greater attention has also been given to the concept of the "migration of legal ideas", which occurs primarily through institutional dialogues between countries, particularly in the area of judicial review, though it is not limited to this field. In this context, legal arguments concerning fundamental rights, human rights, and specific institutions relevant across multiple legal systems are particularly significant (Silva, 2010, p. 522; Choudhry, 2006, p. 9).

These movements are central to the broader process known as "legal transferability" or "legal transplants", as articulated by Alan Watson (1974). From Watson's perspective, a legal transplant refers to a legal system's ability to "receive" or adopt a foreign norm. This transfer is influenced by various legal and extra-legal factors, including the linguistic and cultural characteristics of the receiving state, its political and ideological context, and the technical and professional acceptance of the transplant by jurisprudence, legal doctrine, and the academic community (Watson, 1974). Consequently, a legal transplant interacts with multiple factors influencing legal change,

[4] "When we refer to a transfer, we are dealing with the punctual displacement of a public policy from one place to another, from "A" to "B". The policy originates in a government, non-governmental organisation, or international body and moves to another actor of a similar or different nature. This is the case, for example, in the case of the adoption in the Philippines of conditional cash transfer technologies from Brazil. A set of more or less simultaneous adoptions of a public policy can be called diffusion. Diffusion can occur across clusters or regions. For example, when Latin American countries carried out actions aimed at implementing state reforms. Or else on a global scale, such as the dissemination of the Sustainable Development Goals. Circulation, on the other hand, is an even broader movement, as it can involve the comings and goings of public policies and mutual learning processes. We can consider as an example a policy that originated in Brazil, was adopted in South Africa, where it was improved, and then adopted in its new format in Kenya, or whose new elements were incorporated in Brazil. It is a broader movement that can involve mutual learning in different temporalities", my translation (Oliveira, 2020, pp. 20-21).

such as legal sources, pressure or opposition groups, lawyers and judges, and social, economic, and political interests (Watson, 1974, p. 9).

According to Watson, legal transplants are a primary source of law transformation and represent "the usual way of legal development" (Watson, 1974, p. 7). Although Watson's theory can be interpreted as an "apology" for legal transplants – highlighting their potential simplicity – it is essential for understanding contemporary legal flows, despite some methodological criticisms it has faced.[5] The main critiques of Watson's theory come from French jurist Pierre Legrand, who argues that legal transplants are "impossible". Legrand's argument is rooted in the "mirror theory of law", which suggests that law reflects the spirit of a particular community or society, a perspective that has influenced modern legal thought from Montesquieu to Hegel and Savigny (Legrand, 1997, pp. 111-124; 1999, p. 121).

By linking the existence of a norm to the contextual meaning it imparts to a community or society – its "intersubjective meaning" – Legrand argues that "the meaning of a rule is a function of the interpreter's epistemological assumptions, which are historically and culturally conditioned". Vlad Perju[6] supports this view, asserting that meaning is an essential component of legal norms, and since meaning cannot travel, norms cannot be transplanted to different contexts. He emphasises that a norm cannot retain the same meaning in both the country of origin and the country receiving the transplant. While Watson acknowledges that norms undergo change during the transplantation process,[7] Legrand critiques Watson's formalist stance, arguing that his rule-centred approach overlooks the transformation and adaptation that legal norms experience during transplants.

This debate has significantly influenced comparative law theory and continues to generate discussion among comparatists. There is a consensus, however, that law is a *circular* phenomenon, evolving through influences and dialogues with prior experiences. Although transplants are not the only – or necessarily the most important – forms of legal change, they do occur and play a vital role in shaping contemporary legal perspectives. It is essential to recognise that legal transplants: 1) are not always easy to execute, and 2) undergo significant transformations in contextual meaning when integrated into a different legal culture. Thus, this process requires an intercultural methodology that prevents the "acculturation" of the receiving legal culture while fostering dialogue with its traditions and legal framework.

[5] "In the closing chapters of his book Watson offers a list of general reflections on legal transplants that he combines with a few cautionary considerations. On the other hand, he argues that 'the transplanting of individual rules or of a large part of legal system is extremely common' and 'socially easy'. From this he infers that it is, 'in fact, the most fertile source of development' and accounts for the 'astounding degree' to which 'law is rooted in the past'. On the other hand, he introduces authority in law as an important variable intervening in any transplanting process, and, in the end, he finds 'the mixture' more fascinating than the very act of borrowing" (Frankenberg, 2010, p. 567).

[6] "Since meaning is an essential part of a legal rule and because meaning cannot travel, it follows in Legrand's view that rules—and legal norms more generally—do not travel. Meaning changes between the points of origin and destination on a scale of magnitude that radically transforms the so-called transplant. While Watson acknowledged that rules are altered in the process of transmission, Legrand argued that Watson's formalistic, rule-centred approach led him to downplay the scale of transformation. Law's rich 'nomos' makes convergence impossible" (Perju, 2012, p. 1317).

[7] As Vlad Perju accentuates: "Watson acknowledged that 'with transmission or the passing of time modifications may well occur, but frequently the alternations in the rules have only limited significance'. But by drawing attention to the direction of change, Legrand makes clear the political stakes of comparative method" (Perju, 2012, p. 13). In this light, see also: Kennedy (2003).

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4. INTERCULTURAL DIALOGUES BETWEEN LEGAL CULTURES

As Catherine Walsh (2008) notes, the term "interculturality" entered the lexicon of cultural theory in the 1980s, initially emerging in Mexico in relation to educational policy. At that time, the focus was on the concept of "intercultural bilingual education". In the 1990s, indigenous groups in Ecuador adopted the term, linking it to issues of law, language, and public health (Walsh, 2008, p. 139; Flores, 2015, p. 292). Since then, "interculturality" has evolved into a framework for managing cultural pluralism in several countries,[8] influencing public policies in Latin America and more recently in Europe.[9]

Walsh (2010, p. 5) points out that "interculturality" has always represented a struggle involving cultural identification, law, difference, autonomy, and nation.[10] She emphasises its strong political and legal implications, viewing it as a method for accommodating cultural differences. This approach fosters better understanding between diverse cultures or epistemologies, promoting the harmonious coexistence of cultural differences. Ultimately, it embodies the possibility of achieving equality within diversity.

It is important to differentiate between the notions of interculturality and multiculturalism, as they represent distinct approaches to managing cultural pluralism. Interculturality emphasises the need to genuinely "live together," interact, and learn from "the other" and diverse cultures, highlighting the process of cultural hybridisation (Bhabha, 2013, p. 94), learning with the other. In contrast, multiculturalism focuses on "coexistence" within the same geographic space (Lopes, 2012, p. 67). Thus, while multiculturalism is centred on "tolerance" as a means to foster a peaceful society, interculturality prioritises "dialogue" as a more proactive and engaging approach.[11]

Various models of multiculturalism have emerged since its inception in Canadian and U.S. public discourse during the 1980s.[12] However, the principle of tolerance remains a cornerstone of this framework for political and legal management of cultural pluralism. Interculturality, on the other hand, seeks to move beyond tolerance, arguing that it is often insufficient for promoting social cohesion and mutual understanding among culturally distinct individuals. In some instances, a reliance on tolerance can even exacerbate inequalities and tensions within societies or between groups.

In the 21st century, the concept of interculturality has emerged as a politically significant initiative, described by Peruvian jurist Fidel Tubino as an "[...] ethical-political project of transformative action and radical democracy" (2005, p. 122).[13] This concept invites a critical examination as both a political methodology – functioning as a procedural ideal – and a democratic paradigm – serving as a substantial ideal within contemporary constitutional states. Tubino further explains that when viewed as a normative project, interculturality fosters relationships among diverse cultures,

[8] Perhaps the most emblematic case for comparative analysis is that of Bolivia, in which the recent 2008 Constitution has constitutionalised the principle of interculturality, while its Plurinational Constitutional Court coined it as a specific method of constitutional interpretation. For details, see: Burckhart and Melo (2021).
[9] As it is the case of the "Baku Declaration for Promotion of Intercultural Dialogue" (2008), and "European Year of Intercultural Dialogue" (2008).
[10] Translation of the author.
[11] As Fidel Tubido underlines, "While in multiculturalism the key word is tolerance, in interculturality "the key word is dialogue. Interculturality partly resumes multiculturalism, in the sense that in order to dialogue it is necessary to presuppose mutual respect and conditions of equality between those who dialogue" (Tubino, 2002. p. 74). Translation of the author.
[12] Such as the "classical liberal-political model", the "multicultural liberal model", the "maximalist multicultural model" and the "combined multiculturalism", only to stick to the classification made by Andrea Semprini (1999, p. 87).
[13] Translation of the author.

establishing common bonds. It calls for both state and civil society to gradually promote environments that encourage positive interactions, intercultural dialogue, mutual recognition, cultural exchange, cooperation, and peaceful coexistence. This challenge is paramount for law and politics in the 21st century.

Achieving interculturality relies heavily on "intercultural dialogue". Boaventura de Sousa Santos (2009, pp. 17-18) states that this dialogue occurs through "diatopical hermeneutics", which seeks to mutually understand the perspectives and epistemologies of different interacting subjects. This approach requires individuals to position themselves in a "frontier zone", balancing their own cultural identity and heritage with that of others. For comparative law to be effective and avoid merely reproducing studies of "foreign" legislation, it must adopt this notion as a fundamental premise. Engaging deeply with the legal culture(s) under analysis necessitates exploring various elements and aspects, ultimately leading to a critical examination of one's own legal culture.

In this context, intercultural dialogue between different legal cultures emerges as an effective methodology for understanding the flows and circulations of legal models globally, aiming to develop an "intercultural translation" that supports these legal exchanges in various ways. However, it is important to note that such dialogue is not always feasible, particularly due to political and economic colonisation, which has historically imposed a uniform framework on law and politics and continues to do so in some cases. Nonetheless, this proposal seeks to enhance the understanding of the "journeys" that legal norms undertake around the world.

To be effective, the dialogue must be "intercultural," facilitating the "translation" of underlying assumptions and prompting necessary transformations, rejections, adaptations, or reformulations by the receiving state during the circulation of legal models. Furthermore, these dialogues should occur between "legal cultures," not just "legal systems". The concept of legal culture, as articulated by Jaakko Husa, emphasises the importance of legal context, suggesting that law should be understood within its broader cultural framework. This context encompasses various elements – traditions, ideological components, and conceptions – that significantly influence legal practice. Thus, referring to "legal culture" rather than merely "legal system" reflects a comparatist aim to attain a deeper understanding of law beyond its written texts (Husa, 2015, pp. 3-5).

This "intercultural dialogue" should adhere to the foundational assumptions necessary for any intercultural process within the social or political realms. Boaventura de Sousa Santos' principles can be adapted to this context, including acknowledging the incompleteness of "legal" cultures and systems; fostering an awareness of the diversity among "legal" cultures; respecting the varying openness or closure of a given "legal" culture to certain aspects; and upholding mutual agreements as the basis for dialogue between "legal" cultures (Santos, 2009, pp. 17-18). Ultimately, the intercultural dialogue among legal cultures is primarily facilitated by jurists, legal practitioners, judges, policymakers, and state officials responsible for drafting national and international laws, conventions, and other normative acts, along with various stakeholders who may also engage in this process.

As a "method," intercultural dialogues between legal cultures can be applied at different analytical levels or scales, depending on the goals of the comparison and the receptiveness of a particular legal culture to others. This approach can be employed in several ways: 1) *academically*, to enhance mutual understanding of various legal systems; 2) *practically*, to facilitate effective legal transplants, migration of legal ideas, processes of hybridisation, harmonisation and integration, and legal borrowings; and 3) in *both academic and practical terms*, to initiate dialogues that genuinely enrich and

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transform two or more legal systems or cultures. Achieving this last outcome is often challenging due to numerous contingent factors, but it represents a significant practical objective of this methodological framework.

Intercultural dialogue between legal cultures serves as a means to navigate the ongoing debate between Watson and Legrand. In the globalised world, characterised by the exchange of ideals, people, goods, and legal norms, it is misleading to claim that "legal transfers" are impossible, thereby supporting Watson's theory. However, it is equally important to recognise that these transfers are not straightforward and necessitate intercultural dialogue to ensure that such transfers do not devolve into impositions that lead to "legal acculturation" – the erosion of the foundational elements of a particular legal culture – thus reinforcing Legrand's critique. Consequently, a common ground is established where aspects of both theories can be integrated.

These intercultural dialogues demand cultural translation, primarily aimed at identifying "equivalent" elements across different legal systems, making various legal concepts and institutions comprehensible. Paul Ricoeur (2001, p. 135) emphasises that translation "respects differences while seeking equivalences",[14] thereby fostering fair and effective intercultural dialogue. Given this framework, intercultural dialogue can stimulate processes of "*créolization*" (Delmas-Marty, 2009, p. 5) within legal cultures, acting as a "*métissage*" mechanism that requires genuine reciprocity between the cultures involved. Although achieving this reciprocity is challenging, it can be facilitated through intercultural dialogue and translation processes in certain contexts.

In this length, interculturality can be understood as a valuable "tool" for comparatists, providing a methodological framework that prioritises "understanding" over "prejudice". This approach emphasises "opening" rather than "closing" and fosters "dialogues" aimed at translating meanings instead of engaging in a simple "monologue." Beyond seeking "clarity" and "mutual understanding" of legal elements from other cultures – resulting in "intercultural legal translation" – this method encourages productive exchanges between different legal cultures. The following elements characterise intercultural dialogues between legal cultures in the context of a comparatist's work:

a) Intercultural dialogues are essential for facilitating legal flows – a "condition" – as legal cultures exhibit varying levels of receptiveness shaped by each country's legal and political history. When legal flows are established, these dialogues promote legal transfers, borrowings, or the migration of legal ideas, enhancing legal *adaptation* and preventing legal acculturation;
b) Intercultural dialogues can be conducted at different analytical scales within comparative law. They may aim to: 1) improve understanding of various legal cultures through academic study; 2) enhance suitability for legal transplants, borrowings, and migration of legal ideas, particularly concerning the role of the receiving state; or 3) promote broader dialogues between two or more cultures that can enrich and transform aspects of a given legal system;
c) Dialogues can be categorised as *vertical* or *horizontal*. Vertical dialogues occur between national law and supranational or international law, or among national and regional laws within a state. Horizontal dialogues focus on comparisons that reveal similarities between different legal orders, such as constitutions or civil codes of various states. Occasionally, a subject might be regarded as "constitutional" in one legal system but viewed differently in another, necessitating a comparative approach;

[14] Translation of the author.

d) Intercultural dialogues are particularly important in states characterised by cultural plurality, where reconciling different perspectives and conceptions of law is essential. Bolivia exemplifies this, as its Plurinational Constitutional Court employs a legal methodology based on intercultural analysis to address the complexities of its diverse legal landscape.

Intercultural dialogues between different legal cultures can be instrumental as both an academic method and a practical approach in complex comparative studies. These dialogues foster new exchanges in an ongoing, flexible and open-ended process rather than being confined to fixed interactions. To effectively apply interculturality as a method in comparative law, a structured roadmap can be established, divided into three essential steps:

1) *Understanding the subject matter*: the first step involves a thorough examination of the theme to be compared. This entails studying the various formants that constitute the legal issue in two or more countries. A deep understanding of the selected countries is crucial, focusing on their cultural, social, political, and legal elements. This includes an analysis of their "legal culture" and the myriad elements that shape it.
2) *Assessing the intercultural variable*: The second step is to evaluate the intercultural "variable" or "condition." This involves determining whether there is receptiveness within the legal culture(s) towards engaging in intercultural dialogue. More importantly, it requires assessing the potential effectiveness of such dialogues for the comparatist, considering the specific research topic and objectives.
3) *Engaging in dialogue*: The third and final step consists of actively engaging in dialogues between the selected legal cultures, guided by the main aims established in the comparative research. Guided by different actors, this process of dialogue should facilitate mutual understanding and exploration of legal principles across different contexts.

Through this methodological approach, intercultural dialogues can address several challenges that arise from misunderstandings of foreign legal cultures or from the uncritical adoption of legal elements from different legal cultures without appropriate contextualisation by the receiving state. Interculturality, as a method within comparative law, emphasises the necessity of conducting this contextualisation in process, requiring comparatists to possess heightened theoretical and practical *sensitivity* regarding their research subjects and the countries under study. Furthermore, this methodological perspective complements traditional comparative law methods, such as *functionalism* and *structuralism*, adding depth and clarity to the complexities inherent in the analysis and intervention in the field of comparative law. By incorporating intercultural dialogues, scholars and practitioners can better navigate the nuances of legal cultures, leading to more informed and effective *legal adaptations*.

5. CONCLUSIONS

Interculturality plays a crucial role nowadays as a perspective that promotes fruitful dialogue, cultural interaction, and cultural understanding among groups, communities, and individuals, aiming for the mutual enhancement of analytical and cultural tools in response to pressing issues of globalisation.

Within the realms of comparative law, intercultural dialogue between legal cultures offers a new methodological perspective for comparatists, providing an effective and flexible approach for several legal research and practical interventions. This

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effectiveness, however, depends on the topic, countries involved, level of cognitive openness, and the variables and constraints related to each state's legal culture, which must be assessed by jurists, policymakers, and legal practitioners in practice. This approach remains adaptable to each circumstance, a responsibility shared by scholars, jurists, and policymakers.

These dialogues can take various forms and explore multiple levels of depth, yielding distinct academic and practical results. This dynamic and flexible methodology complements traditional approaches – functionalism, and structuralism – enhancing the understanding of legal phenomena and the connections among different legal cultures. Various forms of dialogue, such as interinstitutional, inter-legislative, and judicial dialogues, are gaining prominence in legal studies, addressing the challenges of legal science and law in the 21st century, particularly due to globalisation and the intensification of legal and political integration processes.

In this regard, Interculturality can drive the re-evaluation of classical comparative law methods, fostering new dialogues that enrich not only the legal culture of the receiving state but also those of multiple legal cultures through the exchange of best practices and potential solutions. Finally, intercultural dialogues between legal cultures facilitate processes such as legal *hybridisation*, *integration*, and *créolization*, preventing "legal acculturation" from becoming the dominant paradigm in comparative law theory and practice. This approach fosters international legal cooperation, values the diversity of legal cultures worldwide, and enriches legal experiences across various fields.

BIBLIOGRAPHY:

Amico di Meane, T. (2016). Oltre l'esotico giuridico: Diritto comparato e metodologia verso un approccio flessibile. *IV Convegno Biennale dell'Associazione DPCE. La Comparazione giuridica e i suoi metodi: Approcci ed esperienze*. 20-21 ottobre 2016, Lecce.

Amico di Meane, T. (2019). Metodologia e diritto comparato alla ricerca della "creatività": Verso un approccio flessibile. *Annuario di Diritto Comparato e di Studi Legislativi*, X, 165-197.

Amirante, D. (2015). Al di là dell'Occidente: Sfide epistemologiche e spunti euristici nella comparazione "verso Oriente". *Rivista Diritto Pubblico Comparato ed Europeo,* 1/2015, 1-36, https://www.rivisteweb.it/doi/10.17394/79522

Bagni, S. (2014). Il Sumak Kawsay: Da cosmovisione indigena a principio costituzionale in Ecuador. In: S. Baldin and M. Zago (Eds.), *Le sfide della sostenibilità: Il buen vivir andino dalla prospettiva europea* (pp. 73-100). Bologna: FiloDiritto.

Baxi, U. (2003). The colonialist heritage. In: P. Legrand and R. Munday (Eds.), *Comparative legal studies: Traditions and transitions* (pp. 46-75). Cambridge: Cambridge University Press. DOI: https://doi.org/10.1017/CBO9780511522260.003

Bhabha, H. (2013). *Nuevas minorías, nuevos derechos: Notas sobre cosmopolitismos vernáculos*]. Buenos Aires: Siglo XXI.

Burckhart, T. and Melo, M. P. (2021). Interculturalidade e constitucionalismo: Uma análise da experiência boliviana [Interculturality and constitutionalism: an analysis of the Bolivian experience]. *Revista Videre,* 13(27), 289–308, https://doi.org/10.30612/videre.v13i27.11800

Choudhry, S. (2006). *The migration of constitutional ideas*. Cambridge: Cambridge University Press. DOI: https://doi.org/10.1017/CBO9780511493683

Creutzfeldt, N., Kubal, A. and Pirie, F. (2016). Introduction: Exploring the comparative in socio-legal studies. *International Journal of Law in Context,* 12(4), 377–389, https://doi.org/10.1017/S1744552316000173

De Coninck, J. (2010). The functional method of comparative law: Quo vadis? *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 74(2), 318-350, https://doi.org/10.1628/003372510791090238

Delmas-Marty, M. (2019). Droits culturels et humanisme juridique. Communication presented at the Colloque "Du partage des chefs-d'œuvre à la garantie des droits culturels". Paris: Musée du Louvre.

Doleček, M. and Smolík, J. (2022). Comparison of Czech and Slovak "Anti-Extremism" legislation. *Security Theory and Practice,* 3, 67–96.

Flores, R. V. (2015). La interpretación constitucional en el Estado Constitucional. *Revista Derecho del Estado, 34*, 289-310, https://doi.org/10.18601/01229893.n34.13

Frankenberg, G. (2010). Constitutional transfer: The IKEA theory revisited. *International Journal of Constitutional Law,* 8(3), 563-586. https://doi.org/10.1093/icon/moq023

Gambaro, A. and Sacco, R. (2018). *Sistemi giuridici comparati*. Torino: UTET.

Glenn, P. (2010). *Legal traditions of the world*. Oxford: Oxford University Press.

Gordley, J., Jiang, H. and von Mehren, A. T. (2021). *An introduction to comparative study of private law*. Cambridge: Cambridge University Press. DOI: https://doi.org/10.1017/9781108869348

Halász, I. (2022). The establishment of the institutional framework of comparative law in the Socialist Czechoslovakia and Hungary. *Hungarian Journal of Legal Studies, 63*(3), 236–257, https://doi.org/10.1556/2052.2022.00338

Heringa, A. W. (2023). *Constitutions compared: An introduction to comparative constitutional law*. Chicago: Eleven Intel Pub.

Husa, J. (2003). Farewell to functionalism or methodological tolerance? *Rabels Zeitschrift für ausländisches und internationales Privatrecht, 67*(3), 419-432, https://doi.org/10.1628/0033725033631996

Husa, J. (2006). Methodology of comparative law today: From paradoxes to flexibility? *Revue Internationale de Droit Comparé, 58*(3), 1095-1117, https://doi.org/10.3406/ridc.2006.19483

Husa, J. (2015). *A new introduction to comparative law*. Oxford: Hart Publishing.

Kennedy, D. (2003). The method and politics. In: P. Legrand and R. Munday (Eds.), *Comparative legal studies: Traditions and transitions* (pp. 345-434). Cambridge: Cambridge University Press.

Legrand, P. (1997). The impossibility of legal transplants. *Maastricht Journal of European and Comparative Law, 4*(2), 111-124, https://doi.org/10.1177/1023263X9700400202

Legrand, P. (1999). *Le droit comparé*. Paris: Presses Universitaires de France. DOI: https://doi.org/10.3917/puf.legra.2016.01

Lopes, A. M. D. (2012). Da coexistência à convivência com o outro: Entre o multiculturalismo e a interculturalidade [From coexistence to living together with others: between multiculturalism and interculturality]. *Revista Interdisciplinar de Mobilidade Urbana, 20*(38), 15-30.

Masterman, R. and Schütze, R. (2019). *The Cambridge companion to comparative constitutional law*. Cambridge: Cambridge University Press. DOI: https://doi.org/10.1017/9781316716731

Melo, M. A. (2016). Prefácio: Difundindo a difusão [Spreading diffusion]. In: C. A. P. de Faria, D. B. Coêlho and S. J. da Silva (eds.), *Difusão de políticas públicas* [The Diffusion of Public Policies] (pp. 11-22). São Bernardo do Campo: EdUFABC.

Menski, W. (2006). *Comparative law in a global context: The legal systems of Asia and Africa*. Cambridge: Cambridge University Press. DOI: https://doi.org/10.1017/CBO9780511606687

Menski, W. (2007). Beyond Europe. In: E. Örücü and D. Nelken (Eds.). *Comparative law: A handbook* (pp. 189-216). London: Hart Publishing.

Michaels, R. (2002). Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung – Gedanken anläßlich einer Jubiläums-konferenz in New Orleans. *Rabels Zeitschrift für ausländisches und internationales Privatrecht, 66*(1), 97-115, https://doi.org/10.1628/0033725024104252

Monateri, P. G. (2013). *Geopolitica del diritto: Genesi, governo e dissoluzione del corpo politico*. Roma: Laterza.

Moustafa, T. and Ginsburg, T. (2008). Introduction: The functions of courts in authoritarian regimes. In: T. Ginsburg and T. Moustafa (Eds.). *Rule by law: The politics of courts in authoritarian regimes* (pp. 1-26). Cambridge: Cambridge University Press. DOI: https://doi.org/10.1017/CBO9780511814822

Oliveira, O. P. de. (2020). *Difusão de políticas e cooperação para o desenvolvimento: Elementos norteadores para a implementação de projetos de transferência de políticas públicas por meio da cooperação internacional* [Policy diffusion and development cooperation: guiding elements for the implementation of public policy transfer projects through international cooperation]. São José do Rio Preto: Balão Editorial.

Oliveira, O. P. de and Faria, C. A. P. de. (2017). Policy transfer, diffusion and circulation. *Novos Estudos CEBRAP*, *36*(1), 13-32, https://doi.org/10.25091/S0101-3300201700010001

Orti, N. (2006). *Norma e luoghi: Problemi di geo-diritto*. Bari: Laterza.

Örücü, E. (2007). Developing comparative law. In: E. Örücü and D. Nelken (Eds.) *Comparative law: A handbook* (pp. 43-65). Oxford: Hart Publishing.

Örücü, E. and Nelken, D. (2007). *Comparative law: A handbook*. Oxford: Hart Publishing.

Pegoraro, L., Morbidelli, G., Reposo, A. and Volpi, M. (2012). *Diritto pubblico comparato*. Torino: Giappichelli.

Perju, V. (2012). Constitutional transplants, borrowing, and migrations. In: M. Rosenfeld and A. Sajó (Eds.), *The Oxford handbook of comparative constitutional law*. Oxford: Oxford University Press. DOI: https://doi.org/10.1093/oxfordhb/9780199578610.001.0001

Ponthoreau, M.-C. (2017). Le pluralisme méthodologique dans l'enquête comparative à l'heure de la globalisation. *Diritto Pubblico Comparato ed Europeo, 1*, 1-25, https://doi.org/10.17394/85823

Portale, G. (2007). *Lezioni di diritto privato comparato*. Torino: Giappichelli.

Ricoeur, P. (2001). *Le juste 2*. Paris: Esprit.

Roberts, A., Stephan, P., Verdier, P.-H. and Versteeg, M. (2018). *Comparative international law*. Oxford: Oxford University Press. DOI: https://doi.org/10.1093/oso/9780190697570.001.0001

Rosenfeld, M. and Sajó, A. (Eds.). (2012). *The Oxford handbook of comparative constitutional law*. Oxford: Oxford University Press. DOI: https://doi.org/10.1093/oxfordhb/9780199578610.001.0001

Sacco, R. (1991). Legal formants: A dynamic approach to comparative law. *The American Journal of Comparative Law, 39*(2), 1-34.

Sacco, R. and Gambaro, A. (2008). *Sistemi giuridici comparati*. Torino: Utet Giuridica.

Sacco, R. and Rossi, P. (2015). *Introduzione al diritto comparato*. Torino: Utet.
Santos, B. de S. (2009). Direitos humanos: O desafio da interculturalidade [Human rights: the challenge of interculturalism]. *Revista Direitos Humanos*, 2/2009, 10-19.
Scarciglia, R. (2017). Strutturalismo, formanti legali e diritto pubblico comparato. *Diritto Pubblico Comparato ed Europeo, 3*, 649-670, https://doi.org/10.17394/87561
Schiff Berman, P. (2013). Towards a jurisprudence of hybridity. *Utah Law Review, 1,* 11-29.
Semprini, A. (1999). *Multiculturalismo* [*Multiculturalism*]. Bauru: EDUSC.
Silva, V. A. da. (2010). *Integração e diálogo constitucional na América do Sul* [Integration and constitutional dialogues in South America]. In: A. von Bogdandy, F. Piovesan and M. Morales Antoniazzi (Eds.), *Direitos humanos, democracia e integração jurídica na América do Sul* [Human rights, democracy and legal integration in South America] (pp. 515-530). Rio de Janeiro: Lumen Juris.
Somma, A. (2015). *Introducción al derecho comparado*. Madrid: Universidad Carlos III de Madrid.
Tiede, L. B. (2021). The role of comparative law in political science. *The American Journal of Comparative Law*, 69(4), 720-747, https://doi.org/10.1093/ajcl/avab022
Tubino, F. (2002). Entre el multiculturalismo y la interculturalidad: más allá de la discriminación positiva. *Derecho & Sociedad*, (19), 299-311.
Tubino, F. (2005). La interculturalidad crítica como proyecto ético-político. Ponencia presentada en el Encuentro Continental de Educadores Agustinos, Lima, 24-28 de enero. Available at: https://sermixe.org/wp-content/uploads/2020/08/Lectura4.pdf (accessed on 10.12.2024).
Tushnet, M. (2018). *Advanced introduction to comparative constitutional law*. London: Edward Elgar Publishing.
Twining, W. (2000). Comparative law. In: Twining, W., *Globalisation and legal theory* (pp. 174-193). New York: Cambridge University Press.
Van Hoecke, M. (2015). Methodology of comparative legal research. *Law and Method*, *12*, 234-262, https://doi.org/10.5553/REM/.000010
Walsh, C. (2008). Interculturalidad, plurinacionalidad y decolonialidad: Las urgencias político-epistémicas de refundar el Estado. *Revista Tabula Rasa, 9*, 131-148, https://doi.org/10.25058/20112742.343
Walsh, C. (2010). Interculturalidad crítica y educación intercultural. In: J. Viana, L. Tapia and C. Walsh (Eds.), *Construyendo interculturalidad crítica* (pp. 75-96). La Paz: Convenio Andrés Bello.
Watson, A. (1974). *Legal transplants: An approach to comparative law*. Edinburgh: Scottish Academic Press.
Zimmermann, R. and Reimann, M. (2019). *The Oxford handbook of comparative law*. Oxford and New York: Oxford University Press. DOI: https://doi.org/10.1093/oxfordhb/9780199296064.001.0001
Zweigert, K. and Kötz, H. (1996). *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts (3rd ed.)*. Tübingen: Mohr Siebeck. DOI: https://doi.org/10.1628/978-3-16-162053-9