VIEWS OF A LAWYER FROM NOWHERE AND ANYWHERE

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This contribution argues that the author's biography (Austrian-German citizen born and raised in Italy) makes him simultaneously a natural candidate and an outlier for the epistemological dual lens envisaged by this special issue. Whilst in terms of legal education the Italian legal and cultural tradition have exercised a profound influence on the author's scholarship, not being fully part of that tradition constituted a certain freedom of critical thought and observation. At the same time, this not fully belonging anywhere also set certain professional limits that are further compounded by the structural realities of the Italian university system.

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I. A PERSONAL INTRODUCTION

This special issue searches to understand how much the Italian legal and cultural tradition has affected the training, research, and academic ideas of Italian scholars working abroad and/or how much the interaction with Italian legal thought and culture influenced the studies and research of foreign colleagues. At the risk of being too autobiographical, I need to explain why I am both an ideal candidate for this special issue and why I am not. In fact, I am a foreign scholar who studied law in Italy but who lives and works abroad. I hope that nevertheless, at the end of this piece, the readers will excuse my self-references because it shows how much the personal experiences have shaped my scholarship and vice versa.

As my name states, I am of German origins. Unlike what some who do not know me might expect or think, I do not come from the German-speaking part of Italy, South Tyrol. My father was German and my mother is Austrian. In the late 1960s they decided to move to Italy for professional reasons. I was thus born in Milan and grew up in the province of Varese, where I attended the German-speaking section of the European School of Varese[1] from kindergarten until the baccalaureate. It would thus be correct to say that I grew up in a German-speaking, international bubble in Italy. Apart from watching Italian TV and interacting with neighbours and locals in the village that I grew up in, my use of Italian was limited.

After doing my mandatory military service in Austria at 18, I returned to Italy, where I embarked on my law studies at the Università Statale of Milan (hereinafter 'Statale'). It would be fair to say that the first book I (ever) read in Italian was *Diritto costituzionale* by Temistocle Martines. Not only was this a huge book written in old-fashioned Italian but also - rather than studying (law) in the inductive way of learning that I had known from school and especially in the courses taught in English and German - we had to learn the material by heart and be able to reproduce in a structured and reasoned way what the author had written in oral exams. At school, practically all of our exams had been in writing. It requires a whole different skill set to study for oral exams…..all the more if it is not in your native tongue.

I believe the reader by now understands why I am neither an Italian scholar working abroad, nor a foreign colleague whose studies and research have been influenced by Italian legal thought and culture; rather, I am a foreign Italian scholar.

Despite some of the alienation that I may thus have felt when starting my studies at the Statale, this institution offered wonderful opportunities to those who kept their eyes open and their grade point average high enough. Indeed, in classes with up to 1000 other students that took place in cinemas in the center of Milan during the first year, it was easy to get lost. Those were the years right after the *Mani pulite* political and judicial earthquake when many (young) people believed that through law, one could change the country and thus flocked to law

[1] These are schools created for employees of European community institutions. At the time, in Varese there existed an Italian, an English, a French, a Dutch and a German language section.

faculties *en masse*. I was one of them.

II. THE POSITIVE ASPECTS OF AND SUBSTANTIVE INTERACTIONS WITH THE ITALIAN LEGAL SYSTEM AND CULTURE

The encounter that shaped my life until today, was during the course on *Diritto Privato Comparato* with Professor Albina Candian. I finally felt that my foreign language knowledge and identity was not a burden but an asset. It is also in this context that I found out about two unique opportunities that were available to students. One was the exchange program which the Statale had with Berkeley School of Law (at the time still known as Boalt Hall) and the other one was the (post-)graduate course offered by the *Faculté Internationale de Droit Comparé* in Strasbourg. I managed to do/obtain both, even though they were very selective. Both experiences have had lasting influences on my career.

As mentioned, the class on private comparative law was a breath of fresh air in many ways. Not only because it opened up to these international possibilities but also because we were using a textbook that was not doctrinal in a way that I had encountered so far. This was the teaching manual by Professors Antonio Gambaro and Rodolfo Sacco, entitled *Sistemi giuridici comparati*.[2] While both were/are eminent *private* comparative lawyers, in my view this book opened up to a much more sociological and even anthropological approach to law. In fact, it is one thing to understand and explain *how* a given rule functions in a given legal system. It is another thing to try and explain the similarities or differences. And for such explanations, one may need to resort to history, to sociology, to politics and a whole series of extra-legal considerations. Without stating it explicitly, one could say that this book encouraged to think about law in a way that in the anglophone world would be described as 'Law and Society'.

This may explain why during my exchange in Berkeley during the Fall Semester of 1998, I encountered Critical Race Theory (CRT) in Angela Harris' class, another game changer in my legal thought and upbringing. I immediately thought how interesting it was that, to my knowledge, this approach did not exist in Italy or in mainland Europe. Moreover, it was an eye-opener for me that one could think about law in such a different way. In this course, we looked at the terrible effects that law could have on racialised individuals and groups rather than studying and understanding law as a closed, inherently rational, objective and coherent system, as we were taught back home in Italy. This approach immediately resonated with me as a gay man growing up in Northern Italy at a time that (male) homosexuality was still being punished legally in other European countries or was still socially largely not accepted and that internet did not exist. I will come back on this point

[2] A. Gambaro and R. Sacco, *Sistemi giuridici comparati* (Torino: UTET, 1996).

a little further below.

When I returned to my regular law studies from that exchange semester, I started looking for material on CRT in Europe and could find little or nothing. What I did start seeing, however, was racism; not necessarily in the forms or history as it had developed in the United States but still racism. Slowly but surely, thanks to this comparative eye and to the textbook and teaching on comparative law, I developed this strand of research on CRT and years later wrote my doctoral thesis on the relevance of CRT in Europe which then became my first monograph.[3] In this work, Italian comparative doctrine – or the way I had learnt it – was very influential: legal transplants as we had discussed them in our private comparative law class were really relevant in challenging the notion that they take place easily without consideration of the underlying social and cultural realities. I argued that there were a whole series of obstacles ranging from civil law legal education and public university systems to a reluctance to frame things in racial terms in mainland Europe that prevented CRT from migrating from the United States to Europe, just to use another metaphor from comparative constitutional law.[4] This was puzzling to me, especially because the absence of CRT in mainland European legal scholarship came or comes at a time that American legal thought had been very influential for some time already, as yet another Italian comparative scholar had so appropriately written.[5] Moreover, it turned out that between my exchange semester in 1998 and the beginning of my doctoral thesis in 2007, some things had started moving with regard to CRT. A small pioneering publication by Kendall Thomas and Gianfrancesco Zanetti in Italian on CRT[6] was the first translation into a language than English and helped me incredibly for my own work and thought. It would be fair to say, that Italian doctrine was ahead of French, German or other mainland European legal thought in engaging with this type of scholarship from the other side of the Atlantic Ocean.

Substantively, my work on CRT in Europe allowed me to look at the Italian and other mainland European legal systems through that specific lens and with the tools developed by this approach, such as intersectionality,[7] post-racialism,[8] colorblindness,[9] and interest convergence.[10] More broadly, I have argued how,

[3] M. Möschel, *Law, Lawyers and Race. Critical Race Theory from the United States to Europe* (London: Routledge, 2014).

[4] S. Choudhry, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007).

[5] U. Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law' 42 *American Journal of Comparative Law*, 206, 195-218 (1994).

[6] K. Thomas and G. Zanetti, *Legge, razza e diritti. La* Critical Race Theory *negli Stati Uniti* (Parma: Diabasis, 2005).

[7] K.W. Crenshaw, 'Demarginalizing the Intersection of Race and Sex' 1989 *University of Chicago Legal Forum* 139-167 (1989)

[8] S. Cho, 'Post-Racialism' 94 *Iowa Law Review* 1589-1650 (2009).

[9] N. Gotanda, 'A Critique of "Our Constitution Is Colorblind"' 44 *Stanford Law Review* 1-68 (1991).

[10] D.A. Bell Jr, '*Brown v. Board of Education* and the Interest Convergence Dilemma' 93

especially in the early 2000s, Italy's legal system has constructed a white, Christian and male identity via mostly local measures targeting migrants/refugees, one example of which being local burqa bans.[11] As a concrete example of how colourblindness is created via judicial interpretation, I discussed a case that had caused some public debate in Italy. It involved an Italian teenager of colour, Abdul Salam Guiebre, who was clubbed to death by a store owner and his son after having stolen some cookies from them with some friends as a late-night prank. Both men had yelled racial epithets during the killing and were charged with murder. However, the public prosecutor only asked for the crime to be aggravated for futile motives and not for racist ones as well. The first instance judge explicitly agreed with that omission and explained that the crime had not been exclusively motivated by racism, but that there had also been the humiliation of someone robbed and ridiculed by foreigners, something that was interpreted as having a conservative attitude towards a cultural and territorial integrity more than a question of racial supremacy.[12] The case then went all the way to the Supreme Court which, in summarizing the facts of the case, referred to the teens as *marocchini* ('Moroccans'), a negatively connotated term generically referring to Africans, even though the victim was originally from Burkina Faso (and not Morocco) but had the Italian citizenship.[13] A traditional legal analysis would probably have focused on whether the legal characterization of the facts was correct and followed the jurisprudence and interpretation by courts in this and other cases. While clearly relevant, what a CRT analysis adds, is to see how tropes and understandings of race and racism make it into such reasoning and how something that had a clear racial and racist background, ended up becoming a 'simple' and colourblind murder of a teenager.

The sociological approach and angle that I had encountered thanks to CRT in the United States, opened my eyes to feminist legal theory as well. Indeed, it is impossible to look at racial issues in law without taking into account other axes of subordination, like gender. Probably, feminist legal approaches were a little better known in mainland European legal scholarship. But even then, after my doctoral thesis, I had the chance of obtaining a post-doctoral position at the Université Paris Ouest Nanterre in a research project, called *REGINE*, which had the goal of mainstreaming gender and feminist legal theory in French legal scholarship. Like for CRT, also for feminist legal theory, I attempted to apply some of the concepts and thoughts to the Italian legal system, as for instance in my work on gender stereotypes in Italy.[14]

In this phase and aspect of my writing and research as well, Italian (comparative law) doctrine remained relevant to my work. In fact, another seminal concept by

Harvard Law Review, 518-533 (1980).

[11] M. Möschel, n 3 above, especially at 165-190.

[12] Tribunale di Milano 16 July 2009 no 1586, 14, available at www.dejure.it.

[13] Corte di Cassazione 1 August 2012 no 31454, available at www.dejure.it.

[14] M. Möschel, 'La lotta giuridica contro gli stereotipi di genere' *Rivista Critica di Diritto Privato*, 443-466 (2015).

Rodolfo Sacco, 'legal formants',[15] allowed me to highlight a different approach to gender quotas between France and Italy. In the literature, these two are often presented as similar case studies, because of the fact that the legislator tried to introduce such quotas only to see them struck down by their respective constitutional courts. Only when the constitutions were modified in both countries did things advance. However, using Sacco's legal formants approach, in which he demonstrated that legal systems are not unitary and actually are composed of various legal formants (the legislative formant, the judicial one and the academic one), I argued that when looking more closely at Italy and France, the Italian judicial formant has become much more friendly to gender quotas, whereas the French one remains reluctant or even hostile.[16]

As already mentioned, the Statale was a springboard in a variety of ways. First, during my studies and later, too. In fact, shortly after graduating, I was informed by Professor Albina Candian that the Paris-Assas *Institut de droit comparé* (IDC) was looking for someone to teach Italian law and that they would want to nominate me. I was honoured and thanks to my French which I had maintained partly due to attending the courses of the *Faculté Internationale de Droit Comparé* over the years, I felt sufficiently confident to apply and be interviewed. I was selected to the confusion of quite a few upon my arrival in Paris because the Italian law expert lecturing in French was actually Austrian-German! This experience meant a farewell to Italy for quite some time because after two years at the IDC, I went on to Berkeley for an LLM, passed the New York bar exam and then practiced law for almost two years in a Silicon Valley law firm. I would return to Italy for my PhD at the European University Institute of Florence in 2007 with an Austrian scholarship, even though I had never really studied and 'only' done my military service there!

As one can see, the fact of having been educated as a legal scholar in Italy, has had deep influences on myself, my research and my career. And yet, as a foreigner I also always remained to some extent something of an outsider. As much as I cherished and appreciated the intellectual and human contacts with many friends and colleagues whom I met during those formative years that remain until today, like Albina Candian, Diana Cerini, Rossella Cerchia, Antonio Gambaro, Valentina Iacometti, Barbara Pozzo, and Paola Regina certain things struck me as being odd; just as conversely things strike me as socially and culturally odd in Austria or Germany because I did not grow up in those realities.

[15] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' 39 *American Journal of Comparative Law*, 1-34 (1991); Id, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' 39 *American Journal of Comparative Law*, 343-401 (1991).

[16] M. Möschel, '"Gender Quotas" in French and Italian Public Law: A Tale of Two Overlapping and then Diverging Trajectories' 19 *German Law Journal*, 1489-1518 (2018).

III. THE SUBSTANTIVE AND STRUCTURAL OBSTACLES AND PROBLEMS ENCOUNTERED IN THE ITALIAN UNIVERSITY SYSTEM

As influential and overall positive as my Italian legal education and experience has been and remains, other realities about the Italian university system were off-putting. I already mentioned the sheer size of the public university, where it was easy to get lost, as well as the rather mnemonic way of studying law that often seemed to be far removed from practice and reality. As I progressed through the academic system, I realized that other things were not exactly as I had expected them to be or as they had been presented.

One first encounter of that was when I wanted to choose my thesis topic. In Italy, after many years of oral exams, one is expected to write a master's thesis to conclude one's degree. Apart from broader questions on whether this form of examination is really the most efficient and apt to test someone's knowledge and capacities to become a good lawyer in the future, at a personal level this specificity of Italian academic exam culture was an additional challenge due to the fact that I had never written anything in Italian.

The even bigger challenge turned out to be my thesis topic. In fact, in those years Denmark and France had just started legally recognizing certain forms of same-sex partnerships. As an openly gay man, I wanted to write my thesis on this. Carefully approaching my future supervisor, Professor Albina Candian, with such a suggestion - which at the time was risky because it came close to a coming out and one might run into a close-minded professor who was homophobic - she very kindly said that she would support my research but that there were certain risks connected with this. To provide some background information for foreign readers, master's thesis defenses are public and take place before a large panel of all faculty that comes together on a given day. So, one actually discusses and defends one's thesis in front of a random panel of 10-20 people from all legal disciplines which includes your supervisor(s). At the end, that panel needs to determine how many points you can add to your average grade and potentially reach the maximum grade 110/100 *cum laude*. The issue was that I had a very good grade point average, but I was told that my chosen topic might be seen as too sociological and too controversial, thus making it difficult to attain that maximum final grade. With a heavy heart I decided not to take the risk and wrote my thesis on a functional comparison between Italy, Germany and the United States on securitization and asset-backed securities. All went well in the end, and I managed to graduate with my dream grade. However, it said a lot about how law was (still) seen as this closed system where outside influences like politics, culture, history or societal aspects are seen as 'irritants' and external rather than as an integral part of law. Admittedly, this approach is a common feature of most, if not all, civil law countries and their legal education. Even more importantly and especially with regard to this question of (homo-)sexuality and the law, today only twenty years later, few would doubt

that this is a legal issue and topic. In fact, today I am a proud part of the editorial staff of GenIUS, Italy's first legal journal dedicated to issues of sexual orientation and gender identity.

A second unexpected encounter came later in my academic life when I wrote my doctoral thesis on CRT and its related focus on anti-discrimination law in the European reality. The cross-boundary approach such research required made it difficult to fit into any of the scientific categories pre-established by the Italian Ministry of Education and Research which entitle you to first qualify and then search and apply for an academic position in Italy. In fact, CRT and anti-discrimination law can be part of the scientific domains of European Union law, labour law, international human rights law, constitutional law, philosophy of law, criminal law, private or public comparative law or administrative law. In order to qualify either as Assistant, Associate or Full Professor, you need to have a certain number of publications in one of these sections. Clearly, my work on CRT and anti-discrimination law did not allow me to have sufficient publications in any one of these domains, thus de facto and *de iure* excluding me from participating.

Admittedly, this downside is not a specificity of Italy. My work was not qualifiable in France either. In this context, I even had to translate my doctoral thesis (or parts of it) into French to be allowed to apply for university teaching and research positions in the first place. In France, the categories are broader than in Italy. They are essentially subdivided into public law, private law and legal history and thus theoretically, it might be easier to pass and have sufficient publications and experience in one domain. However, when applying with my doctoral thesis on CRT to the public law section, at one stage it was rejected because it was not deemed to be public law.

A third encounter with the academic reality of Italy came even later, when envisaging to research and teach in Italy, at some point. Certainly, there are economic reasons which constitute a formidable obstacle for someone to return to Italy because (for public universities) it is cheaper to take someone internally than someone who comes from outside. At the same time, there are also other – let us call them 'human' - dimensions which make an external hire in Italian law difficult, despite bringing an international profile, network, as well as knowledge of the law and language with them. How does one justify hiring an external person when internally someone has been teaching classes, supervising master's theses and done all the other invisible academic work with and for you and all this for little or no money, with the (legitimate?) expectation that one day a position may be opened for you? Other mainland European law faculties present similar obstacles also due to the fact that law remains, by and large, a national issue both in substance and in language. It is thus difficult to speak of a European academic market, at least if one speaks of law. However, the obstacles may be more acute in Italy.

An additional obstacle has little to do with Italy as such, but with the mere fact that studying law without being a citizen of that country presents a whole set of additional obstacles. Many potential future legal professional paths are shut

because any position or profession that is deemed to be the exercise of some form of state power or representation of the state cannot be exercised by a non-citizen even a European Union one: judges, notaries, diplomatic positions that may either require a legal education or where lawyers are often highly sought after are just a few examples. Ironically, at this stage, I also do not qualify in Austria or Germany for such positions because I did not study the law of those countries.

At the same time, I had already run into some of these citizenship-related obstacles early on when wanting to embark on my legal studies. Back in 1994, after my military service, I had discovered that at the University of Innsbruck there existed a whole study programme on Italian law taught by faculty from the Università di Padova for the South Tyrolean students. I thought that enrolling in this programme would be an excellent chance to keep track of both my Italian and German-speaking heritage, only to discover that it was reserved for Italian citizens only via an international agreement. Since I was and am not an Italian citizen, I was not allowed to enroll. Phone calls were exchanged between the ministries in Vienna and Rome, but there was nothing to be done. This was truly ironic because after spending my life out of one of my home countries, upon 'return' I was prevented from studying in a specific programme there! I am sure that after Austria joined the European Union in 1995 this restriction must have been abolished. However, by that time I had decided to return to Italy and study law there.

IV. CONCLUDING AND BRIDGING WORDS

Despite all the obstacles or difficulties described above, I do not regret for a moment my decision to study law in Italy. As I hope to have demonstrated, Italian (comparative) legal scholarship has played an important role for me and the friendships forged during my university and study times last until today. So do the new contacts made later on where – despite my having now lived and worked outside of Italy for many years – my scholarship always looks at this legal reality and interacts with wonderful colleagues from it. Thus, my forthcoming book, *Ex-Ministers as Constitutional Judges*,[17] is a comparative study between Italy, France, Austria and Germany on what happens when former high-level politicians join constitutional courts as judges. It involved interviewing (former) judges and high-level personnel of the courts of those four jurisdictions. So, I started integrating law and society methods like interviews into my scholarship as well and who knows if I would have been able to include Italy in my study, if I had not studied law there?

As one last observation, maybe what seemed to be a disadvantage at first (ie studying law in a country where one does not have the citizenship or cultural and language knowledge from), might turn out to be an advantage for a comparative

[17] M. Möschel, *Ex-Ministers as Constitutional Judges* (Oxford: Oxford University Press, 2025, forthcoming).

lawyer. Given that I am not indebted or profoundly enmeshed with one legal system, it is easy to have a critical outsider's eye on any of the legal systems that I study. There is no legal nationalism but also no 'institutional' or 'strategic' expectation that my writing might qualify me for a given high-level position in Italy or elsewhere as to that. For this reason, I entitled this contribution as 'views of a lawyer from nowhere and from anywhere'. The expression is borrowed from Thomas Nagel's theoretical work[18] and has been applied in comparative constitutional theory more recently.[19] I am not claiming that this positionality of view from nowhere allows me a particular epistemological objectivity, but rather that it has facilitated a more critical and possibly less-biased view of different legal realities and thus informed my research agenda.

[18] T. Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986).

[19] S. Suteu, 'The View from Nowhere in Constitutional Theory: A Methodological Inquiry', in D. Kyritsis and S. Lakin eds, *The Methodology of Constitutional Theory* (Oxford: Hart, 2022), 341-358.