Questo volume è stato realizzato con il contributo finanziario del Dipartimento di Giurisprudenza dell’Università degli studi Roma Tre e della Associazione Italiana di Diritto Comparato

Coordinamento editoriale:  
Gruppo di Lavoro RomaTiE-Press

Elaborazione grafica della copertina: Mosquito mosquitoroma.it

Impaginazione: Colitti-Roma colitti.it

Edizioni: RomaTiE-Press ©  
Roma, marzo 2018  
ISBN: 978-88-94885-??-?

http://romatirepress.uniroma3.it

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Vincenzo Zeno-Zencovich

Introductory notes

What do we mean by “jurisdiction”? Some questions – and fewer answers – from a comparative law perspective.

I. The XXIV biennial colloquium of the Italian Association of Comparative Law (AIDC) was organized, as the previous ones, around a topic – *Jus dicere* in a globalized world – and a call-for-papers based on several open questions that it is useful to present here:

1. Can one agree on the statement that in the Western world the notion of jurisdiction is considerably fragmented and is no longer limited to the national State (or expression of public sovereignty) courts, and is dispersed in a multiplicity of experiences? Private jurisdictions (such as ADR, arbitration, sport courts etc.); and trans-national jurisdictions, set by international treaties, or by *lex mercatoria*.

2. What do we mean today, in the western world, by “jurisdiction”? What are its essential features? Can the resolution of disputes still be considered the main function of courts of law or should the traditional model of jurisdiction be enriched to encompass the new role of courts in many social settings (e.g. transitional justice and its emphasis on reconciliation)? Should one look essentially at the formal elements [such as independence of the decision-maker(s) and adversary procedures], or at the functional role [e.g. adjudication which imitates traditional court jurisdiction], or a legal-realist approach [jurisdiction is what is perceived as such]?

3. To what extent can/are Western models exportable/transposable in non-Western contexts? To what extent have Western models of jurisdiction imported ideas from non-Western traditions?

4. The traditional notion of rule-of-law is strongly related to the control by the courts and the enforceability of their decisions. Should the notion be adapted to a changing reality?

5. What is the effect of the fragmentation of jurisdiction on the
traditional court system? Are there consequences on the traditional (in continental Europe) distinction between civil, criminal and administrative jurisdictions?

6. What, if any, are the effects, both theoretical and practical, on the apportionment of powers and functions with regard also to the branches of the legislative and government? Is jurisdiction encroaching on Parliament and Government?

7. What are the implications of those forms of jurisdiction directly challenging the role of national States, e.g. those connected to international investment treaties (Investor-state dispute settlement)? Do they represent a conditioning of State prerogatives able to weigh upon State obligations towards their citizens?

8. Increasingly contemporary societies are concerned with the administrative costs related to providing access to justice, and jurisdictional procedures are seen as a service dependent on budget allocations. What are the emerging models, and to what extent are they circulating and hybridized? Is a global market for judicial services feasible? Are “digital jurisdictions” an appropriate alternative?

9. Can numbers and statistics help us to compare jurisdictions and jurisdictional models? And how?

10. Jurisdiction is intimately associated with effectiveness: can/should one compare/classify models according to the degree of compliance, whether spontaneous or forced?

11. Adjudication requires a variety of sanctions and of remedies: what is the relation between the two aspects? What is the circulation of sanctions and remedies within the various forms of jurisdiction, within the same legal system or among different legal systems?

12. Sociology of adjudicators: judges, arbitrators, mediators. And what is the role of lawyers (in a wide sense) in the various jurisdictions? What is the effect on the recruitment of ‘traditional’ judges?

13. Involvement of laypersons (i.e. non-lawyers) in adjudication (e.g. scientific experts in IP controversies or in international trade controversies; historians in civil liability or property cases).


15. “Jurisdiction shopping”: a disparaging notion or an occasion for
effective application of comparative law in the legal profession?

16. Courts of law and courts of public opinion. How is the judicial process communicated to the public? What is the interaction between traditional and social media and the administration of justice? Should and can safeguards be taken? Or are we facing, at the end of the day, a “narrative” issue?

II. As one can see the fil-rouge among the 16 questions was to verify to what extent the traditional notion of jurisdiction, as it has developed in the Western Legal Tradition around judges and courts empowered by the constitution to solve disputes between individuals or between the State – in its multiple expression – and individuals, has changed.

In particular one of the main issues was if jurisdiction has moved from its traditional fora and actors to new premises inhabited by different agents which one generally did not encounter in the past.

The questions were born out of the observation of a growing demand for dispute resolution.

This is due – if one can venture some hypothesis – to at least three factors:

a) The increase in legislation and in juridification of every aspect of life. Norms, especially those with a regulatory function, are seen as a form of apportionment of rights and advantages. However, every new piece of legislation interacts with the existing ones and carries with it a variable percentage of litigation.

b) Globalization, simply by increasing the numbers of those (individuals and entities) who come into contact with each other requires more and new forms of dispute resolution especially trans-national.

c) There is very strong ideology behind jurisdiction, especially that which goes under the name of “rule of law”. A comparative lawyer detects immediately that putting the focus on judges and courts is typical of the common law tradition. In the continental European tradition the focus, instead, is on the legitimacy of the sources of the law and falls under the notion – which only partially is over-lapping – of “État de droit” or “Rechtsstaat”. At any rate, very simplistically, the dominant idea today is that if there is no adjudication there is no law.

III. The ever growing demand for dispute resolution is, however, difficult to satisfy through the traditional forms of adjudication. The impeding factors are multiple.
a) On the one hand the sheer numbers of controversies would require an army of judges and a multiplication of courts. To express things paradoxically they should be more than doctors and hospitals.

b) If one has to rely on the existing structures, times for a judicial decision would become – and in certain jurisdictions have already become – endless, and has been aptly remarked, delayed justice is injustice.

c) The nature of the controversies that arise in the present day developed world are not only extremely complex and varied, but often require the use of quite different weights and measures, which one does not find in the historical three branches of the judicature, civil, criminal and administrative.

d) Related to this last aspect is the extremely high level of specialization that the law has reached in many sectors, requiring hypothetically not a judge but an encyclopedic being, experienced in all fields and able to move, with agility, from one to the other.

f) Finally one must add that for trans-national controversies it is extremely difficult to find a (national) judge on which both (or all) parties agree upon. It is therefore understandable that new fora for dispute resolution are created.

IV. At the same time one must take note of a clash between opposite movements. On the one side there is a centrifugal tendency away from State adjudication towards private fora: not only arbitration but also the countless procedures in sports activities both professional and amateur. To these one must add trans-national institutions which have a public nature but whose dispute resolution bodies do not fit in the classical jurisdictional model.

On the other side one encounters a centripetal tendency within the State in the sense of a growing expansion of the latter’s power by submitting more and more controversies to its courts. And at the same time one sees the sunset of the revered notion of “judicial self-restraint”, superseded by judicial activism and by regulation through adjudication.

V. The reply that the reader will find in the following contributions is mostly negative towards the idea of a fragmentation of jurisdiction. The reasons are in no way due to a staunch conservatism, but to more profound and systematic reasons. Their essence – if I may summarize much more complex ideas and arguments – is that legal theory avoids – and should avoid – fuzzy notions, and not only in this field. If everything is “jurisdiction” the term is emptied of its value and ordering significance. Jurisdiction and dispute resolution are two terms which are related but not
all procedures which are meant to tackle the latter fall within the former. This does not mean that new and different forms of dispute resolution are a second-class jurisdiction. They deserve a great deal of attention and study, but having in mind different background and bearings.

This partition, theoretically clear and well argued, requires however that lawyers study and put order in what otherwise might appear to be only a waste land full of *et caetaras*.

The debate, therefore, has only started and we hope that the many contributions to this volume can fuel a productive exchange of views and move us towards firmer grounds.