



SPECIAL ISSUE: “WHO NEEDS COMPARATIVE LAW?”

WHO NEEDS COMPARATIVE LAW?! WHAT A QUESTION!

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I. It is argued that in a world of steadily increasing contacts and mutual influences, we need to understand the other people, the other laws. It does not suffice to cite descriptions of law’s function or of various states’ attitudes towards the law. Thus, the comparative perspective is used in order to approach and comprehend a legal culture.

During this effort, various dilemmas come up, such as: what is culture? Should a global system or the national legal cultures or concrete institutions be the center of such studies? Will be considered as culture the total of acts and ideas of a certain group of people or is to be preferred a postmodern description of culture, as a constructed flux of images? And what is legal culture? Are we interested in definitions used by politicians and jurists or in how people define, see law? ¹

One also often notices disagreements concerning whether there is or not a connection between the legal culture and the culture in general – the cultural conscience². Those who support the existence of such a connection, believe that there may be a big variety of the ways in which the legal culture reflects the general culture. Besides, as it is pointed out, the probability of the existence of a large gap between the two cultures, is one more important element denotative of the general culture³.

II. Every person has a personal identity which is the distillation of his/her experiences and a social identity which is part of the self-identification created by the fact of belonging to one or more social groups, as well as by the

¹ D. Nelken, *Comparing Legal Cultures: An Introduction*, in: *Comparing Legal Cultures* (ed. D. Nelken), Aldershot 1997 [*Comparing Legal Cultures*], 1-2.

² E. Blankenbourg, *Civil Litigation Rates as Indicators for Legal Cultures*, in: *Comparing Legal Cultures*, 41, 64-65 denies that connection.

³ D. Nelken, *Puzzling Out Legal Culture, A Comment on Blankenbourg*, in: *Comparing Legal Cultures*, 84.



value and the emotional importance that this belonging/membership has for each person.

An important element of each person's identity, both personal and social, is the language, since his/her life experience is linguistic in every phase of his/her life. It is thus unavoidable that language also constitutes a "tool" of comparative law.

Each society's culture is a constituent element of her identity. Law, inside culture, proves and at the same time composes this identity. It incorporates beliefs and it expresses them with the sovereign language of each society. And exactly because the linguistic possibilities as well as the mentality are different in different societies, we have different laws, ready to respond to the specific conditions of these societies, even when the starting point seems common to all of them⁴.

One could therefore argue that the power of language in the legal procedures is very strong, that the legal narration is necessary in order to grasp the often elusive meaning of the human acts. Besides, it is the narrative form that connects the past with the present as well as the author with the reader and therefore has a innate ability to reveal the plurality of each fact's perspectives.

III. It has been claimed that culture, in the form of politics of dissimilarity in a multicultural society, "has invaded law"; that in our days, one observes an increase of pressure for e.g. a juridical definition of the racial or the national identity or for a specific protection of certain minorities in case their members commit criminal offences (*cultural defence*)⁵.

However, as it is rightly pointed out, this opinion presupposes that law formerly was culture-free, that before the appearance of the cultural pluralism, law could express without a problem people's moral convictions and social aspirations because, due to the social homogeneity, frictions were excluded. Even without the idea of multiculturalism though, law and culture try together to compose the people's codes of conduct. Law has never existed outside the cultural area, it was always obliged to handle the cultural variety and conflict⁶.

Law is not static; neither is culture. Various procedures formed contemporary societies and their cultures, like for example the industrialization, the urbanization, the meteoric rise of the mass communication. Thus, objects of research and study are the inner procedures of cultural change. Cultures

⁴ J. Bell, De la culture, in: *comparer les droits, résolument*, Presses Universitaires de France 2009, 247, 259-260.

⁵ R. Cotterrell, The Struggle for Law: Some Dilemmas of Cultural Legality, *International Journal of Law in Context* 2009, 373, 376.

⁶ N. Mezey, Law's culture and lived culture: a comment on Roger Cotterrell's 'The struggle for law: some dilemmas of cultural legality', *International Journal of Law in Context* 2009, 395, 396.



change, via a discourse with the powers of modernization of societies and it is exactly the way they change that anthropologists mainly study. Both anthropology and law – and both anthropology of law and comparative law – go along, incorporating complex conceptions of culture and legal theory⁷.

Law is not static; its solutions circulate, are spread and provoke imitation. Besides, imitation is an important ally of uniformity. However, there are various kinds of uniformity. Thus, according to an opinion, the uniformity that is imposed as the result of an international agreement or of a transnational regulation puts a serious obstacle to the development and progress. This obstacle is even bigger when the uniformity is the result of a multilateral agreement that may not be reformed in the future and that is the result of a uniform decision taken by all the members, the most absurd and backward looking included⁸.

However, even those who support a more “conciliatory” attitude that would have as an aim the achievement of a certain unification of legal rules admit that the “Western intercultural arrogance” and her misconceptions were and are innumerable and destructive and remain a threat for comparative law’s prestige. They know that each legal system has its “atmosphere” and that many legal issues in a legal system may be accurately understood only by someone who is really acquainted with the atmosphere and who has sacrificed much time and effort in order to get to know these issues with all their possible nuances⁹. They accept that the starting point for the comparatist should always be the respect to the national traditions, to the different cultures and ethics, and, in essence, to the diversity. They nevertheless claim that this respect in its absolute form could have – and according to them, had in the past, death as consequence¹⁰.

IV. As the great Italian jurist Rodolfo Sacco points out, science expands its field of research in the maximum grade. Especially as far as law is concerned, science does not limit herself in an isolated empirical knowledge, but strives to acquire as solid as possible knowledge, based on a big number of experiences, and juxtaposes experiences, counting the respective distances and drawing conclusions according to the concrete way by which these distances are coordinated. When a jurist works that way, we call him/her comparatist. Legal

⁷ M. Sunder, (Un)disciplined, *Political and Legal Anthropology Review* 26 (2003) 77επ.

⁸ R. Sacco, Diversity and Uniformity in the Law, 49 *A.J.C.L.* 177-178 (2001).

⁹ O. Lando, The Worries of a Comparatist, in: *Mélanges en l'honneur de D. Tallon. D'ici et d'ailleurs : Harmonisation et dynamique du droit*, Paris 1999, 139, 141.

¹⁰ V. Grosswald Curran, On the Shoulders of Schlesinger: The Trento Common Core of European Law Project, *Eur.Rev.Pr.L.* 2003, 66, 77-78.



science, says Sacco, sustained a qualitative change when she learned to be comparative and for that reason she is in debt to comparison¹¹.

In this trajectory, the comparatist has much to be taught by the anthropology of law, which also constitutes a comparative knowledge of laws. The difference between the anthropologist and the (traditional) comparatist is that the first studies the human beings, focusing on their dissimilarity, diversity, in order to get to know them as better as he/she can. Therefore, the anthropologist may teach the jurist that the dynamics of the official legal rule is not limited in the concretely chosen words, but it incorporates elements of its substratum, elements that often are not related at all to the legislator's will.

It is pointed out that when the comparatists turned their attention to the "other legal systems", as R. David had (somewhat disparagingly, one could argue) defined them, they were obliged to adapt the traditional methods of comparative law. Thus, a *deeply contextual approach*, enriched with the methods of history, sociology, anthropology and economics and based on extensive long-lasting contacts with those societies as well as on the analysis of the primordial languages' material, is since long time ago the dominant tradition of comparative law in those territories. Especially the comparative legal studies that focus on the legal systems of Africa and Pacific Ocean are since long time ago closely connected with the anthropology of law¹².

V. Maybe the more interesting declaration from the side of the advocates of the respect to the differences of laws – therefore of peoples and cultures too - is that the comparatist should allow the others to realize their dreams about the world¹³. That is, comparison must not have a unifying result but a multiplying one¹⁴. It must aim to the organization of the dissimilarity of the reasons that are expressed by various cultural configurations. According to this opinion, comparison presupposes and has as a consequence the primordial and fundamental quest of the difference¹⁵.

The contemporary comparatist is not afraid of differences and does not try to erase them in the legal regulations that he/she studies and compares; on the contrary, he/she tries to locate them, so that the conclusions that he/she will draw will be as reliable as possible.

¹¹ R. Sacco, *Antropologia giuridica. Contributo ad una macrostoria del diritto*, Bologna 2007, 22-23.

¹² A. Riles, *Comparative Law and Socio-Legal Studies*, in: *The Oxford Handbook of Comparative Law* (ed. M. Reimann/R. Zimmermann), Oxford (2006) 2008, 775, 785-786.

¹³ B. Malinowski, *Argonauts of the Western Pacific*, London 1922, 25.

¹⁴ P. Legrand, *What "Legal Transplants"?*, in: *Adapting Legal Cultures* (ed. D. Nelken/J. Feest), Oxford - Portland, Oregon 2001, 55, 67.

¹⁵ M. Foucault, *Les mots et les choses*, Paris 1966, 68.



Emphasizing the dissimilarity of the human societies is of preeminent importance. It is this particularity of each culture, therefore of each law too, that distinguishes the richness that entails from the coexistence of these different cultures – and laws. Because nobody ever said that dissimilarity impedes coexistence and actually the smooth coexistence. On the contrary, it is this dissimilarity that engenders the curiosity to discover other ways of life, other ways of regulation of the life in society. It is this dissimilarity that exhorts to the comparison of legal regulations and via this comparison, to the better understanding of the foreign laws and of our law – of the essence of law.

So: Who needs Comparative Law? I dare to answer: Literally everybody.