

## THEORETICAL OUTLINES OF COMPARATIVE LAW METHODOLOGY

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***Abstract:** In the following paper, we will be mapping comparative law as an enterprise directed towards the differences between legal systems. This recent epistemological trend corresponds to similar tendencies in other sciences. Comparative law adapted to a hermeneutic imperative- to interpret legal rules according to the relevance in their proper local context. This requires flexibility in analysis, a propensity to accept various contingencies, even regarding the interpreter's own legal system. This model might be connected with what in political sciences is called post-foundationalism, an acceptance of principles, but only as a contingency, not like a immutable criterion.*

***Keywords:** comparative law, legal order, post-foundationalism, legal epistemology, tort law, common law*

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### THE PLURALITY OF LEGAL ORDERS

Comparative law is subjected to multiple influences, especially extra-legal and extra-judiciary. Many legal, statutory, judicial and jurisprudential contingencies shape law. That is why, when invoking comparative law, the interpreter must take into account these features, much more than its own legal tradition. This one becomes a contingency on its own. In this manner, the interpreter overcomes his own self-limitations imposed, making an important step towards the elimination of “legal isolation” [10]. This tendency to invoke foreign legislations, solutions, jurisprudence and so on represents a relative recent trait in the world of the law.

A national order is somehow an “illusion”, comparative law underlying, as a hermeneutic discipline, the existence of a “plurality of legal orders connected through comparisons” [7]. The comparatist imposes to himself a momentary suspension of his own legal formation. This is due to the desire to eliminate reductionism, in the sense that one legal order is considered a reference point for the others. Reductionism distorts the object of analysis because it only interposes an abstract scheme to the difference incumbent into a foreign legal system and its own life form. The Western world had to pass through the stage of Eurocentrism (or ethnocentrism) [9] to be able to interrogate

critically the tendency to impose its own way of life on other cultures. Colonialism (with the recent version, neocolonialism) is an old European trait: to occupy the territories of less developed populations and subjugate them economically in the name of civilization. In the last two centuries, Eurocentrism takes the form of imposing the capitalist mode of production and extending this economic model to pre-industrial countries. The process was facilitated by the national movements in the XIXth century, which led to the adoption of the bourgeois way of life and the legal paradigm that it sustained it. Napoleon's Civil Code, no doubt one of the most significant legal and cultural documents in European history, became the model for almost all European countries (and not only). Significant for the French and their stage of development, it represented a fast-emulated model for less developed countries, e.g. the ones in the Eastern Europe. The local law of these provinces appeared very inadequate for the emerging economic paradigm. From that moment, the impetus was towards the imitation of the general type law embodied in the Code civile, ancient institutions disappearing due to feudal origins.

Recently, comparative law tries to reconnect to the features relevant in local contexts. Sometimes, small and apparently unimportant local details must be taken into account to understand a statute, a social trait or a certain mentality. The epoch of an all-encompassing legal framework for a cluster of states is almost impossible to ascertain. A European *jus commune* cannot take the form of an imperial scheme, as imagined by Roman jurists but must recognize multiplicity and plurality. The European project must have rules, but these rules cannot be the embodiment of natural law precepts, unless they are agreed upon or open for revision.

This is why comparative law is not a "systematic and rational enterprise", understood as a chain of rational successive steps allowing the legal mind to conceive and understand, through an orderly, methodical and progressive process, the sameness and the difference between legal orders, their structures and functions proper to each of them [2]. Understood in this manner, comparative law would not be able to cope with the task of representing a world of meanings in which a rational order is only a contingency, not a *mathesis universalis* for understanding.

## **THE EPISTEMOLOGY OF COMPARATIVE LAW**

Comparative epistemology is not based on a methodological unity, on a pre-given structure of ways to follow, but on a multiplicity of methodologies, each one adapted to the institution it wants to analyze. Due to specificity of an institution, the comparatist chooses from his toolbox a certain type of instrument, e.g. a research on tort law will be different from a research on trust or labor contract. The inconvenience regarding the absence of a unitary corpus of methodology is in fact an advantage, since one can easily eliminate the forcing of the interpretation on the track imposed by the method. In other words, between the comparative methodology and the analyzed institution there is a bi-univocal relation. This dependency will have consequences on the entire legal system because, if a norm cannot be separated by the normative context in which it appeared and developed, then any critique can purport effect on the entire context. If comparative hermeneutics would only describe a legal system and mirror a rule from one system with

one from another, then we would be simply engaged in contrasting, just a particular moment in comparative enterprise. We could engage in pragmatic researches based on contrasts, but the stakes of comparative law is much more than that. It is rather oriented towards differences, not sameness. To understand differences, one must understand the context: the comparatist must understand and describe the foreign element before proceeding to elaborating a system of similarities and differences to serve as a base for further analyses [5]. The foreign law, and implicitly their norms, must be related to economic, political, social, moral and cultural background of that society, in their proper historical development.

## **THE PARADIGMS OF EUROPEAN LAW**

For the European researcher, the horizon of comparative interrogations is shaped by two modes of thinking, each with its own principles of memory, reproduction and extension: on the one hand, the Roman nomothetic tradition, and on the other hands the ideographic common law tradition [8]. Educated in a certain tradition, the jurist will consider the other one under the sign of alterity- the differences seem far greater than the similarities, and the dialogue is not as smooth as it should be. By comparative law, we try to establish “bridges” and create the conditions of possibility to understand other legal systems.

Even if sometimes the comparative endeavour does not seem to have a practical purpose, like explaining a rule or *de lege ferenda* proposals, the task is to create a certain familiarity, a proper channel for a real dialogue between cultures. At least after the Roma Treaty, the European legal landscape could not relate only to a particular system and interactions became a common denominator.

## **LEGAL SOURCES AND CULTURES**

One of the main concerns of comparative law is to underlie the specific setting of legal sources in a certain context. Two meanings encompass the concept of legal source. On the one hand a material meaning, determined by the totality of material, spiritual and cultural conditions that determine the emergence of a legal rule at a certain moment in a specific form, and on the other hand a formal meaning dependent on the expression of a will, no matter the form it takes, a law, a rule, an edict, doctrine, jurisprudence [1].

This is why any comparative endeavor is simultaneous an interrogation on the legal culture in which an institution appeared and developed. Regardless of the connections we take into consideration, law and language, law and social organization, economics and politics, law and history, law and philosophy, what we consider as culture remains a relevant aspect for our understanding of what we consider technically relevant to law [8]. We can say that the rule of law becomes less important than the social phenomenon that justifies it.

## **THE CONTINGENCY OF FOUNDATIONS**

In the history of humankind one could easily remark a deeply connection between law and morals. Of course, for a natural law supporter, the issue is already concluded: law springs necessarily from morals. However, recent historiography showed that original phenomena, like instituting rules from morals, do not remain fixed or immutable. Initial principals are reevaluated according to a variety of historical, social or cultural factors. Customs, convictions, beliefs from the “childhood” of law form rules and legal formulae that shape legal systems that in turn become independent from the material source they spring from. The initial customs and beliefs disappear, but the rules remain and due to the lack of historical proofs, the initial reasons that determined these rules are forgotten.

However, through historiographical research, the researchers try to re-describe these initial phenomena and advance explanations for the manner the rules of law evolved in time. In fact, this historical investigation, which comparative law integrated it organically, becomes essential for the understanding of every rule. This is because the tendency is to reconcile the ancient rule with the present state of facts. An ancient rule gets a new content and, in time, even the old form changes to overlap with the meaning it received [4].

The claim regarding a clear connection between a rule of law and its foundation is not certitude, but many times the “decision” of the interpreter. We choose from history what is convenient for us, regardless of the lack of proofs, and underlie our legal rules on actual necessities, not venerable tradition.

## **CONTINGENCY AND POST-FOUNDATIONALISM**

The continental lawyer usually sustains a claim by invoking a legal rule. In addition, sometimes this legal rule is related to a general principle considered immutable. Let us consider tort law in continental tradition. When someone claims recovery from a damage, he may invoke contractual or delictual liability, but not both at the same time. If the rule will be delictual, a variety of possible foundations will be invoked to sustain the applicability of the legal rule. Either fault, risk or guarantee, the tendency is to relativize the idea of foundation. Fault as multi-faced an all-encompassing foundation for tort law is over.

A similar trait we can find in political sciences under the name of post-foundationalism [6]. The reflex of underlying tort law on only one moral aspect-individual responsibility forged in the internal consciousness is similar to foundationalism-based strategy. In political science, foundationalism supposes that society/politics are based on principles 1) undeniable and immune to review; 2) outside society and politics. In other words, what is searched is a principle to underlie politics form outside, transcendently. Similarly, tort law is conceptualized in the same manner, an outside criterion being invoked to justify the recourse to this institution. The same epistemological model works here: to each institution corresponds a principle, exterior to law through its moral source, but immanent to law by the manner in which it is applied.

Post-foundationalism supposes a continuous critique of the idea of ultimate principle. Post-foundationalism does not deny the recourse to principles or the idea of principle. Anti-foundationalism is only a masked foundationalism after all, but it rather supposes a multiplicity, a plurality of contingent foundations. Here, contingency means a priori the impossibility of an ultimate principle. In fact, a principle becomes contingent due to the impossibility of an ultimate criterion- this impossibility makes possible the use of one principle.

## **CONCLUSIONS**

Under the scope of comparative research, one cannot take anything for granted. So long revered legal principles, precepts, statutes are not the starting point of an investigation, but the end of it. Do they really stand after thorough scrutiny? The dynamics of modern world imposes such an adaptive capacity. The physical and mental borders incumbent in national legal systems make room for multi-faced interaction between international agents. On a global scale, one order is just an entity among others and this multiplicity is already acknowledged. The recourse to natural law precepts is no longer sufficient for the challenges we face. Global warming cannot be addressed through classical agreements, but must surpass particular arrangements. The divide between common law and continental law must not be taken for granted, as legal families separated by insurmountable differences. The setting of legal sources, sometimes the starting point for comparative endeavour, might grasp not irreducible differences, but convergent goals and shared tendencies.

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