The dialogues of [comparative] law*

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Abstract: Law is forbidding, correcting, punishing, helping, restoring, rewarding. Law needs tools, of other disciplines too. Language [of law too] is a means of communication and of isolation (wanted or imposed). Expressing law, interpreting law, implementing law, exploiting law needs all sorts of language. Law and economics discover and uncover rational (though still often irrational) choices. Judicial decisions are political decisions, Critical legal studies point out. Law is always influenced by politics. Politics can be benefactor and destructor. Rituals as expressions of living law may have double (or multiple) meaning. Law is always influenced by religion – either explicitly or implicitly. Convivencia in the same country of people of different religions and, accordingly, application of different laws of civil status (for example in Liban, in Greece, etc) is a fact. First nations (in Latin America, USA, Canada, Australia, New Zealand, Caribbean, etc,) live together (not really, not always in an idoneous way) with former colonizers and immigrants. Is there a real Convivencia of laws, there (as most countries in Africa have almost managed to achieve), or primacy of one (central) law and exclusion of the others? In many countries, there are different rules for the same issues, according to the particular problems of the persons to whom they apply – hypothetically aiming at the same protection(?). Is it an opposite discrimination or just a means of organizing the way to live together? Co-existence, Com-petition, Com-paring, Con-vivencia: Harmony is feasible, is possible, is not alchemy, it respects and requires the different, in order to be a rich image of life.

Keywords: Pluridisciplinary study, legal pluralism, colonization, different cultures, decolonization, neo-colonial rule, law's memory

Summary: 1. By way of introduction; 2. Law is; 3. Comparison – Comparativism; 4. Dialogue-Monologue; 5. Different laws, different cultures; 6. The importance of language for the dialogues of [comparative] law; 7. Continuing dialogue[s].

1. By way of introduction

Dialogue of law with other disciplines, either in the same legal culture or across the legal cultures – Dialogue of state law with other forms of law (informal, unrecognized) – Dialogue of the various sources of law, between them – Dialogues between verbal and non-verbal (mute) law – Permanent dialogue of comparative law with history (and with history of law) – Dialogues before, during and after legal transplanting.

Why not also dialogue between the various methods/approaches of Comparative Law.

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2. Law is

Are the various accounts of law's role in societies so different? Could they not be considered (all of them) as parts of a whole, as complementary, instead of different? Is the question "Is it [the law] a basis for social order, an instrument of power, or an aspect of culture?" really a question[2]? Could each one of the above (and many more other descriptions and definitions of law) be considered as a sufficient word/phrase/meaning of the law?

To my opinion, the answer to the last question is "no". The dialogue of the various expressions of law(s), either between each other, or between them and other disciplines is perhaps the only way that could lead us to an in depth understanding of the way the human communities live.

As it is splendidly said by Giorgio Resta: "Law, as a university discipline, should overcome the narcissistic disorder developed in the last two centuries. It should stop looking only at itself, at its organization, made up of a complex web of rules, principles and procedures. Rather, it should turn its eyes more decidedly to the social reality, or … the "vital forces" behind it."[3]

The dialogues of [each] law may give us the means to compare it with another law or with other laws. The dialogues of each law are a prerequisite for the dialogues of comparative law.

A "child" of the West, comparative law, when it first appeared as a discipline; western remained its mentality, for many years, many decades. "Inevitably Western" was (and often remains) the language of the comparative law. If, however, we consider comparative law as a cognitive discipline – tool of research and study of all the laws of the world -, interdisciplinarity is a condicio sine qua non for it. The comparativist who will follow such an approach, must study the various problems-issues not only with an "internal perspective", but also with an "external perspective", meaning that he/she must be familiarized with techniques, examples and conclusions of other disciplines. A "pluridisciplinary study" often is the first step for an effective communication between disciplines, which in turn gives precious elements for an as secure as possible comparative study of laws.

Thus, comparative law, "in dialogue with non-legal disciplines, it gains control of the "deep connection" of the law with its cultural and environmental contexts", as it is very clearly pointed out by Nicolini.[4]

3. Comparison - Comparativism

"We compare to get to know ourselves better". Comparison is the practical tool in the quest for human understanding, it is argued. Is there a dialogue between that comparison and "comparativism as a theoretical framework, …, an autonomous field of research"[5]?

Before that field of research was recognized as such, people and their leaders were (perhaps? certainly? from time to time? consciously? unconsciously?) comparing, either just to understand or to understand and use the conclusions of that procedure in order to achieve something for their own aims. Somehow, that was a preview of what Sacco much later said about the discipline of comparative law:

[2] F. PIRIE, *Law as ritual. Evoking and ideal order*, in *HAU: Journal of Ethnographic Theory, 4,* 2024, 403.
[3] G. RESTA, *"So Lonely": Comparative Law and the Quest for Interdisciplinary Legal Education,* in *International Journal for the Semiotics of Law,* 37, 2024, pp. 1569, 1581, 1582-1583.
[4] M. NICOLINI, *"Writing the Earth and Representing the World": The Cartographical Ambitions of Comparative Law'*, *The Journal of Comparative Law*, 19, 79, 2024, p. 83.
[5] G. RESTA, *The 'Comparative Method' at the Roots of Comparative Law*, in H. DEDEK (ed.), *A Cosmopolitan Jurisprudence. Essays in Memory of H. Patrick Glenn*, Cambridge, 2022, pp. 44, 47.

Its principal aim is the knowledge about its object of research. Other aims that might be set, such as improvement of another law, unification of laws, etc., belong to the sphere of *subcomparatismo*.

It is rather (or certainly) right that the philosophy of comparativism is in constant development, is pluralist, and is difficult to systematize.[6]

It is often argued – and not without a reason – that comparative law keeps on being mainly interested in whether western laws are influencing all the other laws of the world[7]. In that case, the phrase "We compare to get to know ourselves better" would/should be rephrased as: "Western scholars compare to get to know themselves and their laws better". In that case, the dialogue would become a monologue.

4. Dialogue-Monologue

As Rodolfo Sacco had pointed out (and Salvatore Mancuso has reminded us), "law was born before the state and lived for a long time without needing a legislator or legal professionals, which are typical of the Western legal development." In legal pluralism, especially as it has been defined during the last decades, state law may not be a necessary element of the law ruling a human community (see examples of African countries).[8] On the other hand, it can be used to give an identity to the so-called mixed jurisdictions, mixed legal systems. [9]

Colonization meant – among other things – a huge reversal of what had been considered as law. So did the end(?) of the colonization, out of the colonizers' fear of loosing their spheres of influence. Thus, the dialogue – monologue would be somehow as follows:

"What happened, happened, no change is possible (or permitted …). We influenced your way of living, we set your laws (for you …), with many similarities to our own, so researchers should not search for differences, they do not really exist. And if they exist, we can (convince you to) transplant laws similar to our own. And because we are open-minded and generous, we can let you also be ruled (partly) by your own laws (that we did not consider as such in the past), but only on the condition that they are not somehow opposite to our own beliefs about law. Generosity has its limits."

So, according to that mentality, the standard to which every single law should be measured and perhaps allowed to be, is a Western law. So, all the world can be considered as belonging to the families of common law and civil law.

5. Different laws, different cultures

As it has been very clearly presented[10], during the 18th century European intellectuals were considering law as ecumenical – obviously, their own law. During the 19th century, when there was explosion of many new disciplines, the anthropologists of law started field studies (but in reality, "armchair work", back then), in order to point out differences between western and non-western laws.

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[6] O. KRESIN, *World Picture of Comparative Law: "The Courage of Your Convictions"*, in *The Journal of Comparative Law* 19-3, 2024, p. 16.
[7] See L. SALAYMEH, R. MICHAELS, *Decolonial Comparative Law: A Conceptual Beginning*, in *RablesZ* 86/66, 2022, p.169: "Mainstream comparative law is arguably intertwined with colonialism, from the modern beginnings of the discipline to its latest involvement in projects on law and development".
[8] S. MANCUSO, *Lawscapes*, in *International Journal for the Semiotics of Law*, 37/2024, pp. 1643, 1645, 1646.
[9] See E. ZITZKE, *Decolonial Comparative Law: Thoughts from South Africa,* in RabelsZ 86/189, 2022, p. 193: "But beyond the classical comparatist definition of mixed legal systems lies a much more far-reaching pluralist conception of mixing".
[10] L. NADER, *The Life of the Law. Anthropological Projects,* University of California Press, 2002, p. 9.

But the real field studies started in the 20th century. In both centuries, but especially during the 19th century, those "field studies" were taking place while the European colonization was reaching its peak – everything happened so fast… They gave ideas about the control of societies via the laws. They showed that the law often was and is a way to "invent culture". There was no real dialogue, back then.

Those ideas still exist in some legal scholars' minds. But fortunately – in several fields and especially in the field of comparative legal studies – new ideas have been born; new approaches have been proposed.

Todorov had pointed out that, by juxtaposing (by comparing, we would say) various cultures/civilizations and various laws, we may stress more either the equality of their rights and of their dignity or the differences that divide them. He had argued that the first attitude/stance is moral and legal, it describes what must be; the second stance is anthropological and historical, it refers to what really happens. However, he had argued, none of those positions is simple.

The principle of equality is accompanied, slyly, by an anthropological hypothesis, that of similarity, which in turn is often translated in assimilation politics. As he reminds us, this is, in essence, the history of the French colonization, which took place in the name of the Enlightenment ideals. Condorcet was saying: all people have the same rights, including the right to be civilized. Since, then, The French and the English are the most civilized people on the earth, they have the right, but also the obligation, to bring their civilization to the wild people. That means, they have "a duty of interference" (*un devoir d'ingérence*). According to that mentality, if the "wild" people resist and remain ignorant, they must be civilized by force. He (Condorcet) was writing: "*Les populations européennes doivent civiliser ou faire disparaître les nations sauvages*".[11]

But the second case too, that of the stressed differences between people, between cultures, has certain hurdles: the scientific interest for the description of the differences entails the risk of making us forget that we all belong to the same species, the human one. Thus, each human community considers herself as the basis, the paradigm of social behaviour. Often an evaluative opinion creeps into the research/study, and the differences ends up being translated on terms of hierarchy, superiority and inferiority. This is also the danger that threatens all [political] ideologies (either left or right) that put forth as flag the differences between people. If the differences are not defined on an equal basis, apartheid and xenophobia lurk into all discussions/analysis.

6. The importance of language for the dialogues of [comparative] law

It is pointed out that comparative legal studies constitute a priori a place of privileged thought, concerning the possibilities and the limits of legal translation. Each law is expressed via the language[12], in oral or written form[13], therefore the comparativist has the duty to make eligible a law articulated in a different from his/her own language[14].

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[11] T. TODOROV, *Devoirs et Délices. Une vie de passeur. Entretiens avec Catherine Portevin*, Paris, 2002, pp. 190-191.

[12] See H.E.S. MATTILA, *Comparative Jurilinguistics: A Discipline in Statu Nascendi*, in B. POZZO, V. JACOMETTI (eds.), *Multilingualism and the Harmonisation of European Law,* Alphen aan den Rijn, 2006, pp. 21: "*Law is necessarily bound to human language. Hence, the language of law is as old as law itself and has drawn people's attention from different viewpoints since ancient times*".

[13] H.E.S. MATTILA, *Legal Language: History*, in K. BROWN (ed.), *The Elsevier Encyclopedia of Language and Linguistics*, 2006, p. 8, declares that the language is power, authority, and that the language of law, that the state administration and the courts use, is a power instrument *par excellence*.

[14] S. GLANERT, *De la traductibilité du droit*, Paris, 2011, p. 10.

Translation must be considered as a mediated form of communication, a further step that surpasses the basic communicating procedure and thus alters its character. Translation adds one more dimension in the communicating procedure, because the act of trans-fer that is enclosed in the translation demands the active and creative act of a subject, the translator[15]. That means that the translation aims at the recreation of an already existing identity, in an unavoidably modified form[16].

The legal discourse in every culture has its own structure and expresses ways of syllogism. It is pointed out that the language gives form in what the user of language knows. The importance of that formation of knowledge becomes even more obvious when it is about the knowledge of a foreign law[17].

James Boyd White, in his book "Justice as Translation", rejects the idea of the language as a neutral sum of combined and combinable signs that function as vehicles that would transfer the thoughts of a person to another, because that would presuppose that things exist independently of language, that the language would just have the mission to represent the things in a way that could be transferred, translated, without the fear of ambiguity[18]. However, White does not believe that. On the contrary, he believes that translation is the art "of confronting unbridgeable discontinuities between texts, between languages and between people"[19].

Some languages as also some laws are in a steady movement. This may happen for various reasons: historical, political, or economical. According to an opinion which seems influenced by the theory of evolutionism, this movement, as generally any movement in law or in language, may be considered as either evolutionary or degenerative[20].

Rodolfo Sacco was pointing out: "The laws and the languages differ. Do we have an explanation for that datum?"[21].

The explanation, he argued, is in the nature of the things. Everything real is dominated by the diversity. And this, he believed, is true both for the material reality as for the cultural reality. Diversity has its provenance in the variation, in the movement (*la diversita proviene dalla variazione, dal mutamento*).

Where would we be without diversity, he was asking. Without diversity, the *homo habilis* would have never succeeded the Australopithecus. If the language had not wanted to "explode", in order to give birth to thousands different languages, it would have remained as it were at the moment of its first appearance; in essence, a total of five or six vowels. If the law had not wanted to "explode", in order to give a place to thousands different systems, it would have remained as it were at the moment of the humanization of the *homo habilis*[22].

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[15] J.B. WHITE, *What Can a Lawyer Learn from Literature?*, in *Harv.L.Rev. 201,* 1989, p. 2011, declares that the essence of a legal scholar's work is in the procedure of identification and construction of valid texts, in the procedure of translation from discourse into law. According to his opinion, the legal scholar's work is the translation of the imagination into reality via the language's power.

[16] J. GAAKER, *'Judex translator': the reign of finitude,* in P.G. MONATERI (ed.), *Methods of Comparative Law* (Research Handbooks in Comparative Law), Cheltenham, UK + Northampton, MA, USA, 2012, pp. 252, 258.

[17] B. POZZO, *Comparative law and language*, in M. BUSSANI, U. MATTEI (eds), *The Cambridge Companion to Comparative Law,* Cambridge, 2012, pp. 88, 102.

[18] Thus, J.B. WHITE, *Legal Knowledge*, *Harv.L.Rev. 115,* 2002, p. 1396 asks, or asks himself, "what do we know when we know the law"?

[19] J.B. WHITE, *Justice as Translation: an Essay in Cultural and Legal Criticism,* Chicago, 1990, p. 257.

[20] N.J. JAMIESON, *Legal Transplants: Word-Building and Word-Borrowing in Slavic and South Pacific Legal Discourse*, in *Victoria University of Wellington Law Review* 42/417, 2012, p. 419.

[21] R. SACCO, *Il diritto tra uniformazione e particolarismi*, *Università degli Studi Suor Orsola Benincasa. Facoltà di Giurisprudenza*, Napoli, 2011, p. 10.

[22] E.N. MOUSTAIRA, *Juridical influences in the frame of Comparative Law,* Athens – Thessaloniki, 2013, pp. 60-61.

Language makes us "persons", creates our identity[23]. Language is an element of the society, depends somehow on the society and the communication in its frame, can create an important structural element of people's identity[24]. Every person "lives inside a language"[25], is able to acquire the experience of the world via a linguistic form[26]. Language is much more than a collection of translatable representations of an immovable reality, it contains a specific vision of the world, it constitutes a testimony of the human intellectual power. Legal language too creates somehow our identity inside a legal culture/a legal system. As it is very clearly said: "Each individual legal language is the result of its immemorable development and of that of a specific legal system, of its history and culture"[27].

Language is the instrument of dialogue – for comparative law too.

7. Continuing dialogue[s]

Comparative law in the past (and often now, unfortunately) has been used to give a solid basis to the "neo-colonial rule after formal decolonization"[28]. However, it is well known that disciplines may be used in various ways, by various scholars, either to defend and support their own (mostly political) ideas, or to discover and uncover (and possibly accuse) dark, darkened situations. The method of legal families is not innocent. It was perhaps useful as a scientific tool, according to the ideas of former times, but it is almost unacceptable now. The rise of the legal families was followed by its fall. We should not refuse to see that that method was perpetuating the [legal] colonization, by including former colonies' laws in the "families" of Western laws. But not even Western laws may be considered as members of a family – there are so many differences between them.

The new approaches of comparative law, approaches that could be named methods but not necessarily, do not close their eyes to the differences (or the similarities) between the various laws. They are discerned from the initial methods (especially from that of the legal families) by their "generosity" (a real one, this time), their open-mindedness, the will to take into account all the details that contributed and contribute to the forming of each law. And those details are only via the dialogues of law(s) uncovered.

Even if "some rules remain law on the books forever"[29], even when there is resistance to the efforts of those legal scholars who believe that law is much more than that, the dialogue between the legal formants of each law never stops. And in order to be able to comprehend those "national" dialogues, we, comparati[vi]sts, need to study those dialogues, as well the dialogues between the various legal systems, before reaching our conclusions.

Can we ignore the past and its events? Obviously, not. Law and especially comparative law, in order to get to know itself and its object(s) of study (the first and most important aim of comparative law), must take into account everything that had some sort of influence on laws' trajectories. This does not mean any "forgiveness" of the past (and the present) dark spots of those trajectories. If laws must

[23] See also the theatrical play of B. FRIEL, *Translations* London-Boston, 1981, (speaking about the Irish-Gaelic language): "a rich language… full of the mythologies of fantasy and hope and self-deception – a syntax opulent with tomorrows"
[24] S. SKYTIOTI, *Comparative law and language* [in Greek], Athens – Thessaloniki, 2022, pp. 12.
[25] H.-G, GADAMER, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik*, 6. Aufl. (durchges.) Tubing, 1990, p. 392.
[26] E.N. MOUSTAIRA, *Milestones in the Course of Comparative Law. Thesis and Antithesis* [in Greek], Athens – Thessaloni, 2003, pp. 163-171.
[27] A. DE LUCA, E. IORIATTI, *Comparative Legal Systems. An Introduction*, Torino, 2023, p. 27.
[28] L. SALAYMEH, R. MICHAELS, op. cit., (fn 6), p. 169.
[29] C. ENGEL, *Challenges in the Interdisciplinary Use of Comparative Law*, in *American Journal of Comparative Law* 69/777, 2021, p. 787.

change, again the dialogues of law and of comparative law (being that procedure a "*subcomparatismo*") can give the keys for that change.

Certain scholars argued that references to the past must be banished from the political speeches and references to history must be banished from the legal discussions.[30] However, they did not achieve that, at least not as far as law is concerned. Because law has memory. And people, however globalization wants to present them as similar, "ask who they are". And the answers may only come from the past[31] – both for them and for their laws. And thus, history remains present in many appearances of the law – and of the positive law too, for example in the preambles and introductory reports of the laws and in judicial decisions.[32]

It more and more appears that the contribution of other disciplines and especially of the history of law[33] to the achievement of its principal aim, is more than necessary[34]; it is functionally helpful.[35] Thus, it is argued that the comparative law is a historical discipline par excellence; that the study of the past is somehow tantamount to the approach and study of foreign legal systems.[36]

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[30] BA. KAI RANDALL LESAFFER, *Law and History. Law between Past and Present*, in B. VAN KLINK, S. TAEKEMA (eds.), *Law and Method*, Tubing, 2011, pp. 133, 134-137, for the three forms that the relation of history and law may have. First, there is the study of "history in law". Legal scholars often consider necessary to refer to the past, in order to support the existence or the interpretation of a specific rule. The history of the rule constitutes an innate part of the rule itself. Second, there is the "law in history". This refers to the study of the law inside its social, economic, cultural and political frame. The object of study is the mutual interaction between law and society in a historically specific time and place. Third, there is the "history of law". This relation is in the middle of the other two. It refers to the research that considers law as an autonomous historical fact. Its aim is to understand what exactly was the "law" in certain historically specific time and place.

[31] H. P. GLENN, *Legal Traditions of the World: Sustainable Diversity in Law* (5th ed.), Oxford, 2014, pp. 56: «In all the sameness, people ask who they are, and the answer can only come from the past».

[32] A. ARAGONESES, *La memoria del derecho. La construcción del pasado en los discursos jurídicos*, in M. BRUTTI, A. SOMMA (eds.), *Diritto: storia e comparazione,* Max Planck Institute for European Legal History, 2018, pp. 5, 6.

[33] The dialogue between history of law and of comparative law, as T. DUVE, *Legal Traditions: A dialogue between comparative law and comparative legal history*, in *Comparative Legal History* 6/15, 2018, p. 16 and footnote 2, has a long history.

[34] C. VARGA, *Legal Images and Understandings of Law: Juristic Assumptions and Results, Students Evaluations and Choices*, in *The Journal of Comparative Law* 19, 2024, p. 421: "… **historical investigation** is also a comparison, built up by comparing successive chronological sections of the past up to the present"

[35] G. PAVANI, 'El papel de la historia del derecho en la formación del "criptotipo centralista" en América latina', in M. BRUTTI, A. SOMMA (eds.), *Diritto: storia e comparazione,* Max Planck Institute for European Legal History, 2018, pp. 389, 391.

[36] M. GRAZIADEI, *Comparative law, Legal History, and the Holistic Approach to Legal Cultures,* in *Zeitschrift für Europäisches Privatrecht 7,* 1999, pp. 531ff.

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