

TEACHING ABOUT “THE OTHERS”: A PLEA FOR INTERDISCIPLINARITY

Contribution to a discussion on “Effective techniques for teaching about other cultures and legal systems”

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A discussion about the topic which has been proposed should start, in principle, from the analysis of the concepts referred to, or implied in, the title itself of this academic programme, i.e. ‘culture’ and ‘legal system’, since such concepts are far from being unequivocal or unproblematic if taken either separately or in their reciprocal relationships.

As far as the word ‘culture’ is concerned, especially if expressed in German (*Kultur*), this is a term which for an average European coincides with the ability to elaborate and comprehend in an harmonious whole one’s useful and largely symbolic knowledge – i.e. ‘culture’ is what a ‘cultivated’ human being brings with her/him. It was only in recent times that this word has come to be adopted, socially, in its anthropological meaning, i.e. the set of all notions, be they ‘material’ or symbolic, which belong to a people – i.e. ‘culture’ as a (quasi-)synonym of the French ‘*coutumes*’ or ‘*moeurs*’, the German ‘*Sitten*’ and the English ‘*custom*’ or ‘*folkways*’, let alone the originally Latin, ‘*mores*’¹, which still survives.

In its turn, ‘legal system’, with its equivalent expressions in other languages: ‘*système juridique*’, ‘*Rechtssystem*’, ‘*sistema giuridico*’ etc., comes to signify something which happens to differ according to different times, places and, indeed, cultures, in particular juristic cultures, which, again, diverge sharply about the definition of ‘law’ – in itself a perennially unsolved question in jurisprudence. In a typically positivistic vision, e.g. in a Kelsenian perspective, the ‘legal system’ may be meant as the whole set of enforceable legal rules, which actually form a ‘system’ *per se* (Losano 2002). In a sociological vision, in contrast, the term usually coincides with the whole of social actions or communications inspired by, or oriented toward, legal rules, and this set, again, is differently portrayed in its content by different authors, such as Niklas Luhmann (1974, 1981), Lawrence M. Friedman (1975) or William M. Evan (1990)²

Finally, as far as the relationships between ‘culture’ and ‘legal system’, and the derivative expression ‘legal culture’, are concerned, this seems to be a “relatively new term”³, as David Nelken (2007) says in the *ad hoc* entry of David Clark’s *Encyclopedia of Law and Society*. Symbolically, its use in jurisprudence is said to have begun with Lawrence Friedman’s renowned book devoted to the legal system “in a social science perspective” (Friedman, 1975), where a distinction was drawn between “external” and “internal” legal culture, the former referring to the social values and opinions that orient all actions addressed toward the legal system, and the latter referring to those ideas, concepts and practices which specifically belong to lawyers as a social group – a seminal notion indeed, which has anyway raised a number of critiques and given rise to a terminological discussion which has lasted for many years already (see Gessner, Höland and Varga, 1996; Nelken, 1996; Nelken and Feest, 2001)⁴.

¹ All these terms, in their turn, should not be taken as mutually interchangeable, as shown in a classical distinction between ‘folkways’ and ‘mores’ (Sumner, 1906).

² The writer tried to highlight the differences, only apparently marginal, between the notion of ‘legal system’ offered by se three authors (Ferrari 2000).

³ With exceptions, such as Treves, 1947, and his references to the tradition of sociology of knowledge.

⁴ It is interesting to note that for the term ‘*Culture juridique*’ of the 1988 first edition of the *Dictionnaire encyclopédique de théorie et sociologie du droit* edited by A.-J. Arnaud *et al.*, the author, Giorgio Rebuffa, offered four different definitions (all directly or indirectly connected with positive law), to which Erhard Blankenburg felt it necessary to add a number of specifications in the 1993 second edition. Subsequently to this entry, the *Dictionnaire* goes further by offering five other entries, corresponding to as many different *cultures juridiques* (African, Chinese, Christian in both the Roman-Catholic and the Protestant version, Islamic, Jewish and Oceanic).

I shall not venture into a terminological discussion, which would not fit in with the purposes of this paper. Still, I am convinced that pointing to the importance of linguistic questions, especially in view of teaching about ‘other’ legal cultures and systems is by no means useless. This kind of teaching is by necessity comparative, and language is by necessity the first step of any kind of comparison. Language is the most typical aspect of a culture, in that it expresses deeply rooted social feelings which often come prior to rational conceptualization: defining marriage as a mere ‘*negozio giuridico*’ (a legal transaction in general), rather than as a contract, as the Italian legal doctrine has traditionally done for decades, reflects an ethical conception that seemingly neglects the importance of the economic and financial side of the conjugal bond. Moreover, all branches of knowledge make use of, and communicate through, words reciprocally linked in more or less abstract wholes that should be understood unequivocally by audiences sharing a sense common to all the speakers involved. This is a *sine qua non* condition for a fruitful communication within any social group, especially so in the field of the social sciences which deal with largely artificial and symbolic materials. As a consequence, the definitions of such material are also largely artificial or, if one prefers, *conventional* – if not stipulative⁵, at least explicative, i.e. constructed on the basis of meanings usually attributed to words in a social milieu (Scarpelli 1965, Jori 1976). Attributing the same meaning to the same linguistic expressions is vital for all kind of debates, including scientific debates, in view of avoiding confusions (for example between descriptive and prescriptive utterances, but not only that), which may lead straight to incommunicability⁶.

These preliminary remarks help introduce the main subject of my contribution which, as the title reveals, is addressed to suggest that teaching about ‘other’ legal cultures and systems should be inherently *interdisciplinary*. This is no surprise, in theory, since interdisciplinarity is invoked in a plethora of scientific and ‘political-scientific’ documents⁷. Still, this point should always be underscored, especially with reference to legal studies, whose predominantly formalistic and ethnocentric leaning has never really been abandoned, so that any course that goes beyond the landscape of positive legal rules enforced in a single nation state is tolerated as a kind of pleasant extravagance and thus placed in a marginal position, if not drastically excluded from the scene once for all. This attitude has some arguments to spend, as we know. One must work hard and avoid distractions to achieve real acquaintance of both the content and the method of a legal ordering. Again, on an ethical level, some say that opening the mind toward alternative contents and methods might “trouble” the serene conscience of future jurists who are expected “to believe” in the legal order within which they will be called upon to operate. Yet, this attitude should be contrasted. On a cultural level, it is short-sighted, since it leads lawyers to ignore the substance of the social relationships upon which laws happen to impact. Then, on the level of the ethics of science, it is paradoxical, in that it implies the supremacy of ignorance over knowledge, as well as the idea that law is a faith, to be accepted as such and repeated through ritual formulae, rather than science and practice.

Interdisciplinarity in legal education displays several aspects, some of them preliminary with respect to law itself, be it viewed from ‘inside’ or from ‘outside’, in Hartian terms. One of such aspects is linguistic competence, not only in the sense – already mentioned – of semiotic consciousness, but, more simply, in the sense of *the knowledge of more than one spoken language*, let alone ancient languages which constitute their historical root. Not because knowing one or two foreign

⁵ See a renowned example of stipulative definitions in the works of H.D. Lasswell and his school (e.g. Lasswell and Kaplan 1950).

⁶ A telling example may be found in a (though remarkable) work of Ch. Wollschläger (1988), devoted to a comparison between litigation rates in a number of European countries, where, with respect to Italy, the author seemed to confuse the proceedings held by the *Uffici di conciliazione* for settlements in court (*Schlichtungsverfahren*), may be as a result of a misunderstanding about the nature of the *Ufficio di conciliazione* which, let alone its name, was not a *Vergleichamt* called upon to settle disputes, but a court like all the others, called upon to handle ‘small’ disputes adjudicatively.

⁷ See, recently, the position paper of the League of European Research Universities (LERU) about doctorates (*Doctoral Studies in Europe: Excellence in Researcher Training*, Leuven, May 2007) (par. 10: “Scholarly communities should be interdisciplinary since there is no scientific milieu which does not need to look beyond its boundaries”).

languages may cover the field of all possible linguistic and conceptual comparisons, which is obviously impossible, but because transposing concepts from one to another language is an extremely useful exercise which helps understand the *complexity* of comparisons, since these cannot rely on mere automatic operations. Nothing is more convincing than comparisons between civil law and common law: '*propriété*' or '*Eigentum*' do not have the same semantic intension of 'property' or 'ownership', whilst it may be decided, *conventionally*, to consider such terms as equivalent. Unfortunately, instead, linguistic competence is generally, and traditionally, not seen as an important element of legal education. Only recently, has English become part of the cultural background of many lawyers. Still, even forgetting that the universal diffusion of English brings with it the side-effect that English speaking lawyers tend to ignore foreign languages more than they did in the past, it should be stressed that the English language which is universally spoken seems to be quite far from standard English, syntactically and lexically. It allows one to communicate more or less superficially within specific milieus (see, e.g., that of informatics), but it does not allow one to understand the profound sense of things or the convergencies and divergencies of different cultures in the way they express abstract concepts.

At this stage of the discussion, I shall confine myself to examining only two specific fields, i.e. legal philosophy and legal sociology, which seem to me to be of the utmost importance in view of an interdisciplinary approach to legal education.

Philosophy of law – or, if one prefers, jurisprudence – is highly relevant for future lawyers, especially as far as the analysis of legal reasoning is concerned. By legal reasoning I refer, on the one side, to the logical analysis and the interpretation of legal utterances and, on the other side, to legal argumentation. Both such perspectives, again, have to do essentially with language, either in its structure or in its pragmatic function. That lawyers – incidentally – should master either aspect may appear obvious and has been so for many centuries, also in civil law countries, until formalistic legal positivism has brought with it, jointly with the idea that rules have but one correct meaning according to the purportedly 'unitarian' logic of a legal system, also the sacrifice of rhetoric as a teaching subject. What especially matters, in view of the comparison between legal cultures and legal systems, is that law students understand fully the differences between *a top-down and a bottom-up way of reasoning*. One thing is to start from rules and another thing is to start from facts, leaving aside any question about how a fact should be 'subsumed' under a rule. Top-down reasoning is typical of European formalistic culture, which *prescribes* it to legal operatives. Bottom-up reasoning seems closer to a legal culture which combines formal and material elements – to speak in Weberian terms – and may seem more typical of common law systems, based primarily on custom and precedent, although formalistic currents may periodically prevail also in the common law world. Comparing these two types of legal reasoning helps law students to reach the heart's core of different legal cultures. In particular, they will understand that referring to written laws as a *prius*, which is typical of civil law systems, is essentially *a political choice* (Scarpelli, 1965), obviously acceptable as such, rather than a logical necessity. They will also learn to "take facts seriously", as William Twining (1990) said in one of his renowned books. *De facto*, both judges and lawyers, while dealing with concrete cases, start from facts rather than from rules. They contribute to *construct*, or rather *re-construct*, facts⁸, before 'subsuming' them under a rule which they will *choose* among different options. A *post-factum* choice, precisely. Taking facts seriously also helps to understand how legal systems change, not only through formal laws, but also through acts, either private or institutional, which purport to interpret the existing law, while in fact they create new law. It was a court of appeal that, inspired by a highly creative lawyer, introduced a new conceptual 'category' of dam-

⁸ That 'facts' are constructed in court, rather than 'given', is something that belongs to the common experience of practicing lawyers. Still, theories about how this comes about are still relatively insufficient, though with notable exceptions especially in the common law world (see Frank, 1949; Bennett and Feldman, 1981; Jackson, 1988, Twining, 1990.). Recently, endeavours have been made to apply socio-psychological 'constructionist' theories to court interaction, seen as a kind of 'narration' (see, e.g., Amsterdam and Bruner, 2000).

ages – the so-called ‘biological damages’ – into the Italian legal system, which does not recognise either doctrinal writing or precedent as law sources. The consequence of all this is that, ‘technically’, law students should be seriously engaged, in small groups, in such exercises as comparing distinct modes of reasoning in different languages, factual analysis of concrete cases, commenting defense briefs, disclosing rhetorical devices, interpreting narratives, simulating trials, etc.

Coming to sociology of law, the most important point to stress is that, sociologically, law is a matter of communication. Legal rules themselves, be they customary or statutory, parliamentary acts or judicial precedents, are but *messages* which circulate in a discursive space, moving from one or more sources toward one or more receivers through one or more media, themselves institutional or non-institutional. Only the analysis of this incessant movement of normative messages helps understand fully the machinery – so to say – which regulates interpretative processes. Rules always display a degree of semantic uncertainty and vagueness since the beginning of their journey as messages. Even Kelsen and Hart, though they were positivist thinkers, admitted it openly. This degree of uncertainty *is destined to grow*, not to shrink, through interpretation, for a number of reasons. Firstly, those who receive a message will interpret it according to cultural codes which may not correspond fully to those of the framers. Secondly, the number of acts of interpretation will be multiplied by the appearance of new concrete cases, none of which will be ever identical to the others, as well as by the evolution of doctrinal writing – it may seem a paradox, but a rich and creative doctrine contributes to *increasing* the disorder of a legal system, i.e. to rendering it more *entropic*, in semiotic terms. Thirdly, legal communication is inherently conflictual, in that it springs from potential or real conflicts and develops through a series of conflicts. Two parties in court, plus their respective lawyers, will diverge in the interpretation of both facts and rules. May be the court, which is called upon “to reduce the complexity”, as Niklas Luhmann said, will opt for one of the competing positions. Still, it may also opt for a third solution and therefore add a new message which will go around, reaching an appellate court, other courts, other lawyers, etc. There is evidence that even openly recognised faults of a court may become precedents and affect future decisions.

Sociology of law, of course, is not only this. It is a perspective, an *angle de vision*, as Jean Carbonnier said, from which law can be observed. First and foremost, it is a discourse that, under the aegis of a theory, recommends *ad hoc* methodologies, differing from juristic methods, yet fundamental if one wishes to understand in which way social actions, practices, institutions and roles, directly or indirectly affecting or involving the legal system, actually interact with each other. It is not so important now to discuss about such methodologies in detail and wonder whether one should recommend quantitative techniques, addressed to describing wide social phenomena systematically through figures, or rather qualitative techniques, addressed to “understanding” (again in Weberian terms) the “sense” of social actions through in depth observation. What matters is that the knowledge of such methods should be part of a lawyer’s cultural and ‘technical’ background and that the only ‘technical’ way to help students achieve full acquaintance of them is to engage them directly in field research, especially documentary analysis, during their law curricula.

About the utility of sociological methods (and, I shall add, of ‘sociological imagination’, as Charles Wright Mills said), there no real need to spend many words. Legal pluralism has been the dominant theme in jurisprudence for a long time already, and is especially so in our times, as a result of the challenges issued at the nation state both from above – reference to the ever-expanding sphere of super-national, international and transnational forms of legal regulation – and from below – reference to the ever-increasing claims of ethnic, religious, cultural or linguistic minorities, which are multiplied by incessant migrations. Sociological analyses allow one to better understand how messages transmigrate from one to another system, often through non-institutional ways, and to study, *in vivo*, the source and the development of cultural exchanges and cultural clashes, in this case converging with legal anthropology, which has coped with such phenomena since its 19th century beginnings.

It seems to me that sacrificing philosophical and sociological approaches in the study of law, as often happens, is heavily detrimental for interdisciplinarity, which should be at the core of legal education and inspire teaching in all law schools.

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Provisional text