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Re-Thinking the Legal Vocabulary of Public Law

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Europeanization is no longer discussed as actively as a couple of decades ago. Instead, current debate and study focus on influences and *challenges of globalisation*. Again, we are witnessing two conflicting tendencies. On the one hand, a particularistic tendency exists that emphasises differences, the uniqueness of (legal) history, culture and identity. On the other hand, awareness of globalisation points to the changing, even diminishing, significance of national boundaries. Viewing globalization from a political and economic – but also from a legal – standpoint enables one to recognize the rise of new actors such as multinational firms, non-governmental organisations and social movements. Globalisation has also blurred and splintered the boundaries between the domestic and external spheres of nation states and of regional integration organisations such as the EU. At the same time, new terms, such as governance, have found their way from the political arena into legal vocabulary and into legal practice as well.

As a cultural phenomenon, globalisation implies the emergence of a new (global) culture. To some extent, this is shared by many elite groups, including legal professionals. At the same time, this has contributed to the transformation of many local cultures. In legal practice, for instance, judicial comparisons are becoming more widespread. To illustrate, it is quite usual for constitutional courts to refer to foreign law. They do so for many reasons. Among other things, national legal orders are increasingly bound together in supra-national and global regulatory regimes, which facilitate the opening up of national legal systems towards each other. It has been said that judges of the constitutional courts of the world, coming together regularly, form an »epistemic community« when discussions on fundamental and human rights are concerned.[1]

The rise of new (regulatory) actors and the changing role of old ones have also challenged legal scholarship: i. e. the traditional, nation state and Eurocentric *doctrine of legal sources* requires rethinking. Generally speaking, new academic approaches are needed to take account of multiple levels of legal ordering. Then – according to William Twining, interested mostly in a universalistic approach – one of the central questions is, how far is it possible

1 S. Cassese, Il Diritto Globale. Giustizia e democrazia oltre lo stato, Torino 2009.

and desirable to generalise about legal phenomena (e. g. conceptually, normatively, empirically) as part of understanding law. Twining, who is a legal theorist, points out above all the importance of analysis of concepts. A »cosmopolitan« discipline of law needs a vocabulary and conceptual apparatus that can be used across jurisdictions and cultures: »If jurisprudence is to be general, its vocabulary and concepts need to travel well«.[2]

For legal history, however, a general or universalistic approach is quite problematic. This is also true when legal concepts and their travel are concerned. On the one hand, we know that ideas and concepts have always been travelling: voluntarily, mandatorily, successfully, or »irritatingly«. On the other hand, we know that concepts – as well as legal language more generally – are historically (and locally) determined. Additionally, it should be pointed out that globalisation has tended to weaken, fragment and sometimes even to restructure the state, but it has not destroyed or replaced it. Public law *vocabulary* based on the idea of the modern nation state is still required, but needs to become more nuanced: Its dominance, and its use in supranational contexts, for instance for naming or labelling EU institutions, are problematic. There are, for instance the European Council and European Parliament, and there were – mostly for political reasons – plans and hopes for a European constitution.

Concepts and their analysis are also important for future studies in legal history. Language is a means of legal communication, while concepts are – even today – central instruments of legal scholarship. And as Michael Stolleis has written,[3] with linguistic analysis legal historians do »translations« when trying to understand how certain legal terms have been used in a foreign context: At the same time, when we explain the meaning of an expression we translate it. However, operating with concepts can also lead to misunderstandings, to assume that above legal sources there is a supra-historical level to which linguistic findings belong. This is a danger especially when studying legal phenomena. Legal language is bound by tradition; it is changing slowly, and is even resistant to changes. Too easily legal historians, who are usually educated in law or legal dogmatics, are led to believe that in old texts they can find phenomena with which they have become familiar within the current legal system. Too quickly (meanings of) past circumstances are changed into current ones

2 W. Twining, Reviving general jurisprudence, in: Transnational Legal Processes. Globalisation and Power Disparities, ed. by M. Likosky, London 2002, 3–22.

3 M. Stolleis, Rechtsgeschichte als Kunstprodukt. Zur Entbehrlichkeit von Begriff und Tatsache, Baden-Baden 1997.

and (seemingly) similar legal problems are defined with the same concepts.

Problems of linguistic and conceptual analysis do not exist only when temporally analyzing foreign legal cultures. Similar problems arise when studying today's legal systems. Still, a new and more global approach could be based on the comparative method, and on understanding foreign, including non-European, legal cultures. But this would require not only conceptual studies but also a concrete analysis of the role, functions, and even instruments of various (legal) actors. Special focus should be placed on discussing the *role of legal scholarship* – in maintaining legal reforms by its classic means: conceptualising and systematising.

Interesting ideas can be found in Amartya Sen, who writes much in his book »The Idea of Justice«[4] of the importance of comparisons, and of the history of other than Western European societies. Sen's contribution is a theory of justice in a very broad sense, where analysis of the concept of democracy plays an important role. Thus, discussion of global justice calls for us to examine whether the tradition of democracy is essentially a Western phenomenon, either in its broadly legal-organizational interpretation in terms of ballots and elections, or more generally as government by discussion.

Comparative analysis combined with a global standpoint also enlightens the relativity and limits of legal regulation, and legal argumentation as well. From comparative analysis it is possible to learn that there have been, and still are, different ways to understand the boundaries and interplay between law and politics, or law and morality.

Historical and regional variations also exist between legal orders in their sensitivity to political and social changes, and to values, as well. This is important to notice, especially when discussing justice (*Gerechtigkeit*), and the relationship between law and justice. I would like to suggest that different »techniques« are available for bringing idea(s) of justice within the modern application of law. These techniques are historically determined, and the *»technical« dimension* – the means and style of argumentation of various legal actors – cannot be neglected when analyzing the role or challenges of legal scholarship. These techniques are historically determined, while local variations exist in their use, even within the »Nordic legal family«.

4 London 2009.

In other words, constructivist traditions, i. e. *Begriffsjurisprudenz* with its self-referential notion of legal science, Legal Realism with an approach of social engineering, and Analytic Jurisprudence interested in linguistic aspects – all have different reflections on judicial argumentation and legal reasoning. The first was the most influential doctrine in the Nordic Countries, and was superseded by Scandinavian Realism in Sweden and Denmark from the 1920s, but in Finland by the Analytic School – partly for political reasons – as late as during the 1950s. Thus, real consideration (*reella överväganden*) formed part of the basis of the Swedish doctrine of legal sources. Again, Finnish legal science has been dominated by a quite heavy theoretical dimension. In legal doctrine, principles (as a technique) have become important as part of general doctrines of law (*allgmeine Lehren*), but concepts are still important: they prepare the way for principle-based legal argumentation.

Thus, I will advocate a non-Eurocentric approach based on comparative analysis for re-thinking the legal vocabulary of public law. For that analysis, an actor perspective is also needed – for enlightening the role and the critical potential of legal scholarship for further development of law.

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