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Comments

Let me apply some personal experiences to the important and fascinating themes Thomas Duve has introduced in his programmatic article we have discussed these three days. [1] This colloquium has been a confirmation of a *context breaking moment* – to use one of Martti Koskenniemi's concepts yesterday: The late modern turning point in relation to the legal modernity of the 20th century and its implications on European legal history research. What we have observed during this conference is a highly diversified experience, demonstrating what I would define as a turning point within European legal history, a turning point also symbolized through the inauguration of this new construct of the institute at Hansaallee. In our time of legal globalization we increasingly identify transparent borders, multi-normativity and interdisciplinary perspectives – all concepts diminished, suppressed, neglected or even prohibited during the modernity of the law. Late modern European legal history goes beyond the modernity as well as beyond Europe to be able to re-identify the deep structures of the law in our times. Below you find my reflections regarding this turning point within legal history.

Transcontinental legal cultures

Let me start in the Orient, in postcolonial Indo-China, in Hanoi. Fifteen years ago the Lund Law Faculty initiated a *law and development* program in Hanoi/Vietnam aimed to support a rule of law based legal education at the Law Schools in Hanoi and Ho Chi Minh City. The program was financed by the national Swedish development agency (SIDA). This program ran for ten years and is now terminated. We were a bunch of law professors at the Lund Faculty of Law who took on this challenging possibility to participate in an exotic Asian experience. We came from our local teaching obligations at Lund within the late modern Swedish welfare state related to the transnational courts in Luxembourg and Strasbourg. The aim of the project was to export a modern legal education based on the rule of law and human rights to young law teachers in the communist state of Vietnam. It was a great cultural and professional challenge. In retrospect, I regard this experience as a sort of colonial program of our times, where we, the Swedish law professors, (in an unconsciously magisterial way) taught our young Vietnamese colleagues about the superior Swedish law within a European (and even global) context. [2] My task in this project was to give a class in comparative legal history. My Vietnamese students listened with wide-open ears and eyes when I introduced them to some interdisciplinary and/or postmodern theories in comparative law and legal history.

After a couple of days one of my students came up to me in a break and asked me humbly:
– Teacher, what you are telling us, is that right or wrong?

Is that right or wrong!!! My cognitive paradigm experienced an earthquake. I answered him, that it wasn't my task to come to Vietnam to tell him what is right and what is wrong. Too many Westerners had done so before me.

But I will never forget the comment from this Vietnamese student. His comment gave me, to talk with Theodor Fontane, »one of the most significant incidental circumstances in my life« – »einer von den signifikanten Nebenumständen meines Lebens«.

From the Vietnamese student's perspective his question of course was a very relevant one. He was trained within a traditional, hierarchic socialist legal education, in which the students were just to accept that the teacher always told the truth about »the valid law«. The teacher always gave the

1 Duve (2013).
2 Some of my reflections in that respect are published in Modéer (2012).

right answers. In his dogmatically based legal culture there was no place for interactive argumentation within seminar discourses or an alternative jurisprudence in a Western style.

At the same time the student's question gave me a bad conscience. Why hadn't I been more aware of the prerequisites for the Asian students I had to address? Why did I go to Hanoi as a sort of colonial professor of our times immanently imposing postmodern discourses to them without having learnt more of the legal culture into which I was invited? In my defense I presume my colleagues in the fields of positive law were (and are) still more ignorant about this cognitive problem.

My Vietnamese experience, however, has given me a much more humble view of my task as a law teacher. Listen to your students before you introduce your knowledge to them! Especially after having learnt what Jürgen Renn taught us yesterday; in the globalization process the place of local knowledge has to be a matrix.

My Vietnamese students identified their mixed legal system as related not only to Chinese Confucian thought, but also European and American elements. The French code Vietnamese style was adopted in the 1880s and is still regarded as a living ruin of the law. Their elderly law professors had all been trained in Moscow or East-Berlin in Marxist-socialist legal thought, and contemporary American law sipped into the legal cultures not only from the U.S. law firms in Saigon in the south but also through affiliation to global conventions like WTO, and the wish to be a member of CISG, and other UNCITRAL conventions. Several of the students had been trainees at the offices of American law firms. So their cognitive legal system could be identified by legal transplants and legal transfers from ancient times up to today. Legal history is a must if you want to be a part of the global law! My Vietnam experience confirmed Reinhard Zimmermann's metaphor regarding *mixed legal systems* as »a tapestry of many different shades and nuances«.[3] The Vietnamese example became the eye-opener for a fresh historical perspective on the many European legal systems and cultures.

Law and development as a part of the globalization process

Since then I have also learnt more about the relation between *law and development*. The research problems Thomas Duve has indicated in his paper could have had their embryonic phase within the American discourse on *law and development* in the 1960s and 70s. In the postwar era the U.S. State department sent out a lot of lawyers as »missionaries« to teach the U.S. constitution and other American legal phenomena in developing countries. From a critical perspective this experience was much more imposition than reception, and this naïve perspective on how to relate to legal transplants was heavily criticized.[4] Among those who reacted was Lawrence M. Friedman, whom in an often-quoted article with the title »*On legal development*« in Rutgers Law Review criticized the modernization of law as formulated within *law and development*-projects, which aimed to modernize (read: Americanize) the law in the developing countries. It was in this article Friedman used the often quoted metaphor, that »[y]et no one could modernize a country by changing its clothes«.[5] It was in the same article Friedman introduced the modern sociological concept of *legal culture*, which has been so important for the discourses on contextualization of legal history in increasingly transparent and heterogeneous nation states.

This was in the late 1960s, really one of these »context breaking moments« we talked about yesterday. The critics of this first stage of the *law and development* movement belonged to the Critical legal studies movement.[6] And it was those »Crits« who dominated the postmodern postcolonial discourses within American legal history from the 1970s onwards.[7]

Today critical schools have turned mainstream. An American legal historian told me some years ago, that »nowadays we are all Crits, more or less«. The conflict perspective within legal history established by Morton Horwitz in the 1970s introduced a quite new perspective on legal history research of great importance in the Anglo-American legal world.[8]

3 Zimmermann (2001) 158 ff.
4 Trubek, Galanter (1974).
5 Friedman (1969).
6 Salojärvi (2013).
7 Kennedy (2006).
8 Horwitz (1978). Horwitz's *Transformation* had a major influence on the field of American legal history. Cfr. Review Symposium on the 25th Anniversary.

Hybridization of Comparative Law: Comparative Legal Cultures

One important part of this turning point within legal history is the dynamic interpretation of the concept of legal culture, as Werner Gephardt yesterday so brilliantly demonstrated. By bringing in new scales in our time of globalization, comparative law and legal history have merged into a new fascinating and developable discipline: *comparative legal cultures*.

Comparative law is a discipline, which like International Public law has experienced a paradigm shift from the year of 1900. As we heard from Werner Gephardt yesterday, the World fairs introduced global comparisons, and the International Congress of Comparative law was initiated at the World fair in Paris 1900. The famous *Schulstreit* between the two French law professors in comparative law Raymond Saleilles and Edouard Lambert indicated two almost dichotomic positions, one more idealistic and culturally orientated (that of Saleilles) and one more functional and pragmatic (that of Lambert).[9] We all know that Lambert won this intellectual struggle, and that comparative law as well as many other legal disciplines became dominated by the rationalism and functionalism of the modernity of the 20th century. The German Law émigré Ernst Rabel and Max Rheinstein were the successors of this Lambert-tradition.

But the discipline comparative law of today has also passed a new turning point. One can say that the loosers in the *Schulstreit* 1900 have turned out to be the winners of today.[10]

Some years ago I picked two catchwords in the *Yale Journal of Law and Humanities* defining the current trends within the globalization of law: *De*-secularization and *Re*-traditionalization.[11] Those two concepts were defined in relation to modernity. The secularization and the negative attitude to history and tradition belonged to the paradigm of the post-war period. In the 21st century secularization is challenged by multi-religiosity and the visions for the future compete with an increasing consciousness for history, traditions and culture. This transition of attitudes to religion, culture and identity legitimizes to a great extent the need for a context-orientated comparative law and culture-research.

Law and Religion in Historical Contexts

I will continue by demonstrating another example of the implementation of the perspectives Thomas Duve suggests is his article: Legal history in relation to religion. During the modernity of the 20th century, religion became increasingly marginalized, and the secularization process dominated discourses within church law, religious law and law and religion – especially in the Scandinavian countries. The Scandinavian countries belong to the most secularized in the modern world.

Some years ago a Scandinavian project group of theologians and jurists investigated comparatively the Nordic countries and their relation to state and church and the cultural role of religion. The result of this project became an impressive volume on *Law and Religion in the 21*st *Century in the Nordic countries*, published in 2010.[12] All Nordic countries have a long tradition with the Lutheran Evangelical church as a *majority church* in society and as a state religion. The progressive Swedish state, however, left its relation to the church in 2000, and some ten years later Norway made a constitutional reform, implemented in 2014. In a parliamentarian compromise Norway kept the relation to state and church, but gave more autonomy to the Norwegian church. In Denmark a recent commission has worked for about a year to investigate if some changes also should be made in the Danish constitution as regards the relation between state and church. The mandate for this commission, however, has been so limited that just minor changes are expected in the relations between the state and the church in the future.[13] The diversities between the Nordic countries in this area demonstrate to a great extent the differences in the legal cultures in relation to religion. It's time for the legal historians not only to bring church

9 Vogenauer (2012).
10 Modéer (2002), Modéer (2013).
11 French (1998).
12 Andersen, Modéer, Christoffersen (eds.) (2010).
13 Betænkning 1544 (2014).

history and its cultural aspects into its sphere, but also to identify the fundamental Christian societal values on e.g. solidarity, democracy and human dignity, which Robert N Bellah brought up with the concept of *civil religion* already in the 1960s. [14]

Bellah's concept has been increasingly important within the post-colonial constitutionalism of our times. Bellah in his later works returned to the *civil religion*-discourse and has described the role of Confucianism not only in China but in South-East Asia as a whole as a form of re-traditionalization of the legal culture. [15] Bellah argued for a more open and comparative view on the four cultures emanating from what Karl Jaspers called the *axial age* (Achsenzeit; China, India, Israel and Greece) between 800 and 200 BC. Bellah described the ongoing current discourses on Chinese civil religion, »which would not be a state ideology, which would not be legally enforced, but would operate on a voluntary basis as a kind of conversation about the deep sources of Chinese culture and would be open to the rest of the world. So the degree to which the Confucian argument is alive and well in China is very encouraging«, he stated. »It is divided between ultra-conservative or reactionary views and some very open liberal views – views that would have no problem linking Confucianism to human rights and democratic political forms.« [16] This current civil religion discourse underlines the importance of comparative constitutional law as an important field not only from a European but also from a global perspective.

Europe and The Post-Colonial Other

Boaventura de Sousa Santos introduced the metaphor of *legal maps* in his description of the relation between the Western and the post-colonial legal systems, [17] and in the mid 1990s he published an article on the three metaphors identifying legal post-colonialism in his mapping concept of the law in which he identified three postcolonial elements in relation to the Southern hemisphere: The Frontier, the Baroque and the South. [18] He identified a great mental frontier between the North and the South. The culture of the South is in his view dominated by the *baroque*, not only in the artifacts of the Spanish 16th century and its baroque-cathedrals, but also as a metaphor for colonial elements in postcolonial Latin America: The Spanish language, the Roman-catholic church and the formalistic Spanish bureaucracy. The mixed legal systems are, so Santos, diversified and fragmentized and are exposed as »different legal spaces superimposed, interpenetrated and mixed in our minds as in our actions«. [19]

Post-apartheid South Africa represents another interesting example of this diversified law where colonial law is mixed with deep structures of law. Albie Sachs describes the visibility of *Ubuntu-botho* in the contemporary South African constitutional and judicial culture. *Ubunthu-botho* is a concept he finds »intrinsic to and constitutive« of the South African constitutional culture. [20] »Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatized society to overcome and transcend the divisions of the past. In present-day terms«, so Sachs, »it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution …«. Sachs compares the original concept of *ubunthu-botho* with the concept of the *amende honorable* in the traditional Roman-Dutch law. Both share the same underlying philosophy and goal of restorative justice. »Both are directed towards promoting face-to face encounter between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community. In both legal cultures the centerpiece of the process is to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted.« [21] So *Ubuntuism* represents a philosophy in contemporary South Africa with deep roots in history and defined as »humanity towards others« – an immanent *civil religion*. A colleague of Albie Sachs, Justice Yvonne Mokgoro has explained the

14 Bellah (1967); Modéer (2009).
15 Bellah (2011).
16 Joas (2012).
17 Santos (1987).
18 Santos (1995).
19 Santos (1987) 297 f.
20 Sachs (2011) 100.
21 Sachs (2011) 102.

meaning of *ubuntu* as «it envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense, it denotes humanity and morality«. [22]

In a setting of global normativity the South African Ubuntuism and the Chinese Confucianism represent different forms of deep structures like a *civil religion* embedded in constitutional cultures.

Transatlantic interaction within the law

The discipline comparative law is an interesting instrument if you want to study the legal translations of norms from strict legal rules to norms in metaphors. I'm currently involved in a project on what happened within the Scandinavian legal cultures in the post-war period 1945-75. The title of my project is »When the Wind turned from South to West: The Transition of Scandinavian Legal Cultures 1945–1975«. After 1945 when the young generation of legal scholars got the possibility to travel abroad after the war, they couldn't like their predecessors go to Germany, so they turned West and went to the U.K. and the U.S.A. In post-war U.S. they met not only with very dynamic academic legal cultures, they also met with former German law professors, prominent German law émigrés, e. g. Ernst Rabel in Ann Arbour, Max Rheinstein in Chicago, Hans Kelsen, Albert Ehrenzweig and others at UC/California at Berkeley – all of them examples of legal scholars of great importance for establishing international private law and comparative law as important legal fields within the North American law curriculum. The Scandinavian legal scholars also observed the alternative jurisprudence in the U.S. and transformed it into the Nordic legal cultures. So: The transatlantic interaction within the law – including legal history – during this period is a fascinating topic – another example of a context breaking moment in Nordic legal history. [23]

A Roundtrip to Vietnam

When I, with help of my Vietnamese students, identified the Vietnamese postcolonial period, Boaventura de Sousa Santos' legal mapping construct was very useful. The Vietnamese legal culture had several layers of legal culture, first the Chinese, then the French, and from the 1950s Soviet-inspired and then the last 25 years the current global or Americanized legal culture. The Vietnamese legal culture is a salad-bowl of all these cultural elements transferred into the Vietnamese legal culture. The Vietnamese history is visible in its urban legal culture. French architecture still dominates the Vietnamese courthouses constructed in the colonial era. They are drawn by French architects and look like 19th century *Palais de justice*. They are still used for this purpose by the Vietnamese judiciary. In the temple of the court of appeal in Ho Chih Minh City (Saigon) you still can find a bronze of the Goddess of Justice from the French colonial period in the entrance-hall, even if the judges at least since the late 1970s have be trained into a more or less Soviet-inspired legal culture.

My Vietnamese students taught me there are around 70 minorities to be identified in Vietnam. They informed me about the important role of customary law in the territories of these minorities. One of the customary law sayings runs: »The emperor's laws stop at the village's gate«. It meant, the Emperor's law had the general jurisdiction, but in the villages ruled the customary law of the minority. Interestingly enough this customary law jurisdiction of the Vietnamese minorities is still respected by the political institutions. [24]

By turning East, by going to Vietnam and getting insights into the post-colonial legal culture, filled up with foreign legal translations into Indo-China, I brought new perspectives with me back to Sweden and implemented them in my legal education and tried to identify which general forms of transplants and transfers from foreign legal cultures we can identify in that comparison in the Scandinavian countries.

22 Sachs (2011) 107.
23 Modéer (2008).
24 Cfr. the role of traditional courts in Mozambique: Santos (2006).

Conclusion

Thomas Duve's valuable article as well as this inspiring colloquium gives all of us reason to reflect on the future of European legal historical research. Europe of today is not only a part of a common internal European legal history, but also of an external one, diversified – and as my contribution here today witnesses – related to our identity as legal historians and to our personal experiences in the past. Today customary law as well as International Public Law again is an increasingly important legal source, a part of the deep structures of law to be identified. In European legal history comparative private law has had priority. Today however, comparative constitutional law is an upcoming field of study in European legal history. I have taken the metaphor *civil religion* in its different concepts – not only from the West – to demonstrate an example of important globalized legal discourses. The legal deep structures in China, Vietnam, or South Africa are not necessarily emanating from European legal history. But those elements definitively belong to the comparative legal history we have to use if we want to put European normativity into a global setting.

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