DIRITTI COMPARATI
Comparare i diritti fondamentali in Europa

COMPARING LAW THROUGH CONTEXTS AND CULTURE(S). A REVIEW OF "THE METHOD AND CULTURE OF COMPARATIVE LAW. ESSAYS IN HONOUR OF MARK VAN HOECKE", M. ADAMS, D. HEIRBAUT, HART, 2014

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1. The collected essays in honour of Prof. Mark Van Hoecke represents an excellent example of how challenging and multifaceted legal comparison can be. Even though debates on the sense and aim of the comparison in legal studies engage scholars of private and public law since ages, the volume entails the potential to offer a new insight on that field. First of all the original choice of the editors deserves some explanations, as they opted not to reproduce classical approaches for honour book (this attempt is without any doubt remarkable and it is something of interest for the legal science as a whole): they decided to focus their attention on one of the many themes with which Professor Van Hoecke along his intense career has worked on. His scholar interests namely range from private comparative law to philosophy of law including highly remarkable works concerning constitutional issues. Well, the method of comparative law occupies a central place within such a large set of works: one should, recall here some recent works such as "Deep level comparative law" or "Legal cultures, legal paradigms and legal Doctrine: towards a new model

for comparative Law" (coauthored with Mark Warrington) where Van Hoecke argued for studying comparative law through a cultural, contextual and realist approach, without limiting the analysis to the positive law and its technicalities.

Then, it is understandable why editors added a really demanding concept to the title of their volume, such as that of culture or, better said, "the *culture of actually doing comparative legal research*"which is defined as "a deep level analysis" that "goes far beyond mere fact-binding and the regular self evident way of interpreting and understanding the law" (p. 4). This can be considered the "manifesto" of the book, as it is really coherent with all the chapters, that have successfully been gathered around this purpose: even though they reflect different approaches and deal with several themes, one can observe a common engagement, allowing them to go beyond mere description of legal systems, digging into trends, contexts, traditions and cultures of law.

The very clue of such a conception can be found reading the table of contents: the absence of a parts/sections division helps to muffle the fractures that can affect a collection of essays and to strengthen the sense of unity of the work; nevertheless some articles grapple with common issues such as those centered on history of law, or others on public and European law.

As far the content is concerned, the book is able to unify current comparative problems (i.e., comparison as a method or science; functionalism; comparison between Europeanization of law and globalization) to unconventional matters (i.e. law and translations; juridical epistemology; economic crisis and comparison), that make the work comprehensive and original.

2. Having considered the vast subjects and the several issues the book encompasses (and the limited competences of the reviewer) it seems proper to limit the review to just some of its contents.

The relevance of contexts, cultures, experiences and complexities for the comparison are eloquently explained in the work of Ost, offering an

insightful parallelism – among others – between translation and comparative law. Both of these issues seem to be namely affected by common criticism such as the impossibility of translating/comparing or, conversely, mechanical language transfers/legal transplants. However, more deeply, and as Professor Ost himself remarks, it is now increasingly hard to keep juridical orders separated since they are "hybridizing themselves in a thousand and one ways" (p. 76) and comparative law can persuasively be described as "the study of an "integrated law" (*ivi*; quoting Glenn *Vers un droit comparé intégré*, RIDC, 1999). Nonetheless, the spread of foreign law doesn't occur without tensions, if one considers that the path towards a globalised law implies that imbalances among states and institutions have a normative projection, observable in the imposition of one juridical order over the others.

Furthermore, his analysis goes even further, representing a theory of translation that involves the juridical phenomenon as a whole, which can be summed up by noticing that the discourse on "the same and the other" is indeed something of unavoidable in law: one should recall here the similarities between translators and judges, both committed to further acts of recognition between two "alterities" (p. 86).

3. Comparison allows to get deeper findings, and that aim, according to Pihlajamaeki, is quite visible in the field of legal history ("comparison thus draws attention to causes that one might otherwise have missed", 118). Studying legal history through a comparative perspective instead of a "purely national history" can help to explain why a certain legal phenomenon occurs here and not there (he adds as an example the weak transplant of notary in the Nordic countries). So, one can add, foreign law brightens internal legal experiences from an external side, increasing its heuristic potential. Then, the invitation of this author to deepen the importance of peripheries instead of centre areas when one reflects on European integration is particularly remarkable. Furthermore, he maintains that talking about Europe needs to deepen also what is left outside European traditions, such as Islam or Chinese law: this perspective could allow to resist not only Eurocentrism but also a sort of

Eurocentrism from the centre.

The works of Loehnig and Wijffels are focused on history and comparison as well: the former stressing the relevance of comparative legal history which focuses on transformation of social processes and cultural context calling it the “acid bath of comparative legal history”; the latter exploring the meaning of the *jus commune* for law comparison.

4. Coherently with the multiple interests of Van Hoecke, two essays deal expressly with public and constitutional law (maybe, though, adding an essay on the importance of administrative comparative law could have increased the merits of the work) and both of them are of particular relevance for this blog, since they concern commonly discussed topics, such as the legitimacy of constitutional courts (Moonen, pp. 269 ff.) and the protection of fundamental rights (Millns, pp. 283 ff.). The first was namely the object of a work of Van Hoecke’s (“Judicial review and Deliberative Democracy”) and analyzes one of the most controversial issues in constitutional court studies regarding, generally speaking, the relationship between pluralism and the separation of power doctrine. According to Moonen, courts should take a deliberative approach to strengthen the possibility of its public acceptance. He considers sharply that “the challenge posed by constitutional review, then, is not as much its counter-majoritarian character ... the challenge is in the delimitation of those condition, which in practice form the outer limits of ordinary, majoritarian legislative discretion”. In order to understand the legitimacy’s deficit of the courts it doesn’t seem anymore satisfying to limit concerns on the counter-majoritarian difficulty, but it is necessary to think about the responsiveness of courts and to consider that they do not work isolated from social and political transformations, in as much as they are immerged in a wider context of interpretation of constitutional norms, which is animated by actors others than judges (here the mind runs to the “open society of the constitution's interpreters” of Peter Häberle). Therein, comparative reasoning represents not just an useful toolbox to reinforce some legal grounds (or to advocate for legal transplants) but it is an experience of self-enlightenment as long as it connects judges to different

ways of life; that is of particular advantage in sensitive areas such as that of new rights: it is probably not due to a mere coincidence if rulings on sexual orientation and on the recognition of same-sex marriages often do contain foreign examples.

At this regard, the analysis of Millns focuses on the specific relationship between fundamental rights and comparison (and in this sense the two essays seem to compensate each other) arguing for a contextualization of fundamental rights discourse beyond the nation State dimension. Without underestimating the fact that comparison involves tensions ("conflicts of interpretation are inevitable and are not in themselves a bad thing"), she calls for a "comparative dialogue" whose relevance, as the author mentions, emerges particularly in the development of the European integration (i.e., for what concerns the concept of common constitutional traditions of the Member States). On this, one has to refer also to the interesting article of van Gestel and Micklitz exploring the limits and the potential of the use of comparison by European legislators.

5. Finally the importance of a contextual and comparative approach in the European public sphere is maybe even more openly addressed by Bengoetxea who faces the multiple crisis of European integration (not only the economic one but also that social and cultural): "this is a crisis of the social welfare systems, and therefore also a crisis of identity of Europe" (p. 261).

In particular the conclusion of the article seems to have insightful implications for the relevance of comparison for pluralist societies, when it shows that the openness of the comparison involves not only the studying of law but also a more inclusive perspective of the society itself, thus: "it becomes pressing to understand diversity within Europe … it is necessary to study all dimensions and their interaction from a comparative law and society perspective" (p. 266). This latter statement resembles what Hoecke and Warrington have called "the comparative law as an instrument of integration" ("Legal cultures", cit.), and that seems of particular relevance when exploring the projection of that method onto the comprehension of the social transformations and to set a bridge

between scholars and reality.