TRENTO E LA COMPARAZIONE GIURIDICA: VOCI, ESPERIENZE, RIFLESSIONI. DALLA TESTIMONIANZA DI RODOLFO SACCO E MAURO CAPPELLETTI

a cura di
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BETWEEN ETHNOCENTRIC ASSUMPTIONS AND GEOPOLITICAL CHANGES

Luca Pes

1. Introduction

I am very pleased to take part to the panel «The West and the Rest: comparative law and legal traditions» and to share my thoughts on this topic[1]. I found all the contributions very stimulating and I look forward to the questions and the discussion from the floor.

It will be hard to draw some conclusions, considered that the panel tackles such a broad topic and that the contributions have been so rich, but also diverse in their approach. Therefore, my intervention will be structured around some comments to the papers that have been presented in this session, with the aim to find common threads and shed some light on the subject.

2. The influence of the German model of legal reasoning in the Chinese civil code

I will start from the topic of the new Chinese Civil Code. This is one of the most recent and advanced efforts of codification of private law in the world[2]; and interestingly, it is also the first civil code to be adopted by the People's Republic of China since its establishment in 1949[3].

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[1] This contribution was originally prepared as a discussion in my intervention as a discussant of three papers, which unfortunately are not included in this volume. While I tried to report as much as possible on their content, some passages inevitably refer to such unpublished interventions.

[2] The Civil Code of the People's Republic of China came into force on 1 January 2021. An official translation in English is available on the website of the National People's Congress of the People's Republic of China (*http://www.npc.gov.cn/englishnpc/*).

The Code replaces a special legislation in the field of private law, which started to be passed in the aftermath of the Cultural Revolution (marked by the *anti-rightist* movement of Mao Zedong), as part of the economic reforms of the Deng Xiaoping era (since 1976) that made China the fastest growing economy in the world and the second largest after the US[4].

The relevant contribution presented in the panel analysed the influence of the German model on the new Chinese Civil Code, first by focusing on the *structure* of the Code and then by considering *softer means* of influence, such as legal education.

The analysis conducted on the *structure* of the Code concludes that differences are outweigh similarities. A number of innovations and deviations from the German model find their cause in "path dependency" from the special legislation which was passed over the last 40 years before the Civil Code. This legislation did not necessarily reflect *European* legal models, but it was responding to «Chinese social needs», as put it by the author Jun Xue. I would add that, from the standpoint of comparative law, this legislation also reflects the rule of «political law», as different from the rule of *professional* law, according to the characterization suggested by Ugo Mattei in its essay *Three patterns of law*[5].

Among many analyses in the international literature, see the special section of *Asia Pacific Law Review*, 2, 2021 entitled *The Chinese Civil code*, particularly L. CHEN, *Continuity and change: some reflections on the Chinese Civil Code*, in *Asia Pacific Law Review*, 2, 2021, p. 287.

[3] L. CHEN, C.H. VAN RHEE (eds.), *Towards a Chinese Civil Code: Comparative and Historical Perspectives*, Leiden, 2012.

[4] I. CARDILLO, Y. RONGGEN, *La cultura giuridica cinese tra tradizione e modernità*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 1, 2020.

[5] U. MATTEI, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, in *The American Journal of Comparative Law*, 1, 1997, p. 5. For a reappraisal of this characterization in the light of technological transformations and the COVID crisis, see U. MATTEI, L. GHANGUA, E. ARIANO, *The Chinese Advantage in Emergency Law*, in *Global Jurist*, 1, 2020.

So, although it was *inspired* by the German BGB (just like other civil codes in east Asia and elsewhere)[6], the new Chinese Civil Code is not a copy of its German model, mainly because it was not made from scratch. Its drafting was aimed at unifying, reforming and renewing the already existing special legislation. Its technical solutions are best understood as a compromise between the German model and the legislation preceding the Code.

Nonetheless, the second part of Xue's analysis has argued that Chinese law is under the heavy influence of the German model because of soft means of diffusion and imitation of the «German model of legal reasoning». This is recognisable in a variety of domains: in scholarly work (style of legal research, book translations, etc.), in legal education and in the career of law professors, with significant numbers of German-trained legal scholars working in the most prestigious Chinese universities and serving also as legal advisors to the Chinese government and legislator, as opposed to US-trained Chinese lawyers, mostly inclined towards a professional career in law firms.

Such an approach invites to push comparative legal research beyond an exclusive focus on most iconic sources of law (such as the civil code in Western legal thought), by re-considering dynamics of legal transplants by *prestige*, especially by means of legal education. This topic has been investigated quite extensively in comparative legal literature, from Alan Watson's *Legal Transplants*[7] to the more sophisticated sociology on the reproduction of elite groups of professional lawyers by Yves Dezalay and Bryant Garth[8].

What I would like to point out as a possible theme for the discussion is the geopolitical context in which the influence of the German model on Chinese private law is taking place.

No matter how prestigious we may believe the German model of legal reasoning (and there may be, I suspect, an ethnocentric bias in this

[6] T.F. CHEN, *Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution*, in *National Taiwan University Law Review*, 6, 2011, pp. 389 ff.

[7] A. WATSON, *Legal Transplants: an approach to comparative literature*, Edinburgh, 1974.

[8] Y. DEZALAY, B. GARTH, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago, 1996.

belief), we are dealing with a borrowing country (China) which is by now an established super-power in geopolitical terms, in an emerging new world order unfolding from the war on Ukraine, in which European countries (and the European Union) seem to have lost much of their weight. This is somehow puzzling.

What would drive China to take inspiration from German law in designing and enforcing its Civil code? Perhaps «path dependency», that is the historical influence of German legal thought in east Asia? Or the fact that, among the civilian jurisdictions, that is among the "compatible donors" of legal models to be transplanted in China, Germany is the largest economy, the fourth largest in the world?

And finally, how should we represent this process of legal imitation or borrowing? Does the metaphor of «legal transplants» still hold any heuristic value, with its implicit parallel between legal systems and human biology? With its implicit hierarchy between donor and recipient of legal models circulating by prestige?

3. Human right as a transnational constitutional core in the recent process of constitution making in Chile

The second topic discussed in the panel brings us in the realm of public comparative law, by addressing the issue of constitution making in Chile.

Similarly to the Chinese Civil code, this is a very recent process of law making, although less successful than the latter in its outcome: in fact, the constitutional proposal drafted by the Chilean Constitutional Convention was eventually rejected in a popular referendum by an overwhelming majority[9].

An analysis of this topic brings almost inevitably to the discussion of the multiple *causes* of this failure; however, the contribution discussed in the panel (by Raoul Letelier Wartenberg), shifts the focus on the more specific subject of the use of foreign legal models in constitu-

[9] For an overview of the Chilean constitutional process, see G. GÓMEZ BERNALES, *Revisión y crítica al proceso constitucional chileno*, in *Revista "Cuadernos Manuel Giménez Abad"*, 23, 2022, p. 106.

tion making processes; notably human rights as a «transnational constitutional core», a sort of standardized basic content which is expected in any Constitution of new generation in the world.

The hypothesis – which seems to be verified as true in the end – is that the reference to this transnational constitutional core of human rights has brought confusion and disunity within the Chilean Constitutional assembly and more broadly in the public debate about the constitutional draft, ultimately favouring the status quo and fostering the rejection of the proposal.

This outcome is explained by a sort of clash between the expectations raised by the transnational order of human rights, with its vague language, and the understanding of what those rights should actually mean in the national context.

In so doing, Letelier Wartenberg provided interesting details on the political tensions within and outside the Chilean Constitutional assembly; on the composition of the assembly, with more than one half of the members being independent from political parties and «radically rejecting the main current policies and political structures»; and finally, on the extremely polarized and yet unbalanced composition of the assembly, with right-wing members counting less than one third of the seats and being de facto excluded from decision making.

4. The representation of African law between ethnocentric biases and geopolitical interests

The third subject discussed in the panel (with a paper by Salvatore Mancuso) requires a somehow more theoretical approach. It deals with the general representation of African law in comparative legal literature, trying to move forward from an understanding of African legal systems as bounded entities, often dubbed «pluralistic» but invariably described as derivative from Western law, that is the law of the former colonial powers. Perhaps, this approach resonates quite well with the theoretical preoccupations concerning the representation of Chinese law discussed above.

In order to refresh the way comparative lawyers should look at African legal systems, Mancuso has proposed to take a «geopolitical approach», based on the consideration that law: «is an instrument of hegemony and economic influence for the powers that play their geopolitical games in Africa».

The geopolitical dimension of law has been the object of several works in comparative legal literature, with a focus on the ethical and political dimension of representing differences and similarities among the legal systems of the world, for example by Frankenberg[10], Bussani[11], Monateri[12] among others. Here, however, Mancuso seems to react to common representations of African law based on the mantra of «legal pluralism», and to a lesser extent, on the so called «stratigraphic approach» inaugurated by Rodolfo Sacco in its seminal studies in the horn of Africa[13].

To be sure, both concepts are still fundamental tools for the understanding of African law, but over time perhaps they have been quite overused, to the point of losing part of their heuristic value. In particular, the stratigraphic approach, while remaining a valuable method for the study of African legal systems in a structuralist fashion, ultimately fails to capture the more dynamic dimension of legal relations (and the agency of legal subjects), better conveyed by the notion of legal pluralism.

What Mancuso is calling for, in the end, is the adoption of a «contextual method». Which, as a student of African law myself and a researcher trying to combine law with anthropology, I entirely subscribe to.

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[10] G. FRANKENBERG, *Comparative law as critique*, Cheltenham, 2016.

[11] M. BUSSANI, *Il diritto dell'occidente: geopolitica delle regole globali*, Torino, 2010.

[12] P.G. MONATERI, *Geopolitica del diritto: Genesi, governo e dissoluzione dei corpi politici*, Bari, 2013.

[13] R. SACCO, *Introduzione al diritto privato somalo: Un paese africano inizia l'edificazione del socialismo*, Torino, 1973; ID., *Le grandi linee del sistema giuridico somalo*, Torino, 1985; ID., *Di alcune singolari convergenze fra il diritto ancestrale dei berberi e quello dei somali*, in *Africa: Rivista trimestrale di studi e documentazione dell'Istituto italiano per l'Africa e l'Oriente*, 44(3), 1989, p. 341; ID., *Il diritto africano*, Torino, 1995 (2nd ed. 2000).

5. Conclusion

I wish to turn this call into the conclusion of my talk, by declining it on a more general ground.

I think that the three subjects discussed in this panel, invite us to adopt a less orthodox, perhaps more «sceptical» style of comparative law[14]. Looking at mainstream comparative legal literature, the Western-minded representation of «non-Western» legal traditions is still plunged into ethnocentric assumptions of Western superiority.

Even by overlooking the last 50 years of critical theory on the way «the Rest» is represented by «the West»[15], with little curiosity for what the «resterners» do think, say and write about Western models of thought (including legal models), the attitude of Western superiority is simply no more attuned to the relative weight, in geopolitical terms, of the Euro-American model of society compared to the rest of the world.

In this context, it is increasingly apparent that Western-minded ethnocentrism is a sign of parochialism (the opposite of comparative law), as Western supposed superiority gets challenged even in the most material and mundane domains, like information technology, surveillance and the power to wage war; not to say in the more spiritual domain of culture, in which all civilizations must deserve the same attention.

[14] G. FRANKENBERG, *Comparative law as critique*, cit.

[15] E. SAID, *Orientalism*, New York, 1978; L. NADER, *What the Rest Think of the West: since 600 AD*, Berkeley, 2015.