COMPARATIVE LAW CHILEAN BLOG

With a Twenty-Year Delay, Cinderella has Finally Arrived at the Ball

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"Comparative Law is *en vogue*", claimed Ralf Michaels almost twenty years ago,[1] referring to the conference that took place in New Orleans in 2000 to celebrate the centenary of the first International Congress of Comparative Law. Now, two decades later, the same can be said with regard to Chile: as evidenced by the recent creation of the Chilean Network of Comparative Law,[2] in our country, Comparative Law as a discipline has finally achieved sufficient maturity and critical mass that it may now take on an organized and institutional form.

There are plenty of reasons to look beyond the boundaries of national law and venture into foreign legal systems and ways of thought. These typically include the academic interest in understanding a given legal institution and the practical need to solve a concrete case or enact a new statute. However, in a globalized world, there is also a simpler and more existential motivation: not missing the party. As J. H. Merryman observed, "lawyers are professionally parochial. Comparative law is our effort to be cosmopolitan".[3]

Despite its undeniable intellectual attraction, Comparative Law has historically lacked a well-established place within the realm of legal sciences. In the most extreme case, as André Tunc has argued, 'if there is anything clear, it is that Comparative Law does not exist'. This might seem an exaggeration, but there is little doubt that, until recently, such a statement would have resonated in the Chilean legal community. The impact of this skepticism should not be underestimated. It is a known fact that comparative lawyers -whatever their origin- have frequently suffered an inferiority complex that fills them with doubts regarding the academic status of Comparative Law: is it really a discipline? Is it not a method or, maybe, only an approach?

Uwe Kischel has recently argued[4] that the uncertainty that surrounds this discipline is because it is not possible to explain what Comparative Law is without accounting for what it does; but, in turn, it is also hard to have a notion of what Comparative Law does, without knowing what it is. Therefore, maybe the best way to convey an idea of what Comparative Law is, is by means of an historical overview of its development. Comparative studies of different domestic legal systems have existed, at least, since the emergence of the nation-states.

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[1] MICHAELS (2002).

[2] https://www.redchilenadederechocomparado.cl/

[3] MERRYMAN (1999).

[4] KISCHEL (2019).

However, there seems to be widespread agreement that the symbolic birth of modern Comparative Law was at the International Congress of Comparative Law that took place in Paris in 1900. The Congress was inspired by the optimistic spirit of the time, including setting a framework for nothing less than a common law of mankind.

After the First World War, Comparative Law revived in a more skeptical but also less naïve environment. Vaguely inspired by the ideas of functionalism[5] that had dominated scientific thinking since the end of the 19th century, led by Ernst Rabel, a second generation of comparative lawyers shifted the focus from the formal language of the system's rules to the concrete practical problems those texts aimed to solve.[6] In this way, the attention on how different legal systems solve the same real-life problems provided a method to analyze legal institutions developed in completely different contexts by identifying their 'functional equivalence'. Under the decisive influence of Zweigert and Kötz,[7] a hundred years later and despite significant criticism, this paradigm continues to dominate comparative legal research.

During the second Postwar, Comparative Law experienced a consolidation process in the industrialized countries of the West. In Europe, where the discipline already enjoyed a recognized status, this process was propelled by unification and harmonization of Private Law,[8] while in the United States, comparative research gained visibly with the creation of the American Journal of Comparative Law.[9] Since then, the horizon of Comparative Law has never ceased expanding. Starting in the 1970s, a variety of new themes emerged. On one hand, an array of views that Mathias Siems has grouped under the label of 'postmodern' approaches[10] challenged the scientific neutrality and eurocentrism of the functional method and argued in favor of emphasizing the complexity, diversity and cultural dependence of the law. On the other hand, the evolutionary interaction between legal systems became a central object of study, especially after Alan Watson's Theory of Legal Transplants[11] and Otto Kahn-Freud's work on the uses and misuses of Comparative Law.[12]

Finally, starting in the late 20th century, thanks to the democratic transitions of Central and Eastern Europe, South Africa[13] and, more recently, the Arab Spring,[14] Comparative Law left its traditional prejudices against the political nature of Public Law behind, giving rise to the development of "constitutional engineering",[15] aimed at developing the best constitutional arrangement for a given historical context. According to Mark

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[5] MICHAELS (2019).

[6] GERBER (2001).

[7] ZWEIGERT & KÖTZ (1998).

[8] ZIMMERMANN (2006).

[9] REIMANN (2002).

[10] SIEMS (2018).

[11] WATSON (1974).

[12] KAHN-FREUND (1974).

[13] TUSHNET (2019).

[14] CLAES (2012).

[15] FRANKENBERG (2012).

Tushnet,[16] in this process, Comparative Constitutional Law has become a self-sustaining discipline, no longer dependent on external events for its development.

Despite its 120 years of evolution, Comparative Law still has important pitfalls, including a persistent methodological weakness, an apparent incapacity to look beyond Europe and the United States and problems in engaging with those outside its own circle. Latin America illustrates the successes and failures of Comparative Law especially well. Since the beginning of the 19th century and during all of the 20th century, the Latin American republics have been enormously open to the influence, first, of Continental Europe and, later, of the United States. In this line and from a comparative perspective, Jan Kleinheisterkamp[17] has highlighted the high degree of authority that Latin American legal culture attributes to foreign law and López-Medina has even put forward[18] that Latin-Americans suffer from a 'Cinderella complex' that makes us especially receptive to legal transplants. Even more, Rodrigo Momberg has recently declared that "historically Latin America law is a product of comparative law".[19]

Notwithstanding, or maybe because of this, Latin America has traditionally enjoyed only a secondary place in the global panorama of Comparative Law. In short, the law of this region tends to be seen as a mere affiliate of the Roman-Latin legal family, headed by French Law, with few original elements of its own to contribute to the wider discussion. The marginal place of Latin America in Comparative Law has been deepened by the many methodological problems of the process in which the national legal systems of this continent have received foreign legal experience. For example, Kleinheisterkamp reports that the interaction of Latin American legal systems with foreign law has too often depended on random factors, including linguistic capacity, contacts abroad and the personal library of the law's draftsperson, while comparative sources are frequently cited with insufficient reflection, thereby distorting domestic law.

However, those days seem to be behind us. From the dawn of the 21st century, comparative research has started to consolidate itself as a mature legal discipline in this region, with the Principles of Latin American Contract Law (PLACL) its most tangible outcome. Under these conditions, one of the main challenges for Comparative Law is to enter into a meaningful dialogue with the multiple legal communities of Latin America, including legislators, judges, lawyers and law students. Considering the role that some Chilean legal scholars have played in the development of the PLACL,[20] the emerging interest in the methodology of Comparative Law,[21] the large number of Chilean students that purse graduate studies abroad each year, and the openness to globalization that the country has shown over the last 30 years, Chile finds itself in a privileged position to play a leading role

[16] TUSHNET (2018).

[17] KLEINHEISTERKAMP (2019).

[18] LÓPEZ-MEDINA (2012).

[19] MOMBERG URIBE (2014).

[20] DE LA MAZA *et al.* (2017).

[21] FERRANTE (2016).

in facilitating this dialogue. In this context and following some successful British models[22] (another legal transplant), this blog has been created as an initiative of the Chilean Network of Comparative Law, aiming to facilitate the interaction of all those who are interested in developing, promoting and spreading the study of Comparative Law in Chile and the rest of Latin America. The invitation to post on our blog is open.

[22] https://ukconstitutionallaw.org/blog-how-to-use-it/

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