Does Interculturalism matter in legal studies?♦

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Abstract: Does Interculturalism matter in legal studies? – This short foreword describes the incipient rise of interest in legal studies for the concept of interculturalism, through the analysis of relevant literature. The legal approach to this subject-matter is compared with the much broader and structured use of the concept by other social sciences. It is finally suggested to consider interculturalism as an inherent methodology of comparison.

Keywords: Interculturalism; Intercultural Constitutionalism; Interdisciplinarity; Legal Pluralism; Cultural Conflicts.

Since the entry into force of the 2008 Ecuadorian Constitution and the 2009 Bolivian Constitution, the adjective "intercultural" has obtained formal recognition as a legal term. In fact, these two Constitutions have been the first binding normative documents[1] to have characterized both the whole State (art. 1 of both texts), as well as different constitutional rights, as "intercultural". This fact alone could justify a scientific interest on the question that we have selected for this section of the Review. Of course, even before the recent Andean Constitutional wave, legal scholars had already focused on this emerging concept. In the Italian literature, for instance, Mario Ricca has been focusing on intercultural law for many years, publishing two fundamental books in 2008[2]. However, the discourse on interculturalism, at least until the two constitutional events mentioned above, had seen mainly philosophers and social scientists taking the scene. In Latin America, the sociologist Catherine Walsh has dedicated her scientific research to "interculturalidad" since the beginning of the new century[3]. In Canada, where the

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[1] The Committee of Ministers of the Council of Europe released in 2008 the *White Paper on Intercultural Dialogue*, that nonetheless is not a binding document.

[2] *Oltre Babele: codici per una democrazia interculturale*, Bari, 2008; *Dike meticcia: rotte di diritto interculturale*, Soveria Mannelli, 2008.

[3] See, among others, *Interculturalidad, descolonización del Estado y del conocimiento* (with Alvaro García Linera and Walter Mignolo, Buenos Aires, 2006); I*nterculturalidad y colonialidad del poder: Un pensamiento y posicionamiento otro desde la diferencia colonial*, in S. Castro-Gómez, R. Grosfoguel (eds), *El giro decolonial. Reflexiones para una diversidad epistémica en el capitalismo global*, Bogotá, 2007); *Colonialidad, conocimiento y diáspora afro-andina: Construyendo etnoeducación e interculturalidad en la universidad*, in E. Restrepo, A. Rojas (eds), *Popayán Conflicto e (in)visibilidad. Retos en los estudios de la gente negra en Colombia*, Cauca, 2004.

major literature on multiculturalism has been produced, Will Kymlicka, Charles Taylor and Gérard Bouchard have animated the debate in the last decade. Since the adoption of the "Intercultural Constitutions" of Latin America, many legal scholars have joined the dialogue, from all over the world.

However, scepticism, if not open critique, has always characterized the approach of most legal scholars towards the colleagues who used the term to describe an alternative way to tackle the problems arising from cultural pluralism in modern society. After decades of production of legal literature on multiculturalism as the framework for the co-existence between different nationalities or interest groups in Western legal systems, discarding it seemed almost heretic. Even more so, when the new term did not correspond to any rule, norm or principle ever enforced by legislators or judges. It seems nothing more than a seasonal fashion, a novelty that eccentric lawyers in search of new appealing labels had borrowed from anthropology, sociology and linguistics. In fact, in these sciences, the intercultural approach had already been developing since long, in particular in the field of education and bilingualism[4], pushed firstly by colonial studies and then by migration flows[5].

Since the constitutionalization of interculturalism, this objection has at least been knocked down, but still remains the problem of defining the true prescriptive meaning of interculturalism, and its borders with respect of multiculturalism. Social sciences focus on man's attitude, so they have a more pragmatic, problem-solving approach to social phenomena and could use a descriptive terminology to describe them. The prefix "inter" describes a situation quite different from that represented by "multi": even if both are related to cultural pluralism, the first one implies a shift from a hierarchical to a horizontal relationship, and from a set of closed and self-referential communities to an open and dialogical context, where bridges are built between the different cultural isles, like the canal system in Venice. But if for social sciences the description of a different approach to understand reality can be considered a new scientific paradigm, its impact on legal studies still lacks the necessary elements to transform it into a normative one. In fact, interculturalism, as well as multiculturalism, do not correspond to a legal position or to a subjective right, interest or duty; nor to a procedural action. If we consider some of the definitions proposed by social sciences[6], it is more likely a

[4] See, for instance, the following studies commissioned by the Council of Europe: D. Coste, D. Moore, G. Zarate, *Plurilingual and pluricultural competence (With a Foreword and Complementary Bibliography, French version originally published in 1997). Studies towards a Common European Framework of Reference for language learning and teaching*, 2009; M. Barrett, M. Byram, I. Lázár, P. Mompoint-Gaillard, S. Philippou, *Developing Intercultural Competence through Education*, Draft 10 (Final) – 13 January 2013.

[5] Only to give an hint of the main literature see R. Panikkar, *Pluralismo e interculturalità. Culture e religioni in dialogo*, Milano, 2009.

[6] G. Buchard, *What is Interculturalism?*, in *McGill LJ*, n. 2, 2011, 448: «while fostering respect for diversity, the model favours interactions, exchanges, connections, and intercommunity initiatives. It thus privileges a path of negotiations and mutual adjustments, but with strict respect for the values of the hast society as inscribed in law or constitutional texts and all while taking into account the so-called shared values of a common public culture. A spirit of conciliation, balance, and reciprocity presides over the process of interaction at the heart of

methodology, that can be used to interpret legal situations or concepts, when the social context is characterized by cultural pluralism as a matter of fact (regardless of its origin). Borrowing from Enrique Dussel[7], interculturalism requires the lawyer not to be one-sided, but to stay "in between" the different legal traditions of the world. Depending on the formant that applies it, it can be used as the basis for a new legal theory (by legal scholars), a principle (by the constituent or the legislator), or a hermeneutic criterion (by the judge). Even if many legal scholars continue to pretend that we are talking about a void concept, in my opinion, the real question implied by the definitional objection remains somewhat hidden. In fact, accepting that interculturalism matters for legal studies, forces lawyers to re-think and re-discuss the theoretical foundations or the definitions of many traditional and already set concepts and categories, such as the theory of State, not to mention that of "fundamental rights" (what does it means to reconsider equality and dignity in intercultural terms?).

In a first attempt to analyse the legal implications of the constitutionalization of interculturalism in Ecuador and Bolivia, I suggested that the extensive use of the concept, both as a qualification of the State, as one of the fundamental principles that had inspired the constituent process, and as an interpretative criterion for the implementation of many constitutional rights, could lead to the recognition of a new form of State[8]. As for Ecuador, the thesis found consistency in the case-law of the Constitutional Court, in particular during the tenure of judge Nina Pacari. As the first judge with indigenous origins, she was really engaged with the enforcement of the "intercultural State" provision, and contributed to the creation of a very detailed "test of interculturality", to be used by ordinary courts in cases involving the enforcement of constitutional rights of indigenous people (decision n. 008-09-SAN-CC, 9 December 2009).

In a recent volume, Salvatore Bonfiglio has suggested that the concept of interculturalism affects the theory of constitutionalism, legitimizing a new theory of fundamental rights. Considering the objection of ethnocentrism in the theory of human rights, he claims that intercultural law, that is a «positive approach of openness and cultural respect» can be a useful instrument to overcome the critique. For this author as well, «it becomes necessary to show how pluralism,

interculturalism»; G. Ramón Valarezo, *Plurinacionalidad o interculturalidad en la Constitucion?*, www.cebem.org/cmsfiles/archivos/plurinacionalidad-19.pdf: «la construcción de una sociedad intercultural no solo demanda del reconocimiento de la diversidad, su respeto e igualdad, sino plantea la necesidad de desterrar el racismo de manera activa, promover negociaciones permanentes entre los diversos para construir nuevas síntesis (inter-fecundación), lograr una compresión plural de la realidad, canalizar los conflictos y construir un futuro equitativo e incluyente».

[7] E. Dussel, *Modernità e interculturalità per un superamento critico dell'eurocentrismo*, Caltanissetta-Roma, 2012, 74.

[8] S. Bagni, *Lo Stato interculturale: primi tentativi di costruzione prescrittiva della categoria*, in S. Bagni, G.A. Figueroa Mejía, G. Pavani (coords), *La ciencia del derecho Constitucional comparado. Libro homenaje a Lucio Pegoraro*, Tomo II, México, 2017, 111 ff.

understood mostly as *a way of thinking*, influences the study of law and rights»[9] (emphasis added).

Another research deeply concerned with interculturalism, even without mentioning the word in the title of the collection (but it appears many times in the specific contributions), is the one coordinated by Kyriaki Topidi, *Normative Pluralism and Human Rights. Social Normativities in Conflict*[10]. Here the approach is not only theoretical, but much more empirical and related to the law in action. The purpose of the book is not to formulate a comprehensive theory on human rights, but to suggest enforceable instruments to tackle and solve legal conflicts arising from cultural/normative pluralism. The premises from which the research starts is that cultural diversity can be understood only through an interdisciplinary approach, that helps reconstruct the different normativities that each situation generates. The *fil rouge* among all the articles is «that conflicts of various kinds, including clashes of values, seem unavoidable but may be tackled by constructive dialogue» (W. Menski, *Introduction*, p. 12). This statement leads exactly to interculturalism as a tool to conflict management, as suggested by Pierluigi Consorti in his chapter in the same volume[11]. The research covers a huge number of different situations, both geographically (India, Israel and many European countries are considered) and sociologically (it concerns conflicts generated by religious, ethnical, linguistic, social, cultural, gender issues). Applying a case-method, the book goes through the different stages of conflict management (preventing, articulating, processing, solving), proposing to the reader a toolkit of instruments taken from the comparative analysis, that include interculturalism. Whether explicitly mentioning it or not, all the contributors suggest that self-consciousness of cultural and legal pluralism, active dialogue and empathic communication between the various actors of the conflict are the key instruments to solve conflicts on a consensual basis, to eventually prevent them or, as for the case may be, to accommodate them.

Another consequence of assuming the intercultural perspective when thinking and applying the law, is the possible change in the relationship between jurists and State legislators. In the last century, legal scholars, including most comparatists, have more and more renounced being active formants of legal systems, as was the case in many cultures where scholars are still conceived as such (let us think of Jewish or Islamic Law for instance). They have abandoned the role of suggesting innovative solutions to tackle legal problems, only to play the part of commentators of the existing law. With all evidence, in an historic moment where walls to divide peoples have been built anew, taking interculturalism seriously is a very demanding ideological programme, both for legal scholars and for politicians. It means putting your own person, including your professional

[9] S. Bonfiglio, *Intercultural Constitutionalism. From Human Rights Colonialism to a New Constitutional Theory of Fundamental Rights*, London/New York, 2019, 79 and 81.
[10] K. Topidi (ed.), *Normative Pluralism and Human Rights. Social Normativities in Conflict*, London/New York, 2018.
[11] P. Consorti, *Multiculturalist conflicts and intercultural law*, in K. Topidi (ed.), *op. cit.*, 221 ff.

reputation, in the front line of a war of civilization, that few people seem today to be willing to fight.

Another challenge that interculturalism poses to lawyers, and that makes them extremely uncomfortable, is the necessity to develop confidence with the methodologies of other sciences[12]. From this point of view, legal studies not only suffer a deficit, but have often pretentiously claimed their exceptionalism with respect to other disciplines both in humanities and social sciences[13]. Interculturalism requires the lawyer to approach legal cases armed with the instruments of anthropologists, sociologists, linguistic mediators, religious representatives, and so on.

For this and for all the other reasons listed above, we think comparatists seem to be the best equipped category of jurists to address the challenges that interculturalism presents to legal studies[14]. Consequently, we have asked four comparatists, both from private and constitutional law, to reflect on the meaning and role of interculturalism in their own specific field of studies. Cinzia Piciocchi approaches the subject from a linguistic, analytical perspective, reflecting on the dawn and sunset of the words "multiculturalism" and "interculturalism", and proposing a third key-word, "accommodation", as a bridge between the previous ones. Sabrina Lanni proposes a case-study on a very current issue, the introduction in the EU legislation of insects as food, showing the intercultural shift necessary in the Western culture to cross the line of what should be considered edible. Finally, Serena Baldin and Sara De Vido test the scope of the concept's normativity inside the legal system (Ecuador) and the geo-legal area (Latin America) where for the first time it has been constitutionalized.

[12] A. Salamanca Serrano, *La investigación jurídica intercultural e interdisciplinar. Metodología, epistemología, gnoseología y ontología*, in *Revista de Derechos Humanos y Estudios Sociales*, n. 14, 2015, 59 ff.

[13] L. Pegoraro, *Diritto costituzionale comparato. La scienza e il metodo*, Bologna, 2014, 112; T. Amico di Meane, *Metodologia e diritto comparato alla ricerca della "creatività". Verso un approccio flessibile*, in *Annuario di diritto comparato e studi legislativi 2019*, in part. 181 ff.

[14] On the strict connection between intercultural language education and comparative method see C. Borghetti, *Educazione linguistica interculturale: origini, modelli, sviluppi recenti*, Cesena/Bologna, 2016, 20.