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THE PROTECTION OF BIODIVERSITY AND TRADITIONAL KNWOLEDGE: A COMPARATIVE LAW METHODOLOGY PROPOSAL*

La protección de la biodiversidad y el conocimiento tradicional: una propuesta metodológica desde el derecho comparado

Ronald Becerra Rodríguez**
Corporación Universitaria Republicana. Bogotá, D.C. - Colombia

ABSTRACT

Biodiversity and traditional knowledge are lacking of a solid legal status. International Law and domestic legislations have mistakenly attempted to regulate this issue, since they have usually ignored the reality and social dimensions herein. This is therefore a proposal about how to grapple with this issue using a comparative and pluralist approach. However, this process entails the reflection and the justifications of the choices within a comparative study. Those dynamics imply to leave the strict positivism so as to utilize the interdisciplinary approach of law. An interdisciplinary approach paves the way for wider perspectives within a law research project and of course, in terms of Canadian and Colombian jurisdictions of «Biodiversity and traditional knowledge». Also, the methodology applied through this article was based upon recommendations of law epistemologists where 4 stages were found: the reflection, the context, the justification of choices and the structure. This structure implies two important theoretical frameworks: positivism and pluralism.

Keywords: biodiversity, traditional knowledge, comparative law, legal pluralism, interdisciplinarity methodology, reflexivity, ethnocentrism, Colombia, Canada**.**

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** Candidato a Doctor en Derecho, Universidad de Montreal. LL.M London Metropolitan University. Abogado, Universidad Libre de Colombia. Docente investigador, Corporación Universidad Republicana. Correo: electrónico: ronald.ralf.becerra.rodriguez@umontreal.ca

RESUMEN

La biodiversidad y el conocimiento tradicional carecen de un estatus jurídico sólido. El Derecho Internacional y las leyes internas han intentado de manera fallida regularlos, toda vez que estos han ignorado la realidad y las dimensiones sociales que los integran. Por esta razón, este artículo describe una propuesta de cómo abordar esta problemática desde un enfoque pluralista y del derecho comparado. No obstante, esta situación involucra un proceso de reflexión y de justificación de las alternativas escogidas dentro de este estudio de derecho comparado. Esta dinámica implica abandonar la teoría del positivismo estricto y así utilizar una metodología interdisciplinaria del derecho. Esta metodología interdisciplinaria sirve de asidero a perspectivas más amplias sobre los proyectos de investigación en derecho y por supuesto, en lo concerniente a las legislaciones canadiense y colombiana de la biodiversidad y el conocimiento tradicional. Teniendo en cuenta que no existe una metodología propia para el derecho comparado se ha empleado una basada en las recomendaciones de epistemólogos del derecho donde se encontraron cuatro etapas: la reflexión, el contexto, la justificación de los objetivos y la estructura. La estructura implica dos importantes marcos teóricos de base el positivismo y el pluralismo jurídico.

Palabras clave: Biodiversidad, conocimiento tradicional, derecho comparado, pluralismo jurídico, metodología interdisciplinaria, reflexividad, etnocentrismo, Colombia, Canadá.

INTRODUCTION

The protection of biodiversity and traditional knowledge has been a problematic task for the law in international and domestic levels. Biodiversity for example is endowed with a dearth of legal status.[1] This causes biodiversity a difficult issue to enforce. Moreover, the concept of «traditional knowledge» given by International Conventions does not enclose with the indivisible approach of indigenous and local groups[2]. The loss in biodiversity and traditional knowledge is in both of them looming and irreversible.[3] This is

1 Xavier Le Roux et al (éditeurs), «Agriculture et biodiversité .Valoriser les synergies. Synthèse du rapport d'expertise», France, INRA, (2008) Ch. 4 1 at 7 On line : file:///C:/Users/Ronald%20Ralf/Downloads/inra-4.biodiversite-agriculture-et-politiques-publiques.pdf

2 Thomas Cottier & Susette Biber-Klemm. *Rights to plant genetic resources and traditional knowledge?: basic issues and perspectives* (Oxfordshire?; Cambridge, MA: CABI Pub, 2006) at 21

3 *Ibid.* at 26.

probably because a significant extent of biodiversity relies on the traditional knowledge in terms of sustainable development.[4]

Our objective is to propose a new approach for the legal status of biodiversity and traditional knowledge with a comparative perspective: Canadian and Colombian laws taking into account the International Law scenario. We do consider that the inconveniences of traditional knowledge and biodiversity legal status stems from a misleading perception of the reality. Hence, the use of comparative law is useful for understanding the reality more advantageously[5] . Thus, we believe that the application of comparative law might give us the possibility to classify and elaborate new conceptions[6] in our research problem.

The method of comparison is a reflective action[7] and thereby our departure will be to describe some reflection remarks. These reflection remarks allow us to describe our truly intentions in undertaking such research and extricate the cultural biases of the research problem. In the second part, we discuss the context of this comparative work, which is entrenched with native local communities, asymmetry and globalization. We might find that the concepts of local and global are quite related and the asymmetry and symmetry in a comparative study are crucial for epistemological reasons.

Next, our approach is to establish our research question, clear out our objective and propose a hypothesis. This exercise allowed making some choices that are crucial for the future of this research. We found also suitable so as to strengthen this comparative work the outline of some justifications, given that comparative method has no clear standards for validation.

We end this paper with an explanation of the whole structural process. The starting point is the positivist theory as a *lingua franca* of legal scholars. The essence of the legal structure helps to understand consequences into a social context. However, the tenets of positivism avoid attaining our research objectives and thereby, we find that an interdisciplinary approach of law might be the right tool for undertaking this comparative project. This interdisciplinary

4 Berkes, Fikret, Carl Folke & Madhav Gadgil. «Traditional Ecological Knowledge, Biodiversity, Resilience and Sustainability» in C A Perrings et al, eds, *Biodiversity Conservation* (Springer Netherlands, 1995) at 281.

5 Marie-Laure Mathieu-Izorche « Approches épistémologies de la comparaison des droits » in Pierre Legrand. *Comparer les droits, résolument* (Paris: Presses universitaires de France, 2009) 123 at 124

6 *Ibid.* at 129.

7 *Ibid.* at 123.

approach implies challenges in which the legal pluralist theory has a key role. Legal pluralism allows different paths since law is not the same state law positivists have in mind. In sum, it is believed that our comparative methodology has four stages: the reflection, the context, the justification of choices and the structure.

PROBLEM QUESTION

How is it possible to build a comparative methodology in a research project regarding biodiversity and traditional knowledge law?

1. THE REFLECTION

I commence this comparative work in saying that such endeavor implies an awareness of our previous knowledge.[8] «To turn the gaze back on itself» is of paramount importance within a comparative research project; this is one of suitable ways to avoid ethnocentrism.[9] We cannot compare other systems of law without accepting that we observe them through the prism of our own convictions and experiences.

Prior to undertaking my comparative work, I do need to establish which are my biases and previous conceptions about the subject that I am about to research. I cannot commence the comparison of traditional knowledge and biodiversity law in two countries (Canada and Colombia) without taking into account my previous experiences and approaches. Reality is therefore never apprehended directly. There are always views that are influenced by the culture.[10] Moreover, the process of discovering others is endowed with the question to how this reality is experienced by them[11]. Thus, the starting point of comparative process is not to take one piece of law and simply face it with other legislation. On the contrary, the comparatist needs to be reflexive and to examine how the others see this reality.

8 Marie-Claire Ponthoreau. *Droit (s) constitutionnel(s) comparé(s)* (Paris: Economica, 2010) at 73.

9 Brenda Cossman. «Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project » (1997) Utah Law Review 525 at 543.

10 Mondher Kilani « Découverte et invention de l'autre dans le discours anthropologique » (1992) Cahiers de l'ISL 2 3 at 15.

11 *Ibid.* at 3.

I worked before in research projects regarding «Free Trade Agreements», and then observed that asymmetries within economy made unfavorable conditions for developing countries. I do come from a so-called developing country. Thus, it is difficult for me to eschew the economic gap among countries and its application in trade agreements.

My work is about the elaboration of a different approach to protect traditional knowledge and biodiversity in Colombia and in Canada. My curiosity of developing such idea stems from the study of trade agreements. This is because I observed that conditions in Free Trade Agreements for biodiversity and traditional knowledge were almost ignored by the parties. In brief, it can be said that there are previous steps to be considered prior to start structuring the comparison process. This will be discussed in the next section.

2. SPECIFIC CONTEXT OF THIS COMPARATIVE RESEARCH

The process of gazing back upon ourselves brings that comparative analysis cannot be reduced to a «fundamental critique of the West»[12]. It is necessary for this research project to search the «in-between space»[13] and breaking the binaries of the concepts of traditional knowledge and biodiversity.

This task implies the analysis of the concept of biodiversity and traditional knowledge in all different possible angles. For example, in the case of traditional knowledge and biodiversity, article 8j of The Convention on Biological Diversity (hereinafter CBD) refers to them as «innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity». However, the utilitarian approach of CBD contrast with the holistic approach given by indigenous communities which pointed out that traditional knowledge and biodiversity are embedded and indivisible from their own lands, territories and culture[14]. In fact, there is no an agreed definition of what traditional knowledge is.[15] The controversy of traditional knowledge and protection of biodiversity has been carried out by a myriad of actors such as anthropologists,

12 *Supra* note 9 at 537.
13 *Ibid.*
14 *Supra* note 2 at 58.
15 Nicolas Brahy. *The property regime of biodiversity and traditional knowledge?: institutions for conservation and innovation* (Bruxelles: Larcier, 2008) at 288. The concept of Traditional Knowledge has many different approaches. See the document World Intellectual Property Organization, Traditional Knowledge operational terms and definitions, WIPO Doc WIPO/GRTKF/IC/3/9 (2002), 3rd Sess.

geographers, IP lawyers, artists, political scientists, indigenous and NGOs[16]. This gives us an idea that it is mandatory to grasp all this binaries west/east, colonialist/anti-colonialist, utilitarian/holistic, State/non-State, global/local, and the like. The process of comparison allows these concepts to have collaboration and there will be no superiority of any of them, even if I am prone to defend one specially. Also, I need to unlock the eroded argument that traditional knowledge and biodiversity conceptions were imposed by Western economies to the detriment of developing countries resources. Canadian and Colombian concepts of traditional knowledge and biodiversity will be therefore analyzed from different angles.

Notwithstanding the awareness is a kernel within comparison process, we have also a caveat to consider: the language. Our comparison method is aimed to Canada and Colombia. Canada is a bilingual country (English and French) and Colombia a Spanish speaking country. Thus, we have to start with some semantic issues for example the words «biodiversity»[17] and «traditional knowledge» which in Spanish is translated into «*conocimiento tradicional*», whereas in French is «*savoirs traditionnels*». If we observed translation English into Spanish is quite similar but in French the concept is normally used in plural. This might have some implications. We cannot brush aside the semantics of those concepts amongst indigenous and local communities.

However, semantic exercise is not all that matters. The context in which these concepts are involved, the institutions, values and different legal practices all count on the comparison process. This will avoid problems in the interpretation.[18] Thus, it will be pointless to focus exclusively on the clarity of the words without taking into account the context[19]. Legal documents and concepts cannot be curtailed by their semantics; their further application is also relevant for interpretation.[20]

16 Christoph Antons & Wettbewerbs-und Steuerrecht Max-Planck-Institut für Geistiges Eigentum. *Traditional knowledge, traditional cultural expressions, and intellectual property law in the Asia-Pacific region* (Austin Tex: Wolters Kluwer Law & Business?; Alphen Aan Den Rijn, 2009) 39 at 39.

17 It is important to understand that the concept of biodiversity is different from biological diversity. Biodiversity appears since 1986 as a concern for the humankind. See Virginie Maris. *La protection de la biodiversité?: entre science, éthique et politique* (2006) at 7.

18 *Supra* note 8 at 73.

19 This is a critique to theory of the clarity sense of a text. See Michel van de Kerchove «La doctrine du sens claire des textes et la jurisprudence de la Cour de cassation de Belgique» in Michel van Kerchove, *l'Interprétation en droit approche pluridisciplinaire* (Brussels: Publications des Facultés universitaires Saint-Louis, 1978) 13 at 19.

20 Hans-George Gadamer, *Vérité et méthode: les grandes lignes d'une herméneutique philosophique* (Paris: Éditions du Seuil, 1996) at 329.

In Canada, the context of traditional knowledge and biodiversity is attached to the situation of aboriginal people. It is well known that the process of acquisition of aboriginal land and territories in Canada was endowed with a public policy of cultural extermination. Children were separated from their grandparents losing their traditions and knowledge.[21] We found that nevertheless traditional knowledge in the current Canadian legislation is defined as «Aboriginal Traditional Knowledge (ATK).»[22] Thus, this will be the starting point of our research but we also have to study the evolution of the institutions in protecting such knowledge and biodiversity, their role, approaches and how legal systems are performing.

The definition of traditional knowledge and biodiversity seems whereas to have a wider approach in Colombia. Its definition within Colombian Law includes indigenous people, but also all African descendants groups and any sort of local communities[23]. This might be related to the multiethnic characteristic of Colombian society. This will be also our outset along with the evolution and development within Colombian legal institutions.

The international context of the protection of traditional knowledge and biodiversity is seemingly relevant for this research. The debate had its origins after the Second World War. Formal and informal UN groups, NGOs, indigenous peoples and Nation States with economic interests were interested in discussing about traditional knowledge.[24] This seems that the regulation process of traditional knowledge and biodiversity has been globalized[25].

In brief, three aspects are crucial in the context of our comparative methodology: asymmetry, local communities and globalization. We need to observe those concepts broadly. For example, we found that the concept of local communities has some characteristics of complexity. Is it possible to say that the concept of

21 Julian Inglis et al. *Traditional ecological knowledge?: concepts and cases* (Ottawa, Ont: International Program on Traditional Ecological Knowledge, 1993) at 12.

22 Government of Canada, Canadian Environmental Assessment Agency. «Canadian Environmental Assessment Agency - Policy and Guidance – Glossary», (14 January 2009), online: http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=B7CA7139-1&offset=3

23 Andean Community and Corporación Andina de Fomento. «Elementos para la protección *sui generis* de los conocimientos tradicionales colectivos e integrales desde la perspectiva indígena.», (mayo 2005) on line: http://www.comunidadandina.org/Upload/201164175851libro_perspectiva_indigena.pdf

24 *Supra* note 16 at 40.

25 Gibson, Johanna. *Traditional Knowledge and the International Context for Protection*, SSRN Scholarly Paper ID 1137536 (Rochester, NY: Social Science Research Network) 58 at 61.

local communities is the same under the biodiversity and traditional knowledge perspective? Is it the same in Colombia and in Canada?

This concept is a key element for biodiversity protection as it was mentioned in the article 8j of the CBD. Local community is now a concept, which is integrated with the phenomenon of globalization. «Globalization as used herein refers to social, economic, cultural, and demographic processes that take place within nations but also transcend them, such that attention limited to local processes, identities, and units of analysis yields incomplete understanding of the local. (…) given cultural anthropology's commitment to study of local communities, globalization has implications for its theory and methods»[26].

This insight agrees with the perception that «local communities» concept comprises a global network complexity within biodiversity and traditional knowledge:

> Strategic alliances are being forged between indigenous NGOs, North-South alliances of farmers' and peasants' groups, traditional healers' associations, environmental NGOs, development institutions and activists whose primary commitments are to maintaining food security, as well as to religious organizations who maintain an opposition to the patenting of life forms on spiritual grounds. These new coalitions form the core of a new and vibrant political movement organized around growing opposition to existing intellectual property laws, the way patent and plant breeder's protections are granted, the practices of rights granting bodies in the industrialized world and an insistence upon recognition of alternative values - other than creation of incentives for the further development, proliferation, and circulation of commodities - to those currently given primacy in discussions of intellectual property. These new networks of advocates and activists are organized to put pressure on governments and United Nations bodies to insist upon new understandings of justice, equity, and accountability in the appropriation of genetic resources, traditional knowledge, and in the international exercise of and justifications for intellectual property rights.[27]

Also, this concept of local communities is endowed with utilitarianism. Local communities are keen to protect their own way of living, property and

26 Kearney, M. «The Local and the Global: The Anthropology of Globalization and Transnationalism» (1995) 24:1 Annual Review of Anthropology 547 at 548.

27 Coombe, Rosemary J. «Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law, The» (2001) 14 St Thomas L Rev 275 at 278.

environment, especially indigenous communities that have had little recognition of their land rights.

This comparative analysis will focus on Colombia and Canada and herein we found relevant to study the asymmetries or better said symmetries. Geoffrey Samuel explained the relevance of symmetries throughout the comparison. He indicated that the difference relies on the symmetry of the institutional structure[28] in two legal systems, for example, Common and Civil Law, X and Y jurisdiction. This means that the harmonization of law is difficult to be achieved through uniform codes. Rather, the understanding of epistemological structures and their relations between institutional elements and actual facts would be more useful for harmonization[29]. As mentioned by Samuel, «why is money a generic and consumable thing in one scheme of thought and a specific and non-consumable thing in another scheme of thought?»[30] Thus, the institutional structures of biodiversity and traditional knowledge are not the only issue to be compared. It will be also necessary the relation of these structures with the actual facts.

3. THE CHOICE AND JUSTIFICATION OF THE COMPARISON

Once our biases and contexts were cleared, it is the moment of making some choices. This task will not be able to be accomplished without explaining my central objective. It is crucial for a comparative work in order to be limpid that we propose questions for the problems described.[31] Hence, our question would be how it is feasible legally and socially to change the approach of the current protection of biodiversity and traditional knowledge (in Canada and Colombia)? Our stark objective for this question would be to propose a new approach for the legal status in the protection of biodiversity and traditional knowledge in Canada and Colombia. The question and the objective are broad and thereby choosing is mandatory. These choices are determined by the questions asked and also by the understandings of the law[32]. The question leaves a myriad of answers. We need to be more accurate as regards the answer we want to

28 Geoffrey, Samuel. «Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences» in Mark Van Hoecke, *Epistemology and methodology of comparative law* (Oxford?; Portland, Or: Hart Pub, 2004) 35 at 69.

29 *Ibid.* at 72.

30 *Ibid.* at 73.

31 Béatrice Jaluzot «Méthodologie du droit comparé bilan et prospective » (2005) 2005 R.I.D.C. 29 at 34.

32 Maurice Adams & Jacco Bomhoff. *Practice and theory in comparative law* (Cambridge?; New York: Cambridge University Press, 2012).

tackle. Writing a hypothesis seems to be a good path. This hypothesis is as follows: the coordination of different actors coming from in and out of the State is able to give a more suitable protection for the traditional knowledge and biodiversity, rather than a monist approach. This means that a strict harmonization is not advisable.

Our mission is to promote pluralism. When a comparative legal study is aimed to pluralism, it is no doubt that comparatist will make his emphasis on the differences. On the contrary, when comparatist is searching for harmonization, he will insist on the similarities.[33] However, we prefer to use the approach of Annelise Riles who said that the comparative lawyer is confined to two important missions: «whether is to find a model for modernization or to harmonize legal regimes».[34] Thus, we would rather say that our focus is on the modernization.

In order to demonstrate that this project is for the modernization, it is appropriated to apply the lessons of Roger Cotterrell. He said that seeking similarity is «achieving integration» and appreciating difference is «delineating boundaries».[35] Next, he explained that: «the fixing of boundaries of meaning (for example, the meaning of one rule limited by that of another, or of a word or phrase in a statute, or of an style of thought or way of understanding that informs law). Equally, it can refer to the extent of the authority of law (…) or a legal system»[36]

In this research project the aim is precisely to delineate boundaries. Our interest is to demonstrate that the State or even the international framework limits the concept of biodiversity and traditional knowledge and the understanding of those concepts by the law is not quite integrated with the reality. Furthermore, we want to discuss the limits of jurisdiction regarding biodiversity and traditional knowledge. Definitely, our focus will be on appreciating difference.

The search of a new legal status for biodiversity and traditional knowledge certainly entails the authority of culture. «These kinds of authority points towards logic of socio-legal analysis[37]», we will return to this in the next part.

33 *Supra* note 5 at 144.
34 Annelise Riles. *Rethinking the masters of comparative law* (Oxford?; Portland, Or: Hart Pub, 2001) at 11.
35 Roger Cotterrell «Seeking Similarity, appreciating difference: Comparative Law and Communities » in Andrew Harding and Esin Örücü, *Comparative Law in the 21st Century* (London: Kluwer Law International, 2002) 35 at 39.
36 *Ibid.*
37 *Ibid.* at 43.

The process of justification about the choice between similarities and differences is quite relevant in comparison law. Since there are no standards to verify the accuracy of the comparison given, it is better to insist on the reasons in the choice of the comparatist[38]. Nonetheless, it is not solely the choice between differences and similarities that weighs justification in a comparative project. The choice of different legal systems is also important to be mentioned.

We choose Colombia and Canada for the following reasons: 1) the political structures of both countries are outright different: Canada is a Federal State and Colombia a unitary and centralist government; 2) Colombia is considered a mega diverse[39] country whereas Canada is not; 3) Colombia and Canada have signed a Free Trade Agreement[40]; 4) Canada has a developed economy and Colombia does not; 5) Both countries have a significant indigenous backgrounds and 6) Our previous experience in both countries. This reasoning is based on the idea that the comparison is not only the similarity. Comparison entails also plurality.[41]

4. THE STRUCTURE OF THE PROCESS: AN INTER-DISCIPLINARY APPROACH

The objective and question with their justification are now clear. However, as «there can be no single method for comparative law,[42]» we therefore have to be focused on how to structure all this process. Our objective is a new approach for the legal status of biodiversity and traditional knowledge. Thus, we might need positive law as starting point. This is because positive law might allow us to make a linkage between the law studied (i.e. the biodiversity and traditional knowledge law) and the social and political phenomena around it[43]. In other words, the law in the context, where it comes from and it has been applied[44];

38 *Supra* note 8 at 82.

39 According to the Convention on Biological Diversity, «Colombia is listed as one of the world's "megadiverse" countries, hosting close to 10 % of the planet's biodiversity». Convention on Biological Diversity, «Colombia-Country Profile. Status and Trends for Biodiversity, including benefits from Biodiversity and ecosystem services.»(march 2014), on line: http://www.cbd.int/countries/profile/default.shtml?country=co

40 «Canada-Colombia Free Trade Agreement», (20 November 2008), online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx>.

41 *Supra* note 8 at 79.

42 *Supra* note 34 at 8.

43 *Supra* note 8 at 249.

44 *Ibid.*

as author Ponthoreau pointed out: « *Du droit positif, le regard se déplace alors en amont, en aval ou en périphérie*».[45]

If we observed the traditional knowledge and biodiversity law and the «breadth of their concept[46]», the elaboration of a legal status and its developments has become «a daunting task[47]». However, we need to study all available positive law (International, Canadian and Colombian) to see the effects on the society. For example, traditional knowledge has been associated with property rights; nonetheless, this concept does not match with the cultural context of traditional knowledge.[48]

Lawyers and in general socio-legal researchers are still wedded to the positivism as the sole way to «make the law».[49] According to Le Roy, ethnocentrism[50] is one of the most shared attitudes among legal researchers.[51] On the other hand, biodiversity protection and traditional knowledge are endowed with different complex aspects, such as changeable ecosystems, social, economic and cultural dimensions. Thus, we do have the idea that embracing an ethnocentric approach will be harmful to attain the results of this research.

It is well known that Latin American legal scholarship is quite entrenched in the tradition of positivism:

> «In sum, since the inception of independent states, Latin American legal scholars became familiar with the central ideas of the constitutional government that we now call rule of law. It can be said that rule of law is within the Latin American legal tradition, at least in relationship to the knowledge and culture of legal scholars. Under the traditional idea of constitutional government, the emphasis is on the limit imposed upon the different organs of the state more than on the citizen's rights[52]».

45 *Ibid.*

46 Tania Bubela & E Gold. Genetic resources and traditional knowledge?: case studies and conflicting interests (Cheltenham, UK: Edward Elgar, 2012) at 5

47 *Ibid*.

48 *Ibid*. at 6

49 LeMay, Violaine & Benjamin Prud'homme. «Former l'Apprenti Juriste a une Approche du Droit Réflexive, Critique et Sereinement Positiviste: L'Heureuse Expérience d'une Revisite du Cours Fondements du Droit à l'Université de Montréal» (2011) 52 C de D 581 at 603.

50 *Ibid.* Ethnocentrism is the attitude of being quite attached to our intellectual tradition without taking into account other's disciplinary reflections.

51 *Ibid.*

52 Pérez-Perdomo, Rogelio. «Rule of Law and Lawyers in Latin America» (2006) 603 *Annals of the American Academy of Political and Social Science* 179 at 183.

As Latin American lawyers, we are prone to consider the State as the sole producer of the law. Kelsen precisely indicated that the validity of the positive norm either moral or legal depends exclusively on a fundamental norm: the Constitution. There is no validity without Constitutional approval. Accordingly, positivism is endowed with axiological neutrality[53] . The norms are merely descriptive and lawyers are not therefore allowed to criticize the current rule of law.

In regard to traditional knowledge, it has been the State, which has held exclusive grip into this issue. The legislations and international frameworks have been transplanted to the customary and local rules into the positivist approach. «The vast majority of legislation, draft legislation and treaties produced to date have established a state-centered system for controlling the use of traditional knowledge. (…) in some instances the state has declared itself the custodian of all traditional knowledge[54] .» Moreover, other dimensions have been excluded in the study of traditional knowledge phenomenon in law: «The starting point for discussions about protection of traditional knowledge has predominantly the state, rather than any real investigation of the institutions and processes currently regulating traditional knowledge[55] ». Biodiversity conservation has also been entrenched into a positivist approach. Authors like Trujillo have proposed a dialogical approach so as to enhance the difficult relationship between trade and environment. «(…) global institutional frameworks are only one form of global governance. Soft law norms, through the workings of state and non-state actors, contribute to the dynamism of modern global governance in which organic processes facilitate the furtherance of specific goals. The transnational processes arising from these relationships and law-making mechanisms form part of the relationship between trade and environmental concerns[56]». However, we do consider that biodiversity must be approached into a social and cultural dimension. This element is crucial in a comparative law analysis.

As a corollary, we must move outside of strict positivism so as to better understand the problem and attain our objective. We might say that legal positivism can be structured with other theories, since norms and rules are

53 Hans Kelsen, *Théorie pure du droit*, transl. by Henri Thévenaz (Boudry-Neufchatel: Éditions de la Baconnière, 1953 et 1988), 51.

54 Miranda Forsyth «How can the Theory of Legal Pluralism assist the Traditional Knowledge debate?» *Intersections: Gender and Sexuality in Asia and the Pacific* (2013) 13 par. 8 on line: http://intersections.anu.edu.au/issue33/forsyth.htm

55 *Ibid.* par. 7

56 Trujillo, Elizabeth. «A Dialogical Approach to Trade and Environment» (2013) 16:3 Journal of International Economic Law 535 at 540.

interdependent and rely on the context.[57] It seems therefore appropriate to utilize legal pluralism.

Legal pluralism is «a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform»[58] The tenet of such theory is the opposition to legal centralism or monism[59]. This means that law is not the only law that stems from the State. Other regulatory orders exist which compete with the dominant paradigm as individuals choose which norm to follow in many social situations. Societies are complex (integrated by networks), multiple and diverse[60]. «Every social network attempts to acquire (…) a maximum of control over those it takes to belong it. In that sense every network has a natural tendency toward internal totalitarianism and external autonomy from other networks[61].» In sum, Vanderliden defines four stages to build the theory of legal pluralism: «law only exists in the framework of society; law consists of mechanisms; law does not necessarily appear as a system; legal pluralism refers to the existence of different legal mechanisms applied to identical situations within a single social order.»[62]

The application of this theory might imply three stages: empirical, explanatory and normative theory[63]. We will commence therefore by the study of the differences and similarities of values, representations, actors, spaces, dynamics, institutions and techniques of the different legal systems. Next, we will classify different cases so as to sharpen our description and choose whether or not our pluralist research will be «radical» or «attenuated» (empirical)[64]. Further, it is pertinent to analyze the causes of different social, economic and cultural

57 Wagdi Sabète «La théorie du droit et le problème de la scientificité : Quelques réflexions sur le mythe de l'objectivité de la théorie positiviste ». Archives de philosophie du droit (1999) 43 : 303 at 326. On line: http://www.philosophie-droit.asso.fr/APDpourweb/216.pdf.

58 Werner Menski. Comparative law in a global context?: the legal systems of Asia and Africa, 2nd ed. (Cambridge: Cambridge University Press, 2006) at 115 See also John Griffiths 1986. «What is legal pluralism?» Journal of Legal Pluralism and Unofficial Law, 24:1-55.

59 Prieto Montt, Manuel José. «Una invitación al pluralismo legal» (2012) 1 25 at 27 Revista de derecho (Valdivia).

60 Jacques Vanderlinden «Return to Legal Pluralism: Twenty years later». (1989) 28 149 at 151 *Journal of Legal Pluralism.*

61 *Ibid.*

62 *Ibid.* at 155.

63 Ghislain Otis «Les figures de la théorie pluraliste dans la recherche juridique » in Ghislain Otis. Méthodologie du pluralisme juridique (Paris: Éditions Karthala, 2012) 9 at 9.

64 *Ibid.* at 11.

situations regarding biodiversity and traditional knowledge in both countries. We might crave to propose some solutions and the groundwork of governmental and public policies. We will endeavor a criteria for the legitimacy and effectiveness of the governance within the protection of biodiversity and traditional knowledge (explanatory).[65]

These two stages entail a «turn to social sciences[66]». When the objective within a comparative work is «to attempts at measuring or explaining the emergence, development or effect of foreign law, that an even greater engagement with other disciplines becomes necessary[67]». This means that in order to attain our research objectives, we might rely on the insights of economics, political science, anthropology, history, geography, philosophy, biology, theology, psychology, philology, and sociology, amongst others. Nevertheless, we cannot forget that «their influence on the legal system is not mechanical, and it can vary from case to case[68]».

This research definitely turns into an interdisciplinary approach of law. Nevertheless, what does it imply? It might be said that the reality in legal scholarship is not quite encouraging. Legal scholars find the interdisciplinarity a weakness and loss of identity for the law discipline.[69] Notwithstanding the strong positivist position of legal scholarship, we deem the interdisciplinarity as an asset or even though a compulsory stage within a comparative methodology. The interdisciplinary approach of law allows a legal researcher to adjust different points of view. The law will be the object of knowledge and not the knowledge itself.[70] We will be studying the law in different angles and not merely courts and legislators positions.

We might think that the interdisciplinarity implies to have a grasp of each discipline needed. However, the challenge of this approach is not just the understanding; it is a must for the researcher to acquire a good command of the other discipline.[71] Yet the study of a different discipline of law does not entail that we forget our epistemological and professional identity. The

65 *Ibid.* at 15, 16.
66 *Supra* note 32 at 10.
67 *Ibid.*
68 Michael Bogdan. *Concise introduction to comparative law* (Groningen: Europa Law Publishing, 2013) at 56.
69 Douglas W. Vick, «Interdisciplinarity and the Discipline of Law», *Journal of Law and Society* 31, no. 2 (2004) at 187.
70 Pierre Noreau, «Voyage épistémologie de la pensée juridique : de l'étrangeté…à la recherche de soi », *Les Cahiers de droit* 52 (2011) at 696
71 *Ibid.*

comparatist might criticize the law but he is not allowed to do so for other disciplines. This is a mistake since one might think to understand something when he does not.[72]

Final stage of this pluralist task would be the normative theory. Legal pluralism becomes a rule in which is pretended the creation of a value judgment about governmental or public policies.[73] We must bear in mind that this is our key task, since our objective is to create a new approach for the protection of traditional knowledge and biodiversity in Colombia and Canada. Legal pluralism as a normative theory relies on an instrumental reasoning. This means that legal traditions with non-state characteristics are recognized as powerful factors of legitimacy[74]. We can also consider that in this part the use of philosophical theories such as rhetoric of Chaïm Perelman and the «*analyse systémale*» of Gérard Timsit and Andrée Lajoie might be helpful to prove our hypothesis. Thus, we will be able to build a new value judgment and probably a new approach for the protection of biodiversity and traditional knowledge with two perspectives: Canada and Colombia.

CONCLUSIONS

It was learned from our reflection process, that we are very influenced by the spoiled colonialist and neocolonialist argument regarding the asymmetries between West/East North/South countries. This is a reflection to keep in mind during the entire process of comparing.

The reflexivity is a preliminary and permanent exercise in doing comparative law analysis. Our epistemological values and our own conceptions of reality drive our reflexivity. Avoiding ethnocentrism is crucial so as to not bias this comparative research. Thus, it is necessary to find the «in-between space» and do not participate in any side of the chasm between holistic and utilitarian approaches of biodiversity and traditional knowledge. Otherwise, such *modus operandi* will be a conundrum for a comparative exercise and would avoid making headway so as to reach the real context.

To examine the context of this comparison is necessary to review all possible angles of the main concepts of this research, the languages, but mostly conditions of the application of the law studied and their evolution. We found three

72 *Supra* note 69 at 185.
73 *Supra* note 63 at 19.
74 *Ibid.* at 18.

important aspects to address the context of our research: local communities, globalization and asymmetries. Local communities in the biodiversity and traditional knowledge are embedded into globalization and vice versa. An optimum exercise will be to understand the epistemological values of the symmetrical institutional structures of biodiversity and traditional knowledge and their relationship with the facts. This might allow unfastening the boundaries, which restrain a wider comparative perspective.

The definition of our objective, research question and hypothesis might have led to clarify our choice. This stage is fundamental for the validity of our methodology. The choices were also driven by our epistemological values and sociocultural backgrounds. This is because we choose pluralism and thereby we would rather the differences instead of the similarities between Colombian and Canadian systems of law.

Albeit positive law is the departure to structure the entire process of comparison, legal pluralism completes the objectives of this comparative work. The application of such theory welcomes interdisciplinary insights. The interdisciplinary approach in legal research has not been quite welcomed among scholars. However, we need to observe a different reality from the courts and legislators. Given that condition, the interdisciplinary approach seems to be the right tool insofar as it fulfills such endeavor. Becoming an interdisciplinary legal research dovetails with our epistemological values and concerns. Under this perspective and with the assistance of legal pluralism, we might be able to describe the components of the situation about traditional knowledge and biodiversity in both countries; establish or propose public policies for the governments and creating a value judgment for the society and what we dub «law».

It was Menski who inspired us to apply this theory in our endeavor, when he stated: «Legal Pluralism reflects growing realization that positivistic models of legal study, alone or in combination with idealizing natural law approaches, have failed to grapple with global socio-legal realities[75]». We are eager to explain a new reality, a new approach; we cannot be henceforth stuck in the exclusive and omnipresent authority of positivism.

The grip of positivist thinking remains as one of our better outcomes of this research. We were able to prove the seminal role of our own perspective in describing and setting up new realities. This means comparatist researchers need to release their own legal tradition to look for what is within them. If

75 *Supra* note 58 at 83.

comparatists are free, they will reach new knowledge. Law positivism as a methodology but not as a theory is an obstacle for an exhaustive and breathtaking comparative study. Biodiversity and Traditional Knowledge Law might be an opportunity to demonstrate that the exclusive positivist methodology in comparative law would not be the right track.

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