

Editor-in-Chief

Dr. Kathleen P. King, University of South Florida, USA

Editors

Dr. Gabriele Strohschen, DePaul University, USA

Dr. Linda Sun, Southern Polytechnic State University, USA

Publication Editor: Karen Eggeling, Transformation Education, LLC, USA

Editorial Advisory Board

Prof. Holger Daun, Institute of International Education, Stockholm University, Sweden

Prof. J. B. G. Tilak, National University of Educational Planning and Administration, India

Prof. Henry Kaluba, Commonwealth Secretariat, London, United Kingdom

Prof. Carolyn Riehl, Columbia Teachers College, USA

Prof. Merylan J. Schuttloffel, Catholic University of America, Washington, USA

Prof. K. Dorasami, National Council of Educational Research and Training, India

Dr. Avani Maniar, The M.S. University of Baroda, India

Prof. Johan Hoornaert, Catholic University of Leuven, Belgium

Dr. K. Pushpanadham, The M.S. University of Baroda, India

Board of Reviewers

Dr. Kenneth Browne Elazier, Institute for Performance Enhancement, USA

Dr. Richard Bennett, Southern Polytechnic State University, USA

Dr. Carol A. Burg, National Louis University, Tampa, FL, USA

Dr. Thomas D. Cox, University of Central Florida, USA

Dr. John T. Denny, Department of Open Schools Program, Phnom Penh, Cambodia

Dr. Sue Espinoza, Texas A&M University-Commerce, USA

Dr. Beth Furlong, Creighton University, USA

Dr. Barrie Jo Price, University of Alabama, USA

Dr. Pooneh Lari, North Carolina State University, USA

Dr. Ka Sai Un, Texas A&M University-Commerce, USA

Dr. Victor Wang, Florida Atlantic University, USA

Dr. Yuan Jianhua, Beijing Foreign Studies University, China

Dr. Jin Zhang, Zhejiang University, China

Dr. Hosin Shirvani, Affiliation: University of Texas-Pan American, USA

TABLE OF CONTENTS

Mediating Culture in Legal German Teaching Theoretical Reflections on a Culture-Oriented Approach Almut Meyer	3
The Current Challenges in Fair Trial - How to Take Multiculturalism Into Consideration? Laura Ervo	10
Concept and Types of Women Empowerment Keshab Chandra Mandal	17
Introducing the Possible Advantages of the PGCE to STEPS: A Report on English Teacher Development in Rural Primary Schools in China Wang Ping	31
A Study of Using Instructional Media to Enhance Scientific Process Skill for Young Children in Child Development Centers in Northeastern Area Sutas Janbuala, Sudthipan Dhirapongse, Nisarath Issaramanorose and Mana Iembua	40
Pedagogical Practice and Scientific Techniques <i>--Report on the collaboration between the students of the University of Frankfurt and the students of the North Dakota University Fargo/ND</i> Astrid Seltrecht and Jenny Frankenberg	48

Mediating Culture in Legal German Teaching Theoretical Reflections on a Culture-Oriented Approach

Almut Meyer

Faculty of Law, University of Turku, Finland

Email: almut.meyer@utu.fi

[Abstract] Legal German teaching at the Faculty of Law of Turku focuses on the mediation of culture. For this purpose an interpretation model has been developed for systematically exploring the cultural dimensions of legal texts. To embed this cultural approach into legal studies, examples of cultural concepts within legal studies are presented. Legal scholars recognize the significant role of culture in understanding law within intercultural contexts. Moreover, interdisciplinary cooperation between legal and cultural studies is suggested. Concepts of culture within law are not extensively discussed here. Instead, the focus is on epistemological aspects to distinguish the link between the law and legal language learning.

[Keywords] intercultural competence; interpretation model; cultural exploration; interdisciplinary cooperation

Introduction

The significance of cultural knowledge as a core competence in the legal professions has been empirically ascertained for the context of German-Finnish cross-border activities (Meyer, 2011, 2012). As such, legal German teaching at the Faculty of Law of the University of Turku (Finland) focuses on the mediation of culture. This cultural knowledge is also referred to as intercultural competence, and is established as a didactic learning objective. The learner acquires cultural knowledge in interpretative-constructive procedures that are conducted by a theory-based interpretation model. Legal texts are the subject of interpretation in which cultural contents are represented (Risager, 2006, p.22). By exploring the (implicit) cultural dimensions of legal texts, the learner accesses the (legally) relevant cultural phenomena. As such, prerequisites are created for understanding texts within their cultural, and especially legal, context. In this procedure of text-based cultural exploration, the relationships of reference between legal texts and cultures are established; law is conceived of as culture.

Although this text interpretation approach is rooted in cultural studies, this paper argues for its compatibility with legal studies. Exploring the cultural dimensions of legal texts does not only belong to the field of (foreign) language learning and teaching but can also be considered integral to legal studies. The significance of culture for understanding the law is increasingly well recognized among legal scholars, although culture per se is not new in the legal discourse (Glenn, 2010; Husa, 2012; Gephart 2006, 2011; Häberle, 1982; Frankenberg, 1985; Beck, 2011). Here, this approach is discussed against the background of specific area of law to embed it into the discipline. The epistemological question is whether this cultural approach, which investigates the diversity and complexity of the cultural dimensions of legal texts using an interpretative-constructive approach, can contribute to understanding other law practices. This paper briefly presents first, the underlying concept of culture and the interpretation model. Thereafter, this concept is discussed theoretically in relation to the perception of culture within the law, to localize it epistemologically in respect to jurisprudence. Thus, the leading question is whether culture is acknowledged in the processes of understanding other legal systems as a constitutive element.

Concept of Culture

The aim of this study is not to define the complex and manifold concept of culture, but rather segment it into manageable units. These units are cultural phenomena constituting elements of culture which we encounter in legal texts. Such segmentation refers to the idea that cultural items are preceded or followed by contexts and thus are explained. My concern here is to make these cultural items explicit by applying

this concept of context and addressing legal texts with typical juridical questions, for example, 'who', 'what', 'where' and 'when'. Answering these questions provides information about the environments in which cultural phenomena occur. Exploration can focus on certain contexts depending on epistemological interest, and, moreover, the text in question (Herndon, 1981, p.25). Furthermore, this approach corresponds with the intertextuality of juridical work, and also allows focus on specific interests in teaching situations, (for example Busse, 1992, p.36-37, 2000, p.809-810; Müller, 1991, p.31-31). With respect to language teaching, this means that the learner gains cultural knowledge through the exploration of these contexts.

Additionally, context is associated with conceptualizations of culture within interpreting ethnology, because their hermeneutic implications fit the essential core of foreign language didactics, as well as legal sciences or judicial work. As such, culture comes into being through the permanent reading of phenomena that surround us in our lives. Relationships between individuals and their surroundings are constructed in a continuous process of interpretation that can be understood as the on-going construction of meanings. Interpretation, conceived of as the process of constructing cultural knowledge, functions methodologically as a relevant bridge between the law and language teaching. The application of law always involves interpretation, a linguistic understanding and reading legal texts (Busse, 1992, p.18), since the linguistic fiction of the 'legislative intent' as persistently and immutably fixed in texts, is seen as an obsolete metaphor in the history of legal science (Müller, 1976, p.128).

The Interpretation Model

The interpretation model originates in the ethnomusicological concept of 'music as culture'. This anthropological concept underlines that music is produced, received and defined as such by man and comprehends culture as "the sum total of their thoughts and actions, learned and transmitted through the centuries of adapting to the natural and human world"(Tito, 1992, p.xxi). A similar anthropological access to culture can also be perceived in the philosophical understanding of culture as elements of human activity and comprehension of the world (Konersmann, 2003, p.10). The model offers a systematic way to investigate and understand any music-culture, by offering a framework for questions such as, who, when, where, and why, with respect to music. Searching answers to these questions implicates the interpretation of music as culture. Music conceived 'as culture' is generally understood as a paradigm within ethnomusicology. This predominantly anthropological change from 'music in culture' to 'music as culture' marked the turn from ethnocentric approaches in music studies. The juxtaposition of 'Western' and so called 'non-European' music has been characteristic of ethnocentricity, which fails to do justice to the diversity of music culture of the world. The introduced interpretation model is perceived as one realization of the theoretical concept that implements this anthropological change of paradigm.

In the following, this model has been applied to the subject matter of interpreting cultural phenomena in legal texts. In addition to the original model, the recipient and text are placed at the center, as an anthropological understanding suggests.

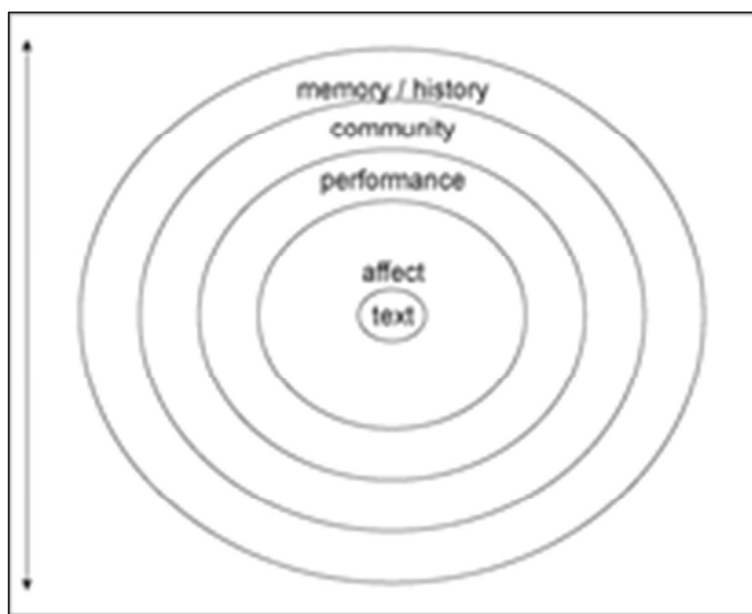


Figure 1. Interpretation model

Legal texts are interpreted from the perspective of affect, performance, community, memory and history. These have a reciprocal relationship and enable us to assign meanings to the text. The reception of the text is understood as performance, the key action that allows texts to come into being and so, enables their effects. Without being received by a recipient, texts would not be considered at all. Konersmann (2003) applies a performance aspect in a far-reaching conceptualization of culture: all cultural creativity and efforts are in vain as long as they are not confirmed by reception (2003, p.10).

The performance of texts occurs in time and space, which are represented in the model as aspects of community, memory and history. A detailed exposition of the model would go beyond the scope of this paper and therefore it will be elucidated only in its main ideas (Meyer, 2012).

- *Affect* determines the particular subjects of interpretation. Such affectemes attract the reader's interest for further investigation. From the perspective of the language learner, this may be incomprehensible words or otherwise expressions in the text which arouse interest. A similar approach within the context of intercultural communication exists in the "rich point" (Agar, 1994, p.100) or the respective "hotspot" idea (Heringer, 2004, pp.174-175) which are defined as culturally enriched words that are incomprehensible for the reader. Here, this method is not adopted, because it presumes already existing cultural knowledge. Thus, the method is rather meant for the expert than the novice.
- *Performance* is conceptualized in an ethnological sense (Turner, 1982, pp.90-91). It emphasizes human activity by a kind of staging cultural phenomena. This staging of cultural phenomena can be seen as a prerequisite of any serious attempt to understand other cultures (Wirth, 2002, p.38). An essential characteristic of the performance-term is that it encompasses the performer, as well as the performed and the recipient.
- *Community* places legal texts into wider social contexts that produce, influence and receive them. This aspect also accentuates the interactive relationship between the text and the recipient, who is a member of larger social contexts.
- History and memory investigates cultural phenomena in terms of transmission processes of cultural heritage over the time.

At this point the question arises of how this interpretative approach of cultural explorations of legal texts can be embedded into legal studies. That leads further to the question of cultural conceptualizations within the law, more precisely the relationship between culture and law: Can we track down a 'cultural

awareness' that ascribes crucial significance to cultural knowledge when we want to understand foreign legal systems. If so, at a theoretical meta-level the introduced cultural approach can be added as a methodological tool in jurisprudence. In the following, approaches to culture in the law are briefly outlined. Descriptions are, however, of an introductory kind and without doubt require further thorough investigation.

Selected Approaches to Culture in the Law

The discussion of cultural issues in the field of jurisprudence is nothing new and numerous publications refer to a current, even increasing interest among legal scholars in cultural issues. A tightly focused, although not complete overview of the discourse within comparative law is provided by Beck (2013) and Örüçü (2004). Here, it is neither my intention to detect how cultural matters like cultural rights of, for example, academic freedom, or the language rights of minorities are dealt with in the positive law, nor to engage in the epistemological discussion about 'legal culture versus legal tradition'. Instead, my aim is to search in an epistemic sense for approaches towards cultural knowledge, which is conceived of as an essential contribution to understanding the (other) law in its culture-bound dimensions. Thus, an overarching theoretical discussion of the conceptualization of culture in jurisprudence is beyond the scope of this paper. Still, some characteristics of the epistemic discourse are briefly presented to identify a starting point for the interpretative approach for culturally exploring legal texts, as discussed earlier in this paper. Such a starting point, for cooperation between cultural and legal studies, begins with raising awareness of ethnocentric approaches, and the limits of pure jurisprudential methods as obstacles to understanding foreign law.

Legal Linguistics

In this context, legal language translation is a natural area of investigation according to the role it accords to culture. Within Europe, matters of translating legal languages are reinforced by the processes of legal harmonization. Translation problems in particular highlight the challenges faced by translators and eventually legal (European) harmonization processes. According to Husa (2012), within the drafting of legislation, legal meanings are communicated through legal languages and legal cultures. These plurilingual and pluricultural settings bring the translator epistemologically closer to comparative legal studies because legal harmonization not only deals with linguistic matters, but also with the cultural aspects of legal content. Therefore, an interdisciplinary approach is suggested to achieve a deeper understanding of the other legal system. This is attainable by drawing on linguistic as well as legal expertise (Husa, 2012, p.179). A substantial contribution to deeper understanding of the law is to penetrate to layers beyond the linguistic level to what Husa refers to as the "legal grammar": the "legal-epistemic level of language" that sets legal concepts (2012, p.167). Such an interdisciplinary practice would facilitate the translator to comprehend the legal contents of legal texts and as a result, an ability to communicate it into another language (2012, p.180).

Kjaer (2004) also exposes the intercultural character and difficulties of integrating European legal harmonization from the perspective of legal linguistics and recognizes that successful communication across different legal languages and cultures is possible. Referring to a hermeneutical framework, a common understanding can be achieved through communicative action if the actors "base their interpretation on the same [...] tacit suppositions about the world". Here, Western legal culture is perceived as one constitutive element of this common ground upon which a mutual understanding can be established (Kjaer, 2004, pp.395-396).

Both authors ascribe culture a significant role in the context of understanding foreign law. A profound knowledge of the cultural dimensions and concepts of the law are prerequisites to adequately understand other legal systems and furthermore, for any legal harmonization processes. Whereas Husa (2012) seems to stay within the jurisprudential paradigm by emphasizing the legal-epistemic level that bears legal concepts, Kjaer (2004) mainly justifies her point of view with hermeneutic theories. The key to successful cross-cultural communication lies in the dialogue, in which a common language has necessarily to be established on the basis of a common pre-understanding of the world (2004, pp.395-396). Nonetheless, in the context of language teaching, it remains unclear how these deeper layers of law

or a common understanding can be systematically explicated. In this respect, Peters and Schwenke (2000), who also pleads for interdisciplinary and intercultural cooperation to combine legal and non-legal know how, give a more concrete outline of the cultural knowledge required by legal comparatists: "They must know something about the historical, social, economic, political, cultural and psychological context which made a rule or proposition what it is" (2000, p.832). An interdisciplinary approach is simply necessary because on the one hand comparatists cannot acquire such a thorough and overarching knowledge and on the other "interdisciplinarity and comprehensiveness are a condition sine qua non for avoiding erroneous, de-contextualized evaluations of legal solutions" (2000, p.833).

Constitutional law

The above stated need for a cultural understanding, of the other legal system, in order to communicate legal contents in border-crossing environments, is supported by another field of jurisprudence as well. With reference to Häberle (1982) the constitutional legislation process demonstrates the insufficiency of a traditional juridical approach since positive law in force does not yet exist. Furthermore, constitutional texts are the outcome of processes of transferring cultural traditions and are drafted by culture-bound legislative authors or instances. Thus, methods of cultural studies can offer access to the cultural backgrounds in question that decisively determine constitutional legislation processes. (Häberle 1982, 31-32). Moreover, comparative constitutional studies, especially in the context of federal states are understood as particularly appropriate for the way of thinking of cultural sciences because federalism arises from its cultural diversity (1982, p.33). In the comparison, cultural studies have to elucidate constitutions in their cultural conditions and highlight them as culture-bound variations of the fundamental type of Western constitutional democracy (1982, pp.34-35).

The culture of constitution not only plays a role in the drafting process but also in regard to the interpretation of constitutional law. Häberle (1982) points out that from an epistemic-hermeneutical perspective, individual cultural premises influence both the judicial suppositions of the interpreter and objectively the interpretation of the legal expert. The explication of the law text through historical or teleological interpretation soon encounters cultural backgrounds, which have to become part of the interpretation processes, and therewith disciplined (Häberle, 1982, p.27). Within the paradigm of cultural sciences, the interpretation of the constitution is enabled to read legal texts in their cultural contexts (1982, p.79). This idea is based on the opinion that a wide-range of cultural crystallizations, sustainably affect the interpretation, changes and legislation of the constitution. Interpreters are not solely responsible for interpreting the constitution, but the facts of political life and cultural crystallizations 'beside', 'before' or 'after' legal texts determine in a deeper sense the processes of constitutional development 'in' the texts as well (1982, p. 23). The total of constitutional and cultural constitutional texts allows the narrowness of legal texts to be enlarged (1982, p.76).

Häberle epistemologically poses cultural studies as an additional, yet essential approach in constitutional theory (1982, p.77) to conceive the constitution in its dimensions of space and time, that is, the cultural environments of constitution, and the cultural processes of its production and reception (1982, p.76). A cultural study approach is indispensable, in so far as it realizes the cultural nature of constitutions as an objective of constitutional studies (1982, p.77). Although Häberle is a distinct representative of the culture-oriented constitutional theory, he mentions its limits as well; legal texts require enlightenment, immersion and enlargement through cultural con-texts. Yet, legal texts have to remain as legal texts, they cannot get lost in the width of culture (1982, pp.76-77).

The concept of con-texts, reflected from a text-linguistic perspective, implies intertextuality that is a common feature of legal sciences, linguistics and language didactics as well. Intertextuality can be depicted as a net of interrelated texts, which are in general the basis, medium and outcome of legal work. In these intertextual nets, texts which in relation to cultural sciences highlight legal texts under social, political and historical aspects constitute an equal source of legal interpretation. From the above it can be concluded that Häberle goes beyond the strict juridical way of thinking and convincingly opens up legal interpretation for a cultural approach. This idea of con-texts can be clearly recognized in respect to texts and their cultural contents in the field of language teaching. Thus, from the side of jurisprudence a basis

for interdisciplinary cooperation is clearly set.

Criminal Law

As a final example of an approach to culture, criminal law is chosen, since it gains growing importance due to globalization processes: criminality does not stop at national borders. In addition to legal harmonization in Europe, internet, economical and environmental crimes express the internationalization of this area of law. On the one hand it is increasingly identified that foreign criminal law codes have to be included in the national application of law, legislation and criminal law theory. However, on the other hand there exists a discontent with comparative studies in criminal law that do not contribute, for example, to the elimination of cross-border economic crimes (Beck, 2013, p.69).

In response to this, intercultural comparative studies are needed. (Beck, 2013, p.65). Regarding comparison, cultural studies are suggested as an additional method to foreground neglected aspects for example, the cultural roots of rules (Beck, 2013, p.71). Here, comparative activity is humanistically conceived of as the search for insight and relativization of the existing truth. Comparing criminal law does not mean scratching at the surface of norm texts; it rather, reaches into the depths of legal systems. Qualifying law as one aspect of culture enables us to understand how the coexistence among people is regulated. (2013, p.68) Furthermore, the comparatist has to be aware of their own cultural ties that need to be revealed (2013, p.77), which is a prerequisite for coping with ethnocentric viewpoints (Frankenberg 1985, p.443).

At the same time, this is a starting point for approaching law from a cultural perspective (2013, p.77). With respect to an intercultural comparison, interdisciplinary cooperation is necessary, because a legal scholar mostly has insufficient knowledge to adequately outline the cultural background of law and its cultural embeddedness (2013, p.80). To reach a deeper understanding of the law, the rules which are the objects of comparison have to be investigated from the perspective of, for example, language, history, economy, social structures and development of ethics. A central task for the comparatist then is to select relevant cultural information (2013, p.86).

Similar to the other above outlined areas of legal studies, an obvious desideratum for cultural approaches to the law is stated in relation to criminal law as well. In contrast to other examples, the latter offers most clearly an epistemic framework in which cultural sciences are placed in an essential role. Legal and cultural studies are not perceived as competing with each other but rather as disciplines cooperating at the same level each within its own paradigm. Thus, cultural studies aim at the core of jurisprudence by supplying it with important cultural information and seem to fundamentally challenge the legocentric assumption of law as immutable and neutral (Frankenberg, 1985, p.445). Nevertheless, questions pertaining to the kind of information needed or moreover, how information is acquired remain unanswered. From this it can be concluded that language teaching could participate in such an interdisciplinary setup, especially with a specific concept of culture.

Conclusions

A culture-oriented approach in teaching legal German (as a foreign language) is also legitimated from the perspective of legal studies. In this context it is considered sufficiently justified when legal scholars recognize the essential role of culture in respect to understanding other legal systems. Although single fields of cultural investigations are mentioned, they do not offer systematic methods of how to approach culture. From the perspective of language teaching, this gap opens the opportunity to integrate intercultural expertise. In the case of legal German, an interpretation model is developed for the purpose of systematic exploration of the cultural dimensions of legal texts. As a result of these explorations, cultural knowledge is gained in constructive-interpretative processes. In relation to intertextuality, this knowledge constitutes intercultural competence, a net of cultural information. Important here is that the acquisition of intercultural competence starts from the legal text and allows a systematic exploration of its cultural dimension in question that is not limited to certain issues beforehand. Thus, the interpretation processes are rooted in the law and therefore, contribute to a deeper understanding of other legal systems.

Finally, since language is neither separable from culture, nor should cultures be reduced to bilateral

relations, this concept of culture pleads for the maintenance of linguistic and cultural pluralism. The establishing of a one and only lingua franca does not facilitate the understanding of problems with other legal systems, whereas conceiving law within its cultural contexts constitutes a sustainable approach.

References

- Agar, M. (1994). *Language shock. Understanding the culture of conversation*. New York: William Morrow and Company, Inc.
- Beck, S. (2011). Strafrecht im interkulturellen dialog. Zur Methode der kulturbezogenen Strafrechtsvergleichung. In Beck, S. (Ed.), *Strafrechtsvergleichung als Problem und Lösung* (pp. 65-96). Baden-Baden: Nomos.
- Busse, D. (1992). *Recht als Text*. Linguistische Untersuchungen zur Arbeit mit Sprache in einer gesellschaftlichen Institution. Tübingen: Niemeyer.
- Busse, D. (2000). Textlinguistik und Rechtswissenschaft. In Brinker, Klaus et al. (Eds.) *Text- und Gesprächslinguistik*. Ein internationales Handbuch (pp. 805-811). Berlin etc.: de Gruyter.
- Frankenberg, G. (1985). Critical comparison: Re-thinking comparative law. *Harvard International Law Journal*, 26(2), 411-455.
- Gephart, W. (2006). *Recht als Kultur*. Zur kultursociologischen Analyse des Rechts. Frankfurt: Klostermann.
- Gephart, W. (2011). *Law as culture. For a study of law in the process of globalization from the perspective of the humanities*. Frankfurt a. M.: Klostermann.
- Glenn, P. (2010). *Legal traditions of the world. Sustainable diversity in law* (4th ed.). Oxford: Oxford University Press.
- Heringer, H. J. (2004). *Interkulturelle Kommunikation*. Grundlagen und Konzepte. Tübingen: Francke.
- Herndon, M. (1981). *Music as culture*. (2nd ed.). Darby, PA: Norwood Editions.
- Häberle, P. (1982). *Verfassungslehre als Kulturwissenschaft*. Berlin: Duncker & Humblot.
- Husa, J. (2012). Understanding Legal Languages: Linguistic Concerns of the Comparative Lawyer. In: Baaij, C. J. W. (Ed.), *The Role of Legal Translation in Legal Harmonization*. Alphen aan den Rijn: Kluwer Law International, 161-181.
- Kjaer, A. L. (2004). A Common Legal Language in Europe? In: Van Hoecke, M. (Ed.), *Epistemology and Methodology of Comparative Law* (pp. 377-398). Oxford: Hart Publishing,.
- Konersmann, R. (2003). *Kulturphilosophie zur Einführung*. Hamburg: Junius.
- Meyer, A. (2011): Wozu brauchen finnische Juristen Deutsch? Eine Bedarfsuntersuchung. In Reuter, E., Bonner, W. (Eds.), *Beiträge zur finnischen Germanistik* (pp.333-345).
- Meyer, A. (2012). Intercultural competence in legal German teaching: A didactical implementation. *Journal of Language and Communication in Business*, 48, 35-53. Retrieve from <http://download2.hermes.asb.dk/archive/download/hermes-48-4-meyer.pdf>
- Müller, F. (1976). *Juristische Methodik* (2nd ed). Berlin: Duncker & Humblot.
- Müller, F. (1999). Warum Rechtslinguistik. In Erbguth, W.; Müller, F.; Neumann, V. (Eds.), *Rechtstheorie und Rechtsdogmatik im Austausch. Gedächtnisschrift für Bernd Jeand'Heur* (pp.29-42). Berlin: Duncker & Humblot,
- Örücü, E. (2004). The enigma of comparative law. Variations on a theme for the twenty-first century. Leiden: Martinus Nijhoff Publishers.
- Risager, K. (2006). *Language and culture. Global flows and local complexity*. Clevedon: Multilingual Matters, Ltd.
- Titon, J. T. (1992). *Worlds of music. An introduction to the music of the world's peoples* (2nd ed). New York: Schirmer Books.
- Turner, V. (1982). Dramatic ritual / ritual drama. Performative and reflexive anthropology. In Turner, V (Ed.), *From Ritual to Theatre. The Human Seriousness of Play* (pp. 89-101). New York City: Performing Arts Journal Publications.
- Wirth, U. (2002). *Performanz. Zwischen Sprachphilosophie und Kulturwissenschaften*. Frankfurt am Main: Suhrkamp, 9-60.

The Current Challenges in Fair Trial - How to Take Multiculturalism Into Consideration?

Laura Ervo

University of Örebro, Sweden

Email: Laura.Ervo@oru.se

[Abstract] This paper is to discuss how to take cultural needs and cultural diversity into consideration if the followed legal rules are based on the main culture and authorities involved in the trial represent the main culture as well. How much cultural diversity can be allowed in a trial and finally how to make the fair trial fair to all involved in it?

[Keywords] procedural law; fair trial; multiculturalism; Scandinavia

The Main Questions

This paper includes three parts and it is based on the current situation in Finland and in Sweden (I am a Finn with the Finnish legal degree but I am professor at the Swedish university where I teach Swedish law). First I will present the current state and the current challenges which is the multicultural reality in proceedings. In many cases, actors, like the parties or witnesses, are ethnically and culturally foreigners compared with the applicable legislation, followed procedural rules. However, the legislation and procedural rules are based mainly or only on the cultural majority in each country and decision makers in the other words judges which all represent the cultural majority. In addition, even their advocates are mostly locals who belong to the majority and therefore know the cultural context of the proceedings and so on but no one is paying interest into their clients who should be the main actors as parties in the trial. In such situations, how to take cultural needs and cultural diversity into consideration if the followed legal rules are based on the main culture and authorities involved in the trial represent the main culture as well. Is a party or a witness who belongs into cultural minority always a loser in these situations and should s/he integrating her-/himself or how much cultural diversity can be allowed in a trial?

Therefore my main aim is to respond to the question: How to make the fair trial fair to all involved in it? Sometimes these kinds of situations have been solved by formal fairness with the contents that no one may practice her/his rights and the solution has been grounded with equality. One example of this kind of decision is that because of the religious freedom no one may practice religion in public (for instance use scarf or cross) because those kind of practicing offenses people who does not belong into the same religion group or who have no religion at all. However, this kind of solution means that rights lose their contents. In my opinion cultural diversity is fairer solution and instead of weeding those kinds of aspects totally away we should think how much diversity is needed to make the trial fair?

In the second chapter, I will in addition present practical situations on the multicultural procedures in Finnish and Swedish trials and I will consider how these kinds of multicultural situations should be met *de lege lata* and *de lege ferenda*.

Current State and Challenges

The current court culture in civil litigation is based on communication and interaction between the parties and the judge. There has been a radical change from the adjudication, the ideals of material law and a substantively correct judgment towards the ideal of negotiated law and pragmatically acceptable compromise. The most important function in the adjudication is that the contextual decisions, which the parties are satisfied with, are produced through fair proceedings. There has even been a change from the formal justice towards a perceived procedural justice and from the judicial power towards court service. In achieving these aims, communication and interaction between judges and parties are the most important tools. From this point of view, the language and the cultural context play a very significant role.

At the same time, the free movement guaranteed by EU, the global phenomenon of immigration and the refugee problems are current worldwide issues. The linguistic and cultural context is complex and multilingualisation and multicultural procedures have become a commonplace (Ervo – Rasia, 2012, p. 63 – 64). How to respond to these challenges and how to handle the current situation correctly?

Multiculturalism at the Trial

The Postmodern Court Culture

There has been a radical change in the Finnish court culture since the beginning of the 1990's based on the wide reforms in civil proceedings (more information in English, Ervo, 1995, pp. 56 – 64 and Ervo, 2007, pp. 466 – 483) as well as the change in attitudes and policy making in civil litigation and dispute resolution (more information in English, Ervo, 2007, pp. 466- 483 and Ervo, 2009, pp. 361 – 376). At the same time there has been a wide-ranging discussion, especially in Sweden, of the ultimate functions of civil litigation (Ervasti, 2002, pp.56-62, Leppänen, 1998, pp. 32-41, Lindell, 2003, pp. 82-101, Lindblom, 2000, pp. 46 -58 & Virolainen, 1995, pp. 80-89).

It has affected even the Finnish legal tradition, where conflict resolution, rather than traditional dispute resolution or legal protection, is the most important function of court work. In this change, the role of parties in the relation to the judge has been changed from the subservient towards clients which means that parties are nowadays much more in the center of the proceedings than before.

Proceedings have also been seen as moral discussions especially in multicultural situations where different ethical and cultural codes easily come up or collide (Wilhelmsson, 2002, pp. 252-264). The current multicultural societal challenges are challenges for both the law and the courts. It has even been asked if globalization involves not only the duty to be attentive to the differences between cultures but also whether culture becomes a genuine source of law (Gephart, 2010, p.32).

For instance, in Sweden there was a wide discussion based on the case of the Svea court of appeal judgment B 3101-00, 2000-06-09. There African adults were found guilty because they had tried to exorcized evil spirits from children, when the child died and the other was hurt. The court followed the Swedish criminal law and did not argue at all that parents had really believed that there were evil spirits affecting their children and that it was typical in their culture to believe in this and to try to exorcize them. The court was criticized in the doctrine that they totally ignored this cultural collision and its possible effects on national criminal law (on this discussion see SOU 2006, p.30).

It has been said that judicial communication and legal identity can be seen as constructions which allow the dialog between different ideologies, good life, different language-games and different experience culture (Raes 1996, p. 38). In addition, a procedure is practical and contextual (Wilhelmsson, 2002, p. 260). Due to these reasons, it is a very suitable forum for moral discussions as such.

We cannot ignore the challenges which multicultural situations in the proceedings cause. Because of the multiple values which exist in the post-modern culture, the legislator is obliged to have a discussion on values when legislating. It is no longer possible to create neutral and formal laws which are equal to all they cover. Actually, laws have never been neutral but in the democratic society they have corresponded with the values the majority accepts and recognizes. Nowadays, there is no longer such homogenous and dominant major culture but the values of individuals' do vary very much. This is due to the changes in the attitudes but the situation is more hybrid especially because of the mixing of peoples and due to the current multiculturalism. We cannot escape. This existing situation is an order and an opportunity which we have to take in serious.

The same demands cover courts when they are interpreting laws and giving single and contextual judgments. More than ever, the courts have to be moral actors in the field. They cannot hide behind legal facades and overarching laws and make decisions like robots or computer programs do. They have to come out and meet the audience and the parties more than before. They have to be responsible not only for the legal correctness of judgments but also on the moral correctness (Ervo, 2013, Chapter III). This is due to two facts. First of all, the attitudes have been changed. People do not appreciate laws, courts, judges, authorities and institutions any longer as such but all the named actors have to deserve the

authority and legitimacy in practice by factual action. Secondly, there is more and more decision power delegated to the courts by the legislator and in many cases it is the court which has the last word and the correct solution cannot be found in laws as such. This is due to more and more complicated society when all situations cannot be covered by laws and where the legislator has knowingly delegated its decision making power to the by legislating open norms which leave much discretion power to decision makers (Heinonen, 1998, p. 954 & Kuuliala, 2004, pp. 646, 648 & 658).

Multilingualism

The other challenges are multilingualism, translations and interpretations. As mentioned above communication and interaction are important tools for making the modern trial fair. The main core of the fair trial guaranteed in the article 6 of the European Convention for Human Rights is the parties right to participate and advocate in the procedure in an active, equal and factual way (Ervo, 2005, pp. 451-458).

As best, the communication is direct interaction between the parties and the judge by the language both of them understand perfectly and in the cultural context which is common for all actors. Nevertheless, this does not correspondence with the factual situation in reality. Proceedings where all actors represent the same cultural background are rare. We have to keep in mind that even if all actors have the identical national and ethnical background they do not always share the identical cultural background. They can represent different generations, different societal classes, different genres, different geographical areas in the same country with different dialects, for instance criminals and youngsters can represent some sub cultures and communicate and behave according to the typicalities for them then. These challenges are linked with foreign languages, linguistics and legal ethnology. Judges cannot speak all languages which are nowadays needed. The parties cannot always speak the language of the court either. We need interpretation which makes communication indirect and uncontrolled. The more exotic background the actors have the more significant role even the cultural differences play. They affect the interpretations of the speech acts and the behavior. Without knowing the language and the cultural background and cultural meanings, the court cannot get the authentic material but it is more or less spoiled by linguistic and cultural interpretations done by an interpreter or by the judge her-/himself.

Problems related to legal ethnology and differing cultures and languages can be latent and hidden so that we don't even recognize how they have spoiled the trial material and why the judgment is not correct. Sometimes they can even be very visible (Kjus, 2005, pp. 291-316 & Kjus, 2008). I will pick up two examples from the daily life courts.

In the first case, the Estonian father and daughter were opposite parties at the Finnish district court. It was a criminal case where the father was accused and the daughter the victim. The damages demanded by the daughter were from the legal point of view very complicated. From that point of view it was a hard case. Even the facts were not at all clear. The status as a party and counterparty was obvious. However, the daughter spontaneously volunteered to be an interpreter for her father when needed. She spoke fluent Finnish but the father didn't. Due to the counterparty positions the proposal was rejected by the court and the session was cancelled as well. The new date for the main hearing was scheduled and the professional interpreter was invited to assist the father.

In the other case, the witness was Russian and did not speak Finnish. However, the professional interpreter was at present. The witness was asked to give the oath. The interpreter did not translate the phrasing of the oath at all but repeated it in Finnish so many times that the Russian witness could somehow repeat the same words. It was a strange situation. It is unclear if the interpreter did not know how to translate the wording. In that case, her expertise was not good enough for that purpose. The other possibility is that the interpreter, who – of course – was a layman from the legal point of view, thought that the oath is like magic and it is important to repeat the wording as such. Whatever, the meaning of the oath became a nullity thanks to linguistic problems.

The challenge of multilingualization can be met from different points of view. First of all, it is a question of linguistic diversity and equality. Multilingualization can be seen as a fertility and richness like biodiversity. Therefore it is worth protection. It belongs to human rights to have the possibility to use their own language at courts and other authorities. How to realize this right may vary and there are

different solutions and tools how and how far to actualize it. Still, from the procedural perspective the main point is to be understandable and capable of solving the case according to the existing and proven facts and valid laws. Both examples presented above show us how fundamental mistakes the linguistic problems may cause. In the first case, the court personnel and all parties missed a lot of time due to the cancellation of the main hearing because of the lack of the interpreter. The suspected had informed the police that he speaks Finnish and therefore no interpreter was invited *ex officio*. In the latter case, no one knows if the witness understood what the oath means and that she has to tell the whole truth and nothing but the truth with the threat of a hard sanction. The sufferer was the society as such and the private persons involved in the cases.

Experientality and Contextuality

Currently, there has been a change from the formal justice towards a *perceived* procedural justice and from the judicial power towards court service. The most important function in the adjudication is that the contextual decisions, which the parties are satisfied with, are produced through fair proceedings. The role of a party is similar to a client in the shop. S/he wants to get products of good quality with a good prize. In addition, it is very significant that s/he is treated well and that s/he feels that the business situation was pleasant and s/he felt comfortable. The same requirements cover courts and other authorities. Individuals want service. They are even ready to demand. They want that they feel well and that they are treated kindly and in an appreciated way. They want good products with a reasonable prize, in the other words; the judgment or decision should correspond with their needs and be contextual (Ervasti, 2004, p. 168, Haavisto, 2002, p. 20, Laukkanen, 1995, p. 214, Takala, 1998, pp. 3-5, Tala, 2002, pp. 21-23, Lakimies 2002 pp. 3- 33, Tyler, 1990, p. 94 & Virolainen, 2003, p. 5). All that leads to the new requirements, the judges must have social skills and cultural understanding. Situational sensitivity plays a major role but how to get the knowledge and tools for it? How to meet these current challenges for the fair trial?

Again it is not only the societal problem but it is also very directly linked with the procedural law as such. In that context, the question is: How to solve the multicultural case? How to get and find the tools to find out the facts and to make a correct judgment?

One more example from the Finnish court of appeal, where the victim was a female Muslim. The crime was a sexual offence. The composition of the court was regular, consisting of Finnish male and female judges. The problem was: How to find out the facts because the Muslim lady had no possibility to tell in a detailed way to men who were judges and not her family members. In addition, it is forbidden to talk about body parts and describe sexual acts directly and detailed. The court got the impression that almost nothing illegal had happened just because the victim could not tell directly and transparently.

The question is: Is there in such situations the need for special treatment and specific procedural arrangements like totally the female composition of the court? Usually it is not possible to choose the judge but it belongs into the fair trial that no one may choose the judge but the composition of the court is coincidental. Should the judges understand that the message is hidden? Would it be fair to use a little imagination to understand the rest due to the cultural context? Should the Muslim lady who is an offer in sexual offence forget her culture and behave herself like local ladies do at the courts and to tell everything in a very detailed way to get the punishment for the accused? The fundamental question is: Who should give up and become integrated? The lady who is a victim and the party in a foreign country or the court who should understand foreign cultural standards? Is it possible somehow to find and realize the cultural biodiversity where all flowers may blossom?

Biodiversity in Fairness

The new challenges can be met from different perspectives. It is a question of diversity and equality. Multiculturalism can be seen as richness and a fruitful alternative in the society. Therefore I would like to compare the multicultural and linguistic challenges with biodiversity in the nature and state that like the natural biodiversity, also the cultural biodiversity is to be appreciated and worth protection. Protection can be active or passive. In the case it is passive it is enough to stay out of discriminating acts but the active

protection means the active role to promote real actions to make the contents of fairness more multiple and varying.

One example on the latter possibilities, which happened at the Finnish district court. The accused wanted to call the witness to give evidence. To call the witness into the court the main hearing was cancelled and the new date was decided. The accused, who was a foreigner, became very nervous and asked many times if there is a Koran in the court house or if he should take his own Koran with him for the next main hearing to take the witness oath correctly. He did not become satisfied when the judge explained that in Finland the Finnish laws are followed and in the case the witness does not belong to the Christian congregation instead of the oath, the affirmation can be given. The accused became more nervous and repeated his question if there is a Koran in the court house or if he should come with his own because otherwise it is useless to call the witness to give evidence at all. According to the accused, without a Koran, the witness will not tell the truth.

The question is should we accept the Koran even if it is not totally correct according to the Finnish law? However, the Koran would make the accused feel satisfied and pleasant. He will get the feeling of experimental fairness. He and his wishes have been heard and taken in serious. In addition, the case and the facts will probably be solved more carefully and the result corresponds better with the material truth especially if the accuser's doubts are true and if the Koran is the tool for getting the better and more honest testimony. With a little bit broad interpretation of the Finnish procedural laws, the better result can be achieved quite easily and at the same time the procedural biodiversity is actively protected. Winners are both the parties and the society itself.

Conclusions

These kinds of multicultural situations have to be recognized and we have to be conscious of the new challenges. As actors we may not close our eyes and try to escape. The new challenges of the fair trial have to be met and solved. In the case, there are gaps in the legislation or the new, current situations are not yet solved by a legislator and legislation, it is a duty of courts to find solutions and to give answers. This is the minimum requirement in the fair trial. In the names of the normative and perceived fairness, we have to be aware of these situations, the discretion has to be transparent and the multiple values have to be realized always when it is possible taken the common aims (like the aim to solve the conflict or the aim to collect the best evidence) into the consideration. Only by doing so, the trial can be seen as micro politics or moral discourse. Sometimes even difficult and brave decisions are needed but it belongs to the nature of the issue in the case, the function of the trials is conflict resolution and proceedings are seen as a forum for micro politics and moral discourse. In that context, the decisions and the decision making are not easy tasks.

The unification is no justice when it makes all rights empty and blank. There is no neutral society or no neutral legislation. They are always moral and political choices linked with existing values. Therefore it is useless to aim at that kind of neutral and therefore equal society and legislation. They are utopias. It is also a utopia to create the society or legislation which correspondences with everyone's opinions and values. Laws are always compromises or majority products. Instead of that, we can choose between the monocultures and multicultural society. In both cases, however, the culture is there and it must be maintained.

In the case, the goals are common, like to solve the case and to find the best evidence, it is probably irrelevant whether the oath is taken in connection with the Bible, the Koran, a law book, or some other sacred object. Fairness is easy to implement in such a way that cultural diversity is maintained, because the common goal (to get the best evidence and to solve the case) is realized in any case despite the way how the oath has been taken. In addition, all the actors are satisfied and the perceived procedural fairness is also achieved.

Still, when goals are in collision, we need to implement an open discussion on fairness and we have to find the balance. If the call on spirits has caused the death of a child, it is hardly possible to accept this kind of action in the Western society. Even then, however, the question arose whether such cultural reasons can be taken into account one way or another, how it should be done and what kind of legal

significance these kinds of cultural reasons may have if any. Still, the minimum is that the court picks up the cultural background and considers its meaning in the judgment. The very worst situation is that the court doesn't take any notice on cultural reasons in its reasoning.

It is not fair to declare the majority culture and values in it to be the best without discussion, consideration and reasonable reasons. The hegemony of the local, majority culture does not fulfill the demands of the cultural biodiversity. Still, the formal equality where the goal is the neutrality leads to the similar result. In the first society only the majority can enjoy their culture and realize their values when in the latter type of society no one has that right because the formal neutrality has made the values and culture materially empty. In such a society, the rights have no substance but they have been gouged out and are like standing dead trees. The vibrant and diverse forest is much more interesting. Therefore, the first landscape is better and more fascinating for the future even if it is more challenging and more difficult to fertilize. However, to realize the fairness we should take up the gauntlet.

References

- Haavisto, V. (2002). *Court work in transition*. An activity-theoretical study of changing work practices in a Finnish district court. University of Helsinki.
- Ervasti, K. (2002). *Lainkäytön funktiot*. *Lakimies*, 47-72.
- Ervasti, K. (2004). Käräjäoikeuksien sovintomenettely. Empiirinen tutkimus sovinnon edistämisestä riitaprosessissa. Oikeuspoliittinen tutkimuslaitos.
- Ervo, L. (1995). The reform of civil procedure in Finland. *Civil Justice Quarterly*, published by Sweet & Maxwell in association with the Institute of Judicial Administration at the University of Birmingham, 14, January, 56 - 64.
- Ervo, L. (2005). Oikeudenmukainen oikeudenkäynti. WSOY.
- Ervo, L. (2007). Scandinavian trends in civil pre-trial proceedings. *Civil Justice Quarterly*, October, 466-483.
- Ervo, L-Rasia, C. (2012). Legal bilingualization and factual multilingualization: the protection of linguistic minorities in civil proceedings – Comparative studies between Finland and Italy. Together with Carlo Rasia. *IJLLD* 2(4), Dec, 62 – 98.
- Ervo, L. (2013). Liability and social control of Scandinavian Judges. In Liability of public officers - selected issues. Ed. by Monika Gizynska and Anna Piszcz. Oficyna Wydawnicza Szkoły Wyższej im. Pawła Włodkowica w Płocku - Wydawnictwo Naukowe NOVUM sp. z o.o. 102, 117-132.
- Gephart, W. (2010). Recht als Kultur. Für eine geisteswissenschaftliche Erforschung von Recht in Globalisierungsprozess. Vittorio Klostermann.
- Heinonen, O. (1998). Tuomioistuinauho turbulenssissa. *Lakimies*, 954-961.
- Kjus, A. (2005). Jeg skal ta deg med bak sentret, så får du se hva som skjer & Fortellinger fra vitneboksen. In Muntlighet vid domstol i Norden: en rättsvetenskaplig, rättspsykologisk och rättsnologisk studie av presentationsformernas betydelse i förfarandet vid domstol i Norden. Ed. by Eric Bylander and Per Henrik Lindblom. Iustus, 291-316.
- Kjus, A. (2008). Sakens fakta fortellingsstrategier i straffesaker. Unipub forl.
- Kuuliala, M. (2004). Hakemuslainkäytön alasta yleisissä tuomioistuimissa. *Lakimies*, 639- 663.
- Laukkanen, S. (1995). Tuomarin rooli. Suomalainen Lakimiesyhdistys.
- Leppänen, T. (1998). Riita-asiain valmistelu todistusaineiston osalta. Suomalainen Lakimiesyhdistys.
- Lindblom, P. H. (2000). Processens funktioner – en resa I gränslandet. In Progressiv process. Spridda uppsatser om domstolsprocessen och samhällsutvecklingen. Iustus, 41-85.
- Lindell, B. (2003). Civilprocessen. Andra upplagan. Iustus.
- Raes, K. (1996). Communicating legal identity: A note on the inevitable counter factuality of legal communication. In Nelken, D. (ed.), *Law as Communication*. Ashgate (pp.25-44).
- SOU. (2006). (Statens offentliga utredningar) (Swedish working group report)
Är rättvisan rättvis? Tio perspektiv på diskriminering av etniska och religiösa minoriteter inom rättssystemet.
- Takala, J-P. (1998). Moraalintunteet rikosten sovittelussa. Oikeuspoliittinen tutkimuslaitos.

- Tala, J. (2002). Luottamus tuomioistuimiin – mitä se on ja tarvitaanko sitä lisää? *Lakimies*, 3-33.
- Tyler, T. R.(1990). *Why people obey the law?* Yale University Press.
- Wilhelmsson, T. (2002). (Media)julkinen oikeudenkäynti moraalikeskustelun tilana. *Oikeus*, 252-264.
- Virolainen, J. (1995). *Lainkäyttö*. Helsinki.
- Virolainen, J-Martikainen, P. (2003). *Pro et contra: Tuomion perustelemisen keskeisiä kysymyksiä*.
Talentum.