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## WHAT KIND OF CRITIQUE FOR CENTRAL AND EASTERN EUROPEAN LEGAL STUDIES? COMPARISON AS ONE OF THE ANSWERS

**Abstract.** This paper seeks to emphasize the merits of comparative law as a critical legal enterprise. For this purpose, it first provides a brief overview of the various forms of critique that have been advocated in the field of comparative law. Second, it discusses four epistemological concerns as regards legal comparison that are meant to orient comparatists towards a critical mode of comparative reasoning. While most of the remarks comprised in this contribution apply to legal comparisons in general, a few observations shall be made with specific reference to the stakes and limits of legal comparisons in Central and Eastern Europe.

**Keywords:** comparative law, critique, cultural resources, critical interdisciplinarity.

### 1. INTRODUCTION

Critique, as Foucault famously stated in his lecture ‘What is Critique’, is certainly not one thing but “seems to be condemned to dispersion, dependency and pure heteronomy” for “[i]t only exists in relation to something other than itself” (1978, 21). In relation to law, one can already notice the gap that exists between the general public’s perception of law (and lawyers) as being critical and a well-established tradition of scholarly understandings of law as scarcely self-reflective, mired in thinking taking its cue from authority, not unlike religion. When lay people think of lawyerly activities as critical they usually have in mind lawyers’ abilities of close reading and hair-splitting. It is quite common that first-year law students tell their professors that they joined law school because they want to learn to think critically. When scholars denounce law’s overconfident and self-congratulatory language, they usually refer to its excessive formalism, its self-centeredness and its lack of preoccupation with people’s real experiences in law. It is nothing less than fascinating that one of the least critical disciplines from an epistemological point of view asserts itself publicly as properly belonging to the realm of critique, a fact that stands, to my mind, as a proof that academic critique in relation to law is much needed. The goal lies not in shaking the public’s trust

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in law but in refining some of the preconceptions when it comes to what law does and does not, can and cannot achieve.

From an internal perspective, lawyers commonly engage in normative analyses. They seek to answer what the law on a specific issue is and, for this purpose, they establish how the various pieces of legislation, caselaw and doctrinal insights relate to each other. Correlatively, their critique generally resides in fault-finding: the judge was mistaken on the law when rendering this or that decision, this author got the law wrong or the lawmaker was incoherent.

As the title of a book by Günter Frankenberg reads, *Comparative Law as Critique* (2016), comparative law itself can be the critique we want in relation to law, for, from the very outset, it suspends this idea of normativity as the main pillar of thinking about the law. Comparisons force a reconnection of law to its material conditions, to life, and thus unveil how law relates to society, ultimately offering answers about law's "whereabouts". It points to the fact that law does not own a transcendental condition. It also highlights that some general questions that we ask about law, oftentimes *ad nauseam*, cannot even be answered, at least not in abstract. With comparative law, suddenly, both the questions and the critique focusing on the usual suspects charged with infringing law's integrity and systematicity are radically called into question. When dealing with two distinct legal orders, it no longer makes sense, from an intellectual point of view, to address the same typical normative questions raised within the confines of national scholarship. As opposed to traditional dogmatic writings, whose utility has been defended for a long time and is taken for granted by most jurists, the act of putting together, in the same mental configuration, two or more legal systems represents an unnecessary intervention. It is the researcher who generates this theoretical encounter and, therefore, he or she bears a greater responsibility for why and how they are doing this.

Insofar as it unmaskes legal structures as contingent and dependent on cultural context, comparative law lays the ground for apprehending law's ways of domination. In this sense, comparative legal research could service an explanatory goal as understood in Max Horkheimer's *Critical Theory* (1993). However, for it to remain a useful critique of law, comparative law's critique needs not overlap with the other goals (practical and normative) of the Frankfurt School of Critical Theory. Thus, while exposing domination could be a legitimate outcome of comparative legal studies, comparatists should, for instance, refrain from proposing change based on the simplistic assumption that what works abroad shall necessarily work (in the same way) locally. This is not to say that comparative can or should be ideologically-free for it cannot. As David Kennedy rightly points out, even the no-politics attitude of post-World War II comparatists represents a politics. In fact, Kennedy denounces contemporary comparatists' political numbness contrasting it with their pre-war peers' political engagement: "[a]ll [comparatists before WW II] felt comfortable participating in public life,

making choices and advocating positions on issues facing government on the basis of their comparative knowledge” (2003, 373). By contrast, in the contemporary landscape, “[t]he discipline encourages its practitioners not to take positions on issues facing government and to think of their professional work as the exercise of academic good judgement rather than political choice. Comparative law today is about knowing, not doing” (Kennedy 2003, 346). Departing from the prevailing vocabulary imbued with agnosticism, this author pleads for much more visible political commitments from the part of those working in comparative law, a claim he makes upon the “intuition that the profession does more to sustain than remedy the world’s *status quo* injustice” (Kennedy 2003, 433). While I admit that no comparative act is politically innocent and that it is always better to be honest about one’s ideological commitments and social interests, I also think comparative lawyers can contribute something interesting to legal knowledge without overtly assuming a political mission. Kennedy states as follows: “[i]magine each comparative-law project coming with an ideological and interest ‘impact statement’, articulating the effects of knowing this, rather than something else, might have on the distribution of ideas and things in the world. Become a habit, this heuristic might heighten the comparatist’s experience of himself as a ruler” (Kennedy 2003, 432). Indeed, while I am prepared to accept the first part of his statement, I am much more reluctant to share Kennedy’s view according to which a successful comparatist should transform himself or herself into a ruler, whose choices are “to be part of the fabric of global governance” (2003, 432). To allude again to Horkheimer’s criteria, in being explanatory a comparative endeavor is always already a normative endeavor. The question of knowing whether on top of its already inherent normative character comparatists should add another layer of more explicit normativism is something over which they should enjoy a large margin of discretion. Thus, critique does not mean politics (for there is an implicit politics, at least in the sense in which choices are involved, even in the least critical projects) and it needs not be equated with assumed political goals (comparative studies can retain a scholastic reach without losing their critical stance).

Comparative law comes in many packages, some less critical than others. My intention in what follows is, first, to provide a brief overview of the various forms of critique that have been advocated in the field of comparative law (II). Second, I would like to discuss four epistemological concerns as regards comparison. Most of the remarks apply to legal comparisons in general but a few observations shall be made with specific reference to the Central and Eastern European region (hereafter referred as CEE) and its problematic geopolitical situation as a “*peripheria duplex*”, “a unique amalgamation of postcolonialism (vis-à-vis the former Soviet power) and neocolonialism (vis-à-vis the West)” (Mańko, Cercel, Sulikowski 2016, 3).

## 2. COMPARISONS AND THEIR CRITICAL ITINERARIES

It is fair to acknowledge that “[c]omparative law has not made its mark as a discipline boosting doubt and introspection, even though a comparative attitude, more than a non-comparative approach, one would assume, would lend itself to practicing (or arguably presupposes) a modicum of self-reflection and critical thought” (Frankenberg 2016, 17). In fact, as I argued elsewhere, the idea of bringing comparison to the field of law exacerbated legal scholars’ attachment to positivism and its scientific ethos (Mercescu 2018, 135). In viewing comparison as a tool of objective measurement, in line with its conceptualization in the social sciences, legal scholars rest assured that their endeavors were thus legitimized and, therefore, felt no need to extend their research beyond law’s conventional boundaries. Through comparison, law came to be closer to science in the imagination of many jurists who envied the universal status of other disciplines. To use the words of two prominent figures of mainstream comparative legal theory, Konrad Zweigert and Hein Kötz: “comparative law offers the only way by which law can become international and consequently a science. In the natural and medical sciences, and in sociology and economics as well, discoveries and opinions are exchanged internationally. [...] There is no such thing as ‘German’ physics or ‘British’ microbiology or ‘Canadian’ geology” (1998, 15). Paradoxically as this might seem, such conclusions ensued as the existence of similarities even as to details between various legal systems and, at the same time, the superiority of some national systems in relation to the others. Arguably, Alan Watson’s seminal study on legal transplants (1993) encouraged scholars of comparative law to think in terms of similarities and to therefore regard “minor” systems as replicas of “major” ones.

Clearly informed by a universalistic post World War II vision, this approach did not come under serious attack until the end of the 1980s and the beginning of the 1990s. Significantly, in 1985, Günter Frankenberg published an article entitled ‘Critical Comparisons: Rethinking Comparative Law’ in which he criticized mainstream comparisons especially for their formalism and ethnocentrism. Frankenberg’s critique entered the Critical Legal Scholars Network in the United States whose members appreciated its potential for taking Critical Legal Studies (CLS) insights beyond the American Legal System (Mattei 2006). In 1996, the conference ‘New Approaches to Comparative Law’ was organized at the University of Utah where critically-inclined comparatists gathered to discuss comparative law’s renewal in light of the CLS’ agenda. As Ugo Mattei notes in his review of the encounter between comparative law and CLS, what followed were a series of meetings that helped the formation of a rather loosely connected network of scholars whose interest lied in denouncing “law as a hegemonic system legitimating direct forms of domination” (2006, 876). Thus, critical scholarship covering the

Arab world, Asia, Latin America or Africa, questioning the way in which the legality of these spaces has been perceived by the Western gaze, were soon to be produced. For instance, Teemu Ruskola's *Legal Orientalism* challenges traditional depictions by Western scholars of Chinese law (Ruskola 2013) or, in the words of one of his reviewers, leading comparatist Pierre Legrand, "emphasizes how the United States features China as an especially important other-in-the-law – or, more accurately, as a significant other-out-of-the-law or as a compelling out-law" (Legrand 2014, 449). Inspired by Edward Saïd's pathbreaking study, *Orientalism*, Ruskola uses case studies to propose a departure from the opposition between an idealized American law and a caricatured Chinese lawlessness. Thus, he claims that there is indeed a strong cultural tendency to associate the United States with law (even if excessively so at times), and a corresponding historic tendency to associate China with an absence of law (whether that absence be considered a vice or a virtue). The distinction is crucial because the emergence of law, in the sense of rule-of-law, is one of the signal markers of modernity. This rough cultural mapping of the triangulated relationship among China, the United States, and law generates a number of assumptions that provide the framework for scores of comparative studies of China. These include, most notably, the notion that China is traditional – or worse, primitive – while the United States is modern, as is the law that embodies its essential values. From these fundamental oppositions much else ensues, historically and conceptually (Ruskola 2013, 5).

Or, to take another example, comparative law was employed to question the alleged Europeaness of Latin American law and denounce this qualification as factitious and only meant to serve the Latin American elites and their neo-liberal projects in national governance (Esquirol 1997, 2003). The examples could go on. Thus, Mattei credits comparative law with the merit of having moved the Crits agenda to a global level (2006, 877).

Besides its CLS strand, comparative law developed other paradigms of critical thinking manifested in what one could call its "cultural awareness". Comparative lawyers started to understand that contrasting legal systems *in abstracto* amounts to a void intellectual enterprise: not only uninteresting but also utterly flawed inasmuch as these exercises in black-letterism invariably ends up presenting legal systems as similar, when, in fact, detailed analyses attuned to the law in practice or to law as a social phenomenon would tell us a rather different story. For a long time, "comparative lawyers have neglected to scrutinize the foundations of their discipline or to think with sufficient rigor about the essentially philosophical question: How can we best come to understand law in cultures other than our own?" (Ewald 1995, 1891). Starting with the 1990s, a number of comparatists took this question seriously and began working on the notion of "culture" for the purpose of refining the discipline's epistemology.

Thus, the notion spans almost all the writings of Pierre Legrand, the most prominent figure of the field's heterodoxy, who insists that we should view law

as culture and cultural explanations as having a better explanatory potential than positivist renditions of law, which confine themselves, somewhat tautologically, to what is legally binding. Importantly though, Legrand cautions that

[s]peaking of 'legal culture' certainly does not automatically privilege coherence, imply reification, entail essentialism, exaggerate distinctness, preclude temporal change, efface individual variations or contestations that can take the form of participation or non-participation in a range of sub-cultures, fetishize identity so that it would lay beyond critique, trivialize agency or individual reasoning, and cast its advocates as blinkered conservatives (Legrand 2011, 111).

Legrand's sophisticated use of culture in relation to the comparisons of laws paved the way for other critical insights, ranging from a critique of method (Glanert 2012) to refined investigations of law's translatability (Glanert 2011). Various authors proposed other terminologies such as legal consciousness, legal discourse, legal ideology, regulatory styles, legal styles, legal epistemes, legal traditions to ultimately suggest that there is more to law than its textualism and that comparatists should be eager to excavate its multiple cultural ramifications. In any case, culturalism then, with its emphasis on differences, has gained terrain as a serious competitor to functionalism – comparative law's traditional approach. Indeed, the topic of the Annual Meeting of the American Society of Comparative Law in 2007 was 'Comparative Law and Culture'. More recently, in 2017, the *American Journal of Comparative Law*, one of the leading journals in the field, dedicated a special number to Pierre Legrand's critique of mainstream comparative legal scholarship.

The "cultural awareness", in turn, brought about a series of critical investigations in response to the legal transplant literature asserting the relative easiness with which law travels from one jurisdiction to another. In the 1990s, unsurprisingly given the celebratory "end of history" atmosphere, it was not uncommon to come across statements such as the following: "[o]ften when we speak of globalization we mean that certain American legal practices are being diffused throughout the world (for instance, the legal device of franchising) [...] [f]or whatever reasons, it is now possible to argue that American business law has become a kind of global *jus commune* incorporated explicitly or implicitly into transnational contracts and beginning to be incorporated into the case law and even the statutes of many other nations" (Shapiro 1993, 39). Or, in the words of another author: "the reception of American law is an irreversible process"; "remarkable parallels exist between the process by which Roman law took root at the Italian universities in the Middle Ages and developed into the European *ius commune* on the one hand, and the dissemination of American law, on the other" (Wiegand 1991, 230). Looking at the case of product liability, Mathias Reimann goes as far as suggesting that the ubiquity of legal transplants challenges the very idea of legal traditions:

The basic concept of strict liability regardless of contract spread from the United States as a common law jurisdiction to the civilian world of continental Europe, from there to the

common law regimes of England and Ireland as well as to the Asian legal systems of Japan, Taiwan, and Korea, not to mention mixed jurisdictions like Israel and the Philippines. It crossed and re-crossed the boundaries between legal traditions with an ease that suggests their irrelevance (Reimann 2003, 837).

Nowadays, it is much more common to encounter less hegemonic and more nuanced positions in scholarship.<sup>1</sup> For instance, in comparing American universal service to French and Italian public service, Tony Prosser concludes that “[l]egal transplants and adaptation are quite a lot easier than Legrand suggests; However, legal culture plays an important role in explaining differences; each approach has something to learn from the other” (2001, 239). In showing that legal knowledge is always local knowledge, comparative law helps one withstand global convergence claims and uncover their underlying hegemonic ideology (Bönnemann, Jung 2017, [9]).

To sum up, critique in comparative law means

to re-think the methods, theories, and masters of the discipline; to re-view the genealogy of the privileged Western tradition; to confront its colonialist legacy and hegemonic services; to re-evaluate the proclaimed ideological agnosticism; to re-consider the ethnocentric and nationalist framework of the discipline and meet the challenges of globalization; to submit to ‘close reading’ the operations of the legal consciousness in foreign systems, the styles and mentality they shape; to revise the exaggerated concern with private law; to reject the assimilation between law and rules, law and state, law and the West; to reassess the preoccupation with and privileging of similarity; to re-orient comparative studies to the analysis of legal transfer, its contexts, risks and side-effects; to analyze the relationship between comparative and international law; to produce not only ‘reliable information’ but critical-comparative insights into projects of governance and legal harmonization (Frankenberg 2016, 18–19).

What do these critical itineraries of comparative lawyers tell us about their discipline’s possibilities of critique in relation to Central and Eastern Europe? In what follows, I will try to provide an answer to this question and launch some tentative guidelines for how to conduct critical comparisons involving Central and Eastern European countries.

### 3. A CRITICAL GUIDELINE FOR COMPARISONS IN CEE

From the point of view of Central and Eastern European scholars, Central Europe has been described “legally speaking” as “an extraordinary place (in the sense used by Örüçü), that is a place where things ‘out of the ordinary’ are happening and where lawyers are questioning once again the tenets of the order”

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<sup>1</sup> This should not be taken to mean that comparative law is now “cured” of its ethnocentrism. For instance, Upendra Baxi rightly denounces its “colonialist heritage” that makes itself felt in important scholarship quarters: “[t]he revival of comparative constitutionalism studies almost always ignores the remarkable achievements of decolonized public-law theory” (Baxi 2003, 53).

(Mańko, Cercel, Sulikowski 2016, 4). However, not unlike Latin America which has been characterized by the West as “a European appendix lacking a distinct legal culture that could serve as the basis of a genuine and exotic contribution to jurisprudence” (Mattei 2006, 820), CEE’s “out of the ordinary” is generally either negated or, when affirmed, it is rather affirmed in negative terms (the “out of the ordinary” all too readily becomes the “out of order”). If I were to subsume the various instances of critique stemming from comparative law under a unique label I would point to its ability of unveiling “how thought [is] related to place” (Chakrabarty 2000, xiii). For this to happen, we need as many critical-cultural comparisons as possible: between Central and Eastern European countries themselves but also between CEE countries and the traditionally privileged Western legal systems. This would allow us to reconstrue legal spaces in CEE anew by inscribing them twice in the logic of *distinctiveness*: first, Central and Eastern European legal systems are to be shown distinct from its Western counterparts and not mere imitations thereof; second, they are to be contrasted to each other so as to counter the narrative according to which they are trapped in the same past of actually existing socialism or in the same present configured, for example, by their relationship with the European Union.

The appeal to culture as a heuristic tool forces us to admit the influence of the past. As Legrand emphasizes, citing Giorgio Agamben’s definition, “[e]very culture is essentially a process of transmission and of *Nachleben*” where “*Nachleben* [...] harbours a posthumous dimension, such that it allows for ‘a derivation of ought from was’” (Legrand 2011, 110). But it does not foreclose us from evaluating how a common past translates into different presents. By “generat[ing] a sense of our historical contingency” (Fletcher 1998, 700), legal comparisons rebut determinisms of all sorts and therefore, in a sense, free the entities under review, which can come to appreciate the fact that because things could have been different, they can be different.

Thus, alongside its usual benefits (de-naturalization of one’s system of thought, better knowledge of the self, the accrual of legal imagination), comparative law’s utility in relation to the CEE space also lies in its anti-hegemonic power. Danjan Kukovec decries the center-periphery dynamics inscribed in the existing configuration of rights and obligations in the European Union (2015). Interestingly, this author reconceptualizes the EU as a space where the dichotomy center-periphery cuts across the distinction left (social concerns) – right (free market/movements), which solicits, to my mind, all the more so the intervention of comparative law broadly conceived. In fact, while neo-liberalism within the EU can be usefully criticized from various non-comparative standpoints, comparisons seem to be favorably suited to address the more complicated picture involving these four conflicting sets of interests: those of the right, those of the left, those of the center and those of the periphery, where center and periphery can, although they must not, be circumscribed by national borders. Indeed, an analysis of how the

EU's relation to the member states belonging to the center stands as opposed to the EU's approach towards the periphery can reclaim for itself a comparative character.

However, not all comparisons are conducive to critical insights. To the contrary, comparative law can be used in an uncritical way to advance hegemonic projects that do violence to the legal systems involved. I introduce here a critical analytical toolbox that could guide comparatists of laws in their academic paths. Nevertheless, this theoretical discussion is meant, at the same time, to point to some inherent limits of comparative law.

### 3.1. Critical Interdisciplinarity

Serious comparative work, relying on the law as culture paradigm, cannot circumvent an interdisciplinary path. In general, interdisciplinary thinking is associated with critique. "Romantic", "rebellious", "the expression of a self-sacrifice against stupid authority" (Balkin 1996, 957), interdisciplinarity often poses – in a self-congratulatory rhetoric – as knowledge unconstrained by disciplinary shackles. While it is fair to acknowledge that all interdisciplinaries fight against limits in a necessarily limited framework, some do fight better than others.

Students of interdisciplinarity can find at least three recurrent justifications in favor of the cross-fertilization of knowledge: ontological, pragmatic and epistemological.

According to the ontological rhetoric, it is possible to document the integrality of a complex phenomenon deemed to have multiple layers (Repko 2012, 126). Interdisciplinarity's task would then consist in bringing together the various pieces in an all-encompassing matrix meant to allegedly reflect "reality". Inspired by continental philosophy and its propensity for totalizing thought, this vision lost however momentum although it tried to reinvent itself by giving up on the single reality discourse to replace it with the language of multiple levels of reality (Nicolescu 1996, 10).

In contradistinction with the previous approach, the pragmatic justification frames the call to interdisciplinarity as being triggered by the necessity to solve social issues and other unresolved problems. It does not concern itself with the "nature" of things but in a typically pragmatist fashion only with the impact of our knowledge. Unsurprisingly, this approach, developed especially in the socio-historical context of the Cold War (Fuller 2010, 24), enjoys today considerable respect in the context of the marketisation of knowledge. Whereas the ontological approach surprises in that it represents "a regain of a quite classical scientism" (Stengers 1987, 331) in its "nostalgic search for a whole" (Resweber 1998, 21), the pragmatic paradigm is excessive in the way in which it only looks for solutions. While possibly useful in more pragmatic domains, the relevance of this approach for comparative law is questionable, for comparative law should have above all a critical, hermeneutic vocation and resist instrumentalization. Therefore, because,

as Peter Goodrich says, “[i]t is the beauty of theory that it does not require decision but, rather, and only, argument, knowledge, and insight brought to bear as invention and intervention” (2009, 490), I favor in relation to comparative law a type of interdisciplinarity that challenges one discipline through another rather than one purporting to solve problems.

The epistemological approach to interdisciplinarity focuses on the plurality of discourses. Since discursive practices join other forces in the creation of “reality” what matters is how the researcher manages to make these interact. As long as more than one discipline talks about a given object of study it is commendable to generate an encounter between the various perspectives. It is then not reality itself that is being recomposed and thus better explained. It is the languages that are being reimagined: ultimately, then, what counts is the intertextuality put forth by the researcher. Unlike the ontological approach, the epistemological one does not conceive of interdisciplinarity as an *adequatio rei et intellectus*. Thus, in light of these different motivations for an interdisciplinary work, the specialized literature provides us with the following dichotomy: between an integrative or Apollonian interdisciplinarity and a critical, Dionysian interdisciplinarity (Newell 2003). Whereas the first one seeks to build bridges between disciplines with a view to obtaining a holistic explanation without critically interrogating the disciplinary *status quo*, the second type aims at reconstructing disciplinary frontiers by highlighting each discipline’s tensions, uncertainties and inconsistencies. Such an interdisciplinarity puts to the test each discipline’s premises and predispositions and usually involves two stages: first, the denunciation of an act of exclusion and second, the reconstruction of the discourse by including the path(s) not taken.

Comparative law risks to propose flawed conclusions if it lets itself guided by an integrative interdisciplinarity. While it winded up non-interdisciplinary, functionalism aspired, at least in the beginning, to coalesce the various laws under the umbrella of a common social function. In other – epistemic – words, sociology was meant to play an integrative role. More recently, the “Legal Origins” theory proceeds in a similarly integrative vein when it pits the various laws against economic standards and declares some to fare better than others (see, for instance, La Porta *et al.* 1998). Here it is through economics that the different laws are integrated into a common theoretical structure. In the context of the CEE, it might be tempting to resort to such a “methodology” if, as a result of its use, CEE countries could shift from the periphery to the center. For example, in the World Bank Doing Business Reports of 2018, elaborated on the basis of the “Legal Origins” theory, five CEE countries, that is Estonia, Latvia, Lithuania, Poland and the Czech Republic, rank in the first 50 countries and, at the same time, higher than France (which is the 31<sup>st</sup>).<sup>2</sup> However, critical comparative law should resist the idea of superiority – the impossibility of objective measurement does

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<sup>2</sup> <http://www.doingbusiness.org/en/rankings> [Accessed: 15 September 2018].

not preclude the possibility of a foreign eye criticizing, inevitably from his or her cultural categories, a different legal system (Legrand 2011, 147). Or, integrative interdisciplinarity usually leads to asserting the superiority of one legal system over the other, the “foreign” discipline acting as the final arbiter. I claim that this mode of interdisciplinarity should be resisted.

By contrast, a study such as the one of Hila Shamir, for example, entitled ‘The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States’ (2010), puts forth a fruitful *critical* interdisciplinarity. In comparing specific legal aspects of the welfare regimes in Israel and the United States, Shamir calls into question, on the one hand, the various economic and sociological theories that converge to uphold the view according to which the welfare state represents a leveling force in society. The comparatist shows that while seeking to promote equality the welfare regimes end up by “producing stratifying effects” (Shamir 2010, 957). On the other hand, law does not remain unscathed at the end of Shamir’s comparative research. She reconstructs the notion of “family law” to include not only “peripheral legal orders” (Halley, Rittich 2010, 772) but also extra-juridical elements.

### 3.2. Collective research

Team work is the norm in the sciences, less so in the humanities and other soft disciplines (Cummings, Kiesler 2005). However, according to Michael Gibbons *et al.*, under the new Mode 2 regime of knowledge production, which finds itself on the rise, “creativity is mainly manifest as a group phenomenon, with the individual’s contribution seemingly subsumed as part of the process” (1994, 9). Indeed, collaborative work has been appreciated as having important merits when applied to the field of comparative law (Girard 2009). Thus, a team can be as culturally diverse as the coordinator wishes and, as such, it has been highlighted that one member can “correct” another’s excesses and vice-versa. In fact, comparative law has a rich, tough not unproblematic, history of collective undertakings starting from Rudolf Schlesinger’s Cornell project to von Bar’s Study Group on a European Civil Code.

Moreover, whereas collaboration is not coterminous with interdisciplinarity (Klein 2010, 19), they can reinforce each other. Collaboration allows from the outset for a wide representation of disciplines. Or, if CEE legal scholarship is to be taken seriously it has to exhibit the strength to let itself debated and critiqued inside eclectic networks of scholars.<sup>3</sup>

However, if collective work is to remain relevant and go beyond a mere juxtaposition of the participants’ legal (or disciplinary) systems facilitated by their representatives’ physical presence, I suggest that each participant work

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<sup>3</sup> Existing networks such as CEENELS (<http://ceenels.org/>), CEE Forum (<http://www.cee-forum.org/>) or CLEST ([clest.pl](http://clest.pl)) are models to be followed.

on a foreign legal system (or other discipline) so that the research preserve its deterritorialization goal. Comparisons take place in the mind of the comparatist and are then articulated in writing. They do not take place *in der Luft*, in a room where lawyers gather to speak, in turn, of their own systems. Such an enterprise would amount to nothing else than an inventory of legal systems having little analytical value.

### 3.3. Cultural resources

Critical comparatists understand law as culture and therefore are ready “to embrace interpretation as emphasis on heterogeneity, mobilization of difference, activation of the singular” (Legrand 2011, 128). Or, difference can easily be converted into negativity in a context marked by a “centre-periphery” dynamics. Indeed, if one compares CEE to Western countries and difference is asserted, there is a risk of CEE legal systems mistakenly being perceived as incapable to do away with their dark past. Moreover, a theory focused on difference might legitimize an exacerbated national identity rhetoric, which can give rise to populist and illiberal politics, as we have recently witnessed. In practice, then, comparatists should seek to articulate difference without the implication of an objective hierarchy between the two or more objects of the *differend*. For this end, a slightly revisited theory of comparison replacing *difference* with *distance* might be useful. I propose in what follows a tentative scheme to be further developed.

In 2016, François Jullien, a French philosopher and well-renown sinologist, published a small book entitled *There is no such a thing as cultural identity* where he asks the following question: “should we account for the different cultures in differential terms or according to specific traits, held to be characteristic, from which it would follow that there is an identity of each culture thus distinguished?” (Jullien 2016, 34). The author first draws a distinction between the concept of distance (*écart*) (between cultures) and difference and argues that we should embrace the former. Both entail the idea of separation, according to Jullien. However, he argues that *difference* is too closely linked to the fallacious concept of identity. When we say *difference*, we either imply that there is some sort of a common, original identity from where the process of differentialization started or we defend the idea of fixed identities that exist in isolation from each other. On the other hand, when one says *distance* one does not seek to range the object of study in any way, one simply suggests that there is a space between two or more entities that calls upon us to reflect on it, to fulfill it conceptually as one thinks fit. Difference hints to classification, distance, by contrast, to confrontation.

There is no such a thing as identity then but only a set of resources (or fecundities) made available by each culture by virtue of the distance existing between the participants to that culture. Distance allows the conversation to go on and, thus, a culture to be built precisely in the interstices, between (*entre*) the

various resources. Indeed, Jullien reminds us that transformation is what makes the cultural cultural when he asks: “How could we characterize French culture, how could we fix its identity? Under La Fontaine or under Rimbaud? Under the figure of René Descartes or André Breton? French culture is no more one than another, but it is, obviously, in the distance between the two: in the tension between the two or in the betweenness that opens up between them” (Jullien 2016, 48). Or, similarly, at the time when we wanted to draw a Constitution for Europe we asked ourselves whether Europe was Christian or secular. A proper answer would have been: Europe is “at the same time Christian and secular (and other). It developed itself in the distance between the two” (Jullien 2016, 49). What is common then in a culture is the sum total of those cultural resources: “what is common is not what is similar” (Jullien 2016, 74). What is common encompasses “the common of the language as well as that of history, of cultural references, of intelligence modes transmitted through education, of arts and of lifeforms” (Jullien 2016, 74).

While Central and Eastern Europe remains too heterogenous for one to be able to speak of a common culture, I do think it is possible to work with *Central and Eastern European cultural resources* ranging from collective memories of actually existing communism to post-transition experiences, whose expression can be found not only in law and politics but also in literature, sociology, psychology and the arts. Talking about CEE cultural resources then must be recognized as a political gesture directed, before anything else, at making the region more intellectually relevant.

### 3.4. Language

Law is inextricably connected to language (see, for instance, Glanert 2011). Therefore, a sensible comparative approach would require looking at a different law in that law’s particular language. As it has already been remarked: “[n]ot working in the other’s language would mean imprisoning the other in a system which is mine (‘I’). It would simultaneously mean a force (violence) in the form of a translation by means of which the uniqueness of the case in hand is covered and by which the uniqueness of the other is interrupted” (Škop 2016, 42). Or, we have to admit that when it comes to the comparisons I praised here (between the various CEE countries) very few scholars would have the necessary linguistic competences to engage in this kind of ethical comparison. Imagine a Romanian scholar working on Czech and Polish law without reading neither Czech nor Polish. For instance, this is what a reviewer writes of a comparatist who addressed Romanian constitutional law: “[a]s the author acknowledges, not being able to read in the original language, he was at the mercy of primary source translations, the relatively scant constitutional law and political science academic publications in English, and German, and the foreign language press (*i.e.*, a couple of local and relatively marginal newspapers published in German and English)” (Iancu 2013, 99).

As in the case of critical interdisciplinarity, one language provokes the other and, as a consequence, one law confronts the other. If English is solicited, as it will often be, in order to mediate this negotiation between Central and Eastern European legal languages, we can be sure that some resources will be lost (in translation). Indeed, all cultural resources live in a given language and no cultural resource lives in no or above language. Hence, should they be forced to pass through another semiotic matrix, their message will be filtered all the more so that English, a hegemonic language at least to a certain extent, cultivates “preferred readings” (Škop 2016, 40). Indeed, it has been pointed out that “in the process of interpretation, some meanings that correspond with everyday experience, everyday knowledge, or a dominant ideology prevail against ones that are new, novel, deemed dangerous or unusual” (Škop 2016). While interdisciplinarity, and especially critical interdisciplinarity, might be very hard to do, as Stanley Fish tried to demonstrate (1989), the linguistic problem raised here must be recognized as an inherent limit of legal comparative analyses that becomes especially problematic in the context of the linguistic periphery of CEE countries.

#### 4. CONCLUSION

Critique can mean many things: critical legal studies, feminist jurisprudence, postcolonial studies, law and psychoanalysis, queer studies or socio-legal studies. All of these have been shown to be useful in the context of CEE scholarship as well (see generally Maňko, Cercel & Sulikowski 2016). Additionally, I tried to show in this contribution that comparative law can also play its part in a critique of law. Though the various branches of critique mentioned above can inform legal comparisons, they should not be confounded. Comparisons are not methods but intellectual postures. Thus, they have an intellectual standing of their own requiring careful consideration of both their promises and limits. I emphasized, in particular, how comparative law can contribute to map the complex dynamics between the various European states in a context crisscrossed by multiple dichotomies.

Thus, not every kind of comparative law is worthwhile. I suggested that for a comparative enterprise to display its fully-fledged critical potential it first needs to be founded on interdisciplinary premises. Importantly, I cautioned that interdisciplinarity, to whom, significantly enough, many comparative legal scholars still resist, does not guarantee the success of one’s endeavor. Indeed, there are many possible interdisciplinary designs not all of which are suitable for comparative purposes. I therefore argued in favor of a critical – not integrative and not instrumental – interdisciplinarity.

I also briefly discussed collaborative work as an important research tool in CEE academic world. However, as in the case of interdisciplinarity, my point

was not so much to advocate it indistinctively but to contest conventional ways of collective comparative research and to correlatively plead for what I view as a critical mode of collaboration, one which maximizes the deterritorializing effect of the comparative act.

In order to counter narratives of CEE's (legal) backwardness while defending its specificity, I proposed to slightly amend the theories of culture as currently understood in comparative law. Resorting to French sinologist François Jullien's terminology in understanding cultural phenomena, I explained how the concept of distance, as opposed to the concept of difference, can help account for CEE legal spaces in a non-hegemonic manner. I also suggested that it might be theoretically more interesting to imagine CEE in terms of a panoply of cultural resources rather than a culture. An important limit of my proposal resides however in its exclusively theoretical stance. Further studies pointing to the practical ways in which comparatists can draw on the concepts of distance and cultural resources with a view to putting forth critical legal comparisons are undoubtedly needed.

Last, given the endless list of publications in the field of comparative law circumventing the question of language, my guide to a critical comparison included the reminder that comparatists should stay attuned to the intricacies/limits of language and translation, especially in a context of linguistic periphery such as the one of CEE countries.

To sum up, this contribution was meant to present comparative law, more precisely a specific way of doing comparative law, as a good candidate for a critique of law in Central and Eastern Europe, of whose possibility one should be reminded regularly.

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