Asking questions about the language in which we ask our questions

Hirsch Ballin, Ernst

Published in:
Asking questions about asking questions in the anthropocene

Publication date:
2022

Document Version
Publisher's PDF, also known as Version of record

ASKING QUESTIONS ABOUT THE LANGUAGE IN WHICH WE ASK OUR QUESTIONS

Ernst Hirsch Ballin

I

Jurisprudence and theology have more in common than many researchers are aware. Both disciplines deal with texts with a meaning and significance that are richer, and more open to future contexts of understanding, than what their authors had intended. Institutions belong to the lingually expressed conditions of our lives, including such venerable institutions as universities and their faculties. Institutions are created, they may perish or be abolished, or they can merge with other institutions, in which they do not 'die' but live on under a different name.

The latter is applicable here. For, this symposium has been organized on the occasion of the fifteenth anniversary of the Tilburg School of Catholic Theology, established under a dual legal regime of canonical and Dutch law. While TST enthusiastically presents itself as the university's youngest school, this can also be looked at from another angle. This School resulted, in 2007, from a merger between Tilburg University (legally the *Katholieke Universiteit Brabant*), which before had merged with the *Theologische Faculteit Tilburg* (itself the result of mergers), and the *Katholieke Theologische Universiteit* (KTU). The KTU had its seat in Utrecht, which nowadays hosts one of the two locations of the Tilburg School of Theology.

In 1991, the KTU was itself the result of a merger between two institutions: the *Katholieke Theologische Universiteit Amsterdam* and the *Katholieke Theologische Universiteit Utrecht*. In accordance with the former legal terminology, up to 1986 universities that organized only a limited number of academic disciplines were called 'hogescholen', but this terminological variation had no legal effects. These two small universities themselves were in fact the outcome of a merger in 1967, between several major seminaries for philosophy and theology established by the ecclesiastical authorities. One of the seminaries that was continued in Amsterdam was the major seminary of *Warmond*, founded in 1799 as a replacement for the Northern Netherlands of the Theological faculty of Leuven University. That university was shut down in 1797, following the annexation of the Duchy of Brabant two years earlier, together with the other territories of the Southern Netherlands, by the French Republic.

Following the legal principle that a merged legal entity lives on in its new institutional body, we must therefore conclude, admittedly a little facetiously, but taking history seriously, that the Tilburg School of Theology is not the youngest, but *by far* the oldest School of our university. Hence, it is a pleasure for me to contribute to this celebration of what few people so far have realized is its 225th anniversary.

II

But I will now turn to the field of research at our much younger Law School, established in 1963, starting with two observations. First, somewhat comparable to theological research, legal research manifests itself as 'a discourse about a discourse'. The meaning of the legal language that we investigate does not remain unchanged while we are researching it. Hence, no legal or other normative text can be applied to real-life situations without interpretation. That means that every time a legal act is pronounced, its words deploy the actual meaning of the act. Contrary to the common belief that the meaning of a phrase will remain constant, the present-day significance may be different – even if just slightly different – from meanings previously attributed to it. Assigning meaning to the words in a legal rule is thus a continuing process. Seyla Benhabib, following Jacques Derrida, has called this a process of 'iterations'. Although rules are designed for repeated application, the situation in which such applications take place is never the same.

The second observation concerns the origin of law. Law is no longer imposed on legal subjects because they are subject to the will of the ruler, but it is decided on behalf of the subjects themselves, or rather by their representatives, in constitutional procedures that we call democratic decision-making. This reflects the actual power distribution in a political system, which is based on the principle of equality, even if it is far from realizing perfect equality between all human beings.

III

The function of critical legal research in this setting is to uncover the structure, concepts and connectors of legal language. The grammar of legal language in modern societies is genealogically determined by its common origin from Roman law and is interintelligible across various natural languages. Expressions that appear to be the same across natural languages and across eras in history are subject to variations and mutations. These variations and mutations are related to underlying social, economic and – with respect to the distribution of power – political mutations.

The distinction between *persona* (person) and *res* (thing), for instance, is one of the most elementary features of the language of law. Property and contract presuppose these categories. But notwithstanding the singularity of its historical origin in Roman law, the concept of 'person' has not remained unchanged, nor is it at present the same everywhere in the world. In Roman law, being recognized as a person in law was limited to free, not-enslaved male human beings.[1] Nowadays, the definition of a 'person' is in principle defined by the recognition of fundamental rights from which no subject may be excluded, although pervasive differences in effective protection subsist.

This view is rooted in the recognition of human dignity as an inherent quality of every human being. As a person, every human being is entitled also to be recognized as a citizen, with ensuing rights to vote and co-decide on the future of the communities to which he or she belongs. Citizens of a state have more political power than 'foreigners' or 'illegal' migrants. Such legal distinctions reveal underlying, often conflicting power dynamics.

IV

I will now briefly elaborate on the mutations of personhood, because these changing notions exemplify just inasmuch the language of legal research is not 'innocent'. One of the most important implications of the emergence of human rights is the rejection of reducing personhood to economic actorness, as in Roman law, and of limiting constitutional entitlements to a class of distinguished male citizens. However, Roman law was created in a completely different constitutional and political context, one which was neither democratic nor guided by the principles of what we call in Dutch the *Rechtsstaat*, the rule of law, a concept problematized by Han Somsen in this volume. The grammar of legal systems that resulted from the ancient systematization of Roman law is based on a few core concepts that are on the spectrum of the subject-object distinction and connection.

1 On categorizations in law and legal research, see more extensively Ernst Hirsch Ballin, *Advanced Introduction to Legal Research Methods*, Cheltenham / Northampton MA: Edward Elgar 2020, chapters two and five.

The concept of person is therefore limited to a certain category of subjects: those endowed with a will. That is why legal grammar is structured around specifications, extensions and reductions of personhood (such as the inclusion of associations and states as legal persons, and the exclusion of or limitations applied to minors and enslaved people) and a range of connectors (such as ownership, will, causation, liability and authority) with other subjects, and other living and dead beings.

V

All of the above is increasingly significant today, in the Anthropocene, which is hollowing out the human-in-world template of legal grammar. In legal relations, personality means 'presence', as it is the condition of things to not be present or represented, but only owned, and this condition applies to animals and other parts of living nature. However, as Roberto Esposito puts it, '[a]nthropological studies tell a different story, one set in societies where people and things form part of the same horizon, where they not only interact but actually complement each other'.[2] This is being reinforced by the view that, in the Anthropocene, humans and all other forms of animated life are irreversibly interdependent. They are embedded in 'Mother Earth', as it is said in the theological contribution here, and as it is understood in Andean traditions. The earth has moved from being the place of expanding human exploitation to being an entangled system that suffocates aspirations to take control of the future of humankind. At various occasions, other contributors to this symposium have spoken of the need to decentre the human, or even of dethroning man. Today, such 'post-anthropocentric' approaches allow the legal imagination to endorse the possibility of legal personality for non-human entities, such as animals, rivers and ecosystems. With a view to providing protection, these views have already reached the domain of international law, a domain that until recently was entirely defined along state-centred lines of thinking.[3]

2 R. Esposito, *Le persone e le cose*, Turin: Einaudi, 2014, e-book loc. 33; R. Esposito, *Persons and Things: From the Body's Point of View*, Translated by Z. Hanafi, Polity Books, 2015, p. 3.

3 C. Brölmann & J. Nijman, 'Personality', in J. d'Aspremont & S. Singh (ed.), *Concepts for International Law: Contributions to Disciplinary Thought*, Cheltenham: Edward Elgar, 2019, p. 678–90, there p. 684, 688.

Though such steps towards redefining legal subjectivity beyond humanity are still maturing, they shed a new light on the inclusive/exclusive ambiguity that is inherent in the categorizations of the grammar of law.

VI

The developments I have come to describe concern the language in which we ask questions as legal researchers. These questions take a specific form in comparative law, the subdiscipline devoted to legal research on differences and concordance between different legal systems. As said, the language of law, with its own categories and connectors, is always expressed using a natural language. Comparative law, that compares law in more or less similar legal systems, is relevant because the underlying differences are smaller, whereas more distant comparisons across legal cultures are much more challenging and therefore more revealing.[4] Traditionally, comparative law was almost exclusively concerned with legal systems that we thought we could understand, especially those of France and Germany, which had strongly influenced ours. Increasingly, comparative law was complemented with common law – the increasingly influential Anglo-Saxon alternative – and up to 1989 with that of the communist states of the time as a contrast experience.

If the same terms were in use – the terminology of Roman law continued to be an obvious point of reference in most legal systems – it was easily assumed that they also meant the same thing. It was hardly recognized that the social, economic and cultural context led to concepts acquiring different meanings, to the extent that they could not be simply equated with each other. Only when a hermeneutical approach gained acceptance, insight grew into the contextual situatedness of terms that had prematurely been regarded as simple translations with the same meaning. This is one of the hurdles that usually have to be overcome when scholars endeavour to make comparisons between different legal systems.

4 R. Sacco & P. Rossi, *Einführung in die Rechtsvergleichung*, 3rd edition, Baden-Baden: Nomos, 2017.

Comparative law must investigate these deeper layers of legal linguality, which is only possible through advanced interlingual semantic research. Unavoidably, it makes a difference in which language we ask questions. In that regard, the Anglo-Saxon mono-linguality of most of current Dutch academic research is a problem, as it hampers both the methodological approach in our research and the understanding of its object.