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Comparative Legal Argumentation: Three Doctrines

ABSTRACT:
Sempre più spesso, specie in materia di diritti fondamentali, accade che il giudice nazionale, nel determinare il significato di un enunciato giuridico, cerchi ispirazione e conforto nelle pratiche interpretative dei propri colleghi stranieri. Si tratta di una prassi problematica che ha diviso, e continua a dividere, legislatori, giudici, giuristi e teorici del diritto. Questo articolo si propone di indagare le ragioni a fondamento di una simile prassi mediante l'identificazione di tre principali gruppi di dottrine dell'interpretazione comparativa: la dottrina dei trapianti giuridici, il cosmopolitismo giudiziario e la dottrina della comparazione "sovversiva". Pur muovendo da assunti diversi, ciò che ad avviso dell'autrice lega le tre dottrine è una visione inevitabilmente universalista del fenomeno giuridico.

National courts, while determining the meaning of a legal utterance, especially dealing with fundamental rights, more and more take inspiration and support from their foreign peers. This is a problematic practice, which has divided, and still divides, legislators as judges, jurists as legal theorists. This article aims to investigate the basic reasons of the practice. Moreover it identifies three main doctrines of comparative legal interpretation: the legal transplant doctrine, the cosmopolitan judicial doctrine and the "subversive" comparison doctrine. Even though these three doctrines move from different standpoints, nevertheless they show a common universalist legal background.

KEYWORDS:
Interpretazione costituzionale, interpretazione comparativa, diritto straniero

Constitutional interpretation, comparative interpretation, foreign law

diritto & questioni pubbliche

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Introduction – 1. *The judicial transplant doctrine* – 2. *The judicial cosmopolitan doctrine* – 3. *Few words on the subversive trend*

Introduction

Nowadays, comparison is more and more associated with law, even though it is unclear what it is exactly meant by that. Comparison is an ordinary language word which otherwise evokes an idea of contrast, distinction, both in ordinary speech and in the discourses on law. So, for instance, dealing with legal documents, expressions such as *judgment of comparison* are absolutely common, with respect to the penalty computation criteria when the crime was committed in presence of extenuating and aggravating circumstances; or *comparative handwriting*, as regard the handwritten documents used to ascertain the veracity of a will.

Nevertheless, both in law and in other discourses, comparison means absolutely more than that. As a matter of fact, comparison had been (for long time) associated with a specific method of research, typical of the social sciences, based on the idea that comparing enables scholars to obtain a better understanding of the research object.

During the twentieth century this idea of comparison had been gradually replaced by the belief that foreign legal ex-

periences contain a heritage of valuable information useful in order to improve national legal systems.

In recent times, finally, the approach to comparison has changed again. According to the new trend it has been associated with legal interpretation – especially with fundamental rights interpretation – and with legal reasoning.

In the first pages of one of his last writings, Sir Basil Markesinis hailed the era of comparatist courts, stressing that nowadays *judges across the globe are gently entering into this marginalized area of the law*[1]. Similarly Gustavo Zagrebelsky dedicated one of the last paragraphs of his recent work to the renewed role of comparison in constitutional hermeneutics and legal theory[2]. In his perspective comparison is considered a means to build a horizon of constitutional cooperation in which particular and plural, unity and multiplicity, do coexist and interact one another. Peter Häberle[3], moreover, defines comparative reasoning as the *fifth commanded canon* for constitutional interpretation.

The common idea is that comparison – or rather, comparative interpretation – in contemporary constitutional frameworks, plays a double role: on the one hand, a *meta-theoretical* role acting as a crazy cell – the Thomas Khun's anomaly – which concurs to the crisis of the Westphalian legal model, and, as Zagrebelsky argues, of a closed and positive legal order. On the other hand, a *meta-ethical* role, working as a criterion of Justice, and a useful means to redirect the interpretation of constitutional principles toward the *one right answer*.

Considered this framework, my (obvious) questions are: who is the comparatist judge? What visions for law and for

1 MARKESINIS and FEDTKE 2005, 4; MARKESINIS and FEDTKE 2009.
2 ZAGREBELSKY 2008.
3 HÄBERLE 2005.

legal research, does the use of the comparative method in interpreting legal documents really reflect?

In the following pages I aim at focusing on two specific comparative interpretation doctrines which have dominated the debate on comparative reasoning since the last century: the judicial transplant doctrine and the judicial cosmopolitan doctrine.

The former is based on an objectivist and cognitivist approach and reinterprets the traditional assumptions of legal functionalism into an ethical view. Moreover it looks at comparative law as an essential means to direct the solution of a difficult case towards absolute standards of truth and justice.

The latter, risen from the ashes of the ethical objectivism, which looks at comparison as the means for judges to build a global community involved in the task of a new constitutional order.

Both doctrines are universalist, although in a different way which will be better clarified in the next pages. In recent times, moreover, a third doctrine, called the subversive comparison doctrine, has gently emerged. This doctrine is totally a contrast to the above mentioned ones, proclaims its irreducible particularism and looks at comparison as a means to provide judges with a more complex and complete view on national law.

My aim, in the next pages, is to cast light on similarities and differences existing among these three approaches to comparative legal reasoning and on the different idea of universalism underlain. It deal with an idea that actually crosses all the three doctrines, affecting the nature and function of comparison, as well as, more deeply, the image of law itself, of courts and of legal interpretation.

1. *The judicial transplant doctrine*

«To what extend – Konrad Zweigert and Hein Kötz wonder

> – can comparative law be used for interpreting national law? In our textbooks nothing is said about it: what is said concerns, instead, the old dispute whether the interpretation has to be guided by the legislature's intent, considered at the time the act was enhanced, or whether the law has rather its own autonomy, which allows the interpreter, each time, to adjust the interpretation according to the existing social reality. When interpretation is doubtful, or when the judge has to fill a gap – the two scholars maintain – it is accepted almost everywhere that he will decide according to the rule that a legislator would adopt, i.e. more and more like an eclectic comparatist»[4].

This is, in brief, the position that for long time has dominated the debate on comparative reasoning. This position – which, for convenience, I will call *doctrine of judicial transplants* – moves from a premise far from being original: law is a dynamic phenomenon which evolves and changes together with the structure of a certain society.

Whenever a legal text is incomplete, uncertain, or indefinite, or it does not meets anymore a common need of protection – as it often happens to fundamental rights – courts are so supposed to intervene on the text by acting on the semantic level and – as a legislator – by renewing its meaning in response to the renewed circumstances.

In few words, this premise succeed in explain the reasons why so long the debate on the use of foreign law in legal interpretation had just reflected the debate on judicial discretion. Moreover it explains why the main objections against the doctrine of judicial transplants – the violation of the principle of separation of powers and of democracy, the desecration of the dogma of legal certainty and of the prin-

[4] ZWEIGERT and KÖTZ 1992, 21.

ciple of formal equality – had been the same objections affecting judicial activism and the creative power of judges in legal interpretation.

The most discussed theoretical issue, even today, is whether judges have the power, or the duty, to intervene and change the legal framework in case of a motionless legislator − i.e. of a legislator which lacks initiative, or promptness. And regarding constitutional principles, the issue is whether judges can or have to arrogate the power to rejuvenate the contents of the constitution by hermeneutics.

Although this issue is absolutely interesting, however it lacks theoretical specificity[5] and it does not give any answer to the following fundamental question: why should a modern legislator act as an eclectic comparatist?

What we should ask, then, is not if a national judge can adapt the meaning of legal texts according to the renewed needs of social justice but, rather, its connection with foreign law. «Pourquoi – asks Marie-Claire Ponthoreau – aurait – il recours au droit étranger alors qu'il a déjà de nombreuses sources du droit internes et internationales à sa disposition?»[6]. In other words, we should ask what judges are expecting from foreign law which cannot be found in their national law.

Moreover, as Justice Scalia has noticed with pragmatic emphasis, if the judge had the intention to participate in the emerging of social rights, the specific legal and cultural context should be taking into her account. According to that «it is quite impossible for French practice to be useful in determining the evolving standards of decency of American society»[7]. It is quite impossible, unless such specificities are

5 See BAUDENBACHER 2003.

6 PONTHOREAU 2009, 543.

7 «The only way in which it makes sense to use foreign law is if you

supposed to be mere contingencies resulting from an error of evaluation.

The judicial transplant doctrine[8] builds its proposal around five main theoretical assumptions logically connected.

The first one concerns the nature of law and is based on the principle of *functional universalism*. According to this principle all legal systems are oriented to solve the same practical problems. It implies, as already noticed, that far from legal and cultural particularism, it does exist a practical-functional dimension. This dimension is actually able to neutralize the divergences among legal systems and to move legal experiences to a common ground of mutual commensurability. Moreover this kind of functionalism transposes the traditional concept of universal problem on an ethical ground. It maintains that, far from legal and cultural particularism, all legal systems are engaged, in the end, in solving shared moral dilemmas, as shared is the idea of humanity that law is called to achieve[9].

have a third approach to the interpretation of the Constitution, to wit: I as a judge am not looking for the original meaning of the Constitution, nor for the current standards of decency of American society; I'm looking for what is the best answer to this social question in my judgment as an intelligent person. And for that purpose I take into account the views of other judges, throughout the world» (DORSEN 2005, 526). On the point see also ZWEIGERT and PUTTFARKEN 1976.

[8] I don't mean to refer by that to Alan Watson concept of legal transplants. Watson affords the topic from an historical point of view.

[9] Some scholars actually fail to stress the ethical premise. Concerning that, see PAOLO CARROZZA 2002, 1081: «This explanation is essentially functionalist, based in the shared task of seeking solutions to common problems. But there is more than functionalism present in the ethical premise of the value of human dignity so widely shared among the different courts involved in the transnational jurisprudence of capital punishment. In fact, on many occasions we

> «American and foreign judges alike are human beings using similar legal texts, dealing with a somewhat similar human problem […] – as stated by Justice Breyer – England is not the moon, nor is India. Neither is a question of cruel and unusual punishment an arcane matter of contract law where differences in legal systems are more likely to make a major difference»[10].

The second theoretical assumption on which the legal transplant doctrine is based concerns the objective foundations of legal knowledge and the consequent equivalence between scientific problems and legal problems. Espousing Jhering's maxime – only a fool would refuse quinine just because it didn't grow in his back garden – Jeremy Waldron retains:

> «Solutions to certain kinds of problems in the law might get established in the way that scientific theories are established. They do not get established as infallible, they change over the years, and there are always outliers who refuse to accept them some cranky, some whose reluctance leads eventually to progress. But to ignore foreign solutions, or to refrain from attending to them because they are foreign, betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face»[11].

see judges specifically abstracting from and eschewing comparisons in the functional terms of "common solutions to common problems" and speaking much more in terms of "common principles for a common humanity". It is, more often than not, the judge who wants to *avoid* foreign influences who takes a functionalist approach focusing on the unique, pragmatic aspects of the problem at home».

[10] DORSEN 2005, 527 and 529.

[11] «I have invoked the image of science and of scientific problem-

The third one is an implication of the first two assumptions and deals with the nature of legal interpretation. Such an assumption is based on the well-known thesis of the *one right answer*: as long as for each scientific problem there is a truth to be discovered. Similarly for each problem of interpretation there is *one right answer* that expresses a universal ethical truth and that the interpreter ought to ascertain[12].

The fourth assumption regards the nature of the decision making process and supports a new judicial model, i.e. the model of the *problem solving courts*[13]. According to this model, decision making is far from being a discretional activity, even in difficult cases. It is neither a matter of logic, nor a matter of legal texts application. It is rather a practical matter and it requires first, the identification of the concrete moral issue the judge has to deal with. Second, the reconstruction of all the relevant theoretical and practical concerns, of the competing interests, of the ethical and factual involvements which would be consequence of each considered solution. The practical reasoning of the judge, in this way, would be optimized and guided, *all things considered*, to the best solution for the case.

The fifth assumption, to conclude, concerns the nature and the role of comparison. Foreign legal experiences pro-

solving several times to illustrate how a foreign law consensus may be relevant to U.S. legal decision making. […] I have emphasized the point that referring to ius gentium treats the problems that arise in our courts as though they were questions for legal science. It does not simply look to foreign moods, fads, or fashions» (WALDRON 2005, 8).

[12] The clear reference is Ronald Dworkin's theory. See DWORKIN 1978; DWORKIN 1986.

[13] «Functionalism treats comparative law as a technique of problem solving. The subject of legal analysis is the legal problem excised from its context», cfr. TEITEL 2004, 2574.

vide national judges with new tesserae of practical wisdom and stretch their view on a shared heritage of truth and justice, with the effect of minimizing their own level of appreciation. According to Joan Larsen «[j]udges should look to comparative and International law – for substantive constitutional content because foreign and International rules are readily ascertainable and are formulated by sources external to the judiciary itself»[14].

Similarly Jeremy Waldron argues: «this is exactly what ius gentium provided – the *accumulated wisdom of the world on rights and justice*. The knowledge is accumulated not from the musings of philosophers in their attics but from the decisions of judges and lawmakers grappling with real problems»[15].

Hence, foreign law provides a crucial contribution to the optimizing enterprise of judges, especially of constitutional judges. They are no longer just arbiters of law substantial validity – namely its conformity to the fundamental constitutional principles – but rather guarantors and founders of the ideal, ethical and legal order, by the means of comparative analysis[16].

From a conceptual point of view, all that results in complex notion of comparison: first, the reconstruction of analogies and differences in the way in which normative utterances *roughly comparable* are interpreted in different

[14] LARSEN 2004, 1303. Larsen, anyway, doesn't agree with this point of view.

[15] WALDRON 2005, 138.

[16] Recognizing the influence of Dworkin moral reading approach, Charles Fried on the point says: «Justice Breyer's move […] have introduced a whole new range of materials to the texts, precedents and doctrines from which the Herculean task of constructing judgments in particular cases proceeds». See FRIED 1999-2000, 820-821.

contexts[17]; second, the evaluation of the best solution, having regard to the different answers and to the peculiarities of the concrete case; third, the inner criticism, whereas, at the end of the analysis, the answer given by the foreign judges would be evaluated superior, more effective o better fitting than the national one; fourth, the normative challenge, to conclude, by *transplanting* the foreign solution into the national legal order.

Evaluation and criticism are the most relevant steps and they have their clearest articulation in the corollary of *persuasive authority*[18].

Persuasive authority has been conceived as a conceptual alternative to binding authority that is, as Patrick Glenn claims, «an authority which attracts adherence as opposed to obliging it»[19].

This special kind of authority is characterized by two specific elements.

First, it is entirely based on the persuasion force. This implies that the content of the utterance is relevant more than the reputation of the *author*[20]. Accordingly, as Chad Flanders argues,

[17] See BREYER, dissenting opinion in *Knight*, 120 S. Ct. at 464.

[18] «Reception is the obvious instance of adherence, on a large scale, to persuasive authority» notices Patrick Glenn, in GLENN 1987, 264.

[19] GLENN 1987, 263.

[20] «The idea that some authority is *persuasive* is then contrasted with authorities that are mandatory or binding and which have their authority by virtue of something else besides their persuasiveness, say, because they are the rulings of a higher court, or are decisions made by the same court in the past. Foreign authorities, the argument goes, are merely *persuasive* and are not binding, and as such can be cited insofar as they are helpful and illuminating to the issue; because they do not bind, they do not raise any specter of being ruled by a foreign country, as some fear», FLANDERS 2009, 56.

> «even though these sources do not have any power over courts by virtue of what they are (that they are some source that is intrinsically authoritative) they still can have a power by virtue of what they say, if they say it persuasively. In other words, if one of these sources makes an argument that a judge or court finds convincing, then to that extent, that source has some authority over the judge»[21].

Second, it has a weak nature. As a matter of fact, this authority is said to be *soft*, since the acceptance of the decision entirely depends on a prudential evaluation – the force of persuasive authority is the unforced force of the better argument, argues Habermas.

Anyway, this evaluation would not be discretionary. On the contrary, it is supposed to be an highly sophisticated means to avoid judicial arbitrariness in difficult cases[22].

The judicial transplant doctrine has been object of four main objections. Two of these objections concern the persuasive authority corollary and, more in particular, the coexistence among three concepts that are supposed to be inconsistent: authority, persuasion and truth.

In short, as Joseph Raz claims, if «to be subjected to authority […] is incompatible with reasons»[23], therefor authority and persuasion are mutually exclusive notions.

[21] FLANDERS 2009, 56.

[22] See GLENN 1987: «highly sophisticated alternative to notions of binding law and mechanical jurisprudence on the one hand and arbitrary personal licence on the other».

[23] «For reason requires that one should always act on the balance of reasons of which one is aware. It is of the nature of authority that it requires submission even when one thinks that what is required is against reason» (RAZ 1979, 1).

> «Once we understand that genuine authority is content-independent – accordingly Frederick Schauer argues – we are in a position to see that persuasion and acceptance (whether voluntary or not) of authority are fundamentally opposed notions. To be *persuaded* that global warming is a real problem is to accept that there are sound substantive reasons supporting these conclusions and thus to have no need for authoritative pronouncements in reaching those conclusions»[24].

Hence, or national judges quote foreign law because it is persuasive or they quote it in deference to the authority who stated it. «The fact that the reasoning of the foreign court was found persuasive does not mean that the authority itself was persuasive»[25], argues Taavi Annus, and vice versa.

The second objection is based on the inconsistence between truth and persuasion. On the one hand foreign law is said to be persuasive. On the other hand, being persuaded evokes a certain dimension of thought which is linked to the sphere of subjective opinions. But truth is independent from opinions. In other words, something that is persuasive is not necessarily true. Hence my question is: what is the link between foreign law and objectivity in judicial decisions?

The third objection is much more general and has a normative status. According to that, given the separation of powers principle, this practice would be illegitimate and undemocratic. In fact the power to legislate is moved from parliaments to judges. «Even decisions rendered by judges in democratic countries – claims accordingly Richard Posner – are outside the U.S. democratic orbit»[26]. This criticism

[24] SCHAUER 2008, 1941.
[25] ANNUS 2004, 319.
[26] POSNER 2010, 353.

is far from being original but this depends on the above mentioned use to confuse the debate on foreign law with the debate on judicial discretion.

The last objection has an epistemological status and deals with the functional universalism and with the idea that *each juror answers the same question*[27]. It is argued that law is a cultural phenomenon and that its content is strongly influenced by the specific way to consider it. «Prior to understanding there must be (cognitive) commensurability. In the absence of shared epistemological premises, the common law and civil law worlds cannot, therefore, engage in an exchange that would lead one on understanding of the other»[28].

Moreover, law is a social and institutional phenomenon. This means that it rises from some ethical, political and economic aspirations and that it results in a certain balance of interests, priorities, values, texts, practices and meanings: «You are talking about using foreign law – argues Justice Scalia– to be sure that we are on the right track, that we have the same moral and legal framework of the rest of the world. But we don't have the same moral and legal framework as the rest of the world»[29].

2. *The judicial cosmopolitan doctrine*

Nowadays the debate on the use of foreign law is dominated by a new doctrine of comparative reasoning. This doctrine is based on the idea that human rights are to justify the use of foreign law in judicial decisions. More specifically, these rights would be universal from a normative point of view

[27] QUINN ROSENKRANZ 2007, 1283.
[28] LEGRAND 1996, 76.
[29] DORSEN 2005, 521; see also Legrand 1996.

and particular as a matter of fact. Hence, judges of all over the world would be required to achieve a universal dimension for human rights.

> «Nowadays legal comparison – as Gustavo Zagrebelsky argues – has more tasks. In a closed constitutional system constitutional institutions were the natural reserve of national sovereignty. The practical functions of comparison were: defining its own constitutional identity by analogies and differences with the other ones; Borrowing or copying constitutional institutions or practices. Today things has changed and comparison is asked to realize a shared constitutional horizon in which single and plural do coexist and interact»[30].

Therefore, the judicial cosmopolitan doctrine[31] can be considered an hermeneutical version of the human rights universalism old theme. In fact, it focuses on a re-conceptualization of the relationship between constitutional rights and human rights.

Until 1948 human rights thinking had been dominated by a dualist view. This view identified two main, different kinds of rights: the philosophical rights and the positive rights. The former were considered universal as they belonged to each individual, whatever was her personal and social status. These rights were also absolutely ineffective and, at least, they might be considered a proposal for the next legislators. From this point of view they were moral rights. The latter, i.e. the positive rights, were the rights that constitutional charts recognized to citizens.

The difference between moral rights and positive rights

[30] Zagrebelsky 2008, 400 (translated by Serena Romano).
[31] The expression is by Richard Posner (POSNER 2010, 347).

become weaker when the first international human rights charts were enacted – first of all the Universal Declaration of Human Rights of 1948. According to a new monist and inclusionist view – as Norberto Bobbio argues[32] – human rights were positive and universal at the same time.

Anyway, the universalism positivization didn't give birth to the internationalization of constitutional law. Rather it clashed with a not duly considered obstacle. Even though almost all the states had enacted a shared list of human rights, very often the meanings of these rights were mutually inconsistent. In other words, human rights were universal in books, and fragmentized in practice.

According to that, argues Baldassare Pastore, rights enacted in international charts hide inconsistent views and therefor they just appear universal. The consent bases the formal level of rights but people disagree on how to implement them. Universalism, claims Pastore, requires as a universal community of rights as an agreement on their content[33].

Hence, here is the judicial cosmopolitan proposal: a global community of courts[34] for creating the human rights universal core.

> «Constitutional Courts – Anne-Marie Slaughter argues – will be forging a deeply pluralist and contextualized understanding of human rights as it spans countries, cultures and national and international institutions […]. [It] requires recognition of participation in a common judicial enterprise, independent of the content and constraints of specific national and international legal systems. It requires that judge

[32] BOBBIO1990, 23-24.

[33] PASTORE 2003, 9. See also VIOLA 2000, 192.

[34] *A Global Community of Courts* is the title of an Anne-Marie Slaughter's article, cfr. SLAUGHTER 2003.

> see one another not only as servants or even representatives of a particular government or polity but as fellow professional in a profession that transcends national borders»[35].

Anyway, this dimension is said to be possible[36] as far as human rights are articulated through *crossed interpretations* involving the various conceptions.

This kind of universalism is far from the objectivist view of traditional legal naturalism. It is, rather, a shared plan involving, in Pastore's words, the communicative skills of human beings and cultures: it is the "agreement horizon" among more particulars[37].

Concerning the use of foreign law, this implies to give up the borrowing model espoused by the former doctrine. The new model is grounded on a mutual semantic fertilization – the *cross fertilization*, in John Bell's words – and on a shared judicial ethics based on dialogue, mutual ear and comprehension.

> «The process of international influence – Claire L'Heureux-Dubé maintains – has changed from *reception* to *dialogue*. Judges no longer simply *receive* the case of other jurisdictions and then apply them or modify them for their jurisdiction. Rather, cross-pollination and dialogue between jurisdiction is increasingly occurring. As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts»[38].

35 SLAUGHTER 2000, 1124.

36 PASTORE 2003, 10.

37 PASTORE 2003.

38 L'HEUREUX-DUBÉ 1998, 17. Similarly John Bell talks of an external stimulus that promotes an evolution within the receiving legal system in contrast of an internal adaptation (organic) by the receiving

The difference between the two models is clear. The borrowing model requires a simple act of reception. It's a one-sided, unilateral act by means of which the foreign norm is implanted into the national system. Its original meaning remains untouched without review because of its own persuasiveness.

The cross fertilization model, on the other hand, implies a different task. In this model the interpreter is required to create a shared semantic horizon and therefor he ought to intervene on the meaning. As Peter Häaberle argues, by comparison different constitutional issues are enabled to communicate one another[39]. Consequently, judge are required to create a new legal utterance by transcending the differences into an *interactive communicational practice*[40].

According to a similar plan, constitutional judges are called to give birth to a global cooperation that is expected to achieve a human rights shared core and to generate consistent practices all over the world.

Consequently, judges would be members of a sort of *constitutional federalism*, as Zagrebelsky defines it, whose components are neither people not states but, rather, constitutions and their interpreters. The outcome, argues Zagrebelsky, is not an unavoidable singleness but, rather, a convergence that has to be pursued[41].

Accordingly, as Marie-Claire. Ponthoureau claims, «l'ouverture de contenu et de la dimension des droits fondamentaux vers l'extérieur est la conséquence de l'évolution vers un État constitutionnel coopératif. Se crée alors une

legal system in its own way (BELL 1998).

39 Quoted in PONTHOUREAU 2005, 174.

40 PASTORE 2003, 20.

41 ZAGREBELSKY 2008, 409.

communauté des interprètes des droit fondamentaux»[42].

This implies that each judge has to recognize her colleagues as pares when she participates in the shared discourse on human rights. In other words, she has to accept their argumentative authority and their legitimation in playing the game.

3. *Few words on the subversive trend*

The same objections which have been made to the legal transplant doctrine, affect the judicial cosmopolitan doctrine. It has been considered undemocratic, usurping and unconstitutional. Moreover it has been said to underestimate, as Massimo Luciani maintains, the political genesis of constitutions[43].

Anyhow, the most interesting objection concerns the idea of a global community of courts. This idea is said to be fallacious and delusive, because among legal systems there are insurmountable differences concerning cultures, languages, institutions, texts and so on. Judges results from these differences so a global community of courts does not actually exist.

Moreover, the possibility to create a common horizon is said to be implausible from a practical point of view.

First of all, it is not much clear how judges would be enables to obtain a similar privileged point of view, a point of view capable of comprehending at the same time the particular and the general. Can a human mind really conceive a similar point of view?

Secondly, even admitting that a similar point of view does virtually exist, which usefulness for a judgment? A

[42] PONTHOUREAU 2005, 174.
[43] LUCIANI 2006.

notion resulting by several, blended horizons would be too weak and totally fruitless from a practical point of view.

A third doctrine of comparative interpretation focuses on the last points: the subversive comparison doctrine, as one of its founder, George Fletcher, named it. This doctrine is actually not more than a germ and it is said to be born under the aegis the legal particularism. Indeed, in my opinion, it participates to a very weak form of universalism.

The subversive doctrine supports the idea that comparison provides judges with more effective lenses for observing their national law. It would be a kind of knowledge strategy, a research method based on the *otherness*. According to this view differences and particularism would be at the core of the comparative analysis.

Therefore, comparison would enable judges to look into the distance, beyond the known, *ultra moenia*, as Rodolfo Sacco had argued about the concept of *criptotip*. The collision with *the other* would provide judges with a more complex vision of their own law. It would unveil aspects before unknown and unknowable.

> «Nationals – argue Mattei and Bussani – may be less well equipped in detecting the hidden data and the rhetorical attitude, because they may be misled by automatic assumptions»[44].

Accordingly Cécil Vigour thinks that comparison is a means to give up all the prejudices and superstructures and to break

> «avec le registre de l'opinion. La comparaison, notamment entre pays ou dans le temps, rend plus nécessaire et plus visible ce travail de rupture épistémologique que le

[44] BUSSANI and MATTEI 1997.

> chercheur doit accomplir. En conséquence, la comparaison est un *moyen de rupture* avec *le ça-va-de-soi* des représentations sociales issues d'un contexte sociologique culturel particulier»[45].

Michael Tushnet claims that this way to approach law is typically post-modern, free from the methodological anxiety of the other doctrines, «worry about whether appropriating selected portions of other constitutional traditions is sensible, or whether the appropriation will work in some sense»[46].

> «La comparaison – argues Muir Watt – s'engage ainsi contre le dogmatisme, contre les stéréotypes, contre l'ethnocentrisme, c'est-à-dire, contre la conviction répandue (quel que soit le pays) selon laquelle les catégories et concepts nationaux sont les seuls envisageables. Cette conviction serait celle qui procède d'un discours «officiel» trop exclusivement légaliste et par ailleurs trop peu enclin à regarder au delà des horizons purement nationaux […] centré sur le texte, pyramidal, vertical, légi-centré, écrit, logiço-déductif, dogmatique, entièrement dominé par les figures de la loi, de l'État, de la puissance publique, elles-mêmes fortement théorisées sur la base de certains dogmes politiques ou idéologiques»[47].

Law without authority is an open discourse, uncontainable and paradoxical. Comparison is a place among others in which the mixture of plays and registers − the narrative with the denotative, the performative with the descriptive − takes place. Hence the epithet *subversive*.

[45] VIGOUR 2005, 100.
[46] TUSHNET 1999, 1228.
[47] MUIR WATT 2000.

> «In their provinciality, in their listening only to those who subscribe to the indigenous legal culture resemble religious communities […]. As legal arguments are based on authority of constitutions, statutes, cases and scholar writings, the great religions of the West are all based on holy texts […]. By becoming aware of linguistic and philosophical differences we can generate a sense of our historical contingency […]. And if we understand the roots of our resistance to change, perhaps reforms become thinkable. This is the subversive potential of comparative law»[48].

This third doctrine is universal too, in spite of its particularistic expectations, although in a weaker sense. Comparative law, as a matter of fact, is expected to play a role in legal knowledge. Reading a foreign judicial decision is considered substantially different from reading a foreign book or a newspaper or from taking a cup of coffee. Just the former, indeed, can inspire and provide judges with a more complex view on their national law. Hence law is provided with some shared features which differentiate it from other phenomena, whatever is the considered legal systems. These features are, in a word, universal.

[48] FLETCHER 1998, 700.

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