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***Judicial Re-Use: “Codification” or Return of Hegelism?
The Comparative Arguments in the “South” of the World****

Abstract: *The so called “Meta”- “Trans”- and “Cross”-constitutionalism do not produce any definitive “codification”/constitutionalization in all social contexts where they are practiced, especially when those contexts have problems of economic and social underdevelopment, together with problems of a democracy that is “delegated”, rather than “deliberative”: practically, when the mentioned contexts coincide with the «South of the World»*

Keywords: “Judicial dialogue”; Trans-constitutionalism; Codification and Constitutionalization; South of the World; Judicial Re-Use.

1. There is a large interest about the subjects of “Judicial dialogue” and “Transjudicial communication”.¹ Someone considers those subjects as expression of a “common” and “ubiquous” constitutionalism, with a predominant judicial matrix.² Usually, legal Scholars discuss about “Meta-constitutionalism”,³ “Trans-constitutionalism”,⁴ “Cross-

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¹ See A.-M. SLAUGHTER, *A New World Order*, Princeton, Princeton University Press, 2004; B. MARKESINIS – J. FEDKTE, *Judicial Recourse to Foreign Law: A New Source of Inspiration*, London, UCL Press, 2002 [tr. it.: *Giudici e diritto straniero. La pratica del diritto comparato*, Bologna, il Mulino, 2009].

² See M.R. FERRARESE, *Transjudicial Dialogue and Constitutionalism. A Risk or an Opportunity for Democracy?*, in «Sociologia del Diritto», 2, 2009, p. 348 ss.; I. TURÉGANO MANSILLA, *Justicia global: los límites del constitucionalismo*, Lima, Palestra, 2010.

³ See N. WALKER, *The Idea of Constitutional Pluralism*, in «Modern Law Review», LXV, 3, 2002, p. 354 ss.

constitutionalism”,⁵ “Permeability of constitutional borders”.⁶ But, at the same time, talking about “Meta-constitutionalism” does not mean involving “Meta-constitutions”, but only discursive and “extra” State practices, while the “Trans-constitutionalism” is useful to search “Transversal reasons” for juridical and cultural orders, trying to put them together; as alternative, they would be in conflict because they are un-homogeneous; finally, the “Cross-constitutionalism” is considered an intellectual and elitist phenomenon which does not guarantee public policies of a constitutional and spread concretization.⁷ This means, with other words, that the optimistic approach to describe these new practices leads to a less enthusiastic conclusion.

2. The so called “Meta”- “Trans”- and “Cross”-constitutionalism do not produce any definitive “codification”/constitutionalization in all social contexts⁸ where they are practiced, especially when those contexts have problems of economic and social underdevelopment, together with problems of a democracy that is “delegated”, rather than “deliberative”:⁹ practically, when the mentioned contexts coincide with the

⁴ See N. NEVES, *Transconstitucionalismo*, São Paulo, Martins Fontes, 2009.

⁵ See A. RAMOS TAVARES, *Modelos de uso da jurisprudência constitucional estrangeira pela justiça constitucional*, in «Revista Brasileira de Estudos Constitucionais», III, 12, 2011, p. 4 ss.

⁶ See G.J. JACOBSON, *The Permeability of Constitutional Borders*, in «Texas Law Review», LXXXII, 7, June 2004, p. 1763 ss.

⁷ See R. HIRSCHL, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, in «Fordham Law Review», LXXXV, 2, 2006, p. 721 ss.

⁸ About Codification and Constitutionalization, see G. TARELLO, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, il Mulino, 1998.

⁹ See G. O'DONNELL, *Delegative Democracy*, in «Journal of Democracy», V, 1, 1994, p. 55 ss.; C.S. NINO, *Fundamentos de derecho constitucional*, Buenos Aires, Astrea, 1992.

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«periphery of the constitutional modernity»,¹⁰ with the «South of the World».¹¹

Most of the Scholars from the “North” of the World are optimistic about the “Transjudicial constitutionalism”, but they forget that this kind of global (pseudo-) communication does not overshoot the “Hegel’s circle”, which was exclusively (and with excluding effects) built on the outline of the west Euro-North American constitutional memory and experience. In his *Lectures on the Philosophy of History* (*Vorlesungen über die Philosophie der Weltgeschichte*, 1832), Hegel wrote that even if the Earth has a spherical form, history does not go around it, for this reason the West is the end of the history of the world, as Asia is its origin.

Neither the “dialogue” circulates in a spherical way. It is also elliptical in his effects and unidirectional in his communication and “imitation” “flows”:¹² in his effectiveness, it is constructive in the North, but often illusive and not-definitive in the “South”; in the “flows”, the “South” tries to imitate the “North” and not vice-versa. This is demonstrated by several studies which have not a European or North-American origin.

3. Actually, in the “South” of the World, there is a widespread critique about these ways of “dialogue” because many times they are a kind of

¹⁰ M. NEVES, *A Constitucionalização simbólica*, São Paulo, Martins Fontes, 2007².

¹¹ B. DE SOUSA SANTOS, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, London, Butterworths, 2002².

¹² See M. CARDUCCI, *Le integrazioni latinoamericane nei “flussi giuridici” fra “prototesto” europeo e “metatesti” locali*, in «Diritto Pubblico Comparato ed Europeo», 1, 2013, pp. 1-26.

“copy” of ideas and concepts which do not belong to their own cultural contexts or traditions;¹³ for this reason they produce a methodological syncretism sometimes quite confused.¹⁴ For example, someone thinks that the mentioned “copy” has already produced “imitative illusions”,¹⁵ or “inopportune ideas”¹⁶ or “internal irritations” to be evaluated case-by-case within each juridical system.¹⁷ The generalizations are generically assumed as methodologically wrong, a practice of «intellectual deviation»,¹⁸ a form of «fragmentation of law».¹⁹

In the “South” of the World, the propensity toward the “dialogue” seems to be useful to produce an «expresión simbólica de comunicación», as asserted by Marcelo Neves,²⁰ a kind of «Heading South But

¹³ See M. GORDON, *Don't Copy Me Argentina: Constitutional Borrowing and Rethorical Type*, in «Washington University Global Studies Law Review», VIII, 3, 2009, p. 486 ss.

¹⁴ See V. AFONSO DA SILVA, *Sincretismo Metodológico*, in V. Afonso da Silva (org.), *Interpretação Constitucional*, São Paulo, Malheiros, 2007, and ID., *Princípios e Regras: mitos e equívocos acerca de uma distinção*, in «Revista Latino-Americana de Estudos Constitucionais», I, 2003, p. 607 ss.

¹⁵ See A. FRANCO MONTORO, *Filosofia do direito e colonialismo cultural: transplante de institutos jurídicos inadequados à realidade brasileira*, in «Revista de Informação Legislativa», X, 37, 1973, pp. 3-20.

¹⁶ See R. SCHWARZ, *As ideias fora do lugar*, in *Ao vencedor as batatas: forma literária e processo social nos inícios do romance brasileiro*, São Paulo, Duas Cidades, 1992⁴.

¹⁷ See R. SAAVEDRA VELASCO, *Sobre formantes, transplantes e irritaciones*, in «Ius et Veritas», XL, 2010, p. 70 ss.

¹⁸ C. TAYLOR, *A Secular Age*, Cambridge, Harvard University Press, 2007 [tr. it.: *L'età secolare*, Milano, Feltrinelli, 2009].

¹⁹ P. HOLMES, *The Rhetoric of “Legal Fragmentation” and its Discontents Evolutionary Dilemmas in the Constitutional Semantics of Global Law*, in www.utrechtlawreview.org, VII, 2, 2011.

²⁰ NEVES, *A Constitucionalização simbólica*, cit.

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Looking North»,²¹ that sometimes acts like a «subaltern thinking», other times like a «border thinking».²²

But this means that even the “Constitutional imitations” and the “Constitutional dialogue” of the Judges cause a metaphoric discourse:²³ that is to say, a discourse which does not examine the characters of its own orders and constitutions, but promotes a promiscuity of linguistic formulae and concepts, as a kind of a juridical, meta-constitutional “new-formalism”.

In the “South” of the World, the sketched situation is problematic from two viewpoints: on the one hand, it is problematic for the effects of “codification” that it can guarantee; on the other hand, it is problematic if we take into account the comparative method that it can build in the community of Judges and Scholars.

About the “codification”, Marcelo Neves from Brazil, as already said, reduces these questions to a “linguistic game”, that expresses a “transversal rationality”, as defined by Wolfgang Welsch.²⁴ With that expression he refers to a discourse that has not the duty to use concepts and words of others in a rigid form, in order to build a certain legal order guaranteed for everyone; on the contrary, it allows to do transac-

²¹ J. THOME, *Heading South But Looking North: Globalization and Law Reform in Latin America*, in «Wisconsin Law Review», 3, Fall 2000, p. 691 ss., and H. SPECTOR, *Constitutional Transplants and the Mutation Effect*, in «Chicago-Kent Law Review», LXXXIII, 1, 2008, p. 129 ss.

²² W. MIGNOLO, *The Darker Side of Western Modernity: Global Futures, Decolonial Options, Latin America Otherwise*, Durham, NC, Duke University Press, 2011; ID., *Histórias locais/projetos globais. Colonialidade, saberes subalternos e pensamento liminar*, Belo Horizonte, Universidade de Minas Gerais, 2008; ID., *Teoría del texto e interpretación de textos*, México, DF, UNAM, 1986; ID., *Textos, modelos y metáforas* Jalapa, Universidade Veracruzana, 1984.

²³ See N. NEVES, *Transconstitucionalismo*, São Paulo, Martins Fontes, 2009, p. 38 ss.

²⁴ See W. WELSCH, *Vernunft. Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft*, Frankfurt am Main, Suhrkamp, 1996.

tions between narrative contexts that are different for their stories, contents and identities, within a logic which is reactive to individual and collective requests, and not directly active in the society.²⁵

For this reason, the “linguistic game” get, as main actors, the Judges and not the legislation as a political instrument to definitely formalize a determined institutional identity: the judicial “imitation” remains ductile, not politically demanding, and finally, less fearful if compared with the power assets, within it works.

Through this “weakness”, the “linguistic game” is practiced in the peripheral Countries of the “South” of the World, where constitutional histories, aimed to build their own identities, are more conflicting and powerless; and where the role of policy is less believable. Through the “dialogue”, Judges can promote a constitutional emancipation towards the requests claimed by the single subjects or by those subjects involved in a trial; in any case, this emancipation does not imply public policies of a definitive “codification”.²⁶ It just remains a “symbolic” emancipation, a *fétiche*.²⁷ It produces “background concepts”, not “systematized concepts”.²⁸

From the viewpoint of the comparative method, Diego Eduardo López Medina from Colombia,²⁹ assumed that the “dialogue” in the

²⁵ About the difference: M.R. DAMŠKA, *The Faces of Justice and State Authority*, New Haven, Yale University Press, 1986 [tr. it.: *I volti della giustizia e del potere. Analisi comparata del processo*, Bologna, il Mulino, 1991].

²⁶ See CH. BATEUP, *The Dialogic Promise: Assessing the Normative Potential of Theories do Constitutional Dialogue*, in «Brooklyn Law Review», LXXI, 3, 2006, p. 1109 ss.

²⁷ See W. PIETZ, *Le fétiche. Généalogie d'un problème*, Paris, Kargo & l'Éclat, 2005.

²⁸ R. ADCOCK - D. COLLIER, *Connecting Ideas with the Facts: The Validity of Measurement*, in «American Political Science Review», XCV, 3, 2001, p. 529 ss.

²⁹ See D.E. LÓPEZ MEDINA, *Teoría impura del derecho. La transformación de la cultura jurídica latinoamericana*, Bogotá, Legis-Universidad de los Andes-Universidad Nacional, 2004.

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“South” of the World causes a real heritage of mistakes, adjustments and approximations. Because of various “imitations” in the linguistic space, this kind of “dialogue” contributes to shape the constitutional culture among its operators on the theoretical and practical aspects of the law, able to build the mental maps of self-identification of their own formants.

This is the only constructive specificity of the “flows” going from the “North” to the “South” of the World: this is not a “codification”, but a methodological and shared *opinio iuris* (not *sive necessitatis*, not *jus commune*).³⁰ On the one hand, in the “places of production”, that is to say, in the “North” of the World, in Europe and in the United States, the main theoretical and conceptual elaborations concerning constitutional law and the theory of law have their own power, not only because a historical supremacy or the original thinking, but, first of all, because of the material, social and political conditions of a spread communication and circulation. This allowed those elaborations to get rich of new contributions for the debate and experimentation, able to be projected on the dimension of a real “*teoría transnacional del derecho*”. On the other hand, considering the “transnational” impact of the Euro-North American theory and law, the “reception sites”, that means the “South” of the World, have lived as “*tradiciones débiles*” because of the colonic conquer, of the imposed colonialism, of the economic conditionings, that have limited the social creativity of the constitutional discourses and built elitist, slow, excluding and inopportune

³⁰ See C.S. CERCEL, *Le «jus commune» dans la pensée juridique contemporaine, ou le comparatisme perverti*, in P. LEGRAND, dir., *Comparer les droits, résolument*, Paris, PUF, 2009.

constitutional languages. These kind of discourses determined an evolution of the peripheral contexts as forms of a constant “copy”, promoted not for an abstract target of erudition, nor for a faithful reproduction of the foreign shape, but just to elaborate, in an autochthonous environment, a “*jurisprudencia pop*”, arranged and transformed in consideration of the context and the contingent use.

Therefore, the “flow” corresponds to a “borrowing” of foreign elements, but it is always an “*unfaithful* borrowing”, flowed into a narrative and explicatory imagery, totally disconnected from the original formant. The final result could be «*fértiles malas lecturas y apropiaciones*», that will go around the “South” of the World, not necessary because of the power or the meaningfulness of their content, but because of the communicative easiness of the product as soon as it is transformed into the transmitting languages of these contexts (e.g., the Spanish or Portuguese languages in the Latin America).³¹

This kind of confusion of the “flow” could involve a circulation of ideas and debates, useful to emancipate the constitutional context. The analysis proposed by Gordon, Neves and Medina allow to understand how phenomena of “trans-judicialism” are useful to root a constitutional culture, but are not appropriate to build new forms of a definitive “codification” of constitutional conquests realized through a “dialogue”.³²

In fact, this is demonstrated by the relationship between the judicial entrenchment created by the “judicial dialogue” and the constitutional

³¹ See J. CARPIZO, *Derecho constitucional latinoamericano y comparado*, in «Boletín Mexicano de Derecho Comparado», 114, 2005, p. 949 ss.

³² See D.S. LAW - WEN-CHEN CHANG, *The Limits of Global Judicial Dialogue*, in «Washington Law Review», LXXXVI, 3, October 2011, p. 523 ss.

transformations or “constitutional frauds” caused by some political powers through laws, constitutional amendments, unconstitutional or anti-constitutional practices.

In the “South” of the World, the anti-majoritarian logic of Courts and Tribunals that mutually “dialogue”, cannot resist to the abuses of the political power. In the “South” of the World, the present constitutional problem is not that concerning the abuses of the judicial power – like in the “North” of the World³³ – but that concerning the abuses of the “others” constitutional powers, the government branches of the constitutional systems.

4. From the methodological viewpoint, this optimistic approach on the law in action of Judges as promoters of global “dialogues” and “comparisons” forgets several analytical questions about the constitutional comparison.

First of all, it forgets that the “common law” of constitutionalism is historically passed through the edification of “common senses” of belonging, built on political spaces, territorial borders, social histories, languages and cultures, conflicts of identities that are described and solved through the constitutional scripture, as demonstrated by the historical studies of Tomás y Valiente³⁴ and Karl Loewenstein;³⁵ for this

³³ See F.G. PIZZETTI, *Il giudice nell'ordinamento complesso*, Milano, Giuffrè, 2003.

³⁴ See M. LORENTE SARIÑENA, *Historia del Derecho y sentido común: la obra de Francisco Tomás y Valiente y el oficio del historiador*, in «Historia Social», 38, 2000, pp. 141-159.

³⁵ See K. LOEWENSTEIN, *Political Power and the Government Process*, Chicago, The University of Chicago Press, 1957.

reason it needs narrations much more complex than a mere judicial “dialogue”.

Then it forgets that, considering the empirical data, the so called “dialogue” is a “*cliché*” of discourses that are usually unilateral, “monologic subcontracts”³⁶ and with an internal rhetorical use, without a proper process of elaboration of a “mutual” use of conceptual instruments and decisions, as clearly underlined by the surveys of the Italian Scholars as Giuseppe de Vergottini.³⁷

Again, it forgets that the so called “dialogue”, intended as a technique of quotations of other juridical opinions, never was able to build juridical traditions that had their roots in the society, while it produced “individual” *opinio iuris*,³⁸ not “common” constitutional customs and conventions.³⁹

Finally, it forgets that any “dialogue” must deal with the internal structures of the legal order in which each Judge works, especially considering the choice, in the power relationships, between political decisions e judicial decisions as regards the concretization of individual and social material rights, and the claims of emancipation and equality.

So, we have to ask if the enthusiasm for this global communication instrument is a “trend” of the legal Scholars, considering that any trend, as Walter Benjamin said, just creates illusions about the coincidence

³⁶ See L.-J. CONSTANTINESCO, *Die rechtsvergleichende Methode.*, Band II, Köln, Carl Heymanns-Verlag, 1972 [tr. it.: *Il metodo comparativo*, Torino, Giappichelli, 2000].

³⁷ See G. DE VERGOTTINI, *Oltre il dialogo tra le Corti*, Bologna, il Mulino, 2010.

³⁸ See A. SOMEK, *Individualism: An Essay on the Authority of the European Union*, Oxford, Oxford University Press, 2008.

³⁹ See H.P. GLENN, *Legal Traditions of the the World: Sustainable Diversity in Law*, Oxford-New York, Oxford University Press, 2010⁴ [tr. it.: *Tradizioni giuridiche nel mondo. La sostenibilità della differenza*, Bologna, il Mulino, 2011].

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between *ordo idearum* and *ordo rerum*:⁴⁰ it reduces the intellectual work⁴¹ of the social scientist or that of the practical intellectual, as the Judge, to a pure formalization and self-orientation, as Theodor W. Adorno said;⁴² or to a teleology of the subject, as specified by Paul Ricoeur.⁴³

It can happen that, following a “trend”, we are persuaded that the concepts of the comparative constitutional law, as a socio-normative science and theoretical derived elaboration, can be used in a disconnected and eccentric way, putting some of those concepts away in the “trunk of useless”.⁴⁴ But, considering the “constitutional globalism” phenomena⁴⁵ and the world social conflicts,⁴⁶ in the common practice, law actors, single citizens, national actors, most of the Judges (national and supranational), political and institutional actors of the globalization daily use the mentioned concepts.

5. Actually, the “dialogue” is not always a proper “dialogue” because, like the most general phenomenon of “Constitutional borrowing”, it is a

⁴⁰ See J. CESAR, *Walter Benjamin on Experience and History: Profane Illumination*, San Francisco, Mellen Research University Press, 1992.

⁴¹ See M. WEBER, *Politik als Beruf, Wissenschaft als Beruf*, Berlin, Bunker & Humblot, 1948 [tr. it.: *Il lavoro intellettuale come professione*, Torino, Einaudi, 1966].

⁴² See TH.W. ADORNO, *Notes to Literature*, Vol. 2, New York, Columbia University Press, 1992 [tr. it.: *Note per la letteratura*, Torino, Einaudi, 1958].

⁴³ See P. RICOEUR, *Essai sur Freud*, Seuil, Paris 1965 [tr. it.: *Dell'interpretazione. Saggio su Freud*, Milano, il Saggiatore, 1979].

⁴⁴ M. REVENGA SANCHEZ, *Cinco grandes retos (y otra tantas amenazas) para la democracia constitucional en el siglo XXI*, in «Parlamento y Constitución», 12, 2009, p. 25 ss.

⁴⁵ See B. ACKERMAN, *The Rise of World Constitutionalism*, in «Virginia Law Review», 83, 1997, p. 771 ss.

⁴⁶ See A. PACE, *Le sfide del costituzionalismo nel XXI secolo*, in Id., *I limiti del potere*, Napoli, Jovene, 2008.

system of decision-making,⁴⁷ which expresses a logic of a communicative approach that can be effectively called “Ikea”,⁴⁸ and that affects the formants of the constitutional actors.⁴⁹

Starting from here to declare the origin of a global community of constitutionalism,⁵⁰ we require some specific metaphorical abilities. The “borrowing” is not only the description of the phenomenon, but it is its justification in consideration of several shared words.⁵¹ It translates (and reduces) the realty into language (*ordo rerum* as *ordo idearum*?) so that it can leave the social (and non natural) basis of the language out; furthermore, it can ignore the material dimension, because it cannot reduce the juridical experience to a simple product of reality used by the subject, nor a mutual implication between a subject and his related object;⁵² furthermore, it can also ignore the moral dimension, that is to say a judgment on the production of power relationships, increasing the effect of a real “linguistic alienation”.⁵³

In his *On the Genealogy of Morality: A Polemic (Zur Genealogie der Moral. Eine Streitschrift*, 1887), Nietzsche underlined how the “Right of the master” to give names is so ancient that it is possible to

⁴⁷ See N. TEBBE - R.L. TSAI, *Constitutional Borrowing*, in «Michigan Law Review», 108, 2010, p. 459 ss.

⁴⁸ See G. FRANKENBERG, *Constitutional Transfer: The IKEA Theory Revisited*, in «International Journal of Constitutional Law», VIII, 3, July 2010, p. 563.

⁴⁹ See M. CARDUCCI, *Euristica dei “flussi giuridici” e comparazione costituzionale*, in «Annuario di Diritto Comparato e di Studi Legislativi», 2013, p. 333 ss.

⁵⁰ See A.-M. SLAUGHTER, *A Global Community of Courts*, in «Harvard International Law Journal», XLIV, Winter 2003, p. 191 ss.

⁵¹ See S. CHOUDRY, *Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation*, in «Indiana Law Journal», LXXIV, 3, 1999, p. 819 ss.

⁵² See S. TIMPANARO, *Sul materialismo*, Pisa, Nistri-Lischi, 1975.

⁵³ See F. ROSSI LANDI, *Il linguaggio come lavoro e come mercato*, Milano, Bompiani, 1968; ID., *Significato, comunicazione e parlare comune*, Padova, Marsilio, 1961.

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considerate the origin of the language as a manifestation of power of the masters: they are used to say “what is that”, giving a specific name to it, and saying if it is a specific thing or a fact; by acting that way, they could take possession of it.

Does the “judicial dialogue” even realize an actual form of “right of the masters to impose names”?

Nietzsche reminds that the “imposition” of names was historically done through the use of the “priestly caste”. This involves that words can be borrowed even by a decision of the “priestly caste” of the Judges, even if words hide a historic semantics that reveals various differences and gaps in social stories.⁵⁴

The theme of the “dialogue” is the result of the contemporaneous separation between semantics and interpretation – separation that comes from the de-constructions (and destructions) of the twentieth-century, and it can be summarized in the contraposition between Hans Georg Gadamer and Eric Donald Hirsch, Jr.,⁵⁵ that is to say the contraposition between the subjective moment of interpretation, where the «capability to read, to intend through a script is like a secret art, or better like a kind of magic that set us free and bound»,⁵⁶ and the subjective

⁵⁴ See N. ELIAS, *Über den Prozeß der Zivilisation. Soziogenetische und psychogenetische Untersuchungen*. Bd. 2: *Wandlungen der Gesellschaft. Entwurf zu einer Theorie der Zivilisation*, Frankfurt a.M., Suhrkamp, 1969 [tr. it.: *Potere e civiltà*, Bologna, Il Mulino, 1983].

⁵⁵ See A. BRIOSI, *Su Gadamer, Hirsch e l'interpretazione*, in «L'Ombra d'Argo», 9, 1986, 157 ss.

⁵⁶ H.G. GADAMER, *Wahrheit und Methode*, Tübingen, Mohr, 1960, p. 201 [tr. it.: *Verità e metodo*, Milano, Bompiani, 1983].

moment of the author of a script that is expressive of «Meaning and Significance» that are changing time after time.⁵⁷

This way, the “dialogue” produces the preclusion of any judgment about a language that lives of historical reifications and of social relations: it becomes a rhetoric use of words to legitimate judgments.

But the methodological premise of these questions about “dialogue” is a presumption that cannot be confirmed by a proper constitutional comparison: it is the isomorphism of each Constitution, apart from the polymorphism or anamorphism of the constitutional histories produced by the social relationships.

The ethereal dimension of the “dialogue” does not perceive these questions.⁵⁸ It presupposes that constitutional texts and judicial decisions are equal, without any consideration – within the linguistic enunciation – of the difference between the “literal meaning” and its “real meaning”: Paul de Man used the formulae “*allegoresis*” and “*allegorema*” to define the mentioned distinction,⁵⁹ referring to the classical difference between “*noesis*” and “*noema*”.⁶⁰ “*Noesis*” are those simple elements that compose words, while “*noema*” refers to all those concepts and ideas communicated through the execution of the expressed linguistic relationships, in consideration of the material conditions in which they live. Notwithstanding this complexity, the linguistic infor-

⁵⁷ See E.D. HIRSCH, JR., *Validity in Interpretation*, New Haven, Yale University Press, 1967 [tr. it.: *Teoria dell'interpretazione e critica letteraria*, Bologna, Il Mulino, 1973].

⁵⁸ See S.W. RICHARDS, *Survey Article: The Legitimacy of Supreme Courts in the Context of Globalization*, in «Utrecht Law Review», IV, 3, 2008, p. 104 ss.

⁵⁹ See P. DE MAN, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke and Proust*, New Haven, Yale University Press, 1979 [tr. it.: *Allegorie della lettura*, Torino, Einaudi, 1997].

⁶⁰ See F. KERSTEN, *Husserl's Doctrine of Noesis-Noema*, in *Phenomenology: Continuation and Criticism*, Den Haag, Martinus Nijhoff, 1972.

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ality of a “dialogue” is able to produce “*noesis*” in each field, even in the judicial “Cross” fertilization because of the “system of conferences” between constitutional Courts and equivalent bodies.⁶¹ In that case, there never is a “*noema*”. Just communicated Reports, that is to say, a “*noesis*” for the community.

The same destiny involves those subjects who live within the judicial borders available for the “borrowing”: involving them is involving both the particular relationships on the political citizenship, that are the cause of the powers responsibility, and the problem of the democratic legitimation of this “talking”.

With the emancipator constitutionalism of the twenty-century we were used to think about subjects of constitutional law not only as un-historical and un-social individuals, that is to say as a simple “*noesis*”, but, first of all, as social persons within material relationships of life, or as “*noema*”. In fact, in the constitutional history, “borrowing” and “dialogues” always followed power relationships among real subjects. The notion of *Ungeschriebenes Verfassungsrecht*, with which Rudolf Smend describes the outcomes of the way to solve constitutional conflicts in the late German constitutionalism⁶² – considering that it influences an order, a space, a scripture, an availability of the text – cannot leave subjects out if they have a decisive role or if they are the main receivers.

⁶¹ See R. ORRÚ, *Informal Judicial Cross Fertilization*, in <http://www.juridicas.unam.mx/wcccl/ponencias/12/206.pdf>.

⁶² See R. SMEND, *Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat*, in *Festg. Otto Mayer* (1916), in R. SMEND, *Staatsrechtliche Abhandlungen*, Berlin, Duncker & Humblot, 1968, p. 39 ss.

This means that “borrowings” and “dialogues” produced receptions of “*noema*”, and not simply “listenings” of “*noesis*”, because the receptions influence subjects, bodies, rules, modifying them.⁶³

The great German Romanist Paul Koschaker asserted that history knows two forms of reception: *ratione imperii* and *imperio rationis*, underlining as the first comes before the second.⁶⁴ If everything happens with the “borrowing” and the “Cross-constitutionalism” of the “juridical globalism”, it does not seem a serious problem. All of us, are aware,⁶⁵ that «the theoretical paradox of the constitutionalization or hetero-directed democratization are replaced by the hard logic of the practical indispensability, of the material necessity and of the eventual success of a work, where the outcomes are more important than the methods [...] and where the founded democracy puts the founding democracy in the shadow». ⁶⁶ Since the era of Otto Hintze, it was possible to imagine how “imitations” and emulations were just phenomena reflected on the dialectic between Form and *äussere Bildung*.⁶⁷ exterior forms and real conditionings determined by interests and power relationships, that were not internal to the single States.

⁶³ See D. HYMES, *Models of Interaction of Language and Social Setting*, in «Journal of Social Issues», XXIII, 2, April 1967, p. 38.

⁶⁴ See P. KOSCHAKER, *Europa und das römische Recht*, München-Berlin, Beck, 1947.

⁶⁵ See M. HERRERO DE MIÑON, *Nacionalismo y constitucionalismo. El derecho constitucional de los nuevos Estados*, Madrid, Tecnos, 1971.

⁶⁶ G. FLORIDIA, *Il costituzionalismo “a sovranità limitata” tra paradosso e necessità*, in R. ORRÙ - L.G. SCIANELLA, a cura di, *Limitazioni di sovranità e processi di democratizzazione*, Torino, Giappichelli, 2004, p. 16.

⁶⁷ See O. HINTZE, *Roschers Politische Entwicklungstheorie*, in *Soziologie und Geschichte*, Göttingen, Vandenhoeck & Ruprecht, 1964.

Judicial Re-Use: “Codification” or Return of Hegelism?

Probably, the “dialogue” is just a form of a re-use that expresses mere “fictions” or various interests.⁶⁸ The need to re-use, as demonstrated by Heinrich Lausberg,⁶⁹ is not an aesthetic, neutral and disinterested choice, but it is a need perceived in “typical situations” to “manage” themselves, within a social order that is presumably constant: with one word, the re-use does not codify a new reality but it reinforces the already existent situations, especially in the power relationships within a specific social context. It leads to a standardization of the socio-political *status quo*, without granting common rules for a constitutional emancipation, but creating “Standards” instead of “Rules”.⁷⁰

Therefore, is the judicial international “dialogue”, as re-use, effectively innovative and emancipatory?

It seems to have the borders of the “individualized society”, using the pessimistic formula elaborated by Zygmunt Bauman:⁷¹ we are worried about rights that belong to individuals, but we do not consider them as a common project of emancipation – as thought in the Constitutions of the second twentieth-century to build communities of justice and peace.

In the European context of the twentieth-century, constitutional law was elaborated and studied as a “general” dimension,⁷² in order to rep-

⁶⁸ See E. ESPOSITO, a cura di, *Sul ri-uso. Pratiche del testo e teoria della letteratura*, Milano, Franco Angeli, 2007.

⁶⁹ See H. LAUSBERG, *Elemente der literarischen Rhetorik*, München, Max Hueber, 1969 [tr. it.: *Elementi di retorica*, Bologna, il Mulino, 2002].

⁷⁰ See K. PISTOR, *Standardization of Law and its Effect on Developing Economies*, in «American Journal of Comparative Law», L, Winter 2002, p. 97 ss., and L. KAPLOW, *Rules versus Standard: An Economic Analysis*, in «Duke Law Journal», XLII, 3, 1992, p. 557 ss.

⁷¹ See Z. BAUMAN, *In Search of Politics*, Cambridge, Polity Press, 1999 [tr. it.: *La solitudine del cittadino globale*, Milano, Feltrinelli, 2000].

⁷² See B. MIRKINE GUETZÉVITCH, *Les nouvelles tendances du droit constitutionnel*, Paris, Librairie générale du droit, 1933.

resent juridical phenomena, not only considering the final activity of the Judge (as Law in Action), but considering it as a political action of the powers, to be observed with the application of the Constitution and the concretization of the constitutional rights (as important example in the Italian legal scholarship, we can think about the “indirizzo politico” questions).⁷³ The notion of “constitutional codification” was bound to the political dimension of constitutional law.⁷⁴

It was translated in a “constitutional *diktat*”, for the social emancipation, for the transformation of society, for the normative binding of the powers, including the private and economic ones, for the social inclusion with respect for the differences, in order to protect citizens as persons and to promote equality.

Today, the “codification” is a mere irenic and encouraging «constitutional conversation»:⁷⁵ an irenic model⁷⁶ that does not limit the power but immunizes it through “Technical Problem-Solving Approaches” suggested by the “borrowing”, without compromising itself with the fundamental political choices of powers. This way, the Problem-Solving produced by the “Conversation” becomes the only “*Diktat*” of the global constitutionalism.

⁷³ See M. DOGLIANI, *Indirizzo politico. Riflessioni su regole e regolarità del diritto costituzionale*, Napoli, Jovene, 1985.

⁷⁴ See B. MIRKINE GUETZÉVITCH, *Les nouvelles tendances du droit constitutionnel*, Paris, Librairie générale du droit, 1933; P. BARILE, *La Costituzione come norma giuridica*, Firenze, Barbera, 1951; G. TARELLO, *Storia della cultura giuridica moderna. Assolutismo e codificazione del diritto*, Bologna, Il Mulino, 1998.

⁷⁵ J.H.H. WEILER - U.R. HALTERN, *The Autonomy of the Community Legal Order: Through the Looking Glass*, in Jean Monnet Working Paper, 10, 1996, www.jeanmonnetprogram.org/papers/9610.html.

⁷⁶ See M. LUCIANI, *Costituzionalismo irenico e costituzionalismo polemico*, in «Giurisprudenza Costituzionale», LI, 2, 2006, p. 1644 ss.

6. The experiences of regional economic integration demonstrate that it is not necessary to realize a complete harmonization of the various national constitutional rights, as the free-exchange economic system, which is the background of every regional economic system, needs few essential and fundamental rules: the rules that Carl Schmitt called *Konstitutionelle Verfassung*,⁷⁷ that are coincident with the protection of property and of individual rights of freedom and contractual autonomy.

For this reason there is the conviction that the “judicial dialogue” within the regional systems produces an “evolution time” useful for the market, as an unavoidable natural “entropy”,⁷⁸ not a “normative time” useful to social promotion programs written in the national Constitutions:⁷⁹ a kind of “language economy” needed to memorize the *status quo*;⁸⁰ an universal practice “of sustain” toward the needs that are already manifested, but not a practice of valorization and development of new universal needs.⁸¹ In the comparison between regional integrations, even in the extra-European context, this data seem to be confirmed.⁸²

For the peripherals, “dialogues” are just re-uses of elaborations promoted by the “center” of the constitutional modernity; they are the

⁷⁷ See C. SCHMITT, *Il Nomos della terra* (1950), Milano, Adelphi, 1998.

⁷⁸ See R. BIN, *Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia*, in *Scritti in onore di Franco Modugno*, vol. I, Napoli, Editoriale Scientifica, 2011, p. 363 ss.

⁷⁹ See J.J. GOMES CANOTILHO, *Brançosos e interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional*, Coimbra, Almedina, 2008².

⁸⁰ See G. AGAMBEN, *The Signature of All Things*, New York, Zone Books, 2009.

⁸¹ See S. BOWLES, *Endogenous Preferences: The Cultural Consequences of Markets and other Economic Institutions*, in «Journal of Economic Literature», XXXVI, 1, March 1998, p. 74 ss.; M. FREEDEN, *Liberal Languages: Ideological Imaginations and Twentieth-Century Progressive Thought*, Princeton, Princeton Univ. Press, 2004.

⁸² See P. PENNETTA, a cura di, *L'evoluzione dei sistemi giurisdizionali regionali ed influenze comunitarie*, Bari, Cacucci, 2010.

teleological projection that leads the Judges to use comparative arguments and the “borrowing” is always the one of the “order” to be granted within a determined structure; it always remains a “language economy” for the preservation. This is what happens in the “dialogue” between Judges within a multilevel regional structure: in Europe between the European Court of the Human Rights and the Court of Justice; in the extra-systemic “dialogue” between Judges that belong to different regional orders; and, finally, in the “dialogue” between the European Court of the Human Rights and the Inter-American Court, or between regional courts and the European courts.⁸³

The Hegel’s substance that expired the “*nomos*” of Carl Schmitt, remains in the multilevel and global constitutionalism. The “constitutional cosmopolitanism” itself betrays the Hegel’s way to understand the global world as a sphere, even when, as supposed by James Tully,⁸⁴ it introduces itself as an inter-cultural “Ancient Constitution”, that is to say, a Constitution open to everyone, but always insensitive to the material and social contents regarding the cultural conflicts that it wants to avoid.

Judges cannot be revolutionary and they cannot replicate the “priestly caste” as asserted by Nietzsche. Above all, we cannot think that the “global codifications” are granted by the “language economy” of the Judges.

⁸³ See M. CARDUCCI, a cura di, *Le integrazioni regionali latinoamericane tra originalità, “flussi” giuridici e Judicial Re-Use*, in «Diritto Pubblico Comparato ed Europeo», 1, 2013, p. 3 ss.

⁸⁴ See J. TULLY, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995.

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A constitutionalism based on the judicial re-use creates the unequal and one-way world thought by Hegel: culturally communicative and universal, as the Hegel’s philosophy allowed to realize in the twentieth-century,⁸⁵ but materially (and socially, that is to say, constitutionally) non “multi- or pluriversal”, especially toward the “South” of the World: so that, it would be globally unfair.

⁸⁵ See J. DERRIDA, *L'écriture et la différence*, Paris, Editions du Seuil, 1967 [tr. it.: *Dall'economia ristretta all'economia generale: un hegelismo senza riserva*, in *La scrittura e la differenza*, Torino, Einaudi, 1971]; A. NEGRI, *Hegel nel Novecento*, Bari, Laterza, 1987.

