COMPARATIVE CONSTITUTIONAL LAW: A CONTINUATION OF LAW BY OTHER MEANS (A FEW INCIPIENT THOUGHTS)

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Comparatists are evidently in no position to see and investigate always the entire picture: even though one of the founders of comparative law stated that the student of problems of law must encompass the law of the whole world, past and present, and everything that affects the law, from geography, climate and race to developments and events shaping the course of a country's history passing through religion and ethics, the ambition and creativity of individuals, the interests of groups, parties and classes, we cannot actually expect that she can master such an overwhelming mass of information.

Comparatists, though, should be trained with the aim of observing legal documents, i.e. constitutions, through a syncretic intellectual equipment – law is the destination but, to get there, more than law is required. Then, CCL should still be included in the family of legal scholarships, but comparatists could not restrain themselves to learn law only. This assumption implies that comparatists should be trained to develop, nurture, and enhance this broader latitude of analysis and the necessary range of cultural sensitivities: to understand constitutions as culture, law may be not sufficient and many times we already know it is not. Paraphrasing von Clausewitz's well known aphorism, CCL is a continuation of law by (also) other means.

1. A few months ago, I submitted to an international journal an article about how the foundational canon of Comparative Constitutional Law (CCL) should be substantially thought over and changed when it is taught in English as a medium of instruction (EMI) [1]. My main argument was basically that CCL is still too focussed on the models and settings of the Western world to the detriment of other current constitutional experiences around the globe as meaningful and relevant as those which originated and developed constitutionalism since the end of the Eighteenth century. My idea was that CCL should abandon any presumption of constitutional birthright and open up its boundaries to include constitutional patterns that do not belong to the small club of Western countries whose constitutionalism has consolidated throughout the centuries, and consider them not as a belated replica of the original constitutional achievements, but dignify them for the unique efforts and hopes that each of them represents.

One of the reviews I received back from the editors in chief remarked that, to prove how CCL could enlarge its scope and latitude of investigation, I had selected some constitutional experiences, such as Colombia, India, and Estonia, that actually could not be considered properly outside the Western world: in fact, the Colombian Constitutional Court – whose case law I had illustrated with special reference to its decisions on economic and social rights – owes too much to the value-driven Spanish and Portuguese Constitutions to be alien from the Western influence; similarly, India is a com-

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mon-law country like so many others, and its Constitution is largely indebted with the legal influence of the British colonization; finally, Estonia would find very offensive to be excluded from the Western world or the Global North, being on the contrary unreservedly embedded in European history and tradition.

This comment gave me a great deal to think of, far beyond what was necessary for my reply to the unknown, insightful reviewer for whom my gratitude was deep and sincere: in fact, if Colombia, India, and Estonia for various reasons cannot be considered entirely different from the number of constitutional settings that, along the two coasts of the Atlantic, gave birth to constitutionalism in modern times, what is the ultimate space of action of CCL? In other words, if any constitutional model in the world to some extent recalls or echoes the constitutional examples from Europe and North America, what will prevent us from taking them merely as derivates from the originals? And, if this is the case, how comparative can CCL be, if inevitably all the constitutional settings in the world can be traced back to those paradigms that, directly or indirectly, inspired them? After all, even the Chinese Constitutions adopted in 1958, 1975, 1978, and 1982 have been drafted by jurists rather familiar with Western constitutional models: can we say, even in this instance, that the Chinese Constitutions are not entirely foreign to Western constitutionalism, and what implications on CCL has saying this?

I think that a few questions may be drawn from this set of perplexities: is CCL affected by a constitutional birthright prejudice? And, consequently, how truly comparative is CCL – i.e. how broad is its range of vision? Is its methodology well-equipped to contemplate a wide span of constitutional settings? Are comparatists themselves well-equipped in their knowledge to keep up with such task?

A host of questions is nearly all I have to offer in this Article; only here and there I will tentatively shed light on some motions that I feel necessary, if not urgent, at least to take into consideration to shake the most conventional, even occasionally conformist, premises of our scholarship.

2. One of the most puzzling (and also overlooked) issues when comparing different constitutional settings is how to make the selection of models to compare. For instance, recently I attended the presentation of a five-year long research, *Measuring Constitutional Reasoning with Numbers,* supported by the Volkswagen Stiftung and coordinated by András Jakab: the legal orders included in the survey were mainly European and North American, with the exception of Brazil, Taiwan, Australia, and South Africa. I asked the principal investigator whether there were a structural, organic reason why the bundle of constitutional models was put together in this way. In fact, if the research focus was on Europe and North America – say the most traditional and century-long constitutional experiences –, given the clear inclination of the study to dwell on those constitutional realities, I was confused by the insertion of constitutional systems from other continents which are not particularly meaningful or representative either of the variety of constitutional inspirations or of the geopolitical area to which they belong. And, since the study was specifically on measuring through quantitative methods constitutional courts decisions and arguments, I was dubious that the Supreme Federal Court of Brazil could be considered particularly descriptive of the Latin American context. Or, by the same token, that the Constitutional Court of Taiwan could raise as an especially representative model of Asian constitutionalism. Maybe they were relevant for themselves, no matter of their geographical position. In any event, in conducting the research this profile had been admittedly disregarded. I had good reason for asking the question: in fact, if they are not especially remarkable or noteworthy, their incorporation in the study seems merely to pay lip service to a certain polical correctness in the attempt of mitigating the Euro-North American constitutional privilege of the study. As a consequence, in this kind of comparative research, the methods applied neglect entirely the question of how and why choosing the terms of the comparison. I am convinced, on the contrary, that the selection of constitutional orders among which the comparison needs to be drawn must be part of the research; otherwise, CCL may ominously ends to resemble a tourist guide whose grip is proportional to the hint of exotic it displays. My assumption, then, is that the selection of what to compare should be part of CCL methodology. Paraphrasing the late Justice Scalia's notation, the selection of cases to compare should not be unprincipled or opportunistic [2].

But, arguing so, some problems come easily to mind: to begin with, comparatists are evidently in no position to see and investigate always the entire picture: even though one of the founders of comparative law stated that the student of problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as ge-

ography, climate and race, developments and events shaping the course of a country's history – war, revolution, colonization, subjugation – religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes" [3], it is an unattainable goal and a very scarcely credible presumption to assume that every CCL study should be grounded in an overall knowledge of what is constitutionally relevant or important in that specific regard in the entire world or, also, of what is substantial in that particular national context. Moreover, there are practical obstacles on the pathway of getting more acquainted with particular constitutional settings: the language in which both legal documents and the CCL scholarship are presented, especially in case of national realities characterised by a narrow-spoken idiom; the difficulty of providing documents (e.g. lack of access to official data sources); the unfamiliarity with less frequently studied constitutional systems and contexts.

Nonetheless, once we have recognised the importance of selecting the constitutional settings to be compared with some structural, reasoned method, another reflection presents itself, that is the need to abandon the reductive idea that constitutions correspond essentially to their formal manifestation.

In a very enlightening article, Günther Frankenberg has argued that, in order to be rescued from the marginalised role in the curriculum of legal education it is seemingly doomed to assume, CCL needs to adopt a *layered narrative*, according to which comparatists should point at different, notably nonlegal concepts of 'constitution' and to indicate different theoretical perspectives.

Being a comparatist is far from being an easy job:

(d)oing comparative law is demanding and difficult textual work, which can be or at least should be exciting. The comparatist appears an 'intellectual nomad,' bereft of a genuine field of law that could measure up when compared with contracts or criminal law. She is left with nothing but a questionable and, in the recent past, challenged method with which to handle the 'explosion of fact' as it creates great piles of information. Wherever she may migrate and however much she may compare, at the end of the day she still has to settle with incomplete knowledge and less than total 'cognitive control.' [4].

For this reason, he proposes to abandon the meagre idea that constitutions are simply and straight forwardly higher law and, instead, to open up to a variety of meanings, going from the constitution as higher law to its related prescriptive aspects as an instrument of governance and government to its ground rules for social confict. "From this triad – higher law, governmental organization, and ground rules – the reader of constitutions may learn a lot about the visions of order imposed by elites or desired and shared by the constitutions' addressees" [4. P. 449].

Accordingly, constitutions should be envisioned not only as legal artifacts, but as *culture*, embracing their symbolic dimension: in this way, the comparatist should be forced to leave the safe heaven of legal norms, of rules and principles, of cases and legal methods – in short, the world of justice – and to enter a terrain […] [in which] it is crucial to view constitutions as not passively sitting 'at the receiving end,' operating as mere receptacles or reflectors of culture, but to consider that they actively intervene and, under certain circumstances, shape or transform culture [4. P. 449-450].

In this scenario, constitutions may be classified in four models or archetypes: constitution as *contract* (including social contract), *manifesto, program*, and *law*. The constitutional contract dates back to the Magna Carta, one of the foundational documents of the modern constitutional era. The constitution as a political manifesto is epitomized by the French *Déclaration* of 1789. 'Real-existing socialism' *(real-existierender Sozialismus*) introduced the third archetype of the constitution as program and, finally, the constitution as law, i.e. as the product of a legislative process, is tightly related to the worldwide proliferation of legislated constitutions during the Nineteenth and Twentieth century.

Frankenberg suggests, then, a method that, at one time, is deconstructive and structural – intending to unsettle an overly formalistic analysis and to prevent the reification of constitutional structures, types, or models as transnational and ahistorical givens. Therefore, the focus on odd details and loose ends, one might say, is not – or not only – meant to celebrate the narcissism of the small difference but to help contextualize constitution making and to capture the local, elitist, or popular fantasies, conflicts, and problems, as well as to bar the comparatist's way to all-too-easy classifications and typifications. This focus functions as methodological guerrilla warfare against grand narratives – the *grand récits* – in comparative constitutional law [4. P. 458].

Two considerations come to me as a corollary of the analysis and suggestions advanced by Frankenberg: firstly, that CCL cannot rely

only and exclusively on law as fact-finding and analytical instrument, since a broader periscope is in order to grasp the multilayered mechanics, ideas, and functions beneath a given constitution. All this considered, a comparatist should rely on her legal background as much as on her political science and history knowledge. Comparatists, then, should be trained with the aim of observing legal documents, i.e. constitutions, but through a syncretic intellectual equipment – law is the destination but, to get there, more than law is required. According to Frankenberg's point of view, then, CCL would still be included in the family of legal scholarships, but comparatists could not restrain themselves to learn law only. This assumption implies that comparatists should be trained to develop, nurture, and enhance this broader latitude of analysis and the necessary range of cultural sensitivities: to understand constitutions as culture, law may be not sufficient and many times we already know it is not. Paraphrasing von Clausewitz's well known aphorism, CCL is a continuation of law by (also) other means.

The second reflection I am led to formulate is that CCL must abandon any constitutional birthright prejudice, exclusive preeminence or cultural parochialism, and commit itself to exploring contexts in which constitutionalism may imply critical issues and questions not necessarily included in the traditional constitutional history. In his introduction to the book he edited, Daniel Bonilla Maldonado resentfully noted that the jurisprudence of the courts belonging to the global South is seldom known or relied on by constitutional scholars or judges in the Western world, to the point that their legal products have a very scarce dissemination in our branch of study. "It is very rare, – he adds – to see a course on comparative constitutional law in a North American or Western European university that includes a section about the constitutional law of a country in the Global South" [5].

The recurrence to a concept like the *global South*, excluded from the number of institutions and legal scholarships enforcing the basic rules and principles of modern constitutionalism, points to the *conceit* and *narrow-mindedness* of CCL as it is conceived and circulated essentially by the European and North American constitutional scholars, who conventionally open up the spectrum of their observation to the usual circle of constitutional models in the rather dull, drowsy conviction that the crib where constitutionalism was born still offers a sufficiently comprehensive variety of patterns and prototypes to decode the complexities of all modern constitutions – by now, a far more widespread and diversified genre than the novel itself. It is possible, then, to discuss the issue of secession in a distinguished CCL panel in front of an international audience making reference to meaningful attempts of secession in Quebec, Scotland or Catalonia, but totally overlooking the cases of Eritrea (seceded from Ethiopia in 1993), Montenegro (from Serbia in 2006), Kossovo (again from Serbia in 2008), South Sudan (from Sudan in 2011), all unsurprisingly sharing their belonging to the global South's conceptual family.

I am convinced that the content of Bonilla Maldonado's allegation is not meant to deemphasize or degrade the North American and European constitutional traditions, but only to defend the idea that modern constitutionalism includes a plentiful range of experiences, difficulties, achievements, instruments, solutions, and that pretending that the reliance on a fistful of models – all sited along the two coasts of the North Atlantic – is a conceited and narrow-minded cultural indolence. The thing is that constitutionalism as a collection of experiments, failures, and successes is a phenomenon occurring in almost every country in the world – with considerable exceptions just because they are very few – and we cannot keep ignoring the fact that the efforts, skills, and minds deployed at building a national constitutional heritage somewhere in the planet represent for CCL a historical event as crucial and special as ours. We cannot believe in good faith that the undoubted richness of our constitutional past and present can explain and solve every new manifestation of constitutionalism in the world. As Ran Hirschl brilliantly spurred to do, we should get rid of the "World Series syndrome," the pretense that insights based on the constitutional experience of a small set of 'usual suspect' settings – all prosperous, stable constitutional democracies of the 'global north' – are truly representative of the wide variety of constitutional experiences worldwide, and constitute a 'gold standard' for understanding and assessing it. The question here is this: how truly 'comparative' or generalizable is a body of knowledge that seldom draws on or refers to the constitutional experience, law, and institutions of the global south? [6].

These two considerations lead me to argue that only through this transformation of our scholarship comparatists will be able to tackle issues that, rather startlingly, are set aside the boundaries of CCL or even ignored. For example, there are special sets of problems that are normally treated by development economists,

global justice philosophers or political scientists, but much less frequently – and certainly not sistematically – by CCL scholars: I am particularly thinking of the pair constitutionalism/impoverishment, for instance, which refers to the problems specifically attached to those constitutional settings afflicted by poverty, spread illiteracy, economic underdevelopment, unequal distribution of resources, minimal political pluralism, a tendency to adopt authoritarian solutions of government.

But we might take also the case of corruption and how its evil consequences reverberate in the protection especially of ESCR, but not exclusively. My Latin American students, for instance, generally claim to be familiar with paying bribes. This system traces back to the centralised power established by the viceroys of the colonial era through buying the loyalty of local interest groups and then strenghtened along the line of *caudillos*, dictators and elected presidents always personalising power. Despite Brazil's constitution, enacted in 1988, conferred independence on the judiciary, only lately the tolerance for corruption has significantly decreased among the population and the officials in charge of fighting against it. Also some of my Asian students personally experienced the burden of a deeply corrupted system. And obviously it is not only a matter of perception: rampant corruption across Southeast Asia threatens even to derail plans for greater economic integration, according to the latest Transparency International's report [7].

Some of them may have in mind the Singaporean or the South Korean examples, two of the most innovative countries in the world, where standards of living are very high, rankings in education and quality of healthcare excellent and the ease of doing business at its best. These two virtuous realities stand as noticeable countertrends amongst extensive corruption and political recklessness in the region. Generalization about Asia hardly grasps the core of a continent whose size and cultural plurality produce "no quintessential values that apply to this immensely large and heterogeneous population, none that separate them out as a group from the rest of the world" [8]. However, generalization about Asian values is meaningful when Asia is compared to the West: indeed, the process of democratization began there only after a sustained economic growth, as specific of the East Asian Model – the building of a constitutional state was often undertaken rather instrumentally as an inevitable part of modernization, when the opening to foreign investments and international trade required political change. Do democracies preferably thrive after economic development? Does democracy need to be sacrificed in order to achieve development? Does democracy hamper economic growth? Is this the lesson to draw from the East Asian constitutional examples?

Perhaps it has come already to surface that, as a matter of fact, when dealing with these topics I am still and again calling for the implications of my two considerations: to be open to the many fascinating and troubling issues in the wide spectrum of constitutional experiences around the globe, comparatists need to go beyond law but, to feel necessary going beyond law, they have to be sensitive towards all those constitutional settings that do not belong to the historical crib of constitutionalism. In other words, if there are issues to be attended to by CCL that are eminently treated by non-legal scholarships, comparatists need to display a syncretic intellectual equipment and to emancipate from any birthright complex or prejudice.

If we go back to the objection moved by my anonymous reviewer with which I started this Article, presuming that Colombia, India, and Estonia are very much related to some traditional European constitutional models implies that they have not exactly much of their own – and, if they have something, it does not necessarily interest CCL. But this view resents disquietingly of a formalistic approach to constitutions, turning again to what Frankenberg was confronting in his contribution: when constitutions are *cultures*, they cannot be the exact replica of anything, despite the possible technical expertise or formal influence they received from the older constitutional experiences.

We cannot pretend that CCL gets to know everything constitutionally related under the sun and that the comparison is always impeccable and complete. Nonetheless, asking what we should learn from CCL contributes to orient its investigation. In this regard, comparatists should devote their attention to develop a methodology according to which the cases to be compared are selected complying with sensible standards of judgment and judiciously. The selection of comparative terms is part of the study and not an irrelevant, fortuitous detail. In the end, the question that needs to be put has to do with the purposes served by CCL – in other terms, the CCL's epistemology.

References:

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СРАВНИТЕЛЬНОЕ КОНСТИТУЦИОННОЕ ПРАВО: ПРОДОЛЖЕНИЕ ПРАВА ДРУГИМИ СРЕДСТВАМИ (НЕСКОЛЬКО ЗАРОЖДАЮЩИХСЯ МЫСЛЕЙ)

Компаративисты, очевидно, не в состоянии всегда увидеть и исследовать всю картину. Хотя один из основателей сравнительного правоведения заявил, что студент, изучающий проблемы права, должен охватить право всего мира, в прошлом и настоящем, и все, что влияет на право, от географии, климата и хода развития до событий, формирующих ход истории страны, проходящих через религию и этику, амбиции и творчество отдельных лиц, интересы групп, партий и классов, мы но не всегда можем ожидать, что он сможет освоить такой огромный массив информации.

Компаративисты, тем не менее, должны учиться внимательному изучению правовых документов, т.е. конституций, используя синкретический интеллектуальный метод. Право – это конечная цель, но, чтобы попасть туда, требуется больше, чем только право. Сравнительное конституционное право должно быть включено в систему стипендий для изучения права, но компаративисты не могут ограничивать себя изучением только права. Это допущение подразумевает, что компаративистов необходимо обучать умению глубоко анализировать более широкий круг материалов и умению чувствовать особенности культур: чтобы воспринять конституцию как культуру; знания права может быть недостаточно, и мы уже много раз убеждались в этом. Перефразируя хорошо известный афоризм фон Клаузевица, сравнительное конституционное право является продолжением права (также) другими средствами.

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