STUDYING THE "LEGAL FLOWS" AS A MULTIDISCIPLINARY METHOD TO PROMOTE CONSTITUTIONALISM AS A COMMON PROPERTY OF MANKIND

Michele Carducci
Full Professor of Comparative Constitutional Law
Euro-American Didactic Center on Constitutional Politics, University of Salento, Italy
Anna Silvia Bruno
Postdoc Research Fellowship in Comparative Constitutional Law
Euro-American Didactic Center on Constitutional Politics, University of Salento, Italy

Abstract

This paper tackles the problems concerned the constitutional comparison, paying special attention to the "legal flows" in the Era of globalization of information and legal practices. With "legal flows" we mean the communicative interactions that occur between the legal operators from different parts of the world. These "flows" produce "imitations", judicial dialogue, migrations of constitutional ideas, constitutional borrowing between various legal orders. The analysis of these dynamic phenomena requires two methodological needs: the transdisciplinarity opening to social history, to sociolinguistics and anthropology of communication; and the knowledge of the ideological dimensions of geopolitics and geography in the globalized Era. The comparison of "legal flows" becomes a necessary tool for the contemporary education of each legal scholar, dealing him to be used to dialogue, to accept the "other", to understand the difficulties of the comparison and the respect of the complexity of cultures. This is the only way to promote constitutionalism as common property of mankind.

Keywords: "Legal flows", imitations, judicial dialogue, multidisciplinarity, sociolinguistics

Introduction

The relationship between geography and comparative constitutional law is totally neglected by most of the contemporary scholars. We do not refer to the cartography of the concepts and constitutional classifications, but to the (political, economic, social and human) geography itself, as a representation and understanding of spaces within their own historical and material complexity. Furthermore, we also refer to geopolitics as a narrative "building" and related (political) action, useful to reach specific goals and interests among spaces. When the world was separated in two opposing systemic blocks and hardly communicating, the mentioned concepts could be understood through shared assumptions. But today those blocks do not exist anymore. Today the globalization put us in the face of a never ending communications among spaces, where historical and material complexities do not disappear; today, ignoring geography and geopolitics means to fall into a cognitive trap. It is a trap because we are not aware to be conditioned by the space of observation and judgment about the world; then, we forget to take into account that, constitutional comparison must face the heuristic of "legal flows" between all those subjects that communicate in different ways between spaces that are no more imitable by the legal orders.

In fact, today it is easy to talk about a "dialogue" between the Courts, about a "cosmopolitical constitutional law", about Legal Networks and "variegated and conflicting archipelago" of global rules, or about *Constitutional Borrowings* and "*Migrations of Constitutional Ideas*" or about phenomena of "imitations".

What kind of education can we manage to study the "legal flows"?

How can we study these phenomena? And how do we teach their analysis and understanding to the legal operators? These questions are important in order to put different legal traditions and cultures in the perspective to know and to communicate one each other, with a mutual respect. But they are much more important in order to spread the constitutionalism as a common property on human rights, to develop the civilized cohabitation, the limits of power, always as a property of mankind. In the contemporary world, this spread is realized through various dynamics of communication and development of legal ideas and solutions for common problems. This spreading describes the "legal flows".

In fact, what are the "legal flows"? With "legal flows" we mean communicative interactions between the legal operators from different parts of the world. These "flows" produce "imitations", judicial dialogue, migrations of constitutional ideas, constitutional borrowing between legal orders and various practical operators. But these "flows" also determine informative asymmetries, ambiguities, misunderstanding of the problems at hand and other realities. Furthermore, the "legal flows" produced emancipations and claims of rights (e.g. "cultural" rights of indigenous people).

Indeed, their analysis it is important to verify the effective making up of a common property of the constitutionalism as property of mankind. Günter Frankenberg develops some interesting observations on these themes. In accordance with this Author, with the end of the Soviet communism and the collapse of the conflicting blocks, some phenomena of "communication" are modified; this event activated a logic of consumption of "words", ideas and constitutional solutions of others by "constitutional clients" that were looking for new identities to "talk about", trying to forget or to overcome the past, for not remaining within separated spaces. Frankenberg calls this phenomenon: *Constitutional Transfer*. But this kind of communication risks developing an "IKEA constitutionalism"; and it is not sure that it can support thoughts and actions able to accept the real heat of each global constitutionalism: that it is to say the political and social integration of a community. In other words, the "IKEA constitutionalism" does not permit to build a global constitutionalism based on the integration of the differences. It represents just a "collage" of "constitutional fragments", but does not grant to build a common property. What are the necessary steps to build a new "pedagogy" of constitutional comparison in order to promote a constitutional culture as a property of mankind?

Here, we can refer to four steps.

1.*"legal flows" are socio-linguistic phenomena.* As any other human action, law is based on communication and its implications: from the capability to understand and interpret correctly a message, to the cultural aspects that affect the reception of it. In the sociolinguistic studies, this complexity is defined as a "communicative competence". It embraces the linguistic and grammatical ability, but also other extra-linguistic abilities, like the social and semiotic abilities, that are much more complex. Kjolseth proposes to put them in five ambits: the *Background Knowledge,* based on the universal conversational concepts and information about the effective building of a common cultural property; the *Foreground Knowledge,* made up of the communicative styles, conformed to the conversational context; the *Emergent Grounds,* that is the necessary knowledge to deeply understand the communicative exchanges; the *Trascendent Grounds,* constituted by the knowledge accepted by the

participants as "useful" to the communicative moment; finally, the socio-situational knowledge that is part of the context. Sometimes happens that the useful knowledge does not always correspond to the "necessary" one in order to understand reality. And here there is the separation between semantics and interpretation. The complexity is reduced to what is useful: when decisions must be taken, reality will not be understood because it has to be interpreted. In fact, as underlined by the techniques of comparison developed by judges, judicial dialogue works this way: it is based on "utilizations" of information, useful to the decision; "utilizations" that are not tools to deeply analyze the knowledge of different global realities. For this reason, a distinction between the "useful" "legal flows" and the "necessary" ones is fundamental to build up a common property of constitutionalism.

2. *The "legal flows" modify the culture of the subjects.* Appadurai explains how the complexity of the global cultural flows shape the local subjectivities. Apart from the context, they become tools of decision from certain subjects towards other subjects. In this way, they produce a "separation" with the complex aspects of reality. In other words, the ideas emerge as "legal flows"; while the understanding of historical and material situations that produced those ideas remain in the shadow. In fact, this kind of "spreading" involves, above all, the constitutional matters with a moral content, because in this case it is much easier to make abstraction from the related context: e.g. bioethics, new rights, sexual orientations, ... To build up political and institutional systems of action, the interaction between the flows it is less efficacious, as demonstrated by several studies on the so called *policy transfer*. This point is very important because allow us to understand that the "legal flows" can also manipulate the identities of the subjects and their historical conscience.

3.*The "legal flows" are useful to give informative materials to solve concrete problems but they can create relationships of cultural dependence.* In this sense, the "legal flows" plot the legal field characterized by the experiences of "imitations" and "dialogue" between different legal operators. Furthermore, the Frankenberg's thesis that there is a market of constitutional ideas for "clients" that look for identities, it is not totally different from the concept of "economy of linguistic exchanges" proposed by Bourdieu. The "legal flows" plot an "economy of linguistic exchanges". For example, they define the direction of origin and direction of "imitations" and "dialogues". For this reason, when Frankenberg talks about the "IKEA constitutionalism" observes as it produces new forms of "allowed constitutional law" (from one place to another one). But can an allowed constitutional law be the premise of a global constitutionalism as a property of mankind? Therefore, in order to verify if the allowed effect does exist, a process of historicization is necessary, taking into account that comparatist scholars not always do that: it is necessary to organize the history of law that will not start from the internal dynamic of law, such as an internal history of its proper concepts and methods, but from its social conditions of efficacy, from its power relations between social fields and from those situations included in the fields involved by the "flows".

4.*The "legal flows" produce phenomena of linguistic and semiotic interaction.* The linguistic and semiotic studies by J.M. Lotman and A. Popovič highlight the importance of this approach. For these Authors, comparison does not mean to compare "models" or "places" of rules. Lotman talks about a "semiotic sphere" to indicate the semiotic border constituted by the sum of the interpretative and translating filters, together with the communicative and imitative flows that are produced between various places. Popovič distinguishes the dynamics between linguistic "systems" and the concepts of "prototext" and "metatext", as a way to describe and classify the directions of the "flows" of linguistic-conceptual transmission between places.

Neither of these approaches identifies forms, but "subjects of inter textual continuity" between producers and receptors of the "flow". Popovič explains that "the cultural system can be understood as a continuous turmoil of inter textual relationships, generated by the

impulses of a social system". Consequently, the "meta text" is characterized by the fact that various cultural developments are partially overlapping, without any exact and symmetric relation between the placed involved by the "flows". For this reason, the "meta texts" generated by the contact, that are different and embedded within the "semio-spheres" of the different places, do not produce the original idea but they spread an idea partially modified that generates the change of the change until the effective functioning of the "semio-spheres".

The methodology of the compared history proposed by Quentin Skinner follow similar paths. He tries to put the forms of the historical phenomena (starting from the texts) within their intellectual contexts, in order to clarify what, through the production of forms, their authors, understood as "subjects", were going to realize. In fact, in the field of comparison (we mean, the diachronic comparison of ideas in the Skinner's thought), often it is taken into account, in an uncritical way, the existence of ideas or fundamental concepts that are substantially unchangeable and that the scholars of different historical periods decided to interpret in different ways.

In this approach there is a fundamental mistake of perspective that is a projection to the past of the actual conceptual paradigms; or the projection of paradigms to a wrong place, establishing what legal scholarship must be studied.

Against an "unconscious abuse proposed by a viewpoint to describe the sense of an opera", Skinner elaborates the following methodological rule: for a right analysis of a text, it is necessary to overcome it, trying to re-build also the intentions of the author and his relationships with other subjects and places.

Textual and contextual analysis are totally complementary: those words that define an idea can be used with different intentions and with intentions mutually inconsistent.

The "conceptual change" becomes a determinant element of the comparative paradigms, reducing any pursued "*praesumptio similitudinis*". It is something like that "epistemology of absences" proposed by Boaventura de Sousa Santos and that indicates the necessary consideration about how the supposed universal categories produce themselves ignorance and exclusion if understood as objective (categories) beyond space and time. These multidisciplinary approaches develop the humility of the legal scholar when he manages realities that does not know. Until European people understood the world as the earth of their conquest, legal scholars developed a comparison with a world that was not able to make them questions, so, quoting Sloterdijk, it was "scarcely dense" because that world did not communicate with the "civilization" and for this reason it was subjugated, both on the moral and on the political viewpoint by the unilateral actions of the West.

But today this philosophic and political culture of time and concepts "without space" reveals its own partial nature in comparison with the new "problems of density" of the human interactions within the globalization. According to Sloterdijk, the characteristic of the "density" of the contemporary world is to find in the impossibility to ignore the consequences of the actions on all subjects of the world; the effect is a radical change of a normative culture that dominated the observation of spaces and the comparison between places. This "density" started up communicative and informative circuits no more unilaterally "governed" by the center of the West and, for this reason, not totally understandable or classifiable just through the Western paradigms.

Can the comparatist scholar ignore this "geopolitical" data? Can he ignore how this geopolitics influence the "legal flows" of the world? This is probably the most sensitive step.

On which basis does the researcher establish the real meaning of the discourses that he analyzes in comparison with the texts? Does he work in accordance with the "geopolitical" option that takes as a tertium comparationis the Western part of the World? Can the researcher check the discard between his temporal and spatial conditions of interpretation and those of the subjects and the spaces of which he observes the "flows"?

The problem is extremely complex and faraway from a satisfactory solution. The ethnographic perspective often solves it declaring that the observer must be embedded, as "insider", within the context of the "flows". In accordance with other authors, the interpretations proposed by an external interpreter/scholar must be submitted to a "member validation" (a validation made by those who receive and manage the flows). Both of these perspectives imply a kind of "transaction" where the use of the flow seems to be much more important than its meaning. In accordance with other authors, the interpretations proposed by an external interpreter/scholar must be submitted to a "member validation" (a validation made by those who receive and manage the flows). Both of these perspectives imply a kind of "transaction" where the use of the flow seems to be much more important than its meaning. But it is necessary to get used to this complexity as a good antidote to not fall in the cognitive traps toward the "IKEA constitutionalism" and to recoup the critical conscience of the social history of law as a necessary tool of the constitutional comparison.

In the comparative law, as precociously affirmed by Constantinesco: it would be good if this admonition will not be lost.

Conclusion

Some examples confirm the importance of the multidisciplinary perspectives.

The "legal flows" are socio-linguistic phenomena. An example is given by the "collective singulars" that have a European origin (like "State", "Nation" "Sovereignty") but were imposed, through the colonialist process, to the rest of the world through different histories and languages. The German concept of *Organschaft* is a clear example: this word originated the dictionary about the dynamics of the institutional branches and functions in the public law.

The "legal flows" modify the culture of the subjects. For example, the concept of "common constitutional traditions" in the judicial decisions of the ECJ has been definitely recognized as a new juridical category by the art. 6 of the Lisbon Treaty.

The "legal flows" provide "informative materials" to solve concrete problems – but they can also create relationships of cultural dependence. The example is proposed by the studies of López Medina. According to this Author, the "other Latin-American West", reduced to a group of «*tradiciones débiles*» because of events related to the "conquest", evolved as a «*sitio de recepción*» of the «*producción iusteórica*» of the Northern World (Europe in primis); this happened through several operations of translation that were not promoted by abstract goals of a mere erudition, not by imitation or faithful reproduction of the foreign imprinting, but by the making, in an autochthonous place, of a «*jurisprudencia pop*» that has to be adapted to and transformed conforming to the context and the contingent use.

The "legal flows" produce phenomena of linguistic and semiotic interaction. This example is given by the system of *Cross Fertilization* that have been developed within the European Union between different legal operators (judges and legislators) about the vocabulary of the European criminal law.

Furthermore, the linguistic interactions can produce "cognitive traps" (e.g. the phenomenon of the "false friends" in the translations and, on this point, the example of the term "dignity") but they allow to re-build the ethnographies of the juridical communication (D. Hymes).

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