ABSTRACT

This article analyzes the impacts on the constitution idea, of the use of foreign materials by courts. This practice has been indicated as a global trend and, as I argue here, represents a new phenomenon that signalizes the existence of an ongoing process of cross-fertilization among courts, and contributes for the consolidation of an arising global constitutionalism. Traditionally, those borrowings are associated with different purposes: as a way of filling in gaps; as a means of clarify obscurities in the statutes and precedents in hard cases; as a way of legitimizing its practice through the borrowing of authority arising from consolidated institutions; as a way of increasing the level of international legitimacy of the practice of the court; or even as a mere rhetorical purposes. In despite of this, three different factors can be identified which, together, give this apparently instrumental concern a great preeminence on contemporary constitutional theory. They are: the existence of a process of globalization and interpenetration of the legal orders; the existence of a broader movement of the redefinition of the functions of the Judiciary Branches, which confers on it a major role in the definition of the public agenda (judicialization of politics at national and supra-national levels); and, a sudden change on the role of the constitution, which requires a general duty to justify the public reasons for each decision. Therefore, comparative law, by emphasizing transnational dialogue, has an accentuated subversive character (Fletcher) and one of destabilization (Frankenberg), which internalizes an external vision, as a factor of criticism and valuation of the premises itself adopted by national system. In order to fulfill its proposals, this work is divided as follows: firstly, it presents some general considerations on constitutional borrowings; secondly, the debate over its legitimacy is presented in summary form; below, it is presented the idea of a multi-leveled global constitutionalism, arising from the existence of certain common constitutional practices shared; and, finally, it is discussed its consequences on the modern concepts of constitutional identity, and catalogue of sources of law.

Keywords: Global constitutionalism; Constitutional Comparativism; Constitutional dialogue.

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1. INTRODUCTION

This article analyzes the impacts on the constitution idea, of the use of foreign materials by national courts. This practice, as I argue here, represents a new phenomenon that signalizes the existence of an ongoing process of cross-fertilization among courts, and contributes for the consolidation of an arising global constitutionalism.

This use of foreign materials has indicated as a global trend (McCrudden, 2000, p. 506) and a phenomenon that is sometimes hailed with great enthusiasm (Ackerman, 1996; Kommers, 2002; Weinrib, 2002), but sometimes provokes severe objections (Rosenkrantz, 2003; Fletcher, 198) or criticisms (Frankenberg, 1985; Örücü, 2000).

The use by judges, of foreign experiences (legal scholars, foreign statutes and judicial rules) in the process of judicial reasoning, can be easily identified in various periods of history of the western constitutional tradition. These borrowings are usually associated with different purposes: as a way of filling in gaps in the system, arising from the duty of *non liquet* of the Judiciary Branch; as a means of clarify obscurities in the text and supporting decisions in new and challenging cases; as a way of legitimizing the practice of recently created institutions or democratic orders (re)instated through the borrowing of authority arising from consolidated constitutional institutions and experiences; as a way of increasing the level of international legitimacy of the practice of the court; or even as a mere constitutional ornament and resource for argumentation, for the erudition of magistrates.

Three different factors can be identified which, together, give this instrumental concern (recourse to elements of comparative law as a strategy for argumentation) great preeminence in the constitutional theory itself. They are: (a) the existence of a process of globalization and interpenetration of the legal systems, impregnated with a universalizing discourse (Helfer; Slaughter, 1997); (b) the existence of a global movement of the redefinition of the functions of the Judiciary Branch, which confers on it a major role of veto player and co-participant in the definition of the public agenda (the phenomenon of judicialization of politics), which is processed at a national and supra-
national level (Tate; Vallinder, 1995); and, (c) a sudden change of course in the directive role itself, to be undertaken by the constitution (and in the last instance, by the law itself) which requires a general duty to justify the public reasons for the decisions, bearing in mind the overcoming of the formal and positivist paradigm (Carbonell, 2003).

Therefore, in this context, comparative law, which has always been associated with the idea of “importing better ways of ordering the matter that other constitutional systems have discovered” (Tushnet, 1999, p. 1307), by emphasizing transnational dialogue (with normative intent) has an accentuated subversive character (Fletcher, 1998) and one of destabilization (Frankenberg, 1985), which internalizes an external vision of the constitutional system, as a factor of criticism and valuation of the premises adopted, and of the results obtained in the national processes of balancing values in the constitutional adjudication.

In order to fulfill its proposals, this work is divided as follows: (i) firstly, it presents some general considerations on constitutional borrowing, in order to define more precisely the scope of this research; secondly, (ii) the legitimacy of the use of comparative law is presented in summary form, with the intention of presenting a brief systematization of the foreign sources which have been used in the process of judicial reasoning; in the following section, below, it is presented the idea of a multi-leveled global constitutionalism, arising from the existence of certain common constitutional practices shared; and, finally, it is discussed its consequences on the modern concepts of constitutional identity.

2. CONCEPTUAL REMARKS ON CONSTITUTIONAL BORROWINGS

The expressions constitutional borrowings and constitutional transplantations have been used in a wide variety of senses by authors, and involve a wide range of phenomena related to the processes of circulation of constitutional models. These processes can be analyzed from different focuses.

2.1. DIFFERENT APPROACHES TO PROCESSES OF CONSTITUTIONAL TRANSPLANTATION

The approaches to the phenomenon of the circulation of constitutional models can be grouped into two main areas: The first is linked to the key themes of comparative
law (comparative constitutional law in a more traditional version); the second gathers studies concerned with analyzing the practice of the courts which engage in processes of "constitutional dialogue".

The first “area” gives greater emphasis to issues of methodological nature, and presents a greater appeal and penetration among authors of the civil law tradition, focusing the debate around constitutional transplants in the theoretical milestones of comparative science and constitutional history. By way of example, these approaches can be classified as follows: (a) readings which seek to identify constitutional movements and the process of expansion of liberal-democratizing ideas, and those of the republican institutions, from a perspective of the history of constitutionalism and political ideas (Van Caenegem, 1995; Mateucci, 1998; Fioravanti, 1998, 2000; Sanchez Agesta, 1974); (b) the identification of the existence of major constitutional systems, reconstructed through the comparative analysis of processes of differentiation-approximation (macro-comparison) (Di Ruffia, 2000; García-Pelayo, 1993; Di Vergotinni, 2004; Sanchez Agesta, 1974); (c) efforts to identify the processes of approximation and reciprocal influence between these different models, or emphasizing the origins (Henkin; Rosenthal, 1988), sometimes emphasizing the dynamic aspect of receiving/sending of legal institutions (paradigm of the textual levels) – Häberle, 1996); or else, (d) efforts to identify the common elements of shared law, notwithstanding the individual characteristics and national peculiarities, by certain western countries, bearing in mind the existence of a cultural framework which is interconnected and has common elements (Law, 2005; Häberle, 2000).

The second area, in turn, gains greater prominence in the cultural environment of the countries which have a tradition associated with common law, in the spaces of international law (with special reference to the international law of human rights), and are, to a greater or lesser extent, associated with the idea of a process of internationalization of the judicial practice and of constitutionalism on a global scale. In these scenarios, approaches are highlighted which: (a) emphasize the strength with which these communicational relations are established among the courts (Slaughter, 1994); (b) the existence of relations of reciprocal influence and transplantation between different normative levels – internal and international system – (McCrudden, 2000); and
the attitude of receptivity and dialogue of the courts, in relation to foreign law, as having a persuasive authority (Glenn, 1987).

This range of perspectives associated with the idea of the transplant model, or constitutional borrowing\(^3\), as it takes in an infinite range of very different situations, can be summarized, as proposed by Epstein and Knight (2003, 196-197), in three main approaches: (a) when any citizen, based on the observation of other institutional practices, proposes reflections on the need for constitutional change\(^4\); (b) when, during the process of creation of the constitution (and the process of legislative elaboration), the congressmen base themselves in experiences of other constitutional texts at the moment of drawing up their own constitutions; (c) when the judges take into account the decisions of foreign courts, to resolve the disputes established.

This article seeks to analyze the impacts of the latter practice, on constitutional theory. In order to better delineate the context of this article, the next section identifies the different contexts in which this dialogue is processed.

2.2. DEFINING THE FIELD OF TRANSNATIONAL DIALOGUE

The so-called transnational dialogue seeks to take in all the activities of judicial adjudication in which the judges make use of foreign constitutional experiences as part of their argumentation strategy. Although the logic of the construction of reasoning is very similar, it was decided to identify two contexts of application. the decision of the international courts and the decision of the national courts.

In the international courts for resolution of disputes, the recourse to elements of comparative law is a well-consolidated practice, and one of the predominant methods of judging issues before these courts. The recourse to this strategy is particularly relevant when defining the content and scope of the general principles of law, and the recognition of the valid customary rules.

\(^3\) Yazbek (2001) presents a panoramic view on the different expressions that are being used to talk about the facets of the phenomenon of transfer and circulation of legal models. This text deals with the systematization of theoretical proposals and models which explain the process of transfer, in which, according to the understanding, should be better understood by jurists.

\(^4\) In other words, the debate which occurs in the free exchange of ideas which should mark the public space (discussions and results in comparative science, the free confrontation of ideas divulged by the press, media, etc).
This prospecting of national sources fulfills a dual purpose: (a) to identify elements common to the different normative universes, in order to fill the content and define the scope of the general principles of law (Koopmans, 1996); and (b) in particular, in the scope of community law, to increase the level of legitimacy of decisions at community level, and thereby stimulating the national courts, which are responsible for the implementation of community court decision in regime of judicial coordination (Schutter, 2005), to be linked more "spontaneously" to the guidelines established in their judgments (Grossfeld, 2000).

It is also emphasized that recourse to the decisions of the European Court of Human Rights, by the Inter-American Court of Human Rights has been frequent, when this court assumes the possibility of learning from the experience of its congeners, in the protection of rights which, textually, are similar, in the two charters of regional rights.

In the scope of the national courts, the reference to foreign experiences has always been very common (Saunders, 2006). However, despite the identification of an effective approximation and intensification of the dialogue between the courts and the different constitutional experiences, numerous kinds of objection and resistance can be found in relation to the use of this strategy of argumentation in the process of judicial reasoning.

The understanding of the recourse to comparative law, or even the trend (whether greater or lesser) towards carrying out juscomparison in legal processes, is related to a multifaceted set of factors which will be presented here, merely by way of examples. A greater or lesser degree of receptivity in the legal and political culture of countries, to the phenomenon of legal reception; the way in which the court is linked to the system of sources and the use of normative materials in the process of legal reasoning; the way in which the constitutional text or the national courts themselves understand the relation between internal law and international law (interpenetration of the legal orders) and the cultural bases which connect the national experience with foreign experiences (links with a set of shared traditions and relation of legal heritage).

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5 A trend can be identified towards greater receptivity on the part of countries with a tradition of common law, at least in attributing greater weight to the process of supply of reasons for decision.
3. CRITICISM AND OBJECTIONS TO THE USE OF FOREIGN MATERIALS

Numerous authors oppose to the use of these elements, particularly when the courts use them in a constructivist or revisionist way, as they question the use of non-national elements as sources to be considered in the process of judicial reasoning. These objections are identified and analyzed under different aspects (McCrudden, 2000; Aanus, 2003, Tushnet, 1999; Choudhry, 1999). This article, based on Saunders (2006) opts to group these objectives in two ways: those which combine objections concerning the legitimacy of this recourse, and those which are directed against aspects of a methodological nature.

The criticisms that place in check the very legitimacy of the recourse to comparative law in decisions, are opposed, above all, to the normative claims present in the various references to law, compared with the “world community of states” (Breening, in Lawrence vs. Texas), “global constitutionalism” (Achermann, 1997) or “Rights revolution” (Henkin, 1988).

This is the objection eloquently raised by Scalia (Tushnet, 1999) and Fletcher (1994) and who, strongly marked by the North American debate which compares originalists and textualists, oppose the idea of using non-national elements, due to the need to preserve the national identity and integrating role of the constitution, in a society that is so marked by pluralism.

Using very similar arguments (the idea of national identity), but inserted in a cultural context that is vastly different, and with different aims, Rosenkrantz (2003) opposes the recourse to comparative law, as he understands that an authentic national identity can only be created based on the development of autochthonous forms of self-understanding of the constitution and legal forms. Continuing to search for foreign sources as an argument of authority, in the internal scenario, encourages the development of totalizing or colonizing transpositions, leading to a renewed imperialism (neo-imperialism of the legal forms).

Finally, a set of criticisms can be identified which, although focused on the use foreign materials, are addressed to the actual practice of the Judiciary Power. These criticisms are focused on the countermajoritarian difficulty. For these authors, the courts commonly
use the practices of other jurisdictions as a way of legitimizing the solutions adopted. Recourse to the non-national element is more important when the content of the constitutional provision interpreted is less evident, when the intervention of the court in the practice of the other political bodies is greater, and when the intention of the court to revise its own jurisprudence is greater.

In the way in which they are presented, opposing to the strategy of comparison is, ultimately, taking a position in relation to two central questions in the debate of contemporary constitutional theory, the role of the judiciary power (judicial activism vs self-restrain) and that of the constitution itself (defining the limits of the constitution).

Another set of criticisms and objections relates to the methodological difficulties. Whether or not they are related to the question of the legitimacy of the use of comparative law, these approaches demonstrate the risks of abuse and misuse of the recourse to these elements, highlighting different aspects: (a) the difficulty (impossibility) of controlling the reasoning of the decision (what criteria are used for the choice of experiences to be placed in dialogue? Why these and not others?) (Hirschil, 2005); (b) the risk of careless and de-contextualized borrowings (Osiatynski, 2003), or even ones already superseded by more recent court decisions (Saunders, 2006); and, (c) challenges relating to the comparative methodology itself (functional identification of the elements to be compared, the difference in language and the impossibility of precise understanding of the full sense and scope of the experience to be compared) (Lollini, 2007).

Also, attitudes can be seen that place in doubt the very possibility of using the comparison, either because they oppose the apparent neutrality of the one doing the comparing (Frankenberg, 1985), or for questioning the epistemological bases (or a lack of them) on which the legal comparisons are carried out (Schaffer, 2005). Otherwise, the critique of Hirschil is targeted against not exactly the dialogue practice itself, but the inexistence of studies (with empirical basis) that analyze the criteria used by courts on cases selection (Hirschil, 2007).

All these objections raise important aspects that should be taken into consideration when one intents, at the same time, to understand and describe this
practice, on one hand, and recognize it as an important argumentation strategy capable of providing resources for the decision-making of courts, on the other.

Despite these difficulties, the use of this argumentation strategy is directly associated with the existence of demands for increasing the level of material legitimacy of the judicial decisions, within the national legal system. The development of a "constitutional dialogue ad extra" exerts a relevant role on the reasons giving processes by courts. The fact of comparing other constitutional experiences allows both the internalization of alternative critical visions about the best constitutional interpretation, as the construction of shared constitutional identities by the existence of convergent judicial practices.

Accordingly, addressing this issue requires a deep reflection (and taking a position) on the locus of the constitution on actual philosophy and theory of law.

4. CONSTITUTIONAL DIALOGUE AD EXTRA: THE STRUCTURAL OPENNESS OF THE NATIONAL CONSTITUTION

The expression "constitutional dialogue ad extra" is defined here as the process of discussion which is carried out within a specific community of jurists and their co-interpreters. This process contributes to connect, structurally, the constitution with the developments on global constitutionalism. This legitimacy of this connection is possible because its community's members recognize the resource to the argument of comparative law, as part of a strategy for supporting a certain normative point of view. This use, however, in order to be considered legitimate, cannot be used as a mere rhetorical reasoning (persuasive argument), but as a substantial reason which enables a process of self-criticism on the consolidated bases of the comprehension on the

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6 It results from the effort to reconcile the Aarnio's concept of ideal concrete community (AARNIO, 1991) with the Häberle's idea of opening the constitutional interpretation processes to a quite large number of legitimated co-interpreters (HÄBERLE, 1997).

7 Therefore, attention is focused on the dialog which is processed within certain communities of interpreters based on the incorporation of legal materials from outside.

8 Usually authors, when discussing the level of binding of the courts to the reasons conveyed by the foreign law (in particular, judicial precedents), oppose the idea of persuasive reason and binding force, or authoritative reason (Cf. GLENN, 1987; DAMMAN, 2002; JACKSON, 2001; TUSHNET, 1999). However, by incorporating the analyses from the theory of legal argumentation, the persuasive nature of the arguments, in this theoretical tradition, signifies an attitude which seeks to exert influence over another's position, using linguistic strategies other than rational discursive practice (AARNIO, 1991, 95-98; ALEXY, 2005, 196-198).
national constitution. This dialogue may produce an effect of “communicating veins”, which connect the different systems in a “cooperative” perspective 9, producing a multiplying effect of the dimension of protecting the constitutional discourse beyond the national dimensions.

This conception assumes that the interpreter exercises a straight creative role on the process of law adjudication. Considering the constitutional judge, its political preeminence in contemporary democracies is reinforced by the reconnaissance that there is a transference of the debate arena from the political instances (Executive-Legislative branches) to the constitutional courts. This fact generates: an appreciation of the constitutional justice; an increasing movement of demands for recognition; and an excessive over-expectation about the Judiciary branch activities.

Furthermore, in the actual scenario of the law philosophy and constitutional theory, paradoxically, the constitution has been seen so as a factor in increasing the material legitimacy of the entire legal system, as a source of uncertainty because of the fluidity of its normative boundaries. Apart from this, the modern postulates of unity and coherence of the legal system, developed under the idea of Westphalian sovereignty, shall be re-defined. For this purpose, the conceptions of "constitutional sovereignty" (Zagrebelsky, 1995) and "constitutional structural openness" (Häberle, 2001), combined, put in evidence the indeterminability characteristic of the constitutional texts, and its requirement for permanent justification processes.

Because of this requirement, the courts rely on axiological and extra-systemic sources. Therefore, the use of "argument of comparative law" grows in importance due to its innovative characteristic.

5. CONCLUSIVE SUMMARY

This article seeks to recognize that recourse to non-national experiences, in the process of constitutional adjudication, put into effect by the courts, is a legitimate strategy of argumentation which enables an increase in the normative repertoire available, furnishing the constitutional interpreter with tools, and the same time,
argumentative *topos* which are both “subversive” (Fletcher, 1995) - in that they provoke a redimensioning of possible routes adopted in the process of constitutional concretization, and “valorative” (Lamego, 1989) – in that they internalize the constitutional system and self-criticism of the confrontation, in an attitude of dialogue with concrete constitutional experiences from other socio-cultural contexts.

This dialogue, therefore, leads to a continual process of openness and criticism and enables new textual levels to be added to the Constitution, re-specifying the idea of material constitution.

According to Weinrib (2002, p. 3-4), “where the ‘new comparativism’ has been given place, comparative analysis is considered as internal to the activity of constitutional adjudication, or as supplying commentators with appropriate insights for the internal workings of specific constitutional regimes”.

This practice has resulted in various theoretical efforts to define methodologies which, ultimately, are capable of re-dimensioning the scope of constitutional interpretation and the traditional "theory of sources" in law. Facing this question requires deep reflection on the role exercised by the constitution, the legitimacy of constitutional jurisdiction (demarcation of the limits of the Judiciary Branch) and the rationality of judicial decisions. It therefore opens a wide range of possibilities for investigation which do not fit in with the classical concepts of sovereignty, State and constitution. Numerous questions and doubts emerge: Can the use of normative elements which are foreign to the national constitutional culture, by putting in doubt the driving force of the constitution as a fundamental political option (sovereignty) and self-projection of the cultural identity of its people, undermine the integrating function that is traditionally attributed the constitutions?

This range of perspectives suggests something greater than mere academic interest in the differences and similarities between the constitutional systems. The “new comparativism” does not leave constitutional theory unscathed, but instigates processes and ideas that place in doubt key concepts and distinctions that constitute the constitutional right, to the point of developing the idea of the indispensability of comparative analysis, for an adequate understating of the very constitutional system itself.
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