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Comparative Law and "Revolutionary" Constitutionalism – A Short Comment on Bruce Ackerman's Book on "Revolutionary Constitutions"

ABSTRACT - The article further develops a paper given at the Conference "*The Legitimacy of European Constitutional Orders",* University of Trento (24-28 May 2021) a conference moving from the reading of Professor Bruce Ackerman's latest book, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law* (Cambridge, Mass. 2019). Starting from a comparative perspective the article critically evaluates the thesis which claims the existence of an evolutionary movement internal to the evolutionary ideal-type of constitution and the atemporal categorical framework provided by Ackerman.

KEYWORDS - Constitutionalism, Revolutionary Constitution, Ackerman, comparative law

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Comparative Law and "Revolutionary" Constitutionalism – A Short Comment on Bruce Ackerman's Book on "Revolutionary Constitutions"**

I.

It is well known how much legal philosophy, the search for the concept of law, is centered around the controversy between natural law and legal positivism, and how much legal positivism has been the doctrine prevailing in the study of positive law, of legal systems in general.

I would like to point out a side-effect of comparative law within this area of the legal philosophical debate. As a matter of fact, legal positivism is challenged by comparative law. An ostensive definition is the paradigmatic way offered by legal positivists to grasp what law is, its nature – if you like. This in front of you, that particular kind of fact, is law – this is the usual positivist strategy for definition. An object, an artifact?, is showed by pointing with one's finger.

You might remember the debate on the concept of law reported by Xenophon in his *Memorabilia*. It is a short narrative of a discussion between Pericles, the Athenian political leader, and Alcibiades, son of Clinias, Pericles' pupil, a handsome young man, very much admired and indeed loved, because of his beauty, by many Athenians, among whom we should of course mention Socrates. Now, that discussion begins when Alcibiades asks Pericles "what is law": «Tell me, Pericles» – he said – «can you teach me what a law is?».

Pericles answer that he can and offers a sheer description with reference to the Athenian system of enacting laws. «Well, Alcibiades, there is no great difficulty about what you desire. You wish to know what a law is. Laws are all the rules approved and enacted by the majority in assembly, whereby they declare what ought and what ought not to be done». *This* is

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** Contributo sottoposto a valutazione anonima.

Paper given at the Conference "*The Legitimacy of European Constitutional Orders"*, University of Trento, 24-28 May 2021, a conference moving from the reading of Professor Bruce Ackerman's latest book, *Revolutionary Constitutions. Charismatic Leadership and the Rule of Law*, Cambridge, Mass. 2019. I am grateful to Professors Agustín Menéndez and Marco Dani for the invitation to be a discussant at the conference.

law, *this* which you see before you, here and now, in this place and at this time.

Now, comparative law somehow challenges the ostensive definition by its fundamental question. We are addressed in the following way: «you say that this item is law. But what about this other item, this other system, or this other fact? Is this also law?». By comparative law we are thus pushed to transcend the contingent fact, that specific fact, which for the legal positivist is the law and all there is in the law. While the positivist says: "This is the law", the comparativist would then add: "But it is moreover this other, and this too, and this as well, etc.".

However, one might also claim that on the contrary legal positivism is reassured and reencouraged by comparative law. This is so, one might argue, because comparative law does assume an external, not an internal, point of view. It takes as its privileged stance, a place outside that specific system, without any need to offer or elaborate further a notion of law that could also be operative in that particular system and be able to serve a reason for action within the system. Comparative law in this way is purely descriptive, neutral, or, as the positivist says of his own perspective, morally or normatively inert. For comparative law it would seem that law and morality are necessarily disconnected.

So, we might say that comparative law is kind of a "compagnon de route" of philosophy of law, a fellow traveler. This happens in two main ways.

(1) First of all, comparative law confronts us and the lawyer with the "other", the different from us, the unexpected. It triggers off the wonder, the surprise, which traditionally is the beginning of philosophical enterprise. Here the "secret" of the other, of what the "other" is, in order to be understood, however, should be respected. That is, its specific otherness cannot be cancelled by any possible comparison.

(2) Comparative law confronts us not only with wonder, but with doubt too. That is, it confronts us with something, a new fact, a discovery, that opposes the way we conceive and deal with our law. It is based on a gap of a congruent view. This means that a comparative lawyer might play the role of the sceptic in philosophy.

There is no philosophy without the opening move of the sceptic thinker, of the one denying that our truth could represent and project itself

as a general truth. "What is truth"? This is Pontius Pilate's unanswered question. Now, "what is law? – this is the question implicit in any serious comparative law study. However, to reach some cognitive conclusion, we need to go further, to defeat the sceptic challenge. By the way, be said *en passant*, this is why a non-cognitivist metaethics is a blind alley for moral philosophy.

But if the sceptic challenge should be overcome, do we also need to go beyond comparative law? This is, I believe, a legitimate question, within comparative law itself.

Moreover, we might say that comparative law is a declination of the history of law. This was a point stressed by Guido Fassò, a distinguished Italian legal philosopher teaching in Bologna in the Sixties and Seventies of last century. You cannot really compare without having first a good look at the history of what you are going to compare. Law to be compared are not just texts, or essences. Indeed, what has a history can be treated only as having an existence, not an essence.

But how could we compare? And why should we compare? *Las comparacioens son odiosas*, comparisons are detestable – as the Spanish saying goes. If we want to compare, don't we need a *tertium comparationis*? And this would be equivalent – so to say – to a "third" fact of law that we could use as a standard and a model. But where to find it? Should it be grasped through a view from nowhere? How could we be able to compare different, specific histories?

Well, we could easily compare specific histories if we would take out of them their cultural sting, their communitarian "color". This is a strategy that is always available, though somewhat dangerous. Sometimes it might seem that comparative law studies are sort of a Eurovision festival where the different countries' songs are fungible, interchangeable. In the same vein, from a comparative vantage point the landscape becomes culturally flat, or colorless. Constitutionalism would thus be a world where there is no possible incommensurability of rules and values. This, by the way, could be seen as a propaedeutic move towards global constitutionalism. This indeed has two dimensions, a vertical and a horizontal one. Vertical global constitutionalism is the idea of an emerging global constitutional order. This emergence, this new birth, however, might need horizontal constitutionalism, that is, a collection of working legal orders that we could ascribe to constitutionalism as a system with a constitution serving as a rule limiting sovereignty and top decision-making and with identical traits and times. In short, to conceive a global constitutionalism we should perhaps

reshape the polarity between constitutional orders and culture to make them congruent with each other, or at least mutually compatible.

Another solution would be to lay down, as *tertium comparationis*, a history of histories, that is, at the end of the day, a philosophy of history. Now, this a risk that Professor Ackerman might think worth taking in his so interesting and rich new book. We find in the book an atemporal categorical perspective proposed, three sorts of constitutions, revolutionary, elitist, establishmentarian, all of them in the framework of a general notion – a philosophy? – of constitutionalism. This is quite generous, somehow too generous, as it has been hinted by Professor Loughlin in his paper; it is meant as an institutional scheme for binding government, top decision-makers, though it is clearly distinguished from a mere rule of law that could be still compatible with an authoritarian State. Furthermore, we are proposed an evolutionary movement internal to the evolutionary ideal-type of constitution. As for this specific revolutionary form of constitutionalism this, we are told, has progressed following four stages, four points in time of an internal evolution. We have first a revolution with a human face, then a constitution steered by charismatic leadership, later a time of resistance and disappointment, finally consolidation – which mostly happens through the providential rise of judicial review and of a court of constitutional judges.

II.

Now, revolutionary constitutions are presented by Professor Ackerman as rooted in a revolution at human scale. But what is a revolution at human scale? Is the Italian resistance against Fascism comparable to the Polish Solidarność movement? Is the collapse of the Soviet Union comparable to the defeat of Nazi Germany? Is Wałęsa the Polish De Gasperi? And De Gasperi the Italian Wałęsa? And why should a revolutionary constitution be related to, and justified through, a charismatic leadership? In the Italian resistance movement, De Gasperi was not seen as endowed with a special charisma. Nor I would say any other political leader, with the exception perhaps of the Communist Togliatti, whose attempt of assassination in 1948 was triggered a general working-class insurrection in Northern Italy. What does a disappointment or a standstill in the Italian republican constitutional story really mean? Were the social and political tensions in the Seventies, "strategia della tensione" and "anni di piombo", a time of consolidation? And why should we expect the

consolidation of a revolutionary constitution from the most conservative among political actors, that is, judges, moreover constitutional judges, that can actively impinge upon the ordinary play of popular sovereignty? Should we forget that the Italian State was, at least till the beginning of Nineties, something of a "double State, a constitutional State under the umbrella of the Republican constitution and a "deep State" acting outside the constitutional legality, with "Gladio" and other cold war secret organizations, monitoring every step of the Republican political life. Of this "double State" we still know very little.

Indeed, a double reading of the recent Italian constitutionalism is possible and plausible. We might interpret it, on the one hand, as a consolidation of the constitutional order stablished in the aftermath of the struggle against fascism. On the other hand, we could read it as the reassessment and rearrangement of a material constitution whose actors were meant to be political actors once these actors withered away. What about the collapse of the party system? Is this not reflected in the higher activism of the constitutional jurisprudence, somehow assisting and supporting a parallel rise of the President of the Republic's political powers and public role? And what about Europe and the so-called "vincolo esterno", the external bound, that, by the way, has been mirrored in the "vincolo interno", an internal bound, offered by the constitutional court case law? Are we still within the precinct of the constitutional system imagined and projected in the Constituent Assembly after the second world war? None of the parties that wanted and built the Republican constitution and promised a society that would be ruled by this Constitution have survived the time of its consolidation.

Let me now add a few words on the Social state originally entrenched in the Italian republican constitution. I believe the Italian social State was a quite special political project. It was founded on the idea of strong public role in the economic sphere. A fundamental actor in the market was seen to be the so-called "partecipazioni statali", a rich and complex system of public enterprises and companies in several sectors of the economy. Fundamental services, electricity, trains, telephones, were nationalized. But the State was active also in traditional industrial production. Alfa Romeo, for instance, was a State company. ENI, Enrico Mattei's public company, was very active in the oil market and acted as a competitor against the so-called "seven sisters", which by the way might have cost Mattei his life. The Social State was seen as a system more driven by the question of political power than by the question of distributive justice and individual access to

social benefits. It was not a Rawlsian programme. Its inspiration was rather the Weimar republic "economic constitution". The basic idea here was that the material constitution, the primacy of political parties in the government, should be translatable at the economic level. This project is well presented and studied by Salvatore d'Albergo, a public lawyer that was also a member of the Communist Party. Of course, the Social State *à la Italienne* produced a monopolist managerialism and widespread clientelism, and a specific managerial class that could fight on equal terms against and with the traditional industrial and bank barons, indeed a novel "razza padrona", strongly criticized and opposed by the liberal élite. This special form taken by the Welfare State project would also explain the *Statuto dei Lavoratori* enacted in 1970 whereby a constitutionalization of factories and industrial labour, and in general of workplace, was envisaged. A similar move, though less effective, was the one proposed in 1975 by the so-called "decreti delegati" for the school life.

Democracy, conceived mostly in terms of political parties' management, had to enter into all sectors of society, especially in the economy and industrial production. Redistributive policies had to be steered by effective power given to working class political organizations and their unions. This should finally lead to a deep, true "riforma dello Stato", a reform of the State structure, as it was theorized by the Communist Party left wing leader Pietro Ingrao and by his main legal adviser Pietro Barcellona, a leading scholar in private law, advocating an alternative use of bourgeois law, "l'uso alternativo del diritto". This ambitious project then declined and waned because of several reasons, especially the rise of neoliberal policies, the defeat of the radical left and the Unions at the beginning of the Eighties, and the parallel ordoliberal turn taken by the European Community.

At the end of this story are we sure that what we really do get is a consolidation of the Italian republican constitution?

III.

Now, let me proceed and conclude by more specifically referring to the papers, and the corresponding national cases, scheduled in this session. They all confirm, it seems to me, the general points I raised about comparative law studies. They all show how relevant and fruitful comparative law, if properly and seriously pursued, might indeed be for a

better understanding of law. The papers have all also shown how difficult and impervious comparing different legal systems could be.

This session papers also support, I believe, my hesitation in taking too literally the categorical framework offered by Professor Ackerman in his novel beautiful book. In Italy now – remarked Professor Marco Goldoni – «the bearers of the constitutional orders are not the same» as before, I would say especially before the "mani pulite" judicial cleansing. By the way, could we say that "Mani pulite" was a revolution and one at human scale? Could we replace the original bearers of the Italian constitutional order with an activist constitutional court? Was this the path envisaged for a constitutional consolidation by founding fathers and by the mobilized working class in 1947?

The Portuguese perhaps is more promising at least as far as the centrality of judicial review is concerned in the light of a consolidating process of a revolutionary constitution. Portuguese constitutional judges bravely opposed the European Union austerity policies and its disruptive effects on the general system of social right entrenched in the Portuguese constitution. However, they did so by referring back to the legislative power centrality according to a mood at variance with the jurisprudential style for instance of the German Constitutional Court, and more in line with an Austrian kelsenian tradition of deference to popular sovereignty.

The French case, though we didn't have a paper given on it, is –I would say – especially interesting, since the constitution of the Fifth republic can hardly be seen as a "revolutionary" project. It is rather an attempt to react to a post-colonial crisis, and also a confession about the impossible consolidation of a "revolutionary" constitutional order as the outcome of the *Résistance* through the intervention of a strong judiciary. By the way, a serious, existential constitutional crisis is hardly manageable by constitutional courts. Their impartial status cannot feed a reaction that should be necessarily partial and political. On this point Kelsen at the end of the day agreed with Schmitt. Moreover, in the French case De Gaulle's charismatic leadership plays a cooling role about any centrality of judicial review once the game of politics becomes dramatic, and it moreover strikes a dissonant tone with regard to the hopes of a political regime based on some kind of diffused political parties and unions democracy.

Let me also, as a last word, mention the Polish and Hungarian cases, and their narrative of a Christianity offended claiming protection and justice from a redeemed constitutional order, are hardly congruent with a story centering around the progressive notion and pace of a "revolutionary

constitution". What if these rather were "counterrevolutionary constitutions"? The Polish and the Hungarian cases show how ambiguous charismatic leadership can be as an engine of a constitutional process that leads to a consolidation where we are left with a constitution without constitutionalism. And once the final destination of a "revolutionary constitution", consolidation, can be reached through a constitution without constitutionalism, there is little left of the liberal promise of cosmopolitan, global constitutionalism.