ARTICLES

Comparison, Translation and the Making of a Common European Constitutional Culture

By Alberto Vespaziani[*]

A. Methodological Transformations in the Comparison of European Public Law

European integration has forced constitutional law scholars to abandon the perspective of methodological nationalism. Prior to the emergence of the interpretative problems raised by the intersection of domestic and European law, the dominant legal paradigm conceived of "constitution" and "state" as two inseparable terms. With the intensification of European integration and economic globalization, many different constitutionalist interpretations have emerged which all share a belief in the State's loss of centrality, such as post-, supra- and trans-national constitutionalism, constitutionalism without the state and multilevel constitutionalism.

Alongside its interest in the European and global dimensions of constitutional law, constitutionalist scholarship has also demonstrated an increasing interest in comparative law. No longer focused on the classical comparison between forms of government, the new comparative constitutionalist scholarship examines the different interpretations of the meaning of particular fundamental rights.

A serious examination of fundamental rights discourses is now expected to look beyond national legislative texts and judicial decisions, to include an analysis of the approaches of other national legal cultures to similar problems, as well as the comparative arguments put forward by the European Court of Human Rights and the European Court of Justice. The formation of a common European constitutional culture is not therefore the product of an arithmetic summation, nor of a

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progressive geological stratification, but rather of the process of communication and reception between the divergent interpretations of different legal cultures.

The pluralist nature of European constitutional law thus requires a non-essentialist conceptualization of different national legal cultures, which are becoming increasingly porous, specifically because of the openness of their legal systems and the growing importance of legal comparison.

In the academic interpretative community, the renowned German jurist Peter Häberle proposed in his seminal 1975 work, *Die offene Gesellschaft der Verfassungsinterpreten,*[1] that comparison be added as a fifth interpretative method to Savigny's canon – which, at the time, frontally challenged the dominant *Staatslehre* (state-centered constitutional theory).[2] In the judicial interpretative community, the European Court of Human Rights and the European Court of Justice increasingly used comparative arguments in the reasoning of their decisions.[3] As a consequence of such developments, the question is no longer whether public law comparison is legitimate, but rather how it ought to be carried out.[4] In the face of these methodological debates, Häberle invited us to pay attention to the conclusions reached by comparative private law.[5]

The growing relevance of comparative argumentation has of course nurtured renewed methodological disputes about the object and scope of comparison. In this

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[1] PETER HÄBERLE, DIE OFFENE GESELLSCAFT DER VERFASSUNGSINTERPRETEN 297 (1975). *Contra* HUBERT TREIBER & ERHARD BLANKENBURG, DIE GESCHLOSSENE GESELLSCHAFT DER VERFASSUNGSINTERPRETEN 543-552 (1982).

[2] Peter Häberle, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungstaat*, *in* RECHTSVERGLEICHUNG IM KRAFTFELD DES VERFASSUNGSTAATES 27 (1992).

[3] *See* GIORGIO REPETTO, GLI ARGOMENTI COMPARATIVI NELLE GIURISPRUDENZE DELLE CORTI EUROPEE DI STRASBURGO E LUSSEMBURGO (2008).

[4] Ilenia Ruggiu, *Comparazione (Dir. Cost.)*, *in* II DIZIONARIO DI DIRITTO PUBBLICO 1055 (Sabino Cassese ed., 2006). See also Friedrich Müller and Ralf Christensen, JURISTISCHE METHODIK, Band II (CommunityLaw), 2003.

[5] *See* PETER HÄBERLE, EUROPÄISCHE VERFASSUNGSLEHRE 252 (2002) ("*Es ist durchaus kein Privileg gerade der Verfassungslehre, für den kulturwissenschaftlichen Ansatz besonders geeignet zu sein. Die Zivilrechtslehre kann nicht minder fruchtbar kulturwissenschaftliche Fragen aufgreifen und sie hat dabei, vor allem im Felde der Rechtsvergleichung, Tradition*"). *See also id.* at 260 ("*Die Juristenkunst des Privatrechts ist alt, das Verfassungsrecht relativ jung und neu. … Wohl aber hat der Verfassungsjurist allen Grund, die 'feinen Gewebe' zivilrechtlicher Juristenkunst zu respektieren*"); *Id.* at 270 ("*Das Desiderat einer europäische Methodenlehre ist die 'andere Seite' des beschriebenen Europäisierungsvorgangs, auch die Methodenlehre ist ein Beispielsfall für Europäisierungsvorgänge. Doch sind erst die Anfänge zu erkennen. Während im Privatrecht früh und nie ganz vergessen gemeineuropäisch gearbeitet wurde, bot sich im öffentlichen Recht (wegen die Nationalstaatsideologie) lange ein anderes Bild*").

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

article, I shall discuss the crisis in the statist paradigm in public law provoked by the European integration process and the corresponding renewal of methodological disputes in comparative constitutional law. In doing this, I will first give the reader a view from Italy, a survey of the most important Italian trends and schools of comparative law – historicism, functionalism, structuralism and post-modernism – and then put forward my own proposal for orienting the comparison of European constitutional laws around the process of translation.

I believe that comparative constitutional law can be seen as a cultural science, in which comparison seeks to integrate different legal life worlds.[6] Looking closely at this cultural science, we see that the Europeanization of national legal categories has been paralleled by a re-nationalization of European legal categories. I shall illustrate this *Wechselwirkung* in three steps: first I will analyze the main methodological underpinnings of Italian comparative constitutional discourse; I will then discuss the contribution of Italian comparative private law, and will finally put forward my procedural conception of comparison as a cultural enterprise, grounded in the canon of translation.

B. The Italian Contribution to Comparative Constitutional Law

The European integration process has triggered a crisis in Statist theory and methodological changes in Italian constitutional thought. Notwithstanding the dominance of formalist and dogmatic tendencies, Cervati has noted that

> there are signs of a new constitutional culture emerging on the horizon (mainly from Germany). This new culture is quite distinct from the culture of *Staatsrecht* underlying Orlando's thought; the process of European integration has given rise to a new method of constitutional scholarship. The craftsmen of the new theory are already working to forge new conceptual tools, inspired by such values as constitutional pluralism, loyal cooperation and subsidiarity. The results of this integration process are not yet fully foreseeable, but it is clear that legal theory will play an important role in processing the new

[6] *See* JÜRGEN HABERMAS, II THEORY OF COMMUNICATIVE ACTION 124 (1987) (noting that a lifeworld can be described as a "culturally transmitted and linguistically organized stock of interpretative patterns"). Following the communicative approach I use the expression "legal lifeworld" to encompass rules, principles, precedents, institutions, but also pre-comprehensions, background assumptions, metaphors, cryptotypes and paradigms that sustain a legal culture.

> developments in constitutional law. Constitutional theory seems to be increasingly attentive to the need to go beyond dogmatic formalism, to attain the widest possible historical and political vision.[7]

In emphasizing law's intrinsic historicity, and favoring a dynamic definition of legal categories, Cervati criticizes contemporary Italian public law. Though wedged between a future of European constitutional thought on the one hand, and the bygone richness of 19th century Italian comparative legal scholarship on the other, contemporary Italian public law is dominated by Statist, dogmatic and formalist approaches.

From this point of view, the current deconstruction of the constitution-state binomial anchoring 19th century constitutional concepts is pushing Italian public law away from Orlando and inspiring a consequent rapprochement between public and private law, precisely in the area of comparison. In fact, the leading contemporary Italian comparative constitutional law scholars owe a methodological debt to their private law cousins. Whether they are explaining their methodology, the definition of their research criteria, their field of examination or their purposes, public law comparativists almost always begin with a discussion of the older tradition of comparative studies in private law.

The work of Alessandro Pizzorusso provides an illuminating example. Pizzorusso demonstrates a fundamental skepticism towards comparison in general, and relegates comparative law to the status of a positive legal science, capable at most of reinforcing the systematic interpretation of an individual legal system. And yet his classification of legal systems takes its lead from the classic works of David, Zweigert and Kötz.[8] Giovanni Bognetti also avails himself of private law insights regarding such comparative law concepts as system, family, model, formant, micro- and macro-comparison. Although he understands legal comparison as a comparative history of law, he adds that "in substance, all that has been said so far about law and legal comparison in general, can certainly be reiterated in the

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[7] Angelo Antonio Cervati, *A proposito dello studio del diritto costituzionale in una prospettiva storica e della comparazione tra ordinamenti giuridici*, 2 ROMANO ATTUALE 26 (1999). *See also* Angelo Antonio Cervati, *Il diritto costituzionale europeo e la crisi della dogmatica statualistica*, 6 DIRITTO ROMANO ATTUALE 22 (2001).

[8] ALESSANDRO PIZZORUSSO, SISTEMI GIURIDICI COMPARATI 145-178 (1988). *See also La comparazione giuridica e il diritto pubblico*, *in* L'APPORTO DELLA COMPARAZIONE ALLA SCIENZA GIURIDICA 61 (Rodolfo Sacco ed., 1980); RENÉ DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY (1985); KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (1998).

particular case of comparative studies of constitutional norms (to be analyzed from a rigorously realist point of view, with all of its implications)."[9]

Giorgio Lombardi has attempted to free public law comparison from the private law matrix. He underscores the *argumentum quoad auctoritatem* nature of the comparative argument. Moreover he sees a natural tendency for public law comparison to seek out systemic differences, while private law comparison tends to seek out institutional similarities.[10] Lombardi points out that the 18th century saw the appearance of two distinct models, the code model and the constitution model; this distinction was mirrored by a corresponding differentiation between private law and public law. According to Lombardi, a genealogical study of modern comparative public law's scientific and epistemological autonomy rests upon the strict separation between the code and constitution models. Still, the process of European integration – and the European constitution's mosaic structure and multi-level, composite nature – suggest a remixing of the historically distinct code and constitution models.

Even Paolo Biscaretti di Ruffia, though stressing the role of political and economic doctrines in the construction of different state forms, takes an interdisciplinary approach in which comparative constitutional law is able to incorporate extra-legal insights from such fields as political science, the history of political thought, constitutional history, sociology, legal and political philosophy. Though he assumes that the state is the basic unit of comparative constitutional law, Biscaretti holds that a good understanding of the main "families of law", set forth in contemporary private law thought is useful, if not indispensable, to constitutional law comparativists, "especially in determining those 'general principles of the legal system' which, though often originating in private law, impact public law as well."[11]

Giuseppe de Vergottini's public law scholarship incorporates the basic analytical categories of comparative private law. He observes however that,

> in the area of public law, and especially constitutional law, comparison has a particular character that distinguishes it markedly from private law comparison, which focuses on the legal institutions

[9] GIOVANNI BOGNETTI, INTRODUZIONE AL DIRITTO COSTITUZIONALE COMPARATO 126 (1994).

[10] *See* GIORGIO LOMBARDI, PREMESSE AL CORSO DI DIRITTO PUBBLICO COMPARATO 102 (1986).

[11] PAOLO BISCARETTI DI RUFFIA, INTRODUZIONE AL DIRITTO COSTITUZIONALE COMPARATO 28 (1988).

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

> governing individuals. Public law comparison, by contrast, is interested in how different legal systems regulate the organization of power, beyond the organization of individuals and groups.[12]

This observation might be persuasive if it were reformulated in quantitative terms. Comparative private law studies have in fact paid great attention to the organization of public powers, especially those regarding the court systems. Comparative constitutional law, by contrast, has only recently broken the conceptual monopoly of the state-centric paradigm: alongside the traditional studies of the forms of state and government, comparative studies of the protection of fundamental rights in different national, international and supranational legal systems are increasingly important. In particular, the argument that "the basic unit of study in public and comparative constitutional law is the national legal system"[13] has been displaced by the increasing legal pervasiveness of transnational normative networks, as well as by the post-national dynamics of European integration. The 19th century doctrine of the nation-state erected the public-private distinction as an epistemological barrier, to defend an autonomous sphere of exclusive scientific competence. The public-private distinction is vulnerable to challenges capable of giving new immediacy to comparative studies from the period of European history prior to the formation of the modern state and to its monopolizing claims of legality – in other words, to the epoch of European common law.

C. The Contribution of the Italian School of Comparative Private Law

I. Gino Gorla: Comparison as Historical Research

A reconsideration of the contributions of Italian private law scholarship cannot help but begin with the insuperable work of Gino Gorla. Deacon of the Italian school of comparative private law, Gorla developed his methodological views in two essays: 1) his 1963 entry in the Encyclopedia of Law on "Comparative Law" (later incorporated into his masterly book *Comparative Law and European Common Law*); and 2) the entry "Comparative and Foreign Law" in the Treccani Legal Encyclopedia, thought to be written in 1982 though not published until 1989. In this section, I will discuss Gorla's methodological theories, trying to illuminate the differences between the earlier and later essays.

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[12] GIUSEPPE DE VERGOTTINI, DIRITTO COSTITUZIONALE COMPARATO 2 (1999).

[13] *Id.* at 72.

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

Gorla argues that the comparative study of law produces a circular thought process: the scholar moves from one term of comparison to another, and deepens his awareness of both terms in the process. Comparative analysis proceeds from the assumption that one's native law is a known law, while foreign law is unknown. But as comparative analysis unfolds, similarities and differences between the two laws emerge. The unknown law becomes known and the law that was presumed to be known becomes strange, consciousness of it more profound. Certainly, "the comparativist chooses the terms of comparison, often with tacit assumptions, according to his interests . . . His methods, tools and techniques of comparison, and thus his working hypothesis of the common *quid*, and therefore his interests or queries (which are often latent and unrevealed assumptions!) all strongly depend on his choice of the terms of comparison."[14]

Gorla distinguishes comparison from both legal philosophy and legal history. Comparison is more concrete than legal philosophy, and has a wider scope of inquiry than legal history:

> still, legal history and comparison are very similar. A historical fact cannot be fully understood without considering it in relation to other historical facts, especially recent ones: the point is to understand it in its own right, as a historical fact. In itself, history is a history of facts, and not 'comparative history'. On the other hand, one cannot fully know the individual terms of comparison without knowing (but not 'making') history: at least when that history is necessary to the comparison.[15]

Confronting the classic question as to the purpose of legal comparison, Gorla initially distinguished between external and immediate interests. Regarding external interests, comparative law can further the development of a general theory, philosophy and legal history. It can serve domestic law reform projects, check tendencies towards an excessive conceptualism, and aid in the formation of a law common to different states, the development of uniform legislation, the liberation from provincialism and thus the mutual tolerance between different peoples. Still, "the comparativist's immediate interest is pure knowledge."[16]

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[14] GINO GORLA, DIRITTO COMPARATO E DIRITTO COMUNE EUROPEO 7 (1981).

[15] *Id.* at 73.

[16] *Id.* at 78.

"Surely, without those (external) interests or pressing, current problems, the drive towards a pure activity of comparative knowledge would often be lacking, just as without contemporary problems history does not get written. This is why now is the time for comparative law, because those interests and problems are more pressing than ever."[17]

But how ought the comparative methodology be defined? Faced with the great dichotomy between problematic and casuistic methods, Gorla proposes a synthesis of the two approaches: following his hybrid "problematic-casuistic" method, the comparativist highlights common themes underlying apparently divergent rules, while interpreting judicial decisions in the context of wider legal and historical paradigms. In this way, he can avoid the formalizing abstractions of conceptualism and the categorizing obsessions of positivism. Believing that "comparative law is a limitless sea"[18], Gorla proposes some concrete rules to orient comparative research:

> the prudent comparativist approaches the different stages in his work (which are often intertwined) in the following way: I. Seek out a wide, if not total, knowledge of the unknown law, including its history. This can be achieved, at least for the most part, only by hearsay, with the addition however of some direct experience *in loco* […]; II. Choose a problem or group of problems and carry out an in-depth examination through the direct study of the texts […]; III. Always consider every comparative judgment prudently or provisionally, to be perfected through further study or through the work of other scholars; IV. Gradually replace hearsay, or the synthetic-descriptive frameworks described *supra* I, with direct in-depth analysis, described *supra* II and III. Practically speaking, this implies a division of labor, and requires organizing the work in well-integrated groups or teams.[19]

Almost twenty years later, Gorla changes his view of comparative law as a science seeking to satisfy merely intellectual interests. Rather than proceeding from a

[17] *Id.* at 80.

[18] *Id.* at 103.

[19] *Id.* at 94.

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

conceptual analysis of legal comparison, Gorla realistically observes the comparativists' activity and the way they frame the scope of their research:

> in this review of the practice, or the thought-action of the comparativists, it is necessary to understand comparative law not only in a purely scientific sense, but also as applied by the comparativists themselves (which does suggest the functions and purposes of comparative law). And this is because, looking at concrete activities, it is difficult to distinguish the pure science from its application, because there are in fact reciprocal contributions between the two. Even when a judge or lawyer carries out the application, a bit of science may be derived as a by-product.[20]

In his general methodology, Gorla distinguishes between micro-comparison and macro-comparison:

> micro-comparison is focused on individual rules, bodies of rules or institutions that do not by themselves characterize a given legal system, family or sub-family (examples of sub-families are French or German law, with respect to the civil law family). Macro-comparison focuses on the characteristic features of a given law, which are often the traits of the family to which it belongs, or those of the 'head of the family.'[21]

This distinction does not however give way to a rigid separation. Gorla argues that historical, political and socio-economic explanations are inevitable when performing micro-comparison. In comparing specific laws, for example, a reference to the wider framework of the whole "system" in which that law exists will be indispensable; this means that even micro-comparison has to resort to a systemologic explanation.

Gorla also specifies three basic phases in the comparativist's activity. The first phase examines the similarities and/or differences between legal systems, norms, institutions and normative solutions. The second phase tries to explain the reasons

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[20] Gino Gorla, *Diritto comparato e straniero*, *in* ENCICLOPEDIA GIURIDICA 2.

[21] *Id.* at 10; For example, English law is the head of the common law family.

underlying those similarities and/or differences. Finally, the third phase evaluates the laws being compared. According to Gorla, this strictly comparative activity cannot help but widen the scholar's field of observation to include the "para-legal", by which he means different modes of legal thought (casuistic, systematic, conceptualist); legal interpretation not established by legal norms; legal education; the training of lawyers, judges and public administrators; the effective functioning of related professions, the justice system and the public administration; the "style" and types of laws, judicial decisions and legal treatises; the sources of legal cognition and their functioning (collections of laws and jurisprudence, digests); concrete relationships between law, legislation, jurisprudence and academic commentary, and the possible quantitative or authoritative prevalence of some of these factors and, finally the concrete value of judicial precedent. "[T]he history of how a particular law (understood as currently in force) has been received, considered as a historical fact, [also] belongs to the para-legal, as does the history of communications and relationships between the academic commentary and the jurisprudence of one country or group of countries and another country or group of countries."[22] This openness to the para-legal, Gorla argues, has been the major contribution of Anglo-American and French comparative doctrine, and constitutes the best antidote to the traditional way of describing the legal system from a strictly normative point of view, in which the *summa* is Kelsen's pure doctrine of law.

Gorla's historical conception of legal comparison does not emerge simply from his particular methodological preference, but from the historical analysis of the evolution of comparative law itself.[23] Comparative law is traditionally traced back to the 16th century, when Europe saw the formation of modern states. Individual states had their own law, which was mainly grounded in the *interpretatio* of the Roman-common law.

> This mark[ed] the beginning of 'modern' comparative law, coinciding with the beginning of the history of the modern age, as it were. 'Comparative law' (always in the broad sense) thus developed as a comparison between the laws of those different states, as well as between towns and regions, and thus also between civil law and the common law.[24]

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[22] *Id.* at 4.

[23] *See* Gino Gorla & Luigi Moccia, *Profili di una storia del "diritto comparato" in Italia e nel "mondo comunicante"*, RIVISTA DI DIRITTO CIVILE 4 (1987).

[24] Gino Gorla, *Diritto comparato e straniero*, *in* ENCICLOPEDIA GIURIDICA 12.

Notwithstanding a schism between continental and analytical (English, Scottish and American) jurists, the formation of open legal systems was typical of states during the 16th through 18th centuries, and coincided with the flourishing of comparative studies and practices. Both the theorists and practitioners of that time employed comparative arguments in seeking out the concordances between the laws of different states, towns or regions.

> These concordances consisted in the so-called *communis opinio* or *praxis totius orbis* (*totius Europae* to be understood as continental Europe), and they were given great value in the resolution of *casus dubii* or *omissis* in the local law and for its *interpretatio* (which was *restrictiva* when the local law conflicted with the *communis opinio*). Judicial recourse to the *lex alius loci* in *casus dubii* or *omissi* in the local law, or for its improvement, was quite advanced.[25]

The genealogy of modern European comparative law ought therefore to be particularly relevant to the development of a future European constitutional culture. The comparison over time reveals a surprising path-dependency: in 21st century Europe, just like in the Europe of the common law, comparison is identified with the communication between legal cultures. It is not isolated as a discipline distinct from other legal disciplines (it is neither ancillary nor dominant). From a sociological standpoint, the specialized figure of the comparativist cannot be distinguished either.

II. Mauro Cappelletti: Comparative Law, Functionalism and Public Policy

While Gorla's vision of comparison as a historically-informed activity is a criticism of legal positivism, Cappelletti frees legal analysis from mere empirical description to ground a functionalist analysis, which is sensitive to law's role in public policy.[26]

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[25] *Id.* at 12.

[26] V. EMILIO BETTI, SYSTÈME DU CODE CIVIL ALLEMAND 2 (1965) (promoting a functionalist approach to comparison in civil law) ("la méthode comparative, en tant qu'elle poursuit une comparaison fonctionnelle, est appelée à remplir des rôles qui regardent l'intelligence approfondie du droit, donc son essence même en tant qu'objet d'une science juridique. La pluralité des ordres juridiques coexistants peut former l'objet d'une évaluation comparative non seulement au but théorique d'en constater les différences et les convergences, ou dans un but pratique (l'antithèse était bien connue aux Romains) d'une unification à essayer en example; mais aussi avec d'autres points de vue pratiques dirigeants: par example, avec une visée normative en vue de l'élaboration d'un droit à réformer (études législatives), ou avec une visée de traduction, transposition ou préférence dans le domain des conflits de lois").

Cappelletti underscores the distinction between legal comparison (*Rechtsvergleichung*) and comparative law (*vergleichendes Recht*). Legal comparison is simply the product of a comparative analysis. Comparative law, by contrast, is a genuine method for analyzing different legal systems. Cappelletti also distinguishes micro-comparison, which works with family-related legal systems, from macro-comparison, which straddles different legal families.

Cappelletti's methodological discussions moreover distinguish the phases of comparative analysis from its purposes. The first procedural step in comparison is to identify "a real social problem or need that is shared by two or more countries or societies, to which the comparative analysis would like to extend." Comparison then focuses on the law in the strict sense, meaning the recognition of the norms, institutions and legal processes that the countries under examination have used to resolve their shared problem or need. The third phase then looks for similarities and differences, while the fourth seeks out possible convergent or divergent evolutionary tendencies. The fifth phase evaluates the solutions adopted in different countries or societies. "[T]his is where the jurisprudential or the philosophical and judgmental character of comparative analysis emerges."[27] In this sense, comparison represents a third way between a non-judgmental empiricism, typical of a second-rate legal positivism, on the one hand, and the *a priori* abstractions that characterize the worst kind of natural law thinking on the other. The sixth phase asks the comparativist to speculate as to possible future developments.

As to the goals of comparative research, Cappelletti lists four practical purposes and four theoretical ones: first of all, comparative law has become indispensable to the international practice of law; it is also frequently employed in the planning of domestic legal reforms. In this sense, "comparison may be 'horizontal' (or synchronic), having a spatial reach"[28] or it may be 'vertical' (or diachronic), having a temporal reach."[29] The third practical goal of comparative research is to understand and apply the general principles of law at the international level. In the application of both Article 38 (1c) of the Statute of the International Court of Justice, and Article 215 EEC,[30] comparative law becomes a genuine source of law. Finally,

[27] *Id.* at 20.

[28] *Id.* at 25.

[29] *Id.*

[30] Now the problem tends to shift to the interpretation of the constitutional traditions common to the Member States of the European Union, according to the dictate of Article 6, section 2 of the EU Treaty (previously Article F). *See* Miguel Azpitarte-Sánchez, *Artikel 6 EU-Vertrag: Kodifizierung durch die Zeit, seine Bedeutung und Rechtsfolgen*, 51 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 553 (2003).

comparison can be a tool in the harmonization and unification of different national laws.

Turning now to comparison's theoretical purposes, Cappelletti believes that it is

> an important instrument in attaining a non-absolutist, non-dogmatic vision of the law – to finally see law as a real phenomenon, and as such, not as absolute and immobile, but as a fundamental feature of culture and of human society, as historical and thus mutable, like language and art, and not as a purely normative and autonomous phenomena, abstracted from society and its changing needs, ideals and aspirations.[31]

The second theoretical purpose furthered by comparison is the development of ideas, social and political philosophies and ideologies. Fundamental concepts like democracy, separation of powers and constitutional justice can be better illustrated by comparative studies than by mere conceptual elaborations; Aristotle, Cicero, Montesquieu, Tocqueville and Marx were all comparativists too! The third theoretical purpose is to determine the natural laws (for those who believe in them) underlying the evolution of law and society. Finally, comparison may serve to identify great evolutionary tendencies, though they are not necessarily convergent: the spread of constitutional justice, for example, has been the main focus of Cappelletti's work.[32] He attributes a civilizing function to legal comparison, and he values the mutual understanding and tolerance between peoples that it favors. Cappelletti's realist vision attributes a mainly practical function to comparative law in that it furthers the determination of the law's public policies, privileges jurisprudence as a field of examination, and aspires to forecast how judges will decide. Although suited to promoting the unification of European private law, the functional approach is inadequate for understanding the cultural differences that underpin divergent interpretations of constitutional rights.[33] The functional

[31] MAURO CAPPELLETTI, DIMENSIONI DELLA GIUSTIZIA NELLE SOCIETÀ CONTEMPORANEE 24 (1994).

[32] See MAURO CAPPELLETTI, *Il* CONTROLLO GIUDIZIARIO DI COSTITUZIONALITÀ DELLE LEGGI NEL DIRITTO COMPARATO (1979); Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 SOUTHERN CALIFORNIA LAW REVIEW 409 (1980); Mauro Cappelletti, *The Law-Making Power of the Judge and its Limits: a Comparative Analysis*, 8 MONASH UNIVERSITY LAW REVIEW 15 (1981); MAURO CAPPALLETTI, The JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989).

[33] Philip Dann, *Thoughts on a Methodology of European Constitutional Law*, 6 GERMAN LAW JOURNAL 11 (2005).

method offers only a descriptive account of foreign law and falls short of providing value-ridden judgments.[34]

III. Rodolfo Sacco: Comparison as Structural Analysis

The critique of positivism, set in motion by Gorla's historical approach and carried forward by Cappelletti's functionalism, takes a decisive turn in the work of Rodolfo Sacco. His comparative law treatise presents an approach that not only compares different systems of private law, but also traces the historical development of different legal paradigms, explores constitutional history, and constructs analytical categories that are very interesting to public law comparativists as well. The treatise begins with a polemic against those who want comparative law to "serve" something else. "[T]he claim that a utilitarian function is necessary and essential to the legitimation of comparative law is the result of a misunderstanding that is now being overcome . . . . Comparison is potentially impartial and has the right to be so."[35] Addressing the problem of whether or not comparative law is a method, meaning a body of procedures chosen to attain specific results, Sacco observes how

> there is not just one way to compare: different methods (structuralism, functionalism, etc.) can be used in comparison; and we can also observe that comparison does have its own particular subject matter of legal study – the circulation of models; their dissociations and internal relations; their homologations and correspondences. Anyone who says that comparison is a method has a reductive vision of the method of comparison (because he ignores the fact that many methods can be used in comparison, and that there is no pure method of comparison), or he has a reductive vision of its object and purpose (because he ignores, or does not know, its specific and mature field of examination).[36]

This methodological pluralism leads legal research to an interdisciplinary approach.

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[34] Axel Tschentscher, *Dialektische Rechtsvergleichung – Zur Methode der Komparatistik im öffentlichen Recht*, 17 JURISTENZEITUNG 809 (2007).

[35] RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO 5 (1995).

[36] *Id.* at 11.

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

> Those who engage in comparative law should not feel themselves inferior to those who engage in those fields that have always practiced comparison, that have developed a technique of comparison and have taken from comparison all that it has to give. Nevertheless, those who use comparative methods to study law have yet to realize that there are other comparative sciences; it ought to join forces with them, and it ought, if possible, to profit from their experiences.[37]

> The jurist is not the first to arrive at comparison. Before him, the linguist developed as a comparativist. In fact, the linguistic sciences have always taken the problems surrounding the identity of the various disciplines into consideration, without letting it bother them. The knowledge of foreign languages makes the polyglot, and the ability to compare multiple linguistic structures makes the comparative philologist.[38]

Sacco thus implicitly distinguishes between knowledge of foreign laws on the one hand and legal comparison on the other - the first step in comparison is not the study of foreign law.

Considering legal education, Sacco proposes to introduce a foreign "legal language" program, in which a foreign jurist would teach the law of her country to students already familiar with legal comparison.

> [H]ere is the answer to those who ask whether it pays to teach either comparison or foreign law: every jurist ought to be initiated in comparison, as an epistemological instrument and a key to understanding many different legal systems. Some students must then be enabled to acquire ample information on the law of foreign countries. Some comparative law is indispensable for everyone. Any student who wants to should be enabled to pursue a transnational program, or a program largely open to

[37] *Id.* at 13.

[38] *Id.* at 182.

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

> foreign law, that he can then directly use in his professional activity.[39]

On the theoretical level, Sacco develops a number of specifically comparative analytical categories. Firstly, he makes a distinction between genotype and phenotype. While a genotype is an abstract notion (i.e., contract), phenotype is one of its possible historical manifestations (i.e., Italian or German contract law). "The phenotype, or empirical manifestation, ought to be studied through conceptual analysis in every country. At a higher level of abstraction, the comparativist studies genotypes; he discovers them on the linguistic plane and uses them in translation."[40] This translation follows three basic approaches: the determination of a functional equivalent, the creation of a neologism or renunciation. In the first case, the comparativist takes note of how terms like *Président de la République* or *Parliament* tend to encounter corresponding terms; in the second case, by contrast, the translator must face the fact that there is no functional equivalent, and create "in her own language, the neologism necessary to express all the meanings (and only the meanings) that are contained in the foreign term."[41] Finally, it may be – especially in the area of macro-comparison – that the functional equivalent does not exist. Perhaps the term corresponds only in part, and the paraphrase is so unwieldy as to make the original term preferable. This is why "trust" or *Verfassungsbeschwerde* do not get translated into Italian. Renunciation is particulary frequent at the macrocomparison level.[42]

It is precisely the problems raised by the translation of legal terms and institutions which force the comparativist to confront not only fully verbalized legal models, but also the implicit assumptions and the latent patterns informing every jurist's background understanding and cultural conditioning.

> [C]ryptotypes, even if unarticulated, are perceived and transmitted from one generation of jurists to another, just as the legal rules of societies without written rules are preserved and transmitted over time. These cryptotypes seem 'obvious' to someone steeped in a

[39] *Id.*

[40] *Id.* at 37.

[41] *Id.* at 41; An example of this in constitutional law could be the widespread use of the word "*aggiudicazione*" in the Italian literature to translate the English word adjudication, instead of the bulky paraphrase "*controllo di costituzionalità e giudizio in ultima istanza in un sistema integrato*".

[42] Rodolfo Sacco, *Traduzione giuridica*, *in* DIGESTO DISCIPLINE PRIVATISTICHE 733 (2000). *See also* Rodolfo Sacco, *Lingua e diritto*, *in* ARS INTERPRETANDI 117 (2001).

> particular legal culture. Normally, a jurist finds it harder to liberate himself from the body of cryptotypes present in his particular system than to abandon the rules of which he is fully aware. This subjection to cryptotypes constitutes the 'mentality' of a jurist in a given country. And this difference in mentality represents the main obstacle to the mutual understanding between jurists of different territorial provenance; this can be overcome only by the exercise of 'systemologic' and institutional comparison.[43]

The comparativist is better able to identify cryptotypes than the municipal jurist is, because an observer can better apprehend the basic normative assumptions than a participant can. The comparativist in fact has "a view that is historical, realistic, diachronic and dissociates the formants."[44]

Among Sacco's innovations to the comparative terminology, his term "legal formant" has had a particularly great success. The term "formant" comes from phonetics, and a legal formant is the body of rules and propositions that contribute to "forming" the legal system. Without establishing any hierarchy between them, the comparativist studies the relevance of the legislative, scholarly and jurisprudential formants, along with constitutional conventions and interpretative usages, etc. Naturally, the number of legal formants and their comparative importance vary enormously from one legal system to another. "The comparative importance of the various legal formants (the degree to which each one is able to influence the others) is a characteristic fact in every legal system. It is difficult to articulate and to quantify, and its importance is obviously immense."[45] Depending on the greater or lesser convergence between legal formants, we can speak of systems being more compact or more diffused. But we cannot make a specific and definitive list of all the legal formants, due to the dynamicity of the law and to individual formants' functional versatility: a law may contain qualifying propositions and rules of conduct; a judicial decision may contain maxims, which

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[43] *Id.* at 128. *See also* Rodolfo Sacco, *Crittotipo*, IV DIGESTO DISCIPLINE PRIVATISTICHE 39 (1987); Rodolfo Sacco, *Comparazione giuridica e conoscenza del dato giuridico positivo*, *in* L'APPORTO DELLA COMPARAZIONE ALLA SCIENZA GIURIDICA 249 (Rodolfo Sacco ed., 1980) (noting that "[t]he cyptotype is simply the model that is about to become common knowledge"). A relevant example of this method in European constitutional thought was the assumption that constitutional law was inseparable from the state.

[44] Rodolfo Sacco, *Comparazione giuridica e conoscenza del dato giuridico positivo*, *in* L'APPORTO DELLA COMPARAZIONE ALLA SCIENZA GIURIDICA 253 (Rodolfo Sacco ed., 1980).

[45] *Id.* at 61.

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

in turn contain definitions, qualifications and arguments; legal commentary may take the form of an essay, if it aims at persuasion, or a treatise, if it is to be a teaching or informational support.

Because of the particular analytical innovations that comparative study has introduced, Sacco and his followers have had an enormous scientific impact and great international academic success. The assertion of the indeterminacy of normative propositions and the comparative relevance of the dissociation between rules and discourses make up the main thrust of Sacco's critique of positivism. As in the history of American legal thought, where the Realist critique of classical common law's formalism made way for the economic analysis of law and critical legal theory, Sacco's work represents an analogous evolution for European comparative studies, making a return to positivism impossible. In his most recent work, Sacco has suggested that comparative gaps emerging from translation problems should be filled by an anthropologic approach.[46] Compared to Gorla however, Sacco seems to have downplayed the importance of history in comparison. Moreover, while Sacco contributes significantly to the comparativist's analytical toolkit, his structural analysis ultimately refuses to evaluate, and thus risks sliding into a neo-Kelsenian comparativism. In particular, the supposedly impartial and non-judgmental character of comparison *à la* Sacco risks letting the formalism, which was thrown out the anti-positivist window, back in through the structuralist front door.

IV. Circulation of Models and Critique of Ideology in Mattei and Monateri

The recent work of Mattei and Monateri builds upon the Italian masters of private comparative law. They proceed from Gorla's teaching that "comparative law serves the knowledge of law"[47] and thus view comparison as an epistemological tool, rather than a methodological one.[48] Like Sacco, they reject a characterization of comparative law as a method, for that would imply that there is just one method of comparison, when legal comparison in fact uses many different methods. The purpose of comparison can be found in "the different positive laws that are compared in the different legal systems of the world."[49] However, a science of

[46] RODOLFO SACCO, ANTROPOLOGIA GIURIDICA 203 (2007).

[47] UGO MATTEI & PIER GIUSEPPE MONATERI, INTRODUZIONE BREVE AL DIRITTO COMPARATO 7 (1997).

[48] This is a position contained in the Trento theses. *See* Antonio Gambaro, *The Trento Theses*, 4 GLOBAL JURIST FRONTIERS (2004); Pier Giuseppe Monateri, *Comparazione e latenza normativa a dieci anni dalle tesi di Trento*, *in* RIVISTA CRITICA DEL DIRITTO PRIVATO 453 (1998).

[49] *Id.* at 8.

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

comparative law cannot be positivistic. The foundation myths of positivism – the pre-existing will of the national legislature, the closure and completeness of the legal system, the ordered hierarchy of the sources of law, the mechanical, deductive nature of interpretation, the foreseeability of judicial decisions, the certainty of the law – strike the comparativist as bald ideological strategies for denying the fact that different national norms are almost always rooted in a cultural circulation of legal models. It is for this reason that comparativists have always fought "a genuine *Kulturkampf* cultural struggle) against legal positivism."[50]

If the object of comparison is simply the different systems of positive law, how does the comparativist deal with the cultural diversity underlying normative differences? Mattei and Monateri argue that "the comparativist's basic job is to create a bridge between jurists from different legal traditions."[51] This means that faced with normative differences, the comparativist can free himself from the narrow-mindedness of legalistic positivism. This is not however the purpose of his search for generalizing concepts able to comprehend the institutions of different legal systems at a higher level of abstraction.

> [T]he comparativist is well aware of the fact that legal categories do not have a universal conceptual existence, but are simply linguistic tools, inherited from a specific tradition, with which jurist seeks to master socially relevant facts. This observation fueled the second great *Kulturkampf* fought by legal comparison, against *legal conceptualism* […] In this sense, comparative law, in addition to being anti-positivist is also anti-conceptualist, because it is not satisfied with the purely conceptual data written in the law or the law books, but it *must* seek out *the concrete process by which the law is realized in a given society*."[52]

In this view, "*comparative law* is the scientific comparison of legal systems carried out in order to study the similarities and differences between the various systems, taking the different practical and social implications into consideration as well."[53]

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[50] *Id.*

[51] *Id.* at 10.

[52] *Id.* at 11.

[53] *Id.* at 13.

Mattei and Monateri analytically refine Sacco's basic concepts of comparison, such as system, family and model. By *system,* the authors mean

> the body of the rules of law applicable in a determinate community, which usually (but not necessarily) corresponds to a State . . . . [by]*legal families* we mean the body of systems deeply linked by common legal structures and history. Typical examples are the civil law (Roman-origin law) and common law (derived from English law) families. Comparative law does not limit itself to families, but goes further to study the circulation of legal *models,* which are bodies of technical legal concepts that can be found in different legal systems and even in different legal families.[54]

It is in this notion of circulating models or "legal transplants" that we can see an important affinity between the Italian school of private comparative law and the Häberlian view of communicative processes through which legal institutions are received by different legal cultures: it suffices to consider the enormous influence of German constitutionalism on Spain in the area of constitutional review and local autonomy, or the enormous success of the clause guaranteeing respect for the essence of fundamental rights, now codified in Article 52 of the Nice Charter of Fundamental Rights.

Mattei and Monateri specify that the processes of reception-communication between national legal systems, and between national and supranational law, are unlike the importation and exportation of law or an international market in institutions. These differences in terminology correspond to important normative differences. "[A] transplant's success can only be evaluated *ex post*, by the degree to which the institution has taken root in the new context. An export's success is instead *in re ipsa*. An exporter does not care what happens to the exported good."[55] These critical reflections chill an enthusiasm for a free, wide-ranging comparison, where the model with the best circulation wins out over the models unable to affirm themselves beyond their own borders, and where the competition between different models produces a spontaneous order, coordinated by the invisible hand of the global institutional market. In this view of the circulation of models as a supermarket, the comparativist might develop

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[54] *Id.*

[55] *Id.* at 39.

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

> a common *hermeneutic of suspicion*. On the one hand, it is necessary to specify which transplant is desired for efficiency reasons. On the other, we must analyze how lawyers' various manipulative techniques may influence the transplant itself. The old idea of the creation of law through legislation and interpretation needs to be seen more realistically as a scheme for the production of law through transplants and manipulative strategies.[56]

This means that comparative analysis should not aim just to isolate the winning features of those models able to circulate, but rather to analyze the argumentative strategies used by the systems that receive institutions from abroad. "[I]mitation is in fact a *creative* activity, because it is a *selective* activity. The system that imitates is a system that makes choices."[57]

This approach to comparison suggests a dynamic, open vision of legal systems, and a pluralistic vision of the role of different legal formants. This is important for the development of European constitutional culture, for it also suggests that a constitutional jurisprudence can be inspired by one system, while the academic commentary on it is inspired by another.[58] We can also assume that a common European law will be forged through legal contaminations from different systems, coming from both within the European Union and from outside of it (the United States, Canada, etc.). The overall balance in the system will certainly be precarious, given the divergent interpretations of the normative significance of the supposedly common constitutional traditions.

Along these lines, Monateri has more recently proposed a view *à la* legal process, to study the circulation of models in the emerging European law. By combining economic analysis with comparative analysis, the efficiency of legal transplants could be measured, and this could guide the allocation of the most appropriate

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[56] *Id.* at 39.

[57] *Id.* at 44.

[58] In Italy, for example, academic studies on the use of reasonableness in constitutional review are widely inspired by the American and German literature, while the constitutional doctrine has developed in a substantially autonomous way. It has forged its own, genuinely new canon, which is so extended in parts as to defy reduction to any model existing elsewhere.

institutions in which to decide common European policies.[59] From a comparative point of view, this *revirement* of critical theory, which treads *à rebours* the path of American post-Realist legal thought of the second half of the 20th century (*legal process – law and economics - critical legal studies*), could arouse the suspicion that the circulation of models could itself claim to have a natural, neutral and apolitical character, and this is precisely what he wanted to challenge in the first place.[60] For such an approach, however, the main problem for comparative research becomes the organization of the judicial power, in particular an institutional design of the system of high courts.

The jurisprudence of the European "constitutional courts" (the European Courts of Justice and the European Court of Human Rights) has been the main formant in the formation of a constitutional law of the European Union. These courts have also used comparative arguments in the reasoning of their more "constitutional" decisions.[61] However, the study of comparison in the constitutional area cannot focus exclusively on supreme court decisions; insofar as we view constitutional law as a cultural science, we ought to undertake to explicate the methodological assumptions of a comparison that involves all the interpreters of the European constitution. In this sense, I will now attempt to articulate my conception of comparison as an activity rooted in the canon of translation, whose purpose is integration.

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[59] Pier Giuseppe Monateri, *La circolazione dei modelli giuridici e le sue conseguenze per l'Unione europea*, *in* MODELLI GIURIDICI ED ECONOMICI PER LA COSTITUZIONE EUROPEA 87 (A.M. PETRONI ed., 2001). *See also* Pier Giuseppe Monateri, *Il problema di una definizione di Europa: una questione di teologia politica?, in* RIVISTA CRITICA DEL DIRITTO PRIVATO 3-19 (2005); Ugo Mattei & Anna Di Robilant, *International Style e postmodernismo nell'architettura giuridica delle nuova Europa. Prime note critiche*, RIVISTA CRITICA DEL DIRITTO PRIVATO 89 (2001); Pier Giuseppe Monateri, *Everybody's Talking: The Future of Comparative Law* 21 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 825 (1998).

[60] PIER GIUSEPPE MONATERI, CRITICA DELL'IDEOLOGIA E ANALISI ANTAGONISTA: IL PENSIERO DI MARX E LE STRATEGIE DELLA COMPARAZIONE (2000). *See also* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 279 (1992).

[61] PETER HÄBERLE, EUROPÄISCHE VERFASSUNGSLEHRE 271 (2002) ("Ansätze zu einer europäischen Methodenlehre zeigen sich in der Rechtsprechung der europäischen Verfassungsgerichte zu den Grundrechte"); Alexander Bleckmann, *Die wertende Rechtsvergleichung bei der Entwicklung europäischer Grundrechte*, *in* EUROPARECHT, ENERGIERECHT, WIRTSCHAFTSRECHT: FESTSCHRIFT FUR BODO BORNER ZUM 70. GEBURTSTAG (Baur, Müller-Graff & Zuleeg eds., 1992); C. N. Kakouris, *Use of the Comparative Method by the Court of Justice of the European Communities*, 6 PACE INTERNATIONAL LAW REVIEW 267 (1994); Siobahn McInerney, *The European Convention on Human Rights and Fundamental Freedoms and the Evolution of Fundamental Rights in the 'Private Domain'*, *in* ESSAYS AND COMMENTARY ON THE EUROPEAN AND CONCEPTUAL FOUNDATIONS OF MODERN INTERNATIONAL LAW 277 (Harding & Lim eds., 1999); Cristopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20.4 OXFORD JOURNAL OF LEGAL STUDIES 499 (2004).

D. Comparison, Translation and the Making of a Common European Constitutional Culture

In the modern era of comparative constitutional law, the main goal of comparison was to critically examine prevalent conceptions, dominant paradigms and foundational dogmas. Ostensibly closed legal systems were juxtaposed against each other; comparison did not change anything except the critical awareness of the comparativist and his audience. Paraphrasing Wittgenstein, we could say that the purpose of comparison was to reject erroneous arguments. The comparativists aspired to

> find the magic word, which is the word that finally enables us to grasp what was, until now, beyond our reach, a weight on our conscience. (It is like when you have a hair on your tongue; you feel it, but you cannot catch it // grasp it // and thus cannot get rid of it).[62]

The purpose of comparison was thus to "solve" a problem rooted in one's own legal system, by means of an argument derived from an alternative solution to a commensurable problem in one or more foreign legal systems.

Pursuing this goal now in the post-modern era, legal and constitutional comparison also has the added function of integration, which it carries out in the discursive act of translation. The practical function of comparison in the making of a European law and constitutional scholarship cannot be denied. The cognitive function of comparison, a privilege of the observer, is now supplemented by an argumentative function, which is characteristic of the participant's perspective; this can be conceptualized from within the new rhetoric of a common European constitutional law. The point is no longer to retrace the philologically original meaning of a legal institution, and even less to uncover universal solutions to the interpretative disagreements between the participants in the nascent European constitutional scholarship. Translation, in this context, does not imply the circulation of winning models, nor the adoption of solutions worked out elsewhere.

Analytically, we can distinguish between three different senses of translation. In the widest sense, all learning is rooted in the canon of translation. In the hermeneutical

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[62] LUDWIG WITTGENSTEIN, FILOSOFIA 11 (Roma) ("*Der Philosoph trachtet, das erlösende Wort zu finden, das ist das Wort, das uns endlich erlaubt, das zu fassen, was bis jetzt immer, ungreifbar, unser Bewusstsein belastet hat. (Es ist, wie wenn man ein Haar auf der Zunge liegen hat; man spürt es, aber kann es nicht erfassen // ergreifen // und darum nicht loswerden)").*

vision of Gadamer,[63] Betti,[64] and Steiner,[65] "to understand is to translate." From this point of view, even legal interpretation may be seen as an activity of translation; this is the thrust of arguments by James Boyd White[66] and Lawrence Lessig[67]. In a second and more circumscribed sense, European law is distinguished by the problem of transposing concepts derived from a national, state-centered constitutionalism to a post-national landscape.[68] Finally, in the most specific sense of translation, theorists and practitioners of European law must translate nationally- and linguistically-specific categories and legal institutions into another language. The multi-linguistic nature of European law and the lack of an official language pose delicate practical problems in the translation of such expressions as: *riserva di legge*, rule of law, *Rechtstaat*, human dignity, taking and *espropriazione*.[69]

In each of these three senses comparison as translation seeks to loosen the grip of dogmatic thinking. But it too risks falling back onto formalism: temporal comparison can slide into institutional antique-hunting; spatial comparison can corrupt the comparativist into a constitutional tourist. The results of comparison ought to be simple, but the activity of comparison is as complicated as the knots it seeks to unravel. Discursively, it consists in a continuous communicative process that moves back and forth between the perspectives of participant and observer. The comparativist begins by participating in a debate about a contested scientific issue in her own legal system. Faced with a reasonable disagreement in her scientific community, she seeks to solve the puzzle by reconstructing the paradigm underlying the issue; to do this, she turns her attention first of all to one or more "foreign" laws. This foreign law appears at first glance as a homogeneous, graspable body; however the epistemic interest for power deceives the observer: a

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[63] HANS GEORG GADAMER, TRUTH AND METHOD (2005).

[64] EMILIO BETTI, TEORIA GENERALE DELL'INTERPRETAZIONE 636 (1990).

[65] GEORGE STEINER, AFTER BABEL (1998).

[66] JAMES BOYD WHITE, JUSTICE AS TRANSLATION (1994).

[67] Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS LAW REVIEW 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STANFORD LAW REVIEW 395 (1995); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUPREME COURT REVIEW 125; Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM LAW REVIEW 1365 (1997).

[68] N. Walker, *Post-national Constitutionalism and the Problem of Translation*, *in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE (J.H.H. Weiler & M. Wind eds., 2003).

[69] Antonio Gambaro, *Interpretation of Multilingual Legislative Texts*, 11 ELECTRONIC JOURNAL OF COMPARATIVE LAW 3 (2007); Gerard-René De Groot, *La traduzione di informazioni giuridiche*, *in* ARS INTERPRETANDI 135 (2000); Jerzy Wróblewski, *Il problema della traduzione giuridica*, *in* ARS INTERPRETANDI 155 (2000).

culture – even a legal culture – is quite like a horizon, the more we move towards it, the farther away it moves. As she deepens her knowledge of the foreign culture, the observer starts participating in it too, and making it her own. This familiarization with the foreign corresponds with a partial estrangement from the familiar. Looking again at the problem in her own law (which she thought she knew) with an in-depth awareness of the foreign law, the jurist now sees as relative the knowledge and dogmas she thought were immutable. As Cervati has argued,

> comparison in every area of the law, and especially in constitutional law, is the most effective tool for becoming aware of one's own institutional identity, in order to deepen the original terms of one's own constitutional system by transcending an excessively narrow vision. Comparison is moreover able to contribute to cultural enrichment and may also provide an occasion for a searching scientific examination of individual legal problems, as long as it is used as a means for attaining a greater awareness of the evaluative assumptions underlying dogmatic constructions.[70]

Therefore, from the procedural standpoint knowledge of foreign law is just the first step in comparison; to use Lombardi's powerful image, we can say that knowledge of foreign law provides the bricks for constructing the building of comparative law. A genuine comparison is the cement holding those bricks together.[71] Thus the difference between foreign law and comparative law is like that between polyglot and linguist. A discursive conception of the activity of comparison sits nicely with a porous conception of legal culture. An immobile participant is afraid to leave the comfort of her own native legal system, while an instrumental observer reifies the culture in which he yearns to make his home; both tend to conceive of the legal culture that they are studying in an essentialist way. A procedural conception of comparison aspires instead to a hermeneutical approach; one of the aims of comparison is surely the fusion of cultural horizons. But this does not mean that the translation of different cultures necessarily seeks out a single true law, just as the integration of different languages does not create a single true language.[72] Both assimilationist theories, which aggregate translations in pursuit of the essence of

[70] Angelo Antonio Cervati, *A proposito dello studio del diritto costituzionale in una prospettiva storica e della comparazione tra ordinamenti giuridici*, 2 DIRITTO ROMANO ATTUALE 31 (1999).

[71] GIORGIO LOMBARDI, PREMESSE AL CORSO DI DIRITTO PUBBLICO COMPARATO 26 (1986).

[72] *Contra* Walter Benjamin, *Il compito del traduttore*, in ANGELUS NOVUS 47 (1962).

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

the language, and imperialist theories, which conceive of the relationship between original and translation in terms of master and servant,[73] regard translation as a minor or secondary activity serving other ends. A hermeneutic conception, by contrast, sees the translatability of one legal culture into another as implying the communicability of legal, symbolic and narrative horizons, as well as the specificity of differences rooted in such contextual variables as language, history, tradition, customs, foundation myths and stories.

A specifically comparative view of different academic disciplines cautions against a pursuit of a general theory of translation:

> the misfortune of every theory of translation is that it would have to begin with a comprehensible (and inflexible) notion of 'equality of meaning', while it often happens that, in many pages of semantics and philosophy of language, meaning is defined as that which remains unchanged (or equivalent) in the process of translation.[74]

Though faced with the impossibility of theorizing exhaustively about translation, it does remain the case that we have always translated and compared, and it is reasonable to suppose that our desire to do so will persist. And though it is hard to formalize *how* we ought to translate and compare, we can still specify *how not* to do so: we can reject those arithmetic conceptions of comparison, which start from a sum of foreign laws to produce the winning model; we can also set aside those dogmatic conceptions of comparison, which start with a general theory, examine the historical phenomenology and then file it away in reified abstractions. While the arithmetic or inductive approach runs the risk of projection, by transferring the cryptotypes of the observer's world onto the object of comparison, the dogmatic or deductive approach runs the risk of denial, by suppressing the historical anomalies that would unsettle the general theory.

The procedural conception of comparison suggests an analytical distinction between a translation of texts and a translation of formants. Regarding the translation of texts, "it is by now accepted that a translation is not just a passage between two languages, but between two cultures, or two encyclopedias. A translator must consider not only the strictly linguistic rules, but also cultural

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[73] *See* SUSAN BASSNETT, LA TRADUZIONE. TEORIE E PRATICA 15 (1999).

[74] UMBERTO ECO, DIRE QUASI LA STESSA COSA 26 (2003).

https://doi.org/10.1017/S207183220000002X Published online by Cambridge University Press

elements, in the widest sense of the term."[75] The translation of legal formants instead involves the circulation of legislative policies, jurisprudential tendencies, theoretical works, etc. Here, it is important to underscore that to compare is at the same time to observe the circulation of models and the persistence of cultural differences. From the strictly legal standpoint, comparative constitutional law is an inescapable feature of the emerging European constitutional theory. In fact, the passage from a state-based, national constitutional scholarship to a European constitutional culture can be conceived as a Kuhnian paradigm shift.[76] The transformation of the conceptual structure with which European legal scholars have constructed the basic categories of their discipline (statehood, sovereignty, nation, territory) has made it harder for the immobile scholars to file their discoveries away under the old categories of positivism. The progress of European integration and the reformulation of the basic concepts of the *ius publicum europeum* (supranationality, shared sovereignty, multiple citizenship, de-territorialization) have revealed the first steps in a genuine scientific revolution. As is the case with any paradigm shift, critical, philosophical and comparative arguments play a key role in defining the new areas of study for a scientific community that, by changing the object of its study, also changes the methodological tools with which it pursues its goals. Comparative constitutional law is thus a privileged point of view for observing the paradigm shift from a statist doctrine to an European constitutional culture. Especially when it is a question of interpreting the normative scope of common constitutional traditions, comparative private law scholars have been inclined to focus their attention on the circulation of models. Comparative public law scholars, by contrast, have insisted on the persistent cultural differences in the history of the European states. A procedural conception of comparison can seek out the overlapping consensus taking shape in the public legal sphere regarding the practice and the necessity of common constitutional translations.

Comparative law can be seen as a bridge connecting one legal reality with an alternative existing somewhere else. It thus forges a connection between two states of fact, whose normative significance can only be expressed through narration.[77] While storytelling unfolds by attributing normative force to a real or imaginary situation, narration requires codes to connect our normative systems with our social reality. The narrative capacity of comparison tends to link what is and what

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[75] *Id.* at 162.

[76] THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1996); Ulrich Haltern, *Internationales Verfassungsrecht?*, Archiv des öffentlichen Rechts 128, 513 (2003) (discussing a *"kopernikanische Wende"*).

[77] Robert Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

ought to be with what is or has been somewhere else (and thus could or could not be here). After Babel we live in a world of many constitutions. And yet the post-Babel condition points less to incoherence than to a multiplicity of internally coherent systems, and a need for their mutual intelligibility. Especially in a time of globalization, marked by a dizzying acceleration of institutional, legislative and jurisprudential changes, a comparative education is the best professional preparation for the European jurist. By training in comparative law, the legislators, bureaucrats, lawyers, judges and academics who will contribute to the legal discourse of the European constitutional community can develop a critical capacity indispensable for navigating the waves of a European law in transformation. European constitutional scholarship will be more of an indirect constitutional discourse disguised as a direct one. As participants in the new common European constitutional culture, we should seek to cultivate the civilizing function of translation and the value of linguistic hospitality.