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Giuseppe de Vergottini,
Oltre il dialogo fra le Corti,
Bologna: Il Mulino, 2010

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G.de Vergottini, **Oltre il dialogo fra le Corti**,
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Reviewed by

Giuseppe Martinico

This brilliant book, by one of the Honorary Presidents of the International Association of Constitutional Law, now Professor Emeritus at the University of Bologna, originates from the debate about comparative law and judicial dialogue at the 2009 Biannual Conference of the Italian Association of Comparative Law, held in Urbino. As de Vergottini points out in the first pages of the Introduction, this brief volume aims at verifying, with the methodological rigour of the comparative lawyer, the appropriateness of the abused formula "judicial dialogue" and, more in general, to examine the relationship between comparative law and judicial dialogue.

The goal of this short book review is, firstly, to illustrate briefly the structure of this book and, secondly, to focus on some recent attempts to "specify" the idea of judicial dialogue which might be read together with this essay. The book is divided into two parts, and contains seven chapters (plus the Introduction, the Premise and the Final Remarks). The first part is entitled "From the Common Cultural Space to the Presumed Dialogue among Judges" and here de Vergottini starts from the issue of convergence between legal orders and the impact of such a convergence process on the case law of the Constitutional Courts.

Judicial dialogue is a phenomenon well known in all the branches of the legal discipline and the literature devoted to it is indeed massive. At the same time, as the author stresses in the very first pages of the book, such a notion is very far from being understood in a homogenous way and some attempts at classification (such as, for instance, the distinction between direct and indirect dialogues) are very soon abandoned in this volume. This does not mean that, for de Vergottini, a real judicial dialogue could not exist (although from the very first pages the approach chosen is a sceptical one, p. 15), rather, the author (correctly in my opinion) conceives judicial dialogue as a relative notion, whose nature and dynamics depend on the context and on the connections (where existing) among the actors of such a process. The idea of relativity of the notion of dialogue leads de Vergottini to articulate an interesting distinction between "facultative and necessitated interaction" between courts, which is developed throughout the volume.

In the second chapter de Vergottini focuses on the "necessitated interaction", taking into account the relationship existing between national Courts and the European Court of Justice (and paying attention to the conflictual dialogue existing between them), that between the European Court of Human Rights and domestic judges and, finally, that between domestic judges and the Inter-American Court of Human Rights.
The facultative interaction is the subject of the third chapter. By facultative interaction, de Vergottini means the interplay between judicial actors characterized by a situation of symmetry (i.e., by a lack of a hierarchical order) or by a lack of expressed instruments of judicial cooperation (i.e., absence of a preliminary ruling mechanism, for instance).

Focusing on these interactions, the author distinguishes different degrees of attention to foreign case law and different reasons for the use of foreign case law. Examples are the insufficiency of the domestic constitutional text (for example, the judgment of the Swiss Federal Tribunal the on Scientology case, given on 30 June 1999, 121, I, 369), or the recent adoption or deep revision of a constitution (the South African case, for example). Other reasons might be found in belonging to the same linguistic-cultural area, or in the existence of a strong relationship with the former motherland after independence (the Canadian Supreme Court, R v. Van der Peet, 21 August 1996 [1996] 3 S.C.R., 507), or the influence of the constitutional pattern followed by the framers etc. (see Constitutional Court of South Africa, City of Cape Town v. Ad Outpost (Pty) Ltd, 2000 (2), BCLR 130 (C)). Each "reason" is analysed separately by de Vergottini, who moves, in the second part of this third chapter, to the case of the "refused dialogue", investigating the different causes of such a refusal, and giving some examples (for instance, the dissenting opinion of Justice Scalia in Lawrence v. Texas, given on 26 June 2003, 539 U.S. 558 (2003)).

The second part of the book is entitled: "Foreign Law and Comparison" and starts with a chapter on comparison and interpretation. De Vergottini again classifies some examples of this relationship: cases of courts refusing the refer to sources that are external to their own legal order – basically the example of the US Supreme Court, with the famous exceptions represented by Lawrence v. Texas and Roper v. Simmons, 543 U.S. 551 (2005). Another example is courts that know foreign law but do not use it: for instance, the *Conseil Constitutionnel* (at p. 128). Another case is judges that just mention (*ad abundantiam*) foreign law and, finally, courts that use comparative and foreign law in a proper manner.

The fifth chapter is characterized by reference to a method advocated by de Vergottini and the necessity to conceive only the expressed (and verifiable) comparison as real comparison. This way de Vergottini denies the possibility of talking about comparison in many cases that are traditionally conceived of as evidence of judicial dialogue (p. 144). Perhaps this view risks limiting the notion of dialogue to the explicit comparison of legal materials, but it represents an interesting methodological choice which might pave the way for other contributions in this field. The sixth chapter is devoted to the discretionary nature of the recall to the comparative method. In the seventh chapter de Vergottini specifies the relationship between fragmentation (a subject comprehensively studied by public international lawyers) and courts.

In the "Final Remarks", de Vergottini recalls how international fragmentation impacts on the possibilities of dialogue, that is why a distinction is made between dialogue with courts in an international regional ambit (ECHR and EU) and dialogue between domestic courts, pointing out how at the international level the dialogue presents itself (usually at least) as a myth with few exceptions (the well known Cases 7/56 and 3–5/57, Algera v. Common Assembly [1957] ECR 39). De Vergottini does not underestimate the role of the Advocate General, who uses the comparative method in many cases, but distinguishes between the judgments of the ECJ and Opinions of the Advocate General, while other scholarship considers these two elements as part of the same judicial continuum (see the literature cited by M. Lasser, "Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court", Jean Monnet Working Paper, 1/03, http://centers.law.nyu.edu/jeanmonnet/papers/03/030101.html).

This book deserves close attention for the methodological rigour of its argument and for the attempt to "circumscribe" the idea of dialogue, trying to avoid the generalized use of this notion. A similar attempt recently came from another constitutional lawyer, Aida Torres Pérez, in her volume Conflicts of Rights in the European Union. A Theory of Supranational Adjudication (Oxford University Press). Pérez conceives the purest forms of judicial dialogue as those implying differing viewpoints, symmetry (i.e., lack of complete authority over the other), mutual recognition and respect, equal opportunity to participate and continuity over time (pp. 118-130).

Another interesting contribution is that by Luc Tremblay, who proposes a nice distinction between dialogue as a conversation and dialogue as a deliberation. The former implies a conversation not aiming at reaching a specific purpose, this is the case of a casual meeting between friends talking

about trivialities, while the latter is aimed at a specific purpose and attempts to achieve a common agreement, at solving problems collectively (L. B. Tremblay, “The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures” (2005) 4 International Journal of Constitutional Law 617-648).

All these contributions definitively represent the beginning of a new season in the literature on judicial dialogue, born with the specific aim of contesting, in the first instance, the vague notion of judicial dialogue which is widespread, and thence of participating in the construction of a theory of international adjudication. In my view the book under review – the purchase of which I recommend – represents an important part of such a debate.