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Globalization has increased contact between peoples as never before. Migration flows are strong and more and more growing. This phenomenon has led to social conflicts.

A possible solution could come from the 'dialogue' among courts of different States. The dialogue among courts has developed by means the circulation of interpretations of constitutional law concerning fundamental rights. Such a dialogue can close the gap between different levels of protection of fundamental rights.

Western states share common constitutional principles. These principles converge in a 'constitutional common core' from which the courts can draw on to interpret the constitutional text in a reasonably uniform way.

The presence of the guest citizen can excite this dialogue. The guest citizen may ask the courts of the host State to adopt the most advanced solutions in interpreting fundamental rights.

The outcome of this dialogue is the 'cosmopolitan constitutional law': a new challenge to deal with problems of globalization.

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€ 12,90


Pavia University Press

Edizioni dell'Università degli Studi di Pavia

ISBN 978-88-96764-26-8



QUIRINO CAMERLENGO

Dialogue among Courts: Towards a Cosmopolitan Constitutional Law



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PaviaUniversityPress

Camerlengo, Quirino

Dialogue among courts : towards a cosmopolitan constitutional law / Quirino Camerlengo. - Pavia : Pavia University Press, 2012. - VIII, 75 p. ; 24 cm.

ISBN 9788896764268

1. Diritto costituzionale - Teorie

342.001 CDD-22 Diritto costituzionale e amministrativo.
Filosofia e teoria

© Quirino Camerlengo, 2012 – Pavia
ISBN: 978-88-96764-26-8

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The cover shows: *Approdi* by Ida Gallo, 2009.

Publisher: Pavia University Press – Edizioni dell’Università degli Studi di Pavia
Via Ferrata, 1 – 27100 Pavia
<<http://www.paviauniversitypress.it>>

Printed by: Print Service – Strada Nuova, 67 – 27100 Pavia

To my child Jules

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Preface

Through *dialogue among foreign courts*, which consists of comparing interpretations of constitutional law, elements taken from the jurisprudential experience of other states can be used in interpreting the safeguarding of constitutional rights.

Traditional constitutions are the outcome of original processes and they inevitably feature unique contents. Equally clearly, experience shows that constitutional texts are extensively circulated. As a result, textual differences in constitutions are not so outstanding as to prevent comparison among interpretations.

In particular, constitutional systems share an *essential constitutional core* deriving from their *common constitutional roots*, and include some fundamental principles: the safeguarding of fundamental rights and principles of the rule of law; equal protection of the laws; democracy; pluralism; separation of powers; and supremacy of the constitution.

The sharing of the common essential core is expressed through a dialogue among courts from different states.

The set of rules deriving from dialogue between national courts and taken, in the interpretative sense, from the common essential core can be defined as *Cosmopolitan constitutional law*.

Chapter 1

Globalization and Dialogue Among Courts: First Steps

1.1. Introduction

The dialogue among national judiciaries has often been discussed in recent studies of constitutional and comparative law.

The dialogue among foreign courts takes place when a judge refers in his sentence to decisions of judges acting in other Countries, and so reinforcing the reasoning behind his own decision.

This subject is of particular interest at the moment. In the age of globalization, the comparison among different interpretations of the law in relation to the safeguard of human rights can lead to a common approach between countries, thus reducing the risk of tension.

The international treaties on fundamental rights have not yet reached their goals.

The national parliaments have not always produced rules that are really able to improve the level of protection of fundamental rights. Through this dialogue, the courts can contribute to improving the standards of protection thus providing the conditions that ensure pacific and enduring relations *in* the Countries and *among* the Countries.

In any case, the dialogue among courts has a problem of *legitimacy*. Why should the courts dialogue among each other? Which rule should make the court recall the jurisprudence of other Countries in their decisions?

In this essay I shall try to find the source of legitimization of the dialogue.

So, I will try to show that:

1. a uniform level of protection for fundamental rights can be reached thanks to dialogue among national judiciaries;
2. the inter-court dialogue is the consequence of the presence of an essential constitutional common core, that is, an ensemble of common fundamental principles belonging to the constitutional systems of western countries;
3. the principles belonging to the constitutional common core can be identified by considering the expectations of rights protection on the part of specific actors within the state, in this case, foreign guest workers;
4. the rules born of this inter-court dialogue flow into a cosmopolitan constitutional law, according to the well-known Kantian theory of the *Weltbürgerrecht*, different from domestic, national law, and which cannot be assimilated into international law.

1.2. Globalization and social conflicts

Social conflicts have multiple causes. This essay sets out to examine the theory that conflicts derive from differences in the levels of safeguard of fundamental rights achieved in the states.

Migratory flows towards states with elevated standards of well-being are encouraged by the prospect of enjoying improved individual economic conditions and the expectation of benefiting from more liberal rules.

The continuing flow of immigrants generate tensions among states. As it is not possible to receive all who wish to enter the host country, measures have been adopted, at times very strict, that are sooner or later bound to damage international relations.

It can therefore be assumed that differences in the levels of safeguard of fundamental rights is one of the reasons for conflict *between states*.

The arrival of new immigrants can also foment conflict within states. Very soon, in fact, the scarcity of available resources, diffidence towards new immigrants and the differences based on citizenship create a wide gap as regards the safeguard of fundamental rights to be perceived. Hopes are dashed to a certain extent and the consequent frustration produces social rivalry. The host state is therefore forced to implement strict measures to combat this conflict, and the overall level of safeguard of fundamental rights decreases, also to the disadvantage of its own citizens.

It can therefore be assumed that differences in the levels of safeguard of fundamental rights is also one of the reasons for conflict *within states*.

As regards the level of safeguard of these rights, the perception of the gap is an inevitable consequence of globalization. The continuous and rapid exchange of information reduces the physical distance between communities and encourages comparison. This comparison makes people aware. Awareness removes the ‘veil of ignorance’ that prevents individuals from understanding the effective substance of their rights.¹

To reduce this conflict, the prospective achievement of a reasonable balance between states as regards the safeguard of fundamental rights can be imagined from the legal point of view. Full equality is unthinkable. The differences between states, both economically and socially, and as regards the level of criminality, are such as to make it impossible to assimilate perfectly the level of protection of these rights. However, these differences are not so marked as to prevent a reasonable approach towards prospective standardised levels of safeguard.

International law should have simplified the achievement of this objective. However, many states, also in the western world, are reluctant to accept the introduction of foreign factors.² In particular, the Universal Declaration of Human Rights of 1948 and the *Convention européenne pour la sauvegarde des droits de l’homme et des libertés fondamentales* of 1950 have been unable to fully express their formidable potential.

In this context, the lack of a permanent juridical organisation has contributed towards weakening the innovative drive of international law and, on the contrary, encour-

¹ See, e.g., Bauman (1998); Beck (1999).

² See, in particular, Higgins (1999); Held (2003, p. 162).

aged the adoption of discontinuous initiatives to the damage of the domestic jurisdiction of states.³

This essay sets out to illustrate a different solution, consisting of the benefits generated by *dialogue* among courts in different states.

Indeed, the dialogue is achieved through the use of comparative jurisprudence. In turn, this use «is part of a larger phenomenon: the globalization of the practice of modern constitutionalism» (Choudhry 1999, p. 822). Justice Sandra Day O'Connor is right when she says that globalization leaves no other choice (O'Connor 2002, p. 349). As the human activities have globalized, so «courts, like other national institutions, must adapt» (Amann 2004, p. 605).

1.3. The dialogue among courts: an introduction

Dialogue among courts consists of comparing the interpretations of law. Courts conduct this dialogue through mutual citation.

The interpretation of law gives courts a certain amount of room for manoeuvre as regards the meaning of the rule to apply to real cases. The lexical structure of the rule very often contains terms with an ambiguous meaning. In addition, the evolution of social and economic relationships can cause courts to give the rule a meaning that does not fully coincide with the original intent. The very identification of the original intent, however, can lead to different outcomes, depending on the 'sensitivity' of the interpreter.

This especially applies to constitutions.⁴ The main objective of modern constitutions is the safeguard of fundamental rights. Very often, constitutions regulate the relationships between authorities and fundamental rights with extremely generic rules. Written constitutions give the interpreter a wide range of possible options as regards the meaning to give to individual rules while keeping the limitations imposed by the original intent of their creators.⁵

Elements taken from the *jurisprudential experience of other states* can be used when interpreting a constitution.

Traditional constitutions are doubtless the outcome of original processes and, as such, they inevitably feature unique contents. Equally clearly, experience shows that constitutional texts are extensively circulated. As a result, textual differences among constitutions are not so outstanding as to prevent comparison.

In the context of fundamental rights, the factors determining change in the interpretation of a right differ in consistency from one state to another.

Moreover, some states may promote their more far-reaching interpretative evolutions as suitable for other states to imitate. All the above can add value to the activity of interpretation.

³ For a more detailed analysis of this problem, see Lauterpacht (1950); Falk (1981).

⁴ On constitutional interpretation, see, e.g., Post (1990); Tribe (1995); Beatty (2001); Manning (2001).

⁵ See on this Levy (1988); Jaffa (1993).

Consequently, comparison with the laws of other states can give courts innovative elements to use in the interpretation of domestic law, beginning with constitutional interpretation.

The circulation of interpretations can therefore lead to the hoped-for result: the progressive evolution of states towards a reasonable balance of the level of safeguard of fundamental rights.⁶

The subject of dialogue among courts from different states lies at the centre of lively scientific debate.⁷ It should first be pointed out that the logic of dialogue encounters a number of major obstacles.

First of all, it is not possible to imagine a relationship between courts based on authentic legal obligations. The use of comparison is certainly legitimate if it is permitted by an express rule, such as the one contained in the South African constitution of 1996: «When interpreting the Bill of Rights, a court, tribunal or forum [...] (c) may consider foreign law» (art. 39).

To be sure, dialogue is not hindered by difficulty in obtaining foreign jurisprudence, considering the ease of Internet access to various national case databases. Nevertheless, successful dialogue depends on the willingness of domestic courts to compare their interpretations with those of other states.

It follows that dialogue depends on the willingness of domestic courts to compare their interpretations with those made in other states.

As we shall see in the next section, the experience of the United States confirms the consistency of the resistance towards inter-court dialogue, consequently obstructing access to interpretive elements taken from the jurisprudence of other states.

Reluctance to drawing comparisons is widespread, as summed up by Justice Scalia who said:

we think such comparative analysis inappropriate to the task of interpreting a Constitution, though it was of course quite relevant to the task of writing one.⁸

The lively debate on the project of a Constitution Restoration Act (2004) is a further example of the difficulty in dialoguing with other domestic jurisdictions.⁹

Now, dialogue is not obstructed by the difficulty of obtaining foreign jurisprudence, considering the ease of Internet access to the various data banks.

Rather, a misunderstood perception of sovereignty prevents domestic courts from grasping the significant potential of comparison.

⁶ See further L'Heureux-Dubé (1998).

⁷ For similar views, Kalir (2001); Reimann (2002); Berman (2005a).

⁸ *Printz v. United States*, 521 U.S. 898 (1997).

⁹ Compare the views of Posner (2004) and Jackson (2004b).

1.4. The debate in U.S. literature

The lack of inter-court dialogue in the United States is, indeed, quite peculiar. In fact, the author of *Federalist No. 63* had advocated an «attention to the judgment of other nations».¹⁰

Not long ago, the Chief Justice William H. Rehnquist extra-judicially hoped that

now that constitutional law is solidly grounded in so many countries [...] it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process (Rehnquist 2002, p. VII f.).

He alluded to the era of human rights-based constitutionalism, when more courts pronounce decisions in the way of justiciable constitutional law.

The dialogue among courts has promoted a process of «constitutional cross-fertilization» (Slaughter 2003, p. 193). This process is not simply a passive reception of foreign decisions, but is an

active and on-going dialogue. They cite each other not as precedent, but as persuasive authority. They may also distinguish their views from the views of other courts that have considered similar problems. The result [...] is an emerging global jurisprudence (Slaughter 2003, p. 193).

The dialogue among courts is a development site of comparative constitutional law.¹¹ In fact, the dialogue presupposes a comparison between law solutions adopted in different contexts. Paraphrasing Ackerman, the aim of inter-court dialogue is

to identify (a) one or another *common problem* confronting different “constitutional courts”, and then follow up by specifying (b) different *copying strategies* these courts have adopted as they have tried to solve the problems (Ackerman 1997, p. 794).

The use of comparison can be confident that other states have often drawn inspiration from the U.S. Constitution. The dialogue is then compared to the relationship between fathers and sons. In 1995, Judge Guido Calabresi referred to the Italian and German constitutional experience in writing a concurring opinion dealing with an equal protection challenge to the disparity between the sentences required for crack and powder cocaine offenders.¹²

These foreign experiences were relevant to interpreting the U.S. Constitution because the constitutional systems there were «constitutional off-springs»: in fact, they «unmistakably drew their origin and inspiration from American constitutional theory and practice». Reciprocating was appropriate because «wise parents do not hesitate to learn from their children».

¹⁰ *The Federalist No. 63*, at 407-408 (Hamilton or Madison), 1st Modern Library Ed., New York, (1941).

¹¹ See Frankenberg (2006), about the layered narrative as the way to address the methodological and theoretical challenges of comparative constitutional law.

¹² *United States v. Then*, 56 F.3d 464, 468-9 (1995); Calabresi, concurring, quoted by Tushnet (1999, p. 1226).

This awareness should mitigate the skepticism about any direct implementation of solutions made in one national system to help resolve problems in another.¹³

It is possible to make the assertion that the comparative method is worth little if it consists of jerking something that seems useful out of one system in which it is embedded and inserting it into another. According to Mark Tushnet (Tushnet 1999, p. 1228),

we might begin by believing that certain arrangements are necessary, then have that belief displaced by comparative study into thinking them false necessities, only to learn, on deeper comparative study, that they were necessary all along. And if that is so, it is unclear what comparative study can do to inform the making of constitutional law.

Mark Tushnet suggests three ways in which comparing constitutional praxis elsewhere might contribute to interpreting the U.S. Constitution.

1. The *functionalism* can help identify the functions in a system of governance and shows how different constitutional rules serve the same function in different countries:

it might then be possible to consider whether the U.S. constitutional system could use a mechanism developed elsewhere to perform a specific function, to improve the way in which that function is performed here.

2. According to the *expressivism*, the national constitutions offer each person a way of understanding themselves as political beings:

it might seem that comparative study could do little with respect to constitutional provisions or doctrines understood in this constitutive sense, because each nation's constitution constitutes its people differently (Tushnet 1999, pp. 1228-1229).

3. Finally, contemporary references to foreign materials may be a form of *bricolage*. The idea of bricolage, in contrast to the other perspectives described above:

- is against adopting strategies of interpretation that impute a high degree of constructive rationality to a constitution's drafters;
- can remove our perception of the taken-for-granted concepts in the constitutional system with which we are most familiar, without suggesting that we can replace some elements of what we take for granted with elements suitable in other countries;
- emphasizes the historical contingency of all human action:

it may therefore help us think about the recent interest in comparative constitutional law in the Supreme Court and the legal academy (Tushnet 1999, p. 1229).

¹³ See, *inter alios*, Weiler – Trachtman (1996-1997, p. 355).

In short, Mark Tushnet has argued that constitutional praxis in other countries can inform the interpretation of the U.S. Constitution, «but only if one holds a theory of interpretation that licenses reliance on that experience, and that not all theories of interpretation provide such a license» (Tushnet 1999, p. 1307).

Therefore:

1. *functionalism* is an interpretive theory in which constitutional institutions pursue aims that can be regarded at «a medium level of generality». It can be useful provided that the interpreter has a theory about an institutional process that authorizes the same interpreter to generalize from one State's institutions to another's without requiring comprehensive comparisons;
2. *expressivism* is an interpretive theory in which the Constitution is an expression of a particular domestic character. It will be useful to the extent that the interpreter understands that the content of this character is subject to renegotiation and revision;
3. *bricolage* is a perspective in which the interpretive theory sees insistence that the Constitution is a highly rationalized text as only one and historically contingent view of the Constitution.

In studying this issue, Vicki C. Jackson also identified three models that might describe the relationship between domestic constitutions and law from other states (Jackson 2005):

- the *Convergence Model*: the domestic constitutions are the sites for the implementation of international law or for the development of transnational law;
- the *Resistance Model*, according to Justice Scalia in *Roper v. Simmons*: he proposed an approach that relishes resistance by national constitutions to outside influence;
- the *Engagement Model*: the constitution is a site of engagement with the transnational, informed but not controlled by considerations of others' domestic legal norms. In this third model, the constitution's interpreters do not use foreign material as binding:

transnational sources are seen as interlocutors, offering a way of testing the understanding of one's own traditions and possibilities by examining them in reflection of others (Jackson 2005, p. 114).

The path traced by the Engagement Model flows in a «common law» method of constitutional interpretation.¹⁴

The virtues of this model are well emphasized by Vicki Jackson. First, in the presence of more plausible interpretations of the constitution, approaches taken in other states may provide helpful information in deciding which interpretation will work best.

¹⁴ Strauss (1996). See also Alford (2005).

Moreover, the comparisons can shed light on the distinctive functioning of one's own system. In particular, foreign material may illuminate «supra-positive» dimensions of constitutional rights. In fact,

such rights, although embedded in particular national constitutions, have “universal” aspects, reflecting “the inescapable ubiquity of human beings as a central concern” for any legal system and widespread (though not universal) aspirations for law to constrain government treatment of individuals (Jackson 2005, p. 118).

If ethical engagements ensure transparent judgments, then «comparison today is inevitable» (Jackson 2005, p. 119).

Nevertheless, the practice of dialogue through the use of comparative material is hampered by one of the most frequent understandings of modern constitutionalism, that the domestic constitution reflects the nation's particular history and political traditions (Choudhry 1999, p. 826).

The reluctance to use foreign material is particularly strong. Often, the theories of constitutional interpretation are meant to be internal to suit their peculiar political and legal systems. For example, according to Ackerman,

to discover the Constitution, we must approach it without the assistance of guides imported from another time and place [...]. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern of constitutional thought and practice (Ackerman 1991, p. 2).

However, some American scholars are aware that the globalization of the practice of modern constitutionalism is a force with which constitutional theories must come to terms (Choudhry 1999, p. 828).

This reworking of the constitutional theories requires a redefinition of the role of courts. Although legislatures and executives have been viewed as the wielders of the coercive power of the state, the validating role of the judiciary has been reviewed through the great emphasis.¹⁵ Nevertheless, courts are also involved in the process of ‘public justification’ for their own decisions. It is a matter of the legitimacy of judicial review.

Therefore, the real and most serious problem is the legitimacy of the dialogue among courts. The reference to foreign law can be considered incompatible with the democratically ‘self-given’ character of the constitution.¹⁶

According to Vicki Jackson, the empirical or functional use of foreign interpretations does not pose a serious problem of legitimacy. In fact, when a judge finds foreign jurisprudence on a constitutional issue and refers to it, he tries to give the best reading to the domestic constitution.¹⁷

In the Engagement Model the development of standards of inquiry is required (Jackson 2005, pp. 124-126). Firstly, looking at the foreign experience and in the light of the

¹⁵ See Rawls (1993a).

¹⁶ See, for example, Rubinfeld (2004, p. 2006).

¹⁷ See Tushnet (1999, p. 1225).

specificity and the history of the constitution, must be considered the degree to which the issue is unsettled. Secondly, the value of transnational sources depends on a combination of reasoning, comparability of contexts and their origins. Thirdly, a legal argument requires a fair use of foreign material and respect for the context of a decision.

For his part, Sujit Choudhry proposed three different ways in constitutional adjudication, or rather three distinct normative justifications for the use of comparative law through inter-court dialogue (Choudhry 1999, p. 830 ff.):

- *Universalist Interpretation*: constitutional guarantees are cut from a universal cloth. Therefore, all constitutional courts are engaged in the identification and in the interpretation of the same set of norms. Those norms stem from «transcendent legal principles that are logically prior to positive rule of law and legal doctrines» (Choudhry 1999, p. 830);
- *Genealogical Interpretation*: in many cases, the constitutions are tied together by relationships of descent and history. Those relationships provide appropriate justification for the importing of foreign material: «genealogical relationships confer sufficient authority and validity on comparative sources to make them legally binding» (Choudhry 1999, p. 831);
- *Dialogical Interpretation*: the courts identify the normative and factual assumptions underlying their own jurisprudence by engaging with comparable decisions of foreign courts. Those assumptions are sufficiently similar to warrant the dialogue. This mode «is more a legal technique than a theory of legal interpretation» (Choudhry 1999, p. 831).

Regarding legitimacy, according to Choudhry the universalist interpretation emphasizes the position of transcendent common principles:

transcendence is the linchpin of universalist interpretation, because it justifies the use of comparative case law without regard to national boundaries (Choudhry 1999, p. 946).

Legal literature is sensitive to the dialogue. The U.S. Supreme Court has opened up some chinks. Maybe Amann is right when he remarks that

it is wrong to call the U.S. Supreme Court “isolationist”; the term speaks of some other Court, in some other, less globally aware, era. But it is also wrong to say that insular tendencies are dead, that, in part due to overseas junkets, today’s Justices will render unremittingly internationalist judgments (Amann 2004, p. 610).

Chapter 2

The Constitutional Common Core

2.1. Western constitutionalism and common constitutional roots

In order for dialogue among foreign courts to influence the protection of fundamental rights, it is first vital to agree on the fundamental standards promoting reciprocal understanding. It is also indispensable that those participating in the dialogue express their willingness to review their decisions if they recognize the merits and advantages of other interpretations.

It is true that there are considerable differences between states at the level of legal practice. This applies even to the concept of law itself, which differs enormously between common law and civil law systems. Another example is the force of interpretation entrusted to courts, which in the Anglo-Saxon system has a creative capacity that cannot be found in the states of continental Europe. Moreover, the role and force assigned to constitutional rules are not always the same across jurisdictions.

There is also a widely-held conviction that the promotion of dialogue among courts can undermine the balance based on the principle of the separation of powers, especially to the detriment of national parliaments.¹ This risk is particularly noticeable in states where there is judicial review of legislation. More generally, the culture of dialogue among courts is obstructed by a fear of unleashing the desire to ‘moralize’ law through the taking of different positions on the doctrine of natural law.

To find a reasonable balance in the levels of safeguard of fundamental rights, particularly among western states, dialogue among foreign courts can develop hand in hand with the awareness that the constitutional system is not the exclusive product of the tradition of a determinate people, but is based on, and continually nourished by, a shared heritage of fundamental principles.

David Beatty wrote:

the basic principles of constitutional law are essentially the same around the world, even though there is considerable variation in what guarantees constitutions contain and in the language that they employ (Beatty 1995, p. 10).

Indeed, simple comparison of national constitutions reveals shared rules, especially as regards main principles such as equal protection of the laws, the rule of law, and the separation of powers.

¹ See Alexander – Schauer (1997); Ides (1999); Tushnet (2003a).

Despite their undeniable historical, cultural, and social differences, western states have developed from shared roots. The centuries-old English legal/constitutional tradition and the first constitutions (the one in the United States and the one deriving from the French Revolution) laid the foundations upon which other states built their respective constitutional structures.

The sharing of common roots is inherent to the concept of western constitutionalism, it being a current of thought that has extolled the role of the constitution as a defensive bulwark of fundamental rights.² The assertion of constitutionalism has gradually brought states closer together, reducing the differences in legal traditions that were previously thought to be insurmountable. Constitutionalism has promoted reciprocal interaction among legal traditions, which has affected the very concept of law.

All in all, the mere presence of dialogue among foreign courts is a sign of widespread awareness of the central characteristics binding the various states at a constitutional level. The dialogue achieved with a reasonable use of comparison can encourage states to look for the most suitable solutions for safeguarding fundamental rights.³

Nevertheless, the identification of shared fundamental principles is harder than it looks.

First, it is not enough to superimpose constitutions to identify shared or widespread principles. As a matter of fact, constitutional texts change over time, often due to the choice of transient political majorities.

Moreover, a mere comparison of constitutional texts would exclude the United Kingdom, for example, which lacks a formal constitution, yet has long exemplified a commitment to safeguarding fundamental rights: the comparison of texts alone is insufficient as it ignores the fact that

the true reason why England, probably the most constitutional of modern European nations, has also remained the only one whose constitution has never been embodied in a formal document, is not that she has had no constitution, as the French sometimes say, but rather that limitations on arbitrary rule have become so firmly fixed in the national tradition that no threats against them have seemed serious enough to warrant the adoption of a formal code (McIlwain 1947, p. 30).

More generally, then, two obstacles make it difficult to reconstruct the heritage of fundamental constitutional principles common to many states:

- a. the constitutions of states tend to change over time, though marginally and very slowly, which throws into question the stability of the common heritage as a factor of cohesion among states;
- b. the constitutions of states tend to be self-referring. More precisely, constitutions are normally the product of exercises of national sovereignty and so are perceived by states in the best possible light as unique. As states are unable to recognize the shortcomings of their own constitutions, they are

² See generally Wormuth (1949); Rosenbaum (1988); Franklin – Baun (1995).

³ According to Legrand (2003, p. 240).

limited in their ability to recognize the need to increase levels of safeguard for fundamental rights.

To address these obstacles:

- a. it should be assumed that every constitution is born and develops from a stable and intangible *essential core*. This essential core contains the fundamental constitutional principles of the state. By eliminating these principles, the state would cease to exist;
- b. to identify the fundamental principles of the common heritage, a *foreign element* must be injected into the constitutional systems in order to verify whether these principles are able to guarantee an adequate level of safeguard for fundamental rights. This foreign element makes it possible to make the comparisons required to identify the limits and shortcomings of constitutional systems.

2.2. The essential constitutional core

For the purposes of our investigation, it is preferable to use the concept of ‘*constitutional system*’, rather than that of ‘constitutional law’.⁴ Not only because it allows you to play down the gap between states with the written constitution and states that do not have a written constitution.

The system can be considered as the organic combination of heterogeneous elements, whose cohesion is intended to interactive achievement of certain aims.⁵

The use of the concept of legal system allows to communicate in view of the reconstruction of the constitutional common core.⁶

The idea of the system is inherent to each model of knowledge that enhances the scientific method (Bobbio 1977, p. 201): simplify, science is nothing but a complex of knowledge, acquired through the observation of a certain object or on a particular sector, integrated into a structured, rational, balanced and, therefore, systematically.

A system is developed from a few basic elements. These elements define the *essence* of a system. Everything else is important. Everything else defines the identity of a system. Everything else expresses the complexity of a system. But only the basic elements define the essence of the system.⁷

If the comparison was made between systems, the many differences would make the unsuccessful search. The details of each system would be opposed to the identifica-

⁴ Leclercq (1987, p. 29): the system points out «les éléments essentiels du droit constitutionnel, en l’espèce, qui en font un ensemble ordonné, ce qui permet d’en saisir et d’en apprécier la cohésion».

⁵ See von Bertalanffy (1968); Klir (1969).

⁶ Rapoport (1972, p. 453): the system is «something consisting of a set (finite or infinite) of entities among which a set of relations is specified, so that deductions are possible from some relations to others or from the relations among the entities to the behavior or the history of the system».

⁷ See Walch (1733). See also Laszlo (1972).

tion of common traits. If the comparison, however, touches the essence of the systems, then it is easier to achieve a useful result.

Therefore, the comparison between systems is a comparison of the key elements that determine the essence of every system.

The basic elements are the *core* of the system.

The idea of an essential constitutional core was developed in some states governed by a *rigid* constitution.

In common language, the ‘core’ of something is its central part which is more consistent with respect to the other components. Each complex entity develops starting from a limited set of constitutive factors which define its main features, essentially as regards identity (structural dimension) and its concrete capacity of affecting existing entities (functional dimension).

According to this notion, the essential core incorporates *fundamental constitutional principles* that cannot be modified or suppressed, not even with a special constitutional change procedure. The fundamental principles of the constitution guarantee the stability of the state, and their elimination would cause a radical transformation of the state itself.⁸

The theory of the constitutional core took root above all in Germany and Austria where the concept of *Verfassungskern* (constitutional core) embodies the following principles: *menschenwürde* (human dignity), *demokratieprinzip* (democracy), *rechtstaatprinzip* (rule of law), *bundesstaatprinzip* (federalism), and *sozialstaatprinzip* (welfare state).⁹

In Italy, constitutional experts have identified a constitutional core (*nucleo forte* or *nocciolo duro*) by including the following fundamental principles: popular sovereignty, democracy, equal protection of the laws, the separation of powers, rule of law, pluralism, republican government, and the principle of the ‘laicità’ (secularism of the state).¹⁰ These principles are not the result of arbitrary interpretation. They are the basic principles identified through a consideration of their position in the constitution and in constitutional jurisprudence, without forgetting the historical, cultural, and political traditions of the country itself.

The principles of the constitutional core ensure the stability and the permanence of the state, which transcends changes in the legislative majority (Stern 1971, p. 405).

This theory is not incompatible with the possibility of a ‘total’ review of the constitution, as envisaged in Spain, Austria and Switzerland.

In particular, the Spanish constitution denies the existence of a ‘núcleo indisponible’. The existence of a ‘total’ constitutional change procedure is seen as a kind of «compensación para evitar la existencia de cláusulas de intangibilidad» (Molas 2003, p. 220). The above is stated with the awareness that the establishment of an essential core would not be able to guarantee the stability and continuity of the system, as these principles can only be avoided according to methods that cannot be identified in advance.¹¹

⁸ See, in particular, Ehmke (1953, p. 89); Merkl (1968, p. 77).

⁹ See further Pernthaler (1998); Ehmke (1953, p. 89); Öhlinger (2005, p. 273).

¹⁰ See Onida (2004).

¹¹ See Segado (1992, p. 87).

However, essential core and total constitutional change are not incompatible. States that allow total constitutional change hold that this is always the expression of a ‘pouvoir constitué’ that would not be able to cause the disappearance of the pre-existing state.

In Spain, some hold that

si se reforman los principios esenciales sobre lo que descansa nuestra Norma Fundamental, en realidad no estaríamos en presencia de una auténtica reforma constitucional, sino entre la sustitución de una Constitución por otra.¹²

There are, in fact, «principios básicos que no podrán ser reformados, incluso en el supuesto de que la Constitución no lo diga expresamente» (De Otto y Pardo 1977, p. 55).

Therefore, only the destruction of the essential core could cause the ‘pouvoir constituant’ to reappear.

In addition, the theory of the essential core is not incompatible with the flexibility of some constitutions. As a matter of fact, the essential core sets out to guarantee the stability and balance of a state, regardless of the rigidity or flexibility of its constitution.

The British system provides an important example highlighting this aspect.

Indeed, the British Constitution is described as ‘flexible’ because any principle or rule of the constitution «can be altered by the same body and in the same manner as any other law» (Hood Phillips – Jackson 2001, p. 21). The fact that this constitution «represents the height of flexibility» (Barnett 1995, p. 9) derives from the principle of the «legislative supremacy of Parliament» and therefore «the courts [...] have no power to “review” parliamentary legislation and to declare it unconstitutional» (Hood Phillips – Jackson 2001, p. 22).

The ability of the British constitutional system to be changed «easily and quickly» (Carroll 1998, p. 19) does not expose the fundamental principles of that system to continuous violation. In its role as the supreme law making body, Parliament resists the urge to arbitrarily draw up constitutional principles. The sovereignty of Parliament is also limited by extra-legal constraints deriving from the centuries-old legal tradition of that country. Indeed, «the status of constitution is [...] primarily a matter of political and cultural attitudes» (Alder 1998, p. 44).

The balanced combination of political factors and cultural elements, intimately connected with the sensitivity of the institutional players, promotes parliamentary self-restraint. Consequently, even when the constitution «shows signs of stress» (Turpin 1999, p. 5) change can place without altering the fundamental pillars of that system which include, in addition to the supremacy of Parliament: the separation of powers, the rule of law, democracy, and the integrity of fundamental rights.¹³ In fact, the familiar British distinction between a ‘dignified part’ and an ‘efficient part’ of the constitution seems to suggest the very existence of an essential core.¹⁴

Nevertheless, the concept of an essential constitutional core is unfamiliar to many countries. Even in Europe where the idea took root, it has not gained acceptance in all

¹² De Vega García (1985); Conde (1992, p. 158).

¹³ See Harvey – Bather (1964, p. 6).

¹⁴ According to Bagehot (1867, p. 65).

countries. Think of France, for example, where the *Conseil constitutionnel* has excluded the existence of principles not indicated in the text of that country's constitution.¹⁵

In any case, the theory of the essential constitutional core identifies limits to possible modifications of a constitution. The fear that the fundamental principles of a constitution might be undermined by constitutional modification is typical of countries in which the constitutional systems are not completely established. This is the case in some countries (such as Italy, Germany, Spain, and Portugal) which, preceded by dictatorship, built constitutional systems that are still today fragile and unsettled. These countries worry that constitutional reforms will turn into a radical transformation of the state even if the procedure for changing the constitution is provided by law.

In countries with more mature constitutional systems there is much concern that constitutional modification will result in a threat to the survival of the state. Constitutional change is accepted as a matter of course, and judicial interpretation, even if daring, is a common feature of constitutional practice. Briefly, such countries do not feel the need to identify an essential constitutional core as the limit of possible constitutional change; procedural rules are sufficient to protect the stability of the constitutional system (Lutz 1994).

Nevertheless, there is no doubt that these countries have constitutional principles that can be defined as fundamental, and these principles are the roots on which the state grows its own constitutional system. Every state adapts these principles to its social and political conditions. In turn, every principle is specified in different ways and as a result there are many different forms of government, systems of trial, and differences in conceptions of judicial review of legislation. Indeed, but for these differences western states are constrained by a lowest common denominator. This lowest common denominator is precisely the theorized essential constitutional core.

From this point of view, there are also 'salient' (De Grazia 1957, p. 85), 'basic' (Ogg – Orman Ray 1952, p. 35), 'chief' (Munro 1946, p. 821), or 'fundamental' (Willoughby 1938, p. 12) constitutional principles in the United States of America: the rule of law, popular sovereignty, the separation of powers, judicial review of legislation, pluralism, and equal protection of the laws. These principles reflect the fundamental aims of the constitutional system.¹⁶ Indeed, the preamble of the U.S. Constitution «indicates the general purposes for which the people ordained and established the Constitution»¹⁷ and these principles form the core of the constitutional system designed to achieve these purposes (Beard 1936).

It is not necessary that these principles be written into the constitution: implied principles also exist as part of the constitutional core that are no less stable for not appearing in the text itself.¹⁸

¹⁵ 29 March 2003, Dec. 2003-469 DC.

¹⁶ See Sullivan – Gunther (2004).

¹⁷ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

¹⁸ Goldsworthy (2008, p. 277). James Madison, in *The Federalist Papers No. 49*, noted that veneration of the Constitution makes it difficult to change, making it a stable basis for government. The Federalists «believed that the Constitution should be permanent and unchanging over the decades if not centuries to come, given that it contained the lasting principles by which government should be conducted». See Griffin (1996, p. 31).

The same reflections can be found in Canadian jurisprudence. The Supreme Court of Canada, in *Reference re Secession of Quebec*, states that

the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities.¹⁹

Formal constitutional change cannot alter the document's embracing of these principles, even if the term essential constitutional core is not part of Canada's constitutional lexicon. Constitutions embody «deeper imperatives that continue to shape their struggle for power and legitimacy» (Ackerman 1998, p. 384). These 'deeper imperatives', such as the separation of powers or judicial review of legislation, are principles that have not been invented *ex novo* by a state, but rather are the common heritage of western countries linked to the English tradition.

Even if Gladstone called the American Constitution «the most wonderful work ever struck off at a given time by the brain and purpose of man»²⁰ it actually has its origins in the British experience:

the American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past and that the more slowly every institution has grown, so much more enduring it is likely to prove. There is little in the Constitution that is absolutely new. There is much that is as old as the Magna Carta (Bryce 1910, p. 28).

Comparison of the constitutional systems belonging to the same western family shows the existence of common constitutional principles. But how does one identify the characteristics of this essential core?

In common language, the 'core' of something is its central, constant part. Any complex entity develops from a limited set of constitutive factors, which define its essential features regarding identity (*structural* dimension) and concrete capacity to affect other aspects of the entity (*functional* dimension).

When identifying the characteristics of the essential core, it should be considered that the constitutional system:

- is formed starting from a small number of constitutive elements expressing its embryonic condition (*birth*);
- it is a compact body of elements with specific characteristics derived from its genetic matrix (*identity*);

¹⁹ [1998] 2 S.C.R. 217.

²⁰ See Tresolini (1959, p. 5).

- it survives thanks to the indissoluble cohesion and stability of its constitutive elements which assure a permanently balanced structure (*existence*);
- it evolves by following the development trajectories traced by its original elements (*development*).

Therefore, the essential core is:

- a. *necessary*: the constitution is derived from the core. The other elements aggregate around the core to form the system;
- b. *substantial*: the essential core gives the system its specific identity as a complex of peculiar characteristics which define its original physiognomy. The essential core incorporates the ‘genetic code’ of the system;
- c. *indivisible*: the elements incorporated in the core cannot be separated. Though they can also combine with other elements, thus giving life to different constitutional systems, they lose their functional dimension if they are separated from each other. In the core, an indissoluble bond is established between these elements, so much so that the absence of this bond would cause the entire core to collapse, or transform into a different core located at the centre of a different (as regards identity) constitutional system. The core therefore assures the long-term stability of the constitutional system. The core is balanced and spreads this balance to the entire system. The continual and constant interaction between its elements is irradiated into the system, balancing and controlling the tensions (endogenous and exogenous), thereby generating oscillations;
- d. *dynamic*: the core guarantees and guides the evolution of the constitutional system. The essential core does not hinder the fluidity of the constitutional system but influences the responses given to the requirements for change, exercising a gravitational force which attracts the innovative elements and prevents centrifugal reactions.

2.3. In search of the fundamental principles incorporated in the common essential core

According to the theory identified here, every western constitutional system has an essential core incorporating its fundamental principles. It is the interaction of these principles, in turn, that satisfies the characteristics of the essential core: thanks to this interaction, these principles really are fundamental.

At this point, the common constitutional heritage of western states must be reconstructed by interrogating the essential ‘cause’ of the various constitutional systems. In other words, the principles incorporated into the common essential constitutional core must be selected. The essential core gives stability to the state. Stability, of course, is required before a constitutional ‘heritage’ common to several states can be conceived.

The heritage of principles can only exist if it is stable and relatively intangible. In these terms, we will be able to talk of a *common essential core* from this point forward.

First, the constitutional systems forming part of the core must be identified. This is not a difficult task. For obvious reasons, the common essential core will be identified from the family of western states. In fact, these states feature primary common constitutive elements and share the same cultural roots. A word of warning, however. Significant differences between common law and civil law systems must certainly not be ignored. Equally important are differences in the degree of maturation and development of the various systems. However, if one makes do with an inevitable amount of approximation, the family of western states features elements of cohesion that are sufficient for the purposes of this survey.

The statistical method could be used to identify common principles. However, this method presents insurmountable limitations. How ‘frequent’ must a principle be in the constitutions of western states before it can be recognised as a common principle? In at least 50% of cases? Or is a greater frequency required? And if so, how much? Excluding unanimity, as the absence of just one state would be sufficient to bar recognition, a percentage between 51% and 99% would have to be found. Any percentage would be arbitrary, however. A different method must therefore be used.

Though one might make do – in statistical terms – with a high frequency of a given principle, analytical significance can be added to the survey of western constitutional systems and principles by returning to the role played by a constitutional system’s ‘foreign element’ (introduced at the end of Part III) in making comparison across constitutional systems possible.

The primary aim of a constitutional system is the protection of fundamental rights. In keeping with the idea that this is the ultimate purpose of a constitutional system, the search for the fundamental principles of the constitutional common core can begin with the consideration of the holders of those rights.

A constitutional system is not ideal if an appreciable level of protection for fundamental rights has not yet been realized. Indeed, a constitutional system is inefficient if it does not draw upon the arrangement of the fundamental principles belonging to the constitutional essential core.

To test the realization of this condition, it is not correct to use the internal standards of a country. In this context, a state is *introvert* if it does not accept comparison with other states for the purpose of assessing its level of rights-protecting juridical culture. An introvert state measures its degree of maturation by exclusive use of reference parameters taken from its own history, from its own culture and from the economic and social conditions of its own people.

The ‘introverted’ nature of the United States, despite enjoying the reputation of providing a broad scope for the protection of fundamental rights, sometimes makes it difficult for the comparison among the standards of safeguard reached by other countries, as shown by the existence, for example, of capital punishment in many American states.

Dialogue is the antidote to this introverted nature:

the uses of external norms may mark a radical and deliberate departure from parochial practice [...] or they may signal little more than a serendipity not soon to be repented (Amann 2004, pp. 597-598).

This insular way of operating is deceptive, however, as is every assessment that refuses comparison with external criteria. In particular, this method underestimates the impact deriving from the inclusion of issues, situations, and critical elements experienced in other constitutional systems. To provide an external standard, a citizen from another state might provide the external means for comparing systems.

The means of accessing such a foreign element derives not only from the typical features of globalization, such as the constant flow of cross-border information. The admission of this element is also due to the entrance of citizens from other states, in other words, individuals with expectations regarding minimum threshold standards regarding the protection of their fundamental rights.

The presence of *guest citizens* cannot be ignored when assessing the level of the rights-protecting juridical culture of a state. The prospects for the maturation of a constitutional system, revealed by the expectations of foreign guest workers and the facts regarding the protection of their fundamental rights, must necessarily be taken into consideration when assessing the reasonable balance between states as regards the level of safeguard of fundamental rights.

Therefore, the principles of the essential core and, in turn, the common essential constitutional core cannot be selected without considering guest workers. A state becomes less introverted if it accepts comparison with other states through the expectations of guest citizens that their fundamental rights will be safeguarded.

Guest citizens abandon their countries of origin in the hope of improving their starting conditions of life. Therefore, they expect to be accepted by a state which is based on constitutional principles that safeguard their fundamental rights (often) more suitably than their country of origin. The number of potentially attractive host states is sufficiently large if these constitutional principles are widespread, and if their application is sufficiently uniform. A state becomes attractive if, similarly to other states, it recognizes and applies these principles. The larger the number of host states, the greater and more widespread the migratory flows of guest workers will be. Consequently, states will be more willing to accept new individuals, and, therefore, the level of conflict will decrease.

It is true that international networks of legal practitioners or labor activists are a precious source of transmission of knowledge of alternative interpretations of common constitutional terminology protecting fundamental rights. However, the impact of such networks on constitutional practice is different when a foreign guest worker starts legal proceedings in the host country. Legal organizations propagandize to prod transformations in legislation and jurisprudence (*law-in-progress*). The foreign guest worker, on the other hand, starts legal proceedings in which the law is interpreted and applied in concrete cases (*law-in-action*). These two means of transmission are complementary, but

the second is the more efficient way to realize change in a constitutional system because the actions of foreign guest workers create the conditions for inter-court dialogue (Rosenfeld 2001).

There are many kinds of legal challenges that foreign guest workers face in gaining protection for fundamental rights in a foreign jurisdiction and it is not possible to consider each in this article. Of course, the main challenge for foreign guest workers initiating court action to secure rights protection is to obtain recognition of fundamental rights when the relevant written constitution refers to citizens only. In such a case, the use of the principle of equal protection of the laws could cause the extension of fundamental-rights protection (other than the political rights of citizenship) to foreign guest workers.²¹

It is not difficult to imagine examples of the critical constitutional concerns of non-citizens more broadly: respect for the rule of law (especially the rules of evidence, the observance of *habeas corpus*; immigration and rights of asylum), and access to welfare state services (health, school, public assistance, work, and family).²² Just think of the decisions of the United States Supreme Court in the context of Guantanamo Bay, in which the fundamental right of *habeas corpus* (above all the suspension clause) was recognized as applying to foreign prisoners, even if enemy combatants.²³

After obtaining recognition as a subject having access to a state's constitutional mechanisms of fundamental rights protection, the foreign guest worker could plan his judicial defense with reference to interpretations of common constitutional principles such as personal freedom, and the freedoms of religion, association, assembly, and thought, that originate in the jurisprudence of her own (rather than the host) country. Indeed, the trial of a foreign guest worker provides the occasion to develop the potential for fundamental-rights protection coming from the arrangement of principles belonging to the common constitutional core.

In this way, inter-court dialogue can achieve a healthy evolution of mechanisms for rights protection, regardless of the citizenship of the parties. In fact, the benefits of this inter-court dialogue belong to citizens as well, not just to foreign guest workers. For this reason, some decisions will be referred to not for their relation to cases involving foreign guest workers, but as revealing the attitude of some courts to accept inter-court dialogue.

In considering the position of guest citizens when selecting the principles of the common essential core, the result will be the identification of the principles belonging to the constitutional common core:

- a. to make tendentiously and reasonably uniform the standards of defence concerning the protection of fundamental rights;
- b. by placing stress on the *individual* owner of these rights;

²¹ See, for example, *Conseil constitutionnel*, 20 November 2003, 2003-484 DC.

²² See Jacobson (1996).

²³ *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 542 U.S. 507 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). See Vladeck (2009).

- c. as a consequence of the *comparison* between the constitutional cores of different countries.

Moreover:

1. the various principles in the essential core and, consequently, in the common essential core cannot be incompatible. Principles are incompatible when their cohesion causes the essential core to become unstable (a criterion of ‘internal harmony’ is applied to the essential core);
2. if there are several principles, of which one is suitable for safeguarding fundamental rights and the other not, then the former excludes the latter (a criterion of ‘suitability’ is applied);
3. if there are several principles, all indifferently suitable for safeguarding fundamental rights, none of the principles can be preferred to the others and, therefore, all of them are excluded from the common essential core (the criterion of ‘indifference’ is applied). Internal harmony, suitability and indifference will be appreciated in the light of foreign guest workers’ expectations regarding the safeguarding of fundamental rights.

The arrangement of the principles belonging to the constitutional common core must satisfy the requirements of the essential core mentioned above: necessity, substantialness; indivisibility; dynamism.

The individuation of these principles will be accomplished by analyzing the constitutional systems from a legislative and judicial point of view. Every state expresses its fundamental principles both in its constitution and in the decisions pronounced by its supreme or constitutional courts.

2.4. Identification of the fundamental principles incorporated in the common essential core

The identification of the fundamental principles in the common essential core began with article 16 of the *Déclaration des Droits de l’Homme et du Citoyen* of 1789, considered by many to be the epitome of constitutionalism:

toute société dans laquelle la garantie des droits n’est pas assurée, ni la séparation des pouvoirs déterminée, n’a point de constitution.

In fact, the safeguard of rights and the separation of powers are considered «the two core elements of constitutionalism».²⁴

²⁴ Lane (1996, p. 244). See also Häberle (1988). According by Chapus (1989, p. 199), the art. 16 states out «les conditions de l’existence d’une constitution». See also Luchaire (1981, p. 278); Arnold (1989, p. 199).

The search for the common essential core can be embarked on by starting from article 16, which indeed provides a useful synthesis of the very ideal of a ‘constitution’: the constitution as the protection of fundamental rights against the state.

The *Déclaration* of 1789 laid the foundation for the shift to the notion of a ‘constitution’. In spite of Jeremy Bentham’s harsh criticisms of those who believed the French wanted to impose their model of the constitution on the world (Bentham 1843, p. 520), it cannot be denied that by the time of the *Déclaration*, similar notions had already arisen in other systems, such as the United Kingdom, and had spread to many countries.²⁵

Nevertheless, confirmation of the high symbolic value of article 16 for western constitutionalism can be found in the words of Benjamin Constant:

tout ce qui ne tient pas aux limites et aux attributions respectives des pouvoirs, aux droits politiques, et aux droits individuels, ne fait pas partie de la constitution (Constant 1836, p. 137).

The thought of Hauriou is not so different:

les nations, effrayées de l’exagération de l’État et des dangers que ses erreurs et ses incartades font courir à la liberté, s’efforcent de réagir pour restaurer, dans les cadres mêmes de l’État, un ordre de choses essentiel, à base de croyances morales, auquel, pratiquement, le gouvernement quotidien ne puisse pas déroger (Hauriou 1923, p. 39).

The 1789 *Déclaration* can therefore be used as a starting point for the reconstruction of the essential core common to western states. Besides, it is not an invention of the French revolution. As demonstrated by the debate which preceded its drawing up, art. 16 derives from British constitutionalism.

Comparing the constitutional systems of western states and using the above-mentioned selection criteria, it can be demonstrated that the common essential core includes the following fundamental principles:

- safeguard of fundamental rights and the rule of law;
- equal protection of the laws;
- separation of powers;
- democracy;
- pluralism;
- supremacy of the constitution.

The *safeguard of fundamental rights* is the typical aim of constitutions. In its ontological meaning, the constitution is effective only if it safeguards basic rights towards power. The constitutions fix the order of the relations between power and freedom, between public and private, between authorities and people. In other words, without safe-

²⁵ See Duguit (1899).

guarding fundamental rights the constitution does not make sense. The advent of constitutionalism subjected political power to rights.²⁶

In turn, the safeguard of fundamental rights trusts in the *rule of law* institutions (Raz 1977). The principles of the rule of law existed before the idea of constitution, hereby defending basic rights. Indeed, they are protected by the certainty of law, of the independence of judges and by a due process of law.

Without *equal protection of the laws* it's not possible to imagine a fair and strong safeguard of fundamental rights (Westen 1982). Everybody is equal before the law. The law should treat equal cases equally just as the law should treat different cases differently. Every unjustified discrimination is a menace to fundamental rights. Every unjustified inequality puts the mission of the constitution in jeopardy. Acknowledging that all individuals have basic rights presupposes a just distribution of constitutional rights. Without equality there would be a privilege and the constitution is opposed to all privilege.

The individual accepts the limitations of their rights to the extent that these constraints prove equally imposed on all associates (Leibholz 1925, p. 22 ff.).

The *separation of powers* is the solution best suited to the protection of fundamental rights.²⁷ The concentration of power to a single body would make it omnipotent insofar as it would elude all forms of control. The absence of checks and balances would make it the only power to be absolute arbitrator for the destiny of basic rights. It could ordain at its own sweet will the fate of basic rights. It could even have doubts about the very existence of basic rights.²⁸

The separation of powers is not only important horizontally, i.e. in the relationships between the state bodies (legislative, executive and judicial), but also in the vertical relationships between the central state and other political bodies: member states, *Länder*, *regioni*, *comunidad autonomas*. The federal principle contributes to protect basic rights in a better way because it divides power between the central state and the bodies that are closer to the local communities (Friedrich 1968).

Democracy is the principle best able to guarantee the fundamental rights in a State governed by the rule of law and by the separation of power (Ross 1950). In a constitutional system orientated towards freedom, the safeguard of rights presupposes that their limitations are decided in ways that there is a virtual identification between the holders of power and those who are the object of the rules. The formula of 'the people's government' satisfies this condition according to the principle of political representation (Hermens 1958).

The history of contemporary law testifies to the gradual rise of democracy as the institutional formula able to sanction a solution of continuity from previous absolutist structure of ownership and exercise of public power.

Lest it be emptied of meaning, political representation requires the adoption of electoral systems for the selection of rulers: systems informed by the principles of

²⁶ See García de Enterría (1981, p. 41 ff.); Craig (2001).

²⁷ Hofmann (1986, p. 261 ff.); Cadart (1990, p. 187); Böckenförde (1991, p. 29 ff.).

²⁸ Gwyn (1965); Vile (1967); Troper (1980); Ackerman (2000).

equality and political pluralism. Systems, however, where the mandatory ban is an essential element of representative democracy.²⁹

Resulted in the democratic formula, the principle of equality inevitably leads to universal suffrage, free and, in fact equal, because the selection of representatives.

Pluralism aids democracy.³⁰ There can be no democracy without pluralism. In fact, pluralism means the recognition of the many social and political realities of the State. Pluralism means a variety of beliefs, ideal and guidelines, all equally protected by the State.

The political integration through the participation of social groups in decision making. Access to these processes must first be determined in order to guarantee a real openness to all who aspire to join forces in the circuit of representative democracy. The transparency of deliberative processes thus becomes an essential factor warranty.

In this way the circle closes. In view of the protection of fundamental rights, representative democracy based on universal and equal suffrage, is powered by pluralism, which promotes community participation in decision making.

This access is congenial to the representation of interests which, although expressed in the host society, are related to protection of fundamental rights. The connection between the guarantee of rights, separation of powers, equality and democracy ensures the intrinsic harmony and stability of the constitutional common core.³¹

Finally, the *supremacy of the constitution* is the basic condition that they be guaranteed fundamental rights.³² These rights can, indeed, be put in jeopardy even through the laws approved by Parliament. The majority could carry out its legislative function to harm the minority to the extent that it avoids a rotation of power (the swing of the pendulum). And if the minority is wiped out or greatly scaled down, the majority can fortify its own power. But this is inconsistent with democracy. Accordingly, the constitution acts against these laws by means of the *judicial review of legislation*. Chief Justice Marshall had guessed right when he said that

The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.³³

²⁹ A circumstance already perceived by Jefferson, Hamilton and Adams, as recalled by Dumbauld (1964, p. 21 ff.), including the representative democracy of «the essentials constituting free government».

³⁰ Häberle (1980); Dahl (1982).

³¹ See Habermas (1992); Nino (1996); Gearty (2002).

³² Bobbitt (1980); Haltern (1998); Vanberg (1998); Böckenförde (1999); Troper (2003); Adler – Dorf (2003); Tremblay (2005, pp. 617-648).

³³ 5 U.S. (1 Cr.) 137 (1803): «If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration». See also *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

However, already in the Federalist, states that no law contrary to the Constitution can be valid, on the assumption that the governed to the governors delegate the exercise of legislative power for the protection of rights.³⁴ Since then, it is believed that the model of judicial review is not only an expression of power given to judges, but also an obligation imposed on them.³⁵

We can therefore say that only with the emergence of judicial review of legislation it is possible to speak of «constitutional state». With the emergence of the constitutional state is less than the gap between North American and European constitutionalism born with the French Revolution, which emphasized the centrality of parliament. The Constitution is finally seen as an act containing actual legal rules.

The constitution really can protect basic rights only if it acts as the supreme source of law – only if the laws against it can be invalidated.

a) Compatibility of fundamental principles in common essential core

The fundamental principles that together comprise the common essential core must be compatible with each other; moreover, the structure of the essential core does not tolerate the presence of incompatible elements, and incompatibility exists when cohesion between principles causes an intrinsic inconsistency in the common essential core. In a constitutional system that is not ‘introverted’, and so is willing to engage in constitutional comparison, the search for the constitutional fundamental principles can look to foreign guest citizens as the theorized external element needed to measure the degree of maturation of a constitutional system as regards the safeguard of fundamental rights.

So the safeguard of fundamental rights of guest citizens can be best guaranteed by:

1. a system that recognizes the *equality* of individuals as a necessary precondition. Fundamental rights are not absolute peaceful social relations and can only be assured if liberties are limited. Individuals accept these limits to the extent to which they apply equally to all: «laws are needed to protect equality, and laws are inevitably compromises of liberty»,³⁶
2. a system based on the principles of the *rule of law* (a law that is general, prospective, open and clear, relatively stable, not retrospective (criminal law) and adjudicated by an independent judiciary using a fair trial process based on the presumption of innocence).³⁷ Without the rule of law, fundamental rights are bound to remain empty symbolic formulae;³⁸
3. a system comprising a large number of institutions or bodies to which the fundamental powers are distributed and which operate according to mechanisms of co-ordination and reciprocal control, with organizational solutions capable of enhancing local needs, in view of the effective participa-

³⁴ Federalist Papers (1787-1788), No 78 (Hamilton).

³⁵ See Wechsler (1959); Harrington (2003); Rowe (2005); Treanor (2005).

³⁶ Dworkin (1978, p. 267). See also Berlin (1969, pp. 1-38).

³⁷ See, in particular, Raz (1977, p. 195).

³⁸ *Dennis v. United States*, 341 U.S. 494 (1951); *Verfassungsgerichtshof Österreich* 2455/1952; *Cons. constitutionnel*, 93-335 DC; 2001-455 DC; 2003-475 DC; *Cour d'arbitrage de Belgique*, arrêts n. 22, 32 e 128/1999.

tion of the various local communities in political choices (*separation of powers* and *institutional pluralism*). A system based on checks and balances guarantees fundamental rights as it distributes powers among several authorities whose activities are in any case subject to the observance of the law.³⁹ The distribution of powers to local authorities also affords enhanced protection of the interests of the respective communities: the proximity of the decisions to the areas they affect improves the balancing/weighting of the interests involved;⁴⁰

4. a system which bases the legitimacy of its institutions on investiture mechanisms shaped according to the political representation model and which, at the same time, recognizes and guarantees the multiplicity of the social and political bodies legitimated to participate in decision-making processes (*democracy* and *social and political pluralism*).⁴¹ The safeguard of fundamental rights assumes that its limits, established to assure peaceful cohabitation, are decided in such a way as to achieve a kind of virtual identification between the holders of these rights and the decision makers. The concept of ‘government of the people’ supports this identity and consolidates the legitimacy of power and individual acceptance of decisions.⁴² The importance of the principle of democracy can also be appreciated in the light of its relationship to the other principles referred to above. The prohibition of discrimination, imposed by the principle of equal protection of the law, guarantees a uniform application of rights; in turn, certain privileges are repudiated by the principle of democracy, the success of which depends on universal suffrage. The principle of democracy cannot exist without the separation of powers; democracy cannot express its potential without the assertion of pluralism; all political positions must have the same opportunities to be represented in society;⁴³
5. a system that guarantees the stability and force of these principles, establishing itself as a set of rules binding all government activities in all their expressions with adequate enforcement mechanisms (*supremacy of the constitution*). It is crucial to recognize that the constitution is a higher or supreme law. The ranking of constitutional norms at the top of the legal hierarchy implies that constitutions are law. The safeguard of fundamental rights can only be truly achieved by limiting the law itself: changing legislative majorities, in fact, could arbitrarily limit minority rights in order to consolidate their power. All this would violate the principles of the rule of law, the separation of powers, equal protection of the laws, and democracy. The invalidation by an independent judge of laws that are contrary to the constitution is necessary if the supremacy of the constitution, as a

³⁹ See, for example, Vanderbilt (1953); Vile (1967).

⁴⁰ For more on this point, see Wheare (1963). About devolution in U.K., see Bogdanor (2004).

⁴¹ *Vriend v. Alberta*, 1 S.C.R. 493 (1998).

⁴² See Kelsen (1929).

⁴³ Compare on this point, Häberle (1980); Habermas (1989).

guarantee of fundamental rights, is to be truly effective (*judicial review of legislation*).⁴⁴

b) Inclusion of only those principles congenial to the improved safeguard of fundamental rights

If more than one principle is identified in the same segment of the constitution, one of which is congenial to the above purpose and others which are not, then the first excludes the others:

1. by safeguarding rights, as a fundamental imprint of the constitutional system, the individual is raised up as the central element of the system. In this sense, the principle of the centrality of the individual becomes a fundamental guideline for the selection of the core's fundamental principles. This principle is incompatible with the exploitation of fundamental rights for the purpose of achieving the supreme interests of the state (typical of Marxist-inspired systems);
2. the principle of equal protection of the laws excludes the existence of situations of totally unjustified privilege. It is consequently incompatible with all principles that allow disparity of treatment based on racial, religious, linguistic, economic or social characteristics;
3. the separation of powers creates a wide gap with respect to systems distinguished by the centralization of powers within a single institution. This principle also works vertically, in opposition to states that deny all forms of political representation of local interests;
4. the principle of democracy is opposed to the variously denominated political formulas (autocracy, aristocracy, oligarchy, as well as totalitarianism, etc.) which exclude or strongly limit popular participation in the institutional mechanisms relative to political decision-making. Democracy legitimates the holders of public powers whose activities are based on the consent of the people;
5. pluralism is incompatible with systems that only recognize certain social or political forces. The preventive selection of the interests that can be represented in the decision-making processes involves, in a system that denies pluralism, the sacrifice of debate among conflicting requirements, to the advantage of a limited section of the community;
6. the supremacy of the constitutional system is incompatible with every system that denies the prevalence of fundamental principles over all public powers.

⁴⁴ According to Kelsen (1961, p. 269), «judicial review is an obvious encroachment upon the principle of separation of powers». See also Ely (1980).

c) Exclusion of principles equally efficient in safeguarding fundamental rights

If more than one principle is identified in relation to the same segment of the constitution, all of which are qualitatively suitable to assure the best possible safeguard of the fundamental rights of guest citizens, they are all excluded from the common essential core:

1. the federal principle (in federal states such as the United States, Canada, and Germany) and the principle of self-government of ‘regional’ states (Italy and Spain, for example, have reached a level of self-government that is less advanced than it is in federal states), is, as regards the best possible safeguard of the rights of foreign guest citizens, a non-exclusive solution and, as such, cannot be preferred to the direct safeguard of the fundamental rights. Therefore, the federal principle remains outside the common essential core. In other words, the safeguard of the fundamental rights of the foreign guest citizen does not depend on the level of self-government;
2. the same applies as regards the relationship between the safeguard of fundamental rights on the one hand, and republicanism and the principle of the constitutional monarchy on the other.⁴⁵

⁴⁵ See, in particular, Bryce (1921, p. 14).

Chapter 3

Dialogue Among Courts: Some Examples

3.1. Introduction

The sharing of the common essential core is expressed through dialogue among courts from different states. However, it is not easy to find concrete cases of this dialogue. At times, the echo generated by decisions taken in other systems is hardly perceptible; in other cases, one has the feeling that the meticulous investigative work done prior to the pronouncement of the final decision has also made use of regulatory material acquired from other systems. It is, however, possible to find sentences including explicit references to the jurisprudence of other countries in the grounds for judgment.

As I showed before, the presence of a guest citizen in the process is a good occasion to stimulate the inter-court dialogue. However, in the absence of this condition, the search of solutions inspired to the common constitutional core can be made by consulting the jurisprudence of foreign courts.

3.2. Decisions pronounced in cases related to a guest citizen

In these cases, the National courts examined the demands of guest citizens by recalling the decisions of foreign judiciaries, thus clarifying the meaning of constitutional principles – *habeas corpus*, rule of law, equality rights – not as principles belonging to the Canadian constitutional system only, but as principles shared by the constitutional systems of western Countries.

a) Princess Soraya

The former wife of the Shah of Iran, Princess Soraya, had brought a lawsuit to court for invasion of privacy, alleging that the defendants had written and published a fictitious interview in which she had revealed intimate details of her private life. No statute authorized such damages for invasion of privacy, but the *Bundesgerichtshof* held they could be awarded anyway. The defendants argued that the court had disobeyed its constitutional obligation to respect the limitations imposed by the Civil Code.

The *Bundesverfassungsgericht* Constitutional Court held the court had acted within its powers. In the *Prinzessin Soraya* case, the *Bundesverfassungsgericht* drew inspiration from American case law in relation to the freedom of expression.¹

b) Suresh v. Canada

Mr. Manickavasagam Suresh was a Convention refugee from Sri Lanka who had applied for landed immigrant status.

In *Suresh v. Canada (Minister of Citizenship and Immigration)*² a case relating to immigration, deportation, and risk of torture, the Supreme Court of Canada cited the decision pronounced by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundzija*.³

Moreover,

we note that the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combating terrorism and protecting national security.⁴

Canadian law and international norms reject deportation towards torture.

Canadian law views torture as inconsistent with fundamental justice. The terms «danger to the security of Canada» and «terrorism» are not unconstitutionally vague. Therefore, a person constitutes a «danger to the security of Canada» if he (or she) poses a serious threat to the security of Canada, whether direct or indirect, bearing in mind the fact that the security of one country is often dependent on the security of other nations.

c) Charkaoui v. Canada

Mr. Adil Charakaoui, Mr. Hassan Almrei and Mr. Mohamed Harkat were also refugees.

In *Charkaoui v. Canada*, the Supreme Court of Canada took note of the special advocate system employed by the Special Immigration Appeals Commission (SIAC) in the United Kingdom.⁵ The SIAC and the special advocate system were created in response to *Chahal v. United Kingdom*, in which the European Court of Human Rights had held that the procedure then in place was inadequate:

The court in *Chahal* commented favorably on the idea of security-cleared counsel instructed by the court, identifying it as being Canadian in origin.⁶

The procedure under the IRPA for determining whether a certificate is reasonable and the detention review procedures infringe s. 7 of the Charter. The right to a fair hearing comprises the right to a hearing before an independent and impartial magistrate who

¹ 34 Bverf GE 269 (1973).

² 2002 SCC 1, [2002] 1 S.C.R. 3 at paras. 64 and 74 (asking whether deportation of refugees facing risk of torture is contrary to principles of fundamental justice).

³ 38 I.L.M. 317 (1999).

⁴ H.C. 6536/95, *Hat'm Abu Zayda v. Israel General Security Service*, 38 I.L.M. 1471 (1999); *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47.

⁵ *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 80.

⁶ (1996) ECHR 54.

must decide on the facts and the law, the right to know the case put against one, and the right to respond to that case. The detention of foreign nationals without warrant does not infringe the guarantee against arbitrary detention in s. 9 of the Charter. While the s. 12 guarantee against cruel and unusual treatment cannot be used as a mechanism to challenge the overall fairness of a particular legislative regime, indefinite detention without hope of release or recourse to a legal process to procure release may cause psychological stress and therefore constitute cruel and unusual treatment. Finally, the rule of law is not infringed by the unavailability of an appeal of the designated judge's review of the reasonableness of the certificate; or the provision for the issuance of an arrest warrant by the executive in the case of a permanent resident, or for mandatory arrest without a warrant following an executive decision in the case of a foreign national.

d) *R. v. Zundel*

Mr. Ernst Zundel asked Canada for the status of refugee. He underwent many processes to have a paper written which is part of a genre of literature known as 'revisionist history'. This pamphlet suggests that it has not been established that six million Jews were killed before and during World War II and that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy.

With respect to freedom of expression in *R. v. Zundel*, the Supreme Court noted that this fundamental right «is hardly essential to the maintenance of a free and democratic society» as testified by many constitutional systems.

The Italian provision has clearly been limited in its scope to the preservation of the rule of law or the legal order by the Italian constitutional court.⁷

e) *Canada (Justice) v. Khadr*

The following case can be considered here because it regards a city held by the authorities of another country. Indeed, Khadr, a Canadian, has been detained by the U.S. military at Guantanamo Bay, Cuba, since 2002 when he was a minor. In 2004, he was charged with war crimes. In 2003, agents from two Canadian intelligence services questioned Khadr on matters connected to the charges pending against him, and shared the product of these interviews with U.S. authorities. In 2004, a Canadian official interviewed Khadr again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the 'frequent flyer program', to make him less resistant to interrogation.

In *Canada (Justice) v. Khadr*⁸ the Supreme Court of Canada held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations, and, under s. 7 of the *Canadian Charter of Rights and Freedoms*, ordered the Canadian government to disclose to Khadr the transcripts of the interviews he had given two Canadian intelligence services, which it did.

⁷ 2 S.C.R. 731 (1992) at 770 (addressing a *Criminal Code* prohibition on wilful publication of false statements or news that a person knows is false and that is likely to cause injury or mischief to the public interest).

⁸ [2008] 2 S.C.R. 125. See also *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, where is quoted the Constitutional Court of South Africa in *Kaunda v. President of the Republic of South Africa*, [2004] Z.A.C.C. 5, 136 I.L.R. 452.

In this decision, the Supreme Court quoted *Rasul v. Bush*:⁹ the United States Supreme Court held that detainees at Guantanamo Bay who, like Khadr, were not U.S. citizens, could challenge the legality of their detention by way of the statutory right of *habeas corpus* provided for in 28 U.S.C. § 2241.

According to Supreme Court of Canada, the principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them.

3.3. Decisions pronounced in cases not regarding guest citizens

The presence of a guest citizen in the process is not decisive in the search for dialogue among courts. However, the national courts have the possibility to exploit the common constitutional core.

In its decision no. 123 of 1980, the Italian Constitutional Court quotes from *Missouri v. Holland*, a case heard by the U.S. Supreme Court in 1920, in order to reaffirm the exclusive jurisdiction of the state for international politics following claims made by the regions.¹⁰

In its decision no. 161 of 1985, concerning trans-sexualism, the same court refers to a well-known pronouncement made by the *Bundesverfassungsgericht* on 11 October 1978 concerning the need to safeguard the inseparable tie between soma and psyche.

The Spanish *Tribunal Constitucional* has also drawn from the jurisprudence of other states. Its decision no. 126 of 1987 made reference to pronouncements by the Italian Constitutional Court concerning the absence of retrospective criminal laws. With regards to fair trial, especially the right to evidence, the Spanish court, in its decision no. 114 of 1984, mentions the U.S. Supreme Court in *United States v. Janis*¹¹ while its decision no. 282 of 1993 draws from the jurisprudence of the same U.S. Supreme Court, though without express reference to it.

In the Israeli Supreme Court, Justice Dorner made extensive use of comparative, mainly Canadian, case law.¹²

See, for example, the experience of the Supreme Court of South Africa.¹³

The Constitutional Court of South Africa was particularly distinct in the use of foreign case law.¹⁴ The prime example is the decision with this Court declared unconstitutional the death penalty. In *State v. Makwanyane*,¹⁵ this Court has initially observed that

In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the

⁹ 542 U.S. 466 (2004).

¹⁰ 252 U.S. 416 (1920).

¹¹ 428 U.S. 433 (1976).

¹² *El Al Airlines Ltd. v. Danilowitz*, 48 (5) P.D. 749 (1994). Fundamental principles are also quoted in *Israeli Supreme Court, Kach Faction v. Knesset Speaker*, 39 (3) P.D. (1995).

¹³ Regarding this experience, see Dixon (2007).

¹⁴ See Botha (2010); Lollini (2011).

¹⁵ Case No. CCT/3/94 [1995].

constitution was adopted, including the debates and writings which formed part of the process.

To this end, besides the United States of America, this Corte has cited the *Bundesverfassungsgericht*,¹⁶ the Canadian Supreme Court,¹⁷ and the Indian Chief Justice Kania in *A.K. Gopalan v The State*.¹⁸

Given this methodological premise, the Constitutional Court of South Africa notes that the death sentence is a form of punishment which has been used throughout history by different societies and it has long been the subject of controversy. This Court was addressed to judgments dealing with challenges made to capital punishment in the courts of other countries and in international tribunals:

The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention.

When challenges to the death sentence in international or foreign courts have failed, the constitution or the international instrument concerned has either directly sanctioned capital punishment or has specifically provided that the right to life is subject to exceptions sanctioned by law. The Constitutional Court of South Africa notes that the only case to which we were referred in which there were not such express provisions in the Constitution, was the decision of the Hungarian Constitutional Court. There the challenge succeeded and the death penalty was declared to be unconstitutional.¹⁹

At this point, this Court emphasizes that

Our Constitution expresses the right to life in an unqualified form, and prescribes the criteria that have to be met for the limitation of entrenched rights, including the prohibition of legislation that negates the essential content of an entrenched right. In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

The ruling focuses, therefore, on the capital punishment in the United States of America. It has been said there that the «Constitution itself poses the first obstacle to [the] argument that capital punishment is per se unconstitutional».²⁰ Although challenges under state constitutions to the validity of the death sentence have been successful, the

¹⁶ 45 BverfGE 187 [1977], in the decision on the constitutionality of life imprisonment.

¹⁷ Reference re s.94(2) of the Motor Vehicle Act (British Columbia) (1986) 18 CRR 30 at 47-50; *United States v. Cotroni* (1990) 42 CRR 101 at 109; *Mahe v. Alberta* (1990) 46 CRR 193 at 214.

¹⁸ SCR 88 at 111 [1950].

¹⁹ Decision No. 23/1990 (X.31.).

²⁰ *Furman v. Georgia*, 408 U.S. 238, 290 (1972), at 418 (Powell, J., joined by Burger, C.J., Blackmun, J. and Rehnquist, J., dissenting).

federal constitutionality of the death sentence as a legitimate form of punishment for murder was affirmed by the United States Supreme Court in *Gregg v. Georgia*.²¹ The Constitutional Court of South Africa notes that

Both before and after Gregg's case, decisions upholding and rejecting challenges to death penalty statutes have divided the Supreme Court, and have led at times to sharply-worded judgments.

In conclusion, the Constitutional Court of South Africa notes that

The United States jurisprudence has not resolved the dilemma arising from the fact that the Constitution prohibits cruel and unusual punishments, but also permits, and contemplates that there will be capital punishment. The acceptance by a majority of the United States Supreme Court of the proposition that capital punishment is not per se unconstitutional, but that in certain circumstances it may be arbitrary, and thus unconstitutional, has led to endless litigation. Considerable expense and interminable delays result from the exceptionally-high standard of procedural fairness set by the United States courts in attempting to avoid arbitrary decisions.

After that, once recalled that the United States Constitution does not contain a specific guarantee of human dignity,²² the Constitutional Court of South Africa notes that the *Bundesverfassungsgericht* has stressed this aspect of punishment.²³ The capital punishment constitutes a serious impairment of human dignity has also been recognised by judgments of the Canadian Supreme Court. In *Kindler v. Canada*²⁴ was concerned with the extradition from Canada to the United States of two fugitives, Kindler, who had been convicted of murder and sentenced to death in the United States, and Ng who was facing a murder charge there and a possible death sentence. Three of the seven judges who heard the cases expressed the opinion that the death penalty was cruel and unusual. Below are other decisions of other foreign (Indian Supreme Court; Constitutional Court of the Republic of Hungary; Canadian Supreme Court; *Bundesverfassungsgericht*) and international courts (European Court of Human Rights).

In conclusion:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by

²¹ 428 U.S. 153, 173 (1976).

²² But it has been accepted by the United States Supreme Court that the concept of human dignity is at the core of the prohibition of 'cruel and unusual punishment' by the Eighth and Fourteenth Amendments: see *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *People v. Anderson*, 493 P.2d 880, 886 (Cal. 1972).

²³ 45 BverfGE 187 [1977], in which we read that the respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. The State cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.

²⁴ (1992) 6 CRR (2d) 193 SC.

objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.

In the balancing process the principal factors that have to be weighed are on the one hand the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment, and the existence of a severe alternative punishment (life imprisonment) and, on the other, the claim that the death sentence is a greater deterrent to murder, and will more effectively prevent its commission, than would a sentence of life imprisonment, and that there is a public demand for retributive justice to be imposed on murderers, which only the death sentence can meet.

Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights in Chapter Three. It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out.

The quoted decisions show the effort in finding inside the common constitutional core elements of juridical reasoning to enforce the consolidated interpretations or to explore new solutions.

3.4. Some openings in the jurisprudence of the U.S. Supreme Court

The experience of the United States confirms the consistency of resistance to allowing access to interpretive elements taken from the jurisprudence of other states.²⁵

Just think of the Reaffirmation of American Independence resolution according to which

judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.²⁶

*Stanford v. Kentucky*²⁷ is an unsuccessful attempt to use foreign material to affect the solving of a problem about the right interpretation of the U.S. Constitution.

Two murderers were respectively sixteen and seventeen years old at the time they committed their crimes. The challenge to their execution relied on the principle that the

²⁵ See Harding (2003).

²⁶ H. Res. 568, in <<http://judiciary.house.gov>>.

²⁷ 492 U.S. 361 (1989).

punishment was inconsistent with the «evolving standards of decency that mark the progress of a maturing society».²⁸ The challengers looked to practices elsewhere in the world. They noted that many States, especially with reference to Western Europe countries, had abolished capital punishment or severely restricted its use to a narrow class of truly unusual crimes: where countries abolished capital punishment, the majority had banished the execution of minors.

According to Justice Brennan, in dissenting opinion, the law and practice «generally throughout the world» demonstrated that the execution of juveniles was inconsistent with «evolving standards of decency» and therefore should be held unconstitutional under the Eighth Amendment.

A majority of the U.S. Supreme Court rejected this argument. According to Justice Scalia, «it is American conceptions of decency that are dispositive». Practices in other countries were not relevant to the Court's interpretive task, which demanded a determination of whether practice was «accepted among our people».²⁹

In *Printz v. United States*³⁰ the U.S. Supreme Court held a federal requirement that local law enforcement officers perform background checks on prospective gun buyers to be an unconstitutional federal commandeering of state employees to administer federal law.

In his dissent, Justice Breyer indicated that the experience of other countries «cast an empirical light on the consequences of different solutions to a common legal problem»: other states, with federal systems, «have found that local control is better maintained» by allowing the national government to use local governments to administer national law.³¹ According to Mark Tushnet, Justice Breyer can be taken to be working within a functionalist model of the value of foreign material for constitutional interpretation (Tushnet 1999, p. 1232).

Nevertheless, as summed up by Justice Scalia, the majority opinion confirms the widespread reluctance of the Court to draw comparisons: «we think such comparative analysis inappropriate to the task of interpreting a Constitution, though it was of course quite relevant to the task of writing one».³²

More recently, the U.S. Supreme Court, though not inclined to draw from the jurisprudence of other states, has recently taken a more receptive approach.

There are some decisions containing unspecified allusions to consolidated legal practices in other systems.

Of significance is *Roper v. Simmons*.³³

The Eighth Amendment's prohibition against «cruel and unusual punishments» must be interpreted according to its text, by considering history, tradition, and precedent, and must have due regard for its purpose and function in the constitutional design. To implement this framework the U.S. Supreme Court has established the propriety and

²⁸ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁹ See Tushnet (1999, p. 1231): «we might say that the Constitution must *license* the use of comparative material for the courts to be authorized to learn from constitutional experience elsewhere».

³⁰ *Printz v. United States*, 521 U.S. 898 (1997).

³¹ *Id.* at 976-7.

³² *Id.* at 921, footnote 11.

³³ 543 U.S. 551 (2005).

affirmed the necessity of referring to «the evolving standards of decency that mark the progress of a maturing society» to determine which punishments are so disproportionate as to be «cruel and unusual».

Well, in *Roper v. Simmons*, the U.S. Supreme Court ruled the death penalty to be a disproportionate punishment for juveniles. This determination finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. The U.S. Supreme Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of «cruel and unusual punishments».

In *Trop v. Dulles*³⁴ this Court observed that «the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime». In *Atkins v. Virginia*,³⁵ recognizing that «within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved». In *Thompson v. Oklahoma*,³⁶ noting the abolition of the juvenile death penalty «by other nations that share our Anglo-American heritage, and by the leading members of the Western European community», and observing that «[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual». And others.

In the dissenting opinion, Justice Scalia says: «though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage».

A significant aperture can be found in *Lawrence v. Texas*, a case concerning the principle of equal protection of the laws, personal freedom, and the protection of privacy, in which a European Court of Human Rights decision from 1981 was mentioned.³⁷

In *Lawrence v. Texas*, the question before the U.S. Supreme Court was the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. The Court considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.³⁸

To be precise, in *Lawrence v. Texas* the petitioners complained of violations of their vital interests in liberty and privacy. The Court overruled the precedent of *Bowers v. Hardwick*.³⁹ This conclusion was supported by the European Court of Human Rights, which considered a case with parallels to *Bowers*. In *Dudgeon v. United Kingdom*⁴⁰ the European Court held that the laws proscribing intimate sexual conduct were invalid under the *European Convention on Human Rights*.

³⁴ 356 U.S. 86 (1958), at 102-103.

³⁵ 536 U.S. 304 (2002).

³⁶ 487 U.S. 815 (1988), at 830-831. In dismissing the reference of foreign material, Justice Scalia stated: «the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accent, but rather so “implicit in the concept of ordered liberty” that it occupies a place not merely in our mores but, text permitting, in our Constitution as well».

³⁷ 539 U.S. 558 (2003) at 573, citing *Dudgeon v. United Kingdom* (1981), 45 E.C.H.R. (Ser. A) 5. See Eskridge (2004).

³⁸ U.S. Const., section 1.

³⁹ 478 U.S. 186 (1986).

⁴⁰ 45 E.C.H.R. (Ser. A) 5, at 573.

Writing for a majority, Justice Anthony M. Kennedy observed that

other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.

Also deserving mention is the dissenting opinion of Justice Breyer in *Knight v. Florida*, concerning the death penalty:

a growing number of courts outside the United States – *courts that accept or assume the lawfulness of the death penalty* – have held that lengthy delay in administering a *lawful* death penalty renders ultimate execution inhuman, degrading, or unusually cruel.⁴¹

To this end, Justice Breyer referred a number of decisions of foreign authorities, even if he went on to indicate that «obviously this foreign authority does not bind us» particularly as the task at hand in the case was one of interpretation of the Constitution of the United States of America.⁴²

For example, Justice Breyer referred to *Pratt v. Attorney General of Jamaica*, in which the Privy Council concluded that it was an «inhuman act to keep a man facing the agony of execution over a long extended period of time».⁴³ In *Sher Singh v. State of Punjab*, it was decided that before the Indian Supreme Court a condemned prisoner may ask whether it is «just and fair» to permit execution in instances of «[p]rolonged delay».⁴⁴ In *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General*, the Supreme Court of Zimbabwe concluded that delays of five and six years were «inordinate» and constitute «torture or [...] inhuman or degrading punishment or other such treatment».⁴⁵ Finally, Breyer referred to *Soering v. United Kingdom*, in which the European Court of Human Rights affirmed that the *European Convention on Human Rights* nonetheless prohibited the United Kingdom from extraditing a potential defendant to the Commonwealth of Virginia because the six to eight-year delay that typically accompanied a death sentence amounts to «cruel, inhuman, [or] degrading treatment or punishment» forbidden by the Convention.⁴⁶ Similar gestures towards dialogue can be seen in judgments concerning the subject of fundamental rights, pronounced by the courts of states that are not inclined to consider foreign jurisprudence, such as the United Kingdom (McCrudden 2000).

In *Gratz v. Bollinger*,⁴⁷ the U.S. Supreme Court had confirmed that the Constitution permits affirmative action to achieve a diverse student body. The University of Michi-

⁴¹ 528 U.S. 990 (1999) at 995. See also Justice Thomas, concurring, in *Johnson v. Bredesen*, 558 U.S. ____ (2009).

⁴² Justice Breyer quoted the dissenting opinion of Justice Scalia in *Thompson v. Oklahoma*, 487 U.S. 815 (1988). See, contra, Justice Thomas's concurring opinion: «indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council». *Id.* at 990.

⁴³ [1994] UKPC 1 at para. 60, cited in *Knight, ibid.* at 995.

⁴⁴ [1983] INSC 27 at 584, cited in *Knight, ibid.*

⁴⁵ 1 Zimb. L.R. 239, 240, 269 (Aug. 4, 1999): cited in *Knight, ibid.* at 996.

⁴⁶ (1989), 54 E.C.H.R. (Ser. A) 8, cited in *Knight, ibid.*

⁴⁷ 539 U.S. 244 (2003).

gan had violated the equal protection clause of the Fourteenth Amendment by ensuring minority access to undergraduate and law programs. Well, according to Justice Ruth Bader Ginsburg,

we're part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has as well as the European Union and South Africa, and they have all approved this kind of – they call it “positive” – discrimination.

On the other hand, Justice Scalia asks

whether any of those countries that Justice Ginsburg referred to, which have gone down the road of racial preferences, racial entitlements, have ever got rid of racial preferences or racial entitlements?

3.5. Other significant decisions of the Supreme Court of Canada

The jurisprudence of the Supreme Court of Canada presents some significant examples of inter-court dialogue.

Addressing extradition in *United States v. Ferras*; *United States v. Latty*⁴⁸ the Supreme Court of Canada quoted an ancient precedent:

the need for an independent judicial hearing incorporates the right to have one's case heard by a neutral magistrate [...] a right first articulated by Sir Edward Coke, one of England's most famous lawyers and judges, in *Bonham's Case* (1610).⁴⁹

The Canadian Court also quoted the American case *Glucksman v. Henkel*:⁵⁰

The true principle that emerges from the history of extradition and the test for committal is that a person is not to be extradited without a fair trial, having regard to the history, purposes and policies that underlie extradition [...]. Fair trial in this context means that the requesting state must establish that there are reasonable grounds to conclude that the person sought may have committed the offence.

In the Canadian Supreme Court case *United States v. Burns*,⁵¹ Burns and Rafay, both Canadian citizens, were accused of killing Rafay's father, mother, and sister in the American State of Washington. The accused were arrested in British Columbia in Canada by Canadian police after confessing to an undercover officer. The United States petitioned the Canadian government to have the respondents extradited to Washington to stand trial, a request which the Minister of Justice granted unconditionally, despite

⁴⁸ 2 S.C.R. 77 (2006).

⁴⁹ *Id.* at 92; *Dr. Bonham's Case*, 8 Co. Rep. 113b, 77 E.R. 646.

⁵⁰ 221 U.S. 508 (1911).

⁵¹ [2001] 1 S.C.R. 283.

the fact that Washington law permitted the prosecutor to seek the death penalty for the respondents.

Interpreting the *Canadian Charter of Rights and Freedoms*⁵² the Supreme Court of Canada took support from the above-mentioned decision of the European Court of Human Rights in *Soering*:

having regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.

According to Supreme Court of Canada,

the 'responsibility of the State' is certainly engaged under the *Charter* by a ministerial decision to extradite without assurances. While the Canadian Government would not itself inflict capital punishment, its decision to extradite without assurances would be a necessary link in the chain of causation to that *potential* result.

In addressing the fundamental freedom of expression in commercial advertising, the Supreme Court of Canada, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, mentioned a decision of the French *Conseil constitutionnel*:

it is also of significance that the constitutionality of full advertising prohibitions have been upheld by the French *Conseil constitutionnel* (Décision No. 90-283 DC (Jan. 8, 1991) declaring the *Loi no 91-32 relative à la lutte contre le tabagisme et l'alcoolisme*, which prohibits all direct and indirect tobacco advertising), to be constitutionally valid.⁵³

Indeed, this inclination of the Canadian Supreme Court to engage in inter-court dialogue is well expressed by Honourable Madam Justice Claire L'Heureux-Dubé:

given the similarities of constitutional drafting and sources, one would not be surprised by the new dialogue among judges and lawyers drawing on the expertise and experience of interpreters of similar documents. Moreover, because the legal protection of human rights is a novel phenomenon in many countries, sometimes, little or no previous domestic jurisprudence exists to give meaning to the rights, making judgments from elsewhere particularly useful and necessary. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted for similar legal problems elsewhere.⁵⁴

⁵² Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

⁵³ [1995] 3 S.C.R. 199 at 310.

⁵⁴ L'Heureux-Dubé (2003, p. 661). See also *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519.

Where freedom of religion is concerned, the Supreme Court of Canada, in *Alberta v. Hutterian Brethren of Wilson Colony*⁵⁵ quoted some decisions of the European Court of Human Rights. Pluralism and rights to equality are interpreted as intimately connected principles. Particularly, in *Şahin c. Turquie* [CG] the European Court wrote:

pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that *the* views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position.⁵⁶

See, finally, *R. c. Patrick*.⁵⁷

The police suspected that Mr. Patrick was operating an ecstasy lab in his home. The police used evidence of criminal activity taken from the contents of Mr. Patrick’s garbage to obtain a warrant to search his house and garage. At his trial, Mr. Patrick argued that the taking of his garbage bags by the police constituted a breach of his right guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms* to be free from unreasonable search and seizure.

Quoted by Justice Binnie, the U.S. Supreme Court, in *Katz c. United States*⁵⁸ stated the foundational privacy principle that «the Fourth Amendment protects people, not places». Furthermore, in *California c. Greenwood*⁵⁹ (cited by Justice Binnie and Justice Abella) the U.S. Supreme Court held that by placing the garbage in opaque bags at the curbside for pickup by a trash collector, residents of a house retained no reasonable expectation of privacy in the inculpative items which they discarded.

3.6. Synthesis

Dialogue among courts expresses the potential of the common essential core. When a national court refers to the interpretation of another court, it does not introduce new jurisprudence. The national court simply accepts one of the possible interpretations that can be derived by combining the principles incorporated in the common essential core. An awareness on the part of National courts of the common essential core can be considered fundamental to the development of mature cooperation among constitutional courts.

⁵⁵ 2009 CSC 37.

⁵⁶ N° 44774/98, CEDH 2005-XI, at para. 108.

⁵⁷ [2009] 1 R.C.S. 579.

⁵⁸ 389 U.S. 347 (1967), at 351.

⁵⁹ 486 U.S. 35 (1988). Some State courts have reached a contrary conclusion: *People v. Krivda*, 486 P.2d 1262 (Cal. 1971), at p. 1268; *State v. Morris*, 680 A.2d 90 (Vt. 1996).

Chapter 4

The Cosmopolitan Constitutional Law

4.1. From the common essential core to the cosmopolitan constitutional law

The set of rules deriving from dialogue among national courts and taken, in the interpretative sense, from the common essential core can be defined as *cosmopolitan constitutional law*.

a) This set of rules is first and foremost a system of legal rules: it is *law*. Dialogue among national courts is neither a cultural nor a political phenomenon. Comparison of jurisprudential experiences develops along the trajectories traced by law. The interpretations made by national courts derive from the fundamental principles of the common essential core: they are, therefore, born of legal elements, even though these are particular to a specific constitutional system. These interpretations generate legal rules, which can be applied to concrete cases.

b) In addition, this is a *constitutional* system of legal rules. In fact, this system is taken from the principles incorporated in the essential cores of national constitutions. The constitutional nature of these rules is first and foremost *formal*, given that this attribute is transmitted from principles to rules. Its constitutional nature, however, is also substantial as these rules concern the safeguard of fundamental rights. The safeguard of fundamental rights is the fundamental objective of national constitutions.

c) Finally, this set of rules is a *cosmopolitan* constitutional system.

The use of word 'cosmopolitan' is not uncommon in studies of dialogue among court:

constitutional interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication (Choudhry 1999, p. 820).

Still, in dealing solely with the theme of the dialogue among courts, there is a greater realisation of earlier quoted 'constitutional cross-fertilization': «an awareness of who is citing whom among the judges themselves, and a concomitant pride in a cosmopolitan judicial outlook» (Slaughter 2003, p. 198).

According to Paul S. Berman, «the best way to avoid legal imperialism is for judges to think of themselves as cosmopolitan transnational actors». He adds that a

cosmopolitan perspective might actually cause judges to refrain from overly-aggressive assertions of parochial norms (Berman 2004, p. 102).

This adjective is not used randomly. It is taken from a very famous 1795 essay by Immanuel Kant entitled *Zum ewigen Frieden. Ein philosophischer Entwurf*.

In an attempt to go beyond the rigidity of a state/international law dichotomy, Kant imagined a cosmopolitan law (*Weltbürgerrecht*), which invoked a set of rules aiming to govern relations between a state and the citizens of other states according to the principle of universal hospitality (Kant 1795, p. 93).

Kant's theory is based on three pillars: *Ius civitatis* (the civil constitution of every state shall be republican); *Ius gentium* (the right of nations shall be based on a federation of free states); *Ius cosmopolitanicum* (based on the condition of universal hospitality).

For Kant, it's not a question of philanthropy, but of law:

Hospitality means the right of a stranger not to be treated as an enemy when he arrives in the land of another. One may refuse to receive him when this can be done without causing his destruction; but, so long as he peacefully occupies his place, one may not treat him with hostility. It is not the right to be a permanent visitor that one may demand [...]. It is only a right of temporary sojourn, a right to associate, which all men have. They have it by virtue of their common possession of the surface of the earth, where, as a globe, they cannot infinitely disperse and hence must finally tolerate the presence of each other. Originally, no one had more right than another to a particular part of the earth.

Cosmopolitan law completes state and international law so that international peace can guarantee the respect of individuals as citizens of the world. It can be said that in Kant's theory law begins with the law of the state, continues on through international law, and culminates in cosmopolitan law.¹

Cosmopolitan constitutional law can be located as such because it derives from the consideration of the relations between the state and the citizens of other states.²

4.2. The characteristics of the cosmopolitan constitutional law

The essential characteristics of the cosmopolitan constitutional law theory can be grasped by comparison with similar regulatory systems. It should be pointed out that the differences examined in this paper inevitably suffer from a certain amount of approximation. These differences are therefore tendential and not rigid.

a) Cosmopolitan constitutional law and domestic constitutional law

Cosmopolitan constitutional law and domestic constitutional law share the same genetic background.

In fact, cosmopolitan constitutional law is the product of interpretations of the constitutional laws of a particular State. Even if they are influenced by foreign material, these interpretations are made on the law of the State in question. The common consti-

¹ For more on Kantian theory, see, e.g., von Simson (1983); Brandt (1995); Covell (1998); Kleingeld (1998).

² According to Amann (2004, p. 605), it's possible to use comparative law when litigants are citizens of another country.

tutional law suggests the interpretation that national judges should give to the constitutional rules, so as to guarantee in the best way the safeguard of fundamental rights.

So, from this point of view, cosmopolitan constitutional law stems precisely from domestic constitutional law.

Despite this origin, there is no hierarchical relationship between cosmopolitan constitutional law and domestic constitutional law. It has been seen that cosmopolitan constitutional law is legitimised not by the constitutional principles of a specific State, but by the basic principles contained in the common constitutional core. Cosmopolitan constitutional law is not a direct expression of the sovereignty of the State as is domestic constitutional law. Cosmopolitan constitutional law is the expression of a common patrimony of principles shared by more states.

This aspect highlights a further difference between cosmopolitan constitutional law and domestic constitutional law.

The rules of domestic constitutional law are rules that come from this regulatory system and as such are recognised and applied. The rules of cosmopolitan constitutional law, on the other hand, originate from the combination of the principles of common constitutional law. Freeing themselves from the regulatory system from which they originated, the rules of cosmopolitan constitutional law, precisely as an expression of the common constitutional core, are suited for applying some rules of law also in other States. In other words, the rules of cosmopolitan constitutional law are appropriate in guiding the interpretations of judges in other States: this is certainly not because they are the rules of a particular State, rather than because they are rules derived from a common heritage of constitutional principles – indeed, the common constitutional core.

In a nutshell it can be summarised by saying that cosmopolitan constitutional law is an evolution, it is an enrichment of domestic constitutional law, in that it allows for the singling out of the best rules for the safeguard of fundamental rights.

b) Cosmopolitan constitutional law and international law

Cosmopolitan constitutional law differs from international law in the following ways.

At a genetic level, international law derives from customs and treaties. International law, therefore, originates from the decision-making processes that are performed *outside* national borders.

Vice-versa, cosmopolitan constitutional law derives from decision-making processes that are performed *inside* national borders.

As regards the subjects involved in the development of the relative rules, international law originates from decision-making processes developed by the relationships *between states*.³

Constitutional cosmopolitan constitutional law is formed progressively, starting from the common essential core which is expressed in the presence of relations between a determined state *and the citizens of other states*. International law recognises *states* as its protagonists.

³ See Schachter (1991, p. 9).

Cosmopolitan constitutional law highlights the central nature of *individuals* and the interpretations taken from the common essential core are calibrated to their needs according to the safeguard of fundamental rights. As holders of general interests subject to incisive activities of political mediation, states move in the terrain prepared by international law. Cosmopolitan constitutional law highlights the debate between authorities and communities, between power and individuals, without the limits deriving from citizenship, in view of the improved protection of fundamental rights. It is doubtless true that, especially following the two large-scale conflicts of the 20th century, international law pays unprecedented attention to individuals.⁴ Even today, however, the role of individuals in international law is very limited from several points of view (Cassese 1986, p. 99).

Moreover, international law sets out to govern the relations between sovereign and independent states. International law is intimately connected with the sovereignty of states.⁵ In turn, national sovereignty is nourished by citizenship. As has been seen, cosmopolitan constitutional law does not consider citizenship and contributes towards re-considering the limits established by national sovereignty.

International law mainly sets out to guarantee the peaceful development of relations between states: this, in turn, can raise the level of protection of fundamental rights. Cosmopolitan constitutional law overturns the above by inverting the order of priority. It is born and develops to guarantee the uniform safeguard of fundamental rights. In turn, the pursuit of this aim can generate positive effects on relations between states.

As regards stability over time, in the short-to-medium term, international law seems appropriate in generating binding effects, obliging states to take decisions that are compatible with the aims to be achieved. In the long term, however, international law risks being perceived as a foreign element in the decision-making processes of states.

This sense of foreignness could cause national institutions to review their position with respect to commitments taken at international level. The national political and economic scenario can change considerably and these changes can affect the attitudes of states. Experience teaches that failure to respect international commitments can even legitimise the use of force.

Cosmopolitan constitutional law develops much more slowly. It is reasonable to suppose that in the short-to-medium term, cosmopolitan constitutional law would be unable to establish itself sufficiently. However, it is equally reasonable to suppose that in the long term, the consolidation process of these rules would be perfected.

The progressive use of shared jurisprudential procedures *inside* states can create the most favourable conditions for the consolidation of the common essential core. Experience shows that rules imposed ‘from on high’ (such as international law) are very incisive in the short term while they tend to become less binding over time. Though being slow to implement, the rules established by the internal authorities (such as cosmopolitan constitutional law), gradually tend to fully express their potential as they are recognised and accepted ‘as belonging’ and not imposed by a ‘remote’ regulatory system.

⁴ For similar views, see Korowicz (1956); Janis (1984-1985).

⁵ See, e.g., Korowicz (1945).

As regards the ‘importance’ of the various states, in practice, international law suffers from the dominating role played by some states. Cosmopolitan constitutional law develops through the dialogue between courts belonging to different states, though in conditions of parity.⁶

c) Cosmopolitan constitutional law and ‘multilevel constitutionalism’

The constitutional process taking place at European level also helps to understand the meaning of cosmopolitan constitutional law.⁷

In fact, the theory of ‘multilevel constitutionalism’ belongs to this sphere. This theory sets out to reconcile the ‘supranational’ constitutional elements of the European Union with the constitutional context of national systems. According to this theory, the European constitutional system and the national ones are aggregated in a composite or integrated constitutional system (*Verfassungsverbund*) (Pernice 1995, p. 225).

The concept of ‘multilevel constitutionalism’ «treats European integration as a dynamic process of constitution-making instead of a sequence of international treaties which establish and develop an organisation of international cooperation».⁸

According to this theory, it is not important to establish whether Europe needs a constitution, as it is already a multilevel constitutional system, i.e. «a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties» (Pernice 1999, p. 707). The European Union is therefore depicted as a «divided power system», inside which every level of government reflects one or more possible political identities of the citizens involved. In fact, each of these identities corresponds to a different level of society.

The theories of cosmopolitan constitutional law and multilevel constitutionalism share the same focus on individuals in view of the affirmation of elevated levels of uniform safeguard of fundamental rights.

However, ‘multilevel constitutionalism’ is based on the concept of European citizenship as a supplementary condition integrating the specific condition of citizens. Cosmopolitan constitutional law tends to break free from the notion of citizenship. The results achieved starting from the common essential core set out to increase the legal heritage of the holders of fundamental rights, regardless of the specific legal condition connecting them to a determined state.

Moreover, the overall success of the ‘multilevel constitutionalism’ theory is put to the test by the ‘double standard’ system which characterises the safeguard of fundamental rights. In fact, problems of coordination with the constitutions of member states relative to fundamental rights are generated.⁹ The ‘multilevel constitutionalism’ theory recognises the existence of two parallel trajectories for safeguarding fundamental rights: those traced by European law and those traced by national constitutions.

Cosmopolitan constitutional law, on the other hand, no longer considers distinct levels of safeguard of these rights. There is no double standard of safeguard but an en-

⁶ Compare the views of Charlesworth (1997); Brownlie (1998, p. 11); Paulus (2001).

⁷ See, for example, Eleftheriadis (2003); von Bogdandy (2000a).

⁸ Pernice (1999, p. 707). See also von Bogdandy (2000b); Birkinshaw (2005).

⁹ On this problem, see Engel (2001).

richment, in terms of regulatory solutions, of the level of protection achieved within a single state. In other words, it is not a question of separating competences between cosmopolitan constitutional law and national constitutional systems since they do not reflect different levels of jurisdiction.

d) Cosmopolitan constitutional law and common constitutional traditions in Europe

Finally, there are points of contact, still at European level, between cosmopolitan constitutional law and common constitutional traditions.

The European Court of Justice has recognised the existence of common constitutional traditions, thus alluding to the existence of a shared heritage of fundamental constitutional principles, which is large enough to be projected beyond national borders.¹⁰

There are many points of contact between common constitutional traditions and cosmopolitan constitutional law. In particular, invoking consolidated principles in the constitutional heritage of the various member states is congenial to the improved safeguard of fundamental rights. Cosmopolitan constitutional law and constitutional common traditions will probably be bound to dialogue through jurisprudential communication channels.

Common constitutional traditions can help to decipher the essential common core. From the *Stauder* sentence of 1969 to the pronouncement on the *Internationale Handelsgesellschaft* of the following year, from the *Nold* sentence of 1974 to the decision made in the 1979 *Hauer* case, right up to more recent pronouncements (such as the one defining the *Kreil* case in 2000), the principle of fair trial, the principle of non-discrimination, the principle of non-retroactivity of criminal law, are clearly expressions of a common essential core of systems that recognise themselves in shared principles.

Despite these elements of contiguity, cosmopolitan constitutional law and common constitutional traditions diverge on some fundamental factors.

Similarly to the ‘multilevel constitutionalism’ theory, also in the case of common constitutional traditions there is a problem of co-ordination between systems that claim the priority to manage, from the legal point of view, an extensive series of social relations. The gradual emersion of common constitutional traditions certifies the existence of tensions between national systems which claim ‘sovereignty’ over everything that concerns fundamental rights and the European system, that cannot stand being excluded whenever the subject of fundamental rights ends up by interfering with the aims outlined in the treaties.

In fact, the ‘dialogue’ established in this way reflects widespread conflict between the activism of the Court of Justice and the national courts. This conflict has induced some national courts to establish limits in the use of interpretations made at supranational level: limits taken from the essential core of the respective constitutions.

As regards common constitutional traditions, the essential core has been used to stem the flow of European jurisprudence.

As regards cosmopolitan constitutional law, the essential core can be a stimulus to achieving homogenous levels of safeguard of fundamental rights.

¹⁰ See Weiler (2000); MacCormick (2000); Pizzorusso (2001, p. 307); Ortega (2005).

Chapter 5

A New Constitutionalism?

5.1. The Kantian theory today

The idea on which is based this article develops, above all, from the Kantian studies. This is true not only for the use of the concept of *ius cosmopolitanicum*. The *Perpetual Peace* is really far-sighted. The unlimited freedom of the Countries is the main cause of the social evils. In Kant's opinion, these evils represent the main impulse to find peace among the people. The miseries caused by the wars reveal the advantage coming from renouncing the wars themselves. For Kant, the only rational aim of history is this great ideal of a pacific community governed by the reason.¹

However, the most significant aspect of this study is the presence of the essential elements of the Constitutionalism: the man as the end, not as the means, with the consequent exploitation of his fundamental rights; the idea of the Liberal State; the value of democracy. Everything in harmony with the Enlightened ideas and with a strong assent to the French revolution.

This convergence explains the use of the Kantian theory as the main support of every reflection on the safeguard of fundamental rights.

Kant had placed much trust in the theory of cosmopolitan law:

the idea of a cosmopolitan right is therefore not fantastic and overstrained; it is a necessary complement to the unwritten code of political and international right, transforming it into a universal right of humanity. Only under this condition can we flatter ourselves that we are continually advancing towards a perpetual peace (Kant 1795).

During the following decades, Kant's ideas fell out of favour.

In the field of philosophy, the 17th-century developments of romanticism and idealism, championed by Savigny, von Ranke, Hegel and von Treitschke, contributed towards weakening the foundations of the cosmopolitan theory. The *Volksgeist* concept could not be reconciled with the cultural drive towards enhancing the importance of an individual's sense of belonging to the state. Kant's pupil, Fichte, in his criticism of his teacher's dogmatism, extolled the capacity of the state to use law to guarantee individual freedom. In this idealistic vision, the people were recognised as a real spiritual en-

¹ See Archibugi (1995).

tity: for Fichte, the authentic and all-powerful «love of one's country» consisted in conceiving the people as something eternal (Fichte 1795-1796).

However, from the 19th century cosmopolitanism went from strength to strength thanks to economic and trade development. The opening of the markets and the progressive coming together of economic systems reduced the barriers of territorial boundaries. The consequent contact between what were sometimes profoundly different social systems only stimulated a less introvert idea of the relationship between states and the respective communities.

In more modern times, the cosmopolitan vision theorised by Kant has pervaded some of the most original reflections concerning the essence of law and political subjects.²

An example of this is «The law of peoples» by John Rawls (Rawls 1993b, p. 529).

Rawls set out to support the hope based on the conviction that the nature of the social world allows reasonably fair democratic societies to exist as members of the society of peoples.

The influence of Kant emerges almost immediately: «here I follow Kant's lead in *Perpetual Peace*».³

John Rawls' 'law of peoples' theory is based on extending the idea of the social contract from the state to international level, with the consequent extension of fundamental rights to humanity as a whole, in a cosmopolitan society which pursues the fundamental objective of peace.

Like Kant, Rawls imagines an agreement between liberal societies organised as political systems of constitutional democracy. This agreement chooses, from a variety of interpretations of international law, the one which is most appropriate to the objectives of a general theory of international justice. Liberal societies, based on traditional democratic principles, and 'well-ordered' societies in the light of some kind of political criterion, such as the respect of fundamental human rights, generate a cosmopolitan system based on the duty of tolerance and the principle of planetary pluralism.

Rawls' ideas differ from other theories, though they are based on Kant's cosmopolitanism as regards the political concept of justice. As a matter of fact, some scholars consider all people as reasonable and rational since they have both the capacity to develop a sense of justice and the capacity to form a concept of good.⁴

For Rawls, instead, the sole aim of these theories is to pursue the well-being of individuals and not the justice of societies. Once just institutions are established in individual states, further global distribution must take place. What is important for the law of peoples is justice and stability for the just reasons of free societies and decent societies, as members in good standing into a just political society of peoples.

In many ways, Kant's lesson has also inspired the work of Jürgen Habermas, even though explanations and corrections are not lacking.⁵ In fact, this scholar points out that Kant's construction suffers from conceptual aporia and is no longer suitable for our

² See, e.g., Hinsley (1963); Bull (1977); Häberle (1982); Wight (1991); Capps (2001); Berman (2005b); Ap-piah (2006); Feldman (2007).

³ Rawls (1993b, p. 539). See Kuper (2000); Shaw (2005).

⁴ See, in particular, Beitz (1983); Barry (1989); Pogge (1992).

⁵ Habermas (1998). See Velek (2004).

framework of experience (Habermas 1995). The *Weltbürgerlicher Zustand* idea requires attentive reformulation so as not to lose contact with an international situation that is profoundly different from the one experienced by Kant.

Habermas, however, recognises the farsightedness of the intuition connected with the growing interdependence of societies. Consistently with these assumptions, Habermas suggests ‘institutionalising’ cosmopolitan law in order to bind individual governments: the sanctions applied by the international community must act such as to force its members to observe the laws.

Kant’s theories allow Habermas to suggest the progressive transformation of international law into cosmopolitan law, considering the gradual erosion of national sovereignty and the global stratification of the international society. All in all, for Habermas, the spirit of cosmopolitan law involves directly grasping the position of individual juridical subjects and establishing their (unmediated) belonging to the association of free and equal citizens.

Globalization also influences the capacity of political mechanisms to attract consensus on the fundamental choices affecting the life of a community. The extension of social relations promotes demand for participation which ends up by questioning the very foundations of democratic institutions, not in the sense of abandoning them but in the sense of their subjective enrichment. The traditional political channels traced by democracy are no longer able to meet this demand. ‘Democratic cosmopolitanism’ is a reaction of the global economic competition policy.⁶

Some studies set out to demonstrate the essence of democratic cosmopolitanism as a culture of civil association.⁷ Other studies highlight the role played by politics and law in allowing individuals to exercise their influence beyond the social environment in which they operate.⁸ Through the development of a new political status of universal citizenship, this theory imagines a ‘global democratic order’ established in order to safeguard fundamental rights, in a spirit of ‘cosmopolitan solidarity’.⁹

It has therefore been vigorously sustained that without a «politically robust» cosmopolitan culture and without a global civil society supported by cosmopolitan institutions, one would end up by living in a world «at the mercy of the interests of nation-states and economic markets». Therefore, «democracy has to become a transnational form of governance by breaking with the cultural hegemony of the state» (Stevenson 2002, p. 255). In a ‘multilevel’ cosmopolitan system, cosmopolitan democracy required the creation of institutions that «enable the voice of the individual to be heard irrespective of its local resonance» (Stevenson 2002, p. 256). In this interpretation, democracy promotes the creation of inclusion mechanisms aimed indiscriminately at all those who claim rights, regardless of their citizenship, in a context of extended dialogue.¹⁰

⁶ See Held (1996, p. 224); Patomaki (2003).

⁷ See Falk (1998).

⁸ See Archibugi (2000); Scheuerman (2002).

⁹ Held (1999, p. 84); De Wachter (2006).

¹⁰ See Linklater (1998).

As a matter of fact, democratic cosmopolitanism has also been criticised.¹¹ In fact, it has been pointed out that «Kant's perpetual peace was a project of liberty (because it was a project of security) not democracy» (Urbinati 2003, p. 75).

In addition, the difference with respect to Kant's theory emerges where just a few countries play a predominating role in the diffusion of the democratic ideal. The proposal to 'globalise' parliamentary democracy and political parties themselves does not appear to be supported by convincing elements as regards the capacity of this 'world level' to eliminate the flaws and contradictions that can be found inside states. These flaws include «the problem of how to make elected representatives accountable, how to resist the potential for the development of an elected oligarchy, and the growth of hierarchical structures of consent formation» (Urbinati 2003, p. 84). There is the risk of a paradoxical situation: though encouraging greater participation, the democratic mechanisms can also cause a proliferation of powers which, in fact, lower the chances of real participation (Thompson 1999).

However, cosmopolitanism does not mean universalism. Often, the two concepts are used interchangeably. But they are not. Cosmopolitanism and universalism express very different concepts. 'Universalism' assumes that all belong to one community: the 'world community'. Therefore, international harmonization is viewed as a way of removing the conflict from the conflict-of-laws analysis.¹² In this way, however, there is a risk that the strongest part of the community imposes on the weaker members.

On the contrary, the cosmopolitan approach emphasizes the differences. All converge, *motu proprio*, on shared positions. This is particularly important with regard to fundamental rights, where the solutions imposed from above rarely succeed.

The Cosmopolitan Constitutional Law is an open system, not closed. While emerging from the roots of the Western world, it does not exclude subsequent spontaneous annexations by other legal systems. It is not inconceivable that this process of successive adhesions can lead to an enrichment of the Constitutional Common Core.

The aggregation factor could be the concept of 'human dignity'.

It has become more and more widely accepted that the universal matrix of fundamental rights is the *dignity* of man.¹³ The dignity of man is considered to be the starting point and the ultimate aim of all human societies (Oestreich 1968, p. 149).

The Law gives relevance to human dignity. We only need to think of art. 1 of the German Constitution of 1949: «die Würde des Menschen ist unantastbar» (Häberle 1987). As well as this can be considered the General Declaration of the rights of Man signed in New York in 1948¹⁴ and the art. II-61 of the European Constitutional Treaty (Chalmers 2003).

It is easy to guess the reasons why the recognition of human dignity was fostered from the juridical point of view. It is the reaction to the totalitarian orders that so profoundly lacerated the most intimate nature of man, that exploited human beings for 'higher' interests being responsible for forms of mortification, degradation and abuse of

¹¹ Similar views in Cochran (2002) and Brock (2002).

¹² See Berman (2004, p. 104).

¹³ See, *inter alios*, Dürig (1956); Vitzthum (1985); Gewirth (1992); Perry (1998, p. 5).

¹⁴ Glendon (1998); Rabkin (2003).

power as the manifestation of a deep-rooted contempt for humankind. Above all the *Bundesverfassungsgericht* highlighted the manifold interpretative virtues of the principle of human dignity.¹⁵

The dignity of man itself became a constitutional value (Hanson 2003).

As regards constitutional value, dignity risks, however, being in its turn exploited to satisfy the aspirations of a single part of society: just think of the significance of the religious factor. This is of varied importance depending on the particular historical and cultural context. Understood in this way, human dignity could not carry out the supposed unifying function between constitutional systems.

More generally, human dignity tends to take on very different significance in states governed by liberal principles or Marxist principles, in democratic states or totalitarian states.¹⁶

To ward off this risk it would seem to be preferable to give the term ‘dignity’ another connotation, one which considers the universality of man as a unique being, equipped with a specific personality that shares essential biological traits with humankind permitting him to be distinguished from other living beings (Jackson 2004a).

Dignity is simply that condition of *humanity* in which all individuals belonging to humankind find themselves. Dignity is a commodity that each one of us possesses for the simple fact of being a human being. The respect for dignity implies the safeguard of the most basic right that any man has – to be treated like a *man*, by his own peers – *men* in the social situation in which he finds himself.

In this way human dignity is in harmony with the ideal scheme that lies behind the attempt to build a cosmopolitan constitutional law. The differences between states are reduced to the minimum once again. And the most important thing is indeed the common belonging that all individuals have to the common human being.

It must not be ignored that the theory of cosmopolitan constitutional law originates from the observation of the globalised world, a world in which distances between people (cultural, social, religious, economic) tend to diminish. The global society is a society where human beings live in the real sense of the word and not citizens of one state or another.

5.2. Towards a New Constitutionalism?

The most significant aspect of this study, however, is the identification of the common constitutional court as the source of legitimization of inter-court dialogue, all of which are in harmony with the Enlightenment ideas associated with the French Revolution: the principle of the individual as an end, not a means (with the consequent exploitation of his fundamental rights); the idea of the liberal state; the value of democracy.

In modern times, the cosmopolitan vision theorized by Kant has pervaded some of the most provocative reflections concerning the essence of law and political subjects:

¹⁵ Fletcher (1984). See also Feldman (2000).

¹⁶ See Donnelly (1982).

the Rawlsian ‘Law of Peoples’; the ‘*postnationale Konstellation*’ by Jürgen Habermas; the studies about ‘democratic cosmopolitanism’ as a reaction to the demands of global economic competition.

In its legal framework, cosmopolitanism seems to shorten the distances between national constitutions in order to guarantee a tendential and reasonable uniformity concerning the safeguard of fundamental rights. The theoretical approach followed in this article is a legal approach that can promote interpretations which, being derived from an essential constitutional core common to western states, can give substance to cosmopolitan constitutional law.

In this sense we speak of *cosmopolitan constitutionalism*.¹⁷

Cosmopolitan constitutional law is an answer to legal questions relating to contemporary global change in society. Generally, dialogue between judges in different jurisdictions is placed within a wider process of interaction among states. This interaction is stimulated by globalization: «no one really knows precisely what globalization is, but nearly everyone thinks that it has some effects on domestic constitutional orders» (Tushnet 2003b, p. 142).

Legislatures ‘communicate’, drawing inspiration from the statutes of other parliaments. Executives ‘communicate’ when negotiating and ratifying international treaties. Inter-court dialogue is not the only interaction that can bring states closer together as regards protection of fundamental rights; indeed, the means of communication are numerous and varied.¹⁸

It should not be forgotten, however, that new common rules are often made by supranational economic/commercial organizations (e.g., the World Trade Organization) (Petersmann 2003). In considering globalization, it makes sense to view a system’s openness to outside influences in relation to broader political trends, such that the propagation of constitutional practices and ideas from one country to another is understood to be inevitable.

However, this communication between countries is often undermined by the complexity of the political procedures law must undergo, not to mention the complexity of relations among the governments. Political factors become an obstacle to reach agreement on the enforcement of safeguards for fundamental rights. Indeed, parliaments are slow to make laws; executives are refractory in entering into international treaties.

In the contest of global dialogue constrained by political proceedings, judges can play a surrogate role as a mechanism of global inter-institutional dialogue. By using mechanisms such as judicial review, taken from common law systems, or the evolutionary approach to constitutional interpretation in civil law systems, judges support the development of social relationships, thus trying to satisfy the increasing demand for adequate safeguard of fundamental rights (Garapon – Allard 2005).

This surrogate role for judges may indeed contrast with the role expected of them in their respective constitutional systems. In fact, this role is performed while exalting the potentialities of the basic principles belonging to their respective constitutional systems.

¹⁷ See Habermas (2006).

¹⁸ Gardbaum (2001); Roach (2004); Bateup (2006).

Through inter-court dialogue the potentialities of the common constitutional core are exploited to the utmost. In this way, courts promote the benefits of globalization as regards the protection of fundamental rights and, at the same time, reduce the negative effects of globalization, above all, in relation to the gap between rich and poor. The centrality of economic factors increases the risk that fundamental rights become goods to exchange. Globalization bring peoples nearer each other, thus showing that the safeguard of fundamental rights is not adequately homogeneous across states. Cosmopolitan constitutional law can be an answer to these problems, turning rights into aims to realize and bringing standards of safeguard closer together.

A pervasive inclination to isolationism, to self-sufficiency, and to introverted attitudes on the bench have made the U.S. Supreme Court wary of inter-court dialogue. The reluctance of some justices to incorporate foreign materials into their decisions supports their commitment to limiting opportunities for judicially derived revisions of constitutional meaning; by contrast, justices who see their role somewhat less narrowly are more likely to be open to interpretive solutions inspired by what they have observed of constitutional activity outside the borders of the United States (Kommers – Finn – Jacobsohn 2004, p. 52). This difficulty derives also from the particularly diffuse conception of fundamental rights present in the United States: indeed, this nation has a more categorical conception of constitutional rights than other countries (Gardbaum 2008).

The comparison of states' experiences regarding constitutional rights protection has shown that inter-court dialogue is present in a number of countries.

Sir Basil Markesinis and Jörg Fedtke have classified cases of dialogue.

Inter-court dialogue takes place, for example, when a court has to discover common principles of law; when local law presents a gap, an ambiguity, or is in need of modernization, and when guidance would be welcome; when a problem is encountered in many similar systems and it becomes desirable to have a harmonized response; when foreign experiences help disprove locally expressed fears about the consequences of a particular legal solution; and when foreign experience provides additional evidence that a proposed solution has worked in other systems (Markesinis – Fedtke 2006, p. 109).

The judgments mentioned in this article employed foreign materials not as binding precedent, but only as a source of inspiration. Citations are used as supporting material, or they might contribute to an authentic attempt to take advantage of foreign experience to find the best solution to the problem at hand (Hirschl 2005).

Finally, it is fitting to remark that

cosmopolitan theory begins with the premise that every human being's life is equally valuable, regardless of group or national membership. Cosmopolitanism seeks to enhance attachments and duties to the community of all human beings, regardless of national or local affiliation, and to attenuate attachments and duties to the nation-state, fellow citizens and local culture.¹⁹

¹⁹ Goldsmith (2003, p. 1670). See also Dixon (2008).

The foundations have therefore been laid for the construction of a new constitutionalism based on dialogue among national courts.²⁰

5.3. Conclusion

Today, the dialogue among courts meets the more distrust in the United States (the Scalia's doctrine), being valued only by expressivism supporters. However, even in Europe, where many are in favor of dialogue, debate is still in turmoil. As you know, this debate dates back to the comparison of Josef Kaiser and Hans Nawiasky. The first praised the comparison as a method of interpretation. The second was still tied to the tradition of classical public law, showing some *horror alieni iuris*.²¹

Like other branches of the legal order, including constitutional law, which is law 'placed' (*jus positum*), suffers from the conditioning factors independent historians. The same sovereignty, once a symbol of the sacred power of the state against other states and to the citizens, has significantly changed their characteristics, losing the original substance.

Thus, the constitutional law to 'closed' in constitutional law tends to become 'open'.

This statement may sound out of tune, or even blasphemous, to those who claim the 'singularity' of any constitution. Who is linked to the idea of establishing a state as a reflection of the traditions inherited from the past and rooted in the social consciousness of a particular people, will never accept the idea of a constitutional law that may be open to the influence produced by the experience in other constitutional systems: once again, this is an introverted attitude. However, the reality of peoples and states are moving in a different direction: this fact follows the route traced by globalization. Even the scholar of constitutional law should take note.

It's been a long time since Hegel said that constitutions are peculiar to the people and there is nothing universal (Hegel 1822-1823).

Now, it's not so. In particular, the judicial review of legislation has changed the meaning of constitutional law, as it was originally conceived and created the conditions for the opening of the constitutional law to the experience in other countries. The classical conception of the constitution reached a crisis: it stands in contrast to a more advanced, which rests on several assumptions.

In this regard, according to Zagrebelsky

la concezione materiale dell'incostituzionalità affranca il cuore della Costituzione dalla supremazia legislativa dello Stato; la struttura indeterminata delle norme costituzionali di principio, sulle quali si esercita con più profitto la comparazione, permette connessioni orizzontali (Zagrebelsky 2008, p. 397).

At one time the constitutional law addressed to a particular people, allocated in a given territory. Today, constitutional law is also addressed to foreigners, and the land is

²⁰ See Hirschl (2004).

²¹ Kaiser (1964); Nawiasky (1927). In Italy, Ridola (2006); Cassese (2009); de Vergottini (2010).

no longer the reference point space of sovereignty. The duality of state constitutional law and international law has narrowed, so much so that international law is concerned with fundamental rights.

All this happens in the presence of constitutional principles that are universal because they belong to the shared heritage of mankind: equality, freedom, pluralism, and so on. In these terms, you can think of ‘constitutional globalization’ (Denninger 2004). The sound produced by the crushing of a fundamental right violated in some remote corner of the earth is transmitted in other states: the beat of a butterfly’s wings can cause a hurricane halfway around the world...

We have seen that in many constitutions that are set out in principle by the rules contained extremely vague. The search for the meaning of these standards can facilitate the exchange of interpretations among courts. It is these standards, the ‘passport’ for running firmly rooted interpretive solutions in several countries.

In this climate, the comparison has changed its function. In a constitutional system ‘closed’, the comparison serves to emphasize the identity of a particular constitutional law. In a constitutional system ‘open’, the comparison is stimulating cooperation among countries.²² In turn, this comparison serves to illuminate a common constitutional horizon, at least in its basic outline, to live with unity and plurality.²³

This comparison has been criticized. In particular, it denounced the constitutional right in a fog of vague constitutionalism without borders and without character (Posner 2005, p. 99). In fact, there is no moral avant-garde when it attempted a comparison with the case law of other states. If problems are common, a little modesty can help find better solutions. Prudence helps us to discover their own mistakes: «Comparative law Serves as a mirror. It makes me understand myself better».²⁴

Certainly the dialogue among courts presents significant risks. First, there is a risk that the judgments of the courts is the most ancient and powerful impose on the courts of more recent creation. Therefore there is a risk of a one-way circulation models. Still, there is a risk of misuse of foreign law material (cherry-picking), restored the freedom of selection of the interpreter.

However, these risks can be overcome. Just a healthy dose of prudence (*iurisprudentia*) by the courts.

Reasoning in a broader perspective, the distrust of the cosmopolitan constitutionalism has clear reasons. The constitutional law ‘closed’ is the product of state sovereignty. Sovereignty is guarded by strong states with particular attention. Strong states have no interest in ‘open’ to other experiences as jealous of their political strength. Instead, cosmopolitan constitutionalism look to the weakest: states or individuals. Strong states and more open dialogue act as role models. Guido Calabresi wrote:

²² About a ‘cooperative constitutional state’, see Häberle (1978).

²³ Zagrebelsky (2008, p. 400). See also Ackerman (1997).

²⁴ Barak (2006). See also Goldford (2005).

[Other] countries are our “constitutional offspring” and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.²⁵

Let me be clear. I do not imagine the creation of a constitutional system planetarium. I did not think of Kelsen’s monism of international law. The cosmopolitan constitutional law comes from the same national constitutional systems, which are expressed through their bodies, starting from the courts.

The dialogue among courts change the meaning of the interpretation of the law. In fact, the comparison leads the interpreter to leave the confines of the legal system that is familiar. He enters a different perspective: as an outside observer. This perspective is particularly important in constitutional interpretation, in which the lawyer must distance itself from *wertungen* of individual jurisdictions (Luhmann 1993, pp. 9-37).

On the contrary, critics argue that the dialogue in this way, the lawyer becomes a kind of sociologist, losing their method of legal science.

As we seen, it’s not so. The interpreter is always moving within the frame by the fundamental principles of its constitutional system. It’s just that these principles belong to the common heritage of the West: these principles are the elements of the constitutional common core.

The constitutional common core expands the spectrum of solutions of law interpretation widening the range of experiences to be taken into account.

In this way, the comparison becomes a tool for the construction of the universality of fundamental rights. The comparison becomes the means to achieve an optimum standard of protection of these rights (Häberle 1989).

In conclusion.

Dialogue among courts has been often discussed in recent studies of comparative law.

Many constitutional courts around the world are now engaged in this process. A global community of courts is gradually emerging.

It is now necessary to find a legal basis for this dialogue so that it will not be merely a cultural question. The present study has looked for this basis and found it in the core of constitutional principles common to western constitutional systems. Western countries share the same fundamental constitutional principles. Constitutional systems aim to protect fundamental rights and constitutional principles provide solutions to questions related to the safeguard of fundamental rights. As these principles can be applied in different ways, the solutions found by a particular national court will not always the best ones. So, the inter-court dialogue helps national courts find the best solution. The decisions taken by other courts can suggest different and more adequate solutions, coming from the common constitutional core.

National courts must respect fundamental constitutional principles. The dialogue directed at finding the best solution is based on interpretations of common constitutio-

²⁵ *Concurring opinion*, in *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995). See Parrish (2007).

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nal law. So, this dialogue is not a cultural process; rather, it is a legal process based on respect for fundamental constitutional principles.

The presence of the foreign guest worker – as an actor external to domestic mechanisms of the safeguard of fundamental rights (mechanisms that might be hostile to the influence of constitutional principles elaborated in foreign jurisdictions) – provides a useful occasion for the development of inter-court dialogue.

The foreign guest worker can draw from pertinent arguments to discover a new or better solution deriving from common constitutional law, though the dialogue could develop in spite of the absence of this external element.

The Kantian *ius cosmopolitanum* is the theoretical frame in which the legal basis of the dialogue among courts can be put.

This article has tried to show how Kantian cosmopolitanism, in a context in which there are relations between states and guest citizens, can guide dialogue among courts.

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Dialogo tra le corti. Verso un diritto costituzionale cosmopolitico

Quirino Camerlengo

Italian Abstract

La globalizzazione ha aumentato le occasioni di contatto tra i popoli come mai era accaduto prima. I flussi migratori sono sostenuti e in costante accelerazione. Questo fenomeno ha alimentato conflitti sociali.

Una possibile soluzione potrebbe scaturire dal ‘dialogo’ tra le corti di diversi Stati. Il dialogo tra i giudici ha luogo attraverso la diffusione di interpretazioni costituzionali in tema di diritti fondamentali. Questo dialogo può portare gli Stati a raggiungere un livello uniforme di tutela dei diritti fondamentali.

Per legittimare questo dialogo, si sostiene che gli Stati occidentali siano accomunati da principi costituzionali condivisi. Secondo questa teoria, questi principi sono racchiusi in un ‘comune nucleo costituzionale’, da cui il giudice può attingere per interpretare il testo costituzionale con soluzioni ragionevolmente omogenee.

Lo stimolo al dialogo potrebbe derivare dalla considerazione del cittadino ospite. Egli può infatti chiedere al giudice dello Stato ospitante di adottare le soluzioni più avanzate in termini di interpretazione dei diritti fondamentali.

Ebbene, il risultato di questo dialogo è il ‘diritto costituzionale cosmopolitico’: una nuova sfida per affrontare i problemi della globalizzazione.

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