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# When National Actors Become Transnational: Transjudicial Dialogue between Democracy and Constitutionalism

Maria Rosaria Ferrarese

## **Abstract**

In this paper, after briefly explaining how constitutional dialogue works and has been elaborated for the most part, and the way in which it is encouraged and made possible by some institutional characters of the judiciary, a specific issue will be addressed: the link between the courts' position toward this practice and the different kinds of legitimation that they refer to, democracy or constitutionalism. Legitimacy may be based more on democracy, with the idea that national sovereignty is its almost exclusive source, or on the idea that, in matters of rights, universal standards may or have to pass through different democracies. Of course we usually speak of "constitutional democracies," thereby reconciling the potential opposition between the two aspects. However, globalization, with its challenges to national sovereignty, is strengthening that opposition, and pushing it toward the one or the other aspect. Thus, courts and especially constitutional courts become the place for decision-making on the ambivalence between the risk of de-nationalizing national constitutional law and the opportunity to take part in the creation of new cosmopolitan forms of law and universalization of constitutional protection for fundamental and human rights. Two possible answers to such ambivalence will be highlighted by focusing particularly on the example of two national constitutional courts, that of South Africa and that of the United States, starting from their different attitudes towards involvement in constitutional dialogue. Their different, even opposite ways of approaching transnational dialogue, lead to paradoxical results.

**KEYWORDS:** globalization, transjudicial dialogue, governance, constitutionalism, democracy

## **1. Globalization between feelings of de-nationalization and universalization**

The issue of national actors or scenarios that become global or transnational has been treated in the legal as well as in the sociological literature. Let us begin with two authors that deal with the institutional aspects of globalization: U. Beck and S. Sassen.

Beck has pointed out how the national state produced a “territorial” conception of societies, that was defined by political borders and controlled by states<sup>1</sup>. Global narration entails a sort of “de-territorialization” of the different national societies. In the social experience of globalization, while the territorial identity of society is fading, a new sense of cosmopolitanism is emerging and undermining the traditional national borders.

Similarly, Sassen, referring to “the new geographies of power” created by global changes, stresses the process of “de-nationalization” of the states, whose agendas respond more and more to global ends, especially to the needs of the markets. In this way, states become more and more paradoxical subjects, that act to develop their “capacity to privatize what was heretofore public and to denationalize what was once national authorities and policy agendas”.<sup>2</sup>

The common idea these two authors seem to share is that the global is always embedded somewhere. As a consequence, globalization reshapes the traditional feelings of belonging as well as borders designed by nation-states and creates new mixed forms and confusions between what is national and what is international or transnational. At the same time, behind this common ground, we can note the different stance these authors have toward new tendencies. Beck’s attitude toward cosmopolitanism is very positive, in that he thinks the time for national borders and “territorial societies” is over and states have to take on the challenge for new ideals and institutional settings. Sassen, on the other hand, while recognizing that state participation in global policies “creates an enabling environment not only for global corporate capital but also for those seeking to subject the latter to great accountability and public scrutiny”<sup>3</sup>, seems to underline the different amount of resources and power that can be spent in order to achieve these two different and sometime opposite aims. Especially in the context of today’s financial economy, the trade-off between the two stakes is unequal and can lead economic stakes to prevail over institutional ones.

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<sup>1</sup> Beck, U., *La società cosmopolita. Prospettive dell’epoca post-nazionale*, Il Mulino, Bologna 2003.

<sup>2</sup> Sassen, S., *Territory, Authority, Rights. From Medieval to Global Assemblages*, Princeton University Press, Princeton and Oxford 2006, p. 223.

<sup>3</sup> Sassen, S., “The State and Globalization: Denationalized Participation”, 25 *Michigan Journal of International Law* (2004), p. 1158.

Thus, we can see through these two positions a different way of interpreting the same dynamics and of drawing the line between what is “relative” and what is “universal”<sup>4</sup>. When we speak of de-nationalization, we seem to complain of a past of independence and free political choices for states; on the contrary, when we speak of cosmopolitanism, we convey the idea of sharing a common human destiny in such a way that has never been experienced by humankind in the past. In the former case, what is stressed is a sense of loss, a feeling of “something less”, while in the latter, what is stressed is instead an idea of gain, or reaching “something more”. Through the opposition of these two words and their more or less pessimistic or optimistic semantics we can understand one of the most important tensions or ambivalences affecting globalization.

At the same time, it is important to stress that when we speak of public institutions and their attitudes toward de-localization or universalism, we have to cast their actions within a “transgovernmental” activity<sup>5</sup>, which requires some kind of legitimation. In fact, the two words and their different semantics also convey two different ways of conceiving legitimation. In “de-nationalization” what prevails is a feeling of departure from the traditional conception of legitimacy based on compliance with national laws and constitutions. In Weber’s terms<sup>6</sup>, this legitimacy was founded on a “legal-rational” model, which is centered on legislation. On the other hand, in “universalization” what prevails is a sense of enrichment of the traditional process of legitimation by approaching universalistic standards that are perceived to be at the very heart of any constitutional discourse. Thus, some rationality of law is sacrificed in favor of more uncertain criteria of legal evolution, which is centered on rights.

Following this notion of ambivalence between de-localization and cosmopolitanism/ universalization, we can find a institutional specific practice, common nowadays, known as “constitutional dialogue” or “dialogue among courts”. In the legal debate, expressions such as “constitutional dialogue”, “transjudicial dialogue”, “judicial comity”, and similar ones refer to the current practice of many judges and courts of taking their decisions referring not only to their national constitutional law, but also to opinions, laws and ways of reasoning from foreign or international courts. This is one of the most remarkable legal phenomena of our times and an important way through which judicial actors, even

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<sup>4</sup> Delmas- Marty, M., *Les forces imaginantes du droit. Le relatif et l’universel( I )*, Seuil, Paris 2004.

<sup>5</sup> Keohane, R. O., and Nye, S. Jr. “Transgovernmental Relations and International Organizations”, 27 *World Politics*, (1974).

<sup>6</sup> Weber, M., *Economy and Society: An Outline of Interpretive Sociology*, University of California Press, Berkeley and Los Angeles 1978.

national ones, can play on a global field, contributing to the creation of more shared legal criteria and even the beginnings of a global law.

I will deal with the “constitutional dialogue” with specific reference to national courts, namely constitutional courts, even though it is important to recall that many other judicial bodies are involved in this dialogue: not only the constitutional courts, but also other types of courts, and especially some international courts. An important role is played by the two European Courts, the European Court of Justice (ECJ) as well as the European Court of Human Rights (ECUR), that are closely involved in this dialogue<sup>7</sup>. It is important to stress the role played by the two European courts, in that their role has allowed Europe to take the way of constitutionalism thereby challenging the classical state order built essentially on national sovereignty and legislation. Equally involved in this dialogue are other permanent international tribunals as well as other ad-hoc courts and judicial and quasi-judicial bodies. Moreover, it is important to recall that many other actors in addition to the courts can play an important role in this dialogue: private parties, lawyers, NGOs and the so-called “human rights movement”. Also important in this dialogue are the political and legal doctrines inspiring courts. The role played by judicial doctrines in international legal communication is particularly important in this respect.

In this paper, after briefly explaining how constitutional dialogue works and has been elaborated for the most part, and the way in which it is encouraged and made possible by some institutional characters of the judiciary, a specific issue will be addressed: the link between the courts’ position toward this practice and the different kinds of legitimation that they refer to, democracy or constitutionalism<sup>8</sup>. Legitimacy may be based more on democracy, with the idea that national sovereignty is its almost exclusive source, or on the idea that, in matters of rights, universal standards may or have to pass through different democracies. Of course we usually speak of “constitutional democracies”, thereby reconciling the potential opposition between the two aspects<sup>9</sup>. However, globalization, with its challenges to national sovereignty, is strengthening that opposition, and pushing it toward the one or the other aspect. Thus, courts and especially constitutional courts become the place for decision-making on the

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<sup>7</sup> Bibliography on this subject is immense. With reference to Europe, see, for example, Cartabia, M. (ed), *I diritti in azione. Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Il Mulino, Bologna 2007. As well Martinico, G.-Pollicino, O., “Between Constitutional Tolerance and Judicial Activism: the “Specificity” of European Judicial Law”, *X European Journal of Law Reform* (2008).

<sup>8</sup> See Elster, J. and R. Slagstad (eds.), *Constitutionalism and democracy*, Cambridge University Press 1988.

<sup>9</sup> On the dispute about the relationship between democracy and constitutionalism and its history, see S. Holmes, “Precommitments and the Paradox of Democracy”, in Elster, J. and R. Slagstad (eds.), *Constitutionalism and democracy*, at note 8.

ambivalence between the risk of de-nationalizing national constitutional law and the opportunity to take part in the creation of new cosmopolitan forms of law and universalization of constitutional protection for fundamental and human rights.

Two possible answers to such ambivalence will be highlighted, by focusing particularly on the example of two national constitutional courts, that of South Africa and that of the United States, starting from their different attitudes towards involvement in constitutional dialogue. Their different, even opposite ways of approaching transnational dialogue, lead to paradoxical results. In the South African case, legitimation seems to be pursued through the orientation of the national constitutional Court toward an international view, in an attempt to catch the train of global constitutionalism. In the case of the United States, the Supreme Court appears less open to dialogue and deeply split on the kind of legitimation to be referred to. In the former case, the Republic of South Africa's choice of constitutionalism is not supported by a past of strong democracy. In the latter case, the United States used to the oldest constitutionalism in the world, risks going back from the prevalence of constitutionalism to the prevalence of democracy.

## **2. Constitutional dialogue as a “city of judges and rights”**

“Transjudicial” or “constitutional dialogue” was born as a practice to become a sort of legal doctrine that, in the last decade, has been inspiring more and more courts and judges around the world, particularly when those are dealing with fundamental and human rights. The shift from “practice” to “doctrine” deserves some attention because illustrates a way of constructing legitimation following a path of experience rather than a normative one. More and more often, the idea is that when issues of fundamental or human rights are on the judicial stage, the national or state borders that traditionally divided legal jurisdictions of the world become uncertain or questionable. In a global world, for a better adjudication in matters of rights, judges should assume a new position and look at other constitutional laws or foreign and international judicial opinions. The interplay between national and foreign jurisdictions, as well as the interplay between national and international ones, means a common research for constitutional law, an international elaboration of critical judicial issues that are new for their proportions and that seriously challenge the traditional constitutional engineering and equilibrium of the states, leading toward a “denationalization of constitutional law”<sup>10</sup>.

In human history nothing completely new happens, so the judicial practice of watching outside the borders of national constitutional law is not completely

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<sup>10</sup> de Burca, G.-Gerstenberg, O., “The Denationalization of Constitutional Law”, 47 *Harvard International Law Journal*, 1 (2006).

new, either. Particularly, the United States' Supreme Court has been considered by other countries in the world as a leading "model" because of its "prestige" or its ability to pursue economic results<sup>11</sup>. What is new today is the fact that different ways of communication among courts have become more and more frequent and, more so, that they take the shape of "dialogue", that takes place at an horizontal level without a clear-cut division between those that "export" and those that "import" opinions or legal positions.

Slaughter was the first and most influential scholar to note this phenomenon, and she has significantly contributed to drawing attention to some characters and results of the growing phenomenon of communication among courts and importation of constitutional adjudication from foreign courts. Her work is important in many ways. First of all, it sketches the "new world order"<sup>12</sup>, and places transjudicial dialogue within a dense web of horizontal networks connecting national governments. In this web, judges perceive themselves not exclusively as state actors, but as professionals that "transcend national borders" and can learn from each other's experience and reasoning, referring to a "persuasive" rather than "coercive" authority<sup>13</sup>. Furthermore, she proposes several different kinds of judicial interaction, all contributing to the beginning of a global legal system. The different forms of judicial cooperation demonstrate a crisis of the traditional ways of organizing legal sources following purely hierarchical criteria, which were typical of national jurisdictions. At the same time, the ongoing dialogue allows judges to have a common field of socialization around the idea that judicial independence and professional integrity are more important than issues of jurisdictions and national borders.

This approach to judicial dialogue has been called "sociologic/jurisprudential" by Cesare Romano, in that it imbues the informal aspects of judicial comity with a "grassroots and bottom up" position<sup>14</sup>. Thus, judicial dialogue appears as one of the many expressions of the so-called "flat world" described by Thomas Friedman<sup>15</sup>. Its "horizontal" character seems to

<sup>11</sup> North, D.C., *Institutions, Institutional Change, and Economic Performance*, Cambridge University Press, Cambridge 1990.

<sup>12</sup> Slaughter, A.M., *A New World Order*, Princeton University Press, Princeton 2004.

<sup>13</sup> Slaughter, A. M., "A Global Community of Courts", 44 *Harvard International Law Journal*, (2003).

<sup>14</sup> Romano, C.P.R., "From the Consensual to the Compulsory Paradigm in the International Adjudication: Elements for a Theory of Consent", *New York University Public Law and Legal Theory Working Papers*, 2006, <http://lsr.nellco.org/nyu/plltwp/papers/20>. The problem of normative aspects in the dialogue is at the heart of C. A. Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue", *New York University Public Law and Legal Theory Working Paper* 11/2005, in <http://lsr.nellco.org/nyu/plltwp/papers/11>

<sup>15</sup> Friedman, T. L., *The World is Flat: A Brief History of the Twenty-First Century*, Farrar, Straus & Giroux, 2005.

challenge at once hierarchical and hegemonic criteria that were once prominent in states as well as in the relations among states.

Other scholars, however, don't agree so much on the horizontality and, while highlighting some positive potentials that the dialogue can have for building a global law, stress some risks, especially those of an Americanization of the world, which can circulate through transjudicial dialogue. Delmas-Marty, for example, is sensitive to this risk; at the same time, she sees in the dialogue a "pluralistic way" to approach global judicial standards. She speaks of "mondialisation" as well as of "internationalisation des juges nationaux"<sup>16</sup>, remarking how the multiplication of international courts challenges the classic organization of powers by introducing the concept of transnational and supranational justice in a world that was tailored to the centrality of international law<sup>17</sup>. Cassese as well underlines the potential that courts can have for connecting a still divided legal world, and the role that also no-state judges can play for developing the constitutional discourse<sup>18</sup>.

As we shall see later, transjudicial dialogue also raises many new questions and conflicts, so that one can question the overly optimistic image of dialogical communication among peers. The dialogue seen as a new, flat "playing field" for different national and international courts and judges can be and has been deemed in different ways. Different evaluations can emerge from the tendency to watch it from the side of a de-nationalizing practice or from the side of a universalizing practice. Because of the many shadows that can blur the idyllic picture, it might be useful to speak of the dialogue as one of the important components of the today's "constitutional frontier"<sup>19</sup>. The constitutional frontier, like the "American frontier" described by Turner<sup>20</sup> proceeds along a moving and indented line, with some parts taking a step forward while others lag behind. Along these irregular movements, we can also place some different and even contrasting attitudes about the constitutional dialogue, that can be motivated by different reasons, and that can lead to different results and achievement in matters of rights as well.

Rights are a critical issue in a global world and on this subject the globe is strongly divided not only along West/East lines, as demonstrated by the debate

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<sup>16</sup> Delmas-Marty, M. *Les forces imaginantes du droit (III) La réfondation des pouvoirs*, Seuil, Paris 2007, p. 42.

<sup>17</sup> Delmas-Marty, M. *Les forces imaginantes du droit (II), Le pluralisme ordonné*, Seuil, Paris 2006. Delmas-Marty, 2007: 55.

<sup>18</sup> Cassese, S., "La funzione costituzionale dei giudici non statali. Dallo spazio giuridico globale all'ordine giuridico globale", *Rivista trimestrale di diritto pubblico*, 3/2007.

<sup>19</sup> Ferrarese, M.R. "Hormones and Democracy. Inclusion, no <Exit-Option> and Some <Voice>: <Democratic> Signals in International Law?", 6 *Global Jurist Topics* (2006), [www.bepress.com](http://www.bepress.com).

<sup>20</sup> Turner, F. J., *The Frontier in American History*, Yale University Press, New Haven 1920. Watson, A., *Society and Legal Change*, Scottish Academic Press, Edimburgh 1977.

about “Asian values”, but also along much more complicated paths and “frontiers”. Notably, with the death penalty, for example, there are more convergences between America and Asia, than between America and Europe, and United States continues the legal practice of “killing in good conscience”<sup>21</sup>.

The image of the frontier can also be useful because it conveys the idea of the dynamic character of constitutional discourse, as well as the idea of the “winners” and “losers” that come from its moving line and the cooperation or competition among different courts. Traditionally, in matters of dialogue, the US Supreme Court has long been the most important model for other courts in the world because of its rich history of practice and elaboration of rights. Today, although still quite influential, the Court is losing some of its traditional prestige and position. On the other hand, Canada’s Supreme Court, especially after the Canadian Charter of Rights and Freedoms of 1982, has attained an important position in this dialogue, in that it is at the same time open to other constitutional voices, and also of significantly influence on other courts throughout the world<sup>22</sup>.

I will touch on some of the more problematic aspects and dividing lines that blur this idyllic picture of dialogue later. In particular, I will focus on the issue of power and wealth differences affecting the countries participating in transjudicial dialogue. At the same time, dividing lines can also be found inside any single court on many subjects. For now, let us posit an ideal city, in which the only protagonists are the judges struggling on issues of rights: a sort of “city of judges and rights”, that has its own space, its own laws, different from those of other legal institutions. In this ideal, fictional judiciary city, where judges are the only inhabitants, and rights the central issue, there is a particular regime of transnational communication and a shared search for universal standards.

Hence, “judicial dialogue” lies on legal terrain that has been deeply changed by globalization. On this terrain, judges and courts have become more and more important<sup>23</sup>, in a process of growing jurisdictional relations between national and international courts<sup>24</sup>. This tendency is clear on the national, as well as international scene and a great deal of literature had been devoted to shed light on it.

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<sup>21</sup> Blumenson, E., “Killing in Good Conscience”, *Suffolk University Law School Faculty Publications*, 2006, <http://lsr.nellco.org/suffolkfp/papers/27>.

<sup>22</sup> Groppi, T. “A User-friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies”, 36 *The Supreme Court Law Review*, Second series (2007).

<sup>23</sup> Tate, C.N.- Vallinder, T. (eds.), *The Global Expansion of Judicial Power*, New York University Press, New York 1995.

<sup>24</sup> Shany, Y., *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press, Oxford 2003, and Id., *Regulating Jurisdictional Relations Between National and International Courts*, Oxford University Press, Oxford 2007.

The important role played by judges and courts can be summarized in two different yet closely linked aspects: 1) the growing number of courts, especially international ones, such that we can speak of judicial actors as “ubiquitous” subjects in the global world; 2) the growing process of judicialization of law, that is the important role played by courts in establishing what law is and enforcing it. We could say that the global world has become a sort of immense judge-made-law world, where law consists not so much of statutes and other forms of written laws, but rather of judicial or quasi-judicial decisions.

In the current discussion we will not investigate in depth why this change in favor of courts occurred. Rather, we can only briefly refer to the two main reasons for it. One reason is in the growing problems that traditional democratic techniques of public decision-making are facing both inside and outside states. Especially in the international context created by globalization we can recall the question raised by Roseneau: “Can new global orders be created through political will and imagination, or is their emergence more the result of dynamic technologies, altered socioeconomic conditions, and transformed psychological perspectives that lie beyond human control?”<sup>25</sup>. Of course, there are no definite answers to this question, but its insight tells us that something is changing in the way of public decision-making. Using Damaska’s terms, we could say that the interactive dynamics at the heart of global order requires governmental techniques tailored more to a “reactive” character than an “active one”<sup>26</sup>. Courts have a typically “reactive” character, so that they act when they are asked to act, providing specific answers to specific questions.

On the other hand, a second reason is to be found in the deep constitutional changes in the world during the last decades. The creation of many new constitutions and bills of rights, even in cultures and territories that were not used to them, as well as the idea that a good standard of democracy requires majority rules to be balanced by rights and constitutional guarantees in favor of individuals and groups, has increased the importance of judges and courts. This change means not only more chances for rights, but also a sensitive power-gain for judges as a professional elite vis-à-vis other democratic decision-making bodies<sup>27</sup>. Constitutionalism as a “booming industry”, needs to be inquired from many sides and constitutional reform is an arena in which many power struggles

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<sup>25</sup> Roseneau, J. N., “Governance, order, and change in world politics”, in J.N. Rosenau-E.O. Czempel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge University Press, 1992, p. 19.

<sup>26</sup> Damaska, M. R., *The Faces of Justice and State Authority*, New Haven, Yale University Press, New Haven 1986.

<sup>27</sup> Hirschl, R., “The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions”, 25 *Law and Social Inquiry*, 2000. On the judiciary as an interest-group, Landes, W. - Posner, R., “The Independent Judiciary in an Interest-Group Perspective”, 18 *Journal of Law and Economics* (1975).

can occur. These power struggles can involve the different elites in the country as well as aspects of wealth distribution or redistribution. A constitutional reform can also appear as an example of “plunder” following a vicious “rule of law”<sup>28</sup>.

As admirably demonstrated by Elster in his work on constitutional assemblies, these may always use instrumentally language of “arguments”, that is moral discourse, while concealing “interests” and rent-seeking attitudes<sup>29</sup>. At the same time, this “hypocrisy” can play a positive role, in that it obliges at least partially words and rules to be followed and enforced, especially the ones that have been pronounced in a Constitutional Assembly or written in a constitutional text. Elster, citing La Rochefoucauld, recalls that this is the price that hypocrisy has to pay to virtue.

Furthermore, constitutions and constitutional courts, once established, can continue their life more independently from the intentions of the authors of a constitutional text or reforms. Not by chance, the working of new constitutional courts, e.g. in many former communist countries<sup>30</sup>, proves that even when they have been created for legitimating political bodies, work in a way that makes their role credible. Moreover, transjudicial dialogue, while casting the “new” constitutional courts in an international environment, may encourage their working independently from the intentions of local actors and interests.

### **3. Dialogue, institutional qualities of courts and judicial governance**

After visiting the “city of rights and judges”, it is important to better understand what kind of institutional actors judges and courts are, and why they are so successful on the institutional stage of the global world. Courts appear to be the most globalized legal institutions: more than Parliaments and Executives bodies, they have a position to match the legal style and needs of the global world. We could speak of an overwhelming “success” of these institutional actors on the global scene vis-à-vis other institutional state actors<sup>31</sup>. However, in order to understand how this success has been made possible, the general picture of the judicialization of law needs to be integrated with some analysis of courts as institutional actors. We can briefly focus our attention on three main institutional aspects that seem to allow courts to satisfy quite well the legal needs of the global

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<sup>28</sup> Mattei, U.- Nader, L., *Plunder. When the Rule of Law is Illegal*, Blackwell Publishing, Malden, Mass., 2008.

<sup>29</sup> Elster, J., *Arguing and Bargaining in Two Constituent Assemblies*, Storrs Lectures, Yale University Press, New Haven 1993.

<sup>30</sup> Maveety, N.,- Grosskopf, A., “<Constrained> Constitutional Courts as Conduits for Democratic Consolidation”, 38 *Law and Society Review* ( 2004).

<sup>31</sup> Ferrarese, M.R. *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale*, Laterza, Roma-Bari 2006.

world. All these aspects are deeply entwined with the expansion of transjudicial dialogue, making it possible and changing in some parts the frame of legitimacy of the global world. At the same time, each of these three aspects is emphasized by dialogue.

A) First of all, judicial institutions are not centralized institutions, like Parliaments, but are multiple, spread around the territory and can be located in different seats and positions. Moreover, courts can be modeled in different forms (national, as well as international, supranational or even transnational), for different ends (for general means, as in the case of constitutional courts or in the case of ICC, or for special means, as in the case of ad-hoc tribunals such as the International Criminal Tribunal for Yugoslavia), and with different characters (for instance, as public institutions or private ones), and so on.

Due to their de-centralized character, courts have been multiplied on the international scene, following needs of general justice as well as specific needs that are related to special issues, territories or stories. Moreover, there has been not only a blossoming of international courts, but also a phenomenon of multiple imitations of the judicial model through so-called “quasi-judicial bodies”: these include many kinds of judicial settlements, more or less of private character, such as in the case of arbitral bodies or other kinds of Panels within international organizations.

Given the great variety of judicial forms that can replicate the court’s model, these institutions are able to satisfy quite well today’s legal needs, which rely not so much on overly centralized institutional seats, but rather on institutions capable of providing plural and differentiated answers to different situations and demands.

B) Let me now briefly refer to a second institutional quality of judicial courts, that is their ability to make law with an incremental style. This happens particularly in a common law context, where law is not so centralized through legislation and legal elaboration stays in a circle controlled by judges and other actors interacting with them. In fact, the legal context of globalization is very similar to a common law context, where law is essentially judge-made and each judicial opinion is a piece of a complex web that cannot be pre-planned and completely foreseen. Moreover, each judicial decision-making, even those of constitutional courts, can be totally or partially changed, corrected, integrated, justified in different ways: winners and losers of today are not the same as tomorrow and on the same issue different defendants and plaintiffs can have different answers in different trials. That is why in a global context there are so many jurisdictional overlaps. This means that the same international dispute between the same parties and on the same issue can be addressed to different

courts<sup>32</sup>. This is due to the decentralized nature of the international community as well as to the hopes or attempts to find its own “Judge in Berlin” somewhere else.

C) Let me now turn to a third interesting institutional quality of judicial actors, that is their connecting ability, or their capability to create links between opposite dimensions. This is important in at least three respects. a) First of all, judicial answers can link the private dimension of interests with the public dimension of justice, thus allowing institutional answers that, while being tailored to specific cases and interests, are justifiable in moral terms: that is, according to Elster’s terminology, a reconciliation between the language of “bargaining”, based on interests, and the language of “arguments”, which requires solutions that may appear fair and “justifiable” in terms of ideal conceptions and visions of justice<sup>33</sup>. b) Secondly, judicial law-making can link the particular and concrete side of the cases under examination with the more general and abstract side, that has to be guaranteed in the opinion, so that it can be seen as a “precedent” to be recalled in following cases. c) Thirdly, judicial law-making can link the two sides of justice that have both become very important nowadays: the “local” and the global dimension. This latter aspect has become more and more important in a global time when the local as well as the global character of justice are both highly required as being able to integrate one other. We could even say that judicial institutions have become intrinsically “glocal”, in Robertson’s terms<sup>34</sup>, because they keep together the criteria of global justice with the specific contextual aspects of the case under examination.

If we look at courts from the perspective of the three illustrated aspects, we can understand that they are successful because of their ability to be flexible and to give plural and differentiated answers to different situations and demands. They can move as well in the space between what is national and what is global. Flexibility as a quality for institutions could appear to be in sharp contrast with the expectations of formalism that are typical of the European institutional tradition. As well known, legal formalism was postulated by Weber as an essential premise for the modern world and as a guarantee for economic “predictability” and the development of capitalism<sup>35</sup>. Rather, the flexible form of a legal system, such as the common law one, has proved a match for the legal needs of capitalistic expansion<sup>36</sup>. Moreover, the institutional changes of global

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<sup>32</sup> See Shany, Y. *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press, Oxford 2003.

<sup>33</sup> See Elster, at note 26.

<sup>34</sup> Robertson, R., *Globalization: Social Theory and Global Culture*, Sage, Thousand Oax, Calif., 1992.

<sup>35</sup> See Weber at note 6.

<sup>36</sup> Ferrarese, M.R., “An Entrepreneurial Conception of the Law? The American Model through Italian Eyes”, in D. Nelken (ed.), *Comparing Legal Cultures*, Dartmouth 1997.

world seem to prove that expectations of legal formalism are inadequate for the global world<sup>37</sup>.

We could even say that the hitherto recalled typical characters of courts contribute to composing an image of them as the best institutions for “governance”. They meet very well the typical criteria of governance, that is the vicarious way for government, due to the shortage of classical ingredients of democratic government, first of all, representation<sup>38</sup>. As noted by Stone-Sweet, “mode of governance” means “the social mechanism by which the rules in place in any given community are adapted to the experiences and exigencies of those who live under them”<sup>39</sup>. Thus, when considering the process of rule-making, we can find two core elements to characterize governance as different from government. On the one hand, the partial overlapping between those who rule and those who are ruled instead of clear-cut separation; on the other, a private component as part of the process of rule-making interacting with the public one.

It should be noted that judicial state settlements as designed in the classical European state can appear at odds with governance: Montesquieu’s well-known depiction of judges as a “mouth” that simply pronounces the words of statutes signals a clear plan to fighting against any hypothesis of “government by judges”. But this image, if ever true in the past, is hardly apt to describe the situation nowadays, where courts have gained so much power vis-à-vis political bodies and often can more or less evade any relationship with them.

Today more than in the past courts respond to the typical form of “triadic governance”. This means that their adjudication, however public, carries traces of private components that contribute considerably to the final decision-making<sup>40</sup>. One can consider the role played by lawyers, as well as by experts and witnesses in a trial. The private components are important even more due to the fact that issues to be discussed and decided are chosen by privates and thematized by their lawyers and legal experts. Especially in international, supranational and transnational courts, because of the shortage of legislative resources, governance dynamics increases so that frequently courts become a place for creating rules. In the European constitutional field, one can speak of “a multi-tiered system of

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<sup>37</sup> Ferrarese, M.R., *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Il Mulino, Bologna 2000.

<sup>38</sup> Lanchester, F., “Representation in the Political Field and the Problems of Supra-National Integration and Globalization”, *Paper presented at the International Conference on “State and Democracy”* at the Faculty of Political Sciences, Belgrade, nov. 28-29, 2008.

<sup>39</sup> Stone-Sweet, A., “Judicialization and the Construction of Governance”, in Shapiro, M.-Stone-Sweet, A., *On Law, Politics & Judicialization*, Oxford University Press, Oxford 2002, p. 55.

<sup>40</sup> Shapiro, M., “Administrative Law Unbounded: Reflections on Government and Governance”, 8 *Indiana Journal of Legal Global Studies* 8 (2001).

governance founded on higher-law constitutionalism”<sup>41</sup> where the constitutionalization process has been driven mostly by private parties litigating for their rights.

Therefore, if a court is “a microcosm of governance”, this also refers to the importance of private aspects affecting the adjudication. Judicialization of law implies a certain openness of law to private interests and pressure. Not by chance, corporations in the global world play out their economic games in the judicial or quasi-judicial fora too. As noticed by Delmas-Marty, in the WTO the only true form of power is exercised by judicial bodies<sup>42</sup>. Of course judicial settlement in WTO or other economic international organization do not convey any promise to be a Trojan horse for today’s constitutionalism, but still every judicial body can contain some space for “arguments” and some chance of going out of the economic “WTO fortress” towards true judicial standards and ethics<sup>43</sup>.

All the specific institutional characters of judicial actors seem very important to explain the central role played by courts in the legal global world and their winning position in the job of global law-making. These institutional qualities make the conditions possible for a dialogue among courts that would be much more difficult among other institutional actors.

At the same time, courts involved in the dialogue have an important role in the legitimation process and its transformations. Thanks to these institutional qualities, courts, while answering the demands of justice, sometimes against the states, are changing the job of legal legitimation in the global world. Legitimacy produced by traditional democratic mechanisms in the states cannot cover other forms of law that lie beyond international law: at the supranational and especially at the transnational level there are no mechanisms or procedures to provide legitimacy in a purely democratic way. International law, that in the past was made to be administered under the strict control of sovereign states is more and more often crisscrossed by transnational positions: because of the international organizations and many other actors acting on its stage (NGOs, experts, bureaucracies, corporations, other kind of private subjects etc.), it works in ways that are not so tightly controlled only by states and can appear “global”<sup>44</sup>. Furthermore, courts, that have conquered such a central position, are also

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<sup>41</sup> Stone-Sweet, A.-Brunell, T., “The European Court and Integration”, in Shapiro, M.-Stone-Sweet, A., *On Law, Politics & Judicialization*, Oxford University Press, Oxford 2002, p. 263.

<sup>42</sup> Delmas-Marty, M. *Les forces imaginantes du droit (III) La refondation des pouvoirs*, Seuil, Paris 2007, p.78.

<sup>43</sup> Ferrarese, M.R. “Hormones and Democracy. Inclusion, no <Exit-Option> and Some <Voice>: <Democratic> Signals in International Law?”, 6 *Global Jurist Topics* (2006), [www.bepress.com](http://www.bepress.com).

<sup>44</sup> On this aspect see the many contributions in B.Kingsbury-N.Krisch-R.B.Stewart-J.N.Wiener (eds.), “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems*, (2005). See as well S. Cassese, *Oltre lo stato*, Laterza, Roma-Bari 2006.

contributing to move the basis of international law's legitimacy from democracy towards constitutionalism<sup>45</sup>.

#### **4. Judicial dialogue and dividing lines**

As stated above, the quiet image of a totally horizontal dialogue that happens in the "city of rights and judges" shows only one side of the story. The division between rich and developed countries and poor and undeveloped countries can cast some doubts on the claim of the "horizontal" character of the dialogue and many dividing lines can be drawn on the subject, as well as many questions and critical points. First of all, nowadays criticism against dialogue can be seen as a new expression of the ancient fear of the "Government by judges". Those who mention this aspect stress the shortage of legitimacy that comes from judicial governance. This can be the case especially of Europe, where some are afraid of a constitutionalism that is like "new cloths without an emperor" that can wear them<sup>46</sup>, and many complain about a serious "democracy deficit", and others find that this problem can have its own solutions<sup>47</sup> and that stronger constitutionalism was a necessary step as well. In any case, the law-making of the European Court of Justice has been an important path for judicial "governance" and constitutionalism in Europe<sup>48</sup>.

A central critical issue is that of the unequal position of the different countries involved in the dialogue. Countries can be unequal in many ways: power, wealth, and "institutional capital". As stated above, the horizontal dimension of dialogue, that would imply the crisis of traditional hegemony held by western countries vis-à-vis other countries, can be objected first of all by authors who see the "rule of law rhetoric" as a means "to pave the way for international corporate domination"<sup>49</sup>. Following the route of the new "Law and Development" movement<sup>50</sup>, a critical appraisal can be formulated on the dialogue

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<sup>45</sup> See the special issue of 6 *International Journal of Constitutional Law* (2008) entirely on "Constitutionalism in an era of globalization and privatization" (2008).

<sup>46</sup> J. H. H. Weiler, *The Constitution of Europe. Do the New Cloths Have an Emperor?*, Cambridge University Press, Cambridge 1999.

<sup>47</sup> Cassese, S., *Is there really a "democratic deficit"?*, Europeos, Institutional Reforms in the European Union- Memorandum for the Convention, Europeos, Rome 2002.

<sup>48</sup> Joerges, C-Petersmann, E. U., (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Hart Publishing, Oxford and Portland, Ore., 2006.

<sup>49</sup> Mattei, U.- Nader, L., Plunder. *When the Rule of Law is Illegal*, Blackwell Publishing, Malden, Mass., 2008, p.17.

<sup>50</sup> Santos, A.- Trubek, D.M., *The New Law and Economic Development: A Critical Appraisal*, Cambridge University Press, Cambridge and New York 2004 o 2006? See as well Nader, L. "Promise or Plunder? A Past and Future Look at Law and Development", 7 "Global Jurist Frontiers", (2007) and L. G. Pes, "Diritto e sviluppo neoliberale: il dibattito sul *new law and development*", XXXVIII *Politica del diritto*, n.4/2007.

as well, as one of the many ways through which Western standards and patterns are successful and cancel traditional models of justice in many non-Western countries. From this point of view, countries have to defend themselves from the hegemony of American Imperialism<sup>51</sup> and especially “troubled societies” have to be careful in taking foreign standards of justice, that can hide an ugly political reality under the rhetoric of human rights<sup>52</sup>.

All these warnings are important and deserve consideration. Globalization processes, however, entail new possibilities for exchanges and communication among peoples and countries that are not unilateral. In any case, the “hypocrisy” of institutional language, especially of the constitutional one, deserves consideration because it can challenge the risks of hegemony and prepare unexpected results.

Let us turn to the issue of dialogue taking into account some specific variables in terms of inequality. In order to explore the problem of the unequal status of different countries in transjudicial dialogue, one can refer to different aspects: economic development, democratic standards, as well as constitutional standards.

Once, these differences could have been expected to go together, particularly political and institutional standards would have been expected to be similar to the step of economic development, following a more or less regular sequence. However, everyone knows that today this overlapping between economic, democratic and constitutional standards has disappeared: i.e. national wealth is not necessarily a guarantee for democratic and constitutional achievements. The case of China makes it evident that in the global world economic development and institutional development do not always overlap.

On the other hand, institutions for democracy and constitutionalism, more or less intertwined, can proceed as well each on their own. It is worthwhile paying some attention especially to the relationship between democracy and constitutionalism, in that they are linked and interdependent, but also in reciprocal tension, each of them in fact recalling a different basis for legitimacy. If in the American case constitutionalism rose very soon as a special national character and it was precisely the fear of political majorities to create advocates of constitutionalism, the situation was quite different in continental Europe, where constitutionalism for the most part has been the result of a process of balancing democracy intended exclusively as “majority rule”.

The cases of the United States and France can be seen as the two typical examples in which the mix between democracy and constitutionalism is

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<sup>51</sup> Mattei, U., “A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance”, 4 *Indiana Journal of Global Legal Studies*, (2003).

<sup>52</sup> Mattei, U., “Foreign Inspired Courts as Agencies of Peace in Troubled Societies. A Plea for Realism and for Creativity”, 2 *Global Jurist Topics*, (2002).

unbalanced toward one side or the other<sup>53</sup>. The different mixes are the result of different constitutional designs and institutional achievements. Of course, constitutional courts are important actors for moving the frontier between democracy and constitutionalism. The case of “judicial review”, one of the landmarks of American constitutionalism, established back in 1803, is very clear on the subject: this rule, which allows every judge in the United States to be a potential censor of statutes in his/her trials, was established by the Marshall Court in 1803, but never written in the American Constitution. On the other hand, France has never had a Constitutional Court as a Court to be addressed for litigating the constitutional legitimacy of statutes: the French Conseil Constitutionnel has only an *ex ante* jurisdiction and its decisions to squash a statute can happen only within a month following a political body’s decision.

In all likelihood, because constitutionalism evolved later than democracy, it can be seen as the more inclusive between the two standards: where a constitutional court has been established and works effectively, one could, in principle, expect a decent democratic standard as well. The opposite is not always true because a democracy which is too strong can shrink constitutional protections for people and minorities<sup>54</sup>. Hence, the way in which constitutional courts are planned and enforced is very important, and the effectiveness of their action is equally important. We can consider both these aspects as essential ingredients of what could be labeled as the “constitutional capital” of each country. In the past the most important ingredients for it were a (written) constitution and an effective role played by the constitutional court. We can consider the difference between countries with a rich “constitutional capital”, with a long constitutional history and an established constitutional court, and countries with a poor “constitutional capital”, with a recent written constitution and no institutional tradition of enforcing the rule of law and individual rights.

In principle, one can expect that the different “constitutional capital” does matter and is very important for the institutional development of countries, so that they make some countries able to play in a privileged position vis-à-vis other countries or courts with a poor “constitutional capital”. We can ask if transjudicial dialogue contributes to changing the established constitutional capital of each country, also moving it towards a new balance between democracy and constitutionalism. This is something new: transjudicial dialogue can play a role in moving or changing the previous constitutional capital, as well as in moving the frontier between democracy and constitutionalism. Constitutional courts can act differently on this issue and assume different positions on the enlargement of

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<sup>53</sup> Pasquino, P., “European Constitutional Courts and USSC: Some Differences”, Berkeley Papers 2007.

<sup>54</sup> De Witte, B., “I diritti europei delle minoranze” in Cartabia, at note 7.

communications and exchanges with different constitutional tradition and adjudication.

As already stated, I will attempt to illustrate this aspect by focusing on the example of two countries that can be put at odds in terms of their constitutional pedigree: the United States and the Republic of South Africa. The former has the longest constitutional history and the richest institutional setting to enforce rights, while the latter has only had recent access to the “city of judges and rights”, and is emerging from a history of abominable racism and denial of any constitutional protection for a large part of its citizens. The differing constitutional pedigree between the two countries is even more striking because it overlaps quite well the so-called “big divide” between rich developed countries and poor underdeveloped countries. Even though the United States is declining in some respects, so that one can expect a “post American world”<sup>55</sup> and South Africa has positioned itself as one of the leading countries of the African continent, with the best economic results, these two countries can still be representative of the two sides of the great divide.

I will maintain the economic image of the “great divide” in order to investigate how in the transjudicial dialogue the constitutional capital of some countries can be moved in ways that recall the so-called “newcomer” countries in economic development as compared to developed countries. As is well known, in economic jargon the term “newcomers” entails not only the idea of recent access to economic development, but also something more: a sort of advantaged position, in that these countries can start without replicating the same economic steps and investments made by other countries. Therefore, they can sometimes directly join and enjoy the latest findings of research and infrastructure investments without bearing the brunt of costs. Newcomer countries in economic development, that, for instance, in the past have had very poor telephone infrastructures can now directly enter into the mobile-phone phase, which does not require as significant investment as in the past. Similarly, we can consider the interplay among the different constitutional advancements obtained by different countries: dialogue among courts creates a situation in which newcomer courts need not retrace the same path as along the older constitutional traditions: courts enact an institutional interplay, that can work and be influential in different ways creating unexpected results even with reference to the balance between democracy and constitutionalism. And this balance can be particularly important in new democracies, where the power of local leaders sometimes has the tendency to be unbalanced.

Usually newcomer countries can be expected to imitate more or less consistently the most consolidated constitutional documents and positions. Today

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<sup>55</sup> Zakaria, F., *The Post-American World*, W.W. Norton & Company, New York 2008.

especially, the well known phenomenon of “legal transplant”<sup>56</sup> can find one of the most important ways of “constitutional cross-fertilization” in the constitutional field. However, what happens through constitutional dialogue is a special kind of legal transplant. When we speak of legal transplant we are normally referring to the inclusion of a part of another legal system within a legal system: this part can be a statute-law, a single legal provision, a constitutional draft, and so on. Of course, transplants have been throughout history and, as above mentioned, particularly in the last century the American model of Constitution has been an example to many other countries, and this model has been “transplanted” especially to some South American countries. This was a special case of legal transplant, referring to constitutional design rather than statutes or pieces of legislation.

In constitutional dialogue we can see a “cross fertilization” that happens not so much through constitutional “transplants” – that is imported constitutional legislation – but rather through much lighter forms of importation. This is something similar to “legal grafts”, made with reference to specific issues, and following the style of judicial law that, as said before, is de-centralized, incremental, and both connected to and responding to a governance pattern.

## **5. The South African case: directly to constitutionalism**

If we consider countries that have recently undertaken a constitutional path as “newcomers”, the case of South Africa is a remarkable one: a country that has passed directly from the ugly regime of apartheid into the modern world with its very recent process of constitutionalization, celebrated for its important innovatory aspects. Thus, today in South Africa paradoxically we can find not only a great involvement of the constitutional court in transjudicial dialogue, but also a most modern “model” of constitutional text with reference to this subject. It would be interesting to briefly highlight some of the aspects of this experience of constitutional transition. First of all, we should note an interesting new experience of scripture of a constitutional text, with very special characteristics of openness. Secondly, we can also note a complex institutional setting, which allows for the appropriate social conditions for the best working of democratic and constitutional life. Let me briefly illustrate these two aspects.

After the end of apartheid, before writing the new constitution, it was necessary for South Africa to heal the many wounds of the past, most importantly the conflict between victims and responsible for the racial experience. In a country that had known a strong racial divide with many lines of fragmentation and conflict, the creation of a post-apartheid constitution required reconstructing

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<sup>56</sup> Watson, A., *Society and Legal Change*, Scottish Academic Press, Edimburgh 1977.

the social fabric on a new basis of peace and shared consent<sup>57</sup>. To this end, the South African Truth and Reconciliation Commission (TRC), a supplementary constitutional instrument, created by the interim Constitution in 1993, had the task to judge the crimes committed during the apartheid regime (between 1960 and 1977). The task of this Commission was aimed not so much to revenge, sentence and punishment, but rather to peace and reconciliation: thus it had the power to grant amnesty in case of confession and admission of one's responsibility.

Everyone can see in this task a break in the judicial ratio, a sort of "suspension" of the justice criteria to further the more important aim of "reconstructing the social body"<sup>58</sup>. In addition, a particular means of "transitional justice" can be seen in this position, which usually implies some deviation from the typical justice standards and criteria. As noted by Elster, the choice "between truth and justice" in the South African version was pushed toward justice more than usual, in that the Commission worked for the reconstruction of the names of criminals and their crimes, however giving up their punishment<sup>59</sup>.

We could also say that transitional justice is aimed at limiting the action of the building state towards the past, so that it can be created without burden and be addressed to the typical tasks of a modern state. It is also important to note in this experiment of transitional justice some signs of the African stance to obtain social peace and solve conflicts through ways, that cannot be reduced to binary criteria, such as legal/illegal, that are typical of the Western conception and procedure of justice.

The second and most celebrated aspect of the new South African Constitutional path is the Constitution of 1996: the first constitutional text explicitly including the possibility for the Constitutional Judges to refer to judicial opinions or constitutional laws of foreign states in their constructive process. In this way, the South African Constitution is the first state Constitution allowing constitutional judges to be engaged in the transjudicial dialogue on the basis of a constitutional rule and no longer on the basis of their personal options. Thanks to this rule, the South Africans, "newcomers" to the city of judges and rights, can afford to match the transjudicial dialogue at a "legislative" level (that is, through a constitutional provision), bypassing the layer of judicial choice with no reference in the written Constitution.

This rule can also be seen as the most striking proof of a new states' position towards institutional "extroversion" instead of toward institutional

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<sup>57</sup> Gross, A. M. "The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel", 40 *Stanford Journal of International Law*, (2004).

<sup>58</sup> Lollini, A., *Costituzionalismo e giustizia di transizione. Il ruolo costituyente della Commissione sudafricana verità e giustizia*, Il Mulino, Bologna 2005.

<sup>59</sup> Elster, J., *Closing the Books. Transitional Justice in Historical Perspective*, Cambridge University Press, Cambridge, 2004.

“introversion”. One could say that the South African Constitution of 1996, with its acknowledgement of the legitimacy of constitutional dialogue, is the first constitution created with an explicitly “extroverted” position.

Of course, this important constitutional achievement can still appear controversial to observers that assume an L. & D. point of view. It can appear even more questionable to those that recall the terrible social and economic situation that still plagues many citizens in the country, where, for instance, there is a vast number of people who die from AIDS every day.

Such objections cannot easily be discarded. There may also be relationship between constitutional reforms and the hegemonic intents of internal or external actors. From a critical point of view, the constitutional revolution of South Africa can be seen from the perspective of the local ruling class, namely the Afrikaners, trying to protect their interests and properties against opposing democratic majorities and risks of expropriation<sup>60</sup>. Yet still it is important to not throw the baby out with the bath water. It is important to not forget the work that can be done by institutions, not only through their functioning, but also at a symbolic level, just through their “hypocrisy”, i.e. speaking the language of equality and justice, when and where there is no equality and no justice. On the other hand, one could say that the mix between achievements and failures is typical of many newcomer countries, that have not passed through all the stages of economic development and democratic evolution.

The acknowledgement of judicial dialogue in the South African Constitution can be interpreted and explained because of its position of newcomer. Of course, there is a different “marginal utility” for old inhabitants and newcomers in their involvement in the constitutional communication about rights. For newcomers constitutional dialogue has a much greater marginal utility because of their need for legitimation internally as well as internationally. Countries that do not have a long constitutional pedigree, especially if they do not have a position of economic power, have to act on a double level to rebuild the internal institutional architecture and, at the same time, to show their achievements in a sort of window where they can be seen and evaluated by international agencies and organizations. This is true for all countries, but only newcomers have to be so greatly recognized at both levels and are pushed to do so from international organization pressure and “conditionality”.

The case of South Africa is interesting in two ways because it can lead us to question the constitutional laboratory on this continent, which is engaged in a new process of constitutionalization, while bearing a double burden: on the one hand its ugly colonial past, that in many cases persists in different ways, while, on the other, the condition of being the world’s poorest continent. Africa seems to be

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<sup>60</sup> Hirschl, R., “The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions”, 25 *Law and Social Inquiry*, 2000.

at the heart of the divide between the old and new-comers. The ambivalence between fears of de-localization and cosmopolitan temptations is even stronger here because of the importance of traditional models of social and political organization. The need for Africa to develop its own path to modernization, mixing together in different recipes traditional African ingredients with European and Western standards in an “inclusive model”<sup>61</sup>, is an important point for the future legal evolution<sup>62</sup>. But in all likelihood, because of its racial past, the language of equality, typical of democracy, needs to go hand in hand with a language of constitutional guarantees shared and drawn out with different countries and traditions.

## 6. The United States case: back to democracy?

If South Africa can be seen as the last country to enter the realm of constitutionalism, the United States certainly holds the position of its oldest inhabitant. A long history has made the US Constitutional Court a leading example for many other nations and especially for South-American and continental European constitutionalism. This is due not only to its long history of the institutional practice of rights, but also to the great power held by its Supreme Court, that acted as a true potential counterpower, in an institutional design of “checks and balances”. “Judicial review”, a landmark of American constitutionalism, not only finds its most powerful expression in the Supreme Court, but has become a widespread institutional attitude providing courts with the last word on many issues.

But is the situation still the same? In what way is the “constitutional capital” of the United States so celebrated for its constitutionalism today? We can find the answer to these questions by following two judicial paths that have laid some changes during more or less the last fifteen years. As stated above, both actors and doctrines play a role in constitutional dialogue. From this perspective, one path is so-called “new federalism”, a doctrine supporting the tendency of states to protect their own powers against “invasions” of federal powers as well as of expanding international law. The other path is that of the so-called “originalism”, contrasting any positive attitude of the Supreme Court in sharing constitutional discourse with foreign courts and constitutions.

The “New Federalism” doctrine originates in the 1990s, and moved the established federal balance towards a more sensitive power gain for states. This was the decade in which the process of globalization became evident, even through the growing making of international treaties and agreements among states

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<sup>61</sup> G. Calchi Novati and P. Valsecchi, *Africa. La storia Ritrovata*, Carocci, Roma 2005.

<sup>62</sup> A. Seidman (ed.), *Africa's Challenge: Using Law for Good Governance and Development*, Africa World Press, 2007.

establishing new economic and institutional connections. Multilateralism vs. hegemonic ordering of the world was at stake<sup>63</sup>. In that same decade, the Supreme Court was adopting a growing position to limit the powers of the federal government on behalf of state prerogatives, a stance which increased especially in the second half of the decade, thus preparing the appropriate “answer to globalization”<sup>64</sup>. The Supreme Court, as a guardian of the powers of the states, required Congress to impose self-limitations in its legislative powers where its interventions were not necessary and justifiable<sup>65</sup>. *Printz v. United States*<sup>66</sup> was regarded as symbolic of the new trend, so that it is not at all surprising that we speak of the “post-Printz” era<sup>67</sup> to refer to a time of strong pressure against “undue” intrusions of federal powers or international law.

Let us now focus our attention on this latter aspect, with reference to the reactions against the expansion of the so-called “treaty power”, that the Constitution gives to the President<sup>68</sup>. The stance against the expansion of “treaty power” specifically concerned treaties that could indirectly affect or restrict in some ways the states’ power regarding the death penalty<sup>69</sup>, as well as civil or political rights. It can be recalled that in 1997 the Supreme Court reversed the Religious Freedom Restoration Act (RFRA), as an *ultra vires* exercise of federal powers, probably because of the possibility that this statute could be recognized as an implementation of the International Covenant on Civil and Political Rights (ICCPR)<sup>70</sup>.

Suffice it to say that the important transformations in the international context and the multiplication of international treaties have led the Supreme Court to act in order to establish a clear distinction between internal and international

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<sup>63</sup> Alvarez, J. E., “The New Treaty Making”, 25 *Boston College International and Comparative Law Review*, (2002).

<sup>64</sup> Knowles, R. “Starbucks and the New Federalism: the Court’s Answer to Globalization”, 95 *Northwestern University Law Review*, (2001).

<sup>65</sup> Jackson, V. C., “Federalism and the Uses and Limits of Law: *Printz* and Principles”, 111 *Harvard Law Review* (1998).

<sup>66</sup> In that case the Supreme Court upheld the unconstitutional character of one part of a federal statute, the Brady Act, giving inspection powers to some state employees on matter of the arms trade. The statute was deemed detrimental to the “residuary and inviolable sovereignty” of states. The opinion also shows a new propensity of the Court to interpret the constitutional text following literal criteria.

<sup>67</sup> Tushnet, M. “Globalization and Federalism in a Post-Printz World”, 36 *The University of Tulsa Law Journal*, (2000).

<sup>68</sup> This is the Presidential power to sign international treaties, regulated by art. II, & 2 of the Constitution. This rule also reflects federalist attention in that it, while giving this power to the President, requires the vote of at least 2/3 of the attending Senators.

<sup>69</sup> Posner, M. H. - Spiro, P. J., “Adding Teeth to the United States Ratification of the Covenants on Civil and Political Rights: the International Human Rights Conformity Act of 1993”, 24 *De Paul Law Review* (1993) p. 1209.

<sup>70</sup> Neuman, G. L., “The Global Dimension of RFRA”, 33 *Constitutional Comment*, 1997.

law, mostly reject the shared position to connect constitutional and international law<sup>71</sup>. Especially where human rights were at stake, the American caution has been growing, so that, as some non-governmental organizations have claimed, it is not rare for American guarantees do not fit international standards<sup>72</sup>.

At this point, we should examine the second course, that of the position of the American Supreme Courts towards transjudicial dialogue. When exchanges and communications among courts began, they were essentially seen as a way of exporting American constitutionalism throughout the world. The United States had an unchallenged constitutional pedigree that was often imitated and imported. Yet when the dialogue became a typical practice and ideas started to travel “in both directions - with a profound impact on the Court”<sup>73</sup>, judicial comity became a critical issue. The possibility of dialogue with different constitutions and foreign courts still creates strong conflict inside the Supreme Court, probably, as noted by Tushnet, because it is seen as “an episode in the culture wars”<sup>74</sup>. While some other constitutional courts specifically opened their doors to foreign constitutional voices and experiences, strong division, even conflict, arose on this subject inside the US Supreme Court. Some Justices, such as Kennedy or O’Connor, became open to dialogue and were ready to listen to different constitutional voices. Experiences of “judicial comity” were important and moved them to new positions and openness<sup>75</sup>. A result of this new stance can be seen in some opinions, as the one delivered in 1997, in the *Lawrence v. Arizona* case, that with a 5-4 majority overruled a Texas statute forbidding and punishing consensual sexual practices between adults of the same gender. Divisions in the Court have been even stronger on the death penalty, but still the Court upholds not only its legitimacy, but also the juvenile death penalty, as well as the execution of the mentally retarded.

As for dialogue among courts it is worthwhile focusing especially on the role played by Justice Antonin Scalia, fiercest adversary of the idea of transjudicial communication. Of course, the main justification for this position lies in the ideas of sovereignty and democracy, which is the typical terrain for

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<sup>71</sup> Bogdandy, A., “Constitutionalism in International Law: Comment on a Proposal from Germany”, 47 *Harvard International Law Journal* (2006)

<sup>72</sup> Spiro, P. J., “The States and International Human Rights Accords”, 66 *Fordham Law Review*, (1997), p. 567.

<sup>73</sup> Toobin, J., *The Nine. Inside the Secret World of the Supreme Court*, Doubleday, New York 2007, p.186.

<sup>74</sup> Tushnet notes as well that the conflict is due more to fear of what could happen in the future, than to what the Supreme Court has actually done: something “between seven and four references to non-U.S. law, in a body of constitutional adjudication that runs thousands of pages”. M. Tushnet, “Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars”, *Baltimore Law Review*, vo. 35 (2007), p. 300.

<sup>75</sup> See Toobin, at note 66.

political bodies, and not for courts. As it has been pointed out, also the ideology of an American “exceptionalism”, as a popular ideology, suggests the impossibility for such a special country to be “governed by a Supreme Court that mechanically borrows West European, Canadian or Japanese ideas about constitutional law”<sup>76</sup>. So, the Scalia’s doctrine of “originalism” strongly claims a re-localization of constitutional law against the tendency to go beyond national borders and to meet different positions and traditions. With reference to American “originalism”, he aims to change the common law tradition claiming a “science of statutory interpretation” that United States has never had. His idea is that in “an age of legislation” and in front of a “written Constitution”, the judiciary should follow interpretation criteria that can reach the “objectified” original intent of the legislature<sup>77</sup>. This philosophy of judicial interpretation, also known as “textualism”, aims to cancel the idea of a “living constitution” intended as a way to put “new restrictions upon democratic government”<sup>78</sup>.

Thus, Scalia’s doctrine of originalism tends to place constitutional issues on the same playing field of representative politics: a well-defined field with clear national borders and a constituency that is exclusively national. Hence, by claiming the commitment of constitutional law to territoriality a political “nationalist jurisprudence” is assumed in opposition to “transnationalist jurisprudence”<sup>79</sup>. Yet this is just the denial of constitutionalism, that is intrinsically a way of limiting democracy and defending rights, through the engineering of checks and balances. Scalia has an isolationist position because reasons of democracy are typically addressed to reflect the special characteristics of a community, while constitutionalism is typically addressed to overcome it when fundamental or human rights are at stake.

After examining the double path of “new federalism” and “originalism”, one can wonder if just this claim of the United States to act independently from the international community has had some influence in weakening its traditional constitutional prestige. Cases like that of the Guantánamo prisoners, labeled as “enemy combatants”, in order to avoid the Geneva Convention, or that of Abu Ghraib prison, where people were abused and tortured in horrific ways, may have also originated from this sense of acting alone, far from the scrutiny of the international community. The practice of “rendition” was renewed as well exploiting the lack of legal protection in some territories, thereby connecting the

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<sup>76</sup> Calabresi, S. G., “<A Shining City on a Hill>: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law”, 8 *Boston University Law Review*, (2006), p.1397.

<sup>77</sup> Scalia, A., “Common Law Courts in a Civil-Law System: The Role Of United States Federal Courts in Interpreting the Constitution and States”, in A. Gutman (ed.), *A Matter of Interpretation. Federal Courts and the Law*, Princeton University Press, Princeton N.J., 1997.

<sup>78</sup> See Scalia at note 70, p. 42.

<sup>79</sup> Koh, H. H. “International Law as Part of Our Law”, 98 *American Journal of International Law*, (2004), p. 50.

ban on torture to local governments and democracies instead of to transnational constitutionalism. This playing with extraterritoriality shows a tendency to stress the importance of territories, even when human rights are at stake and precisely when in many parts of the world national borders have a decreasing importance. When the Supreme Court was able to reply to some of the Bush Administration's political choices with opinions like those delivered in the *Rasul*, *Hamdi* and *Padilla* cases<sup>80</sup>, these decisions, although made by majority, partly restored not only American justice, but also communication with transnational constitutionalism.

Paradoxically, precisely the lack of sense of obligation to the international community can lead even "old inhabitants" of constitutionalism to feel more relaxed in keeping their reports in order. They risk losing a part of their traditional glory while "newcomers" are trying to jump the train of constitutionalism and improve the world's "constitutional capital" from their own perspective. Transjudicial dialogue is a good opportunity to catch that train. By arriving directly at constitutionalism, newcomer countries risk missing the unavoidable step to becoming a fully developed democracy as the necessary terrain for constitutionalism. But does the United States not risk losing its traditional commitment to constitutionalism, while strengthening an exclusively democratic ground for legitimacy?

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<sup>80</sup> As known, in these opinions, always ruled 6-3, the Supreme Court gave an answer to the unchecked executive power that had led to many abuses against American citizens, as well as against a foreign citizen, giving them the right to go to an American court asking for justice.

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