

# 22 Constitutional Transplants

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## Introduction

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This chapter investigates the problem of how the transplant and borrowing of foreign constitutional law and international law can influence constitution-making processes and constitutional interpretation – state actions which are still considered sovereign. International law, especially international human rights laws, are of pre-eminent importance in this context since they are virtually by definition based on limitations on national constitutional law to assert internationally shared constitutional principles. In other words, the chapter seeks to answer the question of how far the process of the internationalization of (national) constitutional law has progressed; to what extent are the framers of constitutions and the courts that interpret constitutions willing to accept alien, foreign, or international principles and rules? What underlies the decision by the constitutional organs of certain states to accede to such constitutional migration, and the rejection of such migration by their respective counterparts in other countries?

A growing constitutional cross-fertilization is taking place between national constitutional systems. This process may contribute not only to the emergence of better constitutions and improved (constitutional) court decisions, but also to the rise of a 'global legal system'.<sup>1</sup> Ultimately, the globalization of constitutional law implies that constitutionalism is no longer the sole prerogative of nation-states, but emerges instead as a set of standards for an international community that is now in the process of taking shape.<sup>2</sup> This internationalization is bolstered especially by the expansion of commercial ties and communication, and the increasing depth of political, economic, cultural, and legal relations. In certain analyses they emphasize the potential effects of globalization via market processes on constitutional rights.<sup>3</sup> As economic globalization also implies rivalry - for investments and labour - between states, however, internationalization is

<sup>1</sup> This possibility is proposed by A-M. Slaughter, *A New World Order*, Princeton University Press, Princeton and Oxford, 2004, pp. 65-103.

<sup>2</sup> Bruce Ackerman has already envisioned this future towards the end of the 1990s. See B. Ackerman, 'The Rise of World Constitutionalism', *Virginia Law Review*, Vol. 87, 1997, p. 771.

<sup>3</sup> Cf. D. S. Law, 'Globalization and the Future of Constitutional Rights', *Northwestern University Law Review*, Vol. 102, 2008, p. 1277, and especially p. 1280.

primarily limited to countries that partake in the international competition for capital and labour;<sup>4</sup> and at least those among the latter segment that use international models for designing, amending, or interpreting their constitutions. Also, modern computer technology, personal connection between justices, and developments in legal education have made the circulation of case law easier and more frequent.<sup>5</sup>

To illustrate the various ways in which comparative law materials are used, academic literature frequently turns to the use of metaphors. One of these is the so-called legal transplant, which designates the translation of rules between legal systems. In his early work Alan Watson argued that he needed to address the transplantation of the science of comparative law.<sup>6</sup> Watson himself has been careful to note that his conclusions were properly applicable to the development of private law. Christopher Osakwe is even more certain that public law, much more than private law, is infused with indigenous political, social and economic realities, and therefore is closely linked to national traditions.<sup>7</sup> In his critique of Watson, Pierre Legrand claims that transplantation is not a viable enterprise; in rejecting convergence he emphasizes differences.<sup>8</sup> Csaba Varga reports on the role that transplantation played during the Hungarian regime transition,<sup>9</sup> while Angelika Nussberger on the transfer of constitutional law from West to East.<sup>10</sup>

Another metaphor employed is the opposite of the aforementioned, namely constitutional borrowing.<sup>11</sup> Those who employ the metaphor of the 'migration' of constitutional ideals argue that that is the only concept capable of capturing the versatile impact of constitutional ideals on the judicial practices that incorporates them, as well as to express both constitutional differences and the commitment to a comparative approach, though the latter does not necessarily imply the assertion that constitutions and judicial practices converge.<sup>12</sup> In another study Sujit Choudhry uses the term 'dialogical interpretation' in the context of constitutional interpretation, which falls

<sup>4</sup> See M. Tushnet, 'The Inevitable Globalization of Constitutional Law,' *Virginia Journal of International Law*, Vol. 49, 2009, pp. 985-1006.

<sup>5</sup> See T. Groppi & M.-C. Ponthoreau, 'Introduction. The Methodology of Research: How to Assess the Reality of Transjudicial Communication?', in T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, Hart Publishing, 2013, p. 7.

<sup>6</sup> See A. Watson, *Legal Transplants: An Approach to Comparative Law*, Scottish Academic Press, Edinburgh, 1974.

<sup>7</sup> See C. Osakwe, Introduction: The Problems of Compatibility of Notions in Constitutional Law (1984), 59 *Tul L Rev* 875, 876.

<sup>8</sup> Cf. P. Legrand, 'What 'Legal Transplants'', in D. Nelken & J. Feest (Eds.), *Adapting Legal Cultures*, Hart Publishing, Oxford, 2001.

<sup>9</sup> See: Cs. Varga, 'Transfer of Law. A Conceptual Analysis,' in *Hungary's Legal Assistance. Experience in the Age of Globalization*, Nagoya, 2006.

<sup>10</sup> See: A. Nussberger, 'Verfassungstransfer von West nach Ost. Illusion, Desillusion, Neubeginn', *Osteuropa*, 2010, pp. 81-96.

<sup>11</sup> See the published materials of the scientific symposium on 'constitutional borrowing,' *International Journal of Constitutional Law*, Vol. 1, 2003, pp. 177-324.

<sup>12</sup> On the metaphors see: S. Choudhry, 'Migration As a New Metaphor in Comparative Constitutional Law', in S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press, 2006.

outside the scope of ‘constitutional borrowing,’ but is within the scope of the ‘migration’ of constitutional principles.<sup>13</sup> This model of comparative constitutional law interpretation bears similarities to Vicki C. Jackson's ‘engagement’ model,<sup>14</sup> as well as to Sarah K. Harding's model, which is also based on ‘dialogue’.<sup>15</sup> The political scientist, Ran Hirschl argues that the question, why is the migration of constitutional migration is happening cannot be answered by a juristic methodology or by legal argumentation alone. Therefore, he suggests to turn from comparative constitutional law to comparative constitutional studies.<sup>16</sup>

The migration of constitutional ideals may manifest itself in the use of foreign constitutional solutions, in the process of drafting constitutions, as well as in the application of comparative law in construing constitutions. This is the context in which Frederick Schauer distinguishes between imposed, transplanted, indigenous, and transnational constitutions.<sup>17</sup> Addressing these important manifestations of constitutional migration must begin by addressing the preliminary theoretical question of how far the sovereignty of the branches of powers that make and interpret constitutions, respectively, extend in terms of applying external constitutional solutions or completely disregarding them.

Rosalind Dixon and Eric A. Posner describe four paths to constitutional convergence.<sup>18</sup> The first one is represented by superstructure theories, which argue that constitutions reflect deeper forces – technological, demographic, economic – and therefore constitutions converge across countries just when those factors converge.<sup>19</sup> This means that constitutional borrowing is not within the direct control of constitution-makers, while the other three mechanisms assume that decision-makers do control constitutional change. One of them are the learning theories, which argue that judges, political actors who produce constitutional norms copy what they see in other legal orders, mostly using of course the more successful or older counties’ solutions, as it happened with the post-communist countries, like Hungary after the transitions in 1989-90, using many German constitutional approaches. The next theory is the coercion one, which argues that

<sup>13</sup> See: S. Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', *Indiana Law Journal*, Vol. 74, 1999, pp. 819, 835.

<sup>14</sup> See: V. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford University Press, 2010.

<sup>15</sup> See: S. K. Harding, 'Comparative Reasoning and Judicial Review', *The Yale Journal of International Law*, Vol. 28, 2003, pp. 409–467.

<sup>16</sup> Cf. R. Hirschl, *Comparative Matters*, Oxford University Press, 2014. 281. In contrast to Hirschl's social scientific approach, Armin von Bogdandy in his critic of the book favours a more lawyelly approach. See A. v. Bogdandy, 'Comparative Constitutional Law as a Social Science? A Hegelian Reaction to Ran Hirschl's Comparative Matters', 49 *VRÜ Verfassung und Recht im Übersee*, 2016. 278-290.

<sup>17</sup> See F. Schauer, 'On the Migration of Constitutional Ideas', *Connecticut Law Review*, Vol. 37, 2005, p. 907.

<sup>18</sup> See Rosalind Dixon & Eric Posner, Dixon, R. & Posner, E. A., 'The Limits of Constitutional Convergence', *Chicago Journal of International Law*, Vol. 11 (2011). No.2, p. 400.

<sup>19</sup> The scholars representing this theory are writing in economic and political science literature, treating constitutions as endogenous, like the work of D. Acemoglu & J. A. Robinson, *Economic Origins of Dictatorship and Democracy*, Cambridge University Press, 2006. Cited by Dixon and Posner, id., on p. 408.

countries try to compel other countries to use their constitutional norms. From a different point of view one can state that the countries of East-Central Europe after becoming democratic, believed that they have no choice but to adopt liberal democratic constitutions, if they were to have a chance at attracting global trade and investment. The last, the competition theories argue that countries change their norms to attract migration, or trade, and this should also lead to constitutional convergence. Assessing these theories, Dixon and Posner conclude that probably the best case for constitutional convergence comes from the superstructure approach.<sup>20</sup>

## The Use of International Law in Constitutional Drafting

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National constitution-makers are influenced or constrained by standards of international law. This influence may be direct in states that rely on international help to reframe their constitutional system following a crisis situation, or indirect, as a result of global international agreements that bind nation-states in designing their constitutional systems.

International law, traditionally understood, does not have an impact on the constitutional arrangements of nation-states. Article 2 (7) of the Charter of the United Nations also prohibits the UN from intervening in matters within the domestic jurisdiction of states – except in cases when it applies enforcement measures, which will be discussed separately – and it does not oblige member states to submit issues to a settlement procedure compatible with the Charter. Global and regional international human rights conventions, whose main function is precisely to compel states to respect universal human rights norms, constitute the main exceptions to this ban on interventions.

As of today, the international community lacks a global constitutional document. At most we can speak of the growing influence of transnational standards of national constitution-making and constitutional interpretation in some regions of the world. At the same time, in a global context, international *ius cogens* constitutes a higher order of norms in international norms and prevails over international agreements or common law when they conflict. In other words, in a formal sense it qualifies as constitutional law. Furthermore, many argue that under *ius cogens* the UN Charter, too, may be considered a constitutional document of international law.<sup>21</sup> This means, in other words, that in addition to the external hierarchical relations between international law and national law, there is also an internal hierarchy in international law.

<sup>20</sup> Cf. Dixon and Posner, *id.*, at 421.

<sup>21</sup> See for example B. Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, Vol. 36, 1998, p. 529.

The adoption in 1948 of the United Nations Universal Declaration of Human Rights was the first step in the direction of making human rights legally binding requirements. Richard Falk traces the emergence of international human rights back to the Declaration, questioning as it does the notion of unfettered state sovereignty within national boundaries. Through the Declaration, signatory governments made a pledge of sorts to undertake everything in their power to avert genocides similar to the Holocaust.<sup>22</sup> Jürgen Habermas also argues that human rights were endowed with posterior moral content derived from the notion of human dignity, which emerged in response to the Holocaust. This was first manifested in the UN documents and then in the constitutions of the successor states of those regimes that bore responsibility for the grand moral catastrophe of the 20<sup>th</sup> century, to wit Germany, Italy, and Japan.<sup>23</sup> Nevertheless, once the Declaration was adopted it was seen more as a non-binding principle for states – as a guiding standard rather than a document that served as a basis for decisions rendered by national judicial or administrative bodies. This situation changed with the Spanish and Portuguese democratic transformations, and then, in the 1990s, with the regime transitions in Central and Eastern Europe. The constitutional framers in these countries drew from the Declaration and its bill of rights, which offered a wider spectrum of rights - including economic, social, and cultural rights – than the European Convention on Human Rights. Correspondingly, it is no coincidence that the countries in which judicial decisions explicitly refer to the Declaration and the rights therein most frequently in international comparison are Spain, Portugal, and Poland. Interestingly, in Hungary, which was not a UN member in 1948, the Declaration was subjected to severe criticisms by prevailing political and legal attitudes at the time of its adoption, especially with respect to Article 19, on account the latter's all too libertarian approach towards freedom of speech and its failure to interdict fascist propaganda. Following regime transition, the Constitutional Court expressly based its understanding of the freedom of expression as a pre-eminent right on the very same Article 19, among other things. Despite these changes, it is still fair to assert that even today the Declaration cannot be considered a universally accepted principle of international law, nor is it part of the documents that fall in the domain of *ius cogens*. Nevertheless, certain articles therein, such as, for instance, its Article 5 on the prohibition of torture, are obviously part of international common law.

The second step was the creation of the two comprehensive UN human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Precisely because they enjoyed such widespread

<sup>22</sup> See R. Falk, *Achieving Human Rights*, Routledge, 2009, p. 84.

<sup>23</sup> See J. Habermas, 'Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte', in *Zur Verfassung Europas. Ein Essay*, Suhrkamp, Berlin, 2011, p. 15.

acceptance in the community of nations, these two agreements can serve as frameworks of sorts for international human rights, and they undoubtedly exert some effect even on states that are not parties to the Covenants. Hence some experts also treat these as an International Bill of Human Rights, which provides a basis for examining the legitimacy of any government.<sup>24</sup>

The two Covenants had discernible impacts on both constitution-making and the constitutional jurisprudence of national courts. As far as constitutions are concerned, in certain countries the adopted wording of constitutional texts, or their amendment occurring after the adoption of the Covenants, reflected a direct influence of the Covenants in their entirety. This was the case for the 1993 interim and the 1996 final constitutions of the Republic of South Africa, the 1982 Canadian Charter of Rights, and the 1995 amendment to the Finnish constitution.<sup>25</sup> At the same time, in other countries – Columbia, the Czech Republic, Estonia, the Philippines, Spain, and Russia – individual provisions of the Covenants are reflected in constitutional provisions.<sup>26</sup> In certain countries references to UN human rights documents, including the two Covenants, are regularly recurring features of constitutional jurisprudence: 844 such references were found in Australia, 169 in Canada, 36 in Finland, and 28 each in South Africa and Spain.<sup>27</sup>

## Foreign and International Law in Constitutional Interpretation

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Judicial use of foreign law is a product of globalization of the practice of modern constitutionalism: it has been made possible by a dialog among high court judges with constitutional jurisdiction around the world, conducted through mutual citation and increasingly direct interactions. This growing “transjudicial communication”<sup>28</sup> can afford not only a tool for better judgments, but also for the construction of a global legal system. The globalization of constitutional law means that constitutionalism is no longer the privilege of the nation-state, but has instead become a worldwide concept and standard. Globalization is especially encouraged by advances in transportation and

<sup>24</sup> See C. Tomuschat, *Human Rights. Between Idealism and Realism*, 2nd edition, Oxford University Press, 2008, p. 4.

<sup>25</sup> See the results of the research (conducted in 20 countries: Australia, Brazil, Canada, Columbia, Czech Republic, Egypt, Estonia, Finland, India, Iran, Jamaica, Japan, Mexico, Philippines, Romania, Russia, Senegal, South Africa, Spain, Zambia) about the impact of the United Nations’ Human Rights treaties on the legislation and jurisprudence of the member states, in Ch. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, Kluwer International, 2012. p. 16.

<sup>26</sup> *Id.* Note that Hungary (which was not part of the research), in its 1989 constitution-making process used the philosophy, and often the wording, of the covenants in many of its laws. From the countries included in the research, only Egypt and Iran did not observe the impact of the covenants on their national constitutions.

<sup>27</sup> *Id.* 18. Even though references in the remaining countries researched were not systematic, there were only three, Iran, Mexico and Senegal, out of the twenty investigated where courts did not refer at all to the Human Rights documents of the UN.

<sup>28</sup> For this expression, see A-M. Slaughter, ‘A Typology of Transjudicial Communication’, 29 *University of Richmond Law Review*, 1994, p. 99.

communication, and by the deepening of political, economic, cultural, and legal ties. Since economic globalization includes competition among nations for investment and human capital, globalizing processes are limited to countries that compete internationally for investment and human capital, or at least to those among them which use foreign law. Constitutional jurisdictions tend to fall into one of three different categories: those that do not use foreign law (as we will see, the US Supreme Court seldom cites foreign court decisions); those that do use foreign law, but do not do so explicitly (e.g. Hungary) and, those that do so explicitly (e.g. South Africa).<sup>29</sup>

A recent research project focusing on 16 different countries' constitutional and supreme court explicit citations uses only two categories of courts: the ones that often resort to foreign precedents (Australia, Canada, India, Ireland, Israel, Namibia, South Africa), and the others that only rarely cite such precedents (Austria, Germany, Hungary, Japan, Mexico, Romania, Russia, Taiwan, United States) according to a common methodology.<sup>30</sup> This means that there is almost perfect correlation between the two groups of courts as presented in the research and the legal traditions that the courts belong to: to the first group belongs to the common law countries, or those with a mixed tradition, while to the second belongs the civil law countries, with the exception of the US Supreme Court.<sup>31</sup> In the common law countries, the more frequent use of foreign precedents is a direct product of 'openness' of the legal systems, as demonstrated in the case of Australia, and of the legal culture of jurists, like in India, South Africa, Israel and Namibia, while the refusal of use can have different reasons, but in the case of both the US and Russia, one of them can be a psychological resistance: great countries must be seen to act independently, preserving their national uniqueness.

Even though the research clearly shows that citations of foreign case law prevail in both groups of countries in human rights decisions, whereas they appear less frequently in institutional decisions, the differences between the two groups are significant. For instance, in the first group, 93 percent of the decisions of the Namibian Supreme Court refer to foreign cases.<sup>32</sup> 52 per cent of the decisions of the South African Constitutional Court cite foreign case law. Just to provide an example, the famous case of *S v Makwanyane* on the abolishment of the death penalty contains

<sup>29</sup> See this categorization concerning the use of human rights law in Ch. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', 20 *Oxford Journal of Legal Studies*, 2000, p 511.

<sup>30</sup> See T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013.

<sup>31</sup> See T. Groppi & M.-C. Ponthoreau, 'Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future', in T. Groppi & M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, pp. 412-413.

<sup>32</sup> I. Spigno, *Namibia: The Supreme Court as a Foreign Law Importer*, in T. Groppi & Mari-Claire Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 171.

220 citations to foreign cases.<sup>33</sup> Ireland provides another relevant example: since 1937, 396 decisions of the Supreme Court on constitutional cases out of 902 (43.9%) cite foreign precedents.<sup>34</sup> The High Court of Australia during the period from 2000 to 2008 cited foreign case law in 99 out of 193 constitutional cases (51.3%).<sup>35</sup> The Supreme Court of Canada from 1982 to 2010 cited foreign precedents in a total of 377 constitutional cases out of the 949 it decided (39.7%).<sup>36</sup> From 1994 to 2010 the Supreme Court of Israel quoted foreign case law in 121 cases out of 431 constitutional cases, representing 28 per cent of the total, with a peak of 54 per cent in 1995, the year when the landmark decision *United Mizrahi Bank Ltd. V Migdal Cooperative Village*, which introduced judicial review of legislation in Israel, was issued. This decision alone refers to 35 foreign precedents.<sup>37</sup>

In the second group of courts, the Taiwanese case represents 66 decisions out of 680 (9.7 per cent), which is almost equal to the figure of 179 out of 1908 (9.3%) of the Indian court in the first group, but all but four of the Taiwanese citations are located in dissenting opinions.<sup>38</sup> In Mexico only 11 majority decisions and 18 separate opinion citing foreign cases have been detected.<sup>39</sup> In Romania only 14 out of the total of 13,250 decisions of the Constitutional Court display a clear reference to foreign precedents (0.1%).<sup>40</sup> Even less, 6 out of 11,000 decisions contain foreign citations in the Russian Constitutional Court jurisprudence, all in separate opinions.<sup>41</sup> Austria, the oldest Constitutional Court, did not produce significantly more citations between 1980 and 2010:

<sup>33</sup> Ch. Rautenbach, South Africa: Teaching on 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010), in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, pp. 185-209, 194.

<sup>34</sup> C. Fasone, 'The Supreme Court of Ireland and the Use of Foreign Precedents: The Value of Constitutional History', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges* (2013), Hart Publishing, Oxford, p. 117.

<sup>35</sup> Ch. Saunders & A. Stone, 'Reference to Foreign Precedents by the Australian High Court: A Matter of Method', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges* (2013), Hart Publishing, Oxford, p. 29.

<sup>36</sup> G. Gentili, 'Canada: Protecting Rights in a Worldwide Rights Culture'. An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982-2010)', in T. Groppi & M-C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, 2013, Hart Publishing, Oxford, p. 53.

<sup>37</sup> S. Navot, 'Israel: Creating a Constitution – The Use of Foreign Precedents by the Supreme Court (1994-2010)', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, 2013, Oxford, p. 141.

<sup>38</sup> See W-C. Chang & J-R. Yeh, 'Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 381 about Taiwan. On the Indian case, see V. R. Scott, *India: 'A 'Critical' Use of Foreign Precedents in Constitutional Adjudication*', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 85.

<sup>39</sup> E. F. Mac-Gregor & R. S. Gil, *Mexico: 'Struggling For an Open View in Constitutional Adjudication*', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 308.

<sup>40</sup> E. S. Tanasescu & S. Deaconu, *Romania: 'Analogical Reasoning as a Dialectic Instrument*', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 329.

<sup>41</sup> S. Belov, Russia: 'Foreign Transplants in the Russian Constitution and Invisible Foreign Precedents in Decisions of the Russian Constitutional Court', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 367.

only 60 out of 13,251 cases (0.45%), and even less, only 16 out of the 60 were parts of the Court's reasoning. In all the other instances, the quotation was only made by one of the parties.<sup>42</sup> In Germany, out of a sample of 1,351 decisions selected by analyzing the decades of the 1950s, 1970s and 2000s, only 32 of them cite foreign cases (2.4%).<sup>43</sup> In Hungary, between 1999 and 2010, out of 1016 decisions, 19 cited foreign cases (1.8 percent).<sup>44</sup> In Japan, in the period analysed (1990-2008), there has been one single explicit citation out of 234 constitutional cases in a dissenting opinion.<sup>45</sup> The research shows that in the US during the years of the Rehnquist Court (1986-2004) only 0.3 per cent of the cases cite foreign case law, while citations are almost absent in the years of the Roberts Court (2005-10).<sup>46</sup>

According to the findings of the research, despite the declining influence of US constitutionalism<sup>47</sup> and the corresponding decline in the US Supreme Court's influence,<sup>48</sup> the nine justices still remain the main references for almost all courts examined. This is also a consequence of the influence of US legal culture on legal higher education, and the 'Americanization' of law schools, for instance in Israel. Decisions of the South African Constitutional Court, the Canadian Supreme Court and the European Court of Human Rights are experiencing an increase in influence, and UK courts are also still frequently quoted in Commonwealth countries. On the other hand, the influence of non-English language courts, like the very active German Federal Constitutional Court, is made difficult by the linguistic barrier. Almost exclusively the bilingual Canadian Supreme Court quotes the French *Conseil Constitutionnel*.

According to some scholars the explicit and non-explicit reference to judicial decisions in other jurisdictions can lead to a convergence among the importer's and exporter's constitutional systems, even if this globalization does not entail uniformity. But the findings of the comparative research

<sup>42</sup> A. Gamper, 'Austria: Non-cosmopolitan, but Europe-friendly – The Constitutional Court's Comparative Approach', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 221.

<sup>43</sup> S. Martini, 'Lifting the Constitutional Curtain? The Use of Foreign Precedents by the German Federal Constitutional Court', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 241.

<sup>44</sup> Z. Szente, 'Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999-2010', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 259.

<sup>45</sup> A. Ejima, 'A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 284.

<sup>46</sup> A. Sperti, 'United States of America: Attempts of Judicial Use of Foreign Precedents in the Supreme Court's Jurisprudence', in T. Groppi & M-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, Oxford, 2013, p. 406.

<sup>47</sup> See D. S. Law & M. Versteeg, 'The Declining Influence of the United States Constitution', 87 *New York University Law Review*, 2012, p. 762.

<sup>48</sup> About this tendency see first C. L'Heureux-Dubé, 'Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court', 34 *Tulsa Law Journal*, 1998, p. 15. Later also A. Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy', 116 *Harvard Law Review* 16, 2002, p. 114.

show that among the 16 countries examined, the practice of citation is rather circumscribed and belongs to a limited ‘family’ of courts.

Before going further we should clarify that ‘using’ foreign law in this work will typically mean the application of national law to another national jurisdiction. (In some cases we will also deal with the use of international law to national, and national law to international jurisdiction.) The use to which this foreign law is put is in the context of the interpretation of a domestic legal provision, and not of a direct application of the foreign law in the domestic court’s jurisprudence. Thus the focus is here on foreign law used transnationally.<sup>49</sup> As we will see, the cited foreign cases can have different degrees of influence. Least influential is when judges just mention the foreign law. The next step is when they actually ‘follow’ such cases as some sort of authority. They can also ‘distinguish’ from them. With the exception of some rarely discussed binding international law, the authority of the cited foreign law is only persuasive in the process of judicial interpretation.<sup>50</sup> The rise of persuasive authority is the most important factor of ‘constitutional cross-fertilization’.<sup>51</sup> Even in the case of the South African Constitution, in which the interpretative rule is codified in Section 39, Justice Chaskalson, the then-President of the Constitutional Court, one of the most strenuous supporters of citations of foreign cases, has not treated foreign precedents as having more than persuasive authority. In the famous Makwanyane case on the constitutionality of the death penalty he wrote: “We derive assistance from public international law and foreign case law, but we are in no way bound to follow it”.<sup>52</sup>

After looking at the normative basis of the use of citations I will investigate the questions why and where these uses takes place.

<sup>49</sup> This is also the approach of McCrudden’s study. See McCrudden, 2000, p. 510. Rex D. Glensy argues for the distinction of the use of foreign domestic law and international law, by claiming that comparing a domestic law to another domestic law means comparing apples to apples, but the use of international law, which by definition is not domestic, in this context is more akin to comparing apples to oranges. See R. D. Glensy, ‘Constitutional Interpretation Through a Global Lens’, *Missouri Law Review*, Volume 75, 2010, Number 4, p. 1174 The other difficulty concerning the use of external sources with international law is that the issue of precedent is controversial in international law. Most international tribunals are asked to limit themselves to the dispute at hand. For example, Article 59 of the Statute of the International Court of Justice (ICJ) proclaims that “the decision of the Court has no binding force except between parties and in respect of that particular case.” Exceptions from the rare use of precedents are the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR), which rely heavily on their past decisions, but even these courts refer very rarely to other courts’ decisions. For instance, only 29 majority judgments of all 7319 decisions that the ECtHR made before October 30, 2006 cited one or more decisions of foreign constitutional courts or international courts. (This proportion is higher in the separate opinions of the judges.) See E. Voeten, ‘Borrowing and Nonborrowing among International Courts’, *The Journal of Legal Studies*, Vol. 39, 2010, No. 2, p. 557.

<sup>50</sup> This is the situation in countries like Canada where practice of the courts often results in the rethinking of the domestic interpretation of international law. See K. Knop, ‘Here and There: International Law in Domestic Courts’, *New York University Journal of International Law and Politics*, 2000, Vol. 32, 501 about the decision of the Supreme Court of Canada on the Baker-case.

<sup>51</sup> See A-M. Slaughter, *A New World Order*, Princeton University Press, Princeton and Oxford, 2004, at pp. 75-78.

<sup>52</sup> S v. Makwanyane (1995) 3 SA 391 (CC) 39.

## Normative Underpinning

It is generally agreed that the notion that foreign materials should be used to interpret constitutions is gaining currency, and that the migration of constitutional ideas has been identified at a descriptive level. But many scholars complain that the basic conceptual issues, the methodology of migration, as well as the normative underpinning are lacking, and yet proponents of this practice cannot offer a theoretical justification for it. While some scholars argue that constitutional theory is just a vehicle to make sense of a constitutional practice, others raise the even more general question about the legitimacy of constitutional comparativism, and whether comparativism is only a methodology that is employed on a judge's particular theory, or alternatively whether a special comparative constitutional theory is possible. This theory is profoundly procedural in seeking a particular comparativist methodology, but also substantive in that it maintains the existence of universal norms. One, less convincing methodological reason for a comparative theory is that a parochial methodology places the countries following it (e.g. the US) at odds with international norms and creates diplomatic tensions with foreign allies. Another explanation is to enhance transnational dialogue and the global rule of law through a global jurisprudence. The substantive reasons include the maintenance of the existence of universal norms and the advocacy of the internalization of international norms into the constitutional jurisprudence, together with the ability to promote political democracy and substantive justice by respecting a morally defensible set of individual rights.

In the scholarly controversy over the uses of comparative constitutionalism, especially the judicial recourse to foreign law, there are three broadly defined positions.<sup>53</sup>

a) Those scholars supporting the idea of the use of foreign law legitimate this practice with the sameness of both the problems and solutions of constitutional law for all constitutional democracies. One of the most well-known scholarly representatives of this position is David Beatty, who claims that the ultimate goal of all constitutional adjudication is to subject constitutional controversies to resolutions according to the dictates of the principle of proportionality, which Beatty describes as the 'ultimate rule of law'.<sup>54</sup> This test for justification of

<sup>53</sup> See this categorization in M. Rosenfeld, 'Principle or Ideology? A Comparativist Perspective on the U.S. Controversy Over Supreme Court Citations to Foreign Authorities', in Zs. Gaspár & A. Hanák (Eds.), *Sajó 2009*, Prime Rate, Budapest, 2009, Vicki C. Jackson very similarly talks about three postures toward the transnational. See V. C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', 119 *Harvard Law Review*, 2005, p. 109. But there are also authors who are talking only about two positions in this debate: the first is that the constitutional law of one country is, or should be, largely independent of the constitutional law of other countries; the second is that the constitutional law of one state inevitably influences, and should influence, constitutional law in other states. See R. Dixon & E. A. Posner, 'The Limits of Constitutional Convergence', *Chicago Journal of International Law*, Vol. 11, 2011. No.2, p. 400.

<sup>54</sup> See D. M. Beatty, *The Ultimate Rule of Law*, 2004, pp. 159-188.

rights' limitations articulated by many constitutional systems is a component of 'generic constitutional law', which offers a formula for limiting rights.<sup>55</sup> This position tends to national identification with transnational and international legal norm, towards constitutional universalism. This means that the representatives of this model claim a process of transnational norm convergence.

b) The second position's starting point is that although the problems of constitutional law are the same for all democratic countries, the solutions to these problems should differ from one constitutional system to another. This position, which is advocated by Mary Ann Glendon in her writings,<sup>56</sup> highlights differences and tries to explain how different one constitutional system is from the other, and why they differ from each other. This is also the very idea behind Vicki C. Jackson's engagement approach, considering foreign or international law without a presumption that it necessarily be followed.<sup>57</sup> In other words the engagement model does not treat foreign and international law as binding sources. Jackson argues that the appropriate posture for the US Supreme Court is one of engagement.

c) The followers of the third position claim that neither the constitutional problems nor their solutions are likely to be the same for different constitutional democracies. Vicki Jackson calls this a resistance posture. This position goes back to Montesquieu's observation that "the political and civil laws of each nation [...] should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another".<sup>58</sup> This other extreme position concludes that comparisons are likely to be arbitrary, and that comparativists' choices are driven mostly by ideology. For instance, Günther Frankenberg criticized comparativists who impose Western hegemonic approaches for acting as a colonialist, and characterized constitutional comparativism as "a post-modern form of conquest executed through legal transplants and harmonization strategies".<sup>59</sup> Another objection, raised by O. Kahn-Freund is that constitutional law is much less amenable to legal transplantation from one country to another than is private law.<sup>60</sup>

Richard A. Posner claims that the citations of foreign decisions by US Supreme Court Justices like Antony Kennedy is related to moral vanguardism. Posner labels Justice Kennedy as a kind of

<sup>55</sup> See M. Tushnet, 'Comparative Constitutional Law', in M. Reimann & R. Zimmermann (Eds.), *The Oxford Handbook of Comparative Law*, 2008, pp. 1226-1257.

<sup>56</sup> See M. A. Glendon, 'Rights in Twentieth-Century Constitutions', 59 *U.Chi.L.Rev.*, 1992, p. 532, and M. A. Glendon, *Comparative Legal Traditions*, 1994, 2d. ed., p. 10.

<sup>57</sup> See Jackson, 2010.

<sup>58</sup> Ch. de Secondat, Baron de Montesquieu, *The Spirit of Laws*, 1989, (A. M. Cohler at al. eds. and trans.) p. 8.

<sup>59</sup> G. Frankenberg, 'Stranger than Paradise: Identity and Politics in Comparative Law', *Utah L.Rev.*, 1997, pp. 262-263.

<sup>60</sup> O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', 37 *MOD L. REV.*, 1974, pp. 17-18.

‘judicial Ronald Dworkin’, and marks him (like Professor Dworkin) as a natural lawyer, arguing that the basic idea of natural law is that there are universal principles of law that inform and constrain positive law.<sup>61</sup> Indeed, some scholars argue that the citation to foreign law is best understood as an application of natural law or post-modern natural law, while according to others it is only a theory articulated in terms of *ius gentium*, i.e. “the accumulated wisdom of the world on rights and justice from the decisions of judges and lawmakers”. In other words, a consensus among “civilized” or “freedom-loving” countries” justifies the citations.<sup>62</sup> At the same time, some believe that even if there is no consensus, adaption by judges is justified based on the cosmopolitan view of constitutional law.<sup>63</sup> Arguments for the use of comparative law in human rights are based on the universality of rights concepts, or at least on their regionally divided existence, like the existence of the European *ius commune*, as the cultural relativism approach would make the comparison meaningless.<sup>64</sup>

The different normative arguments concerning the relevance of foreign materials in constitutional cases, especially in the US Supreme Court’s practice, can be followed in a conversation between the late Justice Antonin Scalia and Justice Stephen Breyer.<sup>65</sup> They both agreed that the use of comparative law is not ‘authoritative’, i.e., that it is not binding as a precedent. But for Justice Scalia, such citations were neither legitimate nor useful, while for Justice Breyer, they were useful and legitimate so long as they were considered for their insights and not regarded as authoritative. Breyer offered a pragmatic rationale, suggesting that foreign court “have problems that often, more and more, are similar to our own...If here I have a human being called a judge in a different country dealing with a similar problem, why don’t I read what he says if it’s similar enough? Maybe I’ll learn something...” From Scalia’s originalist viewpoint, foreign law “is irrelevant with one exception: old English law, which served as the backdrop for the framing of the constitutional text. Scalia also stated that judges using foreign materials cite comparative law

<sup>61</sup> See R. A. Posner, ‘Forward: A Political Court’, 110 *Harvard L. Rev.*, 2005, pp. 84-89. Besides this scholarly attack, there were also some political attempts leading members of Congress to call for the potential impeachment of Supreme Court Justices. For instance, Congressman Tom Feeney stated: “To the extent [judges] deliberately ignore Congress’s admonishment [about the use of foreign law in court decisions], they are no longer engaging in ‘good behavior’ from the meaning in the Constitution and they may subject themselves to the ultimate remedy, which would be impeachment.” See T. Curry, *A Flap Over Foreign Matters at the Supreme Court*, MSNBC.com (Mar.11.2004), <http://masnbc.com/id/4506232>. Quoted by D. Fontana, ‘The Rise and Fall of Comparative Constitutional Law in the Postwar Era’, *The Yale Journal of International Law*, Volume 36, 2011, Number 1, p. 44. The most radical consequence for Justices Ruth Bader Ginsburg and Sandra Day O’Connor, who showed their favour towards citation of foreign law in several extrajudicial speeches, was not only criticism, but death threats: See A. L. Parrish, ‘Storm in a Teacup: The US Supreme Court’s Use of Foreign Law’, *University of Illinois Law Review*, 2007, p. 645.

<sup>62</sup> See J. Waldron, ‘Foreign Law and the Modern *Ius Gentium*’, 119 *Harv. L. Rev.*, 2005. pp. 129-147.

<sup>63</sup> See V. Perju, ‘Cosmopolitanism and Constitutional Self-Government’, *International Journal of Constitutional Law*, 2010, Vol. 8, 326.

<sup>64</sup> See this recognition at Ch. McCrudden, ‘Judicial Comparativism and Human Rights’, in Esin Örüçü & David Nelken (Eds.), *Comparative Law: A Handbook*, Hart Publishing, 2007, p. 373.

<sup>65</sup> The transcript was published in 3 *International Journal of Constitutional Law* (2005), pp. 519-541.

selectively, such that “when it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn’t agree we don’t use it”.<sup>66</sup> This means that the citation of comparative case law “lends itself to manipulation”. For Breyer, one of the justifications for citing the case law of other national courts is to consolidate judicial review in transitional democracies. As Justice Breyer emphasized in the discussion, even where there are no apparent firm convergences, human beings across cultures and national borders confront many of the same problems. What is at stake in these situations is a ‘dialog’ (a’la Choudhry) or ‘engagement’ (a’la Jackson) with foreign decisions, which does not mean necessarily any disposition to endorse or adopt particular foreign approaches.

The positions of Scalia and Breyer can also be seen as the dichotomy of American exceptionalism, i.e., the refusal of many US courts and justices, including those of the Supreme Court, to engage in comparative interpretation, and the ‘postwar juridical paradigm’ of rights protection, a common constitutional model found in a variety of liberal democracies. As Scalia’s arguments demonstrate, the starting points of American exceptionalism are that constitutional judicial review is undemocratic and illegitimate, and consequently the use of foreign law is a form of judicial activism, which further undermines the legitimacy of judicial review. American exceptionalism forbids not only the use of foreign law, but also international law.<sup>67</sup> Jed Rubenfeld argues for instance that American constitutionalism is based on the idea of containment by domestic law only, and not by international law. On this basis he argues that two diverging conceptions of constitutionalism, namely a genuinely ‘European’ one and a different ‘American’ one, exist. In that view, ‘international constitutionalism’ is a genuinely European conception.<sup>68</sup>

<sup>66</sup> Id., at 521. As one possible explanation McCrudden mentions that the use of foreign judgments is simply result-driven: that advocates and judges use the foreign decision that will support the result they want in the particular case before the court. He even raises the suspicion that the selective use of foreign judgments is inevitably associated with a rights-expanding agenda. But then he rejected this premise by referring to Justice Frankfurter, who was the US Supreme Court justice most consistently disposed to citing foreign cases favourably, and who was certainly not pursuing a rights-expanding agenda. See McCrudden, 2000, at 527. The role of ideology as a motivating force for the use of foreign and international sources is also suggested by Bork’s words: “Perhaps it is significant that the justices who [borrow] are from the liberal wing of the [US Supreme] Court. This trend is not surprising, given liberalism’s tendency to search for the universal and to denigrate the particular.” See R. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (2003), Washington, D.C.: AEI Press, 2003, p. 22. Eric Voeten surveying the borrowing among international courts, especially in the jurisprudence of the European Court of Human Rights says that judges who refer to external decisions in their separate opinions are more activist than are the judges who refrain from doing so on the same cases. See E. Voeten, 2010.

<sup>67</sup> The past decade has seen international lawyers and political scientists discuss ‘American exceptionalism’. This debate was characterized by the concern about perceived hegemonic and unilateral conduct of the ‘last remaining superpower’. See e.g. M. Ignatieff (Ed.), *American Exceptionalism and Human Rights*, Princeton University Press, 2005; H. H. Koh, ‘On American Exceptionalism’, 55 *Stanford Law Review*, 2003, p. 1479.; N. T. Saito, *Meeting the Enemy – American Exceptionalism and International Law*, New York University Press, 2010, pp. 54-55.; S. Walt, ‘The Myth of American Exceptionalism’, *Foreign Policy*, November, 2011; Jerome Karabel, ‘American Exceptionalism’, and the Battle for the Presidency, *Huffington Post*, December 22, 2011.

<sup>68</sup> Cf.: J. Rubenfeld, ‘The Two World Order’, 27 *Wilson Quarterly*, 2003, p. 28. Obviously the different concepts of ‘international constitutionalism’ contributed to the very fact that while there were almost no international public

According to this argument, nations are bound by international law only if it is legitimate, but international law is not democratically legitimate and therefore not really law, which means that the United States is not legally bound by it.

In contrast, the postwar juridical paradigm model views judicially enforced constitutional rights as subjects of comparative constitutional interpretation. This ‘constitutionalist’ concept is of course in favour of the legitimacy and thus of the bindingness of international law as source of constitutional interpretation.<sup>69</sup>

## Jurisprudential Aspects

In this part I try to identify some criteria that can explain why particular judges and courts decide to use or not use foreign materials. Christopher McCrudden lists the following factors that seem to lead judges to engage with foreign materials: a) type of political regime in which the foreign court is situated, b) pedagogical impulse to look at more established democracies, or wanting not to use certain laws, c) audience, d) existence of common alliances, e) filling vacuum of temporary absence of (preferred) indigenous jurisprudence, f) perceived nature of the constitution as transformative or conservative, g) theories of law and legal interpretation, h) foreign law empirical fact, i) perceived judicial competence in the area of foreign law in issue, j) differences in constitutional structure.<sup>70</sup> But the most important criterion common in all of these factors is the search for good persuasive ideas in other national jurisprudences, which would help to solve similar constitutional problems through interpretation. The very few empirical surveys show that for many judges, foreign judicial colleagues form a reference group on the resolution of constitutional questions. But the data indicate that this globalist conception of judges citing foreign law as a source of persuasive authority may apply to only a minority of judicial comparativists.<sup>71</sup> A survey study of 43 judges from the British House of Lords, the Caribbean Court of Justice, the High Court of Australia, the Constitutional Court of South Africa, and the Supreme Court of Ireland, India, Israel, Canada, New Zealand and the United States on the use of foreign law in constitutional rights cases has shown that 43 of out of 20 judges felt that they used foreign law occasionally or rarely while 23 felt they used it regularly. To the question, whether they use comparative materials to justify their legal conclusions, forty-two percent considered themselves

law concerns expressed in the US after the killing of Osama bin Laden, several such concerns were published in Germany. See Stefan Ulrich, *Darf man Terroristen einfach töten? Juristen befürchten, dass Aktionen wie die Erschießung Osama bin Ladens das Völkerrecht verwässern* (2011), *Süddeutsche Zeitung*, 4. Mai, 2011.

<sup>69</sup> Cf.: M. Kumm, ‘The Legitimacy of International Law. A Constitutionalist Framework of Analysis’, 15 *EJIL*, 2004, pp. 907-931.

<sup>70</sup> See McCrudden, 2000, at 516-527.

<sup>71</sup> See B. Flanagan & S. Ahern, ‘Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges’, *International and Comparative Law Quarterly*, 2011, vol. 60, p. 28.

frequent users, so the frequency with which judges used comparative materials to justify their conclusions was significantly related to the frequency with which they cited foreign law.

As the number of liberal democratic countries is constantly increasing, the migration of constitutional ideas within this community cannot be a one-way process: some courts being always ‘givers’ of law while others always ‘receivers’. Of course, the courts in the countries of the ‘postwar juridical paradigm’ (Weinrib) of rights protection use more case law from the courts of older and more established democracies, like that of the US Supreme Court. As Justice Albie Sachs of the South African Constitutional Court writes: “If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied in our Courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court dealing with what was loosely been called state/church relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text.”<sup>72</sup>

Another example of juridical transplant is the case of the Hungarian Constitutional Court. As Catherine Dupré’s book<sup>73</sup> on the import of the concept of human dignity shows, the judges first carefully chose the German as a suitable model, and then instrumentalised it through a very activist interpretation of the Hungarian constitution. As Andrea Zimmermann observes the influence of the German Federal Constitutional Court was decisive on the jurisprudence of political and civil rights in East-Central Europe.<sup>74</sup> On that basis, the Hungarian Constitutional Court developed its own, autonomous concept of human dignity. Describing the genesis of a new legal system in Hungary, Dupré states that relying on law importation to develop its case law in the transitional period the Hungarian Constitutional Court discovered new rights in the wake of human dignity and the general personality rights. The main characteristic of this imported law is that it is between natural law and globalization, or more precisely “not global but German” as the author highlights the particular nature of Hungarian law importation. The discourse on law importation can be likened to a modern form of natural law.

<sup>72</sup> *S. v. Lawrence, S. v. Ngala, S. v. Solberg*, (4) SA 1176, 1223 (South Africa 1997). Quoted by Slaughter, 2004, at 77.

<sup>73</sup> C. Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity* (2003), Hart Publishing.

<sup>74</sup> See A. Zimmermann, *Bürgerliche und politische Rechte in der Verfassungsrechtsprechung mittel- und osteuropäischer Staaten unter besonderer Berücksichtigung der Einflüsse der deutschen Verfassungsgerichtsbarkeit*, in Jochen Abr. Frowein (eds.), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* (1998), Springer, 89-124. In the same volume the that time President of the Hungarian Constitutional Court and his advisor acknowledge this use of German law in the constitutional interpretation. See L. Sólyom, *Anmerkungen zur Rezeption auf dem Gebiet der wirtschaftlichen und sozialen Rechte aus ungarischer Sicht*, at 213-227., G. Halmai, *Bürgerliche und politische Rechte in der Verfassungsrechtsprechung Ungarns*, at 125-129.

## Conclusions

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We can conclude that despite the different postures towards the transplant and borrowing of foreign law, constitutionalism and judicial review have ‘gone global’, and there is definitely a growing horizontal communication between constitutional systems, and given this dramatic development, the traditional neglect of the study of comparative law is becoming harder to justify.<sup>75</sup> This means that there are more and more countries engaging with foreign, international, and transnational norms. The expanding universe of law through the Internet also makes much harder nowadays to avoid taking position on the role of international or foreign law.<sup>76</sup> Whether the consequence of this development will be the emergence of a ‘transnational or cosmopolitan constitutionalism’<sup>77</sup> or the international community becoming a constitutional community,<sup>78</sup> is to be seen.

One of the signs of this global trend is that more and more polities accept supranational core principles of rule of law in their constitutions, and these principles cannot be changed and can be regarded as intrinsic to its specific identity. As we have seen, the international trend is moving towards accepting the Indian basic structure doctrine, explicitly through constitutional provisions that are deemed unamendable, or implicitly through judge-made laws.<sup>79</sup> There are two kinds of protected supra-constitutional principles: universal and particular. The universal ones are common to all modern democratic societies, such as the democratic nature of the state, human dignity of the individual, and the rule of law, while other, such as federalism, official language, and a state religion might be regarded as particular, as they reflect the specific ideals and values of a distinct constitutional culture.

Constitutional transplant and borrowing contributes to the state of constitutional law in a given country. But, there is a dialectic relationship between constitutional law and constitutional culture: the first is based on the latter, and it also influences it.<sup>80</sup> This means that it is very hard to make

<sup>75</sup> Cf. R. Hirschl, *Towards Juristocracy*, Harvard University Press (2004), at 222.

<sup>76</sup> See this argument in Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (2010), at 5-6.

<sup>77</sup> As Goldsworthy formulates: “We live in an era of ‘cosmopolitan constitutionalism’ in which lawyers and judges increasingly look beyond their own borders and borrow ideas from other jurisdictions.” J. Goldsworthy, ‘Introduction’, in J. Goldsworthy (Ed), *Interpreting Constitutions: A Comparative Study*, Oxford University Press, New York, 2006, p. 3.

<sup>78</sup> The Italian philosopher, Massimo Cacciari uses the metaphor archipelago to describe the type of mutual interdependence between cultural, linguistic, national or ethnic groups as islands, communicating with each other as part of an archipelago. See M. Cacciari, *L’arcipelago* (1997), referred to by A. Lollini, ‘Legal Argumentation Based on Foreign Law. An example from Case Law of the South African Constitutional Court’, *Utrecht Law Review*, Volume 3, Issue 1, 2007, at p. 74.

<sup>79</sup> See C. Fusaro & D. Oliver, *Constitutional Engagement in a Transnational Era* (2011), p. 428.

<sup>80</sup> See R. C. Post, ‘The Supreme Court 2002 Term. Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law’, *Harvard Law Review*, Vol. 117, (2003), 4-112, at 7. Here Post uses the term ‘constitutional culture’ referring to the beliefs and values of non-judicial actors, most of all the people, while the term ‘constitutional law’ according to Post refers to constitutional law as it is made from the perspective of the judiciary.

legitimate constitutional law accepted by the people without a preexisting constitutional culture. For instance, it was difficult to import constitutions after the political transition into the region of the former Communist countries of East-Central Europe in the early 1990s, because constitutionalism was a minor element of the political culture at best.<sup>81</sup> In such situations the constitutional law, including the transplant of it must necessarily be an elitist project with the hope that it contributes to the development of constitutional law.

This is the reason that some scholars are more cautious, emphasizing the difficulties in changing constitutional culture,<sup>82</sup> or saying that the direction in which constitutional identity might evolve through engagement with foreign law might be at stake.<sup>83</sup> Others argue against the existence of convergence,<sup>84</sup> or at least talk about a dual tendency of globalization and ‘balkanization’. Michel Rosenfeld observes that paradoxically, while the world becomes bound together, ideas migrate; at the same time it also becomes violently split and divided due to ethnic-based nationalistic identity politics and religious fundamentalism.<sup>85</sup> Some scientists even raise doubts whether a convergence through transplant and borrowing would be a good thing at all, since significant variations necessarily continue to distinguish different liberal constitutions.<sup>86</sup>

## Further reading

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Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974)

Bruce Ackerman, *The Rise of World Constitutionalism* (1997), 87 *Virginia Law Review* 771

Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation* (1999), 74 *Indiana Law Journal* 819

Sujit Choudhry, *Migration As a New Metaphor in Comparative Constitutional Law*, in Sujit Choudhry (ed.), *Migration of Constitutional Ideas* (2006)

D. M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstruction of Comparative Influence: The South African Experience* (2003), 1 *Int'l J. Const. L.* 181

<sup>81</sup> See U. K. Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization’, *New York Law School Law Review*, Volume 51 (2006) 07. 28.

<sup>82</sup> See V. Perju, ‘Constitutional Transplants, Borrowing, and Migrations’, in M. Rosenfeld and A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 1323–1326.

<sup>83</sup> See Gary J. Jacobsohn, ‘The Formation of Constitutional Identity’, in T. Ginsburg & R. Dixon (Eds.), *Comparative Constitutional Law*, Edward Elgar, (2011) p.138.

<sup>84</sup> Cf. Michel Rosenfeld and András Sajó, ‘Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies’, in S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press, 2006.

<sup>85</sup> See Michel Rosenfeld, *Law, Justice, Democracy, and the Clash of Cultures. A Pluralist Account*, Cambridge University Press, 2011, pp. 2-3.

<sup>86</sup> See J. Goldsworthy, ‘Questioning the Migration of Constitutional Ideas. Rights, Constitutionalism and the Limits of Convergence’, in S. Choudhry (Ed.), *Migration of Constitutional Ideas*, Cambridge University Press (2006).

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- Gábor Halmai, *Perspectives of Global Constitutionalism*, Eleven International Publishing (2014)
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- Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement* (2005), 119 *Harvard Law Review* 109
- Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (2010)
- Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 *Oxford Journal of Legal Studies* (2000), 499-532
- Michel Rosenfeld, *Constitutional Migration and the Bounds of Comparative Analysis* (2001), 58 *NYU Annual Survey of American Law* 67
- Anne-Marie Slaughter, *A New World Order* (2004)
- Mark Tushnet, *The Inevitable Globalization of Constitutional Law* (2009), 49 *Virginia Journal of International Law* 985-1006
- Eric Voeten, *Borrowing and Nonborrowing among International Courts* (2010), *The Journal of Legal Studies*, Vol. 39, No. 2 (June), 547-576