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Converging Courts: Reconceptualizing the Notion of Judicial Cosmopolitanism

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Abstract

IT *Il dibattito costituzionale comparatistico a livello mondiale negli ultimi decenni è stato in larga parte segnato dal leitmotif del 'dialogo tra corti', intendendo con tale espressione la citazione sempre più frequente di precedenti stranieri nelle argomentazioni delle corti supreme e costituzionali nazionali.*

Uno degli argomenti ricorrenti sia per criticare che per sostenere l'uso giurisprudenziale del metodo comparato è che tale pratica stia contribuendo ad un nascente cosmopolitismo giudiziario.

L'articolo si propone di approfondire e ridefinire la nozione classica di cosmopolitismo, sulla base dei concetti di convergenza e pluralismo piuttosto che di unità e uniformità.

Il duplice scopo è quello, da un lato, di adottare una diversa prospettiva a sostegno della propensione dei giudici alla comparazione, e dall'altro, di offrire una risposta alle critiche legate al tradizionale argomento dell'universalismo o cosmopolitismo.

Nella prima parte, l'articolo analizzerà l'evoluzione storica del concetto di cosmopolitismo, dall'originaria teoria kantiana del Weltbürgerrecht, attraverso la rigorosa interpretazione monistica di Kelsen, fino all'idea di uno stato cosmopolitico elaborata da Bobbio e Habermas. Nella seconda parte, si evidenzieranno le principali criticità intorno alla nozione di cosmopolitismo giudiziario: il pericolo dell'imposizione di un imperialismo culturale e la relativa controversia riguardante l'universalità dei diritti fondamentali; la questione della legittimazione dei giudici; la minaccia alla sovranità statale. Infine, l'articolo tenterà una riflessione sulla legittimità o meno del ricorso a sentenze straniere da parte dei giudici e sul modo in cui le corti rispondono alle esigenze e alle sfide della contemporaneità, contribuendo alla costruzione di un nuovo ordine giuridico globale.

Keywords: Cosmopolitismo giudiziario; Dialogo tra corti; Diritto costituzionale comparato; Universalismo dei diritti; Convergenza

Abstract

EN *Over the last decade, comparative constitutional literature worldwide has debated the increased tendency of supreme and constitutional national judges to cite foreign precedents. This tendency is captured by the metaphor of the 'dialogue among courts', a rhetorical metaphor referring to it. One of the recurring arguments of both critics and upholders of the judicial use of the comparative method is that such a practice is contributing to a growing judicial cosmopolitanism. The paper aims at deepening and reconceptualizing the classic notion of cosmopolitanism, focusing on the concepts of convergence and pluralism rather than of unity and uniformity. I intend to adopt a different perspective to support the judicial practice of looking outside national borders, and to answer criticism related to the universality/cosmopolitanism traditional argument. First, I analyze the historical evolution of the concept of cosmopolitanism, from the original Kantian theory of the Weltbürgerrecht, through the rigorous monistic interpretation by Kelsen, to the cosmopolitical state approach formulated by Bobbio and Habermas. Second, I will address the major critical arguments regarding the concept of judicial cosmopolitanism: the risk of cultural imperialism and the related controversy concerning the universality of human rights; the question of legitimacy of judges; the threat to state sovereignty. Lastly, I draw conclusions on whether the recourse by judges to foreign case law is legitimate and, if so, how courts should meet the challenges of the contemporary globalised era, contributing to the building of a new global legal order.*

Keywords: Judicial Cosmopolitanism, Comparative Constitutional Law, Rights Universalism, Convergence

CONVERGING COURTS: RECONCEPTUALIZING THE NOTION OF JUDICIAL COSMOPOLITANISM

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Indice:

1 Introduction

Over the last decade, the practice by national judges of referring to foreign decisions in the course of constitutional adjudication, especially when interpreting fundamental rights and liberties,[1] has been significantly growing.[2]

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[1] Courts in many jurisdictions appear frequently to characterize their domestic rights judgments as 'human rights decisions'. Sometimes instead a clear-cut distinction is drawn between 'human rights' and 'constitutional rights' or 'fundamental rights and liberties'. It is the case of the judgments by United States Supreme Court in which the more common expression is 'constitutional rights' or 'civil rights', whereas human rights seems more associated with something that happens abroad. For the purposes of the paper, both expressions will be used indifferently.

[2] The judicial practice of citing foreign precedents has in fact a long tradition, especially in Europe. In case of lacuna in the *lex loci* or in the *ius commune*, the courts' praxis was to resort to the *lex alii loci*, not as a binding precedent but as a *doctrina magistralis* or a *responsum prudentium*. *See*, G Gorla, *Il ricorso alla legge di un 'luogo vicino' nell'ambito del diritto comune europeo* (1973) 96/5 *Il Foro it.*, 89-90, 107-108. Also in the United States, 'references to foreign and international law sources occur episodically in constitutional decisions throughout the Court's history'. *See*, V Jackson, *Constitutional Comparisons: Convergence, Resistant, Engagement* (2005) 119 *Harv LR* 109, 110. *See* also, RB Ginsburg, *'A Decent Respect to the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication*, International Academy of Comparative Law, American University, July 30, 2010; D Bodansky, *The Use of International Sources in Constitutional Opinion* (2004) 32 *Ga J Int'L & Comp L* 421, 423-424; RD Glensy, *Which Country Counts?: Lawrence v Texas and The Selection of Foreign Persuasive Authority* (2005) 45:2 *Va J Int'L L* 357, 361. Moreover, the use of foreign material with any authoritative force is consistent with the traditional common law approach to constitutional interpretation. *See*, D Strauss, *Common Law Constitutional Interpretation* (1996) 63 *U Chi LR* 877.

At the same time,[3] comparative constitutional law scholarship has been heatedly debating on the appropriateness of the role of the 'judge as comparatist',[4] and the usefulness and legitimacy of the judicial recourse to comparative law as a vehicle for 'transnational judicial conversations'.[5]

The mutual judicial citation is a product of wider processes of interaction among states stimulated by globalization.[6] The phenomenon is child of its time, being both its cause and effect, indeed reflects many features, and echoes most of the criticism expressed over globalization in general.

Among the various attempts by scholars from different disciplines (constitutional law, philosophy of law, political science, and so on) to provide a theoretical framework to square the dynamics of the globalized world, there has been a resurgence of cosmopolitan theory. Cosmopolitan theory has taken multiple forms over the centuries, and today has been related to the current circumstances of globalization. Historically, cosmopolitan theory has translated into notions of world or global government; more recently, it has elaborated notions of *transnational*, *international*, *world*, *global* and even *postnational* constitutionalism, describing the astonishing spread of constitutionalism from the level of states to a global level (through the drafting of written constitutions and the adoption of the model of judicial review all over the world) and the openness of constitutional sources of law to non-national sources (through the increased citation of foreign law in constitutional cases).

Nowadays, the diffusion of constitutionalism and the 'cosmopolitan turn in constitutional sources'[7] are world-wide and documented phenomenons. In particular, the judicial tendency to look beyond national borders and use comparative law arguments in constitutional judgments has become 'inevitable'.[8] However, the acceptance of this tendency is not self-evident, on the contrary large part of academics has expressed reluctance and skepticism. A particularly intense debate has developed in the United States – between academics but also Justices themselves – concerning the recourse to foreign materials by Supreme Court in the so-called *hard cases* regarding 'the fundamental aspects of fundamental rights'.[9] Anyway, in practice, global constitutionalism represents the most visible expression of cosmopolitan

[3] It may be a case of practice generating theory, or theory generated by practice.
[4] B Markesinis & J Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?* (2006); it tr *Giudici e diritto straniero* (2009) 21.
[5] C McCrudden, *'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights'* (2000) 20:4 *Oxford Journal of Legal Studies* 499.
[6] The expression 'globalization' has been overworked and has become an unattractive word. Nonetheless, the term is used for reasons of general comprehension.
[7] HP Glenn, *The Cosmopolitan State* (2013) 207.
[8] M Tushnet, *The Inevitable Globalization of Constitutional Law* (2009) 49 *Va J Intl* 985.
[9] G Zagrebelsky, *Fifty Years of Activity of the Constitutional Court Speech*, 22 April 2006, <http://www.cortecostituzionale.it/ActionPagina_959.do> [accessed 15 September 2015].

theory.

Against this background, some constitutional scholars have singled out the practice to cite foreign decisions as a decisive factor contributing to what they called 'judicial cosmopolitanism'.

Cosmopolitanism in the judiciary – similarly, 'judiciary ubiquity'[10] or 'juristocracy'[11] – may include a great variety of intertwined factors: the already mentioned practice of judicial mutual citation; the increasing opportunities of exchange between judges from different jurisdictions (judicial comitology); the multiplication of the number of courts both at the national and international level; a progressive judicialization of legal systems, so that the observation by De Tocqueville concerning United States – 'there is now hardly any moral, political, or public policy controversy in the new constitutionalism world that does not sooner or later become a judicial one' –[12] may be extended generally; the judges' self-awareness of belonging to a single global community; the idea of a universal natural law,[13] which justifies the judicial creation of a 'common law of human rights' or, in the context of Europe, a '*ius commune* of human rights'.[14]

This complex, multi-faceted cosmopolitan understanding of the role of the judiciary is one of the theories brought up, with opposite arguments, both by upholders and opponents of the practice of transjudicial citation.

My purpose in this paper is to deepen the notion of judicial cosmopolitanism, from the historico-philosophical foundations, through the strong or 'thick' forms of cosmopolitanism/universalism and their criticism, to a reconceptualization of a more modest or 'thin' alternative, focusing on the concept of convergence. The purpose will turn out to be dual, both to propose a more nuanced perspective to support the judicial practice of looking outside national borders, and to answer to the sharpest criticism related to the cosmopolitanism/universalism argument.

2 Historical Foundations of Judicial Cosmopolitanism

We live in an era of 'cosmopolitan constitutionalism' in which lawyers and judges increasingly look beyond their own borders and borrow ideas from

[10] MR Ferrarese, *Diritto sconfinato. Inventiva giuridica e spazi nel mondo globale* (2006).

[11] R Hirschl, *The Political Origins of the New Constitutionalism* (2004) 11:1 *Ind J Global Legal Stud* 71.

[12] A De Tocqueville, *Democracy in America* (1835) 280.

[13] *See eg*, B Ackerman, *The Rise of World Constitutionalism* (1997) 83 *Va LR* 771; P Häberle, *Grundrechtsgeltung und Grundrechtinterpretation im Verfassungsstat* (1989) *Juristen Zeitung* 913; Q Camerlengo, *Contributo ad una teoria del diritto cosmopolitico* (2007) 215; G Zagrebelsky, *La legge e la sua giustizia* (2008) 404; J Habermas, *Theorie des kommunikativenn Handelns* (1986).

[14] C McCrudden, *'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights'* (2000) 20:4 *Oxford Journal of Legal Studies* 499.

other jurisdictions.[15]

The impact of globalisation on the judicial domain has been referred to as the growing 'judicial cosmopolitanism'[16] resulting from the increased tendency of supreme and constitutional courts to examine foreign judicial decisions and doctrines.

'Constitutional interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication'.[17]

It is spreading among the judges themselves 'concomitant pride in a cosmopolitan judicial outlook'[18] and the awareness to 'think of themselves as cosmopolitan transnational actors'.[19]

It is clear that the qualification 'cosmopolitan' used by so many scholars has not been using randomly. The recent notion of 'judicial cosmopolitanism' could be traced back to the philosophical concept of cosmopolitanism. Philosophical cosmopolitanism has a long historical lineage from the ancient Christian idea of *civitas maxima*, the Hellenic universalism of Diogenes the Cynic and the Stoics, Cicero in the Roman Empire, through Grotius, to the most complete formulation by the German philosopher Immanuel Kant in the 1795 essay on 'Perpetual Peace'.[20]

Kant overlooks the traditional *dichotomy* national law/international law, in a period of undisputed dominance of this legal paradigm, before the approval of United Nations Charter, and proposes a *trichotomy*. Typically, law was divided into *ius civitatis* and *ius gentium*; he added a *tertium genus*, the *ius cosmopoliticus*. Through the idea of *ius cosmopoliticus*, a world citizens' law (*Weltbürgerrecht*), he argued in favor of a league of nations, whose most vital ingredient was the law of universal hospitality. Cosmopolitan law completes national and international law so that international peace can be obtained and the respect of individuals as citizens of the world can be guaranteed. Kant strives for the transition to the cosmopolitan condition, which absorbs the whole of humanity and incorporates every other legal system, toward a gradual homogenization of political and cultural difference.

Mediated through the Marburger school of thought, the cosmopolitan vision theorised by Kant was taken up by Hans Kelsen and reformulated in his innovative 'pure theory of law'. His monistic approach consisted of some

[15] J Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 3.
[16] G Zagrebelsky, *Fifty years of activity of the Constitutional Court Speech*, 22 April 2006, <http://www.cortecostituzionale.it/ActionPagina_959.do> [accessed 15 September 2015].
[17] S Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation* (1999) 74 *Ind. LJ* 819, 820.
[18] AM Slaughter, *A Global Community of Courts* (2003) 44 *HILJ* 191, 198.
[19] PS Berman, *Judges as Cosmopolitan Transnational Actors* (2004) 12 *Tulsa JCIL* 101, 102.
[20] I Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795); it tr *Per la pace perpetua, un progetto filosofico e altri scritti* (edn 1985).

basic elements: the unity and objectivity of the legal system; the primacy of international law understood as an original, exclusive and universal legal order; and the associated idea that sovereignty of national states must be eliminated. In order to reach a stable and universal peace, the international legal community has to evolve from its primitive condition as system of sovereign states imposed by the peace of Westfalia (1648), to a universal organization of mankind, with the creation of a World State and the establishment of a Permanent International Court. Kelsen's proposal is a proper 'revolution in a cosmopolitan sense',[21] offering up anew an Enlightment, natural-law doctrine which can be traced back to eighteenth-century Europe.

In more modern times, the influence of the line of thought from Kant to Kelsen has pervaded some of the most original works by international lawyers, philosophers, political scientists. In the Anglo-American debate, Kant and Kelsen's universalim has inspired the works of the *Western globalists* (among them, Richard Falk, David Held, Antony Giddens) and their idea of a global constitutionalism. The work of the philosopher John Rawls has also been inspired by legal universalism. His 'law of peoples'[22] theory is based on extending the idea of the social contract from the state to international level, with the consequent extension of fundamental rights to humanity as a whole, in a cosmopolitan society which pursues the fundamental aim of peace. In Italy, Norberto Bobbio and Renato Treves have disseminated the Kantian and Kelsenian world-view through their writings in legal philosophy. After the end of World War II, there has been a strong acceleration toward universalization of fundamental rights, that Bobbio describes as a path 'from internal law of single national states, through law between states, to cosmopolitan law'.[23] Important advocates of legal pacifism and neo-Kantian internationalism can be found in Germany, and among them, Jürgen Habermas. The philosopher has taken up the challenge posed by Karl-Otto Apel to 'think with Kant against Kant', and reconstructed his theory adapting it to his (our) own time. In his *Die Postnationale Konstellation*, he argued that the challenge posed by social forces of globalization has given new impetus to Kant's idea of cosmopolitanism but such idea has to be reconciled with the national framework, in which Habermas developed his ideas of constitutional patriotism and deliberative democracy. The global economy competition policy does not render the traditional nation state obsolete and does not threaten democratic notion; on the contrary, globalization offers democracy a subjective enrichment. The traditional democratic mechanisms are no longer able to meet the demands of the new global order: 'democratic

[21] D Zolo, *International Peace Through International Law* (1998) 8 *EJIL* 306, 310.
[22] J Rawls, *The Law of Peoples* (1993) 20:1 *Crit Inq* 36.
[23] N Bobbio, *L'età dei diritti* (1992) XII.

cosmopolitanism' is a reaction to that.[24]

Against the above background, it can be easily argued that judicial cosmopolitanism has its theoretical foundations in Kantian *ius cosmopoliticus* and its further developments. However, some academics warn not to confuse the judicial concept with the philosophical one. In the United States, for example, Judge Posner of the Court of Appeals for the Seventh Circuit is convinced that philosophical cosmopolitanism 'has nothing to do with whether American judges should be taking their cues from judges in other nations, even if our common humanity is believed to underwrite a universal natural law that should guide courts, as some cosmopolitan philosophers, Kant for example, have believed'. According to this view, the judicial practice to cite foreign precedents is 'not justified by anything in philosophical cosmopolitanism'. And again, piling it on: 'Kant's concern with cosmopolitan rights […] is as remote from the current issue of judicial cosmopolitanism as international charity is'.[25]

If it is true that, until relatively recently, comparative law has tended to be rather dubious about the universalist possibilities of constitutional law, and the dominant paradigm was particularism, the resurgence of comparative law during the twentieth century brought with it not only an exponential growth in comparative constitutional law scholarship, but also the ascendency of universalism over particularism. And today's universalism/cosmopolitanism in comparative constitutional law contains traces of the historical and philosophical cosmopolitism outlined above.

It has to be noted that, for the purposes of the paper, the expressions 'cosmopolitanism' and 'universalism' are used as synonyms on the grounds of their common historico-philosophical roots. The paper rather deals with distinctions *within* the single category of 'universalism/cosmopolitanism'.

It is possible to identify both a 'thick' and a 'thin' version of universalism. 'Thick' version of universalism posits the universal application of norms and values, as well as a global network community that facilitates the enforcement and communication of these values.[26] On the other hand, 'thin' version of universalism presents more modest arguments about universal values. Similarly to 'thick' universalism, it recognizes a global network of courts as an interchange for ideas, but its focus is more on the universal nature of problems that courts face than on the norms that should be applied.[27]

The 'thin' version of universalism appears to be the most shareable version

[24] J Habermas, *Postnational Constellation* (1998).
[25] RA Posner, *How Judges Think* (2008) 354.
[26] *See eg*, A Barak, *Purposive Interpretation in Law* (2005); D Beatty, *The Ultimate Rule of Law* (2004); LE Weinrib, *The Postwar Paradigm and American Exceptionalism*, in S Choudhry (ed), *The Migration of Constitutional ideas* (2006) 84; TRS Allan, *Constitutional Justice: A Liberal Theory of The Rule of Law* (2003).
[27] *See eg*, AM Slaughter, *A New World Order* (2004).

of universalism at the present time, and should be the theoretical framework through which reconceptualize the notion of judicial cosmopolitanism. Judicial cosmopolitanism does not deserve as much a rejection *in toto* but rather a critical rethinking of its forms and manners of realization and of its rationales. 'Thin' universalism is also less unrealistic, utopian and naïf than 'thick' universalism. 'Complex',[28] 'rooted',[29] or 'bottom-up'[30] cosmopolitanism, which attempt to find a balance between *kosmos* and *polis*, are instances of these more conciliatory versions of universalism.

Even the historical universalistic thinkers realized how much strong universalism is problematic. Kant himself originally is remarkably 'modest': in his works there is no endorsement of global coercive authority or a world state. Still, he thought in terms of hierarchies and superposition of norms on statal entities, therefore his theory remains universalistic in perspective, not being so modest as 'rooted' or 'complex' cosmopolitanism. Kelsen, too, in his 1944 volume, *Peace through Law*, dwelt upon the numerous unavoidable obstacles to the realization of legal globalism. Even Habermas, in his more recent writings, has moved from a notion of world *government* to one simply of world *policy*.

3 Judicial Cosmopolitanism and...

A The Question of Rights Universalism

Proponents of judicial cosmopolitanism find a legal basis of legitimation in the idea of the existence of a *common core*[31] of values shared by all the constitutional systems. In fact, it is undisputed that assumed shared constitutional principles are only shared by Western democracies, which created them. The fact that the same cosmopolitanism upholders recognize that such *common core* is created by Western states, does not prevent them to claim that '[t]he basic principles of constitutional law are essentially the same around the world, even though there is considerable variation in what guarantees constitutions contain and in the language that they employ'.[32] Despite their undeniable historical, cultural, political, and social differences, constitutional systems are not exclusive product of national traditions, but are also based on shared roots and are constantly nourished by a shared heritage

[28] N Feldman, *Cosmopolitan Law?* (2007), 1032.
[29] KA Appiah, *Ethics of Identity* (2005) 213; B Ackerman, *Rooted Cosmopolitanism* (1994).
[30] VF Perju, *Cosmopolitanism and Constitutional Self-Government* (2010) 327.
[31] *Cf* P Häberle, *Lo Stato costituzionale* (2005) 278; A Sperti, *I giudici costituzionali e la comparazione giuridica* (2006) 11/I *Giornale di Storia costituzionale.* In Hungary, constitutional court judges declare the intention to build an 'invisible constitution', *see eg* MC Ponthoreau, *Le recours à l'argument de droit compare par le juge constitutionnel. Quelques problemes teoriques et techniques*, in F. Mélin Soueramanien (ed), *L'interpretation constitutionnelle* (2005)167.
[32] DM Beatty, *Constitutional Law in Theory and Practice* (1995) 10.

of fundamental principles.

The judicial practice of cross-citations, according to such scholarship, creates 'a cosmopolitan constitutional system',[33] based on the existence of a *common frame of reference*. As it is based on the existence of a *common core* of shared values, the mutual citation of judicial decisions concerning fundamental rights is not only legitimate, but also useful. Comparison between different solutions in different countries can illuminate the national tradition and help national judges to find the best solution, and 'to achieve an optimum standard of [rights] protection'. The further conclusion is that 'comparison becomes a tool for the construction of the universality of fundamental rights'.[34]

That being said, it has to be noted how scholars who interpret the judicial recourse to foreign law in a cosmopolitan perspective, provide a stimulating point of view that illuminates both the issues about comparative method in constitutional interpretation and universality of human rights in human rights interpretation. Comparative constitutional law and international human rights law scholarship have strong connections and, particularly, face a parallel ongoing debate: in comparative constitutional interpretation, there is a debate between universalism and pluralism; in human rights interpretation, there is a debate between universalism and relativism. The tension between the need for shared general values and inevitability of local difference is a recurrent theme in much of the literature on the subject: Mark Tushnet refers to 'normative universalism' and 'contextualism',[35] Vicki Jackson depicts movements of 'convergence' and 'resistance',[36] and Sujit Choudhry of universalism and particularism.[37] Mireille Delmas-Marty tries to explore the grey zone in between relativism and universalism, and propose a form of regulated pluralism, a *pluralisme ordonné*.[38]

Therefore, the interdisciplinary debate on human rights universalism presents several counter-arguments.

The evidence that the common fundamental values are Western democracies' values[39] sheds light on the dark side of universalism. The concrete risk to drastically reduce the political and cultural complexity of the world, under the aegis of interventionist countries, might lead to a sort of Western cultural imperialism or colonization. The objective different weight of

[33] Q Camerlengo, *Contributo ad una teoria del diritto costituzionale cosmopolitico* (2007).
[34] P Häberle (1989).
[35] M Tushnet, *Reflections on Comparative Constitutional Law*, in S Choudhry (ed), *The Migration of Constitutional Ideas* (2006), 68 ss.
[36] V Jackson, *Constitutional Comparison: Convergence, Resistance, Engagement* (2005) 119 *Harv LR* 109-11.
[37] S Choudhry, *The Lochner Era and Comparative Constitutionalism* (2004) 2 *IJCL* 1.
[38] M Delmas-Marty, *Le pluralisme ordonné*, (2006), 26.
[39] A Barak, *La comparazione nel diritto pubblico,* in B Markesinis & J Fedtke *Giudici e diritto straniero* (2009) 389, 391.

every state on the global scenario runs the risk of hegemony of the strongest states to the detriment of the weakest ones. Some scholars have defined the risk more precisely, warning to the threat of Americanization, given United States' unique position on the international chessboards. The concepts of democracy and rule of law have been used by United States as ideological means to justify wars and aggressions, like a 'plunder'[40] of the most developed countries at the expense of the other ones. According to the opposite perspective, instead, the current judicial cosmopolitanism would tend to counterbalance the positions of strong and weak countries/courts, providing weaker courts with new channels of communication and chances of improvement and aligning to most developed courts, and stronger courts with chances of exchange and openness to external influences, toward the homologation of the diverse possible legal solutions. 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 human rights.[41]

A second objection to the idea of rights universalism is that any apparent consensus that exists at the international level camouflages massive variations in actual practice. The way in which particular rights are interpreted and applied by judges in particular countries is so context-specific, so culturally contingent as to render the practice to look at another's nations decisions at least useless, if not dangerous. Foreign decisions 'emerge from a complex socio-historico-politico-institutional background of which our judges [...] are almost entirely ignorant',[42] then, as Scalia wrote in his dissenting in *Lawrence* opinion, 'the court's discussion of foreign views is meaningless dicta. Dangerous dicta, however, since this court should not impose foreign moods, fads, or fashions on Americans.'[43]

At this point, a clarification is needed. In the context of such a debate, concepts of *common core* and *global consensus* seem interchangeable. Nonetheless, a distinction has to be drawn.

Laurie Ackermann well-described the notion of *common core* combined with the recent change of constitutional scenario. She wrote: 'Constitutional law in the twentieth century – quite apart from the influence of binding international law – is not a wholly nationalistic and exclusively historical enterprise, but embodies a certain universally normative minimum core'[44] of values.

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[40] U Mattei & L Nader, *Plunder. When the Rule of Law is Illegal* (2008). *See* also, D Kennedy, *Reassessing International Humanitarianism: The Dark Sides* (2004).

[41] MR Ferrarese, *When National Actors Become Transnational: Transjudicial Dialogue between Democracy and Constitutionalism* (2009) 9:1 *Global Jurist* 1, 6.

[42] RA Posner (2004).

[43] *Lawrence v Texas* (2003) 539 US 558 (Scalia, J, dissenting).

[44] LWH Ackermann, *La comparazione costituzionale in Sud Africa*, in B Markesinis & J Fedtke,

After all that being said, it is necessary to deepen the question whether exists, beyond the historical differences, a *threshold*, a *style*, a *common core*, distinctive of human beings as such, though being liable to multiple, open-ended, undefined manifestations.

A possible reasonable answer, as previously mentioned, may be to draw a clear-cut distinction between 'thin' and 'thick' forms of universalism or cosmopolitanism.[45] The distinction between minimalism and maximalism approach implies that the search for universal values cannot go any further than a minimalistic and essential level of those values. Identifying only minimal universal values – a sort of minimum common denominator of common legal values (legally defined in context of the European Union as the 'common constitutional traditions of the member States') – appears as the most feasible way to avert the risk of cultural homogeneization or colonization by the strongest courts. However, the 'thick'/'thin' distinction is anything but undisputed. Other scholars have an opposite view, even hypotizing that 'cosmopolitan perspective might actually cause judges to refrain from overly-aggressive assertions of parochial norms'.[46]

If the universalistic notion of *common core* can be conceptualize in order to reconcile it with particularistic strands, as regards the concept of *global consensus*, instead, such a conceptualization seems harder to achieve.

The idea of measuring a *global consensus* refers to Habermas' theory of communicative action, according to which 'only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity'.[47] Some literature suggests that such a practice has to be avoided by judicial branches in deciding constitutional cases, since it connects to majoritarian dynamics something that is *not* majoritarian, that is to say rights.[48] In United States, scholars have formulated an objection to the practice of 'nose counting',[49] which consists in citing ideas that can be found more frequently in the case-law, and an associated more serious allegation, to which the mere finding of majority, as if a simple majority was more likely to be right than wrong, like in a sort of revisited Condorcet's Jury theorem,[50] conceals an underlying substantial lack of real standards of inquiry.

If the choice of *whether* to cite and *what* to cite is exclusively based on a

Giudici e diritto straniero (2009) 361, 373.

[45] M Walzer, *Thick and Thin. Moral Argument at Home and Abroad* (1994).

[46] PS Berman, *Judges as Cosmopolitan Transnational Actors* (2004) 12 *Tulsa JCIL* 101, 102.

[47] J Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992); it tr, L Ceppa (ed), *Fatti e Norme. Contributi a una teoria discorsiva del diritto e della democrazia* (1996).

[48] M Cartabia, *L'universalità dei diritti umani nell'età dei nuovi diritti* (2009) a XXIX n 3 *Quad cost* 537.

[49] TM Fine, *American Courts and Foreign Law: The New Debate* (2006) *DAJV Newsletter*, 111.

[50] EA Posner & CR Sunstein, *The Law of Other States,* (2006-2007) 59 *Stan. LR*, 136.

supposed *global consensus*, that choice to cite easily becomes a mere artificial device with the aim to find a motivation to a decision already taken lacking other adequate motivations. This is when the judicial practice of mutual citation is 'not reasoned decision-making, but sophistry',[51] and can become really dangerous practice. The judicial reference to foreign law becomes dangerous when it translates into 'a form of judicial fig-leafing',[52] that covers the effective process of decision-making. Or when, using another image, Judge Barak's mirror, the mirror of comparative approach 'that allows me to observe and understand myself better',[53] become the Witch of Snow White's mirror, that reflects only what the owner wants to see reflected. US Judge Posner speaks out against American judges, who cite foreign precedents 'searching for a global consensus on an issue of US constitutional law'. 'That search is the latest hopeless effort to ground controversial Supreme Court judgments in something more objective than the Justice's political preferences'. 'Citing foreign decisions is an effort to further mistify the adjudicative process, as well as to disguise the political character of the decisions': strip the judicial decisions of their fig-leaves and you reveal a naked political judgment.[54]

The notion of global judicial consensus might seem 'the contemporary version of and a reasonable approximation to principles of natural law, deemed universal and therefore suprapolitical'.[55] The idea of natural law is recurrent in the literature upholding a strong form of universalism, combined with the other assumption that every legal system belongs to one single world community. To some scholars, such as Carozza, there are some implicit natural law premises operative in the phenomenon of cross-judicial discourse on human rights. 'Is there something specific to human rights that explains the apparently greater use of foreign case law in human rights cases?', is the repeated question in McCrudden's article.[56] To McCrudden, the tendency of courts to rely on foreign decisions reduces to a matter of functionalism,[57] even if he does not disregard Carozza's opposite thought, to which the practice of

[51] *Roper v Simmons* (2005) 543 US 551 (Scalia, J, dissenting).
[52] RA Posner, *How Judges Think* (2008) 350.
[53] A Barak, *Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia,* Fullbright Convention, 29 January 2006.
[54] RA Posner, *A Political Court*, 90.
[55] *Ibid*, *How Judges Think*, 348-50.
[56] C McCrudden, *Judicial Comparativism and Human Rights* in E Orucu & D Nelken, *Comparative Law: A Handbook* (2007) 371, 392; *Ibid*, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights* (2000).
[57] On functionalism, *see* K Zweigert & H Kötz, *An Introduction to Comparative Law* (3rd edn, 1998). *See* also, M Tushnet, *The Possibilities of Comparative Constitutional Law* (2008) 108 *Yale LJ* 1225, 1228; M Graziadei, *The Functionalist Heritage*, in P Legrand, R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 100; R Michael, The Functional Method of Comparative Law, in M Reimann, R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006) 339.

dialogue between courts has 'naturalist foundations'. Carozza provides 'a paradigmatic example of naturalist foundations at work[:] the tendency of courts involved in the transnational jurisprudence of capital punishment to consistently place their appeal to foreign sources on the level of the shared premise of the fundamental value of human dignity'.[58] The reference is, for example, to *Roper v. Simmons*, a 2005 United States Supreme Court case concerning the death penalty for juveniles, where Justice Kennedy for the majority cites foreign law, holding that the 'task of interpreting the Eighth Amendment [cruel and unusual punishment] remains our responsibility' and that it does not 'lessen our fidelity to the Constitution […] to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our heritage of freedom'.[59] Justice Kennedy wrote the opinion of the court also in the earlier sodomy case, *Lawrence v. Texas*, [60] referring to 'values [United States] share[...] with a wider civilization'.

On the other hand, Justice Kennedy[61] has been stigmatized by Posner as 'the leading moral vanguardist' on the court as well as 'a kind of judicial Ronald Dworkin'.[62] The allusion to Dworkin refers to the basic idea in Dworkin's works, that is the existence of universal principles of natural law. If they are universal, they should be visible in foreign legal systems so it is natural to look to the decisions of foreign courts for evidence of universality.

However, the critics of natural law foundations recall that traditionally 'humanity has a bad reputation. Its universalism is perceived as totalitarian, threatening humans in their singularity'.[63] Therefore, 'flirt[ing]' with the idea of a universal natural law and the sense of being part of a single world community would end up flattening constitutional law in a generic 'constitutionalism without borders',[64] and foreign models in domestic legal systems becoming 'Trojan horses to impose a universalistic rights dictatorship'.[65]

As usual, the truth seems to be somewhere in between the two extremes of universal natural law and national 'singularity'. The tendency to the 'emergence

[58] PG Carozza, *'My Friend is a Stranger': The Death Penalty and The Global Ius Commune of Human Rights* (2003) 81 *Tex. LR* 1031, 1082.
[59] *Roper v Simmons* (2005) 543 US 551.
[60] *Lawrence v Texas* (2003) 539 US 558, 576.
[61] Someone even talked of *impeachment* against Justice Kennedy. The founder of an influent evangelic group, 'Focus on Family', referred to Justice Kennedy as 'the most dangerous man in America' (J Dobson, '*The most dangerous man in America'*, 18 April 2005, <http://jesuspolitics.typepad.com/jesus_politics/2005/04/the_most_danger.html>).
[62] RA Posner, *A Political Court* (2005) 119 *Harv LR* 31, 85.
[63] M Delmas-Marty, *Le relatif et l'universel. Les forces imaginantes du droit* (2004) 74.
[64] RA Posner, *A Political Court* (2005) 119 *Harv LR* 31.
[65] G Zagrebelsky, *La legge e la sua giustizia* (2008) 404-05.

of a global constitutional jurisprudence'[66] can be interpreted without referring to such concepts as natural law. Ultra-national vocation is simply a natural tendency of constitutional courts. They have roots in the political, social and cultural national conditions, but they have heads looking at universal principles. Constitutions themselves contains general principles that need a wider perspective to be interpreted.[67]

B The Question of Legitimacy

One of the major criticism to the practice of judicial comparison is that of its undemocratic character. The fear of the 'specter of cosmopolitan activist judges striking down democratically enacted legislation' has ancient roots.[68] Once again, it is in the United States that such a criticism has been more deeply developed. The debate on judicial discretion or judicial creativity is a long lasting *topos*, related to the doctrine of separation of powers and to the role of the judiciary, to the methods of constitutional intepretation, and to the wider issue of the democratic legitimacy of judicial review, the so-called 'counter-majoritarian difficulty'.[69]

Judicial discretion has always been necessary in the dynamics of powers, but now it has been playing an even more vital role to meet the ever-changing demands of the contemporary age.

The strong role of courts and their activism, according to Zagrebelsky, do not represent the distortion, but the consequence of the current conditions of legal systems. Then, abuses and misuses of judicial power of discretion may happen in the same way both in legal systems that are open to the use of comparison and in legal systems that reject it. Rather, it is more likely that as long as judges refer to foreign experiences, abuses do not occur. 'Cosmopolitan constitutionalism, in the attempt to channel the flux of interpretations towards a convergence perspective, intends to promote an anchorage to objective data and remove subjectivism of the case-by-case

[66] AM Slaughter, *A New World Order* (2004) 75.

[67] G Zagrebelsky, *Fifty years of activity of the Constitutional Court Speech*, 22 April 2006, <http://www.cortecostituzionale.it/ActionPagina_959.do> [accessed 15 September 2015]. Discussing how supreme and constitutional courts have universal vocation *per se*, one should not forget to mention that in some cases courts are also bound by formal provisions promoting such supra-national inclination. For instance, European courts must adopt a wider perspective, as long as they are members of the European Union or the Council of Europe. And again, section 39 of the 1996 Constitution of South Africa, empowering courts to incorporate foreign and international law when interpreting the Bill of Rights, explicitly provides policy insights and practical recommendations to be followed by South African constitutional judges.

[68] PS Berman, *Judges as Cosmopolitan Transnational Actors* (2004-2005) 12 *Tulsa J Comp & Int L* 109, 110.

[69] A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, 1986), 16-18.

decisional process'. Comparative arguments, in the end, become real limits to judicial discretion. Judicial discretion is a power that cannot be fully controlled and unforeseen as it does not always follow definite rules; so that choosing a comparative argument and use it as guide in the activity of interpretation can be seen as an addition of a rule, of an authority – even though never binding, but persuasive – to restrict judicial discretion.[70]

Other scholars argue against the legitimacy of judicial recourse to comparison through narrower argumentations based on methods of constitutional interpretation. Goldsworthy, for instance, asserts that such an interpretative stance fails to take seriously the constraints that text imposes on the legitimate role of the courts in elaborating constitutional meaning.[71] In matter of this, it is important to refer to a quixotic paradox in which textualists incur, according to Zagrebelsky, trying to clear the sense of words using another words.[72] Mere textual exegesis proves to be, in the end, the most open of interpretations. In this context, it has to be mentioned the debate within American constitutional theory between different understandings of interpretation of Constitution, in particular between originalism (textualism and intentionalism) and living constitution. In the Supreme Court, two Justices embody these two theories: Justice Scalia for originalism, and Justice Breyer for living constitution.[73]

So far, it has been considered some of the major criticism to references to foreign law: such references are an 'illegitimate, antidemocratic judicial usurpation of authority, or an effort to obscure the absence of solid grounding in US law'. Vicki Jackson claims that these critiques are not only 'off the mark' and 'often counterproductive', but most importantly they are based on a wrong basic assumption, which is the *binding* authority of foreign law on domestic law. On the contrary, '[it is] important to note that the court's recent references to foreign decisions and practice do *not* treat them as binding. International law may be binding, as when Congress ratifies and implements a treaty. But that [i]s a separate question from whether the Supreme Court should cite foreign or international sources merely as sources' of inspiration.[74] Justice Ginsburg, one of the Justices who places most value on comparative dialogue as an essential way of 'sharing with and learning from others',[75] has confirmed on several occasions that foreign opinions are not

[70] G Zagrebelsky, *Il diritto mite* (1992) 201 ss.
[71] J Goldsworthy, *Questioning the migration of constitutional ideas: rights, constitutionalism, and the limits of convergence*, in S Choudhry (ed), *The Migration of Constitutional Ideas* (2006).
[72] *Ibid.*
[73] *See*, N Dorsen, *The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Stephen Breyer* (2005) 3:4 *Int'l J Const L* 519.
[74] V Jackson, *Yes Please, I'd Love to Talk With You* (2004), *Legal Affairs Blog*, <http://www.legalaffairs.org> [accessed 15 September April 2015].
[75] RB Ginsburg, *'A Decent Respect to the Opinions of [Human]kind': The Value of a Comparative*

authoritative and set no binding precedent for the US judge. The recently appointed Justice Elena Kagan reiterated the same idea in her responses to members of the Senate Committee on the Judiciary, who posed various queries about international and foreign law during the confirmation hearings held on her nomination.

Then, as ultimate argument, it can be even sustained that the question of legitimacy is a false problem.

C The Question of Threat to State Sovereignty

It has been mentioned above (parag. 2) the Westphalian dichotomy between national law and international law, in which law can traditionally be divided. Originally, international law derives from the power of national states, and is rooted in their acceptance, so that contributes as much as national law to emphasize their sovereignty. The regime of international law was the only regime above and beyond national regimes, authorized by national states and compatible with state sovereignty.

In the course of the last decades, the forces of globalization, with the extremely fast technological progress, have led to a real revolution of the concept of space: traditional borders traced by nation states and international organizations are continually crossed by new rules and procedures from different sources of legitimacy.[76] States have no longer the monopoly of the production of law: their sovereignty has dissolved into several 'sites of authority' or 'regulatory regimes'[77] all over the world. In this 'world of hybrid legal spaces, where a single act or actor is potentially regulated by multiple legal or quasi-legal order'[78], states traditional mechanisms are no longer able to manage such a complexity, and regulate the relations between distinct and at a time competing legal orders.

It can be argued that the traditional concept of state sovereignty – at least, the Westphalian version of it – has been facing a deep crisis.

In such a global legal scenario, the practice to look beyond national borders seems inescapable.[79] The national state remains a starting point, and is not abandoned; rather, the scope of judicial actors seems to be supplying to its deficiencies. In the same way, national constitution and its optimal interpretation remains judges' starting point and final purpose. The primary judicial function is still – and must be – the interpretation of the national constitution and the final purpose is to interpret constitutional provisions in

Perspective in Constitutional Adjudication, International Academy of Comparative Law, American University, July 30, 2010.

[76] *See eg*, MR Ferrarese, *Prima lezione di diritto globale* (2012).

[77] *See eg*, S Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (2009).

[78] PS Berman, *Global Legal Pluralism* (2007) 80 *Southern Cal LR* 1155.

[79] M Tushnet, *The Inevitable Globalization of Constitutional Law* (2009) 49 *Va J Intl* 985.

the best way possible to enhance the protection of national rights. To this end, judges are required to realise the changing of the legal world by globalization and the inevitable changing of their role as judges, becoming aware of 'engaging in a common enterprise worldwide'[80] and being part of a global circulation of case law. The circulation of case law does not undermine national identity. Rather, in the process of articulating the assumptions underlying foreign jurisprudence, a court will inevitably uncover its own. 'By asking *why* foreign courts have reasoned a certain way, a court engaged in process of discursive justification asks itself why *it* reasons the way it does'.[81] Moreover, 'communication is always filtered because it requires minimum standards of uniformity and adequacy of jurisprudential texts and contexts. Such judgments are of national courts. Therefore, any decrease in their sovereign function occurs'.[82]

4 Converging Courts rather than Cosmopolitan Courts. Concluding remarks on the Reconceptualization of Judicial Cosmopolitanism

It has been argued that the judicial practice to refer to foreign experiences does not humiliate or deprive national legal systems of their value, rather it strengthens the self-awareness of national courts, following a process of distinction rather than assimilation.

Comparative lawyers and judges 'must purposefully privilege the identification of differences across the laws they compare […] They must make themselves into *difference engineers*'.[83]

The comparison with foreign decisions may lead a court to challenge and reject the same foreign solutions and search for new ones. A court may use comparative arguments to reject rather than to adopt foreign assumptions, on the basis of radically different contexts. Or a court may determine the differences with foreign solutions to be unfounded, and may rely on comparative arguments to bring a change in his own legal system. Judges, as intermediaries between law and society, are engines of legal change in the society. Referring to the old distinction between judicial functions made by Lord Devlin, judges do not only keep the law in line with changes in society (active law-making)[84], but also foresee changes in society (dynamic law-making).

[80] AM Slaughter, *A Typology of Transjudicial Communication* (1994) 29 *Univ of Rich. LR* 99.
[81] S Choudhry (ed), *The Migration of Constitutional Ideas* (2006) 22.
[82] G Zagrebelsky, *Fifty Years of Activity of the Constitutional Court Speech*, 22 April 2006, <http://www.cortecostituzionale.it/ActionPagina_959.do> [accessed 15 September 2015], 3.
[83] P Legrand, *The Same and The Different*, in P Legrand, R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 248.
[84] Lord Devlin, *Judges and Lawmakers* (1976) 39 *MLR* 1.

Diversity is a value to be preserved, and should become one of the guiding principles to shape the new dimension of global law. Cosmopolitan theory has frequently discarded human difference in an attempt to distil what humans have in common so as to derive fundamental principles of law capable to cross time and space. However, 'universality […] is a myth': it neither exists or could ever exist nor it is desirable. The practice to cite foreign decisions concerning fundamental rights and liberties is not useful to draft cosmopolitan codes, but to show the ability of different cultures to communicate, their ability to live together, overlapping and even integrating each other.[85]

The irreducible tension between universalism and particularism belongs both to the ambivalent nature of human rights and to the conflicting forces of globalization. The process of growing unity – the number of international organizations directed to harmonization is increasing – and the contextual process of growing differentiation – nation states continue to multiply and shrink in average size –[86] have to be interpreted as one single process characterizing the current time. The global-local tension is a stable feature of the new legal order. Globalization entails a sort of 'right to difference'[87] since it is 'not a one-way process of universalization, but a universalization of particular and a particularization of universal'.[88] Then, globalization should be better called 'glocalization':[89] global and local spheres are not exclusive and separate, but are subjected to a relentless reciprocal contamination, following bottom-up, top-down, and even transversal directions.

'Unity and diversity cannot […] be seen as binary opposites, one or the other necessarily prevailing, but must be seen rather as correlatives'.[90] Therefore, nowadays, the perspective to adopt should be that one of an ongoing search for convergence, rather than one of a reached, static and stable unity, or one of a chaotic and irreconcilable pluralism.[91]

The search for convergence is a perspective that admits the possibilities of divergence, or even stasis. 'There are forces for both convergence and divergence operating on the constitutional systems of the world of the 21st century.'[92] Judicial cosmopolitanism should be interpreted as a pattern of increasing convergence toward a general human rights core but also increasing

[85] S Cassese, *Universalità del diritto* (2005) 12.
[86] HP Glenn, *The Cosmopolitan State* (2013) 180; M Shapiro & Brilmayer, *Global Justice* (1999) I, ('centrifugal forces at work').
[87] M Delmas-Marty, *Le Relatif et l'Universel* (2004) 65.
[88] R Robertson, *Social Theory, Cultural Relativity and the Problem of Globality,* in *Culture, Globalization and the World-System* (1997).
[89] R Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity,* in M Featherston, S Lash, R Robertson, *Global Modernities* (1995).
[90] HP Glenn, *The Cosmopolitan State* (2013) 203.
[91] *See*, G Zagrebelsky, *La legge e la sua giustizia* (2008).
[92] C Saunders, *Towards a Global Constitutional Gene Pool* (2009) *Nat'l Taiwan Un LR* 1-38.

polarization, or divergence, in respect of the degree to which those rights are interpreted and applied. The dynamics and the diffusion of the judicial practice of comparison do not follow a systemic pattern,[93] but follow 'the pattern of a 'constitutional frontier',[94] or of 'an S-shaped curve'[95]. The constitutional frontier proceeds along a moving and irregular line, with some parts taking a step forward while others lag behind; similarly, along the S-shaped line, one moves first, a few slowly imitate it, then the number of imitators rapidly increases, and then the curve flattens out.

This dynamic and indented pattern searching for convergence can only be followed through the mode of dialogue. The mode of 'dialogical interpretation' described by Choudhry envisages that 'comparative engagement between courts, far from necessarily directing toward constitutional convergence, can instead reinforce moments of constitutional difference'.[96] Recognition of the other and her difference and consequent agreement or compromise can only be achieved through dialogue. Viewed from another perspective, a commitment to dialogue is intended to prevent the suppression or neglect of marginal voices. We look beyond our national borders 'not in order to look away from what is near and familiar, but to see it better, within a larger whole and in a truer proportion'. Conversation with others helps us to see beyond our own horizon and further helps to make the ideas of another person intelligible, without us necessarily agreeing with his point of view. Understanding is the result of dialogue and entails the sharing of a new and expanded perspective that neither conversational partner could have achieved alone.[97]

The dialogical model seems the middle-way solution, ethically preferable *tertium* to the unrealistic relativism or universalism, but at the same time combining features of both.

'[O]f course we share a common humanity'[98] and it is a natural human need to invoke a 'decent respect to the opinions of mankind'.[99] The Universal Declaration of Human Rights (1948) appears to be the recognition of our common condition of humanity and the acceptance of 'some irreducible minimum of common values, not only intrinsic to human communication but

[93] *See*, DS Law & M Versteeg, *The Declining Influence of the United States Constitution* (2012) 87:3 *New York Un LR* 762.
[94] FJ Turner, *La frontiera nella storia americana* (1959); MR Ferrarese, *When National Actors Become Transnational: Transjudicial Dialogue between Democracy and Constitutionalism* (2009) 9:1 *Global Jurist* 1, 6.
[95] R Dixon & E Posner, *The Limits of Constitutional Convergence* (2010) 11 *Chicago JIL* 399, 421.
[96] S Choudhry, *ibid* 22.
[97] HG Gadamer, *Verità e metodo* (2004) 301 ss.
[98] Lord Hoffman, *Human Rights and the House of Lords* (1999) 62:2 *Modern LR* 159, 159.
[99] *Knight v Florida* (1999) 528 US 990, 997 (Breyer, J, dissenting from denial of certiorari).

grounding our conception of a normal human beings'.[100] However, it becomes an empty box as, when applied, is filled with different interpretations and exposed as culturally relative, deeply contingent on local politics and value. The difficulty to define a minimal content of the core of universal values derives from the fact that there is the need to accept the impossibility to define it once and for all, abstracting from the different historical and cultural positive experiences. Universal values should be found in everyday experience, formulated case by case, according to an *inductive* rather than *deductive* method. And, above all, universal values can emerge in the gathering of different cultures and in the recognition of the other, in sum in the comparison.

Concluding, it can be sustained that all the critiques of judicial cosmopolitanism, in the end, become a critique on judicial methodology, rather, a *caveat* on judicial methodology.

Vicki Jackson suggests that if judges act with *care* in making legal comparisons, consideration of foreign legal decisions can contribute to our understanding of our own distinctiveness as a nation, illuminate common concepts, and challenge us to think more clearly about our own legal questions.[101]

Italian scholarship, in the attempt to face the multiple difficulties of the debate, appeal, some, to the *diligence* that every judge and lawyer should have in the exercise of law, balancing national and international demands, and, others, to the *reasonableness*, a sort of modern *aequitas*, that indicates the necessity to compose many reasons, when many reasons are on the table. Not the absolutism of one single reason, not the relativism of one or the other reason, but the convergence of all the reasons, as far as it is possible.

Judges, in the end, have to follow ancient directives. A healthy dose of *prudence*: the *iuris prudentia* that has always been prerogative of the judiciary and that law has always required to the judicial function.[102]

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[100] I Berlin, *Four Essays on Liberty* (1969) 31-32. Many other documents – from the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen, to the several charters of rights enacted in the contemporary age such as the European Convention on Human Rights and the EU Charter of Fundamental Rights – prove the same idea.

[101] V Jackson, *Yes Please, I'd Love to Talk With You* (2004), *Legal Affairs Blog*, <http://www.legalaffairs.org> [accessed 15 September 2015].

[102] A Sperti, *Le difficoltà connesse al ricorso della comparazione a fini interpretativi nella giurisprudenza costituzionale nel contesto dell'attuale dibattito sull'interpretazione* (2008) 1045; Q Camerlengo, *Contributo ad una teoria del diritto cosmopolitico* (2007); G Zagrebelsky, *Il diritto mite* (1992) 203-05.