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Ruling from Below: Common Constitutional Traditions and Their Role[1]

Sabino Cassese

Contents

1. Who Is Shaping Global Administrative Law?

"Who is shaping global administrative law?" asked Benedict Kingsbury, Nico Krisch and Richard Stewart in their seminal article of 2005 on the journal *Law and Contemporary Problems*, that paved the way to global administrative law scholarship.[2] In another article, published in the same issue of that periodical, Richard Stewart wrote that "[a] global administrative law must, of course,

[1] An initial draft of a part of this article was presented at the Seminar on "Constitutional Traditions Common to the Member States", Bocconi University and European Law Institute, 28–29 November 2019. Another version was discussed at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, during the meeting on "Common Constitutional Traditions" of the European Law Institute, 30 January 2020. I wish to thank Giuliano Amato, Armin von Bogdandy, Marta Cartabia, Giacinto della Cananea, Guido Raimondi and all those who participated in the seminars for their comments. In addition, I thank Celestina Iannone, Head of Unit, Research and Documentation Directorate, Court of Justice of the European Union, for her kind support in identifying the Court of Justice's judgments on common constitutional traditions. This article is dedicated with admiration to Richard Stewart and to his vast, seminal scholarly work in the field of administrative law (on which I have written *Richard B. Stewart e la scienza americana del diritto amministrativo*, in "Rivista trimestrale di diritto pubblico", 2005, A. LV, n. 3, pp. 617–631).

[2] B. Kingsbury, N. Krisch and R. Stewart, *The Emergence of Global Administrative Law*, in "Law and Contemporary Problems", 2005, vol. 68, Summer/Autumn, n. 3 and 4, p. 51.

draw on legal principles and practices from domestic and regional legal systems and traditions, as well as from sources in international law."[3]

Supranational institutions do not simply grow out of thin air. The men and women who contributed to their design were citizens of nation-States and had national examples in mind.

This "dialogue" between the supranational and national levels of government show that they are less distant than might be thought by those who see State sovereignty and globalization as opposites; that they are open to reciprocal recognition or inclusion; that they are not only two "layers," one superimposed over another, as presumed by the "theorists" of "multilevel governance;" and that there are, as noticed by Stewart, "two-way vertical linkages between the domestic and the international levels,"[4] as well as a great deal of back-and-forth between the levels.

If national legal principles, practices and traditions can contribute to shaping global administrative law, some questions may still arise. Firstly: can national experience contribute not only to the initial molding of supranational law, but also to its subsequent development, so that supranational law is continuously "fed" with transplants of national institutions and rules? Secondly: is this contribution a "de facto" process, or is it regulated by law, so that transplants are subject to detailed procedures and standards? Thirdly: how are national principles, practices and traditions chosen and balanced with one another, and which national law should prevail? Fourthly: can global law mirror national institutions without losing its proper nature and function?

These questions have become more relevant in the present days, as de-globalization and anti-globalization seem to acquire prominence, because the process of bottom-up transplantation can reduce tensions between the global and national legal orders. But this process can also trigger

[3] R. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, in "Law and Contemporary Problems", 2005, vol. 68, Summer/Autumn, n. 3 and 4, p. 63.
[4] R. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, in "Law and Contemporary Problems", 2005, vol. 68, Summer/Autumn, n. 3 and 4, p. 67. See also G. della Cananea, *The Global, European and National Dimensions of Administrative Law*, in J.B. Auby (ed.), *Le futur du droit administratif*, Paris, Lexis Nexis, 2019, pp. 103 ff. and E. Vitta – V. Grementieri, *Codice degli atti internazionali sui diritti dell'uomo*, Milan, Giuffré, 1981, p. 3.

competition among national legal orders to influence the global space, and consequently weaken global regulatory regimes.

To examine the problem of the relationship between national and global law, I have chosen an example of institutionalized bottom-up system: that established by Article 6 of the Treaty on European Union (TEU).

2. A Higher Law, Made of Lower Law

The Preamble to the TEU establishes two important principles: respect for the past ("inheritance," "history") and subsidiarity (to ensure that decisions are taken as closely as possible to the citizen). In particular, it states the importance of the following: "drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law," "desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions," and wishing "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity" (emphases added).

Article 2 TEU contains a basic recognition of the values shared among the Member States, providing that "[t]he Union is founded on the values of respect of human dignity, freedom, democracy, equality, the rule of law and respect of human rights […]. These values are common to the Member States."

While it is recognized that the "value" of respect for human rights is common to, or shared by, the Member States, there is no such express recognition of the "principles" regarding fundamental rights (like free speech and freedom of association). Rather, the provisions enshrining them are found in various supranational sources of law (the European Convention for the Protection of Human Rights and Fundamental Freedoms – ECHR – and the Charter of Fundamental Rights of the European Union – CFR), but also in what the constitutional traditions of the individual Member States have in common with each other.

Common constitutional traditions clauses can be found in various supranational provisions. Article 6(3) TEU provides that: "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."[5]

A similar clause is found in the Treaty on the Functioning of the European Union (TFEU), Article 340: "[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties." In this case too, European law is grounded on the law of the Member States, but with one major difference: reference is made to the "general principles of the laws," not to the "constitutional traditions" of the Member States.

The reference to the legal orders of the Member States of the European Union (hereafter, Union) as sources of Union law is reiterated in the CFR, albeit with different wordings (first "principles" and later "traditions"). Article 41(3) CFR provides that "[e]very person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States." Article 52(4) CFR states that "[i]n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

A partial application of the same principle may be found in European legislation. An example is Recital 34 of Regulation No. 1024/2013 on the European Central Bank (ECB), according to which "[f]or the carrying out of its tasks and the exercise of its supervisory powers," the ECB should apply "the relevant Union law, in particular directly applicable Regulations or Directives;" however, "where the relevant Union law is composed of Regulations and in areas where, on the date of entry into force

[5] On the origins of the general principles of EC law, see P. Craig, *UK, EU and Global Administrative Law. Challenges and Foundations* (Cambridge University Press, 2015), p. 323.

of this Regulation, those Regulations explicitly grant options for Member States, the ECB should also apply the national legislation exercising such options".

The common constitutional traditions clause of Article 6(3) of the TEU has a precedent in Article 215(2) of the Treaty establishing the European Economic Community (1957), which states that "[a]s regards non-contractual liability, the Community shall, in accordance with the general principles common to the laws of Member States, make reparation for any damage caused by its institutions or by its employees in the performance of their duties". However, this provision originates from the well-known *Internationale Handelsgesellschaft* Judgment (Case-11/70) handed down by the European Court of Justice (as the Union's highest court was known then) in 1970, which stated that: "[r]ecourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law […].The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[6]

The importance of this clause has been stressed more recently by the President of the Court of Justice of the European Union (CJEU): "[a]ny European State wishing to join the EU must adhere unequivocally to the constitutional traditions common to the Member States by ensuring compliance with democratic principles, fundamental rights, and the rule of law. […] once a Member State decides to join the EU, it must comply with a set of common values. It is thus assumed that after taking up EU membership such a State will remain committed to defending liberal democracy, fundamental

[6] On the history and sources of the clause, see S. Cassese, *The "constitutional traditions common to the Member States" of the European Union*, in "Rivista trimestrale di diritto pubblico", 2017, n. 4, pp. 939 ff. See also M. G. Graziadei, R. De Caria, *The «Constitutional Traditions Common to the Member States» in the Case law of the European Court of Justice: Judicial Dialogue at its Finest*, in "Rivista trimestrale di diritto pubblico", 2017, n. 4, pp. 949 ff., M. Comba, *Common Constitutional Traditions and National Identity*, in "Rivista trimestrale di diritto pubblico", 2017, n. 4, p. 973 ff., spec. p. 974; M. Fichera, O. Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?* In "German Law Journal" 20, pp. 1097–1118, https:// doi.org/10.1017/glj.2019.82; G. Pitruzzella, *Do common constitutional traditions matter in the field of regulated markets?*, in "federalismi.it", 25 October 2019, n. 5.

rights, and a government of laws, not men. Recent developments show that this assumption cannot simply be taken for granted.[7]

On the TEU clause that refer to common constitutional traditions as sources of principles for European law, there are two opposite points of view. Some observers consider them "the 'gold standard' for examining the Union's courts' recourse to the comparative law method", and "as a source of inspiration in the interpretation and discovery of general principles of EU law."[8] Others find that "the Charter of Fundamental Rights contains so many and such expansive fundamental rights that these constitutional traditions are likely to decline in relevance."[9]

3. Eight Peculiarities of the Clause on Common Constitutional Traditions

These provisions introduce an entirely new manner of lawmaking. In particular, this type of constitutional legislation has eight peculiarities.

The first is that the higher law is made up of the lower law, through a process of absorption. Therefore, in the area of fundamental rights, the "general principles" of European law are the result of a complex "two-way" process, because they first proceed from the bottom up, and then from the top down. The higher law can derive from lower law; the "general principles" do not drop down from the top. This process launches a "dialogue" between the two levels of government, and is proof of their reciprocal openness. "The inclusion of Member States' law in the concept of European law" produces a "European conglomerate of legal norms of different legal orders."[10]

The second peculiarity is that this vertical two-way procedure also requires a horizontal, comparative process, because the commonalities must be discovered through a comparison of traditions. Comparison becomes a part of the norm-setting procedure. However, at the same time, this

[7] K. Lenaerts, *New Horizons for the Rule of Law Within the EU*, in "German Law Journal" 21, pp. 29–34, https://doi.org/10.1017/glj.2019.91.
[8] K. Lenaerts and K. Gutman, *The Comparative Law Method and the Court of Justice of the European Union*, in M. Andenas and D. Fairgrieve (eds), *Courts and Comparative Law*, Oxford, Oxford University Press, 2015, p. 151 and p. 173.
[9] P. M. Huber and A. L. Paulus, *Cooperation of Constitutional Courts in Europe. The Openness of the German Constitution to International, European, and Comparative Constitutional Law*, in M. Andenas and D. Fairgrieve (eds), *Courts and Comparative Law*, *op. cit*., p. 299.
[10] A. von Bogdandy, *The Current Situation of European Jurisprudence in the light of Schmitt's Homonymous Text,* unpublished paper. P. 15.

use of comparison has an impact on the identity of this branch of legal scholarship, which thus becomes an instrument to develop concepts and institutions that transcend individual national legal orders. Comparative law replaces legal comparison.[11]

The third peculiarity is the continuity that this process establishes between the future and the past. The "general principles" that must regulate future cases derive from what is common to the national regulations of the past. Thus, the future is also shaped on the basis of measures issued over a long period of time. History becomes a part of the norm-setting procedure – a procedure that includes a temporal dimension.

The fourth peculiarity is that "general principles" do not derive from national legislation but must be part of a tradition, and this tradition must be shared by several countries. Therefore, the concept of a common constitutional tradition is basically an anti-positivistic one[12], as tradition also implies taking into account elements of factual situations and capturing the richness of history.[13]

The fifth peculiarity is the discretion that this process leaves to the interpreting authority, and in particular to the CJEU. This court has the power to decide whether a given national constitutional tradition effectively exists, as well as the number of converging national traditions that must be found in order to conclude that a tradition is indeed "common." In addition, the CJEU can determine the balance between common constitutional traditions and the ECHR rules, as Article 6(3) TEU makes a combined reference to the two sources ("as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms *and* as they result from the constitutional traditions common to the Member States.") References to common constitutional traditions leave wide room for maneuvering, especially when made in conjunction with other sources.[14]

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[11] On the methodologies of comparison, see R. Hirschl, *Comparative Methodologies*, in R. Masterman and R. Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, Cambridge University Press, 2019, pp. 11 ff.

[12] As, according to legal positivism, law is synonymous with positive norms, that is, norms made by the legislator or considered as common law or case law.

[13] See M.A. Glendon, P. Carozza, C. Picker, *Comparative Legal Traditions in a Nutshell,* Eagan, Minnesota, West Academic, 2015.

[14] It is therefore interesting to consider cases where the European Court of Justice has decided only

The sixth peculiarity is that common constitutional traditions provide legitimacy for the higher law. Providing that general principles of European law can be established on the basis of what is common to the European national traditions is a means of self-legitimation for European law. This is reassuring both for national legal orders (because they will not lose their voice), and for the higher law (because in this way it can overcome its legitimacy deficit).

The seventh peculiarity is that common constitutional traditions are not imposed as such, but are a source of principles that must be derived through a process of percolation. General principles are recognized on the basis of the law common to the national traditions.

The eighth peculiarity is that this manner of balancing national and supranational law does not apply to all subject matters, but only to fundamental rights.[15] This means that the framers of the European "constitution" believed that in this area, history was particularly relevant, and that the new European law should therefore bow to preexisting legal traditions. They did not wish to broaden the area within which national traditions – if common to the national legal orders – could influence general principles of European law. Constitutional arrangements are excluded from the two-way process of norm-setting.

4. The Insertion of Supranational Regimes into National Legal Orders, and Vice Versa

I shall now take a step back and consider the insertion of supranational regimes into national legal orders, and, conversely, the insertion of national legal orders into supranational regimes.

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on the basis of the common constitutional traditions clause, as that of equal treatment in the field of employment and occupation.
Decision C-193/17 of 22 January 2019 states that "Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, which originates in various international instruments and the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds, including religion and belief, as may be seen from its title and from Article 1 thereof (judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 75, and of 11 September 2018, *IR*, C-68/17, EU:C:2018:696, paragraph 67)". Previously, the Court, in the case C-147/08 (*Römer*) decided that "the Directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds (see *Mangold*, paragraph 74, and Case C-555/07 *Kücükdeveci* [2010] ECR I 0000, paragraph 20)". Similar statements can be found in earlier judgments.

[15] A different interpretation is that proposed by K. Lenaerts and K. Gutman, *The Comparative Law Method and the Court of Justice of the European Union*, in M. Andenas and D. Fairgrieve (eds), *Courts and Comparative Law*, *op. cit*. p. 173. They write "including, but not limited to fundamental rights".

Since the decline of the State as the exclusive source of regulation, supranational and national regimes have attempted to adjust to each other's competences, trying to find a solution to the problem of the simultaneous allocation of authority. There are numerous examples of this "dialogic" exercise.

One example is Article 38 of the Statute of the International Court of Justice, which refers to the "general principles of law recognized by the civilized nations". Another was Article 4 of the Weimar Constitution (1919), according to which "the generally accepted rules of international law are to be considered as binding integral parts of the law of the German *Reich*". Yet another is Article 10 of the Italian Constitution of 1948, which provides that "the Italian legal system conforms to the generally recognized principles of international law". These provisions are good examples of the reciprocal openness of "superior" and the "inferior" legal orders, because they provide for adjustments in both directions.

The Italian legal historian Luigi Lacché noticed that "the concepts of 'common constitutional heritage' and common constitutional traditions are to be confronted […] with those, for example, of pluralism and complexity:" "[w]e need to be aware of the fact that myths and traditions are part and parcel of constitutional history building," and that "[a] constitution is at one and the same time a factor of sharing and of separation, of identity and of difference.[16]

Bottom-up, national regimes accept supranational primacy, but with some exceptions, as may be seen in *Solange I* and *II*[17] and in the "counter-limits" doctrine[18] existing in some European national legal orders. In these cases, while national legal orders accept the primacy of a supranational body of law, they also wish to continue having the final say.

While top-down, supranational legal systems assume that they have superiority over national legal orders, they do recognize that these orders have some room for maneuvering, resorting to

[16] L. Lacché, *Crossing boundaries. Comparative constitutional history as a space of communication*, in "Glossae. European Journal of Legal History", 2018, n. 15, p. 132.
[17] ECJ (1970) Case 11/70; (22 October 1986) BVerfGE 73, 339, [1987] 3 CMLR 225.
[18] See Italian Constitutional Court, Judgement 115/2018.

doctrines of deference, subsidiarity or margins of appreciation, which are all means of decentralization.

The crucial problem is, then, how can superior legal orders assert themselves as higher law? In this context, the richest experience is that of the European Court of Human Rights (ECtHR), that has developed a test of proportionality based on counting (consensus) as a means to confine the discretion ("margin of appreciation") of national governments.

5. Common Constitutional Traditions as a Means of Interpretation

National constitutional principles, when common to the Member States, constitute general principles of Union law, according to Article 6(3) TEU. However, Article 52(4) CFR states that "[i]n so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions". The role of common constitutional traditions, in this case, is different, as they are instrumental to the interpretation of fundamental rights.

It is important to ascertain how national constitutional courts have read this rule of interpretation.

The Italian Constitutional Court, in the *Taricco* saga, made a reference in a preliminary ruling to the CJEU with Order No. 24/2017, for an interpretation of the principle of legality as regulated by Article 25(2) of the Italian Constitution in light of the CFR and the "shared constitutional traditions of the Member States."

The same Italian court, with Judgment No. 269/2017, declared that "[t]he Court will make a judgment in light of internal parameters and, potentially, European ones as well (per Articles 11 and 117 of the Constitution) […],in a way consistent with constitutional traditions, which are mentioned in Article 6 of the Treaty on European Union and by Article 52(4) of the EUCFR as relevant sources in this area".

Other national constitutional courts with long-standing traditions have followed an analogous line of reasoning.[19]

In Judgment No. 20/2019, the Italian Constitutional Court established that it had to:

> express its own evaluation, above all in light of domestic constitutional provisions, on provisions which, like those at issue here, while remaining subject to regulation by European law, touch on principles and fundamental rights enshrined in the Italian constitution and recognized by constitutional case law. One purpose of this is to make its own contribution to rendering effective the possibility, discussed in Article 6 of the Treaty on European Union (TEU) […] that the corresponding fundamental rights guaranteed by European law, and in particular by the CFR, be interpreted in harmony with the constitutional traditions common to the member states, also mentioned by article 52(4) of the CFR as relevant sources.

Finally, the Italian Constitutional Court, with Order No. 117/2019, made a reference to a preliminary ruling to the CJEU asking two questions:

> a) whether Article 14(3) of Directive 2003/6/EC, since it is still applicable *ratione temporis*, and Article 30(1)(b) of Regulation (EU) No. 596/2014 must be interpreted as enabling Member States not to sanction those who refuse to answer questions from the competent authority if that could reveal their liability for wrongdoing punished with administrative sanctions of a "punitive" nature; b) whether, in the event of a negative answer to the first question, the provision of Article 14(3) of Directive 2003/6/EC, since it is still applicable *ratione temporis*, and Article 30(1)b of Regulation (EU) No. 596/2014 are compatible with Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, also in light of the case law of the European Court of Human Rights on the subject of Article 6 ECHR and of the constitutional traditions common to the Member States, insofar as those provisions require sanctions to be imposed also on persons who refuse to answer questions from the competent authority that could reveal their liability for wrongdoing punished with administrative sanctions are "punitive" in nature.

The German *Bundesverfassungsgericht*, in its judgment of 5 May 2020 (para. 112) declared:

> The ultra vires review must be exercised with restraint, giving effect to the Constitution's openness to European integration. The interpretation and application of EU law, including the determination of the applicable methodological standards, primarily falls to the CJEU, which in Art. 19(1) second sentence TEU is called upon to ensure that the law is observed when interpreting and applying the Treaties. The methodological standards recognized by the CJEU for the judicial development of the law are based on the (constitutional) legal traditions common to the Member States (cf. also Art. 6(3) TEU, Art. 340(2) TFEU), which are notably reflected in the case-law of the Member States' constitutional and apex courts and of the European Court of Human Rights. The application of these methods and principles by the CJEU cannot and need not completely correspond to the practice of domestic courts; yet the CJEU also cannot simply disregard such practice. The particularities of EU law give rise to

[19] See, for example, the decision of the Austrian Constitutional Court, Judgment U 466/11-18; U 1836/11-13 of 14 March 2012

> considerable differences with regard to the importance and weight accorded to the various means of interpretation. Yet the mandate conferred in Art. 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded. Against this backdrop, it is not for the Federal Constitutional Court to substitute the CJEU´s interpretation with its own when faced with questions of interpreting EU law, even if the application of accepted methodology, within the established bounds of legal debate, would allow for different views (BVerfGE 126, 286 <307>). Rather, as long as the CJEU applies recognized methodological principles and the decision it renders is not objectively arbitrary from an objective perspective, the Federal Constitutional Court must respect the decision of the CJEU even when it adopts a view against which weighty arguments could be made. The mandate, conferred upon the CJEU in Art. 19(1) second sentence TEU, to ensure that the law is observed in the interpretation and application of the Treaties necessarily entails that the CJEU be granted a certain margin of error (cf. BVerfGE 126, 286 <307>; 142, 123 <200 and 201 para. 149>).

The direction taken by the German court differs from the Italian one. The first, after bowing to common constitutional traditions, declared that the CJEU cannot simply disregard the practice of domestic courts and allowed for a "margin of error" on the part of the CJEU, as is usually done by higher courts with respect to lower courts. What is new is the different usage of the common constitutional traditions clause, a usage that emphasizes the commonality of the traditions and, at the same time, the practices followed by individual national apex courts, without even trying to search for other traditions. This implies an attempt to "nationalize" European law and the control performed by the CJEU over national and EU law.

6. The ECtHR's Doctrine of Consensus: "*Così Fan Tutte*"

I shall now pause to reflect on the ECtHR's doctrine of consensus,[20] which must be considered as a precedent to the common constitutional traditions mechanism.

According to this doctrine, when reviewing the proportionality of a country's application of its margin of appreciation, the ECtHR must consider how many ECHR Contracting States have adopted a given interpretation of the Convention provision in question. An example may be seen in the case on abortion in Ireland, in which the ECtHR also tested the compliance of national law with

[20] To which the ECtHR also refers with expressions such as "common ground", "common European approach", "continuing international trend" and "evolving convergence".

a common, recognized standard (the "consensus standard.")[21] The "higher" court must analyse and compare many different national legal orders, ascertain whether a "consensus" among them can be found, and balance that with the "superior" rule. In this process of reception-circulation of legal rules among parallel national legal orders, the principle of proportionality is used as a facilitator.[22] The job of the courts, then, is to evaluate the relevance of the context of each national provision[23] and to establish the relevant standard (consensus inquiry) by means of a comparative process that leaves space for choice from among a number of options ("*wertende Rechtsvergleichung.*")[24] Integration of the principle of proportionality, which operates "vertically", with the consensus doctrine, which operates "horizontally", is extremely important. If the latter predominates, the principle of proportionality may lose importance, as agreement among different legal orders becomes the parameter against which to evaluate State action.

In these cases, national and supranational courts try to balance national legal orders – that is, diversity – and supranational legal orders – that is, uniformity.

However, the doctrine has presented some problems. One is that the ECtHR has sometimes included references to legal solutions adopted in countries that are not among the 47 members of the Council of Europe, such as Canada or South Africa. Another is that the ECtHR draws a difference between relevant and non-relevant consensus.

A consequence of the reasoning of the ECtHR is that the domestic courts become interested in acquainting themselves with the legal solutions adopted in other countries because of the implications that these may have in subsequent judgments concerning the domestic system.

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[21] G. Repetto, *Argomenti comparativi e diritti fondamentali in Europa. Teorie dell'argomentazione e giurisprudenza sovranazionale*, Naples, Jovene, 2011, pp. 129, 134, 184 and 144.
[22] A. Stone Sweet and J. Mathews, *Proportionality Balancing and Constitutional Governance: A Comarative and Global Approach*, Oxford, Oxford University Press, 2019.
[23] G. Repetto, *op. cit*., p. 127.

[24] G. Repetto, *op. cit*., p. 259 and p. 264. See also S. Cassese, *Legal Comparison by the Courts*, in "Piélagus", n. 9, diciembre 2010, pp. 21-25 (now in S. Cassese, *A World Government?*, Seville, Global Law Press, 2018, pp. 213 ff).

7. Establishing Principles Through Comparison

The EU could have established a higher law on fundamental rights that disregarded the various national legal orders and their relevant provisions or traditions. However, it did not follow that path, precisely in order to take into account the different national traditions, to let them – so to say – "speak" to each other, in an attempt to find out what they have in common. Article 6 TEU is an invitation to compare and find a common heritage (and, therefore, what the Member States do not share with non-EU national legal orders).

When can one conclude that traditions are common? The simplest answer is this: when a majority of countries accept the same principles, in practice. Therefore, "common" means "shared by a majority of countries." But this begs a question: should this majority be counted in terms of countries or of population?

In the background of this question lies a more general problem, that of the relations among national legal orders. One can mention three approaches to this problem.

The first and more traditional is the following: national legal systems are inherently different, because they are the result of decisions taken by national legislators or by national courts; however, they are slowly converging under pressure deriving from common problems.

According to the second approach, national legal systems were once different from one another, but transplants and imitations have introduced many common principles.

The third approach states that national legal systems have always had many common "ingredients" from the very beginning, and it is only because of our intellectual nationalism that we assume them to be diverse; on the other hand, these common principles differ from one another due to the different national contexts in which they exist. Similar provisions are implemented in different ways, in accordance with the varying contexts of each national system.

Notice the difference between the common constitutional tradition[25] and the consensus approach, on one side, and the methodology used in preparing the Principles of European Contract Law and the Common Core of European Private Law. These were also developed through a comparative exercise, but one that resulted in choosing the most efficient solution – instead of the solution applied by the majority of the countries – even if it had not been adopted by any country at all.[26]

Two mistakes should be avoided: cherry-picking and making reference to constitutional traditions that do not belong to the European Union. To avoid cherry-picking, general guidelines can be established to determine what is a common constitutional tradition. For example, when the CJEU is called upon to implement the common constitutional traditions clause, it could initiate a dialogue with national constitutional courts; these would then be required to identify the national constitutional tradition surrounding a certain fundamental right, in order to facilitate establishing what is indeed common.

To avoid making reference to constitutional traditions that do not belong to the European Union it must be remembered that Article 6 TEU refers to the "constitutional traditions common to the Member States." Therefore, to establish what is a common constitutional tradition, the European interpreting authority cannot consider non-European countries (non-Member States), even if they have similar legal orders and belong to the same legal tradition, because foreign law cannot be a source of legal principles of the EU.

An interesting example of a quest for commonalities and a discovery of divergences that could not result in recognizing a common constitutional tradition may be seen in the opinion of Advocate

[25] For cases in which the CJEU resorted to the clause, see K. Lenaerts and K. Gutman, *The Comparative Law Method and the Court of Justice of the European Union*, in M. Andenas and D. Fairgrieve (eds), *Courts and Comparative Law*, *op. cit*., pp. 161–162 and 170–173; and M. Graziadei and R. de Caria, *The "constitutional traditions common to the Member States" in the case-law of the European Court of Justice: judicial dialogue at its finest*, "Rivista trimestrale di diritto pubblico", 2017, n. 4, pp. 949 ff.

[26] P. Sirena, *La scelta dei "Principles of European Contract Law"(PECL) come legge applicabile al contratto*, in "Rivista di diritto civile", 2019, maggio-giugno, p. 612.

General Kokott, delivered on 7 November 2019 (in Case C-584/17 *P* para. 82-89), where it was emphasized that:

> [T]here are […] very different ideas in the EU Member States regarding the contracting administration's possible powers to act as a public authority. Whilst German law, for example, strictly rejects such powers, it is recognised in French law not only that the administration has unilateral powers to amend and terminate contracts in administrative law in the context of the "contrat administratif," but also that the administration may have recourse, as part of the performance of any contracts […] to its general prerogatives as a public authority under the financial rules" […]. [I]t is precisely the different approaches in the Member States that show that there is no general principle whereby, when an administration concludes contracts with individuals, it may never have recourse to its general powers as a public authority or otherwise act vis-à-vis its co-contractor as a public authority. Accordingly, the Commission's power to adopt enforcement decisions in order to recover debts arising under a contract also cannot be rejected by reference to general principles of contract law, as such principles simply do not apply in such a general way to contracts of public authorities; instead, legal experts from various Member States have very different ideas in this regard.

In addition,

> [I]n view of the very different models of contract of public authorities in the various legal traditions of the Member States, it is perfectly conceivable that beneficiaries of subsidies that conclude grant agreements with the Commission like those at issue here do not assume that the Commission can recover the funds awarded under a contract not only by legal action, but also by unilaterally adopting directly enforceable decisions as a public authority.

The Advocate General concluded that in the light of the different traditions in the Member States concerning public authorities' contracts and the case law of the EU courts, it is necessary to inform the co-contractor, before the contract is concluded, of the Commission's power to adopt enforcement decisions.

8. <u>European and National Identity: Are National Legal Orders Necessarily Unconnected?</u>

Do European principles, derived from what the national constitutional traditions have in common, necessarily conflict with national identities?[27]

To answer this question, one must first consider that the TEU addresses both European and national identities. Recital 11 of the TEU establishes the goal of "reinforcing the European identity."

[27] See M. Comba, *Common constitutional traditions and national identity*, in "Rivista trimestrale di diritto pubblico", 2017, n. 4, pp. 973 ff.

Article 4 provides that "the Union shall respect […] the national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government, of the Member States."

According to the European legal order, therefore, the two identities are not mutually exclusive, and for extreme cases, there is an *ad hoc* resolution procedure: national legal orders can react to the development of principles of European law by using the counter-limits doctrine (a doctrine developed by the Italian Constitutional Court, according to which the Court reserved itself the competence to call into question the application of EU law when it comes to measures that are likely to affect the supreme principles of the constitutional order, in order to prevent the enforcement of the CJEU rulings) , in order to allow national identities to prevail.

This brings me to the more general point: are national legal orders purely national, and necessarily not connected to one another?

The traditional point of view was expressed, in reply to Justice Breyer's dissent in *Printz v U.S.*[28], a 1997 case, by Justice Nino Scalia:

> Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.

But is it true that every legal order has its own law, and that a foreign legal system cannot benefit from comparison with a different set of rules? And is it correct to affirm that writing a constitution is an entirely different exercise from interpreting it?

My answer to these questions is negative. Consider what a young British historian, Or Rosenboim, recently pointed out: when, in 1946–1947, the Committee for Drafting a Constitution for the World met in Chicago, instead of replicating the US Constitution or the Anglo-Saxon model of democracy on a global scale, the choice was made to assemble an "inspirational pool" of constitutions and to analyse the legal traditions of China, India, France, Italy, Germany, France and several other

[28] 521 U.S. 898 (1997) p. 921.

countries.[29] Elisabeth Mann Borgese, among the driving forces behind this initiative, confirmed that the first problem was to ascertain which national constitutional traditions were the most important ones.

The same is true for many national charters issued around that time, such as the Italian Constitution of 1948, in preparation for which a large-scale comparative exercise was undertaken. This exercise brought into the national charter many provisions that originated from foreign and different national constitutions: an example is the rule governing relations between national and international law, which was inspired by the similar provision contained in the Weimar Constitution.

Thirdly, "comparative law is no longer an impractical academic discipline." It has been used by national courts as a "persuasive authority or source of law," to "[apply] normative models from comparative law where national law is undetermined," "[review] factual assumptions about the consequences of legal rules, or assumptions about the universal applicability of rules or principles" "to overturn authority in domestic law," or to "[develop] principles of domestic law."[30] Therefore, comparative analysis is as appropriate to the task of interpreting a constitution as it is to the endeavour of writing one.

One can easily conclude that national law is not purely national, because its sources must be traced in different legal orders, and that supranational law is not entirely supranational, because it is also the result of a comparative effort.

9. Carl Schmitt's "Genuine European Community Characterized by a True Common Law"

Let me turn again to Europe. In his seminal 1943–1944 article on "The Plight of European Jurisprudence," Carl Schmitt wrote that there was a "genuine European community characterized by a true common law."[31] According to Schmitt, who wrote more than a decade before the European Community was established, "the meaning and content of essential concepts and institutions of the

[29] O. Rosenboim, *The Emergence of Globalism. Visions of World Order in Britain and the United States 1939 – 1950*, Princeton University Press, 2017, pp. 187 and 191.
[30] M. Andenas and D. Fairgrieve (eds), *Courts and Comparative Law*, Oxford University Press, 2015, pp. 20-21.
[31] Carl Schmitt, *Die Lage der Europäischen Rechtswissenschaft* (1943-44), republished many times, and translated into English as *The Plight of European Jurisprudence*, in "Telos", 1990, no. 83, p. 39.

European peoples are surprisingly similar," and there was "a specific and typically European juridical standard in codification, legislation and justice,"[32] due to mutual influences and receptions.

Schmitt believed that, in the nineteenth century, the crisis of the State's legality, the split in the law between legality and legitimacy, and the "motorized legislator"[33] had produced a weakening of the community of law. However, he concluded that:

> [W]e cannot choose the changing rulers and regimes according to our own tastes, but in the changing situation we preserve the basis of rational human existence that cannot do without legal principles such as: a recognition of the individual based on mutual respect, even in a conflict situation; a sense of reciprocity and the minimum of an orderly procedure, due process, without which there can be no law.[34]

In another essay,[35] Carl Schmitt wrote that:

> legal science is a specifically European phenomenon. It is not only practical wisdom, nor only technical. It is deeply involved in the adventure of western rationalism. As a spirit, it descends from noble parents. The father is the reborn Roman law, the mother the Church of Rome. The separation from the mother was finally accomplished, after several centuries of arduous conflicts, at the time of the civil wars of religion. The daughter chose to stay with her father, Roman law, and left her mother's home. It looked for a new home and found it in the State.

Roman law was, according to Schmitt, "the language of a jurisprudential community, a recognized model of juridical thinking, and thereby a spiritual and intellectual 'common law.'"[36] In a passage of a conversation between J.W. Goethe and J.P. Eckermann, Goethe was said to have likened Roman civil law to a duck: sometimes it is visible, swimming prominently on the surface of the water; other times, it is hidden, diving amid the depths, but, nevertheless, it is still there.

Today, the duck has finally disappeared and will not re-emerge. The Roman law tradition, that provided the basic concepts of law and a shared model of legal thinking in Europe (and in other parts of the world) for a long period after the fall of the Roman empire, does not play any more that dominant role. Moreover, the Roman law tradition was basically a tradition of civil law; in recent times, it is public law that has developed and become more prominent. Therefore, Roman law is

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[32] C. Schmitt, *The Plight*, *op. cit*, p. 37.
[33] With this expression Schmitt meant the "full torrent" of decrees, market regulation, State directives of the economy, delegations to authorities and sub-authorities.
[34] C. Schmitt, *The Plight*, *op. cit*, pp. 44, 50, 66, 64 and 66-67.
[35] C. Schmitt, *Ex captivitate salus*, Italian transl., Milan, Adelphi, 1987, pp. 71-72.
[36] C. Schmitt, *The Plight*, *op. cit*, p. 43.

decreasingly useful as a source of paradigms, as this novel branch of law requires an entirely new set of guiding principles.

The transition from the Roman law to then present situation does not mean that the different European legal orders are separated, each with its own legal system. Quite the contrary.There are a number of common legal principles in the European area and there is not only a body of case law in Europe, but, rather, also a European case law, that acts as a unifying factor. These common legal principles are not simply a mosaic of national rules and institutions.

The most evident element is the presence of a body of higher law produced by the European legislator, a higher law that is imposed on the national legal orders of the Member States. As noted by many authors (including Carl Schmitt), national legal orders already had much in common with one another before the Union was established. However, Union law has now become a dominant actor in the area.

Still, among the different legal systems, a complex web of interrelations exists. Vertically, between the two levels of government, there is a permanent two-way process. From the bottom up, national institutions and rules are transposed into the higher law. From the top down, higher law has an impact on national legal orders.

Horizontally, national legal orders compare themselves collectively and with each other, and consequently there are transplants, approximations, receptions.

As legal institutions and rules are not separated from societal traditions and environments, there are other complex interactions: each "foreign" element is adjusted to the national context and its specific traditions. This may require further adjustments, such as interventions by the CJEU.

The underlying factor of unity is what Immanuel Kant called, in his seminal work on perpetual peace, "*gegenseitige Eigennutz*," the reciprocal interest that is activated, for example, by trade.

This complex web of interactions raises the question of the role of comparison. This exercise is used not only to know foreign legal orders, and to borrow legal paradigms and methodologies, but

also to copy them and recognize common features, as a means of interpretation, in order to develop new law. From legal comparison, we move into the realm of comparative law.

The new pluralist, multipolar, open legal scene is based on an entirely different context, compared to that considered by Schmitt: today, there is no guiding legal culture, as the Roman paradigms are now in the background; there is juridification on a vast scale, and therefore an enormous amount of legal rules that require systematization by lawyers; and much less rigidity in terms of the sources of law, as well as competition among the legal actors.

Comparing the European Union to the USA, the legal scholar Guido Calabresi observed:

> I believe that the United States is much more divided in terms of values than is Europe. I am talking about the core, old Europe, because those countries share similar values. And that may be why Europe can stand not having a strong central government. Consider the death penalty. Countries that have the death penalty may not join the European Union. In the United States, opinions are widely divergent on that topic.[37]

10. The Dangers of Resorting to Common Constitutional Traditions to Establish European Legal Principles

The common constitutional traditions clause raises many questions and presents some dangers.

The first lies in the ambiguity of the word "tradition." What is a tradition? Tradition includes interpretation, implementation, conventions, practices, customs… in one word, "living law." Law in action is as relevant, or perhaps even more relevant, than law in books. But the same principles may have different implementations. Should a time requirement be established to conclude that there is indeed a tradition? What about the "invention of traditions,"[38] or traditions that have been forgotten? Is it advisable to choose an authority or a procedure empowered to determine when there is a common constitutional tradition? If yes, how could it be established?

Second: to whom is the clause directed? Is the common constitutional traditions clause addressed to the European legislator called upon to develop the "general principles" in legislation; to the CJEU, which is required to interpret European law in the light of such principles; or to the

[37] G. Calabresi, *Remarks of Hon. Guido Calabresi* (2010), Faculty Scholarship Series. Paper 2118, p. 436, http://digitalcommons.law.yale.edu/fss_papers/2118.
[38] E. Hobsbawm and T. Ranger (eds), *The Invention of Tradition*, Cambridge, Cambridge University Press, 1983.

European Commission, the task of which is to implement European law in accordance with those "general principles?" In practice, the main "customer" of Article 6(3) TEU has been the CJEU, which originated the clause and referred to it in approximately 120 decisions.

Third: from the common constitutional traditions, can European courts and legislators only derive "general principles" that act as a source of law, or can they also derive criteria for the interpretation of European and national law?

Fourth: if the two diverge (ECHR and constitutional traditions common to the Member States), which one should prevail? Should common constitutional traditions play a residual or a dominant role?

Fifth: can "general principles" regarding fundamental rights be "petrified" into what is common to national constitutional traditions?[39] Should European authorities also look to evolving traditions?[40]

11. Can Common National Traditions Shape Global Administrative Law?

Let me now return to the initial question – "who is shaping global law?" – and leave the European scene to return to the global space. Is it possible to transpose rules like the European one into the global space?

National traditions have an impact on global law. National legal cultures migrate into the global space. The transplant of national institutions into international organizations is a significant and frequently occurring phenomenon, as may be seen in the following examples.

a) The idea of an international secretariat was first conceived and developed within the League of Nations by a British civil servant, Sir Eric Drummond, in accordance with the British administrative tradition of neutrality.
b) The United Nations Administrative Tribunal, introduced in 1949, is a product of French administrative culture, which is relatively incomprehensible to Englishmen and Americans – just as the French Council of State, the special judicial body based on which the Tribunal was established, is wholly foreign to the common law tradition (as late as

[39] This is a paraphrasing of the question raised by C. Santos Botelho in *Constitutional Narcissism on the Couch of Psychoanalysis. Constitutional Unamendability in Portugal and Spain*, in "European Journal of Law Reform", 2019, 21, n. 3, pp. 345 ff.: "Can the constituent power of the people be petrified in one historical constituent decision and constrain future democratic transitions?"
[40] On the different interpretations of the word "tradition", see, in particular, G. della Cananea, *Diritti amministrativi e tradizioni costituzionali comuni nell'Europa unita*, unpublished paper.

1953, in the US, the United Nations Administrative Tribunal was considered to be an "obscure body.")[41]

c) The establishment, in 1968, of a Joint Inspection Unit at the United Nations was suggested, based on the model of the French *Inspection Générale des Finances*.

d) In 1975, an International Civil Service Commission was established under the United Nations. The promoter and supporters of this agency were citizens of the United States, who succeeded in shaping it along the lines of the United States Civil Service Commission.

e) The financial and personnel management procedures applied in the United Nations are similar to those of the United States civil service.

f) Ombudsmen, originating in the Swedish tradition, have been introduced in many international organizations.

g) The European Coal and Steel Community (ECSC) was influenced to a large extent by the French *Commissariat au Plan*.

h) The structure and functions of Euratom (the European Atomic Energy Commission) were borrowed from the French *Commissariat de l'Energie Atomique*.

i) The EU Commission's organization followed the example of the German *Bundeswirtschaftsministerium*.

j) The Council for Mutual Economic Assistance adopted Soviet organizational and operational styles.

k) The 1975 treaty establishing the European Court of Auditors follows the German tradition, creating a body similar to the *Bundesrechnungshof*, which has strictly administrative tasks, but also appears to have been influenced by the French administrative system, because, like its French counterpart, must give advice to the European Parliament on controlling the implementation of the budget.[42]

However, all these transplants were the product of *de facto* decisions, due to the role played by certain nations or actors in the shaping of global institutions, while Article 6(3) TEU establishes a rule that acts as a revolving door. Moreover, these transplants involved – in the majority of the cases – only one nation: there was one lender and one borrower. The Article 6(3) TEU rule, on the other hand, involves traditions of many countries and requires making comparisons among them.

Another matter is institutionalizing the process by which national traditions become part of a higher law, because in this case, the migration would be recognized and regulated by the higher law, which would open its doors to the lower law. The first type of migration of national traditions into the supranational space is episodic and unregulated, while the second is regular and institutionalized.

[41] S. Bastid, *Le tribunal administratif des Nations Unies*, in Conseil d'État, "Études et documents", 1969, p. 15.
[42] See S. Cassese, *Relations between International Organizations and National Administrations*, in «XIXth International Congress of Administrative Science. Actes-proceedings», Bruxelles, IISA, 1985, pp. 159-204.

This process of enlarging the area of general principles in the global space is paradoxical, as it is the result of the combined action of a higher law, which opens the way to the lower law, and lower law, which through this arrangement, becomes a part of higher law.

This might not be the only contradictory process in global governance, since the global disorder arising in 2015.[43]

Transplanting a common constitutional traditions process from the Union into the global space may help balance the need for uniformity and respect for diversity, and reduce the tensions between national governments and global governance. However, it may encounter additional difficulties.

In the global space, there are not 27 nation-States, as in supranational European governance, but rather almost 200. The European countries are already bonded by historical ties and a common culture, which cannot be said for all of the nation-States of the world. It is far more arduous to find out what all of these nation-States have in common. Global regulatory regimes are divided and self-contained, without a superior authority having the power to impose the complex mechanisms for discovery and recognition of the commonalities among them. On the other hand, global regulatory regimes, which do not have a constitution, need a set of common general principles.

These difficulties notwithstanding, there are examples of norms that try to "bridge the gap between international law and the major legal systems of the world."[44] One is the already mentioned

[43] B Kingsbury, *Frontiers of Global Administrative Law in the 2020s*, in J.NE Varuhas and S.W. Stark, (eds), *The Frontiers of Public Law*, Oxford, Hart, 2019, pp. 50 and 67, has observed: "Popular cynicism or indifference were accompanied by active resistance to particular visible or symbolic markers of "global governance" at work. Donald Trump campaigned successfully in 2016 on opposition to TTP and a whole set of other trade agreements. His administration energetically extracted the US from commitments to the Paris Climate Agreement of 2015, the United Nations Educational, Scientific and Cultural Organization, and the Arms Trade Treaty. It largely opposed investor-state dispute settlement during the North American Free Trade Agreement renegotiations, so that its role in the 2018 Canada-Mexico-US Agreement (USMCA) is now much diminished; the US also acted assertively against any glimmers of ICC action directed against the US; and (continuing approaches initiated in the Obama era) it obstructed the WTO Appellate Body's replenishment. President Bolsonaro, inaugurated as President of Brazil in early 2019, employed similar rhetoric on some international issues (including the Paris Climate Agreement). Within the EU, nationalist (and in some cases populist) leaders in several countries took sceptical positions on what had previously been received ideas about the European project". Briefly, these recent years have been "a period in which the UN Charter order and the subsisting North Atlantic global governance legacy co-exist with re-assertive nationalism and even deglobalisation in the North Atlantic region, a power shift away from that region, new ordering forms such as the Chinese infrastructure-based Belt and Road Initiative, and a tilt in US practice toward transactional governance and against institutionalised governance and multilateral treaties".

[44] G. della Cananea, *Due Process of Law Beyond the Sate, Requirements of Administrative Procedure*, Oxford, Oxford University Press, 2016, p. 160.

Article 38 of the Statute of the International Court of Justice, which refers to the "general principles of law recognized by the civilized nations," and is regarded as a rule to which all international courts and third-party dispute settlers may resort[45].

Another one is Article 21.1(c) of the Statute of the International Criminal Court (ICC), according to which, if the Statute and Rules of procedure, treaties, principles and rules of international law fail to resolve a dispute, the Court shall apply "general principles of law derived by the Court from national laws of legal systems of the world […]".

In both cases, as in the European case, global law must turn to national law, and "the transposition of national rules into international law necessarily implies the comparison of municipal laws of the States."[46] As occurs in the European case, the difficult problem concerns the choice of laws to be compared.[47] Just like in the Union, there is no clear dividing line between domestic and supranational law.

Still, the global provisions that require comparison among national legal systems in order to establish global principles possess the following peculiarities. The Statute of the International Court of Justice (1945) refers to "civilized nations", while the ICC Statute (1998) refers to the "legal systems of the world" (and, therefore, also to the legal systems of non-States Parties.)

Moreover, unlike the European case, global law empowers only courts to take into account national law in order to establish applicable principles[48].

Finally, in the case of the ICC, the Court can resort to the "legal systems of the world" only if there is no applicable rule in the ICC Statute, its Rules of procedure, or in treaties, principles and rules of international law. Therefore, other legal systems are a subsidiary source.

13. Conclusion

[45] G. della Cananea, *op. cit*., p. 158.
[46] W. E. Butler, *International Law in Comparative Perspective*, New York, Springer, 1980, p. 72.
[47] W. E. Butler, *op. cit*., p. 73.
[48] And international courts have been reluctant to do so explicitly (W. E. Butler, *op. cit*., p. 72–73).

The conclusions of this essay are simple. Establishing a two-way road between national and global law may be useful to both bodies of law, in order to enable them to communicate and reduce conflicts between the local and the global. This communication may indeed be fruitful for judicial dialogue between the two; however, it may also be instrumental for other legal operators (rule-makers, arbitrators, dispute-settlers, law-enforcement officials). References and comparisons might be extended beyond certain national legal systems (for example beyond those of the "civilized countries"). Still, prioritizing the developmental side of the law cannot be avoided. Finding out what is common worldwide, among many national legal systems, poses a new challenge for legal comparative scholarship.