Notes on TRANSNATIONAL CONSTITUTIONAL LAW

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IUS@B

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WE NEED YOUR HELP!
Writing this handout has been so stressful that the authors cannot even come up with the usual funny way to ask you for your help in correcting the following pages. If you notice errors, inaccuracies, or misuse of the language, please report them to us! You will contribute to improving our notes and making them more effective.
Thanks!
@iusatb and the editors

*"I have a religion: my religion is the **Constitution**"*
A. Vedaschi

DISCLAIMER!
This handout was written without any intention to replace study from the official materials as indicated on the syllabus. Its only purpose is to help students feel more comfortable with the course contents.

Part 1:
The theory of Transnational Constitutional Law

Introduction: is there such a thing as transnational law?

It is useful to start with trying to give a **definition** of the *concept* of **transnational law**, or, more precisely, of transnational *constitutional* law. This is indeed not easy, because it is a concept that has been expanding in the last decades: we will focus on some *ground definition*, and then we shall garnish it with some complementary ideas.
First, a little bit of history. The first reference to the expression of "transnational law" was made by **R. Norman Angell-Lane**, a British journalist and politician, as well as a Member of Parliament for the Labour Party in the years 1929-1931 (during the second MacDonald Government). He then was awarded the Nobel Peace Prize in 1943. In his most famous work, ***The Fruits of Victory*** (1921), he started to talk about transnational law. There, his position about the end of WW1 and the Treaty of Versailles was very critical and very similar to Keynes' one: he expected that such harsh peace conditions would probably yield another war (or anyway, would complicate the evolution of international politics). Therefore, he suggested a **shift** from *international law* to ***transnational law***. At that time, it was probably rhetorical, for he was not a lawyer, and so there was no precise legal construction of this idea. Nonetheless, it was a suggestion that would have been picked up by other scholars in the future.
Among these ones we find the American diplomat and professor of international law **Philip Jessup**, whose idea was, like Angel, to **substitute** international law with transnational law. Literally, to:

"Include all law which regulates actions or events that transcend the national frontiers: private and public international law, as other rules which do not fit into such standard categories".

Put differently, he was suggesting **making international law wider**, including under the definition of "transnational law" <u>not only</u> the classical two areas of *private and public international law*, but also more norms and bodies of laws, suggesting that the span of the area to be investigated by international law scholars should have been wider than before. More recently, another definition has been given by a German scholar, **P. Zumbansen**, who has been one of the scholars who has engaged more deeply and carefully on this topic: his idea is that there is a relationship between Jessups's definition and the end of WW2, in the same way there was a relationship between Angell's definition and the end of WW1; in other terms, according to Zumbansen, transnational law would be the **new dimension of international public law *after the end of the war*** and at the beginning of the "cold law": this way, the transformation of constitutional and international law would be

imposed by historical and geopolitical considerations. Some other authors also believed that transnational law would be a simple **evolution** (or rather, a modernization) of international law in a post-modern name.
To sum up, there are several interpretations of the scope and aim of transnational law, whereby it can be seen as:

- An **evolution of international law** under a new modern name; or as:
- A **blend** of *international* and *foreign* law applicable between citizens and/or between States, that constitutional law needs to confront, as Harvard scholars (mainly, Mark Tushnet and Michael Jackson) would put it: this is a typical American approach, that conveys the idea that, after 1989 (i.e., the end of Cold war), American constitutional law has to confront a new international context. Indeed, at least originally, the end of the Soviet Union introduced a new worldwide political condition which constitutional law needs to confront. Or, again, as:
- **State law *supplemented*** by legal rules that apply **beyond State borders**; however, this idea resembles very closely the idea of *private international law*, which implies having State rules applicable not only within the borders or to citizens, but *beyond* borders and in the relations between national and foreign persons. This is the most persuasive interpretation: it means that, in the last two decades, there have been two phenomena, concerning the two main branches of public law:
    1. The ***transformation of international law***
    2. The ***internationalization of Constitutional law***.

  Both have been transforming so deeply that they have opened new spaces in between, so that transnational law would be the **sum** of the new versions of the two classical branches *plus* new **provisions of hybrid nature** that are in between the two. Both phenomena (i.e., the transformation of the classical branches, and the birth of new kinds of provisions in between) are strictly linked to processes of ***globalization***.

Globalization

Definition, causes and effects

These globalization phenomena are of crucial importance to the birth of transnational law. The main phenomenon, the **idea** that gave birth to globalization, was that law has started to spill out of national borders. Although, since the *Code Napoléon*, there have always been cases in which some statutes needed to be applied beyond borders, after 1989 this kind of approach has been more and more frequent: now, a lot of norms exceed the domestic and municipal dimension. They have become very much **diffused** from different perspectives. Such rules, created in between constitutional and international law, however, are not strictly conducive either to international law or to constitutional law: they are not compatible with the two traditional categories of public law, despite the transformation of their very nature. The idea is that this new kind of norms is made **necessary by the transformation of economy**, that has spilled over national borders, so as to create an **asymmetry**: while the economy has become *global* (as we have political and economic phenomena of worldwide nature), on the contrary, domestic Constitutional law still remains in the traditional territorial limitation. Put differently, the asymmetry is between the **dimension of Nation-State** (i.e., the classical ambit of Constitutional law), and the **global dimension** of the new economy. Therefore, it becomes always more and more necessary to approve new provisions aiming at being applied *beyond* borders. Yet, these provisions are not of international law: they become something different.

In the history of legal thought there have always been some authors suggesting that between *domestic* and *international* law there is no difference, or rather, that the two types of norms must be assimilated and put together in **only one legal system**: the idea was to **unify** the domestic and international law dimension according to the so-called ***monist theory***, whose main proposer was **Hans Kelsen** together with other scholars of the Vienna International Law School. The idea was that domestic constitutional provisions and international law rules should have composed only **one system** built by steps. This is a philosophical theory, taken from general theory of law; nonetheless, many authors have underlined that such a formula was somehow linked to the times when it was proposed, immediately after WW1, with the fall of the Central Empires and the rise of a new Austrian Nation-State. It was at that point that scholars such as Kelsen and Angell-Lane understood that it was necessary to be more generous, to make an effort to overcome traditional borders to build a system where they could put together traditional national approach with international law norms. Apart from having been criticized after WW2 for not having prevented Germany from Nazi degeneration, what makes this theory difficult to be followed is that the world nowadays is **too pluralist** (in a trend that was born much before 1989, that authors trace back to the 50s and 60s), and such a pluralist world is incompatible with a simple theory like monism, which puts everything together in the **same legal order**, in an effort of simplification. On the contrary, pluralism paves the way to the need of **new rules**.

Going back to **1989**, to the supposed beginning of the globalization process, according to one interpretation of the reasons why globalization started (by the Nippo-American Political scholar Francis **Fukuyama**), after the collapse of the Soviet Union, represented by the demolition of the Berlin Wall, the socialist constitutional model had completely disappeared, while only *one model* survived: i.e., the model of **free market** and **liberal democracy**, two things that should go hand in hand. This way, the capitalist economy, together with political democracy, was going to become the only possible way of living, and possibly the final stage of the evolution of modern civilization[1]. In this context, globalization was born.

But what is globalization? We can define it as a **cluster** of **non-legal** and **technological events** that nonetheless have **profound effects** in the **economic and social systems**, provoking **changes** in the legal orders and in political institutions as well. This can be exemplified, for instance, by the revolution in the field of microprocessors (1978), by the birth of internet as a civilian utility (1982), by the first manipulation of the genome (1983), and by the **birth of the World Trade Organization** (**1994**): shortly after, China and **India** were admitted to the elite of the world capitalism through their admission to the WTO. This way, we can see that in the span of about 10 years (between 1982 and 1994-5), a succession of important events (both technological and political) created a very strong link among world States. Therefore, we can formalize our definition of globalization a little more as:

*A **cluster of processes** that operate as forces pushing towards goals of **integration** and **connectivity**.*

The idea is that modern digital **technologies *enhance* economic** transactions worldwide, implying billions of transactions all over the world, most of which simply do not know borders (indeed, it is sometimes impossible to contain capitals and labor force within national borders) and imply **interstate relations**. Hence, we find an astonishing **asymmetry** between the "classical" **State-centric**

[1] Fukuyama soon retreated his (maybe too) enthusiastic idea: in 1996 he wrote another book ("*The social virtues and the creation of prosperities*"), where he suggested that a new more sophisticated order was coming out of the end of the cold war: hence, it was necessary to explore the importance of social capital. Moreover, he claimed there was still room to differentiate from State to State. Later, in 2018, Fukuyama finally published another book ("*identity. Liberalism and its discontents*") suggesting that the liberal model is not so easy to pose, and not really the final stage of human history.

perspective and a **transnational**, borderless economy. One intermediate approach to this asymmetry, typical of transnational law, would be to think that between the national and global dimension there is **room for large free trade areas** on a *continental* basis, and sometimes even **intercontinental** dimensions can be implied – with States creating Compacts, Conventions, Agreements. Therefore, whereas the asymmetry had traditionally been compensated by an instrument of (both constitutional and international) public law, i.e., ***sovereignty***[2], in presence of a globalized economy, the prerogative of sovereignty became **critical** (if not useless), under attack: obviously, it was no longer compatible with the new categories of public law. We could then say that sovereignty is in **crisis**. Actually, this idea of ***crisis of sovereignty*** is <u>not</u> new: sometimes, cyclically, public law authors discuss of a possible crisis (the first time, immediately after WW1 and the disappearance of empires; then, after the WW2; finally, in the 70s with the first petrol crisis, when the welfare-State went into crisis). However, the difference between those times and nowadays is that in former occasions, the possible crisis of sovereignty had *inner* causes (i.e., they were generated *inside* the States by difficulties concerning the relationship between politics and economy) and could be easily solved (as it eventually happened); conversely, now the element of crisis comes from **outside**, i.e., from the new **organization of economy**: capital, labor, and finance make it impossible for States to be confined within national borders[3]. This, apparently, is a **self-sustaining** phenomenon: there is no State power that can counterbalance or rather stop the evolution of economy and finance. Obviously, the utopian consequence would be a **global government**: however, completely cancelling the concept of sovereignty in this way would <u>not</u> be feasible.

The evaluation of globalization by political, legal, and social scholars has been very different: some authors were severely critical of the trend, while some others (the so-called *hyperglobalisers*) supported it unconditionally. As to the former viewpoint, **Joseph Stiglitz** has underlined the capacity of the free circulation of capitals of producing **rising inequalities**; other (even more critical) authors have formulated the idea that globalization might cause **jeopardization of democracy** and have interpreted the post-2009 worldwide **recession** as a consequence of globalization. Other radical opposers are, for instance, the German scholar **U. Beck**, who speaks of a **self-destructive** potential of globalization, taking inspiration from **J. Schumpeter**'s book "*Capitalism, socialism and democracy*". Other authors, such as **J.R. Capella** and **N. Chomsky** speak of **barbarism**, of a return to Middle Ages and of a strategy to **perpetuate US imperialism**. Finally, other authors such as **Z. Bauman** focus on the *destructive* effects of globalization, in the form of a more severe division of society in a sort of "new segregation".

To sum up, the main takeaway of what we have said is that there is an **increasing integration** of the economic and financial systems on a global scale. On the one hand, this introduces the **globalization** of market economy; on the other hand, this causes the **obsolescence** of national political frameworks. Again, in economic terms, the problem is that there has been a new **division** between the States' economies, meaning that the old post-industrial societies have been **outsourcing** manufacturing activities to developing countries, limiting themselves to **immaterial activities** (e.g., services, research, and promotion). Also, the dogma of separation of capital and management has fallen because, nowadays, managers frequently hold shares of capital. This new economy, of course, requires new rules.

For all these reasons, globalization had a **strong impact on legal sources**:

[2] And sovereignty implied **borders**, a classification of people between **citizens** and **foreigners** (with some intermediate categories), **powers** of the State.

[3] It could be said that the financial crisis of 2008 and 2009 has slowed down the process of globalization; however, in the last two years there has been a new expansion of it, with the pandemic (for instance, it took a global policy to distribute vaccines over regions and the world).

- First, there is the necessity of ***new sources*** of legal rules with new ***norm-setter bodies***, since State sources can no longer govern the quick transformation of economy, which do not accept anymore to be governed by State rules.
- Second, norms **change their very *nature***: many of the new rules are defined as ***soft law***, which means that traditional legal sources (i.e., Constitution, Statutes, regulations, etc.) belonging to the States are no longer sufficient, but need to be overcome by new sources such as **standards**, **guidelines**. These are not strictly *normative* in the classical sense: it is obvious that a *guideline* is something less in terms of receptive content than a Statute. However, this apparent less efficiency in legal terms is compensated by their **authoritativeness** from the viewpoint of the economic world: for instance, an underdeveloped Country desiring to borrow money from the World Bank or from other institutions of the "Washington Consensus" will need to follow the guidelines given by the World Bank. Hence, the **efficacy** of soft law is even higher than traditional legal norms.

This causes the **coexistence** of old-type norms with new legal sources coming from new subjects: therefore, the system we now have can be defined as **hybrid**, and this hybridization makes it impossible to imply (or rather, apply) the traditional criteria governing the balance between rules (e.g., hierarchy, succession in time, etc.). Therefore, it is necessary to make the two kinds of rules compatible.

So far, we have considered the ideological roots of globalization, and the relationship between globalization and law sources that has led to long processes of transformation, collectively causing the diffusion of the idea of transnational constitutional law. So, at the end of the day, what is globalization? Is it a *condition*? Or is it a *process*? Is it a *stage of an evolution* or rather an entire *era*? Suffice it to say for our aims that, as **A. Giddens** argues, globalization can be defined as:

*The **intensification** of planetary **relationships**, binding far localities and making them reciprocally **influenced**.*

Instead, another lawyer, **D. Held**, described it as a:

***Transformation of the special space organizations** of social relations and transactions in terms of extension, intensity, speed and impact, which generates **trans-continental and regional nets** and fluxes, interactions in the exercise of power.*

In this respect, in transnational law we would have the famous **butterfly effect**: a stroke of wings in Brazil turns out to be a tornado in Nebraska. The most important thing that can be taken from the definitions is the intensification of the conception of the ***world as a whole*** (something made explicit by **Robertson**), differently from former approaches. The substance is, as **T. Friedman** put it, the dramatic **compression of time and space**. The problem, then, is: has the **economy prevailed** on politics? Is now economy the *new sovereign*, in the sense that now governments are themselves governed by economists? Or is there still room for legal solutions of economic problems? Obviously, the **national dimension has lost** a lot of importance, in comparison to what happened, in terms of constitutional law, up to 25 years ago; however, we must not forget that in old times, even during the old *laissez-faire* times, the most important decisions concerning the economy have always been made in legal terms, by the political side. And this happened even in times when globalization was born: indeed, privatizations, liberalizations, deregulations all have been decided by the States with **political decisions**, and it was not economy deciding for itself. Therefore, we need to remember that politics is still able, has still room, to make important decisions concerning the development of the economy: indeed, it is hard to believe that **globalization** is a purely *economic* process without legal roots, but simply legal consequences. Instead, there are both political and legal consequences on the side of the processes we are witnessing nowadays: it is clear that economic and financial systems are more integrated on the global scale than they used to be, and that market economy has become much more important, but the **national** case has not disappeared. However, we need to remember that some scholars such as **Ralph Michaels** suggest that the ***law of globalization*** has become the **law of our times**[4]. The only difference is that the enormous changes inside the structure of constitutional law are an **effect of a moment of crisis**: indeed, whereas other crises had *inner* causes, this last one has causes *outside* the State dimension.

What are the **effects** of globalization on the side of Constitutional law? In a single word: ***internationalization***. More deeply, we could mention the **increasing number of treaties** (some of which concern *trade*, but most are about *human rights*): if treaties proliferate, that means that in the interpretation of Constitutional law made by national Courts, much more attention must be paid to Treaties, mainly on the side of human rights treaties; for instance, 25 years ago, books on Constitutional Law did not contain any reference to the relationship between our Constitutional law and human rights treaties, and most importantly, and the Strasbourg Court. Conversely, nowadays, it's impossible to describe the content of some basic rights without references to the European Court of Human Rights: the national and supranational case-laws need to be constantly compared. This means that constitutional law has really been internationalized, at least on the side of the **interpretation** of some Constitutional articles (by way of example, take Articles **10** and **11** of the Italian Constitution, or Article **24** of the German Constitution). Another important effect was the **birth of multi-State organizations**, which are hard to describe with a single definition: the various organizations have very different structures, norm, values, and purposes. Nonetheless, we can say that in many cases the **trend** seems to point towards a **quasi**-**federal structure**, as it happens with the European Union[5]. Obviously, the **interdependence** is strictly connected with the birth of multi-state organizations. Then, another effect was the **bottom-up migration** of **sovereignty**, and finally and most importantly, a **crisis of the relationship** between society, territory, State and economy, since many of these elements of the traditional structure of the State have been **reterritorialized** towards a **global dimension**: while the State territory remains where it is, it is suggested by many authors that the nature of the territory in the constitutional dimension of the State has changed completely. According to a classical theory of Constitutional law, indeed, the State has **three components**, i.e., ***territory***, ***population***, and ***government***; conversely, nowadays it is suggested that the territory would no longer be a component of the State and a necessary element of it, but simply a **matter of localization**, the place where the State is, because sovereignty has been migrated towards somewhere else.

Moving to the equivalent process concerning **international law**, we can see that there was a **reciprocal movement** of international law towards constitutional law (i.e., the process of ***constitutionalization of international law***):

1. First, international law changes its subjective nature: **new subjects** (such as NGO and physical persons), for the first time, become at full title **members** of the so-called *international community*, whereas the only members of the international legal order traditionally were States (except for the Vatican, and the insurgents). Now, even physical persons or *private legal persons* can become subjects of the new order of international law.
2. Second, and more importantly, the ***consolidation*** of international law provisions, belonging both to *customary* constitutional law and *conventional* constitutional law, which were compulsory from all points of view: they have become compulsory ***erga omnes*** or even ***jus cogens*** (i.e., they represent the chore of international law, and are so important that they may be enforced by the United Nations[6], or by any State of the international community).

[4] The complete paper containing Michaels' thesis is available on Blackboard.

[5] The EU, by the way, has represented the blueprint of other organizations in other continents. Latin America was one of the first ones to follow the European example. Africa is on her way, in spite of many difficulties.

[6] Or by other international organizations, such as NATO's peace keeping/restoring missions: peace was (in case militarily) imposed.

This way, a process of **concentration of power** has formed in international law, before only a *diffused* legal system without a "center" that holds power, as it happens in the constitutional dimension.

3. At the same time, nonetheless, there is a ***vertical fragmentation***, together with ***hierarchization*** and ***judicialization*** of international law. Indeed, there was a growing number of **international authorities** that fragmented the concentration of power we were mentioning; at the same time, we experienced that concentration of power in a **bottom-up** trend, meaning that power was introducing some forms of **hierarchy** (that – remember! – was instead disappearing in constitutional law); finally many more **controversies** were decided at the **international level** through judicial decisions, many of which, however, were made either in the form of *arbitration* (i.e., through private justice) or by *domestic commercial courts* specialized in international transactions, so that States like those in the Caribbean Islands created **specialized domestic Courts** operating the sector of international trade law. As a result, although many of these decisions were made by international **tribunals** (e.g., Human Rights Courts, or the International Criminal Court), but many others were made through private judgements. **International arbitration** is flourishing nowadays, and it is assuming a dimension that was unknown in former times. Therefore, we have full range of situations, where the **increasing judicialization** of international law sometimes depends on classical public domestic law, and in other cases wither on arbitration or national specialized Courts.
4. Moreover, we experience ***individual accountability*** of Heads of States and Government, even in terms of investigations and convictions. This is another effect of the **judicialization** of international law: after WW2, individual accountability has become the rule: in recent times, for instance, the former Serbian President Karadzic was sentenced, a possibility that was unbelievable before.
5. Furthermore, in an *axiological* dimension, international law **enhanced the relevance** of **values**. As we know, Constitutional law is founded on values and principles: the work of contemporary constitutional Supreme Courts is all about *balancing values*. Nowadays, this kind of approach has **migrated to international law**, whereas before values were totally *irrelevant* in international law. Indeed, the old rough international law was all about balances of power, that could be resolved through treaties or war. Now, we witness an introduction of **value-balancing** also in international law.
6. Then, as we have already mentioned, we witness the introduction of ***soft law***, such as **standards**, guidelines and other even "green" or "white" books suggestions: although they do not carry real normative strength, they often have an enormous level of efficacy, and sometimes more than the "old" norms adopted trough the traditional procedure of approval.
7. Finally, but not less important, a ***hybridization*** of **public and private**. Indeed, when the feudal regime (where public and private were completely merged[7]) died, in the modern State public and private law were strictly separated: the Constitution was the sovereign of the public law sector, whereas (normally) the Civil code was the source regulating private law, apart from Common Law Countries. Now, we assist to the **return to a "medieval confusion"** between private and public law, so much that some authors lament that we are going back to the old times, since sometimes it is impossible to identify the private or public nature of a legal source.

[7] Indeed, the ***vassalage regime*** implied that the baron was, at the same time, the **owner** of the fields and the **governor** by delegation of the emperor.

The **result** of these **two trends** (i.e., ***internationalization*** of constitutional law, and ***constitutionalization*** of international law) is that – given that **both** dimensions are **in crisis** and, therefore, we need to identify a **space in between** the two – the legal order is much more **pluralist** than before, so that the **arena** for conflict resolution is much wider (the right forum, indeed, could be private or public, or even hybrid)[8]. Simultaneously, there is a **juxtaposition** of **private and public**. Well, the problem of this new pluralist order is that it is only *apparently more democratic* than the old sovereign-State: nowadays, we indeed have a problem of **democratization** of the new subjects of international law. Indeed, there is no real guarantee that the new world governance is more democratic than the old (Western) States, that at least had the advantages of the democratic system (such as *democratic elections*, *referendum*, etc.). Instead, this is impossible at universal level: if we keep creating new entities with a private (or even hybrid) nature, there is no real guarantee of democratization: constitutionalization should also imply improving techniques of democratization.
The formula which, somehow, summarizes this evolution is ***multilevel governance***: indeed, when sovereignty migrates bottom-up and becomes fragmented, at that point the political power is split-up into different levels (i.e., at statal level, at continental level, at worldwide level, and at further intermediate levels[9]). Moreover, the term *governance* is not used by chance since it is not a synonym for *government*, which has a precise meaning (i.e., it implies a written Constitution, a President, a form of government, a Constitutional court and so on). Indeed, *governance* is a vaguer concept that does not describe a precise form of government, due to a condition of uncertainty in foreseeing the resulting form of the system.
At this point, it is important to note that some traditional categories of law, both international and constitutional, have been **challenged** and compelled to change their nature due to the change in governance:

- First, the category of ***hierarchy***: traditionally, States had been recognized as subjects not recognizing superior entities (i.e., *superiorem non recognoscentes*). However, this is no longer applicable: clearly, in the last decades there has been a **preponderance of cooperation** between States, more than vindication of superiority. Nowadays, it is normal to **delegate powers** to supranational entities: therefore, we must look for halfway solutions and compromises.
- Also, ***boundaries*** are changing their nature. Once, the theory was that boundaries could be moved, but only through Treaties or through war. Nowadays, boundary drivers are no longer geographical and territorial, but **functional**: they cannot be solved through the surrender of a region, but need to be solved through other (functional) instruments.

Speaking of the legal dimension of globalization, many authors now address the topic of "weak" v. "strong" ***cosmopolitanism***. For instance, **D. Held** speaks of cosmopolitanism as a search for **conditions of just differences**, because until we have a *global government* with a *unique citizenship,* we need to preserve differences. Otherwise, the world would be totally flat. Therefore, we need to **preserve some differences**, but they must be *just*: in this respect, problems concern the relationships between rich and poor nations, developed and underdeveloped States, and so on. In fact, **J. Habermas** correctly speaks of a **transition** from *world government* to ***world policy*** and *governance*, something – as said – less defined and less precise. Therefore, it is necessary to make clear that, apparently, sovereignty is declining and fragmented, so that *State* as an entity seems bound to progressively dissolve; nonetheless, the number of States (that are members of the UN)

[8] Consequently, this activates a **new procedure** (which was very rare before) commonly known as ***forum shopping***: people going around looking for the best forum to have their controversy decided. This is indeed legal both for international law and for modern constitutional law.
[9] Indeed, States stipulate a lot of (trade) agreements that cut off the traditional geographic categories: for instance, the Commercial Treaty putting together Japan, Australia, and New Zealand; or Latin America and Canada.

has been **growing** from 51 to 193. Also, looking at the CIO (i.e., the Olympics Committee, which is an important institution in transnational law), the members are 206, which means that the number of *legal systems*[10] has grown up. At the same time, obviously, their size is **diminishing**: many new States derive from the secession of ancient States. For instance, the dissolution of the Soviet Union brought independence to its former members, starting from the Baltic States. This implies that new States **still** have problems of borders, that sometimes are still solved with the ancient instrument of *war*.
All things considered, can we foresee a future based on larger institutions, or rather on the new significance of **interactions**? We'd rather favor the second option: perhaps, smaller institutions that interact and find solutions with the new system of transnational constitutional law. Also, some authors suggest that we might be witnessing a process where the importance of the State would be **increasing**, instead of diminishing, because the State might be used as a halfway instrument, as a medium, between the local and the global dimension. But this, of course, is just a hypothesis.
Some **formulas** were created, in this respect, by constitutional law scholars. Some speak of a ***disaggregation*** of the State, using the formula "**trans-governmentalism**", which is something alike the idea of *multilevel governance*: indeed, while multilevel governance refers to a *vertical* structure of a new transnational power, the formula adopted by A.M. **Slaughter** refers to a rather *horizontal* distribution of power. The same scholar also underlines that foreign relations are <u>no longer</u> an exclusive State prerogative: once, we used to say that the power of foreign relations was typically a state's power[11]; instead, nowadays we have non-State subjects where important decisions are made (e.g., in the pharmaceutical sector, in the gas market, etc.). Another German scholar, **U. Di Fabio**, speaks of ***open State*** to mention the new **attitude** of States to **open** themselves to higher levels of government and to belong to structures which belong to supranational levels. However, it is important to mention that this development is <u>not</u> simply a political trend, but it has been also brought by **"open" Constitutions** towards international law and global dimension, with norms like **Art. 24 GrundGesetz** and **Artt. 10/11 Cost.**

The actors of a globalized economy

All things considered, we can formulate a more or less appropriate **definition of Transnational Law**, which is nonetheless hazardous, lacking any positive legal source:
*Transnational law encompasses **multiple** issues **arising out of transboundary** business transactions, foreign **investments**, infrastructure development projects, transnational corporations, **judicial** interactions, (global) **administrative** networks, the internet, arbitration, and many more other fields.*
One of these fields is particularly relevant: it is the so-called ***law merchant***, or ***lex mercatoria***.
But who are the **actors** of this new globalized economy, that nonetheless concretely are **legal sources**, i.e., those who produce law in several legal sources? For reasons of simplicity, they can be grouped into five families:

- The ***multinational corporations***, which are a sort of community, that creates **new** forms of **atypical contracts** (i.e., not included in classical civil codes) depending on the needs of their traffics. They are helped by communities of **lawyers** since contracts must be written and then interpreted by **legal firms**. This justifies the use of expression ***lex mercatoria***, which was first used by Grotius and now has become a critical source of legal production.

[10] Indeed, also non-States (such as Wales and Scotland) have their Olympic committee.
[11] Indeed, when Madison, Hamilton and jay wanted to describe the powers of the newly born American Federation, they mentioned "**the purse and the sword**", which meant *the government of the economy* and the use of *war* towards other States.

- The ***rating agencies***, which, at the moment, mainly are S&Ps, Fitch and Moody's. The problem with them is that they exercise an enormous **influence** on the economy: not only on the *market* economy with its private operators (where, producing effects on the **public image** of an operator, a poor rating could cause the exclusion from the stock exchange, or conversely facilitate the listing process), but also on *States*, that are evaluated by the rating agencies. Thus, depending on its rate, a state's position in the world market might be enormously (positively or negatively) affected in terms of – say – public bonds, or of the appearance of the State in the credit sector. The problem is that these rating agencies are **private** subjects: they have the nature of a public company, and **no guarantee** of democracy. In this respect, it implies **efficiency**, but not (public) **accountability**. Thus, who can control the controllers? Indeed, they do not need to respond to any public subject, not even those who receive an evaluation mark which could heavily influence their position in public opinion. Periodically, someone suggests creating a **public rating agency** under control of an international authority such as the UN, or at least less linked to the US.
- In an intermediate position between private and public, we find the ***transnational non-governmental organizations*** (or, NGOs). This is another phenomenon with recent origin: they started to be created in the 50s, with a slow pace; then, many more were created later, at the end of the 80s in connection with the end of the cold war and the opening to more frequent interconnections between Countries. Examples are **Amnesty International**, **Greenpeace**, others in the medical sectors, etc. Such subjects have a **hybrid** nature, since they normally are *private* (i.e., States are not members), but they aim at representing the "new"[12] **collective** interests or rather public interests, such as public health, security, environmental protection, etc. They work as ***countervailing powers*** (as doctrine defined them), a term which was invented by the Federalists during the period when the US were being created as a Nation[13]: now, it refers to the idea of having **collective private** subjects that **supervise** the behavior of the States and other agents, focusing on areas where the States are absent.
- The ***standard setter bodies***, whose nature may be **private** or **mixed**. Indeed, some of these subjects are really **hybrid**, such as the International Accounting Standard Board (IASB), the International Auditing and Assurance standard board (IAASB), the Basilea Committee on banking supervisions: they are **networks** of States and institutions. For instance, in some cases, they were created by strictly private associations of different countries; progressively, other associations of newcomers entered the board. At a certain point, it might have happened that States realized that the phenomenon could not be left into private hands, and decided to enter in these organizations through public instruments. They adopt a lot of norms, which are of crucial importance for some sectors: for instance, the Basilea Committee has adopted many so-called "standards", that are not real "norms" in the classical sense but influence the behavior of its addressees. Indeed, banks need to abide by those standards not to be isolated and sanctioned, through instruments that, despite not being public law, are extremely efficient in term of obliging the subject to comply with the standards. Again, in such institutions there is a problem with **democracy**[14]: when the control over a sector is

[12] In Italy, for instance, they were "recognized" only with the creation of the Ministry of the Environment, in 1985. In the US, instead, the most famous collective-interest association is SIERRA, and focuses on pollution: they collect public money to promote suits and class actions.

[13] They were referring to **public** countervailing powers: for instance, they mentioned the *judiciary* as countervailing to the Congress; or Federalism as a form of balancing powers between national and local level.

[14] However, this problem is less evident as far as banks are concerned, since they are ultimately subject to the National Bank's regulations.

carried out by subjects that have been created and brought up by private entities, and sometimes might have been hybridized, democracy might not be guaranteed, and the same happens with **equality** (indeed, small, underdeveloped banks and large ones are treated alike).

- The same can be said in relation to the last family: the ***institutions of the Washington Consensus*** (finance, money stability and commerce institutions, i.e., **IMF**, **WTO,** and the **World Bank**) have been created mainly by **public** subjects (and thus, they are still partially hybrid) but they are moving towards a prevalence of the private component over the public one. They approve **policies**, guidelines, standards, and best practices (i.e., blueprints of behaviors that are suggested in theory, but imposed in practice) in theory oriented to the **reduction of gaps** between Countries. Obviously, we have also here the same problem of **democracy**: indeed, if the government bodies are controlled and appointed – due to historical reasons – by wealthy countries, there is no guarantee for an underdeveloped country that the promotion of wealth creation all over the world will be really pursued.

The main fields of transnational constitutional law

Some fields can be definitely identified with transnational constitutional law. The first example is ***UNIDROIT***, which is an **independent intergovernmental** organization founded in the 20s under the shelter of the League of Nations. It aims at **harmonizing** and coordinating *private* and *commercial* law, through several instruments: proposing and favoring international **conventions**, drafting **model laws** (i.e., prototypes that States are free to adopt: when a certain amount of important States start to enact those model laws, there is an incentive towards the extension of the model law), **principles** and – again – **guidelines**. Now, 73 Member States belong to UNIDROIT. This is a typical **hybrid** institution, which moves between the public and the private sphere, suggesting, proposing but not imposing the adoption of model laws and contracts.

Another typical field of transnational law, belonging to the leisure time, is ***lex sportiva*** (i.e., sports law), with the **IOC** (International Olympic Committee). It was created in a totally private form at the end of the 19th Century, but it has progressively become more and more public, reaching a **hybrid** form, due to the different natures of National Olympic Committees (that depend on choices of Member States). Formally, it is an international **NGO** and a **final authority** on the Olympic Movement: it is the exclusive owner of the Olympic Games and their symbol, motto, and anthem. Moreover, it is up to the IOC to **recognize** the international **sports federations**, which as well may have different natures in different Countries (in Italy, for instance, the CONI is traditionally a public authority; the Italian Federations are supposed to be private, but they amount to a public subject when jurisdiction is concerned – thus, they are scrutinized by the administrative judge). The IOC is a perfect example of the ***jurisdictionalization*** of international law, because it has created a **Court of Arbitration for Sport** (CAS) in Louanne: this is a **private** arbitration court where very important decisions are taken, concerning for instance doping or sanctions on teams, according to **policies** that, despite not being strictly preceptive, are mandatory, affecting teams' admission to sports competitions. It is curious to notice that the Court of Arbitration has a strange regime: indeed, the two litigants can decide **which law** must be applied by the Court, without any official compulsorily applicable law (and, if no choice is made, the Court applies Swiss law). This is a very peculiar way of **forum shopping**: indeed, litigators can reach an agreement on the applicable law. What's more: decisions by CAS can be applied in the Federal Supreme Court of Switzerland. Thus, the IOC is a typical example of both **hybridization** and **jurisdictionalization** of the new entities of transnational law.

Furthermore, ***Universal Religions*** are again on the stage. Indeed, we used to think they had disappeared as an institutional problem, but they came back in 1975, when the first Lebanon war began, and then many wars have been fought under the name of some religion, like in the Middle Ages. This issue especially concerns **Islam**, since the Sharia law influenced the institution of several Islamic countries, and many western States have allowed the creation of **Islamic courts** inside their judiciary system, which makes religious law transnationally important.
But one of the most important fields in terms of transnational law is, obviously, the new ***law merchant***, which represents the beginning of everything. Indeed, the *lex mercatoria* is not at all new: normally, scholars of both constitutional and commercial law mention the famous **Dutch Indian Company** of 1661 as first example of *lex mercatoria*, whose statute was drafted by **Grotius**. Then, the example was followed by the **British Indian Company**. These companies had a worldwide range of interventions, so that they had interest to create **new forms** of contracts and to try to impose them in other contexts where they weren't known, such as Japan or China. *The lex mercatoria* was re-discovered in the 60s and was adapted to the new worldwide situation: enormous **developments** have taken place after WW1, which will be discussed later in more detail. Suffice it to mention for the present the **standardization** of contract clauses for sales, the growing importance of international **trade** and finance, and of international commercial **arbitration**. We can wonder whether the new *lex mercatoria* is, as **Goldman** suggests, an ***autonomous*** *legal system*, or simply an **application** on a wider scale of the principle of ***party autonomy***, hypothesis which will be discussed later. Again, we can see that the typical phenomena of *lex mercatoria* grew out of a **transnational** body of legal rules and principles, that helped to harmonize and unify international trade and finance, which is the same effect yielded by UNIDROIT. The only difference is that the latter – conversely to *lex mercatoria* – is structured and institutionalized, whereas the former is more of a **common law**, grew up through billions of commercial transactions: indeed, **repetition** implied the birth of rules, because common practices are slowly adopted as private law rules.
Moreover, the more recent field of international law, started in the 90s, is represented by the ***internet*** and ***e-commerce***. The expression that scholars use to define it by analogy to the *lex mercatoria* is ***lex informatica***. By now, States have been reluctant to regulate the behavior of billions of consumers and service providers, or rather incapable: two years ago, during presidential elections in the US, former President **Trump** published an executive order proposing to introduce a **public control** of website managements (this was so because, among other things, his website had been cancelled due to improper use of expressions). Here, again, we have the problem of **democracy** and **transparency**: providers are private subjects, but still they have influence over how **freedom of expression** is exercised. Are we ready to delegate to private subjects our freedom of expression, free of control by any kind other than public opinion[15]? If no global rule is introduced, then everything is left either into private hands, or into some dictatorial governments (e.g., the government of Cuba forbids free use of the internet to its citizens; the Chinese government periodically shuts down websites that make use of certain "forbidden words").
Finally, the activity of ***transnational technical standard setting***, as we have already mentioned together with the problems it implies. Standards can be conceived as **codified knowledge** enabling the development of products and processes. They are **voluntary**, yet they have *normative*, *regulatory,* and *cognitive* function. Although they play a pivotal role for the **efficient exploitation** of technological innovations, in other instances, they might amount to **trade barriers**. One way or another, nonetheless, boards such as IASB, IOS (International Organization for Standardization), and IEC (International Electrotechnical Commission) are more and more favored as the seat where regulatory actions take place.

[15] And it is doubtful that there might be popular reactions to "unpopular" behaviors of service providers.

Constitutionalism: concept, history, and evolution

The Concept and Constitutionalism 1.0

To understand what constitutionalism is, it is appropriate to start from one of the general definitions adopted by constitutional scholarship, taken from a small book wrote by **Maurizio Fioravanti**, perhaps the best Italian constitutional law scholar. According to him, ***constitutionalism*** is:

*a set of **doctrines**, **principles**, social and institutional **practices** driving the **multi-faceted history** of modern state in Europe.*

Constitutionalism could be divided into **three stages**, from Constitutionalism 1.0 to 3.0. Such division is not extremely rigid, since it is possible to spot changes born in one phase, going, and changing their nature in order to survive in the next one.

It is important to understand whether the idea of constitutionalism from which we are moving is linked to a written document. There are authors in the history of constitutional law claiming that the **ideas** forming the bases of a Constitution **precede** the *written* document. Many European authors still use the distinction among ***material*** and ***formal*** **Constitution**, introduced by Carl **Schmitt** and **Costantino Mortati**: *written* Constitution is the document that scholars, judges, and lawyers must interpret, whereas *material* Constitution is supposed to be the mix of principles and values that stay *behind* the idea of formal Constitution. The main problem is that the *material* Constitution **changes**, since values and principles change over time, while the formal Constitution, being a document, remains the same. In the US, the dominant position is exactly the opposite, since the Constitution must be interpreted according to the **original meaning** of when it was enacted. This doctrine, applied for instance by Justice Scalia, is called ***originalism*.**

Basically, the main problem is to understand *whether the Constitution precedes the document*. For instance, **Charles McIlwain** wrote that the Constitution is a **set of principles** resting on the specific **values** in which people believe. It is exactly what Montesquieu wrote in *The Spirit of laws*: many factors (including geography and economy) make the spirit of the idea of Constitutions. In a nutshell, there is not a unique idea of constitutionalism, but just a relative and **local** dimension of this phenomenon. On the other side, many authors support the idea of constitutionalism as an ***absolutist*** **theory**, in every context. Of course, Constitutions are different from each other, but there is always a kind of **universalist** philosophy: for instance, other important American authors, like **Edward Growing**, claimed that every Constitution needs to be ***worshipped***. A typical example of Constitution being worshipped could be noticed from the funerals of Lillibet, since she represented a *dignified* institution embodied in it. This claim of worship can be founded in the belief of **a superior law** that governs people. In other words, it takes a documentary Constitution to **consolidate** the natural factors that Montesquieu and McIlwain mentioned. So, there cannot be a constitutionalism without a *written* Constitution. Hence, a written document is created to introduce what **Alexander Hamilton** called ***auxiliary precaution**,* i.e., a **limitation** to the government powers capable of limiting values, principles and interests embodied in the Constitutions.

Let us start from the first phase, ***Constitutionalism 1.0***: namely, the historical moment in which Constitutionalism was born. The main concept relies on the strict **connection** between *Constitutions* and *Nation-States*. Constitutionalism is tailored on the concept of Nation-state, although the latter concept already existed before: England, for instance, was already a nation-state centuries before the born of its Constitution. Also, France reached its unity before the enactment of its Constitution. The **birth** of the modern concept of **State**, along with the notion of international law, happened in the context of the **Peace of Westphalia** in **1648** (that is, actually, composed by three treaties). The Peace of Westphalia coincides with the end of the Thirty years war, along with the end of the eight-years war among Spain and United Provinces of Holland. It was the date of birth of Switzerland as a nation since parties recognized the independence of the Swiss Confederation. Legally speaking, this peace represented the **end of the medieval era**, since the **Catholic Church** and the **Empire** gave up their aspirations to be universal rulers. They used to be, during Middle Ages, the only two subjects in the context of international law, in the so-called ***dual pattern*** **of authority**. The Peace of Westphalia was the end of an era, and the beginning of a new one. The peace conditions marked the **full independence** from the Empire of many European states, such as France and Switzerland, and introduced the principles whereby religion of the prince implies the sharing of the same religion by his subjects. Thus, dual pattern of authority – where the papacy and the empire were the only actors in the international law scenario – was **abandoned**. This way the idea of ***sovereignty***, where all the powers were **concentrated** in the hands of the monarch, emerged.

In the meantime, another consequence was the recognition of the existence of **new political entities**, namely, the ***States***. This led to the **birth of international law**. The Westphalian system did not arise from nothing: it was the outcome of years of doctrinal studies. **Hugo Grotius**, considered the father of international law, wrote several books on the sovereignty years before the peace of Westphalia. Many authors, like Carl **Schmitt**, wrote that 1648 was rather the birth of the ***ius publicum universal***, namely a new organization of public law both in the domestic dimension of constitutional law and in the universal dimension of international law. In this period, authors like Emer **de Vattel** theorized that law of nations was a mere **system of relations** between States. The only author who did not give a *positivist* construction was J. **Austin**, who argued that the new legal order should be **dubitated**. He suggested that there is no coherence in this construction, since if a state is sovereign there could not be international law. If international law exists, then sovereignty is completely devoid of reason. In contrast, **U. Huber**, a Swiss author, claimed that sovereignty implies the exclusive state power ***within*** the jurisdiction of the state itself.

Sovereignty, then, can traditionally take two meanings:

- ***External*** **sovereignty**, intended as *ius excludendi alios*. This is referred to the relationship **among States** in their quality as international legal persons *vis-à-vis* other states or other international legal persons. This idea is derived from the private law concept of *property*, adapted to the new needs of regulating the novel legal order.
- ***Internal*** **sovereignty** considered a *summa in cives legibusque soluta potestas*, with a view to the relationship between the state (or its institutions) and non-state actors spatially located *within* the territory of the State.

The sum of these sovereignties constitutes the ***potestas abslouta***, which became the dominating form of government. The absolute form of government was obviously adopted, since when a new kingdom proclaimed its total independence from the Church and the empire, then the subsequent concentration of powers was compatible only with ***absolutism***. In this historical period, many authors depicted the State as something oppressing, with huge concentration of powers. This concept is particularly present in the image of **Leviathan**. An exception to the adoption of an absolute form of government is seen in **Britain**, since much earlier it knew a great period of change during the **Glorious Revolution**. Common law institutes, such as the Crown, reached the idea that is possible to live even without the ideas of state and Constitutions. In **1648**, a civil war started in Britain, opposing Crown and Parliament. After the execution of king Charles I, a protectorate was proclaimed by Oliver Cromwell, who was even offered the role of King, but refused. Then, his son Richard Cromwell, along with John Lambert, drafted the so-called ***instrument of government***, which was a sort of Constitution, that, however, was immediately identified with a kind of dictatorship. This experience immunized Britain from the idea of having a *written* Constitution. Nonetheless, the birth of Britain as a State can be traced, as many scholars claim (like Sir Ivor **Jennings**), even *before* the glorious revolution.

It is possible to identify some **common elements** to any theory of state across Europe: ***tradition***, ***hierarchy*** (i.e., a strong structure of both government and administration inside the state borders),

boundaries and ***sovereignty***. The features of **sovereignty** coincide with the **autonomy of political** sphere, the hegemony on **economic** and **social** spheres and the control over the destiny of a **people**, **territory**, and national structure.
Another problem is the relationship among *sovereignty* and *Constitutions*. There are several definitions of sovereign, among which the most important one has been given by C. **Schmitt**. He argued that the sovereign is the only organ deciding in case of **emergency**. The idea is: when a Constitution works in *an ordinary way*, it is possible to think that the authority is *fragmented*, as it happened during the years of Weimar republic. Only when an emergency occurs, and the State comes to a condition of extreme difficulty due to the *diminishing support of the parties* in Parliament, it is possible to see who the real sovereign is. Many other authors, especially after WW2, claimed that to understand who the sovereign is it should be looked at the **political force administering** public life under ordinary conditions. This is ***supreme authority***, namely a subject that does not recognize a superior authority (*superior non recognoscens).*
Therefore, it is possible to say that ***state sovereignty*** in the Westphalian system is a **rationalization** of political power, in which the authority must have **absolute**, **perpetual**, and **indivisible** power. The power must not recognize other origing since it must be self-sufficient. In other words, sovereignty is the instrument of monopolization of strength and the use of force.
Max Weber, in his famous Economy and Society, describes sovereignty as the **legal monopoly** on the production of the law. Thus, there is a connection between *political* power and *legality*, becoming the instrument of transformation of rough political power into a well-defined legal entity. Sovereignty, in its *objective* dimension, has certain prerogatives: ***nativeness***, ***universality***, ***exclusiveness***, and ***inclusiveness***. It has also a ***content*** **dimension**, meaning that use of sovereignty can lead to any kind of content and regulation. Another way to describe such a problem is to explain that sovereignty was born as a typical ***jus naturale*** concept, but later laying as the foundation of the positivistic concept of State.
The **criticism** towards sovereignty as a *positivist* instrument of legal doctrine, started with Hans **Kelsen**, who was the only one being so harshly against the concept of sovereignty, stating that such concept should have been "completely removed". His idea was that, in a monist building where constitutional law and international law are part of the same construction, sovereignty was **not necessary** anymore. Sovereignty, though, still survives, even if it is more **fragmented** among regional and local dimensions. Thus, currently, it is still a hinge between *politics* and *law*, although the concept changed relevantly through time.
Together with the concept of sovereignty, the Treaty of Westphalia introduced the concept of ***Nation***, which is a **conceptual** link reinforcing the **sense of belonging** to the State. In a nation, people are defined in non-state terms, bounded by the *same language*, *religion*, and *ancestry* to a specific territory. The most important expression of Nation-state is included in the **Art. 3 of the Declaration of the Rights of the Man and of the Citizen of 1789**, where the Nation is described as a *homogenous community for language and religion*.
Nation-inspired language and rhetoric was never successful during the **American Revolution**, when the founding fathers drafted and adopted the **1787** Constitution. The American revolution followed indeed different paths, especially compared to the French revolution: it tried to reach independence from the motherland, according to the principle of "*no taxation without representation*", and the idea of nation-state was not needed since the population of the colonies was composed by immigrants from **many different backgrounds**. French revolution, conversely, tried to overthrow the previous social class, i.e., the *ancien regime*. The new foundation of the state, replacing the old order, was considered the Nation. Both *new political regimes* needed, instead, a **formalization** in a legal instrument: the **Constitution**. This was the result of both the American and French revolution.

The main point of the constitutionalism 1.0 relies on the **content** of the Constitutions adopted in France and America, for which they are defined as ***liberal*** **Constitutions**. The real American Constitution is dated 1787, although the *Articles of confederation* had been adopted the year before. The latter were simpler and less demanding to the colonies. It took about ten years to complete the path to the new Constitution, since they understood that, in the relationship with European states, there was a need of offering to the world's public opinion a more **solid** subject. The Constitution was needed, for instance, to borrow money from other Countries, and to be held responsible for the guarantees and the reimbursement.

In **France**, many Constitutions succeeded over the last decade of 18th Century: eventually, the last one was completely set aside by Napoleon when he transformed the republic in a *dictatorship*.

What is the ***content*** of these Constitutions pertaining to constitutionalism 1.0? Normally, these had two kinds of content: the ***form of government*** and a ***bill of rights***.

The idea of substantive content comes from the glorious revolution of 1689. The revolution did not lead to any written Constitution, outcome of the dramatic experience of the Cromwellian government. In the moment in which Charles II Stuart was persuaded to leave the throne, and parliament decided to call William of Orange, a ***Bill of rights*** was sanctioned. Only two conditions were put:

- The acceptance of the **form of government**, according to which the Parliament proclaimed the king. This was the end of years of revolutions: the Parliament had won its battle against the Crown. Their coexistence became thus the distinctive sign of constitutionalism, and the parliament gained its centrality.
- The acceptance of a catalogue of rights belonging to citizens: i.e., ***Bill of rights***. It was a list of citizens' **prerogatives** towards the political power. The idea is that, in a *liberal* form of government, it is not enough to constitute a form of government. It is necessary to establish a list of rights and freedoms that must be preserved.

The **coexistence** of these two conditions became the distinctive sign of this form of constitutionalism.

Even though those two revolutions took place in both sides of the Atlantic, it is worth mentioning that the order followed in America and France was completely different. Also, the two models of Constitutions have *different contents* since they were born in different contexts. More precisely:

- In the American case, the *form of government* came first, addressed in the 1787 Constitution, followed by the *Bill of rights* in 1791. The reason behind it was that the Confederation was still at war, so the creation of a **strong base** was more important. The American public opinion was also more focused on **localistic** perspective, not appreciating excessive concentration of powers on the federal level. For this reason, several long articles were drafted and collected under the title of "The Federalist", in which **Hamilton** and **Madison** explained why the 13 colonies needed to form a **Confederation**. Many Americans, indeed, correctly believed that each colony had *its own* Bill of rights. Some of them had old Statues, which resembled Constitutions, such as Massachusetts. Others wrote new Constitutions, like Virginia and New York, which already included a Bill of rights. There was, in this way, <u>no need</u> for a *new*, federal Bill of rights. What's more: Madison and Hamilton explained that, whenever new federal rights were recognized, **counterbalancing powers** needed to be created (such as federal courts) to protect them. The American public opinion would <u>not</u> have appreciated the idea of adding new powers to the federal level through the recognition of new federal rights to the American citizens. For this reason, they first decided to write a Constitution <u>only</u> regulating the form of government, <u>without</u> a federal Bill of rights. After the approval of the Constitution, the federalist party (of which Hamilton and Madison were authoritative members) started to prepare a new Bill to revise the brand new

Constitution. This way, they could add a new bill of rights on the top of it, composed of **eleven amendments**, including the new rights of American citizens. As to its content, the American Constitution has a strong conception of civil society intended as plurality of powers subjected to reciprocal **checks and balances**. This was so due to the composition of the people of the colonies: they were from different countries, with different backgrounds and religions. The Constitution was intended, for the first time in history, as *higher law*. It was bound with a concept of **supremacy**, and for this reason it was made *entrenched*, providing an aggravated procedure to approve modifications.

- Conversely, in France, the exact opposite happened: for historical reasons, the declaration of rights **precedes** the drafting of a Constitution. The French revolutionaries firstly adopted the famous ***Declaration of the rights of citizens and men*** in 1789, and after two years they approved the ***Constitution of 1791***, providing for the form of government. The situation in France was indeed too fluid, and the national assembly had not clear ideas on what political regime they wanted to introduce. As to its contents, in Europe, the revolutionary background was completely different. The legal system was founded upon the idea of **Nation**, and the State was indented as a *legal person*. This approach was firstly introduced in XIX century by German scholarship, starting from a private law point of view. The idea dominating in XIX century was the **positivist** ideology, that emphasized the formal, rather than the substantial, form of the state.

In sum, the difference among the American and the European model (apart from Britain) is that, in the US, constitutionalism was interpreted as a ***system of limiting government powers***. This was made possible through the recognition of **rights** and the **separation of powers**[16]. The more power is separated, the less it is likely that an authoritative regime can be introduced. Obviously, this is a *negative* conception since constitutionalism is considered a **barrier** against ***monarchical*** **absolutism**. At the same time, nonetheless, it is also barrier against ***parliamentary*** **absolutism**, since founding fathers believed they were outraged by the British parliament. The real oath was to **prevent** any kind of **concentration** of powers, even from the side of the legislative power.

Conversely, in Europe the prevailing idea was the **concentration of powers upon the State**, considered a *legal person* as it happens in private law. The union of the legal system was founded on the unificatory concept of **Nation**. The only exception in Europe was the British case, where the legal personality is not recognized upon the "State" (a concept that was actually absent in British thought) but on the Crown. The latter was a medieval relict, notwithstanding its importance, as argued by **W. Bagehot** and **E. Kantorowicz**: this polish scholar described the structure of the British crown as composed by two bodies:

- the ***physical body***, corresponding to the living monarch-person, and
- the ***immortal body***, corresponding to the **continuity** of the kingship.

Between France and the newborn US, there was a lot of **cultural exchange**: for instance, French generals fought in the American independence war, and Thomas Jefferson lived for many years in France as US Ambassador. The two paths are not different, but the local values had an enormous influence on how the Constitutions were written eventually. Although the process was similar, the Constitutions were different considering the typical national context.

The model of Constitutions belonging to Constitutionalism 1.0 can be described by some **common characteristics**[17]:

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[16] The goal of **separation of powers** can be achieved in two ways (often chosen together):

- ***Horizontally***, with **Federalism**: i.e., cutting across the structure of power through territorial levels.
- ***Vertically***: i.e., through a clear distinction between the legislative, the executive and the judiciary power.

[17] That influenced Constitutions until the First World War.

- ***Short***, since they included only very few articles disciplining the form of government and a catalogue of rights. There was no reference to *civil society*, like family and work. In this model, long Constitutions happen rarely, like it happened with the 1795 Constitution in France and the Italian Constitution of the Cisalpine Republic.
- ***Flexible***, since they could easily be modified.
- ***Not entrenched***, like the Italian *Statuto Albertino*. There were, though, some exceptions: the American Constitution and the French Constitution of 1791 that was never applied (since it was too difficult to amend).
- Included only the ***frame of government*** and a ***bill of rights***. Normally, every regulation on civil society, economy, religion, and all other aspects of the organization of **social society** were excluded by the content of Constitutions. Those aspects were indeed included into the field of **private law**, embodied either in civil codes or pertaining to the common law tradition.

It is now worth focusing on the concepts of ***State*** and ***Sovereignty***, considering the thought of some eminent philosophers:

- **J.G. Fichte**, who *criticized* the French revolution, highlighted the **centrality of individuals**, and described the State's aim as achieving the **rational organization** of social relations.
- **F.W. Hegel**, the thinker who ruined our life and GPA at high school. The great philosopher emphasized **dialectic** as the "*reason of history*". In this sense, there was the need to **contextualize citizens' existence** within the nation **values-system**. The state was considered to have an **ethical role**, and it was deemed as absorbed into society.
- **Schelling**, who considered the State as something **superior**, with a superior **indivisible will.** The sovereign mediates the power of the State, as a sort of "*medium*". Freedom is considered a *negation* of the statal order.
- **Sthal,** who thought the State is the metaphysical origin of the law. Freedom, according to his thought, is admitted as long as the State is recognized as part of the relationship with individuals.
- **Gerber,** who claimed that the State-citizen relationship could be defined as **supremacy** of the former above the latter. Perhaps, we could not even talk about "citizens", since the State always has a position of supremacy upon the subjects. Freedom is only a *fact*, and not a right[18], namely an area where the State decides to not intervene. Whenever the State decides to carry out its political powers, it can do it. When the state refrains from occupying fields or areas of regulation, that is "in fact" (and not in law!) freedom. Moreover, civil rights are **limits** to the rights of the sovereign from the point of view of the subjects. This is a very *conservative* interpretation of constitutionalism during XIX Century.
- **Jellinek,** who was the last scholar who reached with his life the times of the Weimar republic. His theory is that the ordinary relationship among State and citizens is a status of subordination (***status subiectionis***). Other three states are possible, but those – again – are simply a *free room* the State decided to not occupy for reasons of opportunity. For instance, the **status *libertatis*** is the equivalent of civil liberties[19]. Rights are not mentioned, since individuals have no space for autonomous rights, and hence he speaks of *statuses*, that just have those liberties allowed by the State when not invading that sphere. Status is a mere **fact** in this sense, and not a right. Jellinek referred to the formula

[18] Consider here the difference among British or French traditions which interpreted constitutionalism as the instrument to guarantee individual freedoms.

[19] Then, we have the ***status citivatis***, (i.e., the social rights) and ***status activae civitatis*** (i.e., political rights).

***agere posse**,* meaning that what he defined as **public subjective rights** (i.e., the *statuses* we have just mentioned) were not rights on the proper sense, were not liberties (that would have been defined by the concept of *agere licere*); on the contrary, public subjective rights were spaces of actions allowed by the State. In this sense, the State decides that citizens *can* – i.e., *posse* – occupy a space of action. In this sense, citizens have no claim on their own, but only a **space** when space decides not to occupy a certain field, and citizens' claim against the State did not represent *positive* claims, but only ones for the respect and the protection the status.

To sum up, until WW1, ***documentary written Constitutions*** were characterized by:

- The definition of a ***scheme of government***, including the **principle of representativeness** of the government self. It was obvious, as Madison wrote, that the power could not be exercised by the *people as a whole*. A small group of delegated representatives should have carried out powers.
- A careful ***division of powers*** since division was aimed at preventing degenerations.
- The aim of **protecting *individual liberties***. This was the reason why Constitutions included the form of government and a catalogue of rights.
- The creation of a **permanent** form of government, where ***stability*** is the keyword. Otherwise, it would have been difficult to worship and respect a Constitution that could be changed rapidly.
- The conception of Constitution as **supreme, higher,** or **fundamental law**.
- The Supervision by a **judiciary**, that ought to elaborate some requirements of public interests.
- The status of **authoritative expression** of the **political identity** of the community.

This kind of Constitutions has, in a certain sense, a ***negative* function**: it was aimed at **preventing the occupation** of powers by factions or individual bodies through **separation** and **fragmentations** of powers; this was so also in order to **safeguard the individual rights** preventing the state from occupying constitutionally guaranteed spaces. This is why they were short and organized in order to structure a form of government that can prevent the invasion of spaces reserved to individuals.

Constitutionalism 2.0

Let us move now towards **Constitutionalism 2.0**, that starts immediately after the First World War. It would reach its peak, though, only after the Second World War.

WW1 ends up with the **end of the central empires**. At that point, the new constitutional model became the one of the Weimar Republic's Constitution[20]. Its characteristics made it completely different from the Constitutions adopted in the previous phase:

- it was ***long***, since it also included rules and constitutional principles concerning the main social organizations, such as the family and trade unions[21].
- ***Entrenched***, and
- It encompassed provisions addressing ***social organizations***. The Hegelian idea of separation of State and civil society is thus set aside since social organizations are organized through constitutional principles. **Political parties** were also disciplined as private organizations and thus free to organize as they preferred. Private law is in this way not excluded anymore by Constitutions, making them enter every field of society and politics.

[20] This, despite the existence of the Austrian Constitution of 1920, drafted by Hans Kelsen, and of the Polish Constitution of 1921.

[21] In particular, how trade unions were disciplined under the lenses of the different territorial levels of the State.

This model comes out of the sorrowful experience of the WWI, but collapsed dramatically in 1932 when President Heidelberg appointed Hitler as chancellor. The fact that it was short-lived does not mean it was a bad model: it was extremely **modern** in its characteristics, but there were extremely harsh economic and political circumstances that made it difficult to apply for a longer time[22].
After WW2, the model came again to the public debate. The atrocities perpetuated during the war, and the failure of the previous Constitutions to prevent totalitarianisms, suggested that the time was right for a different kind of constitutionalism. In this respect, Weimar represented, at least for European countries, a possible adoptable model. Therefore, it is possible to identify the same characteristics as Weimar:

- New Constitutions of the second phase did not recognize anymore the *separation* between **State** and **civil society**. *All* the aspects of social life are then included in the new constitutional principles. This idea is described by many authors who sustained that Constitutions are ***total***, since they cover every possible aspect of organization of society.
- They were also **entrenched,** meaning that they are rigid. In order to amend them, an *aggravated procedure* with a stronger qualified majority is mandatory. Rigidity prevents easy amendments or derogations of constitutional framework.
- Normally, in this generation, there is also a **proliferation of constitutional courts**, constituted as *vestal virgins* of constitutional principles. These courts were created to oversee the legislator to prevent possible violations of the constitutional rules through legislative acts.
- They incorporated **cluster values**, an axiological content of the Constitution self. This was totally absent in the previous phase, since the latter were short and there was no need to include values in Constitutions which were the result only of certain defined social classes. In this way, the legal system's common heritage had to be implemented over time, enshrined in **broad principles** that must be interpreted. This means a *permanent activity* in terms of interpretation of the values.

Principles are normally quite broad, and for this reason they need to be developed over time through **judicial interpretation**. The problem is that if principles have to be interpreted by judges, a system to prevent them from taking the place of parliament must be introduced. In this respect, German scholars claimed the interpretation process carried out by Constitutional courts should reflect the dialogue of *all* members of society, including **public opinion**. German authors also described ***principles*** as **legal formulation of values**: as **Robert Alexy** claimed, they are **optimization precepts**, meaning that such principles have a normative content but at the same time they optimize such content. The content is not then immediately clear, and it must be discovered through interpretation. Judicial decisions must explain how the reasoning process happened, considering also that they should be *in line* with main trend of public opinion. At the same time, there is no hierarchy among constitutional values (at least theoretically), except for **human dignity**[23]. The outcome of such process is a **perennial balancing** process by the judiciary, becoming thus a key feature of ***Neo Constitutionalism*** (a new model theorized during that time by scholars). Indeed, Constitutional interpretation adjusts principles' respective position balancing their weight in a *case-by-case* approach, rationalized with the instrument of dialogue with the other components of the constitutional framework.
Furthermore, in constitutional interpretation, there is also an open and new sensibility towards **international law**, with a transition from a dualistic approach to the ***monistic model***. A preeminent

[22] Do not forget that we are in the period after the Versailles treaty, which put harsh conditions on Germany's economy, thus humiliating the German people.
[23] This was the result of German thought after the atrocities committed against human dignity during WWII.

position is ensured to international treaties concerning the sphere of human rights. Thus, there is a relevant **role of human rights** conventions in constitutional interpretation.
Immediately after the Second World War, the situation was relatively uncertain. States such as Italy, Germany, Austria, and Japan had been defeated. Excluding the Italian and Austrian Constitutions, Japanese and German Constitutions were written under the influence of Allies who won the war. The new constitutional charters of the '40 still adopted a **dualistic model** in terms in of relationship among international law and domestic constitutional law. However, according to G.F. Ferrari, they left the door ajar to monism. Consequently, there has been an *increasing* preference for the growing monism in the next cycle during the '70 (years in which the last dictatorships of Europe faded away), like it happened in the Spanish, Portuguese, and Greek Constitutions. New constituent fathers took inspiration from the previous experiences in this sense, being more available to abandon the old dualistic model. This does not mean that those Constitutions are *entirely* monistic: indeed, it is still a moment of passage where people preferred dualism.
It is opportune now to explain some definitions of ***constitutionalism*** elaborated by different authors and doctrines:

- According to **Charles McIlwain**, constitutionalism is all about **limited government**. In other words, the State, in the transition from the Westphalian system to the revolutionary age, has concentrated powers. When constitutionalism arose, it conversely aimed at limiting the government. Constitutionalism consists in government's limiting devices. Mainly constitutionalism 1.0. is about limiting government's powers.
- For **M.J.C. Vile**, who wrote a book called "Limited government", constitutionalism was a frank **acknowledgment of the role** of government in society, linked to the determination to bring government under control and to place limits on the exercise of power.
- **U.K. Preuss** argued that constitutionalism was born as a *concentration* or aggregation of power and *limitation* of it, to erect a strong political power and, at the same time, to domesticate it. Limitation of government consists of organizations and procedures. It is possible to work on this through weights and balances, and then introducing procedural fairness in order to properly regulate powers in their carrying out.
- **J. Madison** wrote in a heroic context his revolutionary passage. In his mind, **accumulation** of powers and a system of **checks and balances** are remedies to the possible advent of authoritarian regimes. Judicial review is one of these checks and balances. Someone asked him what happened if judges had enormous interpretation powers. He simply replied that the judiciary has neither *force* nor *will*, only the authority of interpretation. It is then the **least dangerous branch** of power among the legislative and the executive[24].
- **L. Fuller** defined constitutionalism as an **instrument** to establish generality, **stability**, clarity, publicity, and **consistency** on the constitutional system as a whole.
- **N. Luhmann** argued that constitutional law is self-reproductive (i.e., **autopoietic**), because it reproduces the components of which it consists of[25]. It is something organic, which does not look outside in order to increase its strength, doing that on its own. It increases powers on its own over time, as many authors commented addressing Europe and European bureaucracy.

There is a more rhetorical definition formulated by the **Venice Commission**, an administrative body created by the European Convention on Human rights, giving suggestions or directives: the

[24] Madison's best friend was **Justice Marshall**, the responsible of the increasing of powers upon federal judges starting from the famous case *Madbury v. Madison*.
[25] Unless, of course, there is a revolution or other chaotic event that undermines their functioning.

Commission writes opinions, and here is why the following language is more aulic. They put several requirements in their directives, and this lets us understand their definition of constitutionalism:

- ***Legality***, including a transparent, accountable, and democratic law-making process
- ***Legal certainty*** (i.e., openness of the sources) along with **prohibition of arbitrariness**[26]. The latter can have several manifestations, like extraordinary and retroactive statues referring only to a specific subject (the so-called bills of attainder).
- Access to ***justice*** before **independent** and **impartial courts**, including judicial review of administrative acts.
- Respect for ***human rights***.
- ***Nondiscrimination*** and **equality** before the law.

In constitutionalism 2.0, Constitutions undertake **positive functions**, making them completely different from the *negative* functions that represented the attitude of constitutionalism 1.0. The underpinning idea of Costitutionalism 2.0 is realizing a **just** structure of society ("whatever it might mean"). One of the most common interpretations of the just structure of society has been given by **John Rawls**. His idea was the so-called **neo-contractualist** approach, meaning that a nation, while putting together the values which form the axiological platform, should work on the method of ***overlapping consensus***. That means looking for browsing the different components of society, putting together the parts where values overlap, namely that they are widely shared by society. He applies the same method to the international community since he distinguished genuinely democratic states from other categories of states less accustomed to democratic values. The wrong states, due to insufficient historical democratic rules, or to prevalence of dictatorships, are not able to share the overlapping consensus with the international community.

Constitutionalism 3.0

Let us come to the final – at least, for the present – stage: **Constitutionalism 3.0.**

The third model starts with a sort of **rational** basis that constitutionalism 2.0 reaches in its more mature version: Constitutions are considered as ***law in action***. In this sense, the Constitution **incorporates** values, although it remains **neutral** (*wertneutral)* to them: there is indeed <u>no</u> hierarchy among values, that hence need to be balanced by judges following rational standards.

Therefore, **balancing of values** <u>never</u> implies a complete *sacrifice* of one or more values: instead, they are always compensated with one other, standing together although necessarily *in different measures*. For instance, freedom of domicile can be balanced with limitations to circulation due to the pandemic, and although one of those will prevail, the other cannot be cancelled. It is exactly an *et … et* – as Sowohl put it – and never an *aut … aut*. This is done through the method of ***trials and errors***, i.e., conjectures and confutations. Therefore, it could happen that two values are balanced in a certain way in a certain historical moment, but later in time they are balanced in a different way following possible social changes.

As said, the starting point of constitutionalism 3.0 are the previous Constitutions of constitutionalism 2.0. For this reason, Constitutions traditionally **reflect national identity** in a specific context due to their nature as ***ideological documents***. In Constitutions, there is an increasing **interdependence** of domestic constitutional law and international law. Thus, the State's legitimation and its authority <u>no longer</u> depend on community bonds. A growing part of such **legitimation** depends on a *global legal order*. Consequently, sovereignty is more **fragmented**, and its remaining part keeps on depending on the traditional links among the representatives and the represented. Normative force of the global legal order produces rules applying to *all* States. In this

[26] Arbitrariness implies a prohibition of retroactive laws.

respect, as we will see, recognition of national sovereignty is **conditional** upon acceptance and compliance with international rules.
The new archetype of Constitutionalism relies more and more on **international** regimes and institutions. New ***universal Constitutions*** complete the process of dependence of domestic public law on international law. The process started immediately after the collapse of the Soviet Union, when new Constitutions of the '90s introduced an attitude of **dependence on international law** rules. The recognition of national sovereignty, which was prior totally independent from international rules, is now considered under the lenses of their *ability or capacity to compel* to international law rules.
Another worth-mentioning process is the ***strengthening of universalism*** that can be noticed from **reciprocal imitation** of constitutional drafting. An Austrian author generously defined these Constitutions as *photocopied*, since several articles in States extremely far from each other were completely identical. But why is so? The legitimacy of universalist norms is derived from:

- The will of the **international community**
- The existence of supranational and international **processes and institutions** for the articulation of the will in form of law.
- The appearance of **consensus**

Thus, there is a new form of universalism, which is different from *natural law* and does not coincide completely with human rights[27].
Another influencing factor is **international investment and trade law**, which has an enormous influence toward Constitutions. Indeed, for a State to obtain loans and credits from the traditional institutions of the Washington consensus, it was necessary to have "conformed" Constitutions so to be allowed to the international community.
New universalist Constitutions have other main features:

- ***Judiciary*** is considered as a **guardian of global legal order**. This has growing importance in terms of definition of rules. Indeed, now we are more dependent on the decisions of the Courts of Luxembourg and Strasbourg than we were before.
- Universalist Constitutions embrace ***widespread values and principles*** and not unique to single territory or country.
- ***Compliance to universal standards*** overcome local self-determination and is a requirement of a legitimate constitutional order.
- Individual people enjoy rights or statuses (at least, partially) irrespective of their citizenship, and without the need of a grant by state authorities.

In the transition from *Constitutionalism 1.0* to Constitutionalism *2.0* and eventually *3.0* there was another important shift: while in the old European tradition rights were simply a matter of *dialectic* between the individual and the State (in the logic of ***liberty v. authority***: indeed, originally rights were all described in **negative** terms, with private subjects invoking theri rights against the State), according to Constitutions that followed WW2 (and before, in the special case of Weimar) civil liberties can be invoked not only towards the State and other public authorities, but also against some **private subjects** and notably private social organizations, such as the ones mentioned and regulated[28] in Constitutions themselves (e.g., associations, parties, Churches, one's own family, etc.). For instance, the right to free correspondence could be invoked by a boy who is not allowed

[27] Although they keep being highly promoted by international law, both conventional and customary.
[28] By way of example, the Italian Constitution reads that the family must be organised on a *full equality* of its members; that the internal structure of a party must be inspired to *democratic principles*. In Germany, the GrundGesetz even introduced the possibility of declaring a party unconstitutional when its internal structure is proved to be non-democratic.

by his father to write a letter to his beloved one; or by a student who cannot address his rector for the University is against it.[29] Put differently, **including social organizations** in Constitutions as part of a new environment where rights must be applied implies that rights can be enforced even towards them, i.e., private subjects that are not public authorities. Paradoxically, this might cause the need for **support from the State** *against private organizations* in a private litigation: the State went from being an enemy (according to the liberal approach to rights) to a potential ally. This new approach has been described by German constitutional scholars as ***drittwirkug***, i.e., *efficacy towards third-parties*. In short, if on the one hand we include private organizations into Constitutions, on the other hand they will be governed, as consequence of that inclusion, by constitutional rules.

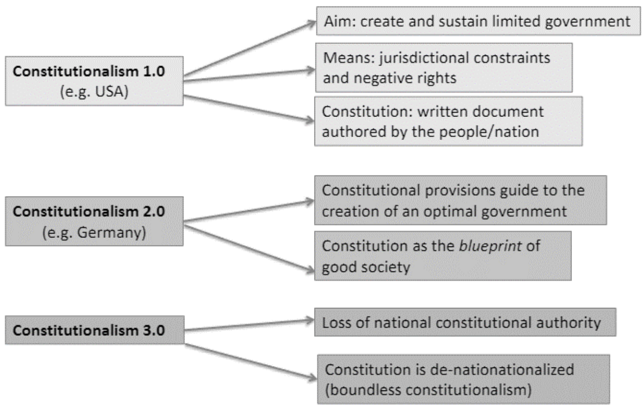
The nice scheme on the right helps us summarize the main points of the discourse.

Constitutionalism 1.0, as it happened in the American case, aims at creating and maintaining limited government, through jurisdictional constraints and negative rights. Constitutions were written documents authored by the people or the nation.

Constitutionalism 2.0, like it was developed in Germany, intended constitutional provisions as a guide to the creation of an optimal government. Constitutions were considered as the *blueprint* of good society.

And, eventually, with Constitutionalism 3.0 we saw the loss of national constitutional authority. This is now a concept that must be shared through intergovernmental and multilevel constitutionalism.

The last thing that deserves to be mentioned is that Constitutionalism 3.0 started and lived during **continuous crises** at the global level, such as terrorist crisis, financial crisis and eventually the pandemic. We have witnessed, indeed, a security and health crisis. For this reason, it is possible to define this kind of constitutionalism as the "*constitutionalism of crisis*".



The new legal order should thus be looked at a global level, since there are now problems a single Constitution cannot solve on its own. Such problems cannot be solved, then, on a country level.

International Law: concept, history, and evolution

The evolution of international law is considered the counterpart of the evolution of constitutional law. Some international law scholars tried to divide the evolution of international law in **three** phases, like it happened with the three phases of constitutionalism[30]. The pillar of international law was ***absolute sovereignty***, as output of the Peace of Westphalia. The idea of sovereignty started to be of paramount importance, not only from the point of view of *internal* sovereignty, but also in *international relationships*. **States** were then considered as the only subjects of international law. The idea of ***international community*** was born though only after the Second World War, when the concept of international society, along with the subsequent contractual relationships, was established among the same subjects of old international law (i.e., the States).

[29] I sincerely do not know why the university should be against it, but this was the example suggested in class…

[30] There is however no agreement on how many stages international law has: some authors argue it has three phases, whereas others back the idea of only two phases.

The actors of traditional international law were **States**, along with other entities such as the **Catholic Church**, the **Sovereign Order of Malta** and those **insurgents** who were able to control some territories and populations. States' legal systems were independent from the international legal system due to the concept of ***external sovereignty***, i.e., independence from every other external entity. For this reason, dependency from worldwide authorities (such as the Papacy) was not possible.
A definition, picked up from a case decided by an international law court[31], reads as a follow:

*"International law governs **relations between independent States**. The rules of law binding upon States therefore **emanate from their own free will** as expressed in conventions or by **usages generally accepted** as expressing principles of law."*

The condition of **individuals** is particularly relevant since they are <u>not</u> subjects of international law, but simply **subjects of the State sovereignty**, that has full control over the people and the territory where it resides thanks to *internal* sovereignty. Neither they are *citizens*, so they do not have rights. This means, at an international law level, that there was a total preclusion to the possibility for individual persons, both physical and moral, to be subjects. For this reason, it was not possible to protect nationals besides war or treaties. If an ambassador, for instance, is unlawfully detained, this does not violate his/her rights as an individual: conversely, the problem is only violating a tradition of international law, which imposes an inviolability of ambassadors. Only the State can thus react to the protection of the person. Another example concerns a private individual seeking **vindication** of his rights *against* a Nation, that must convince his own government to seek a settlement. If a subject is arrested in a foreign State, he cannot do anything against the foreign government but to ask his own state to seek for a settlement that would make her/him free.
In conclusion, it is possible to highlight that in the *traditional* model of international law, **private** actors are always largely **excluded**.
In a famous American case called <u>***The Paquete Habana***</u>, which will be examined later, the US Supreme Court held that:
*"Even when there is no specific treaty governing them matter, it is forbidden by **ancient rules of customary international law** to capture fishing vessels as prize of war".*
It concerned the capture of a fishing vessel as a prize of war, during the Spanish-American war in Cuba where the foreign owner sued the American government to have back his vessel.This meant, for the first time, that a private subject **sued the government** responsible of damages in its own courts. He was successful because the Supreme Court declared that traditional customary law prevented this operation. This is the first known case where a private individual is considered able to sue a *different* State from his own, in order to obtain the indemnification for damages.
Traditional international law is based on a private-like system, regulated by *Conventions*, *Treaties*, and *Executive agreements*. Such system is considered as a **contractual** model, where **States** acted as private parties in an ***inter-pares*** and bilateral way. This was because there was <u>**no**</u> **central organization** emanating rules, imposing sanctions, and deciding controversies. There was a total absence of a higher system over the State, due to the concept of sovereignty whereby the State is "*superior non recognoscens*".
The community of States is thus **horizontal** and **equal** since horizontal relationships between subjects are inspired to the ***principle of reciprocity***. States relationships are hence *inter-pares* relations regulated as private relationships and governed by the principle of reciprocity. Those principles derived from private law were applied due to the previous **private-law education** of international law authors of that time. [32]

[31] <u>***S.S. Louts***</u> *[France v. Turkey]* of 1927 before the *Permanent Court of International Justice.*
[32] **Grotious**, for instance, was a commercial law scholar who had to apply its categories to international law.

International law is considered in this way as an **exchange of promises** through Treaties among States. The principle of reciprocity implied that those promises, consisting in **voluntary obligations**, were no longer valid when the factual conditions of their application changed (the so-called clausula *rebus sic stantibus*). One state might have simply drawn back from the agreement only because factual conditions had changed.

Some of the authors that have been mentioning while talking about constitutionalism had their own thoughts on international law. Let us give a look to their extremely interesting (yet not fun) opinions:

- **H. Triepel** claimed the *centrality of State legislation* or will.
- **K. Bergobohm** highlighted that the *self-obligation of the State* is the typical nature of international law.
- **G. Jellinek** stated that Treaties are legitimized by *consuetudo* or analogy with private law obligations. The idea of executive agreements comes, indeed, from private law.

Dominant doctrines are not necessarily the best and only thoughts on international law. Other interesting points of view were present, although their opinions were discovered decades later. By way of example, J. Westlake, T. Asser, and G. Rolin founded after the second half of 19th century the *"Association international pour le progress des sciences sociales"*, and then the law review "***Revue de Droit international et de legislation comparée***"*.* [33] In their works, they used to look at international law as an instrument of **prevention of wars** and acquaintance among Nations. It is a particularly progressive viewpoint, in a moment where international law was exclusively and closely linked to the power of Member States of the international law societies.

At the end of the Second World War, a new evolution of international law began. It is a horizontal and equal State community, with no superior power with normative and sanctionary tasks. The only occasion in history when the League of Nations, founded after the first world war under the influence of US president Wilson, tried to impose sanctions on Italy, those resulted useless.

At that point, in absence of a superior authority, there was the traditional concept according to a which a State was composed by a government, a people and a specific territory. The capacity of exercising an original and exclusive power over a territorial community is the foundation of international law. The states are totally independent externally, although the effectivity of their control over territory and population implies that a possible recognition of a State is not important in concrete terms. The possible recognition is simply declaratory, other states cannot add anything on top of the effective control of a territorial population. It is then only a mere declaration that increases the power of the government from inside but doing nothing on the international level.

Everything is reduced then to the use of force, both inside and outside.

Modern International Law

The end of Second World War was the starting point of **modern international law**. The emergence of a new international legal order, due to the incapacity of the previous one, was conceived to prevent the violations of human rights happened during the war. It was born, indeed, simultaneously to the birth of the new constitutional law. Up until then, international law, that was historically a horizontal phenomenon, had seldom been viewed through the categories of constitutional law (that has obviously vertical dynamics). During the two wars, a French author called **G. Scelle** theorized that it was possible to build up an international community such as an *international Constitution* in order to prevent the experiences of war.

Let us give a look at the characteristics of modern international law. Constitutionalism, as we know, was conceived as a method of *minimization of the maximization of powers*. **Power limiting devices**

[33] Other authors were then added to their group, like P.S. Mancini and C. Verge and F. Lieber.

is thus the very essence of constitutional law. In the same way, international law was facing similar issues. Since the old horizontal structure of international law has not worked in granting peace, a new form of superior power imposing rules and sanctions was needed. Through creating international organizations, though, a need of limiting their concentration of power arises.
International constitutional law started being at the center of discussion. People started discussing whether it was only an **epistemic** concept[34] or a real phenomenon of ***cross-fertilization***. The concept of cross fertilization refers to the practice of using the example of institutions belonging to different legal orders, such as the constitutional tradition, and applying them to the sector of international law, making such institutions fit the new order to which they are applied for the first time. Basically, it means picking up an institute from a context and applying it to a new sector without adjustments. To sum up, there is lot of talk about the constitutionalization of international law, but the problem is if this is a theory or a real phenomenon. Most scholars believe the latter is the correct theory since the very nature of international law was changing radically over time.
Many authors suggested that this transformation has been a sort of patchwork since there was no pre-conceived design to follow. There was just the awareness about the need of change, missing a general project to follow. The growth of this new constitutional legal order inside international law was an *ad hoc* procedure.
Some authors talk about **micro-constitutionalism** meaning an advancement of constitutionalism within international organizations, and about **macro-constitutionalism** corresponding to a final outcome of a global constitutionalism. The final point of arrival would be a **multilevel constitutionalism**, where the evolution of constitutional law and the transformation of international law will melt together producing an order that could be described both as the domestic and international law point of view. This concept has been described by Ingolf **Pernice** in 2006, showing how this concept is still present.
The factors which have engendered this transformation are several, and difficult to follow. Among those two of them are extremely important:

- **Human rights**, which is the most important engine in the transformation of international law. It is not clear though if they are the cause of the evolution, or just its outcome.
- **International environmental law**, that traditionally corresponded to the free exploitation of the natural resources of a sovereign State. Neighboring states had no right, according to public international law, to receive spillovers. Possible violations were relevant only in terms of classical treaties or agreements. After some time, a new rule was elaborated: no state shall carry out or tolerate activities causing pollution damages to one or more bordering states. There are several different interpretations of this rule. According to some authors it was aimed at avoiding the abuse of right principle, the good neighbor principle and according to the principle of abstention from creating troubles. However, such a conclusion was not applicable to pollution in high seas. The Brussels Convention was signed in 1969, which authorizes a costal state to intervene on foreign vessels and persons to prevent damages to its coasts and communities under its government. However, the exploitation of natural resources and high seas is open to every state, so everyone could exploit the bottom of the sea or the continental platform.

In parallel, international law moves from a mere coexistence attitude to a **cooperative approach**, meaning that positive obligations were put along old negative obligations. The new juxtaposed positive behaviors and duties implied a kind of verticalization of powers, along with the emergence of *erga omnes* obligations. The latter implies that there are collective obligations due by the States on the account of the community.

[34] This is an excessively difficult expression that simply means "theoretical concept".

In 1972 the Stockholm United Nations conference approved a non-binding declaration. Normally, we have learnt that everything starts from a non-governmental agreement or a non-binding government agreement, that get transformed later in time in something binding. This happened here since it was originally not-binding and a simple expression of the States concerning the protection of the environment and the collective environmental conscience. Articles 21 and 22 stated the cooperation and the state commitment towards the international community. That means that, if the declaration becomes binding, it will become an *erga omnes* obligation. Each state would be obliged toward all the other member state, which would be defined as a community.
In **1974** the general assembly of UN approved a principle-resolution, called ***UNGA Charter of rights and economic duties of the states***. Article 13 of this declaration states that the bottom and underground of Oceans are human common heritage. Those are indeed a common responsibility of the States toward the international community. Again, in 1974, the legal value of the charter is uncertain, although it was considered non-binding.
In 1976 the International Law Commission approved a project on State Responsibility, whose article 19 distinguished among two types of torts:

- ***Misdemeanors*** are directed against rights in the interests of the State. In this case the State can directly and individually act toward the state who committed the misdemeanor.
- ***Crimes***, namely a violation of the duty for the preservation of the environment. They consist in the breach of an obligation upon the whole international community, in order to contrast or punish the offender. The international community is the owner of a credit, and the states are obliged as debtors towards the community itself. In case of serious violation of an international duty of essential importance for the preservation of human environment, the offender can be punished or contrasted by the community as a whole.

This system creates a condition where the state has a **twofold** responsibility, toward other states and toward the community as a whole. By way of interpretation, the Vienna Convention on the Interpretation of Treaties states that in case of violation of duties by the state authorities, the parties can react toward the offender, imposing the observance of the agreement and imposing the sanctions. There is a great transformation of the very nature of international environmental law, considering international obligations *erga omnes*, acquiring the quality of *jus cogens*. In practice, whoever is offended, both a member of the community or the community itself, can react and punish the offender.
The typical horizontal structure of international law derived from the end of the Second World War evolved into a regime where there is a community as subject of international law with a strong hierarchization of powers. Moreover, such a subject can impose rules that are interpreted as *erga omnes* and a *jus cogens* norms that can be imposed by other states and the community itself against the offender. This is how international law have been constitutionalized, where even States can be subject to the application of rules or sanctions imposed by other States and by the community itself.
Continuing our discussion on the parallel evolution of international law, which started as a very rough system but changed after WW2, it is worth mentioning that the so-called ***international law 2.0*** implied the **creation** of international organizations, having a public nature that can be qualified under **public international law**. In other words, international law started to have the same problems that constitutional law had had at the beginning: i.e., a process of ***concentration of power***.
To conclude this historical passage, we have outlined some of the main elements of the transformation.

- First, the new international legal order has **new players**: i.e., NGOs. This implies that States are <u>no longer</u> the only subjects of international law, that is opening to other kinds of actors. As to the NGOs, they are supposed, since they become members of the international community, to **represent the *global civil society***: they cannot represent States and be set up by them, and instead should be theoretically **free** from governmental interference. They do not carry out governmental powers, so that they have very little elements belonging to the sphere of public law. The issue with NGOs concerns the interests they represent: they are not *public* interests, but neither are they *private*. Therefore, they have been named ***collective interests***. Nowadays, starting from 1960, many Conventions and Treaties formally provide for some kind of participation, or at least simple consultation of NGOs in international organizations. For instance, the **WTO** agreement of 1994, at **art. 5.2**, mentions the *participation* and *cooperation* of NGOs. And so do the **OECD Convention** of 1960 (probably the first one to include NGOs), the **Basel Convention**, the **Aarhus Convention**, and so on. In brief, many conventions now recognize the existence of NGOs and even include them in their decisions. What's more: on many occasions, in international conferences and committees, the **accreditation** of NGOs is normally provided, with the only exception of the UN and the WTO, for which there is no provision concerning the accreditation of NGOs for the events they organize. Some authors suggest, in this respect, that NGOs might be **recognized** a consultive role at the UN General Assembly, but, at the moment. this proposal has not become reality. NGOs have had ***participatory role***, instead, in the **Council of Europe** since 2003, and in the **Organization of American States** since 2004. This participatory status implies the presence of NGOs and their participation to the discussion on several occasions. However, the problem starts to be: who is supposed to decide on the accreditation and participation of NGOs? Is there some kind of ***gatekeeper***? This is an important question, for the very existence, the number and the power of NGOs also depends on how many public institutions they are admitted to. In this respect, scholars have noticed **openness** emerging in the new international legal order, because there is no *a priori* prohibition of NGOs participation, thus leading to an emerging trend started in **1992**, with the so-called ***participatory revolution*** of NGOs at the **Conference of Rio**, which more or less coincides with the other dividing line between Constitutionalism 2.0 and 3.0. If NGOs are admitted, they have a **legitimate expectation** for prior **notification of meetings** which they have been admitted to, for the possibility to **submit documents** and to **address** the conference, even in the silence of written procedural rules (therefore, admittance of NGOs has become a principle of ***customary law***). Furthermore, they are entitled to participate to **enforcement procedures** as well: their presence is guaranteed not only where rules are drafted, but also in the applicative phase[35]. They also can submit **reports** to agencies and organizations, mainly to provide overviews on the application of Human Rights treaties and environmental conventions. Finally, **exclusion** must be specifically motivated, which means that NGOs almost have a *right* to participate. This regime is justified by the fact that NGOs are supposed to **improve the quality** of the debate, as well as the **legitimacy** of global governance. Here, we again encounter the problem of ***accountability*** of NGOs towards citizens. Anyway, the

[35] International law enforcement with participation of NGOs might happen in two possible ways:

1. First, in a ***procedural*** and ***administrative way***, which implies monitoring and verifying the processes of implementation. This gives NGOs an extremely important power, since they can intervene locally and verify that rules they contributed to are correctly implemented.
2. Or (more rarely) in a ***(quasi-)judicial*** way before the International Courts. Although they rarely can intervene as *parties*, they can **present papers** in the form of *briefs* (as it happens in the **WTO**) or of *amici curiae*, in line with the American tradition whereby organizations representative of collective interests can submit their opinion without being a *party*. For instance, art. **24 ECHR** states that NGOs can *complain about violations of their own freedom of association* and *raise complains concerning groups of persons* as well as *impersonal concerns*. And similar provisions can be found in the **European Social Charter**, in the **American Convention of HR**, in **NAFTA**, and so on. It is alleged that if NGOs can litigate before judicial bodies, then it is less probable that there will be less problems outside.

progressive empowerment of NGOs is considered as evidence of the *constitutionalization* of international law.

- Second, the **capacity of States** to participate in the building and maintenance of the **new legal order**: indeed, thanks to *verticalization*, the **role** of the State is not limited to horizontal contractual relationships but is **improved** and made more important through the participation in **international organizations**.
- Third, **people** are becoming much more relevant both in the domestic organization of the State and in the **international** organization of the **legal system**. This new relevance is strictly connected with the diffusion of Human Rights treaties, which will be analyzed later.
- Finally, the progressive **growth** of ***international organizations***.

To sum up, we witness the ***verticalization*** of international law, in a sort of transition from a horizontal system towards a **hierarchical** structure. Together, human rights are becoming more and more relevant, and there is a **growth** of ***erga omnes*** **obligations** of the States.

The constitutionalization of international law

Several European schools, notably the Wien School with Anne **Peters**[36], have contributed to the elaboration of the idea of ***constitutionalization of international law***. Professor Peters was one of the very first scholars who suggested that we might be able to detect **three phases** of international law, that respectively are ***coexistence***, ***cooperation*** and ***constitutionalization***, in a trend towards a new international legal order. Peters suggests that this transition should be seen as a process of emergence, creation, and identification of **Constitution-like elements** in the international legal order. This implies that, from the scholars' point of view, international law has been changing in the last 150 years radically: it first used to be a very primitive branch of public law (simply because its functioning was limited to *Treaties* or *War*), whereas this transformation has made it much more sophisticated than before, with quite a lot of room for the application of Constitutional law elements and rules to the field of international law. We can identify some of the most important elements of this **transformation**:

- First, the **change in nature** of the norms: through *human rights* law, *environmental* law, and *criminal* international law, the so-called ***jus cogens*** has emerged in contrast with traditional dispositive norms (so-called *jus dispositivum*): the former has a relative (or rather, absolute) ability to **impose** its authority with a **higher normative density**. Thus, some norms are now *higher* than others, which means that there is a **hierarchization** inside the structure of legal sources, according to some criteria (succession in time, competence, strength of the legal source), exactly as it happens when interpreting *domestic* norms. If the legal norms are hierarchized, much is due to the **Universal Declaration of HR**, to the **regional conventions** (e.g., ECHR) and to **HR Courts'** jurisprudence. This idea is, nonetheless, <u>not</u> completely new: however, it has come to surface after 1980. Quoting a work by a German Scholar of 1980s, "*treaties that violate generally accepted Human Rights or the binding norms of international law should be **invalid***". Again, the same idea had already been put forward by the **Kelsen** school:

  *There are two sets of jus cogens norms: **customary international law**, and general **prohibitions against treaties contra bonos mores**.*

  Hence, the idea of a **general prohibition** of adopting treaties violating rules of international customary law qualifiable as *jus cogens*. Finally, in **1966**, the first one to mention *jus cogens* in an official ICJ decision was the Japanese Justice **Tanaka**, who literally stated:

[36] But also, the **Geneva School** of Public Law and the **Helsinki Public Law** Institute.

*Jus cogens is a kind of **imperative law** concerning the **protection of Human Rights**.*

Hence, the idea is that *jus cogens* does refer not only, but at least *mainly*, to Human Rights. Furthermore, in art. **53** and **64** of the **1969 Vienna Convention on the Law of Treaties** (VCLT, as amended) there is a **definition** of *jus cogens*, and precisely of **peremptory norms**:

*A norm **accepted and recognized** by the international community of States as a whole as a norm from which **no derogation is permitted** and which can be modified only by a subsequent norm of **general international law** having the same character.*

Put differently, the provision requires for a norm to be qualified as *jus cogens* that (i) it is **accepted** and recognized as such; that (ii) it admits **no derogation**; and that (iii) it can be modified only by subsequent norm of ***general*** **international law** (thus, not a norm of a specific treaty) that has the same character. Therefore, it is clear that, to put as Kelsen would do, *jus cogens* is **higher** than other international law (so-called *jus dispositivum*). What's more: art. **64 VCLT** adds:

*If a **new** peremptory norm of general international law emerges, **any** existing treaty which is in **conflict** with that norm becomes **void and terminates**.*

Hence, the late approval of a *jus cogens* norm implies the **abrogation** and automatic **termination** of all the norms (peremptory or not) adopted before.

Which are the norms that can be defined as *jus cogens*, whether in the HR area or outside? Which issues are covered by peremptory norms? Who decides when an international law nom can be defined as *jus cogens*? To answer to these questions, the **International Law Commission** proposed a clear definition, whereby *jus cogens* covers at least:

a) The **unlawful use of force**
b) **Genocide** and **Apartheid**
c) **Piracy**
d) **Slavery**
e) Crimes **against humanity**
f) The right to **self-determination**
g) **Racial discriminations**
h) Other rules of **international humanitarian law**

Therefore, international law norms covering these areas have a peremptory nature. As we can notice, many of these areas belong to the sphere of human rights. Of course, identifying a *gatekeeper* for peremptory norms is not easy: in some cases, the articles of the Vienna Convention will be applied (thus, for a norm to be considered as *jus cogens*, **customary law** will be needed); in other cases, States will **agree** on single norms that will be considered as peremptory; finally, in other cases, the *gatekeeper* role will be exercised by **judicial bodies**, through their case-law.

- Second, the **emergence of *erga omnes*** obligations, that are different from *jus cogens*: indeed, whereas normally *jus cogens* is binding *erga omnes*, not all the *erga omnes* provisions belong to the sphere of *jus cogens*[37]. The first time when an international tribunal (namely, the **International Court of Justice**, ICJ) declared that *erga omnes* obligations had to be recognized was in ***Barcelona Traction*** (1970).

This brief overview shows us an **analogy** with what happens in Constitutional law: it is now obvious, in constitutional law, that some **constitutional amendments** can be **declared unconstitutional** by Constitutional courts, regardless of the aggravated approval procedure: for instance, the Italian

[37] Hence, up to now, we have identified three categories of international law provisions, in a fashion that underlines **gradation in normativity**: (i) *jus dispositivum*, i.e., provisions binding the signatory parties; (ii) *erga omnes* provisions; and (iii) *jus cogens*.

Constitutional court stated that should a constitutional law try to amend or limit the **democratic principle**, the **personalistic principle**, or other core principles, then that amendment could be declared unconstitutional. Hence, even among Constitutional norms, a hierarchy can be identified. The same phenomenon happens in **international law**, under color of Art. 64 VCLT: not all *jus cogens* norms can be modified: as Justice Tanaka wrote, *jus cogens* is a kind of imperative law concerning the protection of Human Rights, up to the point that there might be a prohibition for Treaties *contra bonos mores*. This rises a new, unavoidable question: is there a **distinction** between *derogable* and *non-derogable* Human Rights? The topic has been resolved by some crucial Human Rights Treaties, such as by **Art. 4 International Convention on Civil and Political Rights** (ICCPR), by **Art. 15 ECHR**, and by **Art. 27 InterAmerican Convention of HR** (IACHR). These provisions state that Member States can, *under certain conditions of* ***emergency***[38], suspend or derogate certain rights to the **extent strictly necessary** for the exigences of the situations, provided that such measures are not inconsistent with obligations under international law, and they do not represent any discrimination in the most basic form. This means that even civil liberties that are the core of western democracies (i.e., movement, religion, domicile) can be limited: therefore, they are **derogable**.
Yet, some rights remain **non-derogable**. What are they, who identifies them, and how? Lists of non-derogable rights are different among the different Treaties. Nonetheless, five are *commonly* considered as non-derogable by every Convention: the right to ***life***; the **freedom from *torture***; the **prohibition of *slavery***; the inadmissibility of ***ex post facto***[39] ***criminal laws***; and the freedom from **discriminatory treatment** in limiting derogable rights. The **Human Rights Committee** has added through interpretation other prohibitions: the one of **taking hostages**; the one of imposing **collective punishments**; the one of **arbitrary deprivations** of liberty (whatever it means…); the one of **deviating from a fair trial**. In sum, the Human Rights Committee has banned:

Actions that ***shock the conscience***.

Hence, the distinction between derogable and non-derogable human rights has been brought into the sphere of **ethics** and **psychology**. Again, an **analogy** can be traced with the American Constitutional culture: indeed, the US Supreme Court has introduced since 1907 in ***Gitlow v. New York*** a principle whereby a federal judge can interfere with the protection of rights at the State level anytime that the protection to Civil rights accorded by State authorities is so low that need a higher intervention[40]. And this happens – put in the words used by the Court – *when the conscience is shocked* by such a strong violation. And other similar examples could be found in other Constitutional cultures.
With reference to the contribution of human rights to the process of transformation of international law, one more question could be whether it is possible to state that there are, just as it happens in Constitutional law some ***fundamental rights*** vis à vis non-fundamental ones? Or rather, are there rights more fundamental than others? Obviously, we could make a comparison with constitutional law: it is probable that **life**, **physical security**, and **due process** can be somehow qualified as *more* fundamental in international, for other rights **depend on them**. There is, indeed, lot of case-law concerning the list of rights and offering positive bases for the definition of rights as fundamental or not. However, the **Vienna Declaration and Programme of Action** (1993) makes clear that there is no *explicit* priority ranking in HR Convention, in stating:

[38] I.e., under the same conditions that have become normal in Constitutionalism 3.0, such as *financial crises*, *terrorist attacks* and *pandemics*. For instance, during the last pandemic, we have experimented several limitations to our freedoms.
[39] I.e., rectroactive
[40] This is so because, according to the Court, rights are constitutionally guaranteed at two levels: (i) at the State level; and (ii) at the Federal level.

__All__ rights are __indivisible__, __interdependent__, and __interrelated__, so that they must be __treated in equal__ manner, on the __same footing__ and with the __same emphasis__.

Hence, similarly to Constitutional law, **values** and principles normally are <u>not</u> described in a *hierarchy*, except for dignity: posing them all on an equal foot <u>without</u> any hierarchy has the advantage of leaving any balance of rights to each specific case. In this respect, it is a judge that is supposed to decide which right should prevail, adopting the principle whereby rights must be **made compatible** with each other through interpretation.

In sum, it is evident that another constituent element of the new international law is ***human rights***, together with the principle of ***self-determination*** of peoples. This means that, whereas in the traditional structure of international law 1.0 the measure of HR protection by States was totally irrelevant, now it is an **instrument to measure** the fair exercise of foreign functions by a State: it is possible to carry out **external interventions** with the use of force, in case of *gross* violations of human rights, to re-establish **compliance** with the principle we have been discussing. As for the principle of *self-determination*, the starting point in the transformation of international law are the ***Helsinki Accords*** of **1975** that established the **Commission for the Security and Cooperation in Europe** (CSCE). The Accords state that

All peoples have the __right to define their political__ regime <u>without</u> external influences, and to __promote__ their political, economic, social, and cultural development.

Apparently, this means that now we have a **non-State parameter** to evaluate the behavior of the States, on two grounds: (i) the level of protection of human rights, and (ii) the degree of protection of self-determination. Someone has then inferred that from these two obligations a conclusion should follow: that even the ***peoples*** have become **subjects** of international law. Indeed, people's prerogatives can be protected even through the use of force in international contexts. At this point, however, the problem is that if we fully enforce the principle whereby rights and obligations are conferred directly upon individuals, then the international community should **favor all cases of secession** of people who define themselves as a new people. In this respect, the international community must deal at least with Scotland and its referenda, with Cataluña, and finally with Quebec. In this respect, there are two interesting examples of judicial decisions concerning the full protection of the principle of *self-determination of peoples*.

- First, the **Supreme Court of Canada** in 1998 (a moment when Quebec was more and more in protest with the federal government) held that *external self-determination* – i.e., the possibility of seceding from an existing State – <u>only</u> concerned:
    - ***former colonies*** (for colonial powers might have blurred the borders),
    - people subjected to ***former military domination*****,** or:
    - social and cultural groups ***denied the free access*** to public authority to achieve their development.

  Put differently, according to the SCC, the international community should support self-determination of peoples <u>not</u> in any case, but <u>only</u> in some circumscribed situations. This way, the SCC concluded that Quebec had <u>never</u> suffered such conditions.
- Second, the **UK Supreme Court** addressed the same topic in ***<u>Miller</u>***, related to the last Brexit referendum. When the Parliament approved the referendum, it did <u>not</u> clear the *terms* of the effects of the referendum: for instance, it was not clear whether the referendum was merely consultative, or it was binding on the Parliament. Thus, the Supreme Court had to decide an important case concerning this exact question and decided with an incredible description of the concept of **autonomy** of Britain towards its international obligations, and of the relationship between **Parliament and people**: whereas, according to the British Constitutional tradition, the final word about the political life of the State resides on Parliament, in *<u>Miller</u>* the Court held that the democratic principle had **shifted** to the people.

Again, the international **governance structures** normally are founded on **Treaties**, so that the growth of the **hierarchical** structure has been carried out on a *case-by-case* basis with each **Treaty**, or put differently, with the criterion of ***ad hoc-ism***. Consequently, there might be **fragmentation** between cases and international organizations. However, the ***interpretation*** of the Treaties by the Courts represents the **element of unification**, hence leading to a **de-fragmentation** of international law. In this sense, **Artt. 31** and **32 VCLT** offer an instrument of "unification": i.e., the ***rules of interpretation*** of Treaties. What is more, ***international organizations*** have a growing importance: A. **Peters** has defined the creation of international organizations as an element of the old *international law 2.0*, whereas the practice of providing international organizations with functions and limits belongs to the second phase of constitutionalization (i.e., *international law 3.0*).

The International legal order and the States

At this point, it is worth doing a brief analysis of **constituent treaties** and **fundamental charters** of different international organizations, such as the UN, WTO, the EU, the Council of Europe: all of them, according to the prevalent scholarship, put **Constitution-like norms** inside international law. Furthermore, international law is subject to the **growing emergence** of a ***judicial function*** inside international organizations: indeed, they have grown up in terms of number, and they have increasingly achieved a *constitutional status* (through norms either of *jus cogens* or concerning human rights). The first example in this sense is the **Permanent Court of Justice** of 1922 (PCIJ), i.e., the first judicial body created by the League of Nations, with very little work to do; after WW2, we assisted to a multiplication of international judicial bodies (among which we find the **International Court of Justice** (ICJ), the **European CJ** of 1952-57 (ECJ), and the **European Court of HR** of 1959 (ECtHR). In sum, we first have a trend towards **limitation of powers** through judicial scrutiny (indeed, the more judicial bodies are present, the more instances for protection are presented); **remedies** have been multiplied (which is positive, in terms of the protection of legitimate expectations of individual citizens: indeed, they have multiple *forums* they can apply to, so that they can choose which forum best suits them, i.e., the practice of ***forum shopping***). Obviously, the growing number of judicial bodies implies ***erga omnes*** **effects** of their decisions: again, it would be a vane exercise of judicial powers if a Court was allowed to make important decisions without any concrete effects (with a problem of capacity to **impose a concrete application** of the content of decisions, which will be analyzed, to increase the effectiveness of implementation of decisions).
Another phenomenon which is brought about by the constitutionalization of international law is the emergence of the so-called ***international constitutionalism***. It pursues two main aims:

- First, the ***unification*** and ***hierarchization*** of the fragmented system of international law
- Second, the ***conceptualization*** of all arbitrary uses of power by States at the international level, which in its turn implies the increasing role of Human Rights, the hierarchization in the resolution of conflicts between States, and the growing relevance of *jus cogens*.

Obviously, *international constitutionalism* is a vague concept of doctrinal interpretation. Yet, thanks to its holistic and comprehensive nature, it can be also used as a **form of compensation**: since the exercise of sovereignty inside traditional territorial borders has been strongly fragmented, the constitutionalization of international law should be a counterweight of the *de*-constitutionalization of traditional parts of public law. Indeed, where States' Constitutions have been inefficient, this form of "counterbalance" through international organizations should intervene. It might be a reasonable strategy: globalization puts constitutional law into stress, and so non-State actors may be useful instrument to compensate such phenomenon. However, the functioning of this system is not completely clear, with the aforementioned problems of *transparency*, we cannot know if the outcome of this interplay will be positive or not.

As a consequence, both constitutional and international law scholars underline that the traditional categories of *monism* and *dualism* tend to **decline** towards a complete obsolescence, for *monism* has not completely prevailed, and *dualism* is declining. In short, we are in a phase **in between** the two situations: we know that the rigid separation between Constitutional and international law has fallen, but it is still impossible to affirm a prevalence of *monism*. Moreover, another path of democratization (or, constitutionalization) of international law is suggested by the evolution of the ***requisites of subjectivity*** needed by States to be admitted to the international community. To summarize this parallel process: once, there was no problem of *State legitimacy*, for the State did not need to be formally recognized. ***Legitimacy***, indeed, was a matter of **politics**: as long as a dynasty coming from the Medieval order was able to prevail and affirm its independence over the Papacy and the Empire, it was legitimate just thanks to **control** over *territory* and *population*. In this context, recognition[41] by other States was simply useful to **ensure safer exercise of power** and was not founded on any substantial or procedural yardstick of legitimacy. The concept of *legitimacy* was **marginalized** in classical international law, since the latter was an *anarchical society*, where all individuals could only interact *horizontally*: hence, there was no need to found the international society on any legitimacy issue. Instead, all States simply had a **dynastic foundation**, and their legitimacy could be easily adjusted through **marriages** and **alliances** connected by dynastic reasons. Such rules were applied all over the Western World (expect for Switzerland and The Netherlands), since the dynastic paradigm had been crystallized after **Westphalia**. There were – of course – some dissenting voices: **Grotius**, for instance, argued that the international legal order had to be **secularized**, so that the States could be able to do without any dynastic or religious foundation.

With time, the dynastic paradigm, at least in Europe, was substituted by the Christian **Western civilization paradigm**, so that at a certain point it was clear that the European practice had become a **standard of civilization**: the *law of nations* was simply the way of behaving that was shared among the most civilized nations. After 1850, the recognition of sovereign States became a **custom**, normally founded on the parameter of European civilization.

Then, with the foundation of the **League of Nations** in 1919, **independence and effective control** of the State apparatus were adopted as the main criteria of State recognition, in line with the *secularization* hoped and foreseen by Grotius. Indeed, the principle of ***self-determination*** was included by President Woodrow Wilson's **14 points** that became part of the **Versailles Treaty**. This principle was then also included in the **UN Charter** immediately after WW2, at art. **1** and **55**, by the will of USSR, in an effort to favor the expansion of Communism all over the World. This marked the start of the **decolonization process** happened in the 50s. At that point, scholars used to refer to the concept of ***negative sovereignty***, meaning that the West believed it was the right time to leave many African and Caribbean Countries and decolonize them. Nonetheless, there was still that shared idea that those Country were not fully ready for independence, and that the requisites for a **full recognition of independence** were not owned by them at the time. Hence, the idea of *negative* sovereignty referred to the *diminished* condition (or rather, to the limited civilization) proper of these ***quasi-States***. Put differently, the West believed that, although the self-determination of people was a **minimum common standard**, these Countries would probably not have been able to protect the three fundamental Lockean freedoms (i.e., *life*, *liberty*, and *property*). Therefore, new decolonized States (e.g., Uganda, Indonesia, Congo, etc.) were admitted to the international community not at full title, but in a minor position.

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[41] Yet, the practice of *State recognition* started in the middle of 19th Century, at least 200 years after Westphalia.

Then, the **end of Cold War** marked a radical change in the situation. At that point, a new practice of recognition of States was established: i.e., the ***practice of Human Rights*** as standard of civilization. Now, to be fully considered as members of the international community, States need to fully protect Human Rights as new **standard of civilization**. This implies that State's legitimacy depends on **domestic consensus**, and namely on the respect of the principle of substantial *democracy* and of *fair electoral* procedures. In this respect, the never-ending question arises: when is an electoral procedure *fair*? And, from what level do we consider democracy to be substantially respected? **J. Rawls** tried to apply his **overlapping consensus** method to the international community, defining **four** classes of States: from the higher stage of the ***well-order societies*** to the last stage of ***rogue States***, which should not be seen as members of the community but still tolerated (indeed, the global legal order cannot go without even the worst members of the community). Other scholars say that reasoning this way implies **globalizing** the standard of ***liberal civilization***, which is a typical prerogative of the West, in a Eurocentric way. Finally, some others go as far as claiming that, this way, we are imposing the **structural economic policies** defined by the Washington Consensus (i.e., IMF, World Bank, WTO). This is still open to discussion.
However, it is clear that international law has been evolving through several decades from a state where there was no need of recognition and legitimation, to several stages where legitimacy has become necessary, in terms of *protection* of, first, *human rights*, and then, of the principle of *self-determination*. These principles are indeed incorporated in numerous Treaties, and not just in a bunch of them: for instance, the **International Convention of Civil and Political Rights** (1966) openly recognizes the right for peoples to self-determination, and the capacity of pursuing free social, economic, and cultural development; Art. **2.7 UN Charter**[42] forbids international community from interfering with legitimate governments; two declarations of **Foreign Ministers** of the **EEC** in 1991 implied that Europe would recognize new States only when born *out of democratic processes*: Art. **7 TEU** incorporates the famous Copenhagen Criteria, whereby the EC can only admit States concretely practicing the *democratic principle*, the *protection of Human Rights* and the principle of *equality*[43], and can expel Member States that do not abide by them.[44] However, once again, it is not clear what the final stage will be.
There is then a trend towards bringing ***democracy*** into international law, as an element of improving the quality of the structure of international organizations, and necessary to preserve the belonging of a State to the organization itself. The problem is that since democracy is brought into international law (democratizing the *structure* and the *procedures* of international law), could it be imposed as a **remedy** against defects or malfunctioning when at State level it is not guaranteed? The insistence of bringing democracy into the international law system led to several interpretations of its purpose, like the establishment of a ***global federal state***.
Another theory was related to the establishment of a peace covenant among all democratic states, as Immanuel Kant theorized in his "*Perpetual peace"*. This interpretation was then backed by J. Rawls in many of his works during XX century.

[42] Which also includes the ***principle of non-intervention***, whereby a State can only be monitored in its electoral processes (although nobody knows which is the right electoral standard that should be guaranteed) by UN inspectors, and the principle of ***Responsibility to protect*** (R2P), whereby a legitimate government should be protected by the international community against non-democratic forces trough collective actions.
[43] And this not just in theory: the insufficient awareness of the democratic principle has slowed down the entrance of Turkey and Byelorussia to the EU.
[44] A similar provision is embodied in Art. 9 of the Charter of American states, and in the 1995 NATO enlargement study, where new admitted states should have freedom of peoples, democracy, individual freedom, and rule of law as tenants and ideological platform.

The truth is that the system was historically implemented in the name of democracy, although **armed interventions** are allowed under the *duty to protect* provided in Chapter VII of the UN Charter. Those interventions are allowed to keep, maintain, or introduce peace in State contexts not labelled as democratic. The legal basis is the **2005 declaration**, adopted with a unanimous resolution by the United Nation General Assembly on the **responsibility to protect** (R2P). For instance, there have been many interventions in the last 30 years, as those in Haiti, Ruanda, Afghanistan, and Syria. The 2005 resolution tries to define the limits of the principle of responsibility to protect, claiming that those interventions are applicable at least in four cases: *genocide*, *ethnic cleansing*, *war crimes* and *crimes against humanity*.[45]

Finally, we have an international law system that undergoes relevant **normative changes towards constitutionalization**, by incorporating constitutional values typical of constitutional law and changing the idea of *legitimacy* of legal persons (now called "international community"). Even requisites for the membership of the new version of international law are completely new, as we have seen.

The main question to ask is whether defense and **enforcement of democracy** is better than the principle of **non-intervention**. Another question is related to the criteria according to which a government can be defined as non-democratic. Is the legitimacy of a government then based on assessment of democracy[46] or effectivity? Other residual questions concern what happened to democratic governance after 9/11 and the pandemic crisis? Democratic governance has suffered many **limitations** and alterations due to the war on terror in the name of **security**.

At the same time the process of **self-determination** included in the UN Charter suffered several practical problems in its application. For instance, the problem of **secession**, like it happened in the Canadian Supreme Court concerning Quebec. The Court, in that circumstance, had to explain that the principles of the UN declaration have to be strictly applied when countries recently decolonized, or that have other problems of democracy, are at stake. They should not be applied when the State respected the minorities with all the substantial democratic guarantees.

Some authors have suggested that, even the right to democratic governance is a human right and should be recognized (democracy is thus seen as a *panacea*). This interpretation is a little beyond all possible expectations, and it is unlikely that at the moment it can be translated into legal principles.

It is clear that, as a main takeaway, we have a new ***international legal order*** that replaced the Westphalian legal order in an important manner, albeit not completely. That is because **sovereignty** still exists as a category. The differences between the new international order and the old international law, conceived as *law of States*[47], are:

- **Scope of application** of the provisions.
- Subjects **recognized** as members of the legal order.
- **Penetration** into domestic legal system.
- **Autonomy** from the States of many rules of international law, which grow up independently from them. Such rules can become *constraints* against the State, even against its will and also when it does not participate in their enactment.
- **Plurality** of global order, that is kind of a synthesis of the aforementioned differences. This is the final result of many evolutions, that are difficult to be put together in an ordered interpretation.

[45] Crimes against humanity and war crimes could often coincide, considering some local situations.
[46] The criteria of democracy can be intended in several ways, like a common standard made of procedural aspects.
[47] **Coexisting**, but <u>not</u> collaborating toward common goals.

It is possible to perceive a need for rationalization and systematization, along with the fact that international law rules penetrate top-down constitutional models, contributing to the evolution of constitutional law. However, several interpretations are possible of this melting trends that we tried to describe. Among these possible interpretations it is possible to notice:

- As many German scholar wrote, the UN Charter should be the global Constitution of the international community (a so-called **world Constitution**). It is a kind of utopia, similar to the idea developed by Kant in his aforementioned book.
- Another possibility is the idea of a Constitution which detaches from the State dimension, leading to its application to the international legal order. That would imply that all the members of the international community should accept the western canons of democracy. This idea is quite stupid, but it has been proposed by the scholars of global constitutional law belonging to Pretoria University.
- **Functional interpretation**, according to constitutionalism should be deemed operating as a constraining factor. This means that democratic principles and rules should be perceived as peripheral limits of international law. International law should thus be compelled to these principles and take them into account. For instance, the principle of *jus cogens* principle should operate as an external limitation. It is exactly what we defined compensatory constitutionalism, where the inefficiency of international law should be compensated with constitutional law principles.
- **Substantive conception** of constitutional law, meaning that domestic constitutional law and international law often overlap. Their respective evolution has led to overlap, at least partially, while dealing with some principles such as democracy. This is the idea of concurrent legalities, and it leads to the coexistence of similar legal sources and principles that do not strictly prevail on the other. This interpretation is implied especially in presence of constitutional networks, where several legal orders interfere each other, sometimes peacefully, sometimes not.
- **Social constitutionalism**, a theory elaborated by Gunther **Teubner**. He wrote a particular complex book called "*Constitutional fragments*", that perhaps the author himself is not able to understand too. The idea is that constitutionalism and these principles are **self-referential** (i.e., autopoietic). According to a passage that I am not going to show you, there is an important **legal pluralism** in the world, and that society differentiates into autonomous legal systems crossing territorial borders and establishing themselves globally. Societal constitutionalism is thus a kind of constitutionalism without state. International legal order is an amalgamation of developments by international non-state public and private actors. According to him, this global order transcends the division among international and domestic law, as well as that between private and public law. The simplest part of his thought is his suggestion that norms of autopoietic transnational regime should fulfill four criteria to be considered as valid constitutional norms:
    - **Constitutional functions**, namely that transnational regimes must produce norms that perform <u>not</u> only regulatory or conflict-solving functions, but also constitutive or limitative rules. They must have them a kind of **preceptive content**, imposing either positive requisites (i.e., constitutive) or negative limitations (i.e., limitative rules).
    - **Scope of application**, that has to be comparable to that of state Constitutions. The idea is that such norms, either with positive or negative contents, should be adopted in a forms and with procedures similar to those applied at the constitutional democratic state level. They should thus be discussed following a discourse within the national public opinion. A world public opinion, funnily enough, is hardly

conceivable. Overall, to have at a global level a rule that is legitimate as domestic constitutional law, a democratic process of legitimization is needed.
    - **Constitutional processes**, consisting in a close connection between transnational norms and their social and functional context. It would not be possible to have universal rules to local context, like it happens with human rights.
    - **Constitutional structures**, meaning that transnational regimes must form typical constitutional structures such as norms and judicial review.

Obviously, he exemplifies the possible trend of transnational norms to be autopoietic, like *lex mercatoria*, internet law and sports law. Those are particular sectors where law is growing on itself, due to its capacity of elaboration of previously existing norms. Another complication is due to some followers of this human monster who elaborated even more complicated models:

- **Weak model**, that prefers protecting the existing structure of nation-State being it the starting point from some forms of limited, although partially inefficient, democratic models have been experienced. It provides thus an institutionalization of constitutional elements in global sectors.
- **Strong model,** emphasizing the need of a global solution in terms of global civil society. There is a dispensation of public law expressions and setting in the private law domain. Considering the current situation in the world, we can notice that a global civil society is still pretty down on the road.

Human rights

Introduction and foundations

Human rights have been the main trigger in the evolution of rights. Their role and functioning in the last century, starting from the WWI, changed and grew of importance throughout the time. Their emergence has been a **hegemonic** experience during the last 100 years, until the end of the last century. For instance, M. **Villey** said that human rights "*only have friends*", and it is impossible to criticize them. M. **Ignatieff**, an important Canadian scholar and politician, argued that the language of human rights is the *dominant language of public good* worldwide.

The origins of human rights belong to the idea of ***jus naturale***, namely natural law, developed by Christian ideas and liberal rules. In terms of positivization, though, we have to refer to the revolutions. First, it is necessary to make some distinctions:

- The one between **human** and **citizens' rights**. The latter imply State, borders, territory, and government while the formers imply only the existence of a human being.
- **Freedom of the ancients** and **freedom of the moderns**, a concept related to the idea of Banjamin Constant. The rights of the old structure of society can be identified as communitarian rights, namely rights that can be enjoyed in the collective context of Greek or Roman society, where private life is merged into public life. Modern freedoms are, on the other side, rights enjoyable in an *individual* way, as it happens with the Magna Charta and the following bills of rights.

Obviously, there are **catholic theories** regarding human rights, such as those of Saint Augustin, but considering them from their political perspective their father is **John Locke**. Following the idea of state of nature developed by Hobbes, Locke wrote in his Two treaties on government, that the state of nature and natural rights are the foundations of political order, defined through covenants in a contractual way. This was not only a philosophical theory since this situation was historically applied when the English parliament called William and Mary of Orange to sanction the declaration of rights. The glorious revolution was thus a restoration of ancient liberties, that go back to the Magna Charta of 1215. Locke's theories and formulations were used by the American founding fathers, when they mentioned the *necessary protection of life, liberty, and property*. This was a proof on its transformation into constitutional provisions.

During the XVIII century the idea of *jus naturale* widespread all over Europe, especially during **French enlightenment**, becoming instrumental to the delegitimization of current political order and necessary to the establishment of social equality. It also became a source inspiring revolutionary and constituent process in the French context, and in those places where the French army provided liberal democracy. In this respect, the ***Declaration of rights of Men and of the Citizens*** of **1789** included both rights of men and of citizens. The declaration included an analytical description of some rights, such article 2 and 4, belonging to all men *independently* of his citizenship. Other articles, on the other hand, provided rights belonging to citizens only. Other rights are attributed to the "**Nation**", an imaginary entity that created blurred margin of application. For instance, article 3 states that:

*"The principle of any **Sovereignty lies primarily in the Nation**. No corporate body, no individual may exercise any authority that does not expressly emanate from it".*

The importance of 1789 French declaration lies in the fact that, before that moment, human rights were simply considered *natural* rights, similarly to a philosophical theory. Those were **positivised into a declaration**, i.e., transformed into positive provision imposing the application of safeguard of these rights. In the moment a human right was positivized, a natural right belonging to men had to be transformed into a citizen right. Otherwise, there would have been no positive guarantee outside the state of application and safeguard of such right. At that moment no legal power at the state of international law existed, so the only instrument to apply human rights was to safeguard them at a state level through transformation into citizens' rights. The great Norberto **Bobbio** distinguished between a phase of existence of human rights shared by a consistent part of humanity, and a phase of positivization by the state on a constitutional level. That is the first level where democracy have been experienced and transformed into an instrument of protection of rights.

At that time, only white, free, male individual were citizensawa. This way, race and gender **discriminations** were thus institutionalised: slaves, foreigners, aboriginal people, and women were excluded from citizens' rights. According to the political perspective of **E.J. Sieyès**, **differences in the enjoyment** of *active* (i.e., those giving a role in the determination of the distribution of power within society) and *passive* citizenship (i.e., civil rights) were authorised. This means that civil rights can be extended to foreigners or aliens *when* the political conditions allow that. Slavery, for instance, was abolished in France in 1794, as the result of a slave insurgency in the Caribbean colonies. Those did not mean that slaves were able to enjoy citizenship since French revolutionaries became careful in giving it to foreign people due to other states' interferences in the revolution.

In the US, the problem of populating lands that were not really inhabited by white immigrants, was particularly serious. For this reason, the US has always been generous in giving the citizenship. Its Constitution, for instance, prescribes that only the president must be born in the US. One of the fathers of the Constitutions wrote that:

*"What then is the American, this new man? **Whoever** accepts the way of life, the values, and the statues of the new political community."*

So, no requisites were needed to acquire the American citizenship, but just to accept their values and statutes. This was described as a process of ***nation building***.

Conversely, in Europe many States were particularly selective in giving citizenship. The Napoleonic code put particularly harsh **conditions** in order to gain the citizenship, along with strong limitations to commercial and civil rights for foreigners. The **Italian civil code** of 1865 was an exception, since it abandoned the conditions of reciprocity, in order to recognise the full enjoyment of rights to

aliens. The drafters of the Italian codes wanted to *attract foreign investments* to build infrastructure, thus showing their liberal attitude.
The idea is that, during XVIII and XIX centuries, the distinctions into society (like the ones between men and women, voters and non-voters) were considered extremely important. There was then a hidden conflict between the concept of "difference" and the principle of "equality", that started becoming more open into the public opinion. This was due to the **territorialization** of rights, namely that universal rights must be positivized by the State in a territory. XIX century was considered the era of citizens, and human rights were thus absorbed into constituent process and territorialized, belonging thus only to citizens. The birth of nation States limits civil and political rights to members of the community.
French authors also spoke about ***homme situé***, namely a man located in a specific context whose rights are recognised only due to his position in society. Some natural differences are used as discriminatory factors, limiting the idea of equality theoretically affirmed in Constitutions of that age.
A particularly important aspect is related to the tension between **particularism** and **universalism**, starting from the extension of the right to vote. In France, for instance, universal suffrage was shortly introduced for a couple of years, being removed due to the political changes. It came back in 1848 during the second revolution. In Italy an experience of universal suffrage for men happened in Tuscany 1849, but it did not last for long. The universal suffrage in Italy was achieved for male only between 1918 and 1921.
Regarding the treatment of aboriginal people in the American colonies, according to Locke, those were considered not legal subjects. Locke was persuaded that if someone does not exploit the land on which he lives on, he has no right over it, then being not a citizen. For this reason, aboriginals were not considered as citizens. He wrote that
"The sovereign of the vast territory eats, accommodates himself, and distresses worse than a humble day worker in England. Their land is therefore nobody's land".
In XIX century, other theories started being spread. According to J.S. **Mill** legal rights are different from moral rights. The latter precede their positivization and become legal rights when a legal system positivize their existence in legal terms.
On the other side, Karl **Marx** theorized that "citizen" is a formal expression which refers to civil society, while political rights are recognized only to a specific social class (i.e., bourgeoise).
At the beginning of the XX century, a strong change happened after the WWI. The example was offered by the Weimar's Constitution, along with the social reforms introduced by Lloyd George's government in UK. It is said that at this point there is a second wave of rights, coinciding with the aftermath of the WWI:

- **Political rights** are finally **universalized**, with the introduction of male and female universal suffrage.
- **Welfare measures** and **social rights** were introduced. Those are rights with totally different features from the previous ones, because old civil and economic rights were described as negative rights (namely a *non facere* by the State). Conversely, social rights are claims and expectations having a **positive content**. The citizen who owns a social right has an expectation to receive a specific social treatment, as a sanitary assistance, by the State (which can be a service or a sum of money). Such treatment could be embodied either in the Constitution or in a statute. It is worth to note that, during the XIX century in Britain, the main part of social reforms was approved by conservative governments. The liberal theory presupposed indeed a complete autonomy of citizens; thus, they were against any form of intervention in social rights. Things changed at the beginning of the XX century, due to the universalization of political rights: there was a strict combination between this factor and

the introduction of social rights, because new social classes started being represented in the parliament.

- The aforementioned measures were also aimed at turning masses away from **revolutionary doctrines**, to avoid what happened in Russia with the October revolution.

In this framework, considering in particular social rights, it is possible to notice that the dimension of the nation State is even more highlighted. Public resources are indeed aimed at helping citizens, thus emphasizing the national dimension. The extension of political and social rights to aboriginals was still not achieved, thus determining an exclusion of these people from such rights.
Unfortunately, though (as we have already said ten times till now), Weimar's Constitution was a short-lived exception. The forces who approved that Constitution were weakened, due to the subsequent affirmance of the Nazi regime. In general, authoritarian regimes used to wipe out universalism of rights.
After the WWII the problem of a new universalization of rights arose. There is a kind of succession of cycles in the historical life of human rights: they always start from a *jus naturale* position, then they get positivized and finally universalism comes back. Positivization was extremely criticized after the WWII since the State was not able anymore to prevent atrocities and elementary violations of international law. Indeed, *jusnaturalism* was considered again as an effort to make up for the deficiencies of positivist legal theories.
It was then important to build a new political order, without the inefficiencies of the previous systems. Such attitude led to the approval of the Universal Declaration of Human Rights in 1948 by the Assembly of the UN. At that time the members of UN were 58, and 48 of the voted for the approval of the declaration. There were only two states that did not take part in the decision, namely South Africa and USSR.
Naturally, the **principle of equality** came back in a stronger version, being more developed. After 150 years there is a solemn declaration of **anteriority** and **inviolability** of the rights. This formulation means that those rights precede the declaration itself, being natural rights existing before the positivization.
The American Constitution of 1787, the amendments of 1791 and the French Constitutions from 1791 onward, were Constitutions that positivized citizens' rights. We had a positivization of universal rights only with the Universal Declaration of 1948, that was not a treaty in theory (it was indeed not binding on States). It was a kind of declaration of intentions, an announcement of future behaviors.
There are at least two phenomena to notice:

- The very nature of the Universal Declaration went on changing over time. International law scholars say that, even before ten years after the declaration, the interpretation of its legal position in the international context had changed. It became then more binding over time, regardless the original intention of the States. It started being interpreted by international law courts as something binding for States.
- Human rights in 1948 became the new **blueprint** of modern European constitutionalism. Indeed, the Italian Constitution was approved at the end of December of 1948, while the French Constitution was approved in 1946 and the German one in 1949. All these Constitutions adopted the model of Universal Declaration and introduced human rights positively into their Constitutions. There was then a **solemn recognition** into national Constitutions of human rights, such as at the article 2 of the Italian Constitution. The constituent assembly recognized in that occasion some principles of human personality, which is a kind of proxy resembling very closely the full recognition of inviolable rights of individual persons. A similar process happened with the successive Constitutions of the '70s.

The German Constitution, at article 1, states that the recognition of human rights goes hand in hand with the priority of the principle of dignity (becoming thus a *super-value*).

After the WWII, the old positivization at national level had proved not efficient to guarantee a permanent position of peace. The idea was then to re-protect the individuals through new means, such as universal positivization of rights. It goes much beyond the liberal positivization in the constitutional nation-State until the half of the XX century.

Amartya Sen has written that

"There is something enticing in the nature of the idea that everyone has right that must be respected regardless of his citizenship he owns, and independently from the rules and limitations included in the individual legal system to which he belongs".

On the other side, **Norberto Bobbio**, a boring Italian, claimed that there should be three ways of funding and justifying the values which support a right**:**

- The first one should be the deduction from human nature, although human nature is a very vague idea lol.
- The second way should be the **resort** (or recourse) **to evidence**. In our contemporary pluralistic society, evidence is not easy to find out, making it an extremely difficult task.
- The third way he suggested, in a coincidence with Rawls' work, is that the real way of finding out values on which to found rights should be **consensus among humanity**.

There is thus a change of paradigm after the WWII, as we said plenty of times, implying the shifting from the national to the global dimension. Nonetheless, at least at the beginning, sovereignty was still an important category where citizens' rights were rooted, although the international dimension. Constitutionalism 3.0, as we saw, is a new kind of constitutionalism where, through the protection of human rights, international law can penetrate into constitutional rules. Constitutional law is thus considered no more sufficient to protect human rights, justifying the intervention of international law through monism or soft dualism. Human rights declarations and customary international law became an external perspective even for constitutional law. Though, the way how domestic Constitutions recognize or incorporate international law depends on individual choices of the father constituents. In old traditional law, *ius ad bellum* and *iusti hostes* were the old paradigms of state relationships. In this new context there are consistent procedural and substantive limitations of sovereignty, in order to achieve this interplay between state law and international law.

The transition from the rule of law State to the constitutional State, in order to protect human rights, coronated the inauguration of the **era of global rights**.

Constitutions are at this point **total**, **comprehensive**, and **entrenched**: they were then conceived as a system of principles aimed at filling all potential loopholes. Any possible loophole can be filled using interpretation of constitutional norms in a progressive way, in function of a better standard of protection of rights.

Let us summarize the **evolution**, through generations, of **rights**. Between the end of XVII and the end of XVIII century the **first generation** of rights corresponded to **civil and economic rights** and a first core of political rights.

Then it comes period among the XX century and the post WWII era, where there is firstly a widening of the catalogue of civil rights. More civil rights were then added, such the freedom of association. In all the European Constitutions of the previous generation that right was not even mentioned, especially in France. Associations were indeed considered by the revolutionaries as proper corporations, associated with the ancient regime. Then political rights were finally generalized[48], and **second-generation rights** were born. Second generation rights corresponded to **social rights**,

[48] Suffrage, abolition of slavery, protection of aboriginals and so on.

where there is an entitlement to **positive actions by the State authorities**. The content of the new second generation rights is thus a *facere*, as we said.
Then we have a **third generation of rights**, after the European Constitutions of the 70s. In this period there is also a **full enhancement of social rights**. Third generation rights are obviously a doctrinal generation, although it has also a strong authority. The Congress of the international academy of comparative law, in 1996 in Paris, adopted this language as an officially shared language by the professors in constitutional and comparative law. This expression has become as completely normal in common use, even in constituent assemblies. This category of rights includes rights belonging to the **individual personal sphere** (i.e., honor, identity and image)[49]. Another group belonging to this generation are **rights to be enjoyed only collectively**, like the right to environment.
Finally, there are **fourth generation rights**, including all the rights developed after the previous generation of rights. Those are intergenerational rights, such as **development**, **bioethics** and **technology** and **peace.** Other scholars speak also about right to food, animal rights and plants rights. We are not sure if they do exist, because there is no common agreement among the rights included in this generation. I just hope my basil plant won't sue me for attempted murder lol.
At this point, we could wonder what rights are ***fundamental***, and if there are rights *more fundamental* than others. At an international law level, there has been some problems in the interpretation of *jus cogens* to understand if rights protected by it are more fundamental than others. Coming back to the constitutional level, it is possible to notice that every constitutional system has its own interpretation of fundamentality, so that all the definitions of fundamentality change from one constitutional law to the other. However, it is important to have a positivistic and selective attitude, leaving apart the discussion in terms of philosophy. In positive terms, we need to at the way both the Constitutions and their interpretations defined what is fundamental.
Fundamentality varies from one constitutional text and interpretation to the other. The US Supreme Court has experimented this category for centuries: indeed, the US Constitution does <u>not</u> mention fundamentality, thus the category was created and interpreted by the Supreme Court. The method the Court has been following was conditioned by the *federal* nature of the American constitutional system. As mentioned, at that moment of adoption of the federal Constitution, many colonies already had their State Constitutions that included a *catalogue of rights*, as an imitation of the British model. At that point, the federalists decided <u>not</u> to include in the Constitution a *federal* Bill of rights, due to the fear that, in doing so, there would have been a reaction by the public opinion against a "top-down invasion" from the federal level. Therefore, it was only two years after the approval of the Constitution that the Founding Fathers succeeded to get the first eleven amendments, including a bill of rights, approved.
At that point, due to the federal structure, there were **two levels of catalogue of rights**: the *federal* and the *state* level (it was exactly like having two citizenships). The state judiciaries elaborated then an autonomous doctrine concerning the protection of state rights at a state level. This implied, for instance, that although the civil war was fought to abolish slavery, after 1877 Southern States introduced a system of total segregation named **Jim Crow system**. There was thus a legal regime applied in the Southern states. This happened also in other field, such as the freedoms of speech and association. The interpretation of every state court was then different from the one belonging to another state. Some of the rights protected at a state level were though the same protected at a federal level, such as the freedom of religion. After some decades there was a state case law dedicated to a certain freedom and a federal case law regarding the same freedom. Which one must have prevailed (for instance, if the protection at a state level is not sufficient to guarantee full protection)?

[49] Those rights were guaranteed previously, but only in the civil code.

The Supreme Court, starting in 1907 until now, decided that it can step in and impose its view on the interpretation of protection of a right only if the Court itself considers it *fundamental*. This criterion is called ***selective incorporation***, meaning that when a state action is not able to provide a full protection of an individual right conceived as fundamental by the Constitution, the opinion of federal judges would prevail over the one provided by state judges. There is a complete case law of the Supreme Court declaring a right fundamental or not, in order to understand if an intervention into state law interpretation of that right is necessary.[50]

Instead, in **France**, according to the Constitution and administrative law, French judges and Parliament believe that when a right is fundamental there is a **prohibition of infringement** and limitation of that right without authorization by the law. In this respect, if a right is fundamental, the individual who wants to enjoy his right cannot be subjected to an administrative authorization. Conversely, the State (or the local authority) can impose a prior authorization in order to exercise a non-fundamental right. This paves the way to an enormous discussion: if we decide to organize a political meeting in a theatre, no authorization would be needed. An authorization can be required, but only if it is needed for other purposes other than those being strictly functional in enjoying the fundamental right. Controls are possible, but only *after* the exercise of the fundamental right.

The **German** case is also different, since they tried to define what rights are fundamental explicating them in the text of the Constitution. Articles from 1 to 18 of the GG define then what rights are fundamental, while article 19 defines the limits within which the fundamental rights can be limited. A fundamental right can be limited by a law with a general scope of application (forbidding then a limitation only of a certain groups of people) and specifying the fundamental right violated or limited, even mentioning the article of the Constitution where the fundamental right is expressed. Nonetheless, there is the limitation that no fundamental right can be infringed in its "core" (so-called *wesengehalt*).

It is now necessary to summarize the **movement towards the adoption of human rights treaties and declarations**. Not all of them are treaties or formal agreements binding on the States, being merely declarations. Nonetheless, exactly as it happened with the UN declaration, shortly after their signing, the declarations started having **binding effects** through interpretation and judicial caselaw. After the ***Universal Declaration of Human Rights* of 1948**, ***the International Covenant of Civil and Political Rights* of 1966** was signed: it was ratified by 167 States (and thus, not by all the members of the UN). Another global declaration was approved, namely the International Covenant of Economic, Social and Cultural Rights of 1966. Moreover, there are **regional** or **continental** human rights declarations and charters, such as:

- **American Declaration** of the rights and duties of man of 1948.
- The **European Convention** of Human rights of 1950
- **American Convention** on Human Rights of 1969.
- **African Charter** on Human and Peoples' rights of 1981.
- Cairo Declaration on Human rights in **Islam** of 1990.
- Charter of Fundamental Rights of the **EU** of 2000.
- **Arab** Charter on Human Rights of 2004.
- **ASEAN** Human Rights Declaration of 2012.

It is important to underline that all these continental declarations and conventions introduce into the network of protection of rights an ***intermediate level of protection***. There are thus at least three levels of protection of human rights: *statal*, *continental* (or regional) and *global*. Those are strictly intertwined, and they could go either hand in hand or collide with each other. It is much more

[50] Not surprisingly, the Court claimed that even carrying weapons is a fundamental right ☹.

complicated having three levels, so some scholars started talking about a multilevel governance in the area of human rights.

Many sides of public opinion started reacting and many **controversies** arose, that are always pessimistic and tragic toward human rights. Apparently, there is a kind of **crisis** into this topic, and we will try to describe some points of these debates. A specialist of foreign policy, S. **Strangio**, claimed that "*unchecked globalization and liberal internationalism have given way to a post human rights world".* This might be a whole interpretation of the crisis.

Let us summarize some other comments:

- P. **Haberle** and J. **Habermas** claimed that there is a kind of rhetoric about rights, that had been multiplied and extended. The unlimited extension of rights has opened the way to a **demagogic use of rights** and that the claims are too many in a pluralistic society. The clash among claims makes impossible to put under control the interplay among them.
- E. **Posner,** who wrote a book called "*The case against Human Rights",* where he suggested the *hubris* has taken place against the overwhelming model of rights, glorifying non vital needs and desires at the expense of long traditions and real needs. The multiplication of rights then delegitimated then, like a process of inflation. Every claim is oriented toward the protection of a group, and that it is *single-minded*. The public opinion thus cannot understand which the real path is to be follow, and how to make single-minded claims compatible to one another.
- S. **Moyn** states that human rights are accused of limiting themselves to civil liberties, while economic fairness would be far from being implemented. The response would be "social justice", in order to inject into the system of human rights more economic equity (or fairness).
- M.A. **Glendon**, an important professor particularly important in the catholic academic environment. She claimed that the dream of **universal human rights** risks to be dissolved into scattered rights of personal autonomy a range of **novel sexual liberties**. It is a kind of soft modern self-despotism in the sexual sphere.
- Many authors suggested that the executive power might abuse the pandemic and the terrorist crisis to use instrumentally the natural fear of population to limit human rights. Populism can be considered also a cause of limitation of human rights. According to C. **Mudde** and C.R. **Kaltwasser** *"a good number of liberal democracies and hybrid regimes might have eroded the authority of human rights even in the most mature and well rooted democracies"*. They also suggest that even immigration fluxes should have triggered the new care about identity, therefore, localizing elements of fear or reaction against the globality of human rights. We have already cited Fukuyama, who suggested that the new care about identity (especially in Europe) could jeopardize the idea of universal human rights.

Some people claim that business related considerations form the object of frequent trade-offs. So the West inclined to introduce limitations to human rights (especially in other parts of the world) as a matter of exchange in order to have business advantages. The classic example is the action of China in Africa, where the rights of inhabitants are extremely limited in order to obtain business advantages.

Another issue is the **Euro-centric or Western-centered perspective of human rights**, as claimed in the so-called **anthropological argument**. For instance, in Ethiopia there was no private property, so they were not able to borrow money from the World Bank. Amartya Sen acutely objected to this argument that no famine has ever taken place in the history of the world in a functioning democracy. It is thus untrue that human rights are fruit of a western perspective, because **democracy and human rights go hand in hand**: when democracy is mature, then human rights are implemented.

Another critique by the left scenario is a famous book by S. **Zizek**, suggesting that human rights culture is a **fundamentalism** born out of a new imperialism by western countries imposed on other countries. A similar theory by J. **Elster** claims that it would be a **totalitarian drift** of enlightenment by the West.
To conclude the analysis of the so-called *objections* to Human Rights, the last one is particularly used by the opposers, notably J. **Rubenfeld**: according to it, **localism** should be a factor which has been contributing to the decline of the theories concerning human rights. The idea is that Human Rights, just as any kind of globalization, would operate in the sense of **destructing diversity**, homogenising different cultures: in this respect, for instance, Human Rights would be disrespectful of local traditions, values and circumstances. However, this view is oversimplifying, since it is based on a dichotomy between a *local conservative* approach and a *universal progressive* approach: things, however, can be differently balanced between localism and universalism on a case-by-case basis. The problem is that it is necessary to find a **balance** between local and global instances. It also happens that some local traditions are masked under the cover of *religion*: an example of that would be the practice of genital mutilation. Obviously, it is much more difficult to reject a tradition if it is disguised under a religious shelter. The case of burka is another effective example of local traditions very often presented as religious traditions. What's more, things have been changing over time: in the 60s, Human Rights (along with other universal ideals) were very often presented as a way of *unmasking conservative* local traditions and blow up some local crystallized ones. At this point, we have reached the counterpart interpretation of the relationship between local and global, so that some say that protecting universalizing theories would be an **instrument** for hypocritical masking of **municipal interests** or, even, a kind of **self-entrenchment** of a liberal elite (which is exactly the opposite of the dominating theories of fifty years ago). This "inversion of arguments" of course depends on the evolution of public opinion, not only country by country but rather worldwide.
Therefore, is there any solution to such critical opinions against Human Rights doctrines? Obviously, many authors have tried to find **compromise** solutions, halfway in between local traditions and global protection of Human Rights. One of these (so-called ***Minimalist Theory***) has been theorised by Canadian professor **M. Ignatieff**, who claims that we should <u>not</u> formulate HR theories in terms of metaphysics, or through theological arguments. Put differently, we should <u>not</u> be *maximalist*, and describe Human Rights as idolatry or a sort of "secular religion", because otherwise we would create problems:
Any claim nowadays is presented as Human Rights. This is <u>no</u> good. Human Rights should protect <u>only</u> minimum conditions for all times of life. ***The good divides us.***
This means that if we are maximalist, mentioning HR at every step of our life, then we find ourselves in dissent, for the good separates us. Conversely, if we use a minimalist approach whereby HR are at stake <u>only</u> when strictly necessary as a **shelter against evil**, perhaps we can find agreement. In this perspective, we should resort to Human Rights only in their **negative**, liberal interpretation proper of Constitutionalism 1.0: they are <u>not</u> as a one-fits-all remedy for all controversies but should be limited to **protection of minimum conditions** for all kinds of life.[51] The problem, however, is that it is commonly believed among scholars that *civil*, *political*, and *social* rights are **interrelated** all together, creating a kind of "virtuous circle": i.e., they work better if they work all together. For instance, a person who is free in the exercise of his or her freedom of speech (i.e., of their civil liberties) will be a better citizen and a more active political subject: indeed, he or she will exercise their political rights better than others. At the same time, if one enjoys social rights, he or she will

[51] By way of example, the case of **human security** might support Ignatieff's claim. Indeed, the way in which the global community is put at risk makes actors more willing to undertake a **common effort**. And so was the international public opinion in the very first week of the Covid crisis: there was unanimous consensus on how to fight the very first stages of the pandemic.

be freer in exercising their civil and political rights. Given that, how can we believe that it is possible to adopt Ignatieff's minimalist theory? Therefore, many traditional law scholars have criticized his approach. Indeed, even if we stick to facts, it is doubtful whether Ignatieff's theory in the medium run really works[52].

The International Human Rights Protection

Now, we will discuss the international systems of HR protection. This topic must be addressed from two viewpoints:

- First, the Charters, Declarations, and Conventions with their position in the system of **legal sources**. Indeed, we know there are plenty of Conventions and Treaties on Human Rights drafted after WW2 and the end of the Cold War. The problem is, though: given the starting point (i.e., their great number and their coexistence on different levels), which is supposed to be the position of each Convention inside the system of legal sources as to now? Answering to this question is crucial, for the *material* importance of Treaties within each constitutional system depends on the position they are assigned to at the international level.
- Second, once we have verified which is the position of each declaration, how do Constitutional and Supreme Courts **influence** them? How do they interact with one another? In this respect, if we have more **levels of protection** (e.g., one depending on the UN, another at a continental level, and the traditional constitutional system), which are the relations between them?

As to the first point, since the end of WW2 we have experienced an **increasing relevance** of Human Rights within the international law domain, starting with the famous **1948 Universal Declaration of HR**, approved by the UN General Assembly[53] under the auspices of Eleanor Roosevelt. The Declaration represents the first[54] historical **positive recognition** of **shared fundamental values** from a global actor. However, as it has already been said, it was not a Treaty, and thus legally binding. As a consequence, after 10 years a **binding capacity** of the Declaration was agreed.

The declaration was followed by several other Declarations and Conventions (the latter being more important than the former[55]) whose names expressed new, substantive ideas: i.e., the ***European*** *Convention of Human Rights* (1950), the ***American*** *Convention of Human Rights* (1969), the ***African*** *Charter on Human and People's Rights* (1981), the *Arab Charter on Human Rights* (1994, 2004), the ***ASEAN*** *Human Rights Declaration* (2012). All these Charters share two common features:

- First, they are adopted within relatively **homogeneous groups** of States at continental level that share a **hard core** of common values, with also a slow but constant adhesion of new States. Hence, American law scholars are used to refer to them as ***regional*** Charters.
- Second, they (sooner or later) create **supranational judicial bodies**, in charge of the oversight over the compliance by Member States with their international obligations. This is clearly a part of the process of *judicialization* that has been described when talking about the evolution of international law.

What's more: there was another kind of proliferation of Human Rights Conventions. Indeed, *continental* Conventions that were *general* in terms (i.e., adopted to protect all fundamental rights) were joined by other international human rights treaties devoted to **specific issues** (i.e., so-called

[52] Again, the pandemic helps us: after the first stage of unanimous consensus, each Country chose its own way to fight the Covid crisis.

[53] It was approved with a majority of 48 Member States out of 58: the others either were absent (2 States) or abstained (8 States).

[54] We shall not consider the 1789 French Declaration: i.e., a declaration of principles adopted in a *national* context.

[55] Nonetheless, in some contexts, even just a Declaration might be a starting point for something more.

***core* human rights treaties**). Thus, they concern only *one* right or a *specific number* of rights, towards a certain number of (classes of) people. For instance, one could mention:

- The **ICERD** Convention of 1965 (*International Convention for the Elimination of all forms of **Racial** Discrimination*), which was adopted by the UN General Assembly and has been ratified (up to now) by 176 Member States out of 193.
- The **ICCPR** Covenant of 1966 (*International Covenant on **Civil and Politica**l Rights*), now ratified by 167 States.
- The **ICESCR** Covenant of 1966 (*International Covenant on **Economic**, Social, and Cultural Rights*), now ratified by 160 States.
- The **ICEDAW** Convention of 1979 (*International Convention on the Elimination of all forms of Discrimination **against Women***), now ratified by 189 States.
- The **CAT** Convention of 1984 (*Convention Against **Torture***), now ratified by 193 States (all the UN Member States!).
- The **CRC** Convention of 1989 (*Convention on the Rights of the **Child***).
- The **ICRMW** Convention of 1990 (*International Convention for the protection of the Rights of **Migrant Workers***), now ratified by 46 States.
- The **ICPPED** Convention of 2006 (*International Convention for the Protection from **Enforced Disappearance***), now ratified by 39 States.
- Finally, **CRPD** Convention of 2006 (*Convention on the Rights of Persons with **Disabilities***), now ratified by 132 States.

This is just a short list: there are many more HR Conventions which share this very peculiar approach of being devoted to specific issues, to the protection very peculiar rights and to only (more or less limited) categories of people considered **in need** to be protected. The result of the proliferation of these two systems of HR Conventions is that we have a whole network of Conventions, some of which are *global* but *objectively restricted* (the latter we have mentioned), whereas some others are *general in nature* but *regionally adopted*. Sometimes, different forms of protection **overlap**, and this apparently enriches the instruments: therefore, by way of example, a European citizen has a garden full of instruments of HR protection (hence, we experience the practice of *forum shopping*).
However, several authors object that, despite the large number of Conventions, man's conditions have not improved: rather, we might have simply done **rhetorical efforts**. By way of example, a recent report of the UN General Assembly has shown that only 39 States (out of 193 that ratified the CAT Convention) can be really declared *immune* from all forms of degrading punishments and torture. What's more: another theoretical problem is linked to **Bobbio** and **Peces Barba**'s theories. According to them, as said, at the beginning there are ***natural rights*** (i.e., a kind of *jus naturale*). At a certain point, the claims included in *jus naturale* come to surface and are **positivized** and recognized first at State level: historically, they are protected by the Nation-State towards its *citizens* within the boundaries. Hence, from the French and American Revolution, to (at least) WW1, we have **positivization strictly speaking**, because rights are guaranteed only by the Nation-State to its citizens. After WW1, and more importantly after WW2, there is a sudden change: it is believed that protection by the State has been **insufficient** to guarantee full protection. Hence, it is important to **universalize** the rights, and look for a *full positivization* at a global level. This is the ground on which the aforementioned (both universal and continental) *general* Treaties. Then, why are we in need of such a proliferation of *core* Conventions? Why do we feel in need of protecting children, women, etc., specifically, given that Treaties that cover all Human Rights already exist? Apparently, the history of Human Rights teaches us that the evolution of HR protection followed its **universalization**. We started from the recognition of political rights (i.e., the right to vote) to very limited segments of population (indeed, the electors were only a small percentage of the citizens); then, political

rights became general and were universalized (and so it was with civil and social rights). However, it seems that now we are experiencing the opposite process: after a phase of universalization, we are going back to protect **segments of population**, in a *particularization* process, as Bobbio and Peces Barba put it. This is because the general protection accorded by the first kind of Treaties has not been totally effective[56]: therefore, universal formulas are perceived as no longer sufficient, and there is an interest to **re-particularize** rights that have already been universalized to build a more effective "shelter" for certain rights. In this respect, the trend should be *jus naturale*; positivization; universalization; and, finally, re-particularization. Of course, critical voices are not missing: some scholars, indeed, claim that we are going back to the Middle Ages, i.e., the age of particularization[57].
This process of particularization has two possible **ways of implementation**:

- First, a ***subjective*** way, which means addressing a special category, smaller, than humanity at large, such as women, children, workers, etc.
- Or, an ***objective*** way, which addresses specific and special needs in very need of protection.

Sometimes, the two particularization methods are combined. In sum, this process of re-particularization of rights has two important aspects. At the beginning, we have very **specific rights**, and such specificity implies the subjective and the objective dimension: for instance, we have been speaking of the freedom of movement in the Magna Charta, conceived for centuries as the right to ride a boat or a horse. This is true also from a *subjective* viewpoint: in this respect, rights were either *of the farmers*, or *of the barons*, etc. (except for seven points of Magna Charta generally addressed to *liberi homines*). It took centuries for these very specific and **fragmented** rights to be subject to a process of **abstraction** (so that the more general and abstract *freedom of movement* was identified, and similarly it happened with general addressees such as *citizens* and *humanity*), completed with the American Bill of Rights and the French Declaration in 1789. The length of time that was necessary to achieve such result shows how important the new *re-particularization* process is: it is a kind of "circle" which takes centuries to be completed. After such a long time, **new needs** emerged after WW2: i.e., isolating specific conditions that deserve a special treatment and need to be protected in a very dedicated way.

Some concepts can be employed to describe the effects of the network of instruments to protect Human Rights. The first **effect** is that regional and international Human Rights treaties affect the traditional structure of **international relations**: for instance, we can suppose that individuals might have ceased to be simply citizens of their Nation-State but might have become *subjects of international law*. Indeed, people have entered an **international dimension**.

Also, the more Human Rights treaties at global and continental level are introduced into the legal system of sources, towards a full recognition, the more international law **penetrates** Constitutional Law. At the same time, verticalizing and judicializing international law is a form is a form of *constitutionalization* of international law. In this sense, we have two interacting processes that would trigger a **virtuous circle**. However, this creates a problem of **prevalence** and defining the position of new legal sources inside the national context: we therefore must define legal criteria in Constitutional law to prevent clashes which would undermine our theory of "garden of flowers". Indeed, if we had a garden of judicial remedies, but some of which are "poisoned trees" due to the disorder in the legal system, we would not be able to decide which one to pick-up. Hence, the need of **very clear framework** with new criteria solving the balance needed by the **coexistence** of different kinds of norms. In this respect, we know that the logic is never *aut…aut*, but *et…et*:

[56] Indeed, the result has not been achieved: although rights have been *formally* universalized, in concrete terms a consistent part of the population was not able to fully enjoy such rights.

[57] For instance, the Magna Charta (1215-1225) contained very particular rights and analytical rights (e.g., the right to go riding a horse, or the freedom for barons to assemble), and not – say – the more general Freedom of Movement and Freedom of Assembly.

therefore, Constitutional Courts must try to **balance** the different levels of protection, in some cases more favorable to domestic sources, in other more favorable to international law sources. Nonetheless, this balance must be regulated with **a priori criteria**, in order to prevent a total disorder from happening.
Many of these Conventions, as said, created ad-hoc **judicial bodies**. First of all, and first in time, the ***European Court of Human Rights*** activated in 1959 and located in Strasbourg. Second came the ***Interamerican Court*** *of Human Rights*, created in 1979 with the Treaty of San José. Then, we have after a long struggle the ***African Court*** *of Human and Peoples' Rights*, created in 2006: the idea dates back more than 20 years before, but it was impossible to implement for several reasons (e.g., poverty problems affecting many African Countries, a complete disagreement between the Member States[58], etc.). Finally, in Asia, there is now word of a ***Southeaseast Asian*** *Court of Human Rights*, but however it has not been created yet: it is just a hope for the future. These Courts share some features:

- First, they provide **individuals** access to a decision or a remedy for a Human **Rights violation by Member States**, which can be either the claimant's State of citizenship, or another Member State. The real novelty is that individuals can sue their own Member State before a continental or international or supranational tribunal, i.e, a completely new way of protecting Human Rights: indeed, before there was small chance to sue one's State even before the *national* tribunals (the first case was, notably, Paquete Habana, ruled in 1900 by the Supreme Court of the US).
- Second, they share many hurdles and obstacles associated with the requirement of the ***exhaustion of domestic remedies***, which means that who wants to sue his or her own State in Strasbourg (or at San José), he or she must have already **unsuccessfully tried** all the possible levels of domestic protection of rights (such as, in Italy, Tribunal *and* Court of Appeals *and* Corte di Cassazione). Otherwise, the file will be set aside as *inadmissible* by the Court. Obviously, this rule is considered a **filter**[59]: otherwise, millions of claims would be filed before international Courts (which are already full of them: just consider that the Court of Strasbourg receives about 50.000 files each year).
- Last, the presence of these Courts **increases judicialization**: indeed, the more judges are created, the more judicial claims will be submitted. If we consider that judicialization is increasing also at constitutional level, it is possible to say that this is due, in general, to Human Rights (along with criminal law, *lex mercatoria*, and environmental law).

International Human Rights law and the domestic legal order: The Law

Indeed, as it actually happens with *any* Convention, once a State has signed a Treaty, it has two choices to make:

- First, whether to **ratify** the Treaty, for it is not obliged to do so (and, until so, the Treaty is not binding).
- And, if so, whether to **incorporate** the Treaty. Indeed, incorporation is a second step, which again is not mandatory upon the States.

[58] This disagreement continued also after the creation of the Court, up to the point that – due to quarrels between the Justices – the first decision was only delivered in 2009.
[59] The alternative could have been the Common Law instrument whereby the appeal is not as of right: not everybody, indeed, can appeal, but everybody can *file a claim* and it is the judge who decides if the file deserves to be discussed. Put differently, the judge is not obliged to examine a case: he or she can decide whether the question is interesting in point of law, or new, or an opportunity to overrule a precedent.

In this respect, ratification does not mean that States must incorporate the provisions of the Convention into domestic legal instruments. Therefore, ratification implies that individuals may claim the rights encompassed in the Convention (in our case, ECHR) regardless of the existence (or not) of corresponding domestic provisions protecting the same claim, filing a claim to the supranational tribunal. On the contrary, incorporation is necessary to allow citizens to ask **domestic Courts** to apply the international rule.

Speaking of incorporation, it is necessary to deal with the either dualistic or monistic nature of Constitutions. Indeed, international law, in its developments after WW2, was included in domestic legal systems. Nonetheless, there are at least two possible approaches to this "inclusion":

- ***Dualism*** is the most traditional way, based on the division between *external* and *internal* sovereignty following Westfalia. Initially, all systems were dualist. However, it has been weakening, or at least losing its core strength, during the centuries. According to a *dualistic* conception of international law, systems need to **explicitely incorporate** the provisions of (also general) international law and agreements, even when they concern Human Rights. The more a system is dualist, the more there is need for *formal* incorporation, which cannot be *presumed* but needs to be put in practice through sources belonging to the domestic legal constitutional framework. What is more, the source used at domestic level to incorporate somehow imposes an **equal source** to the incorporated international law provisions. Put differently, it gives the *same strength* to the incorporated provisions, similarly to the brocard *nemo plus iuris transferre potest quam ipse habet*: if an ordinary law is employed to incorporate the international norm, then the incorporated Treaty will have the same strength as an ordinary law; likewise, if instead an organic law is employed (as it happens in Spain), then the Treaty will have the force of an organic law. Therefore, there is perfect equivalence between the incorporating and the incorporated sources, so that the incorporated law cannot have a higher force than the incorporating one.
- ***Monism***, on the other hand, is based on the idea that international law has effects when the State has carried out **all the necessary steps** at the international level. Hence, the State's *decision* of subscribing the international law Treaty would be enough to give it force in the domestic legal order. After this "presumed" ratification, incorporation would still depend upon the relevant (constitutional) provisions. Otherwise, if we believed that ratification automatically implied incorporation, a problem of **ranking the force** of the international provision inside the domestic order would arise. Therefore, either constitutional provisions specify how to treat ratified international treaties, or the problem is left to the interpetation of the Courts. In this sense, the problem is *only apparently* simpler.

With reference to Europe, States have chosen different approaches. By way of example, Austria (also thanks to Kelsen's theories) and the Netherlands can be considered monist systems. Indeed, according to **Art. 50** of the **Austrian Constitution**, the Constitutional Court has no part in reviewing international law sources concerning **Human Rights**, thus creating a distinction between general international treaties and those concerning Human Rights that have a preferential treatment. The latter are in fact approved and incorporated into the Austrian legal system using an **entrenched** procedure, just as it were a Constitutional Revision Statute. Hence, those treaties will have the **same** legal force as the Constitution itself so that they will form together a sort of blended nucleus of HR protection, or – as the French would say – a *bloc de constitutionnalité*.

In the **Netherlands**, in turn, there is not a real Constitutional Court but still Dutch judges are not authorized to carry out a *judicial review* of Dutch statutes. In short, they cannot declare a Dutch ordinary statute to be in contrast with the Constitution. Nonetheless, they can apply a kind of (diffused) **Conventional Review** of legislation that contrasts with international provisions concerning Human Rights. Therefore, Dutch judges cannot **disapply** a statute that goes against their own Constitution, but they can do it if the statute goes against international HR law. Again, Human Rights are given a kind of preferred condition, and in this case even more than in Austria, for here the judicial scrutiny is **diffused** (i.e., it can be carried out by every judge). With reference to the Dutch system, French scholars speak of a ***bloc de conventionnalité***.

The **Swiss** case is more complicated since the Constitution has been almost rewritten in 1999 and came into force in 2000. The "new" Constitution provides that the Swiss **Supreme Court** must "***take into account***" international law provisions concerning Human Rights. This implies that Swiss Courts are somehow obliged to recognize a **full protection** and perhaps a preferred position to Human Rights Treaties. In sum, all these examples can be described, despite some differences between one another[60], as **monist** systems where there is an almost **automatic incorporation** of international HR law into domestic legal orders.

Nonetheless, there are some kinds of treatment that are **halfway** in between a totally *monistic* approach (typical only of the systems we have just mentioned) and a totally *dualistic* approach. Even halfway, though, there are very **different** models. For instance, the **French** one (which has been adopted by several Post-Soviet Eastern-European States, such as Romania and Bulgaria[61]) is worth mentioning. According to **Art. 55** of the French Constitution, international law treaties concerning Human Rights have a **higher force** than Ordinary Statutes, yet lower than the Constitution itself: it is something intermediate. Other treaties have it too, but under a **condition of reciprocity**: i.e., the condition of a Treaty in France depends on the reciprocal treatment of the same Treaty in other States where it has been ratified. For instance, if a claim concerning a French and an Italian citizen is filed in a French Court, the latter will check whether the treatment would be reciprocally *equal* or *equivalent* in Italy. However, the condition of reciprocity is not applicable for Human Rights Treaties, that all have a higher strength than all ordinary statutes. But what about judges? The French *Conseil Constitutionnel*, which is the equivalent of a Constitutional Court, has to **review** each international treaty before its approval by the Parliament and its entry into force: therefore, it exercises a preliminary check of **conformity** with the Constitution. Conversely, the *Conseil Constitutionnel* has no instruments to check Treaties after their approval: it will be up to **ordinary judges** to verify, on a case-by-case basis, whether there are French provisions contrasting with international Treaties. Therefore, the French approach is not exactly monistic nor dualistic: there is a prior control by the Conseil Constiutionnel, and then, since the constitutionality of a Treaty has already been recognized by the appropriate institutional authority, the legal status of the source is in between the Constitution and an ordinary Statute. This way, all judges will be able to carry out a kind of "review" in order to check whether a French provision could be incompatible with a Treaty that has already been reviewed and approved by the Conseil. As said, it works the same in other Eastern European countries.

Conversely, in **Spain** and **Portugal** the system is even more complicated. A decisive factor in this respect is that their Constitutions were approved in the constitutional cycle of the 70s: hence, they are probably "updated" in comparison with analogous instruments drafted in the 40s. This way, the drafters perfectly knew thanks to the other European Constitutions that the Constitutional Court would need to deal with the Strasbourg and Luxembourg's case laws, let alone that many Spanish and Portuguese lawyers had studied in Italy, France and Germany. Therefore, Spain and Portugal opted for an **intermediate level** of force. Like in France, there is a **prior control** of constitutionality of the Treaty (art. **95 Spanish Constitution** and art. **278 Portuguese Constitution**) carried out by their Constitutional Tribunals. Once the review has been completed, the approval procedure is the

[60] Indeed, the **rank** in the hierarchy of legal sources is not necessarily established by Constitutions: either they may sanction the prevalence of international law norms over domestic provisions (as the Swiss Constitution provides, even if in ambiguous terms), or it is a matter left to **judicial interpretation**, as it happens in the Netherlands.

[61] In this respect, there has been the so-called ***circulation*** of models.

same as in Austria, so that the Treaty is **incorporated** in the legal system as it was a constitutional revision. At that point, the Constitution prescribes that the Treaty will work as an **interpretive criterion**: therefore, judges will have to use the European Convention (as well as other HR Treaties) as an interpretive preferred criterion for the interpretation of Constitutional Law by the Constitutional Tribunals.

Then, in the case of **Belgium**, there is no particular provision addressing the relationship between international and domestic law: therefore, it is left to the **judiciary** to find a proper solution. It is clear that all these kinds of intermediate approaches require strong **creativity** by Constitutional judges.[62] Sometimes, even on the side of ordinary judges, like in the Netherlands and North-European countries such as **Norway**, Sweden, and Finland, countries that do not have a Constitutional Court. Put differently, these countries do not have a *centralized* judicial review of statutes. Nonetheless, there is a kind of historical interpretive ***presumption of conformity*** of domestic legislation to regional HR Conventions. Therefore, ordinary judges will be particularly available to **adapt** the interpretation of domestic statutes to the current Strasbourg interpretation of the ECHR rights.

The **British** and Irish systems, in turn, reserve a special treatment to the ECHR and, although they obviously form two separate legal orders, have the same rules in that regard. Indeed, only when the war between the two came to an end, they decided to **incorporate** the ECHR through two Statutes (one for each State) both of which are named ***Human Rights Act*** of **1998**. Ireland and the UK chose the same solution in terms of the relationship between international norms concerning Human Rights and domestic provisions.[63] The problem for Britain was that a longstanding tradition dating back to the Norman conquest implied that sovereignty belonged to **Parliament** that had *primacy* on the other branches of power. The Glorious Revolution sanctioned such a prevalence even over the King. This way, if an ordinary British statute had to be set aside for an incompatible Conventional provision to prevail, then the supremacy of Parliament would be undermined or even cancelled. Therefore, it was impossible to adopt a solution whereby anytime a British judge found a British provision in contrast with a ECHR rule, then he or she would have to set aside the domestic rule. At least, impossible *unless* the Parliament decided to abdicate its supremacy. Therefore, a complicated formula was designed in order to adopt a kind of halfway solution. Indeed, the British judge first has to try a **consistent interpretation** with the ECHR (or other Conventional HR) provision. He or she must make any possible effort in this respect. Still, there could be cases in which such efforts would be useless. In those cases, both in Ireland and in the UK, the judge **stays the procedure** and activates a mechanism of **parliamentary involvement**. In short, the judge asks the Parliament whether it is possible to interpret the two provisions in conformity with each other. It is indeed important to remember that until 2008, the House of Lords in its judicial composition was one of the two Chambers of Parliament: the UK still had the old medieval correspondence between the head of the

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[62] One of the problems of Constitutionalism 3.0 is exactly the so-called ***government by the judges***, which was already known by American scholars since although – according to Madison – the judiciary should have been the least dangerous power because of lack of real powers, it turned out that judges are often very important in the structural power of the State. This brings about the problems often referred to as *counter majoritarian objection*: judges are not elected, so they can decide even against the majoritarian positions in both politics and public opinion. We have already mentioned this topic: should judges analyze the public opinion on a certain issue before deciding it? Or could they instead shelter themselves inside a position and defend it against public opinion? This, however, is quite a different matter. Suffice it for the present to describe how the system works, free from ideological problems about the role of judges.

[63] Please note that for the UK it is impossible to talk about domestic *constitutional* provisions, since the UK does not have any written or documentary Constitution. Yet, British scholars still reason in terms of ***substantive constitutional*** provisions.

judiciary and a branch of the legislature. The House of Lords had two different compositions so that it was able to carry out both functions. The Parliament, in turn, has three possible choices:[64]

- First, it can state that the two interpretations are, in fact, **compatible**.
- Or, it can find there is a **real incompatibility** between the domestic and the ECHR provision. Should it find so, it can decide to **change the statute** and send the issue back to the judge.

Through this very complicated procedure, the Parliament was able not to give up its supremacy, its supreme capacity of deciding *what the law is*. The problem of **judicial creativity** was solved. However, **Brexit** created more problems, for judged are no longer authorised to apply the principle of Supremacy of EU Law. Yet, for obvious reasons, the status of the ECHR was not touched by Brexit. Therefore, we have two different treatments for EU Law and for the ECHR. It is left to see what would happen in case of conflicts between domestic provisions and ECHR provisions after Brexit, i.e., whether British judges will change their attitude towards the Convention.
Finally, we shall analyze the **Italian** and **German** cases. It is possible to say that Italy, Germany and France have paved the way for both the EU and the ECHR. What is more, their three Constitutions represents the pioneers, the pilot experiences for other post-war Constitutions. Therefore, our experience can be seen as more important (not because we are better jurists, but) for historical reasons. In this respect, whereas the relevant articles of the Italian Constitution (i.e., **art. 10 and 11**) have never been modified, the German Constitution was subjected several **amendments** (11 just after 1990!) to keep it up to date with the new international Treaties, with the additional protocols of the ECHR, and with the evolution of the EU. This way, the German Constitution has been **increasingly adapted** to the new context. Our Italian Constitution, on the contrary, has remained exactly as it was when it was drafted (at least, as far as this issue is concerned) because, apparently, no member of the Constituent Assembly foresaw the important development that took place in the field of HR after 1950. The Italian articles are indeed ancient instruments, so that much of the core issues on the status of international law has depended on **judicial decisions** of our Constitutional Court, despite the (mere) existence of Constitutional provisions concerning international law. Obviously, it takes a special procedure to grant a **special passive force** to the law of incorporation, so that if the latter is an ordinary Statute (such as in Italy for the ECHR) the force of the Treaty is the same as the incorporating law, although Art. 10 and 11 of the Italian Constitution protect HR Treaties from subsequent decisions of the legislator. This implies that if – after the ratification of a Treaty such as the ECHR – an ordinary Statute tries to violate provisions therein, that would be a **violation of the Constitution** itself. Put different, if it is the Constitution that makes reference to the protection of Treaties concerning HR from subsequent contrasting decisions by the legislator, that means that a possible statutory provision violating the EHCR is **unconstitutional through the violation** of Articles 10 and 11 (and not due to a *direct* violation of the ECHR). Only in a later moment, art. **117 Cost.** was enacted.
Briefly, in Italy and Germany the adaptation of domestic law to international law can be described as an original **construction** of public legal **scholarship**. Obviously, Constitutions provide for an **automated mechanism** of incorporation only of *general* international law provisions, that automatically become superior to the ordinary legislation, whereas Treaties need **incorporation** through a specific legal instrument. Therefore, we have a **monist** opening towards *customary* international law, yet set in a constitutional context of a substantial **dualism** for any *conventional* international provision. Hence, the provisions of international Conventions necessarily have the force of **ordinary legislation**, for they are usually approved through an ordinary statute. In turn, the constitutional coverage of conventional provisions is drawn from **art. 25 GG** in Germany and from **art. 10 and 11 Cost**. in Italy. This way, the ECHR and other Conventions concerning Human Rights

[64] This procedure was triggered only 20 times in 25 years.

are considered ***indirect*** or ***integrative*** **parameters** of constitutionality. This, however, does not imply that our Courts are not respectful, or that they simply consider the Convention as an "ordinary" Statute (also because the Convention should be considered an integrative parameter of constitutionality). We can even believe that the original constitutional parameter has been widened to accepted at least some of the contents of the ECHR. Furthermore, it is important to remember that the ECHR is not simply as it emerges from its text but it is the **product of judicial interpretation** by Strasbourg. Thus, our judges (and, above all, the Constitutional Court) need to keep the pace of the evolution of the case law, for we cannot think of the ECHR as something stable and fixed once and for all. Instead, it evolves over time according to the Strasbourg caselaw. This view whereby the ECHR is **valorized** by constitutional jurisprudence has two consequences:

- First, the interpretation of *ordinary legislation* is carried out **consistently** with the provisions enshrined in the Treaties ratified by the State, notably those concerning Human Rights. This is a specific obligation under **art. 117 Cost**. of (both ordinary and Constitutional) Italian judges.
- Second, the ECtHR **jurisprudence** becomes relevant for the interpretation both of the rights granted by the Convention itself, and of those included in the Constitution but not in the Convention (although the latter is a rare possibility due to the progressive enlargement of the ECHR through protocols).

The two main Italian cases concerning the relationship between the ECHR and the Italian Constitution are the so-called ***twin judgements*** of **2007** (decisions no. **348** and **349**/2017), and the **decision 49/2015** delivered by the Constitutional Court. We will analyze them soon.

International Human Rights law and the domestic legal order: The Courts

The European Court of Human Rights

To complete our analysis of the Continental protection of Human Rights, it is necessary to focus on the dialogue between Courts, which has both a ***vertical*** (i.e., between national, usually Constitutional, Courts and international courts) and a ***horizontal*** (i.e., between the ECHR and the ECJ) dimension. But first, we must make some remarks about the **European Court of Human Rights**. The Strasbourg Court is a product of the ***Council of Europe*** (henceforth referred to also as CoE), created in its turn by the Treaty of London of **1949**. The admission to the Council of Europe requires new Member States to comply with **rule of law** principle (whatever it may mean), with a **democratic working** of the Constitutional system as a whole, and with a **full enjoyment** of Human Rights and fundamental freedoms for all persons under their jurisdiction. The Council of Europe is composed of **two organs**, namely the **Committee of Ministers**, and a **Consultative Assembly**. The Council of Europe is the author not only of the European Convention of Human Rights, for it administers about two hundred treaties that have been ratified in different periods. Still, the ECHR remains the most famous one. It was signed in **1950** and entered into force in **1953**.

Originally, the ECHR consisted of two different organs: i.e., a rather *political body* (the **Commission**) created in 1954, and a proper ***Court*** of Human Rights (1959). For the first forty years of practice, until **1998**, the European Commission of Human Rights worked as a **filter of admissibility** to the Court. Put differently, individuals could not file claims directly before the Court, but needed to present a petition to the Commission, which obviously had a kind of political power to carefully examine the file and was not obliged to defer the case to the Court. In 1998, **Protocol 11 abolished** the Commission and granted *direct access* to the Court.

The ECHR is obviously entrusted with the **adjudication** of alleged **violations of ECHR** perpetrated exclusively by contracting parties (i.e., Member States). It is made of **one judge** per State (hence, there are 47 judges) nominated by the State and appointed by a majority vote of the CoE Assembly. Decisions are delivered either by one of the five **Chambers** (each consisting of 7 judges), or by the **Grand Chamber** (made of 17 judges) in cases of particular importance or of deference by a Chamber.[65]

The workload of the Court is enormous: before the pandemic, the number of cases almost reached 95.000 each year. Therefore, there is a **very low rate of admissibility** (also thanks to the requirement of the *exhaustion of domestic remedies* in the petitioner's State or in the State against which the file is addressed) and it takes a **long time** to reach a decision (on average, between 2 and 3 years). For this reason, in cases of extreme urgence an ***injunction*** can be sought: this procedure is used very rarely, but sometimes it might be helpful for a petitioner. In those cases, the Court can adopt a **stay injunction**, i.e., an intermediate or urgent measure in order to support the reasons of the petitioner.

Rulings delivered by the ECtHR have some peculiar characters:

- As to the **effects** of the decisions, petitioners may also obtain ***declaratory judgments*** with the "opinion" of the Court in a declaration of principle and other than a solution to the specific case. Although this is normally forbidden before Supreme and Constitutional Courts, the peculiar character of the Court as a *vestal virgin* of the system of rights makes declaratory judgements admissible. What is more, **all** decisions have ***erga omnes*** effects: indeed, both in positive and negative outcome of a claim, it is unlikely that the Court will pick up analogous cases for the latter are considered already decided.
- The preferred **sanction** used by the Court is a ***monetary*** compensation that, however, is normally not enough to allow the petitioner to obtain full satisfaction. Indeed, they are normally limited in their amount (e.g., 1000 euros). Sometimes, when a violation of a ECHR provision is going to last over time, and the State is negligent in the application of the ruling or it pretends not to see the decision, there might be a kind of monetary sanction on a **day-by-day basis** (e.g., 500 euros per day until the violation ceases).
- The responsibility for the **enforcement of judgements** is vested in the **Committee of Ministers** of the Council of Europe, which has the specific task of monitoring the sanctioned States. The Committee of Ministers should keep under control the behavior of Member States, suggest solutions, and report whether a violation has been removed.

Usually, the Court sticks to a **substantialist approach** without being too formal. Indeed, it is important for it to reach an outcome for the concrete position of the man or woman involved in the case. For instance, in recent cases brought against Italy, the Strasbourg Court has stated that the State could not apply a double penalty on the same behavior qualifying it both a crime and a source of administrative responsibility (for it goes against the *double jeopardy* clause of the Convention).

What is more, the system of the Court is characterized by the so-called ***margin of appreciation doctrine***. According to it, although Member States are obliged to comply with the Court's decisions, this obligation is not totally compulsory. Indeed, States preserve some margin of discretion. Obviously, the sanction is still valid, but the State is not obliged to amend domestic provisions (like the criminal code, or a provision of a statute, etc.) that have been found to be in contrast with the Convention, if it can demonstrate there are peculiar and **local reasons** in order to preserve the existing rule. This really is a borderline situation in which, on the one hand, we cannot undermine the authority of the Strasbourg Court by simply authorizing the State to ignore its decisions. Still, on the other hand, the underpinning idea of the Treaties of 1949 and 1953 is that this is a matter of **politics**: State must preserve a small amount of discretion in deciding when it is strictly necessary to only partially apply the decisions of the Court. Obviously, someone may object that through these

[65] Each chamber can indeed defer the case to the Grand Chamber in case of particular **difficulty** or of possible **overruling** of previous decisions.

means the **authority** of the Court suffers a strong limitation. However, at that time it was probably impossible to reach a different compromise, and even now States prefer to reserve a margin of appreciation for themselves. Therefore, Member States maintain their **discretion** in the (full) implementation of the ECHR provisions and, consequently, of the Strasbourg decisions. The same feature has been exported to the Inter-American Court of San Jose.

Another important rule, which is not in the Convention but comes from decades of judicial elaboration, is the so-called ***equivalent protection* doctrine**. It was stated in clear form only in the case ***M&Co. v. Germany*** of **1990**, although it was already present in the caselaw years before. Pursuant to this doctrine, if Member States confer upon an international organization powers capable of **affecting the scope** of application of the ECHR, they must confer upon the organization also **mechanisms of guarantee corresponding** to those of the ECHR. This is a problem of succession of rules in time. Indeed, the Conventions supposes to have reach the best standard possible to protect Human Rights in the continent. Nonetheless, States are obviously not prevented from stipulating, ratifying, and incorporating new Treaties over time *even* in the field of Human Rigths, for they are still sovereign. Therefore, according to the equivalent protection doctrine, when States sign and ratify new Treaties that affect the same scope of the Convention, be it HR Treaties or not, they must include in those Treaties either the **same** guarantees or even **better** guarantees. If, instead, the Treaty imposes or simply allows a lower standard, them the State is not prevented from being sued before the Strasbourg Court and potentially sanctioned due to a violation of the Convention.

In short, the stipulation of a later Treaty does not prevent the **compulsory application** of the ECHR although they have delegated some powers to other organizations and/or Treaties: the sovereignty of States remains intact, but no later provision of constitutional public law of Member States can be in contrast with the level of protection provided for by the Convention and by the caselaw of the Court. In case the fundamental rights of the Conventions are not respected within other international organizations, Member States are **responsible** for the violations occurring through the exercise of *delegated powers*.[66] This is because the Court presumes to guarantee the **best protection possible** of Human Rights. Of course, nothing is perfect and there might be a better shelter: yet, less efficient instruments of protection are simply prohibited. In line with this doctrine, in the **2005** case ***Bosphorous v. Ireland***, the Court stated that to hold otherwise would degrade the peremptory value of the Convention and undervalue the effective protection granted by it. In an attempt to balance *international cooperation* and the *effectiveness* of the Convention, it is established that any State conduct undertaken in compliance of its obligations arising from the membership to an international organization, is justified as long as the latter protects human rights (both under the substantial and procedural perspective) in a manner at least equivalent to that of the ECHR. In this respect, the Court must conduct a **twofold phase** of oversight over the State's conduct:

- First, it has to analyze in **abstract terms** the general level of protection of Human Rights guaranteed by the organization.
- Second, setting aside formal or general considerations, it needs to verify whether in **concrete** terms the measures adopted in the specific case are compatible with the Convention, to find

[66] Hence, this theory is applicable only when a State action is limited to the **mere execution** of obligations deriving from its membership to the organization. Indeed, when a Member State has **discretion** on the application of rules derived from another Treaty, the discretionary choice of implementing such an obligation in a certain way depends on the State, thus creating no problem in suing the State for a violation of the ECHR. Nonetheless, even when the later Treaty leaves no discretion to Member States, the latter could be held liable thanks to the **equivalent protection** doctrine, for before signing a Treaty implying a lower protection of Human Rights, the State should have been more careful.

a possible **manifest deficiency** in the conduct requested by the organization. This attention on *concrete* facts is perfectly in line with the trend of Constitutionalism *2.0* and *3.0*, whereby it is important not to limit the analysis to theoretical problems.

The Inter-American Convention on Human Rights, and its Court

The European Court of Human Rights, however, is not the only regional judiciary organ in the World dealing with Human Rights. Indeed, it is now important to focus on the ***Inter-American*** context. There, in **1948**, the **Charter of the Organization of American States** was signed, in the same year as the American Declaration of the *Rights and Duties of Man*. Then, developments occurred through two steps:

- In **1959**, during the moment of turmoil in Cuba, the **Organization of the American States** (OAS) decided to create the ***Inter-American Commission*** on Human Rights, which was a **political body** (exactly like in Europe).
- In **1969**, the OAS adopted the ***American Convention*** on Human Rights (ratified by 23 States) that created the Inter-American *Court* and (negatively) redefined the role of the Commission, despite not completely eliminating it. It is easy to understand that the interposition of a political body in Latin America is much more important than in Europe: indeed, the lower the level of traditional democracy is, the more dangerous the presence of a filter political body is.

The **Inter-American Commission** can be compared, for its functions and structure, to the way the Strasbourg Court works. They decide **individual** claims, as part of the Latin American juridical culture to have *amparos*, i.e., a direct request to higher courts. The Commission was authorized to adopt ***interim measures***, not like injunctions, but with **precautionary** aims. It visits Member States and prepares reports on them concerning compliance over Human Rights. The **Court**, instead, has different functions such as the issuing of ***advisory opinions***, which are of limited importance because they are actually not structured to "threat" Member States violating prescriptions of the Convention. The Court can adopt ***interim measures*** and decides on ***amparos***, protecting individuals through their direct appeals or files. It has a simpler structure than that of the Court of Strasbourg: there are only **7 judges** who must be citizens of a Member State of the organization, and who are directly elected by the General Assembly (indeed, not every state has the chance to appoint a judge). The Court has powers similar to those of the Strasbourg Court, although it took more time to allow the Court to have such a strong, influencing power on domestic Courts. What is more, it can order ***reparation*** in both **monetary** and **non-monetary** terms. The request for an interpretation may be lodged by the parties within **90 days** after the exhaustion of all the national remedies.
However, there have been (and are) some loopholes in the protection of the Court: in 1986, the Court could not influence some dictatorships in Latin America, and before it was not even allowed to operate concretely with judicial powers. What is more, the admissibility screening (as it was also in Strasbourg) was particularly **strict**. A very peculiar problem of the Inter-American Convention is that the US, despite being a promoter of the Organization and a signer to the Convention, has never **ratified**, in a sort of a "tradition" dating back to the League of Nations.[67] In **1977**, the Dem President **Carter**, after a term focused on Human Rights, was not able to get a second mandate, and Ronald Regan won. Perhaps, the American opinion was not ready yet. Ignatieff described this attitude as the ***American Exceptionalism*** whereby the US simply refrains from subscribing international

[67] Indeed, President Wilson was the father of the ideas leading to the creation of the League of Nations in 1919. Nonetheless, despite having the majority in Congress, he was not able to push the bill in the Congress and therefore the Treaty was not incorporated nor ratified. This led France and Germany to be the only real leaders in the Society, thus creating many of the problems therein.

conventions (which is more a matter of foreign policy than of international law). This theory was born as the ***Monroe Doctrine*** (Monroe was a president of the US) and implied the expulsion of all the Europeans from the whole continent (i.e., the concept of *America to the Americans*). The idea was born during the independence process in **1812**, in a moment of crisis for the Spanish monarchy. The Monroe doctrine was an ideal to be pursued by the Latin American patriots, towards the disruption of the Spanish empire. In **1904**, Theodore **Roosevelt** added the so-called *Roosevelt Corollary*. Those were the years of the American conquest, following a war with Spain, of Cuba, Puerto Rico, the Philippines Island, and all the other territories that had remained under the Spanish sovereignty. Therefore, the European presence in the American continent was minimal (i.e., only a few islands and colonies, irrelevant in political terms, was under its control). The political scenario made the US sign many Treaties, both continental and global, with several **limiting clauses**, i.e., the so-called ***RUDS***, "*reservation and understanding"*. This limited the power of the Treaties, leaving some doors ajar <u>not</u> to put the US' sovereignty under discussion. It also happened that reservations were added in a later moment: the most paramount examples are the ICJ decision in <u>*Avena*</u> and the 2008 Supreme Court decision in <u>***Medellin v. Texas***</u>. The two rulings show how can there be problem even in the ratification of a Treaty when the USA are involved:

- First came the so called <u>***Avena***</u> case, that concerned the position of 54 Mexican citizens who resided in the US and were responsible for some serious crimes (e.g., rapes and murders). They had been sentenced to **death**, but with the assistance of the Mexican government they lodged a file to the **International Court of Justice** complaining about the violation of the **Vienna Treaty**, whereby when a citizen is arrested in another State signatory of the Convention, he or she should be informed of their rights and to call their Consulate, which was instead denied in the case at hand. The Court found **violation** of Art. **36 para. 1** of the Vienna Convention and of Art. **1** of the **Optional Protocol on Consular Relations** in the conduct of the US of arresting, detaining, trying, convicting, and sentencing the 54 Mexican nationals without possibility of exercising their *right to consular protection* as provided for by Art. 5 and 36 of the Vienna Convention. Therefore, Mexico is entitled to a full *restitutio in integrum*. Therefore, this means that <u>no</u> doctrine of *procedural default* or of domestic US law can apply, because:
  *"The United States is **under an international legal obligation** to **carry out in conformity** with the foregoing international legal obligations any future detention of or criminal proceedings against the 54 Mexican nationals on death row or any other Mexican national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are international or internal in character".*
  The conclusion is clear: the US had failed to provide for consular notification and consequently the US government should have taken all measures to ensure that no Mexican would have been executed. The ruling should have been implemented by some American courts and, according to the American Legal System, all cases of murder are assigned to State courts.
- Litigants exhausted all their State remedies and eventually the case reached the Supreme Court, which in <u>***Medellin v. Texas***</u> made a very interesting decision with 6 votes against 3: the decision of the ICJ was **<u>not</u> binding** because Congress had <u>not</u> enacted an implementing statute. Indeed, the Vienna convention is <u>not</u> self-executing. Instead, to have an ICJ ruling implemented inside the territory of the US, there are 2 possibilities:
  - Either the Convention is **self-executing** (i.e., the language is clear and the President has signed it without reservations, understandings and declarations – RUDS –,

meaning that the US have accepted full and integral application of the Treaty), and hence there is no need of incorporation.

- Or, the Treaty has been **incorporated**: there might be legislation approved by Congress explicitly incorporating the Treaty.

None of the two circumstances were present, and so the decision of the International Court of Justice was inapplicable within the territory of the USA. In fact, the Court held that the judgement was **not enforceable** as domestic law (and the Treaty was not binding in domestic law) unless one of two conditions mentioned above were fulfilled, which was not the case. Chief Judges Roberts stated that art. 94 of the UN Charter simply requires the US to **undertake to comply**, without any *obligation* to actually do it (put differently, it only requires the US to *start* to comply). However, the Court suggested that the political power could find some compromise to avoid violating the decision completely. The government of Michigan used the instrument of *Pardon* so that the cases went down to 51 and other arrangements were provided. Still, there was no automatic or immediate application of the ruling of the ICJ inside the US just due to the **American Exceptionalism**.

The African and Asian contexts

In the African context, the problem is not the existence of a *superpower*, or of a supranational one. Instead, there are many different States with different cultures and religions, and thus different problems. Therefore, the issue has been to **reach unanimity** and to push States together towards the same objective. In this context, the ***Organization of African Unity*** was established by 32 States in **1963**. Its Charter provided for the creation of a supreme organ, i.e., the so-called ***Assembly of the Heads of State and Governments***. However, in 1999, the Libyan leader Ghaddafi exercised his big influence on other States towards his anti-colonial approach, and therefore the Assembly adopted a resolution, i.e., the ***Sirte Declaration***, which provided for the creation of a new organization called ***African Union*** with the African Economic Community therein, respectively politically and economically oriented (something like EU at its beginning). Its constitutive act was signed and ratified by 53 (now 55) States, and in 2002, following the extinction of the African Unity, the African Union took the place of the former organization with **political**, **economic** and **human rights** bodies. From this point of view, already in **1981,** an ***African Charter on Human and People's Rights*** had been drafted. It created an independent Commission, i.e., a political body composed by 11 members elected by the Assembly of the African Union, aimed at promoting humans and people's rights and ensure their application in Africa. The power of such Commission was to review States' **reports**, when they have the impression that the facts therein are not fair or false or there are problems to be solved. The Commission could adopt **decisions on complaints** submitted by individuals, organizations and States, and even request **provisional measures** in case of *possible imminent and irreparable harm* to victims, whether petitioners or not. In **1998**, the 34th summit of the Heads of States and Governments adopted a new protocol implying the establishment of an ***African Court on Human and People's Rights***. The protocol only entered into force in 2004, the length of time demonstrating some resistance. In 2006, 11 judges were elected and it took 3 more years for the Court to render its first ever decision in **2009**. The Court has competence to **decide** controversial cases as well as an **advisory** competence, which is not probably a jurisdiction, but it resembles it. Complaints and applications can be submitted by the *Commission*, *States*, *NGOs* (which become thus subjects of international law at least at a continental level) with the statute of observer, and *individuals*. With the Court, we substantially have an *amparo* even in the African context. However, this only works when the State has accepted the jurisdiction of the Court, with full and total ratification and incorporation without reservations or understanding. Otherwise, only individual claims are admissible. There has been very little work to be carried out so far.

Besides, African States have created over time quite a complicated structure in terms of **regional economic communities** in order to emphasize the feeling of **collective coexistence** of individuals and distinguish them from the traditional western individualism: we have an *East African Community*, an *Economic Community of West African States* (ECOWAS), and a *Southern African Development Coordinating Conference*. However, cooperation between these organizations is difficult due to strong **regional interests**. Originally, all these economic communities did not encompass any form of human rights protection, but they focused on the **economic development** of different parts of Africa, following the European tradition. In **1991**, the ***ECOWAS Declaration of Political Principles*** was drafted, in a sort of evolution from economic to political cooperation. Then, in 1999, a treaty established the East African Community as a gatekeeper for complaints of HR violation in the East African Community, trying to introduce a filter in order to prevent easy filing of claims in the continental Court for the protection of human and peoples' rights.

As for **Asia**, in **1967** the Bangkok Declaration established the ***Association of South-East Asian Nations*** (ASEAN). There were indeed some political premises: in 1963 the Vietnam war had started during the Kennedy presidency due to a naval accident involving battleships in the Gulf between Vietnam and Thailand. Its real evolution is no longer clear, but at that point many nations (e.g., the USA, Philippines, South Korea, Australia, New Zealand) joined forces to create not only a *military* but also a **political alliance** in order to put an end to the war and to prevent future expansion of the communist organizations in East Asia. The idea was based on **cooperation**, **amity** and **non-interference**, which was the sum of the ideals put together with the Bangkok declaration signed on 8th august of 1967 (now, a national holiday). This notwithstanding, Asia has never had a human rights organ. A Commission was created in 2009, but its nature as political power did not help since political powers in general want to limit human rights organizations and prevent them to become prevalent on considerations of sovereignty. In 2012, another declaration on HR was adopted aiming at the establishment of a human rights mechanism that, yet, has never taken place.

There is a big difference between the Western tradition in terms of protection of human rights and the Asian one. In fact, it is hard to create a **common ideology** in a place, namely Asia, that is very different in culture, religion, and politics. For instance, it is told there is that much more loyalty to family, to nation, the foregoing of personal freedom for the sake of society, stability and prosperity, strong work ethic. In short, community prevails over the individual, and responsibility over the single's right. They put an accent on **solidarity** more than individual personal rights. And founding ideas are different depending on the doctrine or religion: it is indeed pretty difficult to find compromise between Communism, Buddhism and Islam. This is why the ASEAN Charter declares a *generic respect for human rights and freedom* but does not mention any universally accepted human rights standard: this way, they leave open the future possibility of interpreting rights in a different way from the International Court of Justice or other continental Courts' interpretations. In this respect, some western authors argue against the concept of *universality of human rights*, and instead prefer a position described as ***cultural relativism***, something less than the full-hearted relativism of the western approaches.

The vertical dialogue between national and supranational Courts

Introduction: a multilevel protection of Human Rights

After addressing Treaties, Constitutions and the position of HR Treaties in the Constitutions, it is now necessary to confront the system of **relationships between Courts** in the application of such norms: this is because even constitutional norms are static and **interpretation** adds life on the structure of values and principles. Therefore, implementation of such principles can be seen as a

permanent process carried out mainly by Courts, in a continuous confrontation with public opinion, which is typical of modern and contemporary constitutionalism.

The issue of the vertical dialogue between Courts may be situated in the evolution of constitutionalism post WWII and thus in the enshrinement of very long catalog of rights in Constitutions of post WWII democracies. After the **positivization of rights** immediately after WWII (that introduced guarantees of rights both at global and continental level, i.e., in international law and in the Constitutions), Constitutional Courts were provided with important tasks and powers. Constitutions of later generations sometimes included even eternal or **permanent guarantee clauses** (or ***perpetuity clauses***), that is, provisions prohibiting future amendments to the Constitution that would limit the width of the protection of rights. Consequently, even a constitutional statute (although adopted following the procedure required to amend the Constitution) could be declared unconstitutional by a Constitutional Court for limiting the width of the protection of the rights and hence going against such provisions. Of course, this does not mean that any article concerning rights is protected from any modification by a full shelter, but that the protection of such rights can only be increased. It is a sort of one-way movement: modifications and amendments to the Constitution concerning the protection of rights is allowed only if they are **progressive** and do not limit the scope of protection of the rights. As a consequence, some parts of the Constitution are less amendable than others. Therefore, when such *perpetuity clauses* are included, the Parliament (or whatever name the organ capable of modifying the Constitution has) will be very careful in drafting the amendment because the Constitutional Court may tell that it has gone beyond its powers. Of course, the presence of *eternal guarantee clauses* also affects the relationship between domestic constitutional law and customary or conventional international law concerning human rights. In fact, as soon as the caselaw of a continental/international Court becomes somehow compulsory or at least influences the domestic caselaw of a Constitutional court, the eternal guarantee clauses become stronger and stronger: indeed, the paradigm according to which a subject is declared able or unable to modify the Constitution becomes stronger as well. Put differently, if a continental Court improved or extended a right, the standard would be followed as strictly as possible by the domestic Constitutional Court. At that point, a Parliament willing to modify the regulation of such a right will have to be extremely careful: the Court's interpretation of the dividing line between a positive and negative change in the protection of rights **changes over time** due to the **interrelationship between supranational and domestic Courts**. It is not an easy process to explain, still it is the point reached by EU and Latin America (partially) due to the new efficiency in the last 20/30 years. This change also partially affected Latin America (with its San José's Court) because the end of the Soviet Union set free all the nations somehow related to it.

The situation in the EU is very different in terms of approaches. Indeed, each Member State has elaborated its own approach for regulating the intersection between constitutional and supranational protection of rights according to its traditions, to its way of elaborating constitutional caselaw, and so on. Indeed:

- **France** and **Spain** have rearranged the relationship between domestic and European sources by **frequent changes** in their Constitutions, in order not to leave much room to their constitutional Court. As soon as new Treaties were approved, they amended the Constitution sometimes even through a *referendum*. This way, the space left to the Court was limited because the people had already decided (and in such cases, the Court is more cautious in the arrangement of relationships).
- **Germany** has enacted some amendments to the Constitution, yet its Constitutional Court has been very active and has been the real leader in the interpretation of the relationship between EU and domestic law. The criterion adopted by the German Court has been the ultimate **oversight over the democratic nature** of the institutions to whom sovereign

powers are delegated, focusing on where sovereignty belongs to. German judges and authors know that sovereignty is a different concept than it was before: in fact, it has changed its nature and features throughout time. **Sovereignty** is very fragmented and the criterion used by the German Court is not to look at where the political power is, but at where the *competence of all competences* (i.e., ***Kompetenz-Kompetenz***) resides: that is, the power to decide in judicial terms. If it belongs to the Constitutional Court, then the latter is the vestal virgin of German democracy, and will therefore oversee the concrete application of democratic values in Germany. However, that will imply that foreign (or international law) criteria would not be allowed to penetrate German constitutional law. Democracy comes before *State democracy*, *constitutional democracy*, and before any supranational interpretation of the standard of protection of rights. Indeed, a certain interpretation (by the Luxembourg or the Strasbourg's Court) of the standard of protection of a right might be inconsistent with the principles and values of democracy.

- The **Italian Constitutional Court** has experienced something similar, and the idea of *Kompetenz-Kompetenz* has taken the place of the previous formulas. The question is deciding which judge has the power to state which should be the **adequate level of protection** of a right, as well as be responsible for the balancing between different rights inside the constitutional system. If the Kompetenz-Kompetenz belonged to a supranational court, the result would be that not-so-democratic powers will prevail over the traditional democracy at State level. However, in Italy it is not a problem of where sovereignty is located, but of deciding on a **case-by-case basis**. Of course, the Strasbourg and Luxembourg's Courts apply a balancing procedure too, but their way of balancing might be different from domestic Courts. That create a problem of **co-existence**: Courts normally work in harmony but sometimes there may be clashes and conflicts.

After this "short" introduction, it is possible to analyze the system of constitutional rights with what has happening at the supranational and international level. Also, there is **another level of protection** of human rights, i.e., the EU: the former ECSC/EEC made a transition from a regime of supranational organization primarily devoted to the 4 "fundamental freedoms" to a system that also protects human rights, represents an alternative forum for individual rights and interests, and interacts also in a dialogue both with national jurisdictions (and usually with the highest Courts of the Member State) and, on a horizontal level, with the Strasbourg Court. Originally, the Treaty of Paris establishing the ECSC and the Treaty of Rome establishing the CEE did not encompass specific references to human rights. It was only with the **Single European Act** (1986) that *rule of law* and *democracy* appeared for the first time. Indeed, Member States explicitly mandated the European Community to **protect democracy and the rule of law**. Nonetheless, there had already been increasing attention in the ECJ's **caselaw** to the protection of HR.

A pivotal turn may be identified in the adoption of **Maastricht Treaty of 1992**. Apart from making several institutional arrangements, the Treaty had an influence on the protection of human rights on a number of levels:

- First, it established the ***European Citizenship***, which entails the possibility to **vote** and stand for elections of the EU Parliament and of municipal bodies in all Member States. It also entails the **freedom of movement** of people and workers, as a reinforcement of one of the fundamental freedoms that already existed in the Treaty of Rome.
- Also, the Treaty explicitly committed the action of the European Union to **respect of fundamental rights** *as protected by the ECHR* and as consolidated *within the common constitutional traditions* of member states. Put differently, the protection of HR has been elaborated by the action of the Court of Strasbourg and human rights were considered at

the rank of **general principles** of EU law and therefore were considered applicable by the ECJ to *assess validity* of EU acts as well as *interpretive tools*.

The Treaty of Maastricht marks a first shift in the aim of the activity of the EU, followed by the **Amsterdam Treaty of 1997**. It dealt with what had already been decided through the Treaty of Maastricht, highlighting how the action of the EU is **aimed at the protection** of freedom, democracy, and Human Rights. Moreover, it sets the compliance with all these principles as a requirement to be admitted to the EU and as a cause of suspension: hence, beginning from the Treaty of Amsterdam, the respect of *freedom*, *democracy* and *human rights* becomes a condition to further exercise the rights related the membership of the EU. In this respect, if a Member State does not respect the commitment to any of these principles, it may be sanctioned with the suspension of its vote in the Council. The **ECJ** has the duty to **oversee** the commitment to these principles and can issue binding judgements concerning the respect of these principles by national legislations. What is more, the Amsterdam Treaty codified the ***principle of non-discrimination***, which basically mirrors the principle of equality, of which it is a first crystallization.

Considering the evolution and the development of the sources of EU law, starting from the 90s, the **progressive homogenization** of the guarantee of fundamental rights at the domestic level is pushed and favored:

- on the one hand, by the principle of ***primacy*** of EU law (whereby domestic legislation is superseded by EU legislation in case of conflict), and on the other hand:
- by the fact that both the Treaty of Maastricht and of Amsterdam refer to the conception of Human Rights as consolidated in the **system of the Council of Europe**. Therefore, national legal systems were *indirectly* influenced, irrespective of their relationship with the ECHR, by the protection of HR developed by the Commission and by the Court of Strasbourg. Indeed, the fact that the two treaties contain express references to the protection of HR by the Convention makes a **harmonization** in the degree of protection of HR all over the Member States more likely. This is combined with a very important change in the system of the Council of Europe. In **1998** a protocol adopted by the Council of Europe changed the structure of the protection: whereas before the main tasks were vested in the *Commission for the Protection of HR* (which usually declared most applications inadmissible)[68], since 1998 the role of the Commission as *filter* was eliminated and complaints have been directly lodged to the Court. As a result, the system is now more favorable to the compliance and to those lamenting the violation of rights by state action or legislation.

European institutions have strived to change a system that was initially devoted to a specific object: that is, a customs union that would eliminate economic barriers and establish a single market with the 4 fundamental freedoms and provisions that aimed to ensure competition in the market (i.e., forbidding restrictive agreements as well as the abuse of dominant position). The aforementioned steps contributed to change this original framework towards the foundation of a **culture of fundamental rights protection**. Eventually, this process produced the **Treaty of Nice**.

To sum up, we have three levels of protection of HR and fundamental freedoms in Europe: the *domestic* level, the level of the *Council of Europe*, and the level of the *European Union*. This is called ***multilevel constitutionalism***, because we have different jurisdictions and fora before which we can bring our complaints for the violation of our rights. Of course, *requirements* to access these fora are different and so are the *standards of protection*.

[68] Consequently, the ECtHR was invested on a very limited number of decisions and there was a disproportion between the role of the Council and the Court.

The EU, from an economic union to a system protecting Human Rights

The group tasked with the drafting of the Charter of Fundamental Rights was basically concerned with the fact that Member States were not willing to relinquish more competences to the EU. Therefore, they tried to elaborate a sort of **declaratory instrument**[69] of Human Rights: indeed, the Charter was aimed at reflecting the elaboration of the European Court of Human Rights and the text of the Convention, together with the caselaw of some of the prominent Courts of the Member States. Nonetheless, the Charter did not result just in an instrument that mirrors the protection of HRs as enshrined in the Convention of HR, because it adds something, namely, it **combines** the protection of HR at Strasbourg and that at the domestic constitutional level. Indeed, many provisions of the ECHR are similar to those contained in the Charter.

The 54 articles of the Charter are divided into 7 chapters, six of which are **substantive chapters** identified by a **value** (*dignity*, *freedom*, *equality*, *solidarity*, *citizens' rights*, and *justice*), while the last four provisions are labeled as **general provisions**[70]. In the Preamble of the Charter there is a specific reference to the fact that the Charter is adopted on the assumption that the rights and principles provided therein form a ***body of shared values*** of the Member States. This reference to the existence of shared values legitimizes the aspiration of the Charter to be a document with constitutional value in the system of EU law. That notwithstanding, originally the Charter had no binding effect on EU institutions and Member States, because it was not a Treaty, nor it was mentioned in the Treaties. Instead, whereas it had **integrative value** in the interpretation of the principles enshrined in the Maastricht Treaty, it was still **not directly applicable** either before the ECJ or national judges. Two more steps were indeed needed to give the Charter a binding value:

- The Charter was intended to lay down the foundations of the so-called ***Constitutional Treaty***: there was a Project of EU Constitution in 2004, but it was then rejected due to negative *referenda* response in some Countries. Therefore, the Charter could not get constitutional value on that occasion.
- Later, with the adoption in **2007** of the ***Lisbon Treaty*** (then ratified in 2009) there has been a re-arrangement of the structure of the Treaties (now, the *Treaty on the European Union* and the *Treaty on the Functioning of the European Union*). So, the Charter of rights obtained the rank of **binding parameter** for the activity and legislation of EU institution and Member States.

It is now important to focus on the ***general provisions*** of the Charter in order to understand how they affect the general application and structure of the Charter. Let us start with **Art. 51 Charter**:

*The provisions of this Charter are **addressed to the institutions, bodies, offices and agencies** of the Union with due regard for the principle of subsidiarity and to the Member **States only when they are implementing** Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

*The Charter **does not extend** the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

The article first makes a reference to ***subsidiarity***, i.e., the principle whereby the higher level of government is limited as far as there is a more efficient means at lower levels of government. What is more, the article states that the Charter does not create any new power, thus reassuring Member States that it applies to them only in the implementation of EU law without any effect on the fundamental principle of subsidiarity and on the creation of new powers. Put differently, whereas it does apply to the extent to which the **standard of scrutiny of legislation** and action by the EU is

[69] In the Italian sense of *ricognitivo*.

[70] Interestingly, it is unusual to see *general provisions* at the end of a document aspiring to have constitutional value, because usually such general principles are located at the beginning.

assessed by the CJEU, but it does not expand the breadth of the powers and competences in which the EU can intervene. Hence, we can infer the ***scope of application*** of the Charter: differently to the ECHR[71], the Charter is applied only to situations that entail the application of EU law. But what if there are cases in between the Convention and the Charter. Take, for instance, limitations to voting rights depending on one's residence: if a citizen of a Member State is unable to cast their vote for the European Parliament because he/she no longer lives in their Country, the case is related to EU law and then the Charter (and the ECHR) would be applicable. But what if the same limitation was *of general application*? In this case, an **expansive interpretation** of the scope of application of the Charter would help: indeed, arguing that it affects the application of EU law to some extent, the Charter could also have effects on legislation related to other elections that otherwise would not be affected by EU law. This sort of ***theory of implied powers*** broadens the scope of application of the Charter, even if the CJEU still has to be careful because an artificially unbalanced relationship between the ECJ, EU law and Member States may end up to the detriment of EU law. It is always a nature of **balancing**: EU law on one side, and national law on the other. This is also because – as an Advocate General[72] claimed before the Treaty of Lisbon entered into force – the Charter included statements that were in large measure contained in other instruments meant to protect rights, thus referring to the **recognitive value** of the Charter. Indeed, as said, the drafters took inspiration from the ECHR on one side, and from common constitutional traditions on the other.
The following **Art. 52 Charter** reads:

*Any **limitation** to the exercise of the rights and freedoms recognized by this Charter must be **provided for by law** and **respect the essence** of those rights and freedoms. Subject to the principle of **proportionality**, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.*

The first sentence provides for a "**riserva di legge**", for limitations to Charter rights may only be introduced by sources of **primary legislation**, always respecting the essence of the rights and freedom that are limited. There has been a discussion about *what is law* in Member States' legal systems, also because in EU law there is not a definition of what is "law" (but there are the Treaties, and then Directives, Regulations and Decisions). Hence, it is not clear what "*provided by law*" means: does it refer to Regulations only or also to Directives (with or without Direct Effect)? What is more, the reference to **respecting the essence** of rights is clearly a reference to the **German** constitutional system of protection of fundamental rights. There, the *inner core* of each and any subjective right cannot be sacrificed even when balancing competing interests. There is so sort of an echo of this theory of the **essential core** of rights and freedoms.
Also, by referring to the principle of **proportionality**, the Article introduces the mechanism of *balancing between legal rights and interests* in the dynamics of EU Law. Indeed, when a concrete case presents competing rights and freedoms that are *both protected* in the framework of the Chart, yet the guarantee of one *sacrifices the other*, the principle of proportionality prescribes that any limitation must:

1. First, be ***necessary***
2. Second, it must meet ***objectives of general interest***, and:
3. Last, it must protect the rights and ***freedoms of others***.

[71] In fact, the Convention applies to all State legislation and actions, because there is no ECHR law: the Council of Europe has no power to issue instruments of legislation as the EU instead does. Therefore, the Charter only applies when dealing with topics related to EU law.
[72] The **Advocate General** is asked to give his/her opinion before the CJEU reaches a decision. The Court may endorse the opinion or decide otherwise, developing a different legal reasoning.

The test is similar to the proportionality scrutiny of the ECHR, with the difference that Article 52 is of **general application**, meaning it is *applicable to all* rights and freedoms that are provided for in the previous articles. Instead, in the ECHR, limitations to the rights are usually provided for in the *specific* provisions. This difference is of important in the analysis of the multilevel protection of HRs because the application of a different standards for the limitation of HRs that in contrast with each other may result in **different forms of limitations**, more or less intrusive depending on the applied system (whereas common standards would imply same limitations for everything).
As to the value of the Charter after the Lisbon Treaty, **Art. 6 TEU** (as amended in 2007) states:

*The Union **recognizes** the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the **same legal value as the Treaties**.*

Hence, the Charter has the **same value** as the Treaties. Therefore, the TUE, the TFUE and the Charter all make up what is the actual *constitutional framework* of the EU. In sum, we also have an explicit recognition of fundamental rights and an explicit regime of the way these can be limited.
The ECJ in ***Åklagaren v. Fransson*** ruled that wherever and whenever we have an application of the EU, whenever a circumstance *falls within a legislative competence* of the EU, the legal regime of the Charter **automatically applies**. Conversely, whenever a situation falls outside the scope of EU law (i.e., the so-called ***purely internal situations***), the Court does not have jurisdiction to apply the Charter, and the latter cannot be the *basis for the establishment* of the jurisdiction of the Union on that subject matter. This is basically the elaboration in judicial and interpretative terms of the principle embodied in Art. 51: the Charter is not intended to vest any new power more than those already existing in the Treaties, and therefore outside the application of the **principle of conferral**. Although not being a landmark accomplishment on the shared view concerning the application of the Charter, *Åklagaren v. Fransson* was one of the first cases in which the objective scope of application of the Charter was addressed by the CJEU.
But what are some of the reasons that conceptually justify the transition of the EU from an *economic union* related to raw materials, to one also *protecting Human Rights*? First, a reference must be made to the ***principle of supremacy*** established in ***Costa v. Enel***, whereby EU law supersedes national legislation by way of *hierarchy* or *competence*. This is because EU law must be **harmonized**, otherwise the purpose of having a common legislation at EU level would be undermined by the simple application of the chronological criterion to solve conflicts between laws. Therefore, even a *subsequent* law at national level cannot supersede previous EU legislation. For what concerns us, the CJEU is so supposed to **protect and enforce** Human Rights (and particularly, after the Lisbon Treaty): indeed, given that EU law has supremacy over national law and the Charter has the same value as the Treaties, the CJEU is then supposed to apply the Charter, even to hold that some national legislation is invalid under EU law.[73] In sum, the subordination of national laws to European Union law requires the ECJ to be responsible for protecting fundamental rights.
A second fundamental principle the ***principle of direct effect*** as emerged in ***Van Gend en Loos***: it means that EU law provisions that are directly applicable do not need *specific incorporation* or application to be enforced by national Courts. Therefore, provisions of the Treaties and of the Charter must be enforced before national courts, which thus must protect individual rights provided for by Treaty. Another fundamental principle, which has been established in ***Simmental***, is the ***Effet Utile***, whereby the provisions of EU law must be interpreted in a way that allows or guarantees the

[73] Of course, the CJEU cannot invalidate national legislation. Instead, it is presented with a question for preliminary reference on the compatibility of the national legislation with EU law, answering the question whether EU law can be interpreted as allowing a piece of national legislation. It is a **reversed scrutiny** of compatibility: the Court cannot directly address the *substantive* content of national legislation, but it can adjudicate on whether EU legislation allows for such an interpretation at the national level.

better enforcement. Put differently, the interpretation of a legislative act must not be narrow, but one that allows the act to have all its potential effects in practice. This means that national courts have a **duty to give effect** to all EU provisions and they should refuse to apply any conflicting domestic legislation. In practice, the judge directly applies the provision of EU law, *disapplying* (at least, in the interpretation given by the Italian Constitutional Court in *Granital*) conflicting national legislation.[74]

That being said, the Court of Justice referred to the protection of fundamental rights, whether explicitly or implicitly, even before the binding value of the Charter was established, using particular sources to justify the application of fundamental rights to EU legislation. Indeed, the inclusion of HR into EU law was not only institutional, but also judiciary. First, in ***Stauder*** (1969)[75] the Court for the first time makes an **explicit reference** to Human Rights. According to the Court, human rights enshrined in the **general principles** of the EC are protected by the Court and they should be considered as a parameter for either the interpretation and the legitimacy of EU law, and for national legislation. This shy step is a first signal of the trend that would develop later towards full protection of HR.

The 1974 case ***Nold*** adds something to our understanding of HR in EU: there, the Court *explicitly* refers to the common **constitutional traditions** of Member States, highlighting how some (national and European) provisions must be compatible with the fundamental rights protected by the Member States as well as by international treaties protecting HR. Consequently, if the CJEU is presented with an act of national or European legislation, the compatibility of such act with the general principles of the community is **weighed against** this *common constitutional tradition* of the Member States, although this last concept has not been fully defined: to what extent can the Court say that a constitutional tradition is *common*? To help with this problem, the content of HR Treaties may be used by the Court as a **guideline** for the interpretation of EU law and of the common constitutional traditions. For example, it may use the ECHR to interpret EU law, since all Member States are signatories to the Convention. Indeed, the Court **explicitly mentions** the ECHR in ***ERT*** (1989): not only did it indicate the ECHR as a guideline for the common constitutional traditions, but it also mentioned the **Strasbourg's caselaw** to establish a *standard of protection* of HR even under EU law. Then, after the adoption of the Charter, the Court in ***Carpenter*** (2003) held that the rights contained in the Convention ECHR can be used as **interpretative criteria** also for the provisions of the Charter, that is to say, as references to understand and interpret the Charter. This way, the Court has built a progressive consensus between the protection of HR by the EU and that by the ECHR.

However, fundamental rights are not absolute: indeed, they require a certain degree of **balancing** and must be limited somehow. In the EU framework, the caselaw on the limitation of fundamental rights is rather recent:

- In ***Wachauf***, the Court recognized the ***principle of limitation*** of fundamental rights within EU, holding that admissible restrictions were only those that corresponded to the general interest pursued by the Community. Of course, the Court is not a legislator and so it does not necessarily trace a clear perimeter of what are the grounds under which limitations may occur, yet the reference to the **objectives of general interest** should push us to look to the grounds upon which we can restrict fundamental rights: i.e., *explicit provisions* of the Treaties, but also the *pursuance of the protection* of rule of law, democracy, and other fundamental rights (and these rights were already embodied in the Single European Act.

[74] Disapplication is not abrogation nor annulment, but it simply means that defects of national legislation are paralyzed: therefore, if ever EU law is no longer applicable, national legislation will become effective again.

[75] At that time, the European framework was still linked to economic liberties.

- Ten years later, after the adoption of the Charter, in ***Schmidberger v. Austria*** the Court addressed the **balancing exercise**. The question was what happened when two conflicting rights were both *protected by the Charter* and *pursued the general interest* of the Community. In that case, Austria had refused to remove some protesters who were blocking the movement of goods, thus creating a conflict between the *protection of free association and free speech* and the *freedom of movement* of goods. The Court transplanted the balancing mechanism from national systems and from the practice of international courts such as the ECtHR and ruled that the protection of fundamental individual rights was a legitimate interest and therefore it justified in principle a restriction of the obligations under community law. In practice, Austria was restricting the freedom of movement by not removing the protesters, yet it was doing that legitimately because it was protecting fundamental rights falling under the general interest of EU. However, a year later in ***Omega***, the Court makes a different kind of balancing exercise, not between individual rights and free movement of goods anymore, but between the *respect for human dignity* and the *freedom to provide services*. The Court held that the entire European legal order identified **human dignity** as a **general principle of law**, generally drawing inspiration from the tradition of the Member States, the more explicit reference being to Art. 1 of the German Constitution. The Italian Constitution also refers to dignity in Art. 2: by surveying the Constitutions of Member States, the Court qualified the respect of human dignity as a **parameter of compatibility** of EU law and national legislation. Therefore, a limitation to the freedom to provide services (which was at stake in *Omega*) can be justified by the protection of human dignity. These two cases, although different, enucleate in practice the same principle.
- But what about *different kinds of individual interests*, such as economic rights (e.g., the right to strike)? In ***Viking***, the Court held that the right to strike had to be recognized as a fundamental right and as being an integral part of the general principles of Community law. However, the exercise of this fundamental right had to be **reconciled** with the requirements relating to the rights protected under the Treaty, and in accordance with the principle of **proportionality**. Indeed, there had to be a proportionate relationship between the *pursued ends* and the *means adopted*, whereby the means must be **essential to ensure** the possibility to enjoy a fundamental right. Hence, the means of restriction must be proportioned. Finally, in ***Volken and Hartmut*** the Court exercised the balancing in relation to a different right. According to the Court, the right to *protection of natural persons with regard to the processing of personal data* is not recognized as an absolute right. Still, the possibility to protect it in practice and its relationships with other obligations provided for in the Treaties must be considered carefully because this right of personal data is of a different nature according to the interpretation of the CJEU. The meaning of this wording is – alas! – obscure. Only once we have ascertained why this right exists and which are its purposes, we can weigh more accurately its protection with the limitation of the four fundamental freedoms.

These five cases show us a particularly **fast evolution**, especially in comparison with the one *before* the Charter, that led to the recognition of fundamental rights as general principles of the EU, and helped us to understand that national legislation can limit the fundamental freedoms recognized by the treaties if it is for the pursuance of the rights in the Charter. and what is the possible arrangement of the justification for the pursuance of given rights vis-à-vis the obligation. In *Schidberger* and *Omega*, for instance, the pursuance of human dignity and the freedom of speech and association are a compatible and legitimate aim, and the sacrifice of the four fundamental freedoms is acceptable. Instead, the right to strike is fundamental, yet proportionality must be applied. Finally, in *Volken*, we have seen that the right to the protection of personal data is fundamental, but it must be interpreted *accordingly to what it was established* to serve.

The Preliminary Reference Procedure as means for the dialogue

What is the instrument used to establish the vertical dialogue between the CJEU and the Member States' Supreme Courts? How can we call the CJEU to adjudicate on the interpretation of a given subject manner? Not only can the Court be called to decide infringements and annulments of acts by EU institutions, but it is also entrusted with ***preliminary rulings***, with the instrument of the ***Reference for Preliminary Ruling***. In this respect, art. **267 TFEU** provides for this power with regards to the *interpretation of the Treaties* and to the *validity and interpretation of acts* of institutions, bodies, offices, or agencies of the Union. The former, in particular, is extremely relevant for the vertical dialogue with national Courts. Indeed, when a question is raised before a national Court, the Tribunal, *if deemed necessary* to give judgement, may ask the CJEU to give an interpretation of the provision. It is very similar to the Italian "*questione di legittimità*", that gives this power to the judges if the doubt is **relevant** (i.e., instrumental to the judgement) and **not manifestly ill-founded**. The national Court is thus not obliged to refer the question but has a discretional power. This instrument aims to **harmonize** the application of EU law in the Member States. Understandably, States have been reluctant to accept judgements by the CJEU that affected not only the validity and existence of EU law but also the application of national provisions (that were indeed superseded by EU law according to the *principle of primacy*). This is particularly true when **different standards of scrutiny** are applicable. For instance, in ***Melloni v. Ministerio Fiscal*** the Court dealt with two different standards of protection of rights, the one being in the Charter and the other one being provided for in national Constitution and legislation. In that case, an Italian citizen had been charged with some crimes, and he escaped in Spain. When he was arrested, he claimed that he had been tried *in absentia*, without him being present. Italy asked Spain to extradite Mr. Melloni to make him pay his due sentence, since the discipline of the arrest warrant did not provide any exception for trials in absentia. The problem was that the Spanish legislation did not recognize the trial in absentia as legal but considered it against the principle of fair trial: executing the European Arrest Warrant would have been for Spain *violating its own standard of protection*. However, the Court, basing on Art. **53 Charter**, held that:

*"National authorities and Courts are free to apply national standards of protection of fundamental rights (higher than that deriving from the Charter), provided that the level of **protection provided** for by the Charter, as interpreted by the Court, and the **primacy, unity and effectiveness** of EU law are **not compromised**".*

In this passage, the Court tries to strike a difficult balancing between the necessity not to discuss the fact that EU is a forum for Human Rights, and the fact that if we allow Member States to apply their national standard of protection, then EU law may be superseded by national law. Therefore, it suggested that the person could be extradited if there was a possibility at least to *review* the trial because of the fact that he was tried in absentia.

We will now focus on *how* the Constitutional Courts of Italy, Spain, France, Germany, and Austria have established a **dialogue** with the Court of Justice through the instrument of the **Preliminary Reference** enshrined in **Art. 267 TFEU**, whereby whenever a national Court has a doubt on the interpretation of EU law (or has the suspicion that an act of EU law is illegitimate), it *can* raise a Preliminary Reference the CJEU if it deems it necessary. Nonetheless, if the Court at issue is a Court of **last instance** (i.e., whose judgement cannot be challenged), Art. **267 TFEU** provides that the latter *must* refer to the CJEU.

To frame the perimeter of the Reference for Preliminary Ruling, the rule whereby *any judge* can refer to the Court of Justice raises the question on *who* can be considered as a **judge**. The CJEU answered to this question in ***Abrahamsson***, a case concerning appeal bodies of a university (i.e., an administrative body that nonetheless exercises judicial-like functions). The Court held that it is not the *nomen juris* that is relevant to identify a judge, but it is the **substantial characteristics** of an organ that make it a judge for purposes of the Preliminary Reference. Put differently, the PRP (Preliminary Ruling Procedure) can be admissible even when it comes from bodies not considered as Courts under domestic law, but *at the same time* the CJEU may reject some instances even if coming from bodies domestically considered to be Courts. Hence, the Court elaborated a series of relevant **functional and institutional** factors, whereby a body is considered a Court if:

- It has been **established by law**
- It is **permanent** and not temporary (i.e., it has not been established for *ad hoc* instances)
- It has **compulsory jurisdiction** (i.e., cases assigned to that body are *explicitly* provided for by law)
- It is **independent** and applies legal rules (i.e., it works in a way that does not undermine the rule of law principle).

This frames a very broad understanding of the legal subjects that may lodge a Preliminary Reference before the CJEU. Of course, the Court of Justice interprets the requirements in this extremely broad manner also to empower itself: the more PRs are lodged, the more opportunities the Court has to clarify the interpretation of EU law, pursuing a better **harmonization** of all the rules among the various States.

What is more, while any of the parties to a case may request a referral, the ultimate decision always relies on the **judge** (but – again – domestic courts of final resort are obliged to exercise the reference if it is requested by one of the parties). As we have mentioned, ***mandatory referrals*** are prescribed for apex Courts, with two exceptions, consolidated in the caselaw of the CJ, in case either the Court of Justice has *already addressed* the legal question at stake and so the interpretation is already clear (i.e., ***act clair*** whereby *clara non sunt interpretanda*, as established in ***Cilfit***), or it is possible to grasp from the caselaw the fundamental interpretation of the issue at stake (i.e., ***act éclairé***, as established in ***Da Costa***). Of course, there is no prohibition for Courts to lodge the PR, but it is very likely that the CJEU will dismiss them as inadmissible.

The reference for a preliminary judgement is requested when the domestic Court finds that a ruling on the interpretation or validity of EU law is **necessary to enable** it to give judgment. Therefore, once the request has been lodged, the domestic proceeding is **stayed** until the Court of Justice has given its ruling. Although answers to PR requests are made in relation to a specific case, decisions issued by the CJEU are nonetheless binding not only on the *referring national Court* (i.e., the *a quo* judge), but also on all of the national authorities of Member States (as an ***erga omnes* effect**). This is because the CJEU, very similarly to our Court of Cassation, ensures **harmonization** in the interpretation of EU Law provisions in all Member States. Moreover, if the reference for a preliminary ruling concerns (in)validity of EU Law, there is a **derivative effect** whereby the possible invalidity of EU law affects the validity of **all instruments based on it**, also at national level.

The Italian case

We shall now focus on the Italian case, which is interesting because – together with the German one – it shows a sort of **evolution** over time of the Courts' attitudes. Indeed, the instrument of Preliminary Reference existed also in the original versions of the Treaties, yet there has been an **initial resistance** to use it because of a will to preserve its role as a *guardian* of the national constitutional identity. Therefore, for almost 50 years until 2008, the Italian Constitutional Court has not (at least, directly) engaged with the Court of Justice. Conversely, since 2008 it has *step-by-step* established a partial dialogue that has become full in **2013**, as we will see shortly. But what are

the reasons for this struggle to engage the Court of Justice? They ultimately concern the ranking of EC legal sources in the Italian constitutional framework: as said, in fact, the Treaty of Rome of 1957 was incorporated to the Italian system through an *ordinary law*, without any constitutional amendment. In short, the **position of ordinary domestic legislation** *vis à vis* European legislation was unclear. This, together with the **absence of references** to the European legal order in the Constitution until 2001[76], created an unclear relationship between domestic and EU law.
The first approach of the Italian Constitutional Court implied that, due to the incorporation through ordinary legislation, the applicable criterion to solve potential conflicts between national and European legislation was the ***chronological criterion*** (*see* Corte Cost. 13/1960)[77]. That is to say, the subsequent law (whether domestic or communitarian) prevails over a previous, conflicting law. Of course, this approach could not be accepted by the CJ because it would have made harmonization impossible. Therefore, the Court of Justice in ***Costa v. Enel*** established the crucial **principle of *primacy*** of EU Law, whereby the latter prevailed over *any* national (even Constitutional!) legislation, and the chronological criterion was inapplicable. As a reaction, the Italian Constitutional Court in ***Frontini*** (Corte Cost. 183/1973) ruled that, despite recognizing primacy of EU law, it retained a prominent role for itself. In fact, although subsequent ordinary legislation contrasting with EU law was invalid (because **Art. 11 Cost.** is seen as the parameter granting **constitutional rank** to the European legal order), it could not be *found* invalid by ordinary judges. Instead, ordinary judges should have **stayed** the procedure and lodged a Question of Constitutional (QLC) to the Constitutional Court. This way, only the Constitutional Court would have exercised a **monopoly** over the assessment concerning the compatibility of national legislation with EU Law. The remedy in case of conflict is the **annulment** with *erga omnes* effects. Moreover, the Court in *Frontini* laid the foundations for the so-called ***counter-limits doctrine***, whereby despite the primacy of EU law there are certain provisions of the national legal system (usually, Constitutional ones) that underpin the whole construction of the constitutional identity of a State, and that therefore are **core values** of the system. Hence, the latter cannot be derogated even by EU law.
What happened next is that the Court of Justice, despite appreciating the fact that the Constitutional Court had acknowledged the principle of primacy, could not stand the "filter" put by the Italian Court to the *direct application* of the provisions of EU into the domestic legal system (i.e., the necessity to ask for a QLC to obtain a declaration of unconstitutionality or to apply EU law). Therefore, the Court in ***Simmenthal*** prescribed the principle of ***effet utile*** under which EU law provisions that are **directly applicable** should be **applied by all** national authorities without the need to resort to a judgement by the domestic Constitutional Court. Hence, ordinary judges are entitled to carry out the interpretive action of comparing national legislation to EU law, of assessing whether there is a conflict, and possibly disapplying national legislation in conflict with EU law. Put differently, a national Court called upon to apply provisions of communitarian law is under a duty to give full effect to those provisions, if necessary, refusing to apply any conflicting provision of national legislation, even if adopted subsequently. In short, is entitled to **directly applying** EU law on a *case-by-case* basis. Eventually, the Italian Constitutional Court in ***Granital*** (Corte Cost. 170/1984) acknowledged both the principles of primacy and of the *effet utile* and allowed ordinary judges to directly apply *directly applicable* EU law (i.e., Treaties and Regulations) in situations of

[76] Now, art. **117 Cost.** requires both Statal and Regional legislation to comply with the Constitutions and with the obligations undertaken in the context of the European legal system, as well as in that of other international agreements (such as the ECHR Convention). More precisely, it provides: "*Legislative powers belong to the State and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations*".

[77] The same ruling held that the Constitutional Court itself could be included among the organs of the judiciary and, therefore, be involved in preliminary procedures.

conflict with national legislation. Instead, communitarian laws that are not directly applicable are still subject to evaluation of the conflict with domestic law in light of Art. 11 Const.
Subsequent caselaw would have made it possible for national Courts to directly apply those provisions of *Directives* that have direct effect, as well as of ECJ decisions. Moreover, the ***counter-limits*** doctrine was later refined by the Italian Constitutional Court in ***Fragde*** (Corte Cost. 232/1989), where it confirmed a **dualistic** relation between the Italian and the European legal systems. Then it came the addition of a new comma to **Art. 117 Cost**., providing:

*Legislative powers belong to the State and the regions in accordance with the Constitution and within the **limits set by European Union law** and international obligations.*

Whereas, during a first phase, the article was not regarded as an autonomous and exclusive parameter for assessing the constitutionality of national legislation but only as an ancillary interpretive criterion, it has over time acquired a more significant role, especially because it has become one of the ***interposed parameters of constitutional legitimacy*** in the interpretation of the Constitutional Court.[78]
Another issue in the relationship between the Italian Constitutional Court and the CJ has been the **competition** between the interpretation of the two Courts. In fact, when the same legislation gives rise to both a *question of constitutionality* and a *question of EU conformity*, what should ordinary judges do? Should they raise a complaint to the Constitutional Court, to the CJ, or to both of them? Generally, the Italian Constitutional Court has allowed ordinary judges to lodge *first* the preliminary reference before the CJ, and *then* (only after the preliminary ruling of the CJ) the *question of constitutionality* before the Constitutional Court. Instead, if a judge does the opposite, the Constitutional Court will declare its temporary *incompetence* to analyze the question, since it is the judge *a quo* who must refer the question for preliminary judgement to the ECJ in case he/she considers the assumed violation of a directly applicable EU norm as a **pre-requisite of the alleged conflict** with the national provision of the Constitution. This solution – called ***double preliminarity*** – confirms the **separation** between domestic and European legal orders, preserves the control over common judges while **keeping the last word** regarding the interaction with the ECJ, and allows to **avoid direct contrast** with the ECJ. However, it also had its flaws: not only it impliedso a suspension of the main proceeding for a huge amount of time during which the interests at stake would remain unanswered, but, often cases, ordinary judges would not have been interested anymore in an answer by the Constitutional Court after receiving the preliminary ruling from the ECJ.
To sum up what we have said so far, we have seen how the Italian Constitutional Court dealt with the ***preliminary reference*** tool. Initially (i.e., from the 60s to the 80s) there was no dialogue. Instead, the Italian Constitutional Court resorted to preliminary reference for the first time in a ***principaliter* proceeding** concerning a conflict between the State and the Regions (also because in the context of *principaliter* proceedings, it was the only Court which could have referred to CJEU, since in Italy States and Regions can only plead in front of the Constitutional Court). A few years later, the same Court resorted to preliminary reference in the context of **incidental proceedings** (i.e., proceedings in which the Constitutional Court is not the only judge which can refer the CJEU: other judges may refer as well since incidental proceedings may start under the jurisdiction of such ordinary judges). Finally, we have analyzed the relationship between the possibility to refer to the CJEU by ordinary judges and the one of the judges to address the Constitutional Court *before* referring to the CJEU: this causes the issue of ***double preliminarity***, which has endangered the possibility of the

[78] Interposed parameters work in this way: although the legislation does not *directly* violate the Constitution, it violates a *third source*. Nonetheless, since the Constitutions says that legislation must comply with the third source, its violation counts as an *indirect violation* of the Constitution. Another example is **delegated legislation**: when the Parliament empowers the Government to adopt a delegated decree (i.e., *d.lgs.*), if the latter violates the criterion prescribed by law, then it is invalid due to an *indirect* violation of the Constitution.

Constitutional Court to retain its **monopoly** on the interpretation of the constitutional provisions. In fact, whenever an ordinary judge launches a preliminary reference to the CJEU and the latter responds, the judge will no longer be interested in addressing the Italian Constitutional Court. This happens because the judge understands that addressing the latter would make the proceeding too long, and therefore the underlying interest of the parts would be harmed. This notwithstanding, in the recent decision ***267/2017*** concerning double preliminarity, the Constitutional Court has affirmed the principle according to which ordinary judges should **always** be able to refer the Court of Justice. Therefore, not only are they entitled to preliminary reference when they have not addressed the Constitutional Court yet, but even when the latter has already delivered a judgment on the constitutionality of provisions with reference to domestic legal system.

Another issue that is worthy of consideration is the so-called ***counter-limits theory***. We have already seen that the Italian Constitutional Court in *Frontini* accepted the principle of **primacy of EU law** over domestic law but pointed out to the existence of some **core values** within the Italian legal system that cannot be disregarded even if the principle of primacy is applied. We will now analyze the counter-limits issue in relation to two different cases involving two different sources of law: namely, a case concerning **customary principles** of international law that are automatically accepted in the domestic legal system pursuant to art. **10 Cost.**, and another one about **fundamental constitutional** principles and EU Law.

1. First, the issue in ***Ferrini*** concerned the immunity of a sovereign state for civil lawsuits for the so-called **acta *iure imperii***.[79] In *Ferrini*, an Italian citizen asked for damages for the conduct of German soldiers during WW2 occupation of Italy. In this respect, the ICJ (International Court of Justice) had decided a case concerning a conflict between Germany and Italy on the possibility of Italian courts to try the German State and adjudicate damages for alleged victims even if the acts of the German army were technically *iure imperii*. The ICJ had ruled that Italian Courts could not do that in light of the **immunity** of States from civil lawsuits. The issue was brought before the Italian Constitutional Court, which ruled that although Art. **10 Cost.** requires compliance of the domestic system with international law (including customary international law), the case at stake implied a denial for victims to obtain the damages for the harm they had suffered. Therefore, the customary international law principle at stake (i.e., State immunity from civil claims for damages caused by *iure imperii* acts) was incompatible with the fundamental constitutional principle of Art. **23 Cost.** that entitles anyone to file a claim for the protection of subjective rights. Consequently, the following decisions by Italian judges could even attack German properties in Italy, and this obviously triggered several diplomatic issues.
2. Another important case was ***Taricco***, which concerned the ***principle of legality***. In particular, it was unclear whether the principle of legality was *also* applicable to the rules on the *statute of limitation* (i.e., prescrizione), namely the rules that prevent a person from being tried and punished for a given crime unless the prosecution and the judgement had happened within a due time frame. Obviously, the solution of the case required first to solve the issue whether the statute of limitation was a procedural or a substantive principle. What was the circumstance triggering the conflict between the Italian legal system and the Court of Justice? There was an EU directive concerning the prosecution of VAT fraud which compelled the State to persecute those evading the VAT in a way that conflicted with the principle of legality. This was so because the application of the principle of legality and of the statute of

[79] Under international law, States can issue two different acts: acts ***iure imperii*** and acts ***iure gestionis***. By the means of *iure imperii* acts, States manifest their **sovereign powers**, while by the means of acts *iure gestionis* States perform acts of ordinary management related to the activities of public administration. Customary international law usually provides that a State cannot be sued in Courts for iure imperii acts.

limitation to VAT made it *impossible to prosecute* those who had already evaded the VAT tax: indeed, the statute of limitation had already expired. The Italian Constitutional Court first lodged a question for preliminary reference concerning the conflict between the Italian statute of limitation with the VAT framework laid on EU level. Firstly, the Court of Justice held that the statute of limitation under domestic provisions conflicted with the VAT directive and therefore should be set aside. Nonetheless, it underlined that there had to be an assessment in light of the principles of **legality** and **proportionality** contained in the Charter of Fundamental Rights of EU Law. So, the Court of Justice held that the statute of limitation was a **mere procedural rule** and therefore not covered by the principle of *retroactivity*. However, the Italian Constitutional Court distanced itself from this interpretation and held that in the Italian legal system, the principle of **non-retroactivity** of criminal sanctions was not merely procedural but instead a **substantive rule of legal civilization**. Therefore, the Court issued a second *request for preliminary ruling* addressed to the Court of Justice that acknowledged the prevalence of EU law but still pointed out that this prevalence couldn't affect the *core principles* of the Italian Constitution, thus invoking the ***counter limits theory***. The Constitutional Court's firm position made the CJEU acknowledge the risk of an open clash with the former, and diplomatically compelled it to hold that Member States are free in deciding whether certain rules (including the statute of limitation rules) are procedural or substantive. So, the CJEU recognized the Italian right to qualify the statute of limitations rule as a substantive one, leading to the conclusion that the obligation to ensure the collection of the evaded VAT could not violate the principle of legality. Eventually, the Italian Constitutional Court addressed the issue in a final decision and held that:

a. The *question of constitutionality* raised before itself was *unfounded* because the facts of the case occurred before the CJEU decision announcing the Taricco rule and stating that EU law should have prevailed over domestic constitutional guarantees.
b. Nonetheless, the *Taricco* rule was inapplicable by common domestic judges as it contradicted the principle of legal certainty in criminal matters provided under the Italian Constitution and under EU law itself since the latter protects citizens from the retroactivity of criminal sanctions.

What should we take away from the *Taricco* saga? The Italian Constitutional Court has entertained an effective dialogue with the CJEU since it managed to avoid the deflagration of the conflict with the CJEU and has traced the boundaries of the application of EU law in the domestic legal system by affirming that the counter limits were still there even if not invoked openly. Another important aspect is the **interaction** between EU law provisions and constitutional provisions. The dynamic of such interaction sees the prevalence of EU law provisions on constitutional provisions unless the latter are **fundamental** and therefore protected under the counter-limits theory.

But the dialogue with the CJEU didn't involve just the Italian Constitutional Court.

The Spanish case

Spain is not an original member state of the European community but joined it only in **1986**, after the end of Franco's dictatorship in 1975 and the approval of a new constitutional charter. Immediately after, the Constitutional tribunal was created and started to work. Nevertheless, the initial approach was quite **prudent** and reluctant to exercise the reference for preliminary ruling: indeed, in 1991 it declared that EU law has no constitutional relevance, although the position of EU law in the legal system of sources *was* defined by the 1978 Constitution. Prudently, the majority of

Spain constitutional judges tried to avoid the issue, although they tried to adopt a sort of preliminary opinion concerning the accession of Spain to the Maastricht Treaty and then again, another opinion concerning the adoption of the so-called constitutional treaty. Conversely, at the beginning of the new century there has been a massive resort to *preliminary rulings* which led the Court to affirm that EU rules and CJEU caselaw had to be used as **interpretive tools** in cases concerning *fundamental rights* when EU provisions were involved, thus creating a distinction between:

- Cases in which fundamental rights are at stake within the competence of EU law, and:
- Cases where fundamental rights are *not within the competence* of EU law.

In 2004, the Constitutional Tribunal ruled on the **violation of the due process** right, finding that the violation of the right to due process can be found when an ordinary judge has **not sent a reference** either to the CJEU or the Spanish Constitutional Tribunal on the contrast between EU and domestic law.

More recently, however, there has been some change in attitude. Normally, Constitutional Courts take examples from other Constitutional Courts and try to adjust their attitude. In this regard, despite the 2004 ruling, in 2005 the Spanish Supreme Court held that refusal to refer the CJEU did not violate the principle of due process because no Spanish law had to be set aside. Meanwhile, the CJEU was deciding the *Melloni* case by ruling that the common standard of protection established under EU law doesn't affect a higher standard of protection in any MS out of the scope of application of EU law, thus recognizing the possibility for MSs to have **different standards**. Some authors speak of *the best standard* implying that there may be more than two standards between the European standard of review and the domestic one; other authors talk about *a better standard* implying that there is only one standard. Anyway, the main takeaway is that the domestic standard could be **higher** than the EU one if it protects a right not falling within EU law competence; on the other hand, the CJEU is not keen on admitting that such higher standard of protection may be provided on domestic level also in the field of EU competence. To conclude the Spanish overview, it is useful to mention another ruling dated 2014. Here, the Constitutional tribunal ruled that the EU law (as interpreted by the CJEU) and the ECHR (as interpreted by the ECtHR) were **at the same level** of the Spanish Constitution.

The French case

Initially, French courts did not uphold the *principle of primacy* of EU law. This doctrine (so-called ***Matter doctrine***) was followed for decades, until 1975 by the Court of Cassation and until 1989 by the Council of the State, up until the ***Arrêt Nicolo*** ruling when the primacy of Eu Law on domestic constitutional law was finally recognized.

France has had its own Constitutional court since 1958 (the so-called **Constitutional Council**), which worked differently from its Spanish or Italian counterparts. Indeed, its instruments were quite limited, and the Council wasn't very keen on dealing with EU law. In light of this, the Council has been considered a sort of **political** institution. Eventually, things changed, and the Council started to function in a similar way to its European homologues.

The first case of preliminary ruling was admitted only in **2013**. In the same year, the Luxembourg court ruled in a case concerning France that provided that the application of the EU act is not frustrated when Member States apply further constitutional rules like the *principle of fair trial*, but they have **limited discretion** in accordance with the principles of *equivalence* and *effectiveness* of EU law. This means that the French Constitutional Council has some flexibility in interpreting EU law, but this flexibility is limited, and the Council must still **preserve the meaning of EU law**, so that it is not frustrated. Another French case dated 2013 concerned the deportation of a foreigner who was illegally present in France. The French immigration law provided only one kind of recourse to an administrative tribunal, without any possibility of appeal. However, considering that the case law of the CJEU requires **two instances of judicial protection**, the Constitutional Council decided to declare the law above unconstitutional. In this case, it is clear that the Constitutional Council tried to avoid using EU law categories, preferring to apply a **domestic standard** by declaring a domestic provision unconstitutional before issuing a preliminary ruling.

The German and the Austrian cases

As a premise, the German case is slightly more complex than the others we have considered. Germany is indeed the most powerful country of the Union both in economic and political terms. Therefore, it's not surprising that the Constitutional Court of Germany has somehow led the dialogue with the CJEU and still constitutes a model for its European homologues.

At the beginning, there was a **prudent** approach. The case law of the court was founded on Art. **24 GG**[80], which empowers the German Parliament and Government to **transfer powers** to any kind of international organization. Then, in **1992**, there is a kind of change in prospective due to an amendment to art. 23 GG following the reunification of Germany, after which the GG started to be applied in the Eastern part of the country. The new version of the article now provides that Germany **shall transfer** (and is <u>not</u> simply *empowered to*, which implies discretion whether to do it or not) **sovereign powers** to take part in the Union *insofar* as the latter is committed to democracy, rule of law, and subsidiarity, which essentially guarantees a comparable level of protection of basic rights to that offered by the GG. On the one hand, Art. 23 imposes the transfer of powers, using the verb "shall". On the other hand, though, it also states more precisely that the Union to which the powers will be transferred must have specific characters: therefore, powers are legitimately transferred <u>only</u> if the characters of the subjects delegated are in **conformity with the principles** of the German Constitution. Before the Constitutional amendment, the German Constitutional Court had already delivered several rulings to set some constitutional **limits** to the German participation to the European integration. For instance, the Court in **1967** had stated that, while itself was incompetent to review secondary EC legislation, primary EC legislation (intended acts of a supranational authority established by international treaties through a transfer of powers) had to be contained **within the meaning of art. 24** (at that time, art. 23 hadn't been amended yet). In 1971, the Court expressly recognized the **primacy** of EU law over domestic law.

However, in **1974**, the Solange saga began with ***<u>Solange I</u>***.[81] The conceptual premise was the following: the relationship between EC and domestic law does <u>not</u> fit into the traditional scheme of *hierarchy of norms*, because EC law stems from an **autonomous legal source** and thus the domestic legal sphere and EC law are valid **independently** of each other and stand side by side. This is a formulation of a strong ***dualistic theory***, which implies that there <u>cannot</u> be any kind of hierarchy since hierarchy presupposes that the provisions need to belong to the *same* system. Therefore, if systems are different, there is <u>no</u> possibility of a monist system. It is for this reason that the German Constitutional Court in *<u>Solange</u>* ruled that as long as EC law does not encompass a catalogue of *human rights adequate* to the fundamental rights enshrined in the GG, domestic courts are **required to send a question** to the Constitutional court *if* the EU provisions, as interpreted by the ECJ in preliminary ruling **contradict** the fundamental rights of the GG. The Constitutional court, indeed, is the final author of all the decisions concerning a possible conflict between EU law and German

[80] I.e., *GrungGesetz*, the German Fundamental Law. Interestingly, the literal meaning of "GG" is <u>not</u> *Constitution* because the founding fathers believed that a new Constitution would have been approved following the reunification. However, this didn't happen, and the GG has simply been extended to the eastern part.

[81] The German word *solange* can be translated into "as long as".

constitutional law about rights. This means that, as long as a German Court is not sure that the EC system provides a comparable protection of the basic rights enshrined in the German Constitution, any doubt concerning a possible conflict must be differed to the German Constitutional court and not to the EU court. This implies that the final owner of the power to decide is obviously the German Constitutional court and not the CJEU.
Then, in **1986**, ***Solange II*** acknowledged the level of **development of fundamental** rights at the EC level: the situation had been improved and the protection of rights in the European Court had made progresses. The German Court ruled that there might have been a **desistance** from asserting its competence to review the compatibility of acts of EU law with domestic fundamental rights *as long as* the Community's legal order provides for a level of **protection equivalent** to the domestic one. So, Solange II translates into positive terms what Solange I had stated in negative terms. Indeed, the Court held that, since at that time there was a better protection of rights at an EU level, it would have been rare that there would be need for verifying the compatibility of EU acts with the domestic law. This possibility is not excluded, but it is declared *rare* because the state of protection of legal rights had been improved. So, the German constitutional court admitted that it was **unlikely** for EC acts to be scrutinized under the German fundamental rights standard, and accepted that the CJEU was then in charge when it came to fundamental rights protection against EU acts.
Furthermore, German constitutional law introduces another series of problems which can formulated in the expression ***ultra vires doctrine***. This is because EU law is **self-strengthening** through caselaw and in part through the Treaties. Also, the Maastricht treaty reserved certain matters to the competence of the EU. At that point, the German Constitutional Court was authorized to verify whether primary and super-primary acts at the European level complied or not with the **boundaries set** for the transferal of public powers to the EU. Since the competences of the Union grow, due to both judicial interpretation at an EU level and new treaties, when the EU institutions adopt any kind of act it is necessary for Germany to verify whether they are *operating within* the sphere of the **powers delegated**. In this context, the German Constitutional court carries out a **twofold** control: it verifies the act's compatibility with both the GG and EU law (scholars have called it a scrutiny upon a "Germanized" version of EU law). If the act is *ultra vires*, then it will be no longer binding in Germany. One could ask whether this doctrine complies with Germany's obligations under EU law, and primarily with its **duty to enforce** EU law. The German expression that is used in order to make clear this approach is the aforementioned concept of ***competence of competences***, that identifies who has the power to state whether the repartition of competence has been violated or not. The one who has the competence of the competences is the **real sovereign**. Nonetheless, this doctrine has been invoked but has never been applied: indeed, the German constitutional court has never declared an act as ultra vires since 1993, despite restating the validity of the doctrine in ***Lissabon Urteil*** (2009). There, it declared that it has competence to review EU acts to **assess their compliance** with powers conferred to the Union and whether they affect anyhow the *core content* of the GG constitutional identity. Finally, in ***Honeywell*** the Court ruled that it is unlikely that the Court ever will declare an EU act ultra vires. To reach such serious effect the Court must ascertain:

1. that the EU act **exceeds** the competence in an **obvious** manner (i.e., it must be a ***gross violation***), and amounts to a **structural shift** in the balance of competences between the EU and MS *and*:
2. that the CJEU has had the **chance to scrutinize** the EU act at stake through a prior preliminary reference.

What is more, the German Constitutional Court has always been **reluctant** to refer questions for preliminary reference to the CJEU. For instance, in **2003** it stated that there is no need for constitutional review of a statute when it has *already been declared inconsistent* within EU law. This

means that if the CJEU has already declared a statute incompatible with EU law, new occasions of conflict should be **avoided**. Instead, if such incompatibility has not been declared, there is no obligation for the Constitutional Court to send a preliminary reference to the CJEU. This means that the Court remains **sovereign** in deciding if and when to start a procedure for preliminary reference. If the compatibility is still unclear the CJEU could be delivering its preliminary reference on an invalid rule, and therefore to avoid that the constitutional control always comes first.
In 2013 there was a preliminary reference concerning the program of purchase of MS bonds on the secondary market, which could be **ultra vires** or in violation of EU or German constitutional provisions. In this case (***Gauweiler***), the Court held that the problem of the purchase of MS bonds on the secondary market by the ECB at that point was **legitimate** under EU law, so the conflict once again was avoided. But the story was not over. In 2017, there was another preliminary reference concerning the PSPP (i.e., public sector purchase program). According to the CJEU, that is sufficiently justified and falls within the monetary policy mandate on the ECB. Also, it is compliant with the principle of proportionality. The problem was solved again avoiding a real clash. Finally, the problem arose again in **2020** when a new PSPP was activated and, at that point, the German Court stated that there was no sufficient evidence that the principle of proportionality was complied with in designing the program because the German government had failed to take appropriate steps to ensure that the program of bond acquisition would not extend *beyond the monetary policy* competences of the European central bank. In that case, for Germany, the decision of the European central bank was **ultra vires**. This is the first case in which the German court has applied the ultra vires doctrine to the PSPP. Nonetheless, it should be noted that the failure to respect the **distinction between the monetary and the economic policies**, which are two different fields of competences for the European institutions, does not necessarily entail a lack of proportionality. So, this is a kind of mixed decision which *excludes the lack of proportionality*, but it does not exclude the ultra vires operation of the program.
As for **Austria**, it entered the EU only in 1995 and the dialogue started in 1999. There was a partial stall in the last decade, until **2011** when the Austrian Constitutional Court stated that EU law is not a *standard of review* because the latter must follow only the criteria elaborated by itself. However, the Court promised to maintain a **cooperative stance**. This solution is apparently in contrast with Austria's *monist* nature, that would lead us to consider EU law at least as some kind of an integrative standard of interpretation. Nonetheless, in **2012**, the Austrian Constitutional Court stated that the **Treaty of Nice** is a **constitutional yardstick** in constitutional cases before the Austrian Constitutional Court. This might be read as a symptom of the monist understanding of international-domestic law relationship, but this case is quite fluid and paves the way to possible different interpretations.

The relationship between the ECtHR and domestic courts

The relationship between the ECHR and domestic courts brings about another series of problems. We have already defined the position of (human rights) international law in the domestic constitutional law systems. We shall then have a look at the way the Strasbourg Court works, its jurisdiction and its approach. The ECtHR has always tried to explain that is not a sort of *Court of fourth level*, that is, it has not a **subsidiary character** and is not a "supranational Court of Appeal". Besides, its approach is traditionally very **prudent**: indeed, there is a lot of self-restraint and it is hard to describe the Strasbourg court as a hyper-active court, since it has a 97% inadmissibility rate. The Court also usually reminds that it is not a *revision* judge or a fourth-degree judge. This is also thanks to a sort of **presumption of legitimacy** of national domestic legislation:

- Firstly, because it pretends to be **respectful of the legislative choices** and of the constitutional choices of the States that have ratified the ECHR

- Secondly, because the traditional caselaw of the ECtHR leaves to the adherent states a **margin of appreciation** that implies both a respectful attitude towards the most important internal choices and some discretion in the implementation of the Court's rulings: indeed, States might decide not to implement the decision or to implement it differently from what the Strasbourg court had conceived.

Nonetheless, this attitude becomes much more aggressive and concretely operational when the Court comes to the concrete case: from this point of view, the Court is able to review *any kind of act* coming from the adherent States, such as police behaviors, administrative acts, secondary provisions like rules and regulations, statutes and even Constitutions or Constitutional Court rulings. There are some examples of national **constitutional provisions** that have been declared incompatible with Convention by the ECtHR. The most important one concerned abortion in Ireland. **Ireland** had (and has) a provision in its Constitution (art. 40) concerning the legitimacy of abortion. After being amended, it provided for a right of information to women concerning abortion, but it did <u>not</u> admit any kind of *diffusion* of that information. The Strasbourg court declared that the right of the woman, as interpreted according to the Convention, is incompatible with such restrictions applied by the Irish Constitution, and therefore that Ireland had violated the Convention by failing to provide an accessible and effective procedure by which a woman could have established whether she qualified for a legal abortion under current Irish law. Another case, in 1988, concerned **Turkey**. There, the Court declared that the general prohibition under the Turkish Constitution to create a *communist party*, independently of its dangerousness for the liberal democratic order, was incompatible with the ECHR. We then have a case against **Hungary**, whose Constitution prohibited policemen to be enrolled in any political party was declared incompatible with the *freedom of belonging to political parties* according to the Court's interpretation of the ECHR. These examples show that the ECtHR may in practice **set aside *any* provision** conflicting with the ECHR, should it be a *constitutional* one, or even a *general practice* (i.e., an uncodified provision): for instance, the Court declared **unconventional** (i.e., incompatible with the Convention) the rule of procedure of the Spanish Constitutional tribunal which provided that the attorney general, could have the last word in the debate.

In sum, the approach of Strasbourg's Court can be described as implying a substantial **reversal of the burden of proof**. This primarily happens when *life*, *dignity* or *physical integrity* are at stake, which means that if someone declares that he/she has been mistreated in a police station, then it is the State who has to demonstrate that such a behavior has not taken place. This tough approach is justified mainly by the fact that the Strasbourg court (differently from the CJEU) has to handle only **single parameter** represented by the ECHR, which protects human rights only. Therefore, the balancing work is much simpler, because the Court only needs to balance rights and doesn't have to put together *economic interests*, *civil liberties*, or *political freedoms* vis à vis social rights. Such simple **mono-thematic approach** is considered as a kind of "***ius publicum europeum***", as interpreted by the Strasbourg Court in order to encompass the Convention, as well as the added Protocols and the Preamble, which includes a summary of the values applied by the individual articles.

It is worth saying that while the EU has 27 Member States, the Council of Europe to which the ECHR belongs has **47 adherent States**: the number of the States is higher, and their constitutional traditions are much more different because of their different histories. When the Convention was drafted, ratifying MSs were all from western tradition (although some of them, such as Italy and Germany, were coming out of dictatorial experiences). Then came the wave of the 70s, with Greece, Portugal and Spain also coming out from dictatorships, followed by wave of the 90s after the collapse of the Soviet Union and of its satellite States. Therefore, the Court had to reckon with different problems at different times: at the beginning, for instance, it was compelling Italy or France to get **accustomed to some very general principles** of the Convention (e.g., the fair trial principle in

criminal proceedings or the full conformity to the principle of equity and proportionality concerning the tax system); then, during the second wave, the problem was obliging the States to **comply with the caselaw** developed in the previous decades; then, at the beginning of the 90s, the task became very difficult because several of the new ratifying States had adhered to the ECHR not due to a genuine inspiration, but due to simple **reasons of interest**. Indeed, at that point, belonging to the ECHR and to the NATO was an instrument to be accepted by the international community, to receive loans from the IMF or from the World Bank. So, when the spirit is not totally spontaneous, there might be the need for a stronger way to look inside the newcomers' legal systems and make an **deeper adjustment** than before. Hence, the original issues return to the scenes, and that is why it's difficult to describe the work of the Strasbourg Court in homogeneous terms, because both synchronically and diachronically there have been very different groups of cases. By way of example, scholars describe the work of the Court in part as an ***effet incitatif**,* i.e., a **proactive stimulus** towards the States through caselaw, and apparently, from this point of view, there is no difference between States applying a *monistic* or *dualistic* or *hybrid* approach to their interpretation of the relationship between international law and domestic constitutional law. For instance, in the application of Art. **6 ECHR** (i.e., the due process and fair trial principles) the Court exercised an important influence on the structure of the MSs' criminal procedures. Also, the principle of *free legal assistance* at criminal trials has been promoted by the caselaw of the Strasbourg Court. This idea makes us say that the ECHR and its judicial interpretation by the Strasbourg Court have been an essential starting point for the European youngest **pluralist democracies** that came from previous authoritarian conditions, and many scholars speak of a **transcendental effect** of the ECHR, referring to its authority which transcends its mere content but acts as a kind of an interpretive pivot in the process of domestic constitutional law, above all for the last comers to the western values.
Also, an expression that is commonly used to describe the approach of the Strasbourg court is the consolidation of a "***bloc de conventionnalité***" (i.e., a conventionality interpretive block) through the consolidation of a solid judicial acquis. From this point of view, the approach of the Strasbourg court might be roughly described by comparing it with a **constitutional judge**: in fact, there is even more affinity between the Strasbourg Court and domestic constitutional Courts than there is between the latter and the CJEU. To some extent, the ECtHR is much more "constitutional" than the constitutional court. The reason behind this is that the parameter used by the ECtHR is much simpler (it decides only on the basis of the ECHR, which content is limited to human rights), therefore its syllogistic technique is easier and the testing of the provision under the parameter becomes simpler as well. This is probably one of the reasons why, the CJEU has always been suspicious and jealous towards the interpretation of the EU constitutional law operated by Strasbourg.
As far as **Italy** is concerned, the Italian Constitution initially had only two provisions concerning international law. Art. **10 Cost.** states, in its first part:

*The Italian legal system **conforms to the generally recognized principles** of international law* […].

Hence, it seems like the article declares that international customary law has the **same status** as the Italian Constitution itself. Then, the following Art. **11 Cost.** reads:

[…] *Italy agrees on conditions of **equality with other** States to the lim**itations of sovereignty that may be necessary** to a world order **ensuring peace and justice** among the Nations. Italy promotes and **encourages international organizations** furthering such ends.*

Apparently, we have two provisions very similar to the old articles 23 and 24 GG. According to Art. 10 and 11 Cost., the legal status of the ECHR in the hierarchy of norms is the same of the **ordinary law which incorporates** the Convention because the incorporating act (ordinary statute) confers to the incorporated act (ECHR) its same status. Considering this, the Italian Constitutional Court in 1999 ruled that since the Convention aims to protect human rights, these rights deserve such guarantees **regardless of their status** in the constitutional framework. In other words, the Court stated that although the status incorporating the ECHR is an ordinary one, there might still be a **coincidence** between constitutional and ECHR provisions, which shall therefore be granted constitutional protection in light of their particular aim of human rights protection. Therefore, ordinary judges would have to apply the *Granital* criteria not only when EU law was at stake, but also to conflicts involving domestic law and ECHR. The consequence of this is that after *Granital*, any ordinary judge should have been able **set aside** any domestic statute conflicting with the ECHR. However, the Italian Constitutional Court doesn't really like authorizing such an approach, which would have implied a kind of **diffused control of conventionality**: if ordinary judges were authorized to set aside the domestic provisions due to incompatibility with the Convention, any judge would have been an independent interpreter of the relationship between ECHR and the Constitution, and the Italian Constitutional Court would have **lost the control** of this relationship. Therefore, with the ***Twin Rulings*** (**348** and **349/2007**) the Court finally affirmed that the status of the ECHR in the domestic hierarchy of norms and provided ordinary judges with a standard to apply to ECHR/domestic law relationship. What is more, in the meantime the Italian Parliament had amended **Title V Cost.** The new version of art. **117 Cost.** stated that legislative powers:

*shall be vested in the State and the Regions **in compliance** with the Constitution and with the constraints deriving from **EU legislation and international obligations**.*

By introducing such provision, the lawmaker intended to put State and regional laws on the same hierarchical level. Therefore, to fully equalize State and regional law, both of them were subjected to the **same constraints** deriving from EU and International law. Such obligations obviously derive *inter alia* from international human rights Treaties, and above all the ECHR. The need for an interpretation of the new art. 117 Cost. was therefore the second reason behind the Constitutional Court's twin. From that moment on, the Court has stated that article 117 confers to the ECHR a status **higher than ordinary law** in the constitutional framework, although not equivalent to the Constitution itself. Finally, if a conflict between an ECHR provision and a domestic legislation provision arises, the judge must stay the proceedings and **refer the issue to the Constitutional Court**, which means that ordinary judges are no longer the judges of conventionality. We can see the difference with EU law: the latter can prevail over domestic law and can be suspended and set aside by ordinary judges, while a provision conflicting with the ECHR, should be challenged before the Constitutional Court. Consequently, we can affirm that from 2007 ordinary judges are judges of EU law but not of ECHR.

Finally, with the ruling ***49/2015***, the Constitutional Court in a *precautionary warning* held that national courts cannot disregard ECtHR caselaw once it has become **consolidated**. This implies that isolated rulings should not be applied generally beyond the narrow facts of the individual case because they may be simply a *dictum* concerning individual cases with no compelling force towards the constitutional courts. As it emerges, the Court does not justify it with the *margin of appreciation* principle since it would be pointless considering that the margin of appreciation principle is firmly embedded in the ECtHR caselaw. To distinguish between **binding** and not binding effects of the Court's judgements, the ECtHR refers to ***well-established judgements*** and **pilot** judgements issued by the Grand Chamber instead of single Chambers as to the main criteria.

In extreme sum, the Italian Constitutional Court is completely **open** to the decisions made by the European Court of Human Rights, yet it maintains a margin of **appreciation in applying** its caselaw. Of course, future judgements may change this trend.

Speaking of other European approaches, two cases may be mentioned. The first one (2018) concerned **Bulgaria**. The Bulgarian Constitutional Court ruled that the **Istanbul convention** (which falls within of the Council of Europe domain even though it has been signed in Asia) concerning the *prevention of domestic violence and violence against women*, was **unconstitutional** because it contained a specific **gender ideology** whereby gender is a *matter of choice*. This has been interpreted as an affront against the Bulgarian constitutional identity of the state. Here we are on the edge of a theoretical division: on the one hand, we have a trend towards an almost complete freedom of management of gender issues, while on the other we have a traditional approach according to which choice is incompatible with the **national identity**.

Something similar has happened in **Russia** in 2015, when the Russian Constitutional Court ruled that in cases of **conflict** between decisions of the ECtHR and its own, Russian constitutional provisions shall prevail over the ECHR provisions. At the same time, should the latter diverge with Russian constitutional provisions, the Court will not enforce the ECtHR decisions. This argument has been promptly translated into a **constitutional amendment** approved by the Duma in 2016, which has been. The facts have been criticized by the **Venice Commission**, which found them irregular and invited the Duma to revise the statute modifying the Constitution. However, its request remained unfulfilled. Instead, the Russian Constitutional Court in 2017 ruled that ECtHR decisions contrasting with the Federal Constitution must not be enforced.

Last, we must mention that a new ***Protocol 16*** (2018) has been added to the ECtHR, although only 25 States decided to ratify it. The protocol does not identify any new rights or freedoms, but it introduces a new ***advisory mechanism*** through which higher domestic Courts of a state may refer an **interpretive** issue coming out of a case before them. Then, a panel of five judges of the Grand Chamber decides whether the request is admissible, thus acting as a sort of "filter". Should the request be admissible, the **Grand Chamber** (in which at least one judge must belong to the same State from which the case arose)[82] delivers the advisory opinion. The advisory opinions are **non-binding** and thus are not real rulings. Of course, this protocol is very important because it changes the nature of the Strasbourg Court since it could now be reached by Supreme and Constitutional Courts through this sort of preliminary reference and thus reduce the Court's final workload.

The Vertical Judicial Dialogue in Latin American and Africa

The Inter-American Court of Human Rights and the Inter-American Convention of Human Rights are two interesting examples, despite being completely different contexts (in political, economic and social terms). An important precondition which has seriously influenced the working of the **Conference of San Jose** in Costa Rica was the presence of **dictatorships** which ruled Latin American Countries and Costa Rica itself, thus shaping the functioning of the judicial system. There have been frequent violations of human rights such as kidnapping, forced disappearances, executions, tortures, murder etc. during this period of dictatorships, and these situations made it really difficult for the various National Constitutional Courts and for the Inter-American Court of Human Rights to interpret constitutional provisions in a correct way. Also, before the end of the Cold War and the beginning of globalization, the role of the army in Latin America was completely different from other countries: Latin American armies had a massive amount of power (e.g., during a war they could step in and interpret constitutional provisions), with the excuse that they would have taken the power just for a couple of years, to assure restoration of democracy and then maintenance of peace. Thus, here we have a different kind of caselaw compared to the European one. For instance, something worth mentioning is that the Inter-American CtHR has been often referring to its own judgements, their own caselaw and to the Inter American Convention as ***jus cogens*** only from **1993** (after the

[82] This is quite unusual for the Strasbourg Court: normally, judges belonging to a certain nation must not sit together with their colleagues. This exception is due to the fact that it is easier to have someone coming from a particular national legal system since that judge has better knowledge of that specific Country.

end of the Cold War). On a more cultural note, Latin Americans boast of human rights: during the 16th century there was a big quarrel between Franciscans and Dominicans.[83] In sum:

- the cultural, social, and political **premises** are completely **different** than in Europe.
- the Inter-American CtHR states that its caselaw is made of both the ***obiter dicta*** and the ***final dicta***, meaning that both the ruling and the arguments make up the caselaw.
- In Latin America too, filing a complaint requires the **exhaustion** of all domestic remedies as prerequisite.

As to the effects of judgements of the San José Court, naturally, national Courts must **comply** with the rulings since they have **binding value**. In **1998**, the Court stated that not only do national Courts have to *passively* implement its rulings, but they must also be **proactive**: indeed, they must make their best effort to give execution to the decision. The rulings of the San Jose Court also have **horizontal** effect, i.e., they are valid also in the relationships between individuals (the famous *Drittwirkung*). Moreover, a point must be made on issues such as **immunity**, **amnesty**, statutes of limitations, self-amnesties (see Chilean case) or even **blanked amnesties**.[84] Starting from ***Blake v. Guatemala*** (1966), several judgements concerning some particular crimes (torture, murder, forced disappearance, etc.) have declared the inconsistency of certain national provisions with the relevant Treaties. For instance, the Supreme Court of Peru has been compelled to reopen (and here, we see *proactivity*) some cases, thus even violating the *principle of non-retroactivity* (since acquitted individuals may have been released) as well as the *ne bis in idem* principle (since a second criminal proceeding was to be carried out against the same individual), and ignoring the possibility of previous applications of immunities, amnesties, etc. The example makes clear that the Court of Saint José has been very **active** in overseeing national Supreme Courts in their judicial activity and keen on declaring the *unconventionality* of certain national provisions attributing amnesties, immunities and other benefits aimed to certain individuals aimed at waiving certain individuals' criminal liability deriving from rights violations (i.e., *ad personam* laws). Despite an initial tension[85], it is now clear that there is no room for national Courts to create immunity space for people who are responsible of gross violations.

Finally, the San José Court has been also focused on the protection of **indigenous** and **aboriginal** people by primarily resorting to the ***principle of equality***. Indigenous people have been traditionally precluded from being able to file a case before national Courts due to a lack of resources and ignorance of the relevant judicial procedures. So, for a long time, there has been no chance for aboriginal people to start a complaint in domestic Courts. Instead, they are now more and more frequently resorting to international legal and judicial systems to assert their rights. For instance, the Court in the famous ***Mayagna vs. Nicaragua*** (2001) ruled that indigenous people are entitled to the right of ownership of land of resources (that is to say, to property rights). Interestingly, the Canadian Supreme Court more or less in the same years started to deliver a lot of rulings granting better protection for the rights of indigenous people.

We shall now spend very few words concerning the **African** context. First, in that context there is no reference (only) to human rights, but to **people's rights**, with the consequence that balancing

[83] Indeed, the *Franciscans* believed that aboriginal people did not deserve any kind of protection since they did not work the land, they did not own any land and so they could not be considered as normal human beings but they were something *below* the same definition. Contrarily, *Dominicans* were the first ones to proudly say that aborigines were normal people and colonizers were not authorized to impose their way of living on them.

[84] The so-called ***blanked amnesties*** make no mention of the name of the beneficiary, and thus they have traditionally been used as a tool **waive liability** of Heads of the State and police officers responsible of torture, murders, forced disappearances, etc.

[85] In Argentina and in the Dominican Republic, for instance, there have been examples of cases where there has been some local resistance, which has been overcome after a few years.

operations are more complicated to carry out. The context is very different because there is no tradition of lodging complaints in the Continental court. The first case to be recorded is ***Tanganyika Law Society v. Tanzania*** (2013), which contained the first declaration of unconventionality of a domestic law with the continental Charter. Considering the difficult situation, economic, and social situation of the African continent, it is easy to understand that the **margin of appreciation** here is wider. Indeed, several civil wars, as well as revolutions and terrorist activities make it necessary for governments to have some margin of appreciation, since some situations cannot be considered only in legal terms. That is also why not every African country has decided to ratify the Convention and the protocols, or why some others have decided to sign the Convention but did not accept the jurisdiction of the African Court of human and people's rights. Some recent African Constitutions have felt the obligation to enshrine in formal texts some **interpretive criteria**, drawn from the caselaw of the African court, in a starting process which will probably take a lot of years. Yet, this is the sign that they want to follow the European and the American traditions.

The horizontal dialogue between European Courts and institutions

The European level: the Luxembourg Court v. the Strasbourg Court

A dialogue can be carried out **horizontally**, that is, between supranational Courts, although the only proper example of it is that between the Strasbourg Court and the CJEU. Europe has been experiencing it for almost three quarters of a century since the end of WW2. This time span has been divided into two periods. A first, long period goes from the end of WW2 to **1991** and is traditionally defined as a period of **prudence**, conscience, care, in terms of ***prudential distance*** and ***non-interference*** between the two Courts. In 1991, the Luxembourg Court has ruled for the first time that it was impossible to reach any agreement on the European Economic Space (EES) that would include the establishment of a jurisdictional body, because a jurisdictional body already existed, and it was the Luxembourg court itself. Another difficult moment for the relationship was when the ECJ after two years of discussion declared (following a request for opinion on behalf of the EU Commission) that the access of the EU to the ECHR was **impossible** at that moment because there was no *specific* provision in the Treaties authorizing the governing bodies of the EU to accede to the ECHR. The EU institutions were **reluctant** to join the ECHR because there was an idea of "keeping the two worlds separate". In this perspective, there is no reason why the European Union should be party to the Convention.

The **Strasbourg** Court, on its side, was very respectful of the EU mechanisms and of judicial ones. First, the ECtHR used to **reject** as inadmissible *ratione personae* all the claims concerning EU acts. Indeed, one could not challenge EU acts simply because the EU was not a signatory of the Convention. Doing so, the ECtHR showed respect towards both EU institutions and judicial mechanisms, and thus towards the field of competence of the ECJ. Nonetheless, it should be noted that there is an **agency relationship** between the European institutions and Member States, according to which the latter may act *on behalf of* the European union since they are called to **implement** all acts adopted by EU institutions. Therefore, one could lodge a claim before the Strasbourg Court lamenting the violation of a right enshrined in Convention due to a provision of the Treaty, a Regulation, or a Directive as applied in the MS. In that case, it is impossible to deny protection simply because the State act is a consequence of application of rules imposed by the EU institutions. This way, the Strasbourg Court has come to review acts coming from the States yet adopted due to a specific duty in their relationship with the EU. In this perspective, two situations are possible (they will be analyzed later):

1. First, the Member State may have <u>no</u> discretion (for instance, it has been applying a self-executing regulation that leaves no room for discretion on the adoption process).
2. Otherwise, there would be a **margin of discretion**, for instance in the case of a *non-self-executing Directive* that lets MSs decide how to implement it insofar as the envisaged result is reached. There, there is <u>no</u> need for the application of the directive to be *uniform*, and all solutions are legitimate provided that they remain within the framework of the Directive.

Therefore, the Strasbourg court has found a means to review acts belonging to the EU sphere: the latter are implemented by the MSs, which are signatory parties to the ECHR and have no alibi for them drawn from their belonging to the EU. They are hence **compelled to respect** the convention *even* when acting under the shelter of an EU provision.

What is more, the EEC Treaty of the time had two important provisions. First, art. **230 EEC** provided:

The community shall establish all the appropriate ***forms of cooperation*** *with the Council of Europe.*

Of course, this does <u>not</u> imply an accession to the Convention. Still, it creates a friendly attitude in the intention to cooperate. Then, art. **234 EEC** read:

The rights and obligations resulting from ***Conventions concluded prior*** *to the entry into force of this Treaty* [...] *shall* ***<u>not</u> be affected*** *by the provisions of this Treaty. Insofar as such Conventions are <u>not</u> compatible with this Treaty, the Member State* […] *shall take all* ***appropriate steps to eliminate any incompatibility*** *found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.*

Member States shall, in the application of the Conventions referred to in the first paragraph, take ***due account*** *of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of* ***common institutions****, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.*

The problem with this article lies in the fact that the ECHR has been approved years before the EEC Treaty: hence, this is one more reason why the Strasbourg Court should <u>not</u> care about the alibi of the MS, because even the EEC Treaty provides that if there are obligations deriving from a previous treaty (in this case, the ECHR), such obligation will prevail. Although MS are compelled to take "*appropriate steps to eliminate incompatibilities*", apparently, this is just something which can be carried out **over time** and when it will be possible according to political conditions (and, given that we are speaking of treaties, the will of the other parties must be considered).

At the beginning, the Strasbourg Court was very prudent to **avoid confrontation** (*see*, e.g., <u>*Confédération francaise du Travail v. the European Communities*</u> and <u>*Delfino v. Belgium*</u>, cases that were declared inadmissible) but then it decided to state clearly that belonging to the European Union is <u>not</u> a cause of exception from state responsibility even when the state has been somehow *obliged* to implement an EU act. In fact, in ***<u>M&Co. v. Germany</u>*** (1989) the Court declared the admissibility of the recourse, making clear that the National *exequatur* does **<u>not</u> exempt** from State responsibility. Put differently, it is possible to file a claim against an act of the MS implementing an EU obligation thanks to the ***principle of equivalence***, whereby the adhesion of a State to an International Organization requires the **previous verification** that human rights are protected and respected in the same way as the convention. Indeed, when a state decides – after subscribing the ECHR – to enter other international it has a precise duty to verify the new Treaty does <u>not</u> impose behaviors contrary to the full respect of the Convention.

Initially, the attitude of the Strasbourg Court has been so prudent towards the EU institutions that it never accepted to review files lodged by several EU citizens concerning the *structure* and the *election* of the EU parliament. Between 1979 and 1987, the European Parliament was not yet elected but was simply appointed by the national Parliaments. At that point, groups of EU citizens filed claims against the structure of the EEC Parliament[86], but every case got rejected. However, when the EU parliament became **elective**, the ECtHR felt authorized to interfere with the electoral mechanisms. The reason why the ECtHR decided to take such a decisive stance was that it was dealing with *national statutes* and not with EU ones since the mechanisms governing EU elections were decided by each State. Therefore, the regulations governing States' representation in the European parliament were States acts and they could thus be reviewed because they were not EU acts. The principle was established in ***Matthews v. UK***, a case filed by British citizens residing in Gibraltar[87] because the British Parliament had decided that citizens residing in Gibraltar were not allowed to vote for the European Parliament (this was probably due to political reasons: Britain did not want to provoke a Spanish reaction, being Gibraltar from all point of view part of the Iberian Peninsula). This simple international political precaution was not appreciated by Gibraltar's citizens, who thus decided to file a claim in Strasbourg. The ECtHR ruled they should have been authorized to vote. However, it also held that the Convention did not exclude the **transfer of competences** to international organizations *as long as* Convention rights **continued to be secured**, and MSs' responsibility for the respect of the ECHR continues even after such transfer. In this perspective, the denial of vote to British citizens in Gibraltar violated the ECHR. This probably was the first case when Strasbourg clearly stepped in, announcing that it would not have admitted violations of the ECHR *under the shelter* of some EEC alibi.

Moving to the protection of rights within the EU system, the ECJ had initially no mandate to enforce the Convention because it had to protect economic rights only, such as the *four freedoms* of circulation. This was so because the national Constitutional Courts (and especially those of Germany and Italy) were **reluctant** in recognizing ECJ's competence over matters falling outside the economic aim for which the EEC had been established. Indeed, some Constitutional Courts wished to protect human rights following their **own constitutional standards**, as part of a wider *modus judicandi* aimed at **protecting national identity**. Consequently, the ECJ could have been entitled to protect HRs *only if* the ***principle of equivalence*** whereby the Community would have protected *equality*, individual *dignity* and other fundamental principles in the same manner as national constitutions.

However, between 1969 and 1974, in ***Stauder*** and ***Nolde*** the ECJ started to recognize as ***general principles of community law*** some elements coming from outside of the EEC legal order. Indeed, the ECJ realized that not protecting HRs could have been a problem and decided to start protecting them with instruments coming from two legal "sources":

- First, the ***common constitutional traditions*** of Member States. Yet, identifying such rights is a very complicated intellectual operation since one would need to check among 27 different Constitutions to verify whether a certain human right has been **granted general protection** by them. Thus, the Court has never done anything like that to elaborate a common constitutional background: instead, it simply builds up some elements from two or three Constitutions when useful to reach a certain conclusion.
- Or, as stated by the Court:
  "In order to identify rights to be protected we will use ***international treaties*** *and among them, one of the first positions ideologically, historically, culturally is belonging to the* ***European Convention of Human Rights****".*
  This way, the ECHR enters within the reasoning of the ECJ.

[86] For instance, French citizens complained about the five percent threshold necessary to be admitted to representation, and Belgian nationals residing abroad lamented the impossibility to take part into any kind of election.
[87] Gibraltar is an integral part of the territory of the United Kingdom because it was conquered and assigned to it by the treaty of Utrecht (1713). Since then, it has been an important military base to control commercial and military trend form the Atlantic to the Mediterranean Sea and vice versa.

Nonetheless, the constitutional traditions of the Member States and the obligations drawn from international Treaties are not applied *systematically* and *automatically*, but they are **filtered** through the ***principle of community law***, which implies that the Court has total discretion in both the *creation* of the principle of community law, and in the inclusion of common constitutional traditions and international obligations into the general principles of community law. This way, the ECJ has always adopted a *case-by-case* approach, using the principles of community law (of which it is the exclusive interpreter) as its **hermeneutical guideline**.
In **1979** (*Hauer*), the ECJ for the first time fully analyzed the ECHR, fragmenting it in single pieces, but without admitting that the ECHR belonged to the EEC legal framework. Finally, in **1989** it admitted for the first time that the ECHR could be mentioned as a **fundamental source of general principles**. Nonetheless, fundamental does not mean *compulsory*: again, ECHR provisions must always be filtered, interpreted, and adapted to the single case through the "lenses" of EU law. In sum, the ECJ's attitude can be described with a curious scholarly metaphor: the ECJ has behind its shoulders a **cupboard** from which it may pick either an ECHR provision or a principle belonging to MSs' constitutional traditions. Simultaneously, the ECJ always selects what is helpful to reach a conclusion, in a totally **discretionary** way of interpreting rights. In short, the Court does not feel any obligation to draw conclusions from the Convention or from the Strasbourg caselaw.
When, in **1996**, the EU decided not to enter the Convention, the ECJ started to **cite** the Strasbourg caselaw more frequently than before feeling freer after having put the final stone on the idea that the European Union might have entered the ECHR (which would have undermined its authority due to a *transfer of competences* for HRs). This notwithstanding, the ECJ has always made an **indirect** use of the Convention, never mentioning its provisions and related caselaw as *compulsory*. Instead, it has always filtered its content **through EU law principles** and used it as an **interpretive** tool. Again, there is no automatic recognition but a **selective incorporation** of rights and a **substantial discretion** in the interpretation of the Convention and of the caselaw. In the mid-90s, many scholars have noticed a kind of *shift* from recognition to the ***protection*** of Rights, namely from admitting the existence of HRs to a more active attitude.
As to the present relationship between the ECJ and the ECtHR, we must distinguish between:

- Cases in which the two courts have decided in the **same way**.
- Cases in which the two courts have reached **different conclusions**. By way of example, according to the ECtHR the domicile shall be protected *even when an administrative search* is carried out (e.g., a tax authority and/or financial police inspection). Conversely, according to the ECJ a warrant is not necessary in such cases. In addition, the ECtHR held that the same guarantees should be applied even when the administrative search is carried out at the headquarters of an enterprise. Another example concerns the principle of the *prohibition of self-incrimination*. Here, the attitude of the ECJ is very soft, while the attitude of the Strasbourg Court is much more rigid because self-incrimination plays a fundamental part of the right to a due process, not only in criminal but generally in public trials. Also, the Courts have also disagreed about the *requirement of a notice* in antitrust inspections: according to the ECJ that is not necessary, whereas Strasbourg Court requires it (obviously, noticing the person or the company means that the latter will take defensive measures). Finally, in cases concerning Spain and Belgium, the ECtHR, in defining the position of the public prosecutor, ruled that authorizing the public prosecutor to have the last word in civil proceedings is not compatible with convention, whereas as far as civil proceedings are concerned the court of Luxembourg is more linear.

The relationship between the European Court of Justice and the Strasbourg Court is a typical example, probably not exactly the only one, but the most prominent one, of **horizontal dialogue** at a continental level. Originally, the first phase was characterized by a traditional ***prudence*** in a wise

non-interference approach. However, between **1991** and **1996** there was a moment of friction because the ECJ in 1996 (with its **Opinion 2/94**) decided it was impossible for the European Community to accede the European Convention of Human Rights without an ad-hoc Treaty provision. This way, the Court held there would be distance between the Communitarian system and the European system of human rights. Also, in **1991** the ECJ gave contrary advice to an agreement on the European Economic Space (EEC) including the creation of a jurisdictional body: indeed, the Court of Luxembourg has always preferred to be the only judge in the European continental legal space. On the other side, the Strasbourg Court tends to be quite **prudent**: it normally decides to reject all claims concerning possible acts adopted by European institution because since the EU is not a party to the Convention there is no interest in the related claims (that are therefore declared **inadmissible *ratione personae***). However, this does not imply that individual Member States might be held responsible for the implementation of EU Acts, both Regulations – despite being directly applicable – and Directives. This is so also because before the Lisbon Treaty there already were two relevant provisions in the EEC Treaty, the first being **Art. 230 EEC**:

*The Community shall establish all **appropriate forms of co-operation** with the Council of Europe.*

Of course, the reference to the Council of Europe includes the European Court of Human Rights. Moreover, **Art. 234 EEC** provided:

*The **rights and obligations** arising from agreements **concluded before** the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, **shall not be affected** by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take **all appropriate steps to eliminate the incompatibilities** established.*

This implied that since the European Convention had been approved years before the creation of the European Economic Community, the Member States were still **bound** to its obligations, at least until they would have taken appropriate measures to eliminate any incompatibility.

In this context, the Strasbourg Court has normally admitted files (more prudently first, and then rather decisively later) concerning the adoption and the implementation of obligations drawn from EU Law. The first case of that type was ***M&Co. v. Germany*** (1989), in which the ECtHR found the claim *admissible* (despite not being founded in the merits) because the national *exequatur* did not exempt a Member State from its responsibility, and so in the implementation of EU Law there could be no exemption from its responsibility. The ruling established the so-called ***principle of equivalence*** as applicable standard of reasoning, which would have become a pillar of the Strasbourg Court for reasonings concerning any international law obligation. Under color of that principle, the adhesion of a State to an international organization requires the State to verify the **respect of Human Rights** *before* the accession. Nonetheless, several cases (such as the French case concerning the electoral system, the Belgian case, and the Turkish one concerning the treatment of political parties or policemen's adherence to political parties) were rejected by the Strasbourg Court because the case concerned European Institutions directly, until **1999**. Indeed, ***Matthews v. UK*** (1999) followed the transformation of the European Parliament into a directly elected representative body. Since the electoral systems belonged to the Member States' sphere, each State having its own system, States' electoral laws concerning the election of the European Parliament could be easily scrutinized by the Strasbourg Court like any other internal law provision. Therefore, in *Matthews*, the Court decided that the UK could not deprive British citizens residing in Gibraltar of their right to vote for EP elections, although the UK had justified itself through European Law:

*"The Court observes that acts of the EC as such cannot be challenged before the Court because the **EC is not a Contracting Party**.* [Yet,] *The Convention does not exclude the transfer of competences to international organizations **provided that Convention rights continue to be "secured"**. Member States' **responsibility therefore continues** even after such a transfer"*

This is also to say that the Strasbourg Court is not willing to restraining itself simply because an act belonging to the sphere of a State concerns its relationship with other international and supranational institutions such as the UN or the EU.
Obviously, an important factor is to be considered in analyzing the change in attitude of the Strasbourg Court: i.e., the Luxembourg Court had changed its attitude too over the years together with the changes in fundamental values provided for by the Treaties. Indeed, before 1960s there was no protection of the rights enshrined in the Convention, either under color of the Treaties or through the ECJ's caselaw. Instead, the Community simply protected the **economic rights** related to Free Movement.
Then, **Art. F sub. 2** (which would become art. **6 TFEU**) was introduced and made a reference to the European Convention of Human Rights, thus starting the so-called process of ***communitarisation of the ECHR***. Even before the introduction of this article, however, the ECJ had already changed its attitude also thanks to the national Constitutional Courts that were against a total acceptance of the principle of primacy of EU Law[88], in a sort of "triangle": in fact, the reaction of national supreme and constitutional Courts to the absence of HRs protection by the ECJ generated a change in attitude in the ECJ, the inclusion of Art. F in the Treaties, and consequently increased the importance of the ECHR and possibly of the Strasbourg's caselaw in the approach of the ECJ. In this respect, the Luxembourg Court has recognized two kinds of sources to include the rights enshrined in the Convention under its protection: namely, the ***common constitutional traditions*** of Member States (as in ***Stauder***, 1969) and ***international treaties***, notably the Convention (as in ***Nolde***, 1974). Nonetheless, both sources were "filtered" through the Principle of Community Law that was used to **prevent automatic incorporation** of other sources into European law. Indeed, the Court does not feel obliged to recognize rights coming from other sources *as such* but holds a degree of **discretion** (thanks to the filter of the principle of community law) to selectively incorporate rights. Even when an "external" right is incorporated, the *way* it is incorporated is not automatic, so that it is limited and adapted according to the limits of Community law. This way, the court safeguards its discretion in the selection, application, and interpretation of each right. The first complete analysis of a right enshrined in the Convention was made by the ECJ in ***Hauer*** (1979), in a kind of gradual approach toward a full recognition of the Convention. Only in **1989**, however, the Luxembourg Court defined the European Convention as ***source of fundamental significance*** in the determination of European **general principles**.[89]
Obviously, something changed after **1996**, when the ***Opinion 2/94*** was issued by the Court determining the failure of the accession of the EU to the Convention. At that point, the Luxembourg Court "sealed" the system, thinking that it was then "concluded" because the use of the provisions of the Convention was **indirect** and filtered by the Court's **discretion**. Put differently, despite an increase in references to the Convention, the use of the provisions thereof was indirect, without automatic recognition, and those **provisions** were **selectively incorporated** with substantial discretion as *interposed norms*. This also meant that the Strasbourg's caselaw was never fully accepted by the ECJ but only prudently applied. In this respect, many scholars referred to the period in mid-90s as a shift from the *recognition* (which is based on a kind of "passive" attitude) to the ***protection*** of rights, implying an active or even proactive approach.
Of course, there have been cases of conflict between the approach of the two Courts, caused by **contradictions** or by omissions of precedents. For instance, the concept of **domicile** for purposes of

[88] And – remember! – this was so simply because the protection of the **National Identity** was not guaranteed due to the total absence in Luxembourg's caselaw of any rights other than the economic Free Movement ones.
[89] Whatever it meant: *fundamental significance* is indeed an extremely broad term, not exactly engaging the future attitude of the Court. In this respect, some scholars at that time referred to a sort of ***hierarchization*** of rights in favor of those included in the Convention.

its protection was much wider (and thus much better protected) by the Strasbourg Court than by the ECJ: this is because the latter has to balance the civil liberty to freedom of domicile with some economic interests. Therefore, according to the ECJ, no notice is required to carry out antitrust searches, whereas it is due according to the ECtHR. Likewise, the privilege from **self-incrimination** is by far more rigid for the Strasbourg Court than for the ECJ, as well as the **chance to reply** to the public prosecutor in civil proceedings. Other different approaches that are worthy of mention concern, for instance, issues of **interest and legitimization**: indeed, only physical persons are supposed to be owners of civil rights before the ECtHR (therefore, a case filed by a legal person will be deemed inadmissible), whereas it is not the case for the ECJ, where most claims filed before it come from legal persons because more economic interest is at issue. Apparently, the *locus standi* is wider before the ECJ than before the ECtHR. Also, legitimation differs between the Courts since the provisions to be applied are different: the Strasbourg Court must apply articles 6 and 14 of the Convention, whereas the ECJ is bound to articles 230 and 234 EEC Treaty. Furthermore, the problem of **retroactivity of statutes** is applied according to different parameters: while the Strasbourg Court applies Articles 7 and 14 of the Convention (in an absolutely *strict* parameter), the Luxembourg Court is more permissive because – again – economic interests are at stake. It is often argued that both Courts apply a **teleological interpretation**: in the case of the Luxembourg Court, this is a simple consequence of the *functional approach* towards an enlargement of competences in favor of European institutions, following the criterion of the pursued aim whereby focus is put on the *result* rather than the strict definition of competence and a literal interpretation. In turn, the Strasbourg caselaw has more and more defined rights as *jus commune Europaeum*, apparently with a stronger dignity and a higher status than the caselaw of the ECJ. In sum, it is possible to say that in the context of the ECtHR **personal dignity** is necessarily maximized, the balancing activity being reserved only to rights strictly speaking, and all the axiological heritage to be protected is drawn from the Convention itself. Conversely, the ECJ resorts to **wider** parameters and larger sets of values, with a relevant (despite historically decreasing) importance of economic values: this way, civil and political rights are usually *functionalized* to economic principles, implying that they might be restricted in a balancing evaluation with economic values, even if not being completely denied.

This being said, the relationship is not only made of clashes: on several occasions a **virtuous circuit** has been activated between the Courts, with a sort of collaboration (or rather, of a **common streamline** of cases) that avoided tensions and misunderstandings. For instance, both Courts recognized the right to *grants of discounted family rates* for public services (such as a discount on train pass) also to same-sex domestic partnerships. Likewise, cases of workplace discrimination for **transexual persons** were decided by the ECJ in *P. v. S.* under the influence of the ECtHR's caselaw, and the same happened with the application of the **means-ends test of proportionality** first elaborated by the ECtHR in *Lentia* (1993). The so-called *proportionality test* is now probably applied by every supreme or constitutional domestic Court, as well as by international ones. It is a sort of application of the **principle of equality**, which can be distinguished into *formal* equality and *substantial* equality. The latter conception implies differences because to reach substantive equality it is necessary to introduce differences, whereas according to the formal reading of equality we need a test to verify if equality has been respected, treating different groups of people differently and similar ones equally. In this context, the German Constitutional Court and the Italian Constitutional Court have started to apply this means-ends test during the 50s and 60s. Concretely, to verify whether a **diversity** (or equality) **of treatment** between two classes of people is justified by an appropriate use of the parameter of equality, it is necessary to verify that:

- First, the limitations to liberties through the applied means are **strictly necessary** and not overly broad (i.e., not strictly necessary, in which case the measures would be deemed unconstitutional because the means went beyond the strict limit of need).

- Second, that the means are <u>not</u> overly broad in comparison with the **pursued end**. In this balance between means and ends, the Court will realize whether the limitation of the principle of equality remains within the perimeter of the "strictly needed" or whether it is overly broad, and thus unconstitutional.

This test is extremely important because the principle of equality represents a pillar of the European system of rights: it is in fact one of the most frequent tests used as a parameter of constitutionality. It is therefore crucial that both the ECJ and the ECtHR have reached more or less the same standard in the application of the test.

Then, in **1999**, the **Nice Treaty** was drafted. It was an **interinstitutional agreement** that resulted from an intergovernmental agreement among the Member States of the European Union. They decided to establish a Convention "on the future of Europe" with the task of preparing a new Treaty containing all the rights belonging to the sphere of the European Union. The group was chaired by former French President Valéry Giscard D'Estaing and had the precise task to do a **recognition** of all **existing materials** <u>without</u> adding anything new: indeed, the idea was making a sort of "compilation" without adding new rights, since everyone knew from American history that the more rights were added, the more functions the EU would be endowed with. Instead, Member States did <u>not</u> want to (at least, formally) recognize new powers to the European Union. Once everything was put together, the Convention had the task of making order, with a sort of **systemic logic** based on *gradualism*, and reaching a **final synthesis** – again – <u>without</u> any reference to the frame of government of the Union. Although these were the terms of reference in theory, the group did much more than that in practice because they openly and consciously decided to go further. The Treaty of Nice, or ***Charter of Fundamental Rights of the European Union***, enshrined all the rights that could be drawn from all the different available sources, and namely:

- 17 rights came from the **European Convention** of Human Rights, in quite a logical way since they represented common heritage of the Member States, as well as 2 rights (i.e., property and education) belonging to the Additional Protocols of the Convention
- 2 rights came from **common international law**
- 3 rights came from the **European Social Rights** Convention of 1966
- 2 rights (i.e., conscientious objection and equality before law) were drawn from **common constitutional traditions** of Member States
- 4 rights were drawn from the **ECJ caselaw**
- 13 rights came from the EU **Treaty of Maastricht**.

In sum, the Treaty of Nice constituted an **internal**, **organic**, and **<u>non</u>-fragmented** formulation of rights. Most importantly, the Treaty introduced an "outside element" because such rights – conceived as an expression of the European culture – altogether should have represented the **ID Card of Europe** in its foreign relationships. In this respect, any state willing to join the Union would have had to accept the values enshrined in this identity document. Also, one more reason why the Convention went further than expected were Articles 51 to 54 of the Treaty, which included something that apparently was not in the task of the Convention: i.e., a kind of frame of government. The only example of a document putting together a Bill of Rights and a Frame of Government before was the French declaration of 1789. Therefore, some scholars criticized the Nice Treaty for this "mix", whereas some others organically approved the idea of including some rules concerning, for instance, the **hierarchy** of norms and the **implementation** of rights by the Union itself.

The European Charter was generally welcomed as mark of the birth of a new **European constitutional system**, in a shift from a functionalist approach to a sort of **universalism**. It was thus thought that the horizontal dialogue between the Courts would have come to an end, opening new horizons. However, that did <u>not</u> happen at all. In fact, at least until the enactment of the Lisbon Treaty in 2008, the Charter was mostly **ignored** by the Luxembourg Court, except for a few references made by the EU Tribunal of First Instance. Then, in **2009**, the **Lisbon Treaty** entered into force and the Charter is granted a **binding value** through Art. 6 TEU as a *super-primary* source of EU Law.

The Lisbon Treaty actually caused some alteration of the balance of power and authority between the CJEU and the ECtHR, but this improvement is much more evident on the side of the Strasbourg Court than it is on the CJEU's one. Indeed, whereas we experience increasing **references to the Convention** in CJEU's caselaw (since the provisions of the Convention were considered belonging to EU law *as such*), the Court does not mention the caselaw of the Strasbourg Court**.** Conversely, on the side of the ECtHR, even before the Lisbon Treaty the Court in ***Bosphorous v. Ireland*** formally declared a **general presumption of compliance** of the EU law with the Convention. This implies a kind of *lenient* approach towards States applying EU law: indeed, if the latter is generally considered compatible with the Convention, then even States' acts implementing EU law will be guaranteed a relative presumption of conformity, unless proof of **manifestly deficient level** of protection is provided by the claimant. This way, the ECtHR tried to change its attitude in favor of EU law and of the Luxembourg's caselaw. What is more, the ECtHR started to cite more and more often the ECJ's caselaw as a source with **strong persuasive value**, and it has even adopted the same **criteria** as the Luxembourg's Court for the assessment of conformity of the refusal by a national Supreme Court to refer a question for preliminary ruling. Put differently, Strasbourg's approach for the issue of *preventive referral* was the same as the one applied by the CJEU, in a further step towards a meeting point between the Courts. Yet, as said, this friendly attitude was not returned by the CJEU.

Finally, in **2014**, the CJEU delivered its ***Opinion 2/13***, answering the question whether it was time for the EU to accede the Convention. The Luxembourg Court, again, held that the accession was **inadmissible** since the EU is not a State, and the supreme court of the EU can only be the CJEU. As a reaction, the ECtHR declared itself disappointed. Some scholars now argue that from that moment on there have been visible signs of a **stricter standard** in the indirect review of EU law by the Strasbourg's Court (e.g., in *Tarakehl*, 2015). The tale of the two Courts keeps on with new pages still to be written.

The ECtHR relationship with the UN

The second issue we shall discuss concerns possible violations of the rights enshrined in the Convention perpetrated by subjects operating under the shelter of the United Nations. We are mainly referring to the so-called **smart sanctions**, i.e., targeted sanctions against persons (whether physical or legal) that are one of the signs of the transformation of International Law from being focused only on States to addressing also individuals. By way of example, such sanctions include seizures of goods and estates, limitations to the freedom of movement, and other personal restrictions (sometimes they might even imply the arrest). In this respect, the Strasbourg's caselaw is a bit wandering because there are elements of **uncertainty**: in some cases, the Court is deferent and restrains itself, excluding responsibility thanks to the "shelter" of the UN, while in other cases it adopts a more interventionist attitude. The latter is the case, for instance, of the violations perpetrated by soldiers operating under the UN who have gone beyond their duty.

However, although the approach changes on a *case-by-case* basis due to considerations of opportunity, the Court usually prefers **avoiding direct confrontation** with the United Nations and its organs. For instance, basing on the idea whereby the Convention constitutes part of a ***jus publicum Europaeum***, i.e., a constitutional instrument of European public order, the Court recognized the need for **systematic** interpretation of the Convention with all other binding Treaties, which means also those created and/or approved by the UN. In this respect, one of the most relevant Treaties applied by the ECtHR – despite being approved several years after the Convention

– is the **1969 Vienna Convention on the interpretation of the Law of Treaties**. Therefore, the Strasbourg Court has the hard duty to guarantee a systematic interpretation not only of the European Convention, but also taking into consideration the other international law Conventions, creating a coherent system of international law Treaties that have not the protection of human rights as their only object (in contrast to the ECHR): indeed, most of the UN Treaties aim at preserving peace, and this sometimes implies the use of force and armies belonging to Member States (either in the context of *peacekeeping missions* or in that of *peace-restoring missions*). This can obviously contrast with the Convention's aim of proactively protecting human rights. In this respect, protection of human rights needs to be **weighed** with the other pursued aims: the balancing is carried out by the **Security Council**, and Member States are bound to accept and implement its resolutions. What is more, the situation is made more complicated by Art. **103 UN Charter** (approved before the Convention), which provides for the **prevalence of UN obligations** over all other international obligations. Therefore, the problem is that the European Court of Human Rights has been applying the precedent concerning the ECJ to the Security Council and to the General Assembly. This means that the applied standard of protection is the aforementioned **doctrine of *equivalent protection***, whereby when Member States confer upon an international organization powers capable of affecting the scope of application of the ECHR, then they must confer upon the same organization also **mechanisms of guaranteeing** rights at least equivalent to those of the ECHR. And the UN is no difference. This means that, although international organizations cannot be brought before the ECtHR since they are not parties to the Convention, States implementing measures under obligations of an international organization are **responsible if** the latter does not protect rights either from a substantive or a procedural viewpoint. Put differently, they retain responsibility for **acts outside** the transferred competences.
Therefore, the double standard of review implies a **twofold phase** of oversight over State conducts:

- First, the Court verifies *in abstract terms* if there has been a **careful adaptation** of the general level of protection of Human Rights by the organization, assessing whether it is comparable to the ECHR standards, as a sort of *preliminary general requirement*.
- Then, it assesses if the measures taken in the concrete, **specific case** are respectful of the general standard. In case of ***manifest deficiency***, it will be responsibility of the State. It is instead unlikely for manifest deficiency to be found in the first part of the control – i.e., the general assessment.

That is a sort of effort to **balance international cooperation** and the **effectiveness** of the European Convention. In this respect, again, any State conduct undertaken in compliance of its obligations arising from the membership to an international organization is justified as long as the latter protects human rights, both under the substantial and procedural perspective, in a manner at least equivalent to that of the ECHR. This theory is only applicable when a State action is limited to a **mere execution** of its obligations deriving from its membership to the organization: instead, when it has discretion, or it goes beyond its obligations, or it misunderstands the order it has to implement, then it cannot invoke the "shelter" of the international organization, and the violation is simply attributed to the State just as it were a domestic measure.
To clarify this system in concrete terms, some examples will help. A first, relevant case is ***Bosphorous v. Ireland*** (2005), which concerned the possibility of seizing an airplane. The ECtHR has stated that international organizations cannot be brought before the Court and that States implementing obligations under international organizations are not responsible *only if* the organization protects human rights both form the substantive and procedural viewpoint. Therefore, the States bear the responsibility for acts **outside the transferred competences** of Treaties and might not be responsible for acts **inside** the transferred competences when they have been careful to verify –

before acceding to international organizations – that the latter do protect the rights of the European Convention **in the same way** (both from the procedural and substantial viewpoint).
There might be cases following the *Bosphorus* doctrine an act/behavior of a State is under review to verify whether it has been carried out under the **shelter of the UN**, because we know that the evolution (rectius, the *constitutionalization*) of international law has led the UN to adopt an interventionist attitude with several peace–keeping missions. If a soldier is a citizen of a State which is both a signing party of the Convention and Member of the UN, a complaint may be lodged against the behavior of UN forces. However, are possible violations of the ECHR perpetrated by subjects operating under the shelter of the UN justiciable before the ECtHR? This is a major concern for national authorities which carry out the Security Council resolutions to implement peace missions, and to apply force or sanctions.[90] In this respect, the Strasbourg court has received complaints by several subjects lamenting the violation of the ECHR provisions due to the behavior of **people acting under the shelter** of UN. Since the UN is the most important international organization, the Court has tried to be prudent in declaring the UN *directly* or *indirectly* guilty of violating HRs, because that would mean saying that the author of the protection is *also* responsible of the violation. Therefore, the Court must balance **international cooperation**, of which the UN is responsible, with at least the **minimum level** of protection guaranteed by the Convention. That is why the Court held that any state conduct undertaken in compliance of its obligations arising from the membership to an international organization is justified *as long as* it is a **mere execution** of the obligations and the organization protects human rights, both under the substantial and procedural perspective, in a manner **at least equivalent** to that of the ECHR. Hence, by way of example, a British soldier carrying out his office duty in Serbia is acting in accordance with an obligation deriving from a deliberation of a Security Council. However, if the soldier tortures any Serbian, this falls *beyond the obligations* included in the SC Resolution and Britain would be deemed responsible, although under the shelter of the UN, not because the ECtHR is reviewing a conduct of the UN (which is presumed legitimate), but because it overstepped the limits of a fair behavior in the implementation of military orders. Therefore, the implementation of UN deliberations has been improper, and the responsibility is be laid upon the Member State.
Until now there have been several peacekeeping and peace-restoring missions using Member States' armies, and several cases have raised.

- In ***Bolvin v. France and Belgium*** (2008) the Court held that the application of the presumption of equivalence *also* concerns **internal acts** of international organizations, when State representatives took part in making the decision at stake. At that point, the responsibility of the international organization – which cannot be invoked – melts with the one of the Member State concerned.
- ***Gasparini v. Italy*** (2003) was the first case in which the Court held that the burden of proof was upon the **claimant** unless a manifest structural deficiency is evident. Put differently, it is up to the claimant to demonstrate that there has been a violation of the principle of equivalent protection, with the exception of the case of structural deficiency.
- The Court in ***Behrami and Saramati v. France, Germany and Norway*** (2007) recognized that the nature of the UN is not exclusively connected to the protection of human rights, but also to the preservation of peace and security. Hence, these goals are imperative too and do not necessarily coincide with a crystal-clear protection of human rights. This is because the

[90] Recently, UN interventions have consisted in the so-called ***smart sanctions*** against certain people, such as heads of governments/States, officers of the army, oligarchs. They are supposed to be more efficient since they hit people in positions of power, freezing goods such as real estates, or limiting their personal freedoms. The first example of these was back in 1993 in Serbia during a UN PKO.

"*engagement with the UN corresponds to a link with an organization of universal jurisdiction fulfilling its **imperative collective security objective***".

- In more specific cases, such as ***Al Jedda v. UK*** (2011), the Court stated that the main UN goal (i.e., safeguarding peace and security) must be **balanced** with the pursuance of international cooperation in the promotion and encouragement of the respect of human rights and fundamental freedoms. Therefore, the Court concluded that the behavior of some soldiers of the British army was not exempt from responsibility, because of the interpretive presumption whereby UNSC resolutions do not impose upon States any obligation to **infringe fundamental human rights** unless there is resort to **clear and explicit** language. In the case at issue, the UNSC resolution was not as clear as to impose on British troops to resort to arbitrary detention of prisoners, and hence the UK was declared responsible for violating Human Rights while going beyond its responsibilities under UN. Similarly, in ***Nada v. Switzerland*** (2012) the Court found State **discretion** in implementing UNSC resolutions imposing targeted sanctions: there, the problem arose from an Italo-Egyptian citizen residing in an Italian *exclave* and in need for medical treatments. However, he was a suspected terrorist according to the UNSC blacklist, and so the Swiss authorities did not authorize its transfer from the *exclave* to Swiss territory. However, the Court found out that his status did not allow States to impede medical therapies, having Swiss authorities a certain amount of discretion. Oppositely, in ***Ass. Mothers of Mothers of Srebrenica*** (2013), a case concerning Dutch soldiers in the Serbian-Kosovan conflict accused of not preventing the genocide, the Court found that the UN interest in fulfilling its objects **prevailed over the inability** to prevent ethnic cleansing. Therefore, Dutch responsibility was ruled out. Finally, in ***Al Dulimi v. Switzerland*** (2013) Mr. Al Dulimi was the former chief of the Iraqi secret service and had received a smart sanction by the UNSC while being in Switzerland, where he had formerly obtained a refugee status. Consequently, his goods were seized, but Swiss law prevented him for filing an appeal before a Swiss Court. Eventually, the Court found that Switzerland had gone beyond the limits prescribed by the UNSC resolution. Put differently, States always have the responsibility to guarantee effective domestic **judicial review**.

It is therefore clear that the ECtHR has adopted an oscillating caselaw on a *case-by-case* basis, in relation to the political issues involved in the matter. On the one hand, there are cases where it is obvious that the respondent State had no alternative but to comply with the resolution. On the other hand, some cases involved State that exaggerated in the implementation of the UN measures, going beyond the ordinary interpretation of its obligation under UNSC resolutions.

Models of Citizenship, between immigration and cosmopolitanism

Citizenship, nowadays, implies lots of questions concerning immigration, and it is itself the object of study of several disciplines, notably legal studies. We already know that the modern concept of citizenship was born with the emergence of the **Modern State** in **1648** with the Peace of Westphalia, since there is no citizenship without a State (and there is no State without citizens). That being said, the task of comparative law scholars is to classify and define a framework in which to locate the different approaches towards citizenship. Although it is extremely difficult to reach a simple classification due to lots of "intermediate solutions", a rough classification has been suggested by the American Philosopher Hans **Kohn** in his "*The idea of Nationalism*" (1944). Many scholars have agreed with his classification and still use it as a basis for their works, distinguishing between ***ethnos*** and ***demos***. In this sense, an ethnos nation includes regions where the idea of citizenship goes back to an **already existent** nation, in an apparently neutral way. Demos, instead, implies something more **artificial**: citizenship is built up artificially. Consequently, other distinctions follow:

- **Objective** elements *versus* **subjective** elements. Indeed, the *demos* requires the creation of subjective parameters.
- **Cultural** *versus* **territorial** nations. A cultural nation asks for some cultural requirements to obtain citizenship, whereas territorial nations reside over edifying space.
- **Cultural nations** *versus* cultural **States**. This distinction has been made by the German author Hagen Schulze. What does it imply? Apparently, we are not allowed to know it.
- **Naturalistic** nations *versus* **voluntaristic** ones, the latter implying the existence of an objective element (e.g., culture), and the second implying a *demos* to be created by politically defined criteria.

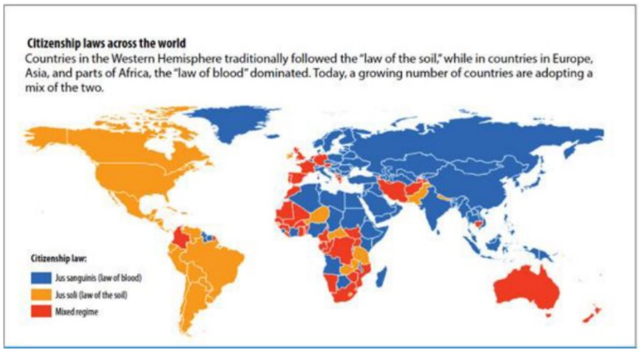
It would be impossible to understand those differences without examples. It is normally assumed that **Italy** and **Germany** are *ethnos* nations characterized by late politicization, whereas **France** is a prototype of a *demos* nation. This is so because Italy and Germany have reached political unity later than other European States. In particular, in Germany the idea of a *division following religious lines* goes back to the Peace of Augusta of 1555 and was codified to the Peace of Westphalia of 1648 with the principle of "*cuius regio, eius religio*".[91] So, the idea of *nation* in the German culture precedes the idea of *State*: in this case, it is possible to speak of ***nation building*** (i.e., the idea of a nation becoming State, of a *demos* becoming *ethnos*). In this respect, German authors such as Herder and Fichte spoke about the nation as a **living entity**. Likewise, the Italian author P.S. Mancini spoke of **national conscience** as an element of the Italian State, Giuseppe Mazzini emphasized the **subjective** elements and the **common** language as part of the nation, and V. Gioberti focused on **language** and **religion** in the *nation-building* process.
Conversely, France is normally cited as the typical example of a *demos* nation for two reasons. First, it was due to the French philosophical and legal tradition: for instance, Rousseau emphasized the importance of the **general will** of the people, Sieyés underlined the general **interest of the Nation**, with the Nation being expressed by the Third State, and Renan conceived nations as **fruits of the will** of the citizens (put differently: a political decision was needed in order to transform an *ethnos* in a *demos*, and a *nation* in a *State*).
In strictly legal terms, we have another problem: indeed, *what is citizenship*? There are more or less two main interpretations of the idea of citizenship:

- Citizenship as a ***legal relationship***. Indeed, the traditional liberal formulation (from Hobbes to Locke and Mill) describes citizenship as a **link** between a State and physical persons, implying a **dialectic** relation between citizens and political power. But citizenship also implies an important sum of relationship between physical persons and towards **third parties**, so that the legal relationship turns into a **sum of relations** (i.e., between State and persons, between persons belonging to the same State, and between citizens and non-citizens). Also, it is important to remember that citizenship is granted **irrespective of individual will**: a person is often not a voluntary citizen, but he/she becomes a citizen simply *by birth*.
- Citizenship as a ***legal status***, i.e., a **cluster of duties and rights**.

The only common element between the two theories is that the concept of **nation as the driver** of the fusion between vertical and horizontal dimension, between the State and citizens, comes to surface during the second half of the XIX Century, probably due to German public law scholarship.
Citizenship can be mainly acquired through two alternative ways, between which many mixed systems do actually exist:[92]

[91] According to this principle, citizens had to practice the same religion of the prince. Otherwise, they had to move in another State following their religious preference.
[92] For instance, some States might just consider the father's citizenship, some others may limit the number of years for the re-acquisition of citizenship by descendants, etc.

- ***Jus sanguinis***, whereby a person is a citizen if **at least one** of his/her **parents** is a citizen, the place of birth element being irrelevant. *Jus sanguinis* is more objective, since citizenship is **inherited** through generations. The idea of ***ethnos*** here is the founding element, and *jus sanguinis* is usually chosen due to cultural traditions, ideology, and demographic considerations. It is usually preferred in Countries with history of emigration: indeed, an emigrated family might have lost its citizenship, but still be able to reacquire it even after two or three generations simply thanks to the descendance from citizens.
- ***Jus soli***, whereby a person is a citizen if he/she **was born in the territory** of the State, the parents' citizenship being irrelevant. Usually, this formula is adopted by Countries of *immigration*. There, as well, there are problems of ideological traditions and demographical factors. For instance, the US or Argentina had problems of insufficient population, and so they used to offer a sort of "easy citizenship" in order to populate wide extensions of territory. In the case of *jus soli*, there is a **subjective** perspective based on future participation in the political life of the community – indeed, citizenship is seen as **driver of integration** – in the idea of nation as ***demos***.



The Italian Case

In the case of **Italy**, for instance, citizenship was differently regulated according to five consecutive phases. During a first phase (1865-1912), Italy adopted a very progressive and liberal attitude: it was indeed the first Country in the world to recognize foreigners an **equivalence** in the enjoyment of civil and economic rights, <u>without</u> need for reciprocity (that was instead applied in Germany and France) and with very limited exceptions (e.g., for certificatory powers and for maritime law) prescribed by law. This was so in order to **attract foreign capitals**, in a typically Mazzinian vision considering citizens simply as *individuals*. Indeed, Art. 3 of the Civil Code of 1865 stated:

Foreigners are admitted *to the enjoyment of civil rights recognized to citizens.*

This also implied **freedom of residence** and expulsion <u>only</u> upon judicial order.

Then, in **1912**, under Giolitti, a new organic regulation was approved following the start of mass emigrations towards Latin America and the US. The new Statute introduce a power for the Prefect to **order the expulsion** of a foreigner without judicial procedure (but simply through *police authority* and administrative discretion). The third phase goes from **1931** to 1948, during the age of fascism. A new Code of Public Security increased police's discretion and totally eliminated the need for judicial orders to expel foreigners. Moreover, a new concept was introduced: i.e., citizenship could be **lost** on several grounds, notably mainly for political reasons. Nonetheless, citizenship could be (re)acquired with marriage or returning after emigration. Finally, the 1942 Civil Code reintroduced the condition of **reciprocity**.

In **1948**, a fourth phase began, influenced by Articles **10** and **11 Cost.** providing for **moderate dualism** and a **reinforced law reserve**. The Code of 1942 was still partially in force, and thus the Constitutional Court had lot of work to do to remove the remains of fascism from the Civil Code and from the Code of Public Security. Simultaneously, the Italian position in the international arena implied the ratification of several international conventions, notably the UN Charter and the ECHR. Last, in **1984** came the fifth phase. The current situation is really complicated and is characterized by a **stratification** of statutes and law-decrees, with an alternation between cycles of *limitations and containment* of immigration, and *pardons and regularizations* of illegal immigrants. Sometimes, the two waves take place even together, with governments limiting the immigration but regularizing former illegal immigrants! The new **Title V Cost.** allocated some new competences concerning immigrations to the Regions, who tried on several occasions to **limit welfare benefits** to foreigners, by requiring a minimum period of residence. The Constitutional Court had therefore to handle such Regional Statutes. Of course, European Law had an increasing influence, with the **Schengen Agreement** in 1985, along with the **Maastricht and Amsterdam** Treaties (1992, 1997), and several EU Directives adopted in the early-2000s.[93] Now, citizenship is no longer a national problem due to the **coexistence** of domestic rules, European rules, and international Treaties (such as the Geneva Convention on Refugees of 1951 and other laws produced by the UN[94]). We really have a patchwork of legal sources as well as a plurality of subjects and situations (e.g., refugees, asylum seekers, displaced persons, persecuted persons, etc.).

In sum, nowadays we have a typical **coexistence of sources** at probably four levels from this point view: domestic constitutional and legislative provisions, EU provisions, international conventions including the ECHR as well as a lot of other global universal conventions. This juxtaposition of sources has created problems even distinguishing the categories of subjects: the classic distinction between citizens/aliens/watershed has now given way to the juxtaposition of several categories of subjects (six of which are: refugees, displaces persons, asylum seekers, persecutions, acceptance and non-*refoulment*, standard of treatment). Consequently, a subject before knowing his/her treatment in a certain state or territory, he or she must be classified within one of the categories. The problems, such as the problem of extension of constitutional rights to non-citizens and the legality and legitimacy of the application of different treatments due to factual reasons related to citizenship do not concern only Italy or Europe but are **universal**. In particular, as we have seen, the **Italian Constitutional Court** has been using a **rationality** scrutiny on a **case-by-case** assessment often applying articles 2 and 3 of the Constitution, meaning the principles of human personality and dignity, implying the application of human rights to all subjects under national sovereignty (art.2), and the principle of equality in its two versions, formal and substantive (art.3). Describing this approach in a nutshell, we can say that the Constitutional court has concluded in its caselaw that **foreigners** can fully enjoy rights when they are defined as ***inviolable*** by virtue of the combination of Article 2 and the definition of a right as inviolable (for instance, personal freedom, domicile, etc.). In other words, it is widely accepted by scholars and judges that if a right is qualified as inviolable, it means that the rights is not reserved to citizens, but it has been conceived as applicable to **all human beings** living or simply present in the Italian territory; while, when rights are not defined as inviolable, they are not necessarily reserved to whole human beings but simply to citizens. However, the Parliament (or the legislative power) has the **faculty of extending** such rights even to non-citizens. This is typically the case of **political rights** which are obviously an instrument to participate to the political life of a Country and are normally associated to citizenship and do not belong to all persons simply because they are staying in a territory but correspond to the membership of the political community. However, in EU countries there is the possibility to grant the right to vote at least in *local administrative elections* (provinces, towns, or local districts, however they are called in different countries) to non-citizens that have resided in an EU country for a certain period of time.

[93] Those directives concern the procedural and substantive protection of **foreign workers**, the management of **immigrants' claims**, the fall-out on social services of the position of an immigrants' **relatives**, the creation of a common informative system, a common immigration policy, **uniform VISAs**, and State permits.

[94] Such as the General Assembly deliberation of December 1990.

In conclusion, although the Italian legislator has shown a hesitant attitude in managing the inclusion-exclusion relationships[95], apparently – as part of a general tendency all over the world – borders are becoming more and more open to the entrance of non-citizens. In some cases (like it happens all over the world), there has been an **ideological** use of the **principle of equality** by Italian judges. Consequently, some authors have talked about ***legal cosmopolitanism*** as a new formula that should allow the interpreters to understand how the general parameters referring to citizenship should be interpreted. Other authors have **objected**, claiming that legal cosmopolitanism amounts to **another interpretation** that it implies the existence of a **global state**, which actually does not exist. They also argue that citizenship is unavoidable and thus, giving up to the very idea of citizenship implies a kind of disempowerment of the idea of state without having a political organization able to take its place.

A comparative overview

Now, we will analyze some of the most important political contexts abroad and out of the EU. Indeed, although it is quite difficult to have a general global overview of the condition of foreigners, and although applying the typical comparative method to this topic is not always fruitful since the disciplines are so different between each other, studying some important examples on how foreigners are treated in different countries might lead to some important general conclusions on citizenship (not necessarily to what is the best policy to apply).

We'll start with **naturalization policies**, which concern how subjects belonging to the *ethnos* can be included into the *demos* in order to have the **evolution and the enrichment of the *demos***:

- ***American ideology***: the USA are an important example to study. The **traditional ideology** has been the **melting pot** idea for about a century at least until the 20th century, then there has been a stronger restriction on immigration from the 20th up until now. The **turning point** has been represented by **9/11** and the beginning of **international terrorism** after which a more cautious attitude has been taken. Even now there is a lively debate between republicans and democrats concerning policies to be applied, with special concern to immigration from Mexico (e.g., the debate around Trump's wall on the border).[96]
- ***Baltic states***: **after 1989** and the fall of the USSR, they became independent from Soviet Supremacy and they had to deal with the problem of big **Russian minorities** (in at least one of these countries reached more than 40% of the whole population), which migrated to Latvia, Estonia, and Lithuania during the USSR era. The three states decided to deal with this problem in different ways:
    - **Latvia limited citizenships** to local ethnic group already residing in the county **between WWI and WWII,** because most of the Russian migration took place after 1942, when the Germans retreated and the Russians advanced. The problem was that granting citizenship only to those who were resident before 1942 represented a very similar treatment to the one applied in the US Southern states to black people with the so-called "grandfather clause", whose aim was to deprive black people of the right to vote.

[95] This is due to the fact that in some periods there is a strong resistance to immigration, whereas in others there are statutes putting an end to difficulties on expatriation or on recognition of the legitimacy of migrations that were illegal at the moment of entrance.

[96] We remember that President Trump wanted to create a wall on the Mexican frontier. President Biden set aside this idea and the relative funds, but it is clear that in the first year of the Biden presidency we have had an increase in the immigration coming from Latin and Central America, so there is still a lot of discussion around this, and a decision must be taken in order to limit immigration by other means different from building a wall.

- In **Lithuania** and **Estonia** citizenship is granted to everyone who has been **legally residents** for 10 years. However, **double citizenship** is not allowed, so that if someone has a Russian passport (or any other nationality) cannot also own a Lithuanian or Estonian one. The rule is, of course, general[97] although its final objective is to target Russian minorities.

- ***Eastern-European countries***: there is a **clash** between recognition and rejection of dual citizenship because some countries allow it, and some don't. Some are committed to protect minorities, whereas some others prefer to include in the constitution provisions concerning the majority, which means a strong protection of *ethnos*. For instance, both in the Croatian and Bosnian constitution, due to the war at the beginning of the 90s, once can find provisions concerning the right to use only one language or passport or alphabet[98] or practice only one religion. This is all to emphasize the **protection of national identities**. Indeed, it is clear that even in Latin America and Europe there are different attitudes towards immigration fluxes, which need to be absorbed but without an excessive sacrifice to **ethnic compactness**.
- In **Germany** the policy applied since the 90s is to "***promote and pretend***", which provides for a very strict selection, that encompass, for example, a good knowledge of German[99].
- In **Spain** there is an important Organic Law dated 2000s that provides for restrictions (which are more permissive than the German ones) to the access and permanence in the territory.
- In **France**, it is necessary to have resided regularly for **5 years** and to pass an exam of knowledge of **French culture and language** in order to be naturalized (it is a special kind of civic contract, which is called "*contract d'accueil et d'integration*"). Indeed, the idea of the **language and culture exam** is very close to the one developed by **Habermas** in the 50s and 60s of a **"republicanism"**. According to Habermas the **belonging to *demos*** is not strictly reserved to those who belong to *ethnos*, but it includes those who are able to become **linguistically and culturally assimilated**.
- In **Brazil** and in Spanish-speaking countries of South America more permissive rules are applied, but this is also because normally migration in these areas is among countries speaking the same languages (**cultural patriotism**).

Another possible perspective from which it is possible to analyze the treatment towards non-citizens is the **treatment towards unauthorized immigrants**; many countries apply ***criminal* sanctions**; other countries prefer to apply ***administrative* sanctions**. It is interesting to analyze the case of Mexico, which used to apply criminal sanction but then turn to administrative sanction because the government realized that most immigration to Mexico was transitory, immigrants were moving from South to North (towards the USA), thus there was no reason to sanction these people who were simply crossing the country to move to other places.

Even the **treatment of non-citizens** is widely different from country to country. **France** applies the criterion of **immediate expulsion for the *sans papiers*** (i.e., people without documents) or for those who do not fall into predetermined quota. In other cases, there are rejection or deportation which can follow a judicial ruling or an administrative procedure. In the **UK** there is a possibility for a **regular judicial appeal** before the deportation from the border, although after 2008 it is possible to immediately expel (so-called immediate *refoulment* of) illegal immigrants.

There are many other possible polices that can be applied: in **Germany** we have the practice of **accompanying to the border** within 6 months; in **Latin and Central American** countries, such as

[97] If it had been a rule aimed at a specific minority, it would have been challenged before local courts and also before the ECHR.

[98] The alphabet is important because Croatian and Serbian languages are very similar, but Croatians write in Latin characters and Serbians write in Russian ones (i.e., Cyrillic).

[99] The same policy is applied in The Netherlands, which require a good level of Dutch.

Mexico and Argentina, the **choice** is completely **discretionary**; in the **Netherlands** illegal immigrants are **expelled** within **3 weeks**. In the case of the **USA**, according to Supreme court case law, **immigration policies** are an **exclusive competence of the President**, which means that it is up to the President to decide in which cases immigrant shall be deported (when they do not have documents or when they lie with regards to their personal quality).

Social services are another important issue, because obviously immigrants also need to receive a **minimum assistance** from different viewpoints (e.g., schooling for children, immediate health services in case of emergency). Also in this case, we have different approaches: in Germany, access to healthcare is free, but the doctor has to inform the police of the fact that the patient is an illegal immigrant, which causes them to barely ask for health care services for the fear of being deported; in Portugal immigrants are granted social training and health assistance including the right to a home; in the UK health services can be provided only after the payment of fee, except in the cases of urgency or infectious diseases (when healthcare is free).

As far as the **right to vote** is concerned, we have several examples of different policies: in Spain they apply a principle of *reciprocity*; in Mexico the extension of the right to vote to foreigners is *forbidden*[100]; in the EU countries there is an almost uniform regulation concerning the possibility to vote in administrative elections which require a minimum number of years of regular residency in order to exercise such right.

In conclusion, we can say that **citizenship still matters**, because the historical link between *demos* and *ethnos* implies that the enjoyment of citizenship can be reduced but can also be expanded to different subjects and not only to those who have long resided in the territory of the state. The idea that the legitimation of state is a kind of self-understanding and self-determination, as an integration function, comes from Habermas. Modern states cannot stick to old traditional ideas reserving citizenship only to those belonging to *ethnos,* but the *demos* must be **built up** using criteria that is up to the same *demos* to elaborate.

Globalization is obviously a **challenge** to citizenship, first because it **splits** the relationship with **economy** and **politics**, so that market economy is global whereas the creation of the civic will must have something to do with nationals and with the territory. Moreover, due to globalization, National solidarity is overcome by **integration processes** and Habermas in relation to this matter talks about constitutional patriotism or constitutional republicanism. This is a way to put together two ideals that are very different from each other. The idea is to confront the dangers of globalization with the traditional viewpoint of sovereignty through the **implementation of fundamental rights** to the extent that such implementation is compatible with the **survival of democracy** inside the dimension of nation state because state implies national identity. Some scholars admonish about the **risk** that **maximizing human rights**, under an axiological sublimation, might lead **to democratic self-determination**. The risk obviously exists, but a solution must be found according to the DNA of each cultural identity.

No way out of the conundrum has been found out at the moment. There is a lively debate, both on the side of constitutional and international law scholars, but a lot of ideas come from political science scholars and other disciplines not belonging to the law field. **Ackerman**, in this respect, argues that the juxtaposition of the **freedom of emigration** and the **limits on immigration** is a guarantee for a democratic decision-making process both in the country of destination and in the

[100] That is because Mexico has a huge border to deal with, and more importantly, it has always had to deal with the USA. In particular, historically, the US, in case of nationalizations of industries, production plants etc.., used industrial plants and mines owned by US citizens to send its army and restore the original ownership (as happened in Nicaragua). To avoid this, Mexico introduced in its Constitution some provisions **prohibiting foreigners from being owners** of mines or other industrial plants. However, notaries have created several possible contracts to circumvent the total prohibition, such as **trusts**.

country of origin. He believes that there should be the general recognition of a **human right to emigrate**, but not the general recognition of the right to **immigrate**. His idea is that by granting full protection to the right to emigrate, but not to the right to immigrate it is possible to **save** not only the integrity of the **national identity** of the country of emigration but even the possible chances of preserving **democracy** in the **country of origin**. This is questionable. Still, Ackerman is considered one of the most liberal scholars in the US scenario (in the category of constitutional law scholars).
On the other side (in the political science field) we have some authors belonging to the family of the liberal thought and other scholars belonging to the group of communitarians. Liberal scholars traditionally belong to the individualist tradition such as **John Rawls**, a famous political science scholar. He wrote some important books concerning the problem of the organization of civil society or social justice including problem concerning immigration. His first important book is "*A theory of justice*" (1980), followed by "*Social Justice in the liberal state*" (1984) and his last one, "***The law of peoples***" (1999). Rawls recognizes **4 mobility rights** of the modern man which apparently clash with the idea of a socially homogeneous world and with the idea of political community which does not have established borders anymore. The rights would be the **geographic rights, the social rights, the matrimonial rights**, **and political rights**. His idea is that a new political system should be engineered lead by individual position of total freedom and looking for the overlapping consensus. Rawls's idea is that inclusion, civilization, and reasonableness are essential constitutional element. In his last book "The law of peoples" Rawls reasons in terms of possible coexistence of states. He divides **states in 4 categories**: *liberal and reasonable* states, on whom Rawls bases his idea of coexistence; *decent* states; countries living under *benevolent dictatorship* without real participation and democracy; *rogue* states. When he talks about the **community of stable people**, he only mentions the states from the first categories with which is easier to find rational coexistence because they share the **same values**, the same approach to them, and live more or less in the same way. It is much more difficult to find overlapping consensus when you have as negotiating subjects people belonging to the last two categories (mild dictators and rogue states). From this side of the liberal thought, we do not find real useful suggestion to be imported and applied for the solutions of the contemporary problems concerning migrations.
Analyzing the debate more in detail, in all these cases, comparative law is almost useless due to the fact the problem of immigration in the last 20 years has been unprecedented, at least in the contemporary history of humanity. That is why Constitutional law is not properly fit for defining a common solution to a problem which is perceived in very **different terms** among different States: some are Countries of immigration, some others of emigration; some have enormous spaces and follow a policy of frequent admission (e.g., Canada in the last 5 years), some others apply quotas (e.g., the US); some that used to criminalize illegal immigration have instead decided to "downgrade" the criminal sanction, some others (e.g., Latin American Countries) have always been lenient due to the lack of immigration. In short, it is impossible to draw uniform suggestions from the various experiences.
A few words need to be spent about the effort that scholars have put in the last 20-25 years, although even in this respect there is a very little takeaway. We may find **two families** of theories, which correspond both to the constitutional *legal* scholarship and to the lively debate carried out by *political* scholars, sociologists, and other experts of immigration fluxes.

- First, ***liberal scholars*** such as J. **Rawls** and B. Ackerman. The former, in his *The theory of justice* (1980) talks about the idea of **disengaged identity**, which is a kind of untied position from local political, social, economic, and religious links. This way, a person in this *original position* is a sort of "pure individual" facing others in the same position. Starting from the disengaged identity, in a pure state of mind and freed from links of any kind, they can look for the maximum possible level of **liberty** as well as allow the maximum possible level of

inequality.[101] This way, putting together what is shared (i.e., the **overlapping consensus** technique, a procedure that puts the individual on the top of the values taken into consideration), it possible to identify some ***fundamental rights of the modern***, such as:

- The so-called **four mobility rights**, i.e., the right to geographic, social, matrimonial, and political mobility
- The freedom of **movement of goods** and free **choice of work**

This notwithstanding, the word Rawls uses to describe a more just society that would be based on the protection of such fundamental rights is **community closed by borders**, which does not quite help to understand which ratio of mobility is admitted in order to govern the fluxes of im/emigration. B. **Ackerman**, in turn, in his *Social justice in the liberal States* juxtaposes **freedom** of *emigration* and **limits** on *immigration* as guarantees for the democratic institutions of the country of destination and the democratic processes in the Country of origin. His idea is to have a **liberal conversation** implying that society must safeguard the survival of its political and social models. This makes also this theory hardly useful to draw conclusions. The most important step, though, was made by Rawls in his last book *The law of people* (1999). There, the same individualistic and liberal method that Rawls had applied to individuals with the aim of building up a just society, is now applied to **societies under ethnic stress** and to the international legal order. Then, he conceives a kind of **social contract** between States, which are divided into four types (respectively, *liberal and reasonable people*; *decent states* that are making some effort to apply traditional western values such as justice and democracy, but they are not completely successful; countries living under *benevolent dictators*; *outlaw* and rogue states, which are impossible to be treated with, and there is no reason why liberal people should convince them to make an international community). Well, if the *overlapping consensus* method is applied only to the States of the first kind (or, at most, of the second kind), then it is possible to build up a **community of stable peoples** and principles such as *equality* and *protection of rights* are not applicable to the rest of the world. Consequently, immigration and emigration cannot be governed if the international community considers just the first two categories. Anyway, Rawls' idea is that:

"Immigration damages responsibility for territorial preservation and demographic development in the Country of Origin, and the democratic processes, culture, and constitutional principles in the Countries of destination if without authorization of the people of the last ones".

Hence, the idea of **transnational distributive justice** is quite weak and rests on rather utopian premises.

- On the other hand, we can identify other (American or Canadian) scholars who belong to the ***communitarian thought***. Despite being lively, the doctrinal debate is again far **unfruitful**. The "communitarists" are liberal, but in a less intense way. Indeed, they do believe that the community must be conceived as an **organic whole** as well as a **holistic concept**, so that they try to defend the current structure of the international community. In this respect, immigration is perceived by them as a chance of disrupting the community, and instead they vindicate the primacy of the **collective identity** of groups. For instance, classical authors like **Weber** and Toennies believe that communities are built by **tradition of feelings**. Others (Taylor, McIntyre) believe that the common understanding is based on **ethical reasons**. Michael Sandel, in turn, prefers to describe a **face-to-face relationship** as the way to prevent disaggregation due to the globalization of markets (indeed, he is an anti-globalist). Others

[101] Indeed, inequality is seen as extremely useful, even if within certain limits.

(Bellah, Etzioni) prefer to use **intermediate societies** as an instrument of linking individuals to the whole, and finally Walzer talk about of **ethnic integration**. The common understanding is that society is the result of the historical and cultural context, and the structure of the *group* must be strengthened. Therefore, promoting and enhancing differences is *allowed* but must always aim at a **better collective enjoyment** of rights. In conclusion, *emigration* is free but there is no *immigration* policy to be preferred as the best solution for migration fluxes (even if the idea of community self-determination as a primary value makes border protection and preservation of cultural characters necessary, through limits to immigration).

Clearly, neither family of thought comes to fruitful conclusions as to the relationship between immigration and emigration. Instead, a very interesting theory has been but forward by **S. Benhabib** (a Lebanese American politician scientist). She starts from the idea that there is an inner and outer **disintegration of citizenship** due to the decline in State sovereignty (which is more and more porous), the regional integration, and the proliferation of HR treaties. The result of this coexistence implies **plural adhesions** and multiple loyalty to different sovereigns: this creates a kind of **network** model of citizenship. The same concept is applicable to constitutional law. Indeed, there are tensions inside liberal constitutionalism between the cosmopolitical protection of rights and State communities which are legitimated by their *demos*. In future, we will probably give way to perennial ***democratic iterations***, so that the national community will continuously redefine itself through admissions and naturalization policies, which must be planned to allow the *demos* in its fluidity (indeed, the *demos* changes) to adjust itself to the *ethnos*. This is no magic formula, of course. Yet, it is probably the most efficient formula describing the perpetual relationship between *ethnos* and *demos*, as well as the adjustments that must be planned by peoples to decide how to change trough frequent adjustments (i.e., the *iterations*).

International trade and regional economic integration

In this last part of our exciting and never-too-long discussion, we will address the topic of transnational trade law. But why addressing the topic of international and transnational trade law in a course of transnational *constitutional* law? We have already highlighted the phenomena of *internationalization* of constitutional law as well as of *constitutionalization* of international law. Indeed, the practice of the **World Trade Organization** (WTO) shows us that transnational and international trade law is one of the fields where there has been a clear trend of these kinds. In addition, the practice of the WTO has been criticized since its creation in 1995 for being **non-democratic** and **unaccountable** to its stakeholders, i.e., States. This is especially true if we consider that the WTO deals with *inter-State* commercial agreements (thus, not between private actors), such as quantitative restrictions, or technical requirements of goods. Nonetheless, the WTO is based on a ***dispute-settlement understanding***, that is, a document providing for the rules on its functioning and for a **twofold review**: indeed, trade measures taken by Member States may be *reviewed* according to certain parameters, and the decision concerned may be *appealed* to the so-called Appellate Body, which is a second-level judge that can adjudicate on the **legitimacy of trade measures** adopted by States. In doing so, the Appellate Body has behaved more or less like a supranational constitutional Court. In some cases, in fact, it has either adopted **procedural standards** for the fact-finding process (i.e., research for evidence), and applied a certain **standard of scrutiny** as well as a **value-based** approach to cases.

Some examples taken from the end of the last Century will clarify the picture. One of the first cases the WTO dealt with concerned hormones. The dispute revolved around the ban imposed by the European Community on the importation of American Meat because of the treatment with certain hormones: indeed, the expert assessment of that meat highlighted possible risks of diseases that would derive by a continuous consumption of “hormonized” meat. Another case – then called *shrimp-turtle case* – concerned a restriction imposed by the US on a type of shrimp fishing practice that hurt protected turtles (who were captured by fishnets). In these cases, the WTO appellate body adopted a really **substantial approach**. Indeed:

- First, as to evidence-gathering, it adopted an ***inquisitorial fact-finding*** approach, in which the judicial body was able to autonomously seek further evidence.[102] In the *hormons* case, the WTO did not accept the conclusions of the European Union’s advisory body but relied on an autonomously sought scientific review. Eventually, the WTO sanctioned the European prohibition on meat bred with hormones due to a violation of international trade law as provided for in the **General Agreement on Tariffs and Trade** (GATT, i.e., an international agreement on international trade).
- What is more, the WTO appellate body has carried out a review according to ***substantial principles*** such as that of **proportionality**, evaluating whether trade measures (i) pursued a *legitimate interest* of the parties, such as food safety; and whether they (ii) were the *least restrictive* means to achieve the interest.
- Third, concerning the standards of scrutiny of the WTO appellate body, the latter has resorted that, depending on the measure at stake, it may adopt either a **strict scrutiny**, the intermediate scrutiny, or the so-called **rationality-based scrutiny**, which is more lenient towards national authorities.

It is clear that this is not the usual behavior of an international organization, but rather resembles the attitude of national adjudicatory boards.

Along with the *internationalization* of trade, there are several **regional agreements** on trade such as the European Union itself. The proliferation of regional trade agreements, to some extent weakened the mission and the function of the WTO settlement body as an institution that tries to conform the rules concerning global trade. In addition, over the years the functioning of the WTO adjudicatory body has been progressively **neutralized**: indeed, since Donald Trump’s election, the US have consistently opposed the nomination of new members to the Appellate Body[103] on the assumption that the decisions of the Body were detrimental to the American trade interests. The problem is that once a term expires, there is no *prorogation of powers*. Consequently, now only 0 (zero!) out of 6 members of the Body are currently serving: the appellate body is an empty shell and will not be able to function until at least three members are appointed. This makes us understand that mechanisms of transnational law are still remarkably **dependent** on the willingness of sovereign States to coordinate at supranational level. Put differently, international institutions are still not autonomous. We are indeed going from a hierarchization of international trade law derived from the characters of the Appellate Body like a Constitutional Court to instead a model of constitutionalism that resembles a **network of different systems** of international trade that must interact with one another.

The problem with international economic relationship is that scholars are striving to reconcile the pursuit of **economic interests** on the one hand (that is the main goal of international trade), and the **widespread protection** of other relevant individual interests (among all, that of Human Rights).[104] International trade has indeed to face the existence of other instruments of international law that bind signing Member States and that provide, for instance, for the access to *good living conditions*

[102] ***Inquisitorial*** proceedings are opposite to the ***adversarial*** ones, the latter being based on the principle whereby the judge decides only on evidence provided by the parties, without autonomous discretion of the judge.

[103] Indeed, new components of the Appellate Body, must be approved by the WTO Member States by **consensus**.

[104] And the track record of the ECJ supports the existence of this problem: indeed, the EC was born to protect the *four freedoms* but over time started to protect constitutional values enshrined in MSs’ traditions.

and *food*, for the right to *life* and *health care*, for that to *accommodation*, to *cultural identity*, and to *natural environment*. The problem with laying down trade rules that are compliant towards **global values** has negatively affected the establishment of *effective* and *enforceable* rules on global trade. Moreover, this permanent balancing between values and principles needs to keep together a **global** and a **regional** dimension. Since the establishment of the WTO in 1994, there have been several *additional multilateral agreements* associated with the WTO, and the areas covered by these agreements have progressively increased. For instance, the 2013 *Bali package* and the 2015 *Nairobi package* extended the competences of the WTO. Instead, the establishment of the WTO itself was a **novelty** in international trade relations because up until WW1 no complete regulation of international trade existed: there were some examples of trade relations in the XIX Century between France and England, but apart from that the only existing trade relations were not relevant in size. In this context, the establishment of WTO attempted to shape relations on a global level through two criteria:

- The ***Most Favored Nation*** (MFN) clause, whereby when a Country enters in trade relations with another Country it should be given access to its market at the conditions granted to all the other Countries already in a trade relation. Basically, it is a principle of **non-discrimination** for third Countries that enter in *new* trade relations. Say, for instance, that France and Italy have a trade agreement whereby customs duties are lowered. If Spain wants to enter in trade relations with Italy, the MFN clause imposes that Spain should be subject to the same lowered duties that are already granted to French goods. One could wonder how then it would be possible to have privileged trade relations: already in the GATT possible **exceptions** were allowed. Ideally, the latter should be communicated and approved as soon as they are formed[105], but the MFN rule (despite being a general criterion in international trade) has been derogated many times. In sum, the MFN clause applies to the level of access of goods *in general* to a market.
- The ***National Treatment*** (NT) clause, in turn, directly deals with goods. It implies that States, in international trade relations, cannot impose on imported goods different or stricter than those established for national goods. Therefore, if national goods must respect certain (technical, sanitary, etc.) requirements, then the State *can* impose them on foreign goods. Conversely, it cannot impose supplemental documentary requirements that are not imposed for national goods. Differently from the MFN rule, the NT clause deals with the treatment of *specific* goods in relation with those already in the domestic market.

Again, this is the theory. In practice, the WTO Appellate body has not been effective in pursuing these goals and many exceptions have been accepted. In a historical perspective, trade at the international level was initially (XIX Century) based on the **supremacy of the British Empire** with its colonies overseas. Indeed, colonial power was not only a matter of political privilege but actually connected to the availability of low-cost raw materials to make factories work, in a society ruled by **full liberalism** and **industrial supremacy**. Also, especially in the first years of the XX Century, there was the spread of **economic nationalism**, implying quantitative restrictions on imported and exported goods. Nor were these issues solved in the aftermath of WW1 because the *League of Nations* eventually did not prove effective enough in laying down shared trade rules and due to the *Great Depression*, which caused the fall of Wall Street (1929), the Weimar's inflation crisis, etc. Basically, until the end of WW2, the system did not provide for a framework for the correct functioning of international trade.

[105] Indeed, Art. XXIV GATT authorizes the creation of **custom zones** and **free trade areas** to facilitate commerce between parties without creating hurdles to others. The prior notification mechanism could trigger a *qualified majority blocking*.

However, in **1944**, the **Bretton Woods Conference** took place. The agreements thereof tried to build a framework for international economic law and transnational trade built on different pillars: the **International Monetary Fund** (IMF) and the **World Bank** had a consultative function for developing economies and were tasked to lend them money under certain conditions, in order to improve the attractivity of the market for international trade. Then, an **International Trade Organization** (ITO) was envisaged in the *Havana Charter,* but it eventually did not become concrete due to strong protectionist forces and to the incoming Cold War, as well as because many States (including the US) failed to ratify it and others (namely, the UK) were not willing to lose their imperialistic prevalence. Nonetheless, the Havana Charter ended up shaping the appearance of the **1947 GATT**, which was more limited in its content than the Havana Charter and was signed by 23 Countries (now, over 160 Countries are members of the WTO). It only consisted in an instrument **regulating international commerce** that never formally entered into force, and it contained the so-called *grandfather-clause* whereby incompatible domestic statutes remained unaltered by the agreement.
Before the establishment of the WTO (1995), the GATT changed over time thanks to several *rounds*, from Geneva (1947) to Uruguay (1986-1993): States agreed on the *reduction of tariffs*, on the *elimination of technical difficulties* for imported products, on the regulation of *public aid* to businesses (which is something pivotal also in EU law) and approved *sectorial codes* as well as *anti-dumping* codes. These changes were made pursuing a **multilateral economy** that was however **lacking** the participation of the Socialist Countries of the Warsaw Block. In short, the GATT was based on an **American hegemony** with the support of the European industrial economies and the Commonwealth. What is more, the resilience of certain economies (namely, Japanese, Italian, and German ones) together with decolonization processes and the birth of the EEC (then EC, in 1993) considerably increased the role of **economic regionalism**, which challenged the idea of multilateralism. This way, there were both a strifeful multilateralism and a competing interest in laying down trade agreements on a regional level.[106]
In this context, the WTO tries to **enforce** the contents of the 1947 GATT. However, States tend to make regional agreements more effective and frequent. That is why the activity of the WTO has been halted in the past few years, opposed to a major resort to regional trade agreements.

[106] Regional Trade Agreements could be found everywhere in the world: in Europe (with the *European Free Trade Agreement* and the *EEC*), in Latin America (e.g., the *Pacto Andino*), and in Africa (e.g., the *Southern African Customs Union*, and the *East African Community*). In a second phase of regional economic integration (post-1970) we witness the EEC extension to three new countries, the signing of the *Lomé Convention* with Africa, and the birth of new trade agreements. In a third phase marked by **economic liberalism** and which followed the collapse of the Soviet Union and the end of colonization, trade agreements started to proliferate also in Asia.

Part 2:
The practice of Transnational Constitutional Law

New Technologies, Transnational Constitutional Law, and Human Rights [107]

The issue we will cover in the following lines is extremely wide, and hence we will mainly focus on **artificial intelligence** (AI) since it is a paradigmatic new technology that raises new challenges to constitutionalism and transnational constitutionalism. As a matter of fact, AI is much more than just a "new technology": indeed, AI is so powerful and pervasive that it is concretely rebuilding our lives, experiences, and relationships. To some extent, AI is also giving a new meaning to ourselves. It is therefore a **disruptive** or rather (as Professor Luciano **Floridi** claims) a ***re-ontologising force***, in the sense it is giving new meanings and values to a number of life factors. As to the transnational level, the AI is actually changing the relationships between human beings themselves, between human beings and society, and between them and the State. What is more, AI is also changing relationships between States, also shifting **geopolitical** relations and balances: for instance, it is bringing new private actors to the scene causing the reaction of some public powers, such as the one of China that is now trying to have the control over AI. Also, the EU is struggling to regulate the matter, towards what will be called the ***Artificial Intelligence Act***. The current Regulation proposal will take at least three more years to get enacted. To develop the topic, after a short introduction about the AI revolution, the *traditional approach* towards AI will be analysed and then compared to a new, experimental way of conceiving "old" and "new" **human rights *vis à vis* the AI**.

As mentioned, AI is extremely important for transnational constitutionalism for it intervenes at different levels:

- First, it is **increasing supranational integration**, as the proposal for Regulation on AI at the European level testifies.
- Second, the role of **international law** is changing due to AI: indeed, several international law documents, namely *soft laws*, are being drafted and are becoming more and more important.
- Finally, AI plays a role for the impact of **economic globalisation** on the domestic arena in an unprecedented and pervasive way.

This AI revolution is overall extremely **fast**, and it is **invisible** and yet **pervasive**[108]. First, it is fast if compared to other technological revolutions: for instance, it took 40 years for the telephone to become pervasive; it took 30 years for the television; it took 20 years for the smartphone. Instead, although the term *Artificial Intelligence* was coined in 1956 by John McCarthy, after the so-called "winter of AI" it was only a few years ago that Artificial Intelligence became "popular". Now, the pace of innovations in the field of AI is super-fast: new applications of that technologies are developed and created every week, as well as new fields for AI. Consequently, there is **no time** for society to adapt, and neither is it for decision-makers (both at national and supranational level) to debate on pros and cons and enact laws on the matter. This is the first difficulty we need to face when dealing with the regulation of AI. In this respect, the EU AI Act proposal is good news: indeed, in this very fast scenario the EU Commission decided to get a regulation.

Furthermore, this revolution is invisible since AI is actually changing our lives without us even noticing it. By way of example, not many people are aware of the fact that the simple action of buying something on Amazon, of choosing a movie on Netflix, and sometimes even of walking

[107] From the lecture by Professor **Carlo Casonato**.

[108] A device or a new technology can be considered *pervasive* when it is used at least by **25% of the population**.

around a smart-city, people leave **digital fingerprints** that allow public and private actors to **profile** their preferences, choices and dislikes in various fields (e.g., commercial habits, political orientations, etc.). In this respective, the AI revolution is invisible because it accurately builds a person's profile without being noticed. This way, it pervasively **penetrates** every aspect of our lives and is capable of influencing (almost) every single choice: it could even be that you are reading these notes simply because a AI system made you do so. Also for this reason, the Japanese governments plans to spend over two billion yens (i.e., twenty million euros) to implement a system that can analyse data collected from persons in order to help them to find their *soulmate*.[109] What is more: AI has numerous applications in other fields, such as medicine, finance, justice, police, etc. This is why some scholars claimed that humans nowadays do not live *online*, but in a kind of ***onlife***: from the atmosphere we used to live in, we have moved to an ***info-sphere***. In this sense, Artificial Intelligence is not just a technology, or an instrument, is a proper **living environment** that builds the reality in which we do and will live (just consider, for instance, the *metaverse*). As to some other, more dystopian authors, Kate **Crawford** referred to AI as *technology of extraction* in claiming that technology makes people extract minerals from the soil, extract labor from the poor, data from every action, etc: according to her vision in the book *Atlas of AI*, Artificial Intelligence is fuelling a shift towards an **undemocratic governance** and an **increase in inequities**. Cecilia **Rikap**, in her turn, speaks about the global race between Nations and private corporations in the Ai revolution: in this sense, AI would trigger a new **war** between global actors, involving both governments and big tech companies (e.g., the one between the US and China).

This revolution can be oriented for the benefits of humanity, or just for the benefits of a small amount of people. Put differently, the main challenge for constitutionalism is to orientate this revolution for the benefit of the humankind. This duty can be traced back to the ***Declaration* of 1789**, where Art. **16** provided:

> *Any society in which the **guarantee of rights** is not assured* […] *has **no Constitution**.*

Therefore, the question is: *vis à vis* the new powers unleashed by AI (such as the use of data to gain more economic and political power), do we have the **tools** and means in order to limit the new powers and to have a **guarantee of rights**? Should the answer be negative, we would not live in a constitutional State.

The traditional approach to rules and to guarantees of rights *vis à vis* AI is based on **Asimov's Three Laws** of Robotics of **1942**, to which the last one (*rule 0*) was added later in **1986**:

0. *A robot may not **injure humanity*** (or, by inaction, allow humanity to come to harm);
1. *A robot may not **injure a human***;
2. *A robot must **obey the orders** given by human beings* (as long as such orders do not conflict with the first law);
3. *A robot must **protect its own** existence*.

Another traditional approach is based on a number of **international documents** (such as the UNESCO *Recommendation on the ethics of AI*, the *Montreal Declaration for a Responsible Development of AI* or the EU Agency for Fundamental Rights document on *AI and fundamental rights*) and was theorised by Luciano **Floridi**. Focused on these international documents, the scholar tried to apply the four traditional principles of **bioethics** to Artificial Intelligence (i.e., *beneficence*, *non-maleficence*, *autonomy,* and *justice*) adding a new fifth one, i.e., ***explicability***: hence, he tried to draft an **ethical framework** for a good AI society, in order to ensure rights *vis à vis* Artificial Intelligence.

However, it is more interesting to focus on a new, experimental approach, based on some pieces of EU Law (namely, the *GDPR* and the proposal of *AI Act*). We will go through 8 human rights divided

[109] Indeed, Japan faces a problem of low birth rates, like in Italy.

into two blocks, i.e., *old* rights that needs to be **accommodated** to face new challenges, and *new* rights emerging from the very specific characteristics of the technology we should rule on.

First, it is necessary to **define** what AI is. In this respect, John **McCarthy** tried to define AI as the *science of making a machine behave in ways that would be called **intelligent** if a human were so behaving*. The definition can be tested with the **Turing test**, whereby a person experience an AI system if he/she cannot say if its interlocutor is a human or a machine. Put differently, if a machine cannot be distinguished from a human interlocutor, then that machine can be defined AI. Nonetheless, do we really want Ai to be human-like?

This being said, we can start with the first right: the ***right to know one's own interlocutor's name***: indeed, a person should know, when approaching to something or someone, whether their interlocutor is a machine or a human being. Otherwise, misunderstandings might indeed occur, as well as the empathy one expects when interacting with a human being, and issues of false trust. To solve this tricky trouble, something like a "I'm not a human" alert could be useful. Scholars such as Tom **Ziemke** have recently addressed the topic, and so did the decision-makers: the proposed Art. **52 AI Act** requires AI systems intended to interact with natural persons to be designed in such a way that the latter are **informed** that they are interacting with an AI system.

Furthermore, another right may rise from the issues of **complexity** and **opacity** proper of AI. By way of example, the most advanced systems are based on neural networks, which makes them as powerful as complex. The problem is even more evident when the algorithm works as a **black box**: in those cases, programmers and designers put in the input layer and get the output layer (i.e., the decision given by the system), but they do not know the actual reasoning process of the algorithm (i.e., the so-called **hidden-layer**). Consequently, the problem involves the ***Right to Reasons***: in this respect, scientific literature speaks of **explainability** and **transparency**, and of the concept of trustworthiness of AI. This right is extremely important: just consider, for instance, the possible deployment of AI in the field of *justice*: even though an AI-judge might reach a very accurate ruling, it would be unconstitutional if it was impossible to know the reasons for the decision. This way, experts are trying to change the black box in a *white* (or at least, grey) *box*. Again, the law provides some examples of this rights:

- The **AI Act** proposal, at Art. **13**, provides that high-risk Ai systems must be designed in such a way to ensure that their operation is sufficiently **transparent** to enable users to **interpret** the system's output and use it appropriately. Hence, the proposals tries to establish a right to ***transparency*** and to know the reasons behind the system's output.
- In **Canada**, a Directive dealing with AI speaks about the duty of a ***meaningful explanation*** to affected individuals as to *how* and *why* the decision was made.
- The French **Loi de bioéthique** (as amended in 2021) provides at Art. 17 that when a health care provider decides to use a **medical device** that includes algorithmic processing, programmers must make sure that the operation of these systems is **explainable** to users. Put differently, the device has to be transparent. And this is not just a technical problem. By way of example, medical devices based on AI are often used in *triage* to assign a priority to arriving patients. AI systems can be very useful to give the right priority. However, if it is impossible to give reasons for each decision (that might make a patient wait for five hours before being treated), then not only the decision itself is invalid (i.e, in a technical and juridical meaning), but also **lacks legitimacy**.

What is more: a third technological problem of AI is that, contrary to the common belief, Artificial Intelligence **might be inaccurate**. The picture on the right is a self-evident example. A machine identified the stop signs as "*speed limit 45*", whereas the last sign as a "*stop*" sign. Just imagine the consequence of a misinterpretation of the sign when sitting in a self-driving car, that goes at 44 km/h instead of stopping at a crossroad! Also, it has been demonstrated that AI can have a **discriminatory effect** based on the biases of the programmers, especially in Artificial Facial Recognition (AFR) systems. For instance, a machine, while having a 1% error rate in identifying the sex of a white male person, increased the error rate to 12% when dealing with a dark-skinned man, and to 35% when analysing an Asian woman. Hence, AI sometimes is **biased** and/or **makes errors**. This could have dramatic effects, by way of example, in the field of *war*, where Self-Driving Drones are more and more often employed. The latter work with an AFR system to identify their target: if it made a mistake in identifying a terrorist, the consequences would be drastic. The same could be said for *medicine*, that should be unbiased by default. On the contrary, medical scholars reported that physicians often use algorithms to individualise risk assessment and guide clinical decisions. By embedding race into the basic data and decisions of health care, these algorithms propagate race-based medicine. Many of these race-adjusted algorithms guide decisions in ways that may direct more attention or resources to white patients than to members of racial and ethnic minorities. What is more, the journal *Science* called the attention to substantial disparities already existing in medicine: from this standpoint, particular dangers may arise through expanding use of big data and AI-based systems in medicine, making bias especially intractable unless tackled directly and early. Be careful: this is not a reason to stop Artificial Intelligence, but rather a reason to **face** the problem and update the fundamental ***Non-Discrimination Principle***. It is true that dealing with this principle in the field of AI is not easy (also considering the problem of black boxes, whereby we do not know at which stage the machine makes the error, or discriminates): therefore, it is needed to find new ways to ensure compliance with the principle. For instance, the **AI Act** at Art. 10 focused on *datasets*: engineers and technicians must pay particular attention in selecting the correct training, validation and testing data sets (that must be *representative*, *free of errors* and *complete*) in order to give an effective respect of the Non-Discrimination Principle. Otherwise, a good law "in the book" would not correspond to an equally good "law in action".

After this first block of already existing rights that needs to be accommodated, it is crucial to focus on three *new* rights *vis à vis* AI that rise from the specific characteristics of the technology. To begin with, AI is based on a **probabilistic approach**. Indeed, when the AI profiles us, profiling is based on choices and preferences expressed by the user in the past. Put differently, people are profiled basing on their "history". Consequently, systems sends people alerts and ads based on their past preferences (e.g., Netflix suggests movies to watch basing on the viewing history of each user; Booking.com tends to advertise seaside location if the user has always been on vacation at the seaside). Therefore, it is a ***conservative profiling***. But what about exceptions and *surprises*? What if the user wanted to go to the mountains for once, or watch a *romance* instead of his/her favourite *action* movie? Or, more seriously, what about proposals from political parties other than the one a person has always voted for? In this respect, it should be important to guarantee a ***right to discontinuity***, i.e., not to be trapped in one's own conservative profiling. Therefore, one should receive also ads that are inconsistent with his/her historic preferences. Otherwise, we would be left

without the *possibility to choose* (different movies, different places for holiday) and to *have democratic exchanges*.
Secondly, AI is also connoted by **autonomy** and **unpredictability**. This raises the necessity for the principle of the ***human in the loop***. We already have this principle provided for in a number of legal documents: for instance, Art. **22 GDPR** provides for the right not to be subject to a decision based solely on an **automated processing**; Art. **14 AI Act** requires **human oversight** for every system, and a human role in every decision-making process; the Canadian Directive finally states that an Automated Decision System must allow for human intervention when appropriate. Otherwise, everything will be left to the machine. As said, this right already exists. However, a human in the loop is not sufficient: usually, people think that AI *is always right*, up to the point that a Japanese driver happened to go straight into the sea just because he wanted to follow the indications of the navigation system. A genius! Also, a public servant is unlikely to be motivated enough to criticise the output of an AI and not to follow it. It would be much convenient to always respect the decision of the machine in order not to motivate the disagreement and thus take *personal* responsibility. Likewise, a doctor is likely to follow the indications of an AI diagnostic system without raising any concern (especially when the system is "certain" about a diagnosis). Effectively exercising human control *vis à vis* an AI system would be too risky: it would be simpler to **de-respoansabilize**. Hence, to overcome these issues of **automatic agreement**, de-responsabilization, and **de-humanisation** we need a *hero.* In this sense scholars speak of the ***right to a hero*** in order to exercise "in action" the principle of the human in the loop.
Finally, a last feature of AI is the so-called **King Midas problem**: in order to have AI performing its activity in an effective way, we must build an environment around it in the scale of artificial intelligence. The dishwasher is a perfect example of a machine built *around a system* to wash the dishes, without minding about a "human" dimension of the appliance. In order to have technology working at its maximum, we must build an **environment around the technology** that might not be adapt for humans. It is the so-called ***envelop problem***: for instance, it is possible that in the future our homes, highways and cities will be built more at "AI scale" rather than at human scale. Therefore, it is important for us to distinguish the environment we want to dedicate to technology (e.g., highways or airport runways are already built for the machines and not for us) from the one we want to maintain *at human scale*. In one expression, the ***right to a human environment***: i.e., the right to living environments built on a human scale in order to ensure **human priority** over Artificial Intelligence.
But we cannot be only pessimistic. In fact, we must admit that in a number of domains, such as medicine, traffic, agriculture, climate change, and maybe public administration, and justice, *AI does it better*. Just consider the fact that the COVID-19 vaccine was produced in such a short period thanks to AI. Likewise, some treatments would be impossible without Artificial Intelligence. In these domains, we can really speak of a ***right to an AI-assisted action***, in a sort of application of the **principle of subsidiarity**: when the AI can do better than humans, in a more effective way, we should leave room to it. Some Courts have already recognised it: in a case in which a lawyer spent a huge amount of time examining Statutes and rules for his client (and making his pay rise more and more) instead of using *databases*, the **Ontario Superior Court of Justice** ruled that:
"AI will increasingly play a crucial role in ***assisting lawyers*** [also] *cutting the time they spend for research.* […] *If AI sources were employed, no doubt counsel's preparation time would have been significantly reduced".*
Finally, we have the **right and duty *to be educated***: indeed, States should start classes of AI or technology from elementary school through college and professional training. Knowledge and understanding are the key to a safe use of Artificial Intelligence.

Administrative simplification as a transnational legal trend [110]

We will address this topic from different standpoints, to give a general (theoretical and methodological) overview. To begin with, ***administrative simplification*** is essentially **absent** as a *specific* subject matter from the contents of handbook of comparative constitutional or even administrative law. Instead, the most prominent authors (e.g., **Rosenfeld** and **Rose-Ackerman**) make only indirect reference to the matter, for instance through *rulemaking*, *transparency*, organisational *structures*, *regulatory* bodies, transnational non-State regulation, deregulation, participation, and so on. Therefore, we need to find some reflections about administrative simplification in other topics of comparative law. On the contrary, administrative simplification is one of the main topics of interests when it comes to international or regional **reports**: by way of example, it is possible to find it in the OECD report on the annual *Regulatory Impact Assessment* and in the European Commission *Simplification Handbook in cohesion policy*.

In the picture on the right, we can find all the different elements and meanings of the so-called ***simplification principle***. In particular, simplification can be achieved mainly through **rule-making** and **participation**: not only legal sources are relevant in this sense, but also different behaviours of public administrations and citizens.

For a long time, the word ***simplification*** would generally point out the **evolution of sources** of law *and also*, according to other points of view belonging to the sciences of administration, a working method to **increase productivity** in public administration or in the relations between public administrations and citizens, rather than in a specific institution. From a public law point of view, administrative simplification pursues three interesting **aims**:

- First, administrative simplification operates a ***balance*** of **constitutional values**. Indeed, the intimate structure of administrative law is deeply influenced by **public values** that guide the **legitimate exercise** of authority by the State, and the accomplishment of missions of general interest. In this respect, public administrations are required to serve the people, to be **impartial** without any discrimination: almost all Constitutions (at least the Western ones) have the **principle of *equality***. In short, the public administration must be **good** and **efficient**, open and transparent, and subject to an effective **judicial review**. What is more, public administration are also required to respect the **fundamental rights** of individuals in the exercise of public authority, and to ensure the satisfaction of the population's **basic needs** through the provision of goods and services. It is clear that after WW2, and particularly after 1989, there was an opening towards transnational relations, thus allowing constitutional and public law ideas to circulate. In this respect, administrative experiences in simplification gave an important contribution to the reinforcement of these values and principles proper of a **liberal-democratic** constitutionalism.
- Second, it **reduces regulatory *complexity*** and ***uncertainty*** that affect the relations between public administration and citizens: in may foreign contexts (for instance, the French or the British one) experience a resistance to complex administrative procedures, seen as irritating. This is why simplification means also reducing the complexity in the relation between PAs and citizens.

[110] Taken from the lecture by Professor **Roberto Scarciglia**. For readers willing to understand the paragraph that follows, it is suggested to read: Scarciglia, R.*, Il "mito di Sisifo" e la semplificazione amministrativa. Alla ricerca di nuovi modelli di regolazione*, in DPCEOnline 47, vol. 2 (2021). Available in Italian at the following link: dpceonline.it/index.php/dpceonline/article/view/1335/1295.

- Last, it **reduces *administrative costs***, thus contributing to the elimination of bureaucratic barriers and burdens.

We shall now develop the first point, concerning the relation between constitutional values and administrative law. The consideration of simplification as a formula for **balancing constitutional values** leads us to observe that, in practice, not all constitutional values of the Western legal tradition are part of a transnational (or neither global) constitutional law, as they have not been introduced in many Constitutions *beyond* Western legal tradition. Put differently, what happens in *western* legal traditions does not necessarily replicate in other Countries where, instead, it is impossible to talk about simplification (e.g., Iran, Russia, African Countries, China, etc.). There, simplification is almost a way to develop different Constitutional values, such as the socialist ones. The intense **difference** between Countries made scholars claim that, while it is true that the principle of simplification represents *in abstract* a **limus test** of constitutional values, it is equally true that the values it relates to differ from Country to Country depending on its form of State and government. Put differently, they depend on different constitutional, social, and economical factors. Therefore, it is extremely difficult to explain the structure the new field of investigation that is transnational administrative law. Nonetheless, it is certain that after 1989, administrative simplification has become a real trend in many Countries.

Another relevant remark is that administrative simplification can be introduced to **circumvent constitutional principles** such as the principle *of good performance* and of *impartiality* of the administration, as well as to **strengthen undemocratic regimes** by *restricting the functions* of the Judiciary or Parliaments. By way of example, we have experienced this in many Countries (e.g., Turkey and Hungary) where administrative law is used an instrument to give less force to constitutional principles, since the latter are realized on a material level only through correct execution by administrative laws and regulations. In this respect, if a principle can be found on a formal level through a circulation in the legislation of most countries of the world, on a material level it is **characterized differently** depending on the **constitutional values it upholds**. The principle of *administrative simplification* is not generally present in constitutional texts (where there are other principles, such as *good administration* or *impartiality*, and sometimes even religious elements), yet it can be considered a worldwide **trend** and as a **common principle** of 'transnational' administrative law.

When speaking of legal systems, we have different factors of change. Indeed, law is **dynamic**, and some significant factors changed the original scenario in which experiences of simplification developed in the latter part of the last century:

- Developments of ***processes*** by which different **large-scale legislations** became increasingly **interconnected** and interdependent, crossing the borders of nation-states. Since 1989, we have experienced different legislations not only in a horizontal perspective, but principally in a vertical one: indeed, we have national regulations and international norms that are different from each other.
- ***Decreasing influence of public law*** on society and economy, counterbalanced by a progressive importance of private actors in the life of nation-States and of citizens. By way of example, consider big data corporations (e.g., Google, Meta), pharmaceutical companies (as we have noticed during the pandemic)[111] and heavy industry. This rises the question of how **fundamental rights** can be nonetheless guaranteed.

[111] Indeed, in the last few years we have experienced the importance of corporations that develop and sell vaccines around the world. This problem became so relevant that there was the urge to regulate that private sector more strictly: for instance, Supreme Courts have prohibited the practice of price discrimination for drugs.

- The distinction of the **labour position of civil servants** in Countries that have (i.e., civil law systems) and have not (i.e., common law systems[112]) administrative models became softer.
- ***Privatisations***.
- Different forms of ***deregulation***, still the idea of deregulating is clearly a worldwide trend for transnational administrative law.
- ***Complexity*** of the law dominating the European administrative system, due to the presence of numerous administrations: i.e., the EU Administration and the national ones.

Still, what does **administrative simplification** exactly refer to? The term has indeed a polysemous nature, leaving room for different interpretations.[113] Simplification manifests itself heterogeneously in legal systems, responding, for instance, to **economic and social needs** through public policies and **cyclical** public administration reforms, which, however, have not consistently constituted an improvement in work processes. This is so, for instance, since a legislative reform of public administration needs to be implemented through lots of secondary legal sources: if the latter are not enacted, the reform becomes meaningless. Anyway, the expression *administrative simplification* is **associated with terms** that also refer to fields other than administrative law, such as *economy*, *better regulation*, reduction of *complexity* and *complication* (for instance, in principles and administrative processes), increase in regulatory *quality*, and reduction of *bureaucracy* (with the expression of "*cutting the red tape*"). As a consequence, scholars adopt a geterogeneous approach aiming at the **simplification** of the regulatory framework of certain activities, and, on the other hand, the **revision** of the structures of *public powers* with respect to activities such as the economic ones of private subjects, thus particularly affecting procedural dynamics. As to this second objective, if we analyze the legislation of European Countries, it is possible to notice that the structure of government has changed. For instance, the new government might decide do divide a Ministry into two structure (as happened with the Italian Ministero dell'Istruzione, dell'Università e della Ricerca). The problem is how to do this revision without losing the **guarantees** for constitutional values and administrative rights recognized to citizens.
If we look at the issue of administrative simplification from an **economic perspective**, excessive **bureaucracy** (i.e., red tapes) **increases the costs** of business, can hinder the entry of new players into markets, and reduces incentives for innovation and competitive pressures within the economy of nation-states. The demonstration of this idea can be found in the regulation concerning *start-ups* that produce a lot of innovation, and hence have less "red tapes" than other businesses. What is mote, bureaucracy also creates **uncertainty** that can disrupt business planning and hinder the ability of firms to respond quickly to crises and new market opportunities. This perception is reinforced by the endurance of the health crisis (Covid-19) that induces **profound rethinking** of public and

[112] These are more prone to changes than the former.
[113] It is difficult to summarize the problems concerning simplification. Simplification has become in the last 30 years a sort of "password" that is used to achieve very different aims. On the one hand, the term would normally have an **ideologically neutral** meaning. For instance, when Franco Bassanini in the 90's mentioned simplification as an important aim of Italian politics, he meant that Italy should have reduced the number of regulations, organized the distribution of function in a more effective way, and so on. Likewise, in France *simplification* has a similar **bureaucratic approach** in order to make bureaucracy more efficient. Yet, in many other cases (e.g., the UK, China) the term has a deep **ideological** meaning: for instance, when Mrs. Thatcher became PM in 1979, and when President Regan was elected, they obviously conceived simplification as *deregulations* and *privatizations*, coherently with their political program that implied an open attack to the so-called "Rooseveltian Coalition". Likewise, Trump's program for 2016 Presidential Elections included a sort of war against the "Deep State", implying there was a kind of conspiracy to preserve the dimension of the federal structure. However, after being elected, he himself started to use the deep State to deal with the lack of Republican Majority in Congress (e.g., publishing a lot of Executive Orders to bypass the legislative procedure). What is more, Biden is doing the same. In sum, there may be cases in which *simplification* is used as an "ideological shelter" to implement a political program.

administrative law and their transnational and global trends. With the **scarcity of economic resources** and reduced accessibility to credit by private companies, the ability to plan the use of available financial means becomes a pivotal element for the successful outcome of future investments. **Simplification** and the element of time – affecting the decisions of public administrations – take on the role of variables in the choices of private actors. In particular, the element of ***time*** in simplification policies or in the decisions of public administrations to regulate administrative procedures and forms of participation, points out the role of **variables** such as the *effects* of policies and decisions, the *reduction* of decision time, differences between civil and common law legal systems (i.e., a formal prevision by a legal source in civil law vs. a case-law approach based on *reasonableness*), the introduction of different mechanisms to u*nify subprocedures* between Countries, and the *exclusion of the majority principle* for public bodies that represent interests of constitutional value. Of course, variables are not the same in the different legal systems, and their impact produces a **variety of solutions**, even if the simplification principle can be just one. As Jacques **Derrida** claimed: *each different experience lives and survives in mutation*. With regard to **legal norms**, a factor as ***quality*** plays such a predominant role that many legal systems provide for bodies specifically in charge of checking the quality of norms. Indeed, the quality of norms (here considered as *simplicity* and *clarity* of the **language**) is necessary to let citizens understand the law and hence to *have knowledge* of it. Moreover, normative quality also concerns their **adaptability** to the changing economic and social conditions of States, mechanisms of political and institutional transformation, the persistence of differences within foreign legal systems, and a potential **convergence** of norms.[114] Simplification may be the **matrix for a transformation** of national administrative entities laws, even within historically different legal traditions, affecting in particular **procedural dynamics**. However, differences between different institutions produces the ***impossibility of a comparison***. As we have said, there are different social and historical dynamics with different effects.

In sum, from a legal point of view, administrative simplification can concern ***rulemaking***, ***participation***, and ***administrative vocabulary*** as well as linguistic support. In any case, simplification is today a phenomenon that characterises national administrative laws in different parts of the world and constitutes a **transnational phenomenon**, beyond the borders of nation-States. The reactions to transnational phenomena are different, and therefore the consequences of these differences are worthy to be analyzed. The problem is that when something becomes transnational or global it also tends to become **fuzzy** and **difficult to define** in an exact manner. It is for instance difficult to explain what *simplification* is in India, or in China, or in South Africa. This is because **transnationalisation** of a concept implies a **shift** in our basic categories. Therefore, there is a need for increasingly rapid and timely public intervention in order to **safeguard** fundamental and subjective rights. For these reasons, there are various forms of classification of rules suggested by comparative lawyers. However, classifying forms of simplification is a difficult operation, not only for the different constitutional and administrative legal traditions, forms of state and of government, but also for the different spheres, both public and private, to which the concept of simplification is addressed. These classifications are:

1. ***Administrative procedures***. The first model deals with administrative procedures according to the idea that it is necessary to **reduce and simplify regulatory constraints** relating to the discipline of administrative procedures. Indeed, we have thousands of administrative procedures, that give citizens a “legal irritation”: in France, for instance, a group of scholars

[114] In this respect, there is debate whether this convergence is real or only **apparent**: indeed, it usually happens that two Countries share the same principle, but they **apply it differently** through different interpretations and operational rules.

had to analyze procedures that were considered irritant by citizens in order to simplify them. On the contrary, excessive fragmentation of the administrative procedures resulted in a **difficult attribution of responsibility** to public officials because when accountability is put on too many people, this means no accountability at all. Furthermore, it is necessary to point out the existence of the so-called ***third-generation procedures***. For instance, the EU simplified administrative procedures required for service providers: the *EU Service Directive* 2006/123, related to services in the internal market, facilitated the cross-border provision of a wide range of services, managing cases in which a business wanted to supply services across the borders in another Member State. More in particular, we can identify simplification:

a. In ***rulemaking procedures***, which include all kinds of rules and regulations made by agencies based on the **collaborative** governance model, procedures of **soft law**, and private procedures.
b. In ***forms of Alternative Dispute Resolutions*** between public administrations and citizens. However, this form of simplification is sometimes criticized because resolutions may be unclear and derogate some procedural principles. In the US, for instance, agencies can resolve through different legal instruments (among which we find ADRs), but it is always the agency that chooses the method of dispute resolution, on a case-by-case basis, enjoying full **discretion**. And what is worse: the choice cannot be subject to judicial review.

The choice of regulatory models to achieve the objectives set by the various forms of simplification depends not only on **common traditions** and their influence on national administrative law, but also on **political choices** selecting one out of the many forms of simplification. Moreover, **emergency events** such as the climate crises, health crises, and economic crises also in the aftermath of the Russian aggression against Ukraine, contributed to the expansion of a proper *social need* for simplification.

2. A second model of simplification can be identified in the ***relationship between public administrations and businesses***, and in the need to **facilitate** market access, also through the reduction of costs related to the implementation of sector regulations (see, e.g., the 2006 *Bolkenstein Directive* that stressed the importance of *reviewing* the administration's contractual activity in light of constitutional principles, and of the reduction of the scope of authorisation in many areas of public action to the advantage of **negotiation instruments** and forms of arbitration). This is of outmost importance not only for administrative law, but also for judicial procedures.

3. A third model of simplification refers to the introduction of specific regulatory rules of ***standardisation*** of the organisational structure of public administrations, through forms of simplification that provide, particularly, for the development of **information technology** and **digitalization**. The term *standardization* is, again, really complicated. For instance, it has been noted that in France some Ministries are against the application of reforms: standardization, in those cases, is important. Or it could refer to similar organizational structures between European and National Agencies. In this respect, there are many legal interventions and regulations concerning digital administration.

4. Last, a fourth simplification model concerns the ***instruments for producing regulation***, which is sometimes not closely related to the other objectives aimed at simplification policies. This model may imply that, although the regulatory framework is modified, administrative activity does <u>not</u> undergo substantial changes. In this respective, there is **asymmetry** between the changed regulatory framework and a constant public behavior. Moreover, the choice to introduce forms of simplification implies, at a regulatory level, the application of the **principle of subsidiarity** of sources.

Of course, simplification has its **limits**, the first being **constitutional principles**: indeed, it is not possible to simplify at the detriment of constitutional principles. In this respect, it is not possible to reduce procedural phases if this reduction is negative for freedoms and fundamental human rights. Moreover, a second limit is the **discretion** in administrative action. For instance, simplification in judicial remedies cannot occur if, like in the US, an Agency can freely decide not to resort to an ADR method and its choice is not subject to judicial scrutiny. Last, the **language** of simplification: despite not aiming at a dystopian neo-language, there is need for explaining complex issues and rules in simple and clear ways. Indeed, law must be comprehensible and still remain "professional".

As already noted, the need for simplification has a transnational scope and transcends the boundaries of administrative laws developed in national jurisdictions. In this sense, the principle of administrative simplification is not a picture, but rather a *movie* that keeps changing in a dynamic movie. The common elements of experiences of simplification can be found not only in European legal systems but also in non-European experiences, from the United States to Latin American Countries.

In conclusion, we can say that administrative simplification, in its many facets and interpretations, represents a **general principle** at the transnational level, essentially characterised by an **incomparableness** between different operational schemes conditioned by many **variables**, which make each experience unique. By way of example, the most recent law concerns China, whose system of administrative law is always work in progress, closely related to both China's evolving political system and changing role in economic governance.[115] Moreover, while scholarship on China's administrative law is large and growing, some fundamental issues remain problematic. For instance, we usually think of administrative law as related to a political system of checks and balances, as Courts apply administrative law to constrain executive action.

The simplification of law has sometimes been associated with the myth of **Sisyphus**. Albert Camus defines it as the one who experiences the unspeakable torment, in which *the whole being strives for nothing to bring to an end*. Some legal scholars agree that simplification represents a **utopian object**, a myth, particularly difficult to achieve, which can turn, for the legislator and the legal practitioner, into a veritable nightmare. In Greek mythology, in fact, Sisyphus was condemned to carry a large boulder to the top of a mountain. Once at the top, the boulder would roll down, forcing the unfortunate man to repeat the same operation until eternity. The reference to this myth represents, among the various interpretations, also the symbol of a **continuous, futile effort** of the human will. Is this the case of administrative simplification? It is not easy to answer this question, if one considers, in particular, the **speed** with which systems, political formulas, institutions, legal problems that are becoming increasingly complex within **dynamic systems** with a large number of their own components that are constantly interacting with each other and changing. However, Camus's Sisyphus suggests that those who strive for simplification are simply 'happy' to begin again their path in search of **effective models** that manage to reduce the increasing complexity of rules and procedures.

[115] It is a Decree of the State Council (n. 752/2022) on *amending and repealing some administrative regulations*. The government has taken further steps to **reduce red tape** in China, amending 14, and abolishing 6 sets of regulations. The bureaucratic changes aim to reduce red tape **for businesses** in a wide range of sectors (but not for constitutional principles!). This push is part of China's long-term reform efforts to **reduce regulatory barriers** and stimulate market activity. The amended regulations cover sectors such as telecommunications, healthcare, transport, customs, artificial intelligence, and internet access services.

Judicial Networks as an Instrument of Dialogue among Courts [116]

It is necessary to analyse the role of **judicial networks** because transnational constitutional law is built in order to favour the communication among judges and Courts. Judges, especially in Constitutional and Supreme Courts, started to know each other very well. They attend the same meetings and influence themselves reciprocally, thus creating a **common knowledge** on the most important topics. Some systems like this kind of approach, although others do not approve. In the US, for instance, there has been a strong reaction in public opinion in cases where some judges had contacts with foreign judges, like what happened with Justice Breyer. Since this phenomenon cannot be ignored, it is worthy to analyse how judges interact with each other.

The topic of judicial networks is pivotal. Recently, for instance, the comparative law area of the Italian Constitutional Court drafted a research paper on mandatory COVID vaccinations, in relation to a matter the Court had to face. There were many refusals about vaccination, and the Court was looking for a solution abroad. The Italian Constitutional Courts, indeed, does not speak only to the Italian people, but also to other judicial bodies in Europe. Nonetheless, the real issue is not studying other Courts' decisions, but rather establishing a **network** and a **dialogue among courts** that is **enriching** and **continuous**. There are of course several **problems** in doing so since there could be a **resistance** from certain courts.

The main problem to establish such network is finding tools and **ways to communicate**, primarily because of the language. For instance, in an effort to find a common language, only few years ago the Italian Constitutional Court decided to translate several important judgments in English. Had the Court remained in the original version, probably only few foreign scholars would have been interested in its decisions. The **translation** of judgments is only the first step to establish a network, along with providing for **abstracts** containing the main rules established in such long decisions. It is very difficult to create the conditions for foreigners to understand Italian judicial decisions. For this reason, the idea of creating networks needs to start from a **common language**. The issue of the language to use is often the key issue in order to start a cooperation. English, nowadays, is widely accepted in any kind of general cooperation among courts.

Once the problem of the language is faced, it is important to focus on *which kind of dialogue* we are talking about. We are now focusing on that among **Constitutional Courts**, although there are many others (such as the one among Supreme Courts). Generally, we refer to a dialogue that can be considered **vertical**, such as the one between the Court of Justice and Constitutional Courts. Such dialogues are, however, **oriented** by the Court that is in higher position. We, instead, will focus on the dialogue based on a level playing field, where there is not an orientation by the Court that is in a better position. This dialogue is very important, since there is **no binding effect** by any Court as it is only cultural and supposed to enlarge views of the Courts. Thus, it is aimed at helping Courts to **find the best solution** for their cases.

Dialogues and cooperation among Courts that are part of different legal orders can be of two kinds:

- They may be focused on **specific cases** or affairs that are in their very nature *transitional* (i.e., temporary). Several organisations, throughout time, had the idea to develop networks in order to facilitate cooperation in these kinds of cases.
- Or, they may be **continuous** and related to the **activity** of the courts, and not only to specific cases.

There are some relevant examples in order to understand this difference. Looking at the TFEU it is possible to understand that there is **judicial cooperation** in **civil matters** recognised in art. 81. The main idea behind this cooperation is that individuals should not be discouraged from exercising their rights. Since the purpose of the EU is to facilitate cross-border exchanges, it has to facilitate judicial

[116] Taken from the lecture by Professor **Passaglia**, member of the study service of the Italian Constitutional Court.

cooperation among national Courts too. Another example is the judicial cooperation in **criminal** matters pursuant to art. 82 to 86 TFEU. However, we shall only focus on the second kind of cooperation, i.e., that related to **ideas**. It is not aimed at finding a solution to real cases, but only to *better know each other* and find *interesting solutions* in order to create the conditions for **transplants**.

These objectives could be pursued by Courts in several ways. The simplest one for a Court is creating its own network establishing **bilateral relationships**. The Italian Constitutional Court, for instance, established several bilateral relationships with other Constitutional Courts. Sometimes they can also be limited in time, as happened from 2006 and 2010 when the Italian Court met several times the Russian Court. In other cases, the Italian Court has **strong relationships** with specific Courts according to their **features**, based on **geographical** and **historical links**. For instance, since 1999 every year the Italian Court meets the Spanish and the Portuguese Constitutional Courts. There was indeed a common understanding, and for this reason they used to decide a common topic to discuss every year in a conference. Such conferences were then enlarged to the French Conseil. However, such cooperations are peculiar since they are generally reserved to judges. Nonetheless, there is also another way to establish links, such as the relationships between the French Conseil and the German Constitutional Court, whose meetings also **involve clerks** and the Courts' staff. These kinds of relationships are of course extremely important, in Europe as well as in Latin America.

Creating a network is even more essential if the Court has been created recently, and it has not acquired a strong **legitimacy** yet. There are then courts able to create a network, and those who need to enter into an already established network because they are not able to create it. The latter are the Courts that most need the network, both for finding solutions and confronting with other courts solutions, and in order to strengthen their legitimacy. Once a Court decides to follow a similar decision of a prestigious court, it can acquire a bit of legitimacy. It is then essential to focus on the networks that become general, and that are not the result of bilateral relationships.

For this reason, we should consider networks generally established by **supranational bodies** or **Courts**, or networks that develop from a reduced number of members that acquire a general status. The former can be especially found in Europe and can explained by some examples. The superior Court network is based on administration of the European Courts of Human rights. This is strictly related in the major changes in the court's structure, like what happened with **Protocol 16**. According to it, the dialogue among highest courts of states is regulated. In those countries that ratified this protocol the Supreme Court can ask opinions to the Strasbourg Court, like regarding the subject of fair trial.

The idea of strengthening the dialogue between the Superior courts was considered a priority of the **Strasbourg Court**. They wanted to establish a real dialogue in order to allow the functioning of **Protocol 16**. The main idea was to create a network of *bilateral* relationships, where administrative members (like the offices of juris counsels) constituted the point of contact between the two courts. The Superior court network originated from this protocol, but there was no need to ratify it. The Italian Constitutional Court was indeed a part of it, even without having ratified it. The outcome of such network is uploaded on the courts' website, according to their view of creating a closer network. The members of this network have indeed privileged access to their respective materials.

Another institution has the same objective, namely the **European Union**. The president of the Court of Justice and the President of the Constitutional courts met in order to celebrate the anniversary of the signing of the Treaty of Rome. This occasion inspired common interest in undertaking the judicial cooperation in Europe, like the one existing with the Court of Strasbourg. The idea is quite similar although there is no direct correspondence between the focal point at a national and supranational level. The most important difference lies in the idea of communication. The Strasbourg Court network is based on an idea of creating a closed network (thus, not disseminating

information to the public), while the one of the EU has the opposite idea. Many materials and research concerning the preliminary rulings are indeed open to the public. What it can be disseminated its published on their website.
Almost in the same period of time both the Strasbourg Court and the ECJ established a network, not only engaging the centre, but also that can allow national courts to talk to each other.
The last case of supranational network is the case of the ***Venice commission***, namely the **European commission for democracy through law**. It is a body within the European Council. The commission was established in 1990, a little after the fall of the Berlin wall. It was aimed at helping eastern countries in their transition towards liberal democracy. Its most important role is providing legal advice to its Member States, in order to align their institutions with European standards.
The Venice commission has a pivotal role in the consolidation of a common constitutional heritage, and it counts 61 Member States. The members of the Commission are appointed for four years by each MS, such as professors of public international law, members of parliament and judges. The members appointed by each state are not though its representatives, allowing them to act autonomously.
The Commission works in three main areas, but the one on which we will focus is **constitutional and ordinary justice**. This is the part in which it is possible to understand the cooperation between Constitutional courts and the Venice commission. The latter, since the beginning, has seen the cooperation with constitutional courts essential to promote constitutionalism, in order to achieve democracy along with rule of law. For these reasons the Commission elaborated several tools to implement the network among Constitutional courts. Moreover, it elaborated tools in order to prevent undue influence, like from politics, into the Constitutional courts' activity.
The Venice commission also extends its services outside Europe, cooperating with other organisations worldwide, like the Association of French speaking Constitutional courts. The Venice commission is thus not only the centre of the dialogue among European courts, but also among other bodies. It is the heart of the World conference on constitutional justice, acting as its secretariat.
Moreover, the Commission established a **Joint council on constitutional justices**, composed by the **Commission members** and **liaisons officers** appointed by Constitutional courts. Within the Council there are small conferences about topics decided by the liaisons officers that can be of interest of the several Constitutional courts. In 2010 the mini conference of liaisons officers dealt with migration, for instance. The Council is a body where the dialogue is the centre of the debate for every sensitive issue.
Venice commission is particularly engaged in disseminating knowledge. It is possible to give a look to their website, in order to understand what kind of staff they deal with. The interesting aspect of their activity is their database, particularly helpful for your future useless research. The Commission can also provide ***amicus curiae* briefs** if a court asks for them. They can thus provide information on comparative constitutional law issues concerning the case at stake. The last one was delivered to the Constitutional court of Armenia in 2021. The commission, in this sense, does not only provide a network, but also provide comparative constitutional knowledge.
The Commission has the task to **support Constitutional courts** when they receive undue pressures. The Commission can take a position regarding conflicts between political bodies and Constitutional courts, adopting declarations or statements denouncing undue interferences. These declarations can have an influence at the beginning of the pressures, although if those have been already carried out those might be **ineffective**.
The Venice commission promoted the **world conference on Constitutional Justice**. The first congress in South Africa was held in 2009, where serious general issues were faced by the Constitutional courts. The model of the World conference comes from the conference on European

Constitutional courts, that at the beginning was composed only by four members (including the Italian one). The numbers of its participants increased steadily. The subjects that are analysed in this conference are a little bit more precise of those of the World conference, such as how to protect the separation of powers. In this case the dialogue is much closer and focused on specific subjects.

What *lex sportiva* tells us about translational law [117]

Sports law is a particular segment of transnational public law, since it includes several subjects such as doping or statutes of the athletes, that are regulated in a very **hybrid** way and encompassing several fields of law. Hence, *Lex sportiva* is able to tell us many things about transnational law, starting from its nature.

Sports law born with the doctrine of **Olympism,** which was a spontaneous movement of athletes and sport organizations on a global scale, promoted and enforced by De Coubertin in 1896 with the first Olympic games. The project culminated with the **Olympic Charter**, which was made of a preamble, the enunciation of the fundamental principles of Olympism, articles, and bylaws. Its only version is in English and has not been translated. Bylaws, in particular, are useful to interpret the chart itself. The approach is a proper **legal approach**. Fundamental principles within it are particularly important and resemble constitutional principles, and are indeed employed in their turnin order to interpret articles and bylaws. For instance, according to the second fundamental principle:

"The goal of Olympism is to place sport at the service of the ***harmonious development of humankind****, with a view to promoting a* ***peaceful society*** *concerned with the preservation of* ***human dignity****"*

Olympism is thus something more than watching Usain Bolt in the TV. There is a proper parallelism with **democratic constitutionalism**. The Charter was indeed approved in 1896, and it was the historical period where Constitutions in Europe were approved. The values embodied in this article are properly constitutional values. In addition, according to the fourth fundamental principle, the practice of sport is a **human right**, because every individual must have the possibility of practising sport **without discrimination** of any kind and in the Olympic spirit, which requires **mutual understanding** with a spirit of **friendship**, **solidarity,** and **fair play**.

Reading carefully both the preamble and the fundamental principles of the Olympic Charter, it is possible to notice that there are values strictly inherent to **sports competitions**[118] (i.e., Olympic games), along with **general constitutional values,** such as ethics and good governance in sport as well as education of youth through sport. Those values are indeed not strictly connected with sport competitions, but they have a general importance in the constitutional context.

In the Charter there are **subjects** belonging to the Olympic movement, such as organizations and other persons who agree to be guided by the Olympic Charter. There are also **institutions**, like the International Olympic Committees and the Organizing Committees for the Olympic Games. All of them are mentioned by the abbreviation of Sports Governing Bodies, namely organs that have the power to enforce the Olympic Charter. The Charter calls itself a basic instrument of a constitutional nature. Is it a tribute to the democratic constitutionalism? Perhaps not, but this does not concern us. Does it have a legal value and a legal force? According to the constitutional theory the answer is positive, since according to article 18 there is an **aggravated procedure** for its **modification** like the one provided in normal Constitutions. Moreover, the topic of **law enforcement** is also fundamental to understand the constitutional value of the Charter. Pursuant to article 27 clearly states that

[117] Taken from the lecture with Prof. **Luigi Melica**

[118] Such as the protection of the integrity of the sport, by leading the fight against doping.

National Olympic Committees (NOC) must **promote** and **protect** the Olympic Movement in their **respective country**, in accordance with the Olympic Charter.
The Charter gives to every governing body ***autonomy***, ***neutrality***, and ***independence***. According to the fifth fundamental principle:

*"Sport's governing bodies have the rights and obligations of **autonomy**, which include a) freely establishing and controlling the rules of sport; b) enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied".*

This is confirmed by **rule 27**:

*"The NOCs have the duty of preserving their own **autonomy**: they must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter. In order to fulfil their mission, the NOCs may cooperate with governmental bodies, with which they shall achieve harmonious relations* [as far as governmental bodies do not interfere with the activities of sport bodies]*".*

The principle of ***neutrality*** is particularly important, that sport organizations within the Olympic movement shall apply according to the Charter. According to this principle no kind of demonstration or political, religious, or racial propaganda is permitted in any Olympic sites, venues, or other areas. Advertising, demonstrations, and propaganda can be exceptionally authorized by the IOC Executive Board.
Let us now talk about A. **Duval**, who wrote a famous essay called "What *lex sportiva* tells us about transnational law" addressing its relevant legal force and normative value. T. **Summerer** coined for first the concept of *lex sportive*, and in Duval's opinion such norms are empirically **more credible** than in the **anarchic commercial world**. According to him the force of the sport governing bodies depends on their monopolistic position and their **capacity to exclude** a person, a team a country from sporting competitions worldwide (including broadcasters).
The reasons behind it can be enriched through considering the content of the Olympic Charter, along with its subjects, flag and slogan and thousands of addressees. Among its subjects there is also a **community of officials** monopolizing its **interpretation** and **implementation**.
From a legal point of view the **IOC** has the nature of a **private association** based in Switzerland, thus subjected to Swiss law. There are sport regulations and disciplinary procedures, but eventually if someone is not willing to accept the rulings it is possible to appeal outside the *lex sportive* to a Swiss court. According to the International Law Act a **CAS** (Court of Arbitration for Sport) panel shall decide the dispute according to the applicable regulations and subsidiarily the rules of law chosen by the parties. A CAS is then a **private arbitral tribunal** seated in Lausanne and subjected to the Swiss private law.
The point is if sport law can impose itself over national, international, and constitutional order. According to Duval this is possible since the possibility of vertical control over the Olympic Constitution is not excluded, although it is extremely unlikely to be exercised by national court. As long as sport law can impose itself it can be considered **pure**, as it happened before. Especially recently though it has been contaminated by other orders, such as the international and the national orders, making it **impure**. In general, fundamental rights are not meant to be applied directly in private relations between individuals, and therefore they are not applicable in disciplinary cases judged by private associations. Indeed, the relation is generally between States and International courts. Nevertheless, the process of hybridization is going ahead towards impurity, due to **influencing factors** such as internal scandals, the enforcement of the rule of law and human rights protection. Then, the concept of vertical control over the Olympic Constitution was a dogma that began to be modified.

As for the description of the international order, it is worth to start from the **Council of Europe**. In 1975, the ***European Sports Charter*** was approved as a guidance for its Member States to perfect existing legislations or other policies and to develop a comprehensive framework for sport. The aim of the charter is to enable every individual to participate in sport/in its multiple individual and social benefits in particular for health, inclusion, and education, and promote the values of human rights, democracy, and the rule of law, as enshrined in the Council of Europe's applicable standards. It offers a clear definition of sport, stating that it is considered as:

"All forms of physical activity which, through casual or organized participation, are aimed at maintaining or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels".

As to its implementation and law enforcement, since 2007 the EPAS (**Enlarged Partial Agreement on Sport**) has started implementing and enforcing the Charter and has become a platform for intergovernmental sports co-operation between the public authorities of CE's Member States. It also monitors MS strategies on sport, and more in general, the lines of the sports evolution in view of the elaboration of the CE's recommendations and the Charter's modifications.

There are important events of overlapping between the IOC and the EPAS in terms of competences. Some important recommendations and proposals by EPAS were in the same field disciplined by IOC, such as on disabled persons and in the adoption of the Antidoping convention. In 2018 the EPAS recommended the adoption of Principles of good governance in sport. Although it does not have a normative value, it comes with an importance since this has been adopted by National Sport Ministers. It was addressed indeed to those institutions in States that can take decisions in sport matters, such as NOC and National federations. Those, whose decisions have certain powers as we said, are advised to apply the aforementioned principles of good governance.

Moreover, **UNESCO** enacted an International Charter of physical education and sport, where the centrality of practice of physical education and sport is considered a right for all, including children and disabled people. To sum up the continuity of physical activity and the practice of sports must be ensured throughout life by means of a global, life-long, and democratized education. Those are the same values promoted by the Olympic Charter.

The UNESCO Charter includes an organization with the duty to implement and enforce the Charter, called **CIGEPS**. It includes the representatives from 18 UNESCO members, and it has a president and four vice-presidents, one for each continent. The values protected through sport, such as education of the new generations and social integration, are the same embodied in the Olympic Charter.

Let now us complete the analysis of the international order, talking about the **European Union**. In the TFEU the title XII is dedicated to education, and there is a mention to youth and sport:

"The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function."

As we said, sport law is contaminated by other legal sources, making it impure. This process takes part in two directions: due to **human rights** and **constitutional values** and the **political area** This **hybridization process** was due to **internal scandals**, such as the FIFA selection process regarding the hosting of the World Cup, and the many others that will emerge regarding the World Cup in Qatar. Moreover, the IOC and main Federations often neglect Olympic ideals, and wants to reform their governance only in words. So often those subjects ignore or frustrate athletes fundamental rights, especially within disciplinary procedures. It is a field governed by governmental bodies and sport bodies, and it is unacceptable that those apply different levels of protection of human rights on a same territory.

For such reasons **international courts** started reacting drastically. The Charter of the Council of Europe has a **vertical structure**, namely that individuals can protect their fundamental rights only

against the Member State. Governing bodies are thus absent from this relationship, being the Swiss state the only responsible of fundamental rights' infringement. The first case is ***Mutu and Pechstein v. Switzerland***, where Switzerland was condemned due to the fact that it had not ensured the compliance with fundamental rights. The legal issue was concerning the responsibility of Switzerland for not protecting sufficiently human rights within its territory under the Convention, since it is unacceptable to have in the same jurisdiction different standards of protection.
Some scholars started speaking of **quasi-horizontal effects**, since an athlete cannot be precluded from obtaining in CAS arbitration at least the same level of protection of his substantive rights that he could obtain before a state court.
Another important ruling was given in the ***Bosman*** case, involving the free movement of workers. Transfer regulations imposed by UEFA and FIFA are sporting associations, under which a professional footballer who is a national of one Member State is registered, may not, on the expiry of his contract with the club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training, or development fee. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. The same concept shall be applied regarding free competition within the EU, along with the prohibition of abuse of dominant position. In the beginning, indeed, UEFA and FIFA used to select deliberately broadcasters, thus violating those rules forbidding the abuse of dominant position.
Hybridization is present since the actual FIFA transfer system is the result of the legal intervention of EU institutions. CAS, as we said, have the power to exclude someone from a competition, such as Olympic games. They can accept athletes in certain cases, but not representing a specific country. A government is then in a weaker position towards the CAS, since the decision of excluding a State from an important competition can have a political impact. But as the relations between EU and CAS the situation is different. The European legal order has the capacity to prevail over the *lex sportiva.* CAS is now fully persuaded to comply with EU law, that is now a potent legal weapon to check the private enforcement of the FIFA transfer system. The only way UEFA and FIFA have to avoid EU law would be, indeed, to not include 27 teams in their competitions! Eventually those bodies complied with Eu law rules concerning broadcasting.
Let us go back to the principle of neutrality. In 2021 the Hungarian parliament adopted a discriminatory law concerning LGBT community. As a consequence, it received many critics. In EURO 2020, in the match between Hungary and Germany, the Munich municipality requested for rainbow colours on stadium, but UEFA rejected it. This refusal was done pursuant to the principle of neutrality embodied to art 50, and a communication was issued: the request had a political aim connected to a decision taken by the Hungarian national parliament.
But neutrality cannot be applied in an absolute way since certain values, such as non-discrimination. are promoted by the UEFA itself.
A similar event happened in 2013, where Emma **Tregaro** painted her fingernails in a rainbow colour to support gay rights in Russia discriminated by a Duma's recent law. The Athletic International Federation ordered her to remove these colours "opting for a more conservative shade". She obeyed declaring: *"So I decided to paint them red instead, for love".* Nevertheless a few days after two Russian athletes were photographed kissing on the podium as they received their gold medal. It was both a clear act of defiance against their government's attitude toward gay rights and of solidarity toward Emma Tregaro. The federation though did not activate any procedure against them.
Of course, the principle of neutrality states that no kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas. But are also relevant the

Fundamental Principles of Olympism, such as the preservation of human dignity. The Charter also states that:

"The enjoyment of the rights and freedoms set forth in the Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status".

Those values could be then in potential conflict. There is indeed a striking in the balance between the principle of neutrality and other values. If the Charter calls itself "of a constitutional nature" a balance between different values and rights have to be made according to certain criteria.

More recently in the Paralympic games of 2022, after the Russian invasion of Ukraine, the principle of the Olympic truce was infringed. This principle though, was not explicitly provided by the Charter, but came from the ancient Greek tradition. The president of the Paralympic Games excluded 83 athletes from Russia and Belarus who were already hosted in the Olympic village. His decision was made in order to preserve the integrity of the Games and the safety of all participants. This was made since some governments would have retired their athletes if Russia and Belarus participated. The Russian Federation appealed against the decision.

Moreover, the Football Union of Russia appealed the ban of Russian Clubs from UEFA'S competitions. Let us consider the legal background. The IOC Executive Board enacted a recommendation in order to protect "the integrity of global sports competitions and for the safety of all the participants".

UEFA claimed that:

"Have been suspended as the result of the objective situation created by Russia's invasion of Ukraine, not because UEFA politically agrees with Ukraine; UEFA also rejects the Appellant's allegations of a breach of the duty of political neutrality or of the prohibition of discrimination, since the Appealed Decision is not based on political considerations. Importantly, points 49 and 50. First, the Statutory objectives of UEFA to promote football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, gender, religion, race, or any other reason […] whilst respecting the players' health" outweigh any other possible interest".

The CAS ruling was based on the values of **integrity of sport** and **security**, but not on those highlighted correctly by the UEFA in its act. The President of the Appeals arbitration division of CAS missed the opportunity to incorporate the human dignity and the peaceful society damaged by the objective situation created by the Russia's invasion of Ukraine, namely an invasion ordered during the Olympic games. Inevitably, the Olympic truce's infringement is at the basis of the IOC decision. In this asshole opinion is that the President did not have to courage to apply a balance among principles of the Olympic charter, such as the promotion of a peaceful society, that are legal values included in the so called **constitutional block**. This is due to the fact that the Charter claims itself to have a constitutional value. The principles evoked by the CAS were indeed not enshrined into the Charter and had been taken from another source.

The different approaches concerning sport between the Strasbourg Court and the ECJ are an important topic to analyse. According to the Strasbourg court, sport is considered a human right, embodied in many national Constitutions. In other cases, though, such as in the ECJ, sport is only something commercial that has to be regulated.

Transnational private law and unification: a view from UNIDROIT [119]

UNIDROIT is one of the possible sectors of interest to transnational constitutional law, which may appear contradictory because (i) UNIDROIT was founded in 1920 as an auxiliary body of the League

[119] Taken from the lecture by Professor **Maria Chiara Malaguti**

of Nations, and therefore its origin its purely *based on international law*, and (ii) because its terms of reference are mainly topics concerning *private commercial law* and contract law. However, this is simply apparent: indeed, among its themes of interest there are, for instance, agriculture and technology. In addition, after its demise at the beginning of the Second World War, it was re-established in 1940 and strengthened later on, so that it is not only a typical international law organization, but something more. Finally, many of the members of the Executive Committee of UNIDROIT are also comparative lawyers, and therefore there is a continuous interference between comparative law and international law, especially within the UNIDROIT.
International law cannot only focus on States or interstate relationships since today's governance (at least, the economic one) requires a different understanding. UNIDROIT shows exactly this. But what is UNIDROIT*?* How has it developed together with its methodology? Starting from these questions, we will ask ourselves how we can reconsider the premises of transnational governance.
Well, **UNIDROIT** is an **international organization**, which is fully *intergovernmental* (hence, its members are States just like the FAO, the UN, etc.). Due to historical (yet, irrelevant) reasons, it is not part of the UN system but autonomous and **independent**. It was established in **1926**, this making it one of the oldest organizations in the world: the only one which is apparently older is the *Hague Conference*, namely an organization addressing topics that are related to what UNIDROIT does. Indeed, while the Hague Conference works in Private International Law and tries to create a homogenous system of private international law under the same principles, UNIDROIT works on the **content**, i.e., on **private law**, meaning private, commercial or anything which is not directly *international* law. Thus, it leaves aside only direct liability of States. More concretely, today UNIDROIT develops modern **standards** for private and commercial law, and tries to get to **internationally harmonized** solutions. Although the organization is small with only **63 Member States**, its members represent the worlds' main economies which correspond to more than 90% of the global nominal GDP. It misses a lot in the African region and is trying to work on that, namely, to convince also African countries to be part of the exercise, because after all UNIDROIT is meant as a **global** institution, open to everyone.
As said, UNIDROIT was set up as an auxiliary body of the League of Nations. That was an idea of **Vittorio Scialoja**, following his research on what was needed for the unification of law at that time. It was created in **1926** and became operational in **1928**. It was initially called ***institute*** (namely, *International Institute for the Unification of Private Law*), a name that seems in contradiction with its nature as international organization. The original purpose of the institute was to build up **international instruments for the unification** of law based on *studies* and on *comparing* the various solutions adopted in different countries, thus trying to find the best possible solution. Hence, it was a **comparative** exercise that was based on scientific and scholarly work, unlike other organizations which looked at the practice and then made a statistic on which solution was the most used in the world. Instead, it really entailed a discussion on which legal systems best guaranteed fairness, efficiency, and even justice, in the effort to build up **common constitutional elements**.
In this respect, Scialoja's understood that after WW1 it was widely recognized that national states had some **limitations**. Of course, he acknowledged the role of national states and he understood that it was a political building of international governance that would stay and had a lot of good "points" in the way it governed and organized communities. Nonetheless, it was clear that the world was at crisis in the way *legislation was applied* and the *world was governed*. This was also the reason why the League of Nations was built up. Consequently, Scialoja proposed this body to the League of Nations since he believed that this kind of attempt to unify legislation was necessary for **peace** and to overcome the **limits of domestic law**, towards what domestic law is unable to reach by itself. Indeed, the unity of law was lost at the end of 18th Century because of the constitution of independent States. Instead, before national states were established, there was a completely

different legal order, where transnational law already existed, with different law according to the sector (e.g., *lex mercatoria*) in the context of a more general *ius gentium* (i.e., international law). What is more, as a Roman Law scholar, he argued that that **Roman Law** was able to be widespread in all Europe, thus acquiring its character of **universality**, not only because of arms and political wisdom, but also because of its **perfect elaboration** and the **careful and progressive** assimilation of the best elements of the law of people subject to the Empire. Put differently, Roman law would slowly get accepted by the population because it was a legislation which was good in itself: being fair and fairly drafted, it was able to address the issues of everyone. In short, not a law that is imposed by the winner, but a law that is able to **represent the needs** of everyone and that can be the answer for governance also of people that have a different culture. Later on, Roman Law kept its "universality" thanks to its **spontaneous acceptance** at the time of the *Renaissance* of European civilization: indeed, its **universality** was seen as the precious fruit of its long and progressive formation. Therefore, according to Scialoja, law is <u>not</u> an *authoritative* law, which is imposed as it would be in domestic law, nor a *fragmented* law. Instead, it is a law that somehow is able to address the understandings and the needs of populations, that puts population closer thanks to common elements in all legal orders. Fragmentation <u>cannot</u> be absent; however, there are some **constitutional elements** that were present in Roman law and that they could re-propose at his time.[120] Although UNIDROIT was established during fascism, it does not come from the fascist conception of legislation, but from the Century before. Hence, Scialoja's idea was extremely **liberal**, and so was his background.

Furthermore, Scialoja conceived UNIDROIT as a *body* of the League of Nations (hence, <u>not</u> an autonomous international organization as it is now) with a very **practical purpose**, namely, to get legislation closers in the way they solve issues. Nonetheless, this required a long **scientific and political** preparation, including a diligent study and preparation of suitable projects which the League would have recommended to Governments. In doing so, ideas should have been translated into facts as far as possible. So, we already have two interesting elements:

1. First, despite the existence of national states, **transnational law** is needed to make people dialogue, speak, and find common solutions. It is <u>not</u> just a *technical understanding*, unlike having international law (or an international treaty) simply to solve a problem. In Scialoja's perspective, to solve a problem it is necessary to start by *solving common problems*, finding *common understandings* of things, and thus *establishing a real dialogue*.[121]
2. Second, to do so, it is <u>not</u> enough to have *diplomatic* negotiations, but you need a **substantive work** by academia, in a dialogue with civil society.

Things changed after WW2: the League of Nations disappeared and was replaced by the UN, which Italy was initially not part of. This was the reason why UNIDROIT did <u>not</u> became an agency of the United Nations. Instead, UNIDROIT remained **autonomous**, then becoming a real **international organization**. Interestingly, at the very beginning member States would not pay their quota by money, but by books. Of course, they rapidly shifted to money (we do live in a capitalist world…), still, this anecdote allows to understand the role of scholarly elaboration. Even today, UNIDROIT's library is considered to be one of the best in the world, especially for old and comparative law books.

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[120] We are aware that, before, Scialoja was part of a *commission for the establishment of a common civil code* between France and Italy, trying to see whether it was possible to have a common code on general principles of obligations. He in fact believed that contract law might have more elements in common to many legal orders.

[121] In a 1971 special issue of the journal "*International Organization*", relations between private actors across borders, but also relations between private actors with governments of other states, were addresses as ***transnational interaction patterns***. The idea was that these "new" patterns would arguably affect the course of how international politics operate.

At that time, of course, the common understanding was not really of *transnational* law, but rather of *international* law: initially, most of instruments would be international treaties, and so the institute elaborated a lot of reports and studies for diplomatic conferences to adopt international treaties. Therefore, at the beginning the first works were **international treaties** and **model laws**. In this respect, the German scholar E. **Rabel**, who was part of the UNIDROIT Board and the founder of the Max Planck Institute, wrote in an article that UNIDROIT worked on *legislation*, on *international treaties*, and on the *unification of sale law*:

*"Twenty-three years after its preparation started, the draft of a **uniform (substantive) law** on international sales of goods has been discussed by a **diplomatic** Conference. [...] The International Institute for the Unification of Private Law in Rome, which had sponsored the long work of formulating the draft, presented it to the meeting. I have reported to the American profession on the projected unification, first with respect to the original draft of 1935**, submitted by the League of Nations to the Governments**".*

After two failed attempts (the first in 1935, and the second in 1952 with the *Hague Conference*), it was possible to enact a *convention on the international sale of movables*, known as the ***Vienna Convention***. The convention was passed to UNIDROIT's sister organization, the **United Nations Commission on International Trade Law** (UNICTRAL, a body of the UN whose work is close to that of UNIDROIT). Therefore, the current international treaty on the sale of goods was not enacted by UNIDROIT, still, it came out of the full elaboration by the latter. The Vienna Convention is particularly interesting for transnational law:

- First, it contains a **definition** of *international sale*, which does not correspond to domestic sale. Put differently, the convention attempts to regulate something which is by definition **cross-border**.
- Second, according to the convention, the **caselaw** of a State which is part of the Convention should be used by judges and courts of other States that are part to the same convention. Indeed, the role of judges as well as the application and implementation of rulings is seen as **cross-country**. This allows to elaborate common understanding and common thinking through **judicial dialogue**. As a result, when one wants to judge and apply this Convention in Italy, he/she should also look at the cases that other contracting states' judges who may have applied the same articles or have done so in similar situations. This moves away from traditional international law and adds an original element: indeed, it considers **transnational common principles** as it happens in the *constitutional* perspective. This is even stronger when done through judges, through the concrete application in conflictual cases. This way to *solve concrete problems* can be confronted and copied and had always been at the basis of what *ius mercatorum* was before national States were established.

But it could not just be a matter of international law and treaties. Indeed, since these instruments often risk remaining little more than a dead letter and tend to be rather fragmentary in character, calls are increasingly being made for recourse to **non-legislative means** of *unification* or *harmonization* of law, and soon UNIDROIT started working also on what is now called ***soft law***.[122] In this respect, and one of its most know instruments are the ***UNIDROIT Principles*** *for international commercial contracts*. The UNIDROIT Principles are a set of **recommendations** for States, judges, and private parties. These principles:

[122] Some of those calls are for the further development of what is termed "***international commercial custom***", for example through **model clauses** and contracts formulated by the interested business circles based on current **trade practices** and relating to specific types of transactions or particular aspects thereof. Others go even further and advocate the elaboration of an international restatement of **general principles of contract law**. UNIDROIT's initiative for the elaboration of "*Principles of International Commercial Contracts*" goes in that direction.

- Could apply to contracts and can be applied by parties by **directly referring** to them (either by copying some principles, or by making direct reference to UNIDROIT principles in a contract). Direct referencing is indeed the easiest way for an international instrument to become contract law.
- What is more, they can also be used as **applicable law**, either because parties refer to these or, in the lack of any reference to applicable law, the judge or the arbitrator can decide that UNIDROIT Principles are applicable law, because of elements that make them understand that there was the **intention** of reference or because these have become part of the **praxis** at the international level. And the existent caselaw confirms so.
- Finally, the principles can be used as a **complement to interpret** national law through international lenses. This is because UNIDROIT Principles are, indeed, a sort of *restatement of principles* that apply to contracts and, generally, to obligations by private law.

The principles are the result of what *States* believe, plus what *scholars* believe, plus what the *market* considers to be the **best solution**. Therefore, some solutions may be far from our Italian understanding of the principles of contract law, but still, we do use them because we believe they constitute the "constitutional" background of international commerce. Of course, this is based on the assumption (which some criticize) that commerce has *its own general rules*, as testified by the longstanding debate on whether to have a commercial code next to the civil code because there are specific commercial law features – e.g., the need for *efficiency* – that require different solutions. Commerce is for sure one of UNIDROIT's main areas of work, but it is not the <u>only</u> one since it also takes care of issues that are related to **private law** in general and of relationships that are not commercial in kind. The logic is always the same, i.e., trying to find common elements that would allow for domestic law to be read and interpreted according to the UNIDROIT Principles.
Why does it work this way in this area of law? Of course, in public law, which addresses the organization of a State or relationships between States, policy and political issues are involved and need to be discussed differently. Here, instead, we are speaking only of how human relationships are established, and thus it is easier to find common principles, which are also dynamic and can be modified according to the circumstances and the evolution of the market. For instance, these principles (not only the UNIDROIT ones, but in general the body of rules of this kind) today also include **sustainability**.[123] This is because **elements of general interest**, of common understanding, are also part of the agenda of private law. There are indeed rules, which are transnational, that expand the specifics of commerce and require us to share common "constitutional" principles. Consequently, today saying that commercial law or private market has its own rules does <u>not</u> stand anymore.
Focusing on what UNIDROIT does today, it changes as the world does. First, it is one of the "**three sisters**" who deal with ***standard setting***, together with UNICTRAL and the Hague Conference.[124] Since they all take care of transnational law and of the unification and uniformity of law, they sit together and **coordinate** their respective projects to make these instruments consistent. They have elaborated a sort of *methodological* tool to let people understand how they work to support this transnational world, and to give them the impression and the understanding that it is <u>not</u> just a piecemeal exercise. Their work is <u>not</u> justified simply because there is a *need* (of course, this plays a role because these institutions work according to the needs of the time, to what is considered to be necessary to harmonized), but theirs is an exercise to **find a common background**. Altogether, the

[123] Indeed, also due to *corporate social responsibility*, all the big sets of international standards that apply directly to companies, the principle of sustainability and the new kind of stakeholders playing a role in these rules.
[124] However, their focus is partially different: UNICTRAL deals with Trade, while UNIDROIT deals with private and commercial law in general; the Hague Conference deals with *Private International* law, UNIDROIT with *International Private Law*. What's the difference? Only God knows.

three institutions, since their main purpose is the **unification of law**[125], try to build a body of principles and of interpretation in a set of rules that would form transnational law and has its own consistency.
Besides, UNIDROIT also works with other **international organizations** from of the private sector (e.g., the *International Chamber of Commerce*, ICC, which normally takes care of private contracts and standard clauses; the *World Bank*, IMF, FAO, etc.). In this respect, four of the main areas of work are *contracts*, capital *markets*, *security* transactions and *law and agriculture*, with **development** as a keyword. Overall, the work of all three organizations has a meaning in its general understanding.
Given that UNIDROIT produces hard law as well as soft law, we shall see how it works. First, it receives **suggestions** on what to work on, then a **study** is made, and finally the **Governing Council** takes the decision. If they decide to progress on a specific topic, the path is different:

- If the proposed action is a ***Convention***, a **Diplomatic Conference** is authorized by the Governing Council, where Governments and Observers take part in the discussion. In those settings, decisions are all upon national delegations.
- Conversely, if a ***soft law*** instrument is at stake, UNIDROIT establishes a **committee** which is formed by governmental experts, together with the representatives of the market, scholars, IGOs, and NGOS. The result in the soft law scenario does not only come from governments but relies on the role of the academia and the civil society.

Well, what are the results of these processes? Which sets of rules are established by UNIDROIT?

- ***International Commercial Contracts***, which we have already addressed. UNIDROIT has elaborated the so-called *principles of international commercial contracts*, with **model clauses**, and non-legislative **guidance documents** on uniform law for international sales.
- ***International financial devices***: UNIDROIT has produced, among others, Conventions on International *Financial Leasing* and *International Factoring* and the so-called *Cape Town Convention System* on international interests in mobile equipment (with protocols addressing aircraft, rail, space). It has also produced *Model Laws* on leasing and on factoring, and finally has worked with UNICTRAL to elaborate a Guide on Warehouse Receipts.
- ***Capital markets private law regulation***: UNIDROIT created in a Convention the instrument of **international securities**, which applies to big machinery and which was of extreme use, for instance, during COVID-19 for the aviation sector: indeed, companies would need to keep the assets liquid in order to have some money, without moving the assets, and using this kind of guarantees, of securities, they could still make benefit of their assets. Possibly, they survived because of the existence of this convention.
- ***International Protection of cultural property***, with a Convention on stolen or illegaly exported cultural objects, as well as a model Law on State cultural ownership (with UNESCO).
- ***Private law and development in agriculture***: UNIDROIT has new, quite modern, tools on investment contracts in agriculture and others on contract farming. It is now working on supply chains to establish their main principles.
- ***Transnational civil procedure***: UNIDROIT worked on identifying the *principles* of civil procedure and is currently addressing the topic of the best practices for effective enforcement of decisions.
- ***Artificial intelligence and digital assets***, a new field where UNIDROIT is working on the taxonomy in the field of AI and Digital Assets.

[125] Actually, only UNIDROIT speaks of *unification*, the others speak more generally of law *harmonization* or of*uniform law*.

For the future UNIDROIT has in mind new pieces of legislation. By way of example, one is the work on **bank insolvency**. We are aware that at European level, and somehow also at international level, we have rules on insolvency of relevant banks or financial institutions. So, if a very big financial institution fails, we do have a safe net; instead, there is <u>nothing</u> for medium-sized and smaller banks. All these issues are extremely technical. So, what do they have to do with constitutional law? It has to do with the fact that insolvency of financial institutions is an issue of extreme seriousness for the working of a community, for **financial stability** which is a constitutional principle at international level. Indeed, the international trade system, and our international economic governance, is based on financial stability, which means that it pro**tects people**, namely, costumers and in general all other stakeholders, from the insolvency of the pillars of our financial markets. Hence, these are issues of common interest, which of course do <u>not</u> involve human rights but still the essence of our communities. Transnational constitutional principles also include these principles, because, even if they are commercial in nature and involve the governance of the economic sector, they are of extreme relevance in terms of understanding of the basis of our society. More in general, UNIDROIT crosses several topics: supply chains and supply chain financing, especially in agriculture; land grabbing, the protection of the land in agriculture; environmental issues. All of these are issues are part of the principles of **living together**.
As we have said, UNIDROIT produces both hard and soft law. It does however little ***hard law***, because today the world has changed: while at the very beginning international law and international instruments were the preferred ways to govern reality[126], today we do recognize that communities are <u>not</u> a *block*: there are many conflicts inside the community and sometimes, especially because of the communication we now have, conflicts inside the community are <u>not</u> always solved domestically. Moreover, now we have **ONGs** that defend a stakeholder as *amicus curiae*, intervening in cases abroad, as well as a **fragmentation of interests** that also rises at international level, and therefore we need some instruments of transnational law. Conversely, **international treaties** are <u>no longer</u> the final (or rather, the only) answer today, as it is difficult to get member States to accept to negotiate a treaty, and it is even more difficult to have them to sign and to ratify that treaty. And in the best cases, it takes ages. Hence, now we have a huge number of provisions that are based on ***soft law***, because soft law is **easier** to obtain and, of course, permits **flexibility**. Soft law obliges states to achieve specific **goals** and you give a recommendation, explaining why and in which way the recommendation is to be implemented, and then you leave to the state some freedom in the way to implement (according to circumstances, to their level of development, to their specificity). This brings **unification**, and <u>not</u> *harmonization*. The difference is that harmonization means setting the same rules for everyone: in short, not what is reached with soft law. Of course, soft law comes with issues as to its **implementation**: it is indeed difficult to implement a measure or monitor that a measure has been implemented.[127] What is more, soft law

[126] That is because in national states we are part of one single community and, of course, our legal order protects our interests. Likewise, at the international level, as a single community, Italy protects the interests of the Italian community *as a single group of people* and the same is done by other states. International law, in its traditional way of understanding, is the same: **States representing their local community** and trying to solve conflicts, or common issues, looking at communities individually inside the states.
[127] UNIDROIT, along with States legal counsels, is studying a way to **monitor compliance**, but this is extremely complicated also because soft law instruments now represent approximately 80% of international law. Interestingly, the ECJ once ruled that Member States *must* apply guidelines of the European Banking Authority, which are *soft law*, thus requiring Member States to take into consideration those guidelines in their implementing legislation.

has no sanctions[128] but is rather **fluid**, dynamic. It is *soft* because it is based on **moral persuasion**, comes from "below", and is the result also of the investment of stakeholders. This is the way UNIDROIT works for the most. And this is not only UNIDROIT: for instance, the *Paris Pact* and all agreements on environmental matters and climate change are soft law; similarly, we have soft law also many other trade issues.

One might have soft law as a transnational law that does not abolish the role of member states, and instead it is **complementary** and lets members states be more open in dialogue, in a more **dynamic** way. In this sense, between the *protection of Member States* and *universal law* there is not an antimony, but transnational law something in between). In respect of the organization of societies in general, we are getting to transnational law in a way that even protects the specificity of each state. **Regulatory competition** remains because it is a matter of institutional elements and not simply of law, but we do not have to take it with a negative understanding: if we have rules based on the same principles even when they are not alike, with a **common constitutional understanding** (with "constitution" meaning the *rules of principle*, as opposed to the specific rule that is then applied in a specific situation), we can still choose where to build up our company but not because we do a race to the bottom, but because we are able to choose the institutional context that we like best. So, this is understanding of law that is more friendly, and that is closer to dialogue.

In this context, **judges** and **arbitrators** also play a role. In this respect, it is necessary to between **best practices** text, **Legal Guides**, and **Model Laws**. Best practice and some legal guides are *mere discussions*, whereas some other legal guides and model laws include *normative content*. In particular, the latter are **not binding** but, if properly drafted, **codify** the "state of the art" in the discipline, because they respond to an *identified need* and are the product of a type of drafting which involves *both the public and private sector*, with a global approach. They also are not directly applicable but deferred to either **incorporation** in domestic legislation o private incorporation through contracts or uses. Indeed, like it happens with the Vienna Convention, if judges implement a legal guide or a model law in the same way having in mind that these are the results of international thinking that was based on what is considered to be the best solution to solve the problem[129], even if the rules are slightly different, then we get constitutional principles coming from the application by judges. In sum, considering a domestic law influenced by a soft law transnational text, both **teleological** and **systematic** interpretation in judicial decision-making would seem to lead to the **attribution of value** to the tenets and principles of Transnational law instruments.

To conclude, Vittorio Scialoja once said:

*"The **certainty** and **universality** of private law, especially in commercial matters and in the law of obligations in general, will be a valuable factor in economic production, since **law is security** and without security we only produce little and badly".*

A hundred years after Scialoja's groundbreaking idea some elements are still there and, what is more, they can be made modern and used to show the logic of this kind of exercise today. Scialoja argued that to govern economics, it is crucial to have **legal certainty** to organize and govern also, at least, trade and economic matters. And indeed, all that UNIDROIT does is extremely useful for commerce and shows that **international governance** today is not only made of the traditional instruments of *multilateralism*, but also of a more **plural multilateralism**, since it considers the everyone's voice. This way, even the challenges of today may be addressed: before the recent crises, multilateralism was highly criticized due to a reconsideration of international relations. Moreover, we are experiencing a strong trend towards **regionalism**. The way UNIDROIT addresses

[128] One can also doubt whether in international law we have sanctions, because it is not based on sanctions at a general level. But this is another story.

[129] It is not a sort of "colonization" from one country to another, but the elaboration of what is supposed to be the best possible solution.

transnational law, proposes instruments, supports this sort of "*constitutionalization*" of principles coming from the continuous and dynamic discussion with all stakeholders, it also helps to safeguard any kind of trend (including regionalism) because it combines the **search for common elements** and principles and the **differences** that do exist among various communities.

Soft law and *lex mercatoria* in a transnational perspective [130]

In the next paragraph we will address *soft law* and *lex mercatoria*. To begin, more than a precise notion, the expression ***soft law*** identifies a thematic area in which heterogenous forms of **weak normativity** may be found, intended as instruments not assisted by cogent force, and produced by various sources. Hence, soft law is the contrary of **hard law**, which instead has a binding nature as it generally comes from a competent authority to adopt and (forcefully) impose it. However, paradoxically, norms may be cogent under a *formal* standpoint (as we have just seen), but not effectively complied with. Likewise, and on the contrary, directives may be non-cogent, yet spontaneously complied with. Hence, it is necessary to **distinguish *efficacy*** and ***effectiveness***. To understand the idea, an example will do: if, on the one hand, a party may wonder whether the contract will be actually executed although the latter is anyway binding, on the other hand, if you want to play a game, you have to play by the rules and if you want to assemble an IKEA piece of furniture, you'd better have the instructions to refer to. In sum, there might be rules that **impose** themselves without being **legally binding**. The concept of soft law is of prime importance in *lex mercatoria*.

If we start thinking about *lex mercatoria* the real problem is **how to make law across borders**. Every state has its own jurisdiction, and it is sovereign within its boundaries, and it is impossible to impose to a sovereign state to do anything (except by force, which means war). To do so, there are **two methods** commonly known by international lawyers, but which are somehow problematic:

- ***International Treaties***, which usually involve **complex negotiations**, especially in the case they involve a high number of parties. What is more: they risk, once approved, **obsolescence**, because they are difficult to amend, you should have all the parties together and agreeing to the amendments. Treaties are agreements, that cannot be modified *unilaterally*. They usually involve the solution of rather **specific issues** relating to some private law field, but **rarely** they can manage to **unify an entire field of law**. Treaties are - at least with respect to commercial law - sector specific and they deal with relatively narrow rules. This poses numerous problems for businessman because there is only one specific issue that is disciplined by the treaty, the remaining law of that filed is not harmonized; therefore, they have to consult several lawyers in several jurisdictions in order to understand what to do. Finally, they pose a problem of **fragmentation**. This is because a treaty is negotiated amongst several parties, however this does not mean that all the parties will put it into force in their jurisdictions (e.g., the UK participated at the negotiations of the Vienna convention on sales law, but never implemented it in the UK). The problem is that if the treaty does not reach a sufficient number of countries in terms of implementation, it simply adds a factor of complication to the already complicated situation. Some treaties by now have a provision that says that the treaty will not enter into force unless a certain number of countries will put into force, but of course after all the negotiations failing to reach that number shows how difficult it is to proceed.

[130] Taken from the lecture with Prof. Michele **Graziadei**.

- ***Customary law***, which **evolves slowly** in order to be accepted as binding law generally recognized by the community of nations. Moreover, it is <u>not</u> so easy to establish the **exact content** of customary law.

Given that these two are still the fundamental means by which to try to establish a common ground for commercial transactions, there are however other **alternatives**, which introduce us to ***lex mercatoria***. If we start looking at transactions across borders in the Middle Ages or even earlier (for example the *Lex Rhodia* was a very important maritime law), we realize that in ancient times and then more clearly in the Middle Ages, the **business community** tried to escape from **legal problems** created by reference to other systems of law by **developing its own rules**. It is clear that this was a **deviation** from the law existing across Europe, either continental Europe (the roman law as taught by university professors at the Universities and as practiced by jurists) or common law, the alternative in Europe to the *jus comune* in that period, which, however, did not deal with mercantile issues.
Speaking of **maritime trade** there are references to **rules** that were **observed by those at sea** that are very ancient. This was because the open sea was by definition not covered by the law of a sovereign state. These rules were consolidated in regulations or ordinances of cities (e.g. Genova, Massei, Amalfi, one of the first city to produce such legislation, Trani) that were ports and had frequently to deal with ships and problems related to them.
Particularly in England, the law of the sea was an important reference point. We have a judgement by **Lord Mansfield**, one of the most eminent English judges of the 18th century, in which he stated: "*maritime law is not the law of a particular country, but it is the general law of the nations*" (i.e., *jus gentium*). It was pointing to the idea that **maritime law** was part of international law; this was not necessarily true or accurate, but the important point was that it was <u>not</u> the law of a particular country.
A more recent statement related to the case of the Titanic's sinking and the right to recover things form the relict. The court has to make a reference to maritime law (in English it is often defined as admiralty because of the *Corte dell'Ammiragliato* or *Court of Admiralty*):
*"the body of admiralty law … did <u>not</u> depend on any express or implied legislative action. Its existence, rather, **preceded** the adoption of the Constitution. It was the well-known and well-developed 'venerable law of the sea' which **arose from the custom** among 'seafaring men', … and which enjoyed 'international court'".*
What the court is saying is that **maritime law** does <u>not</u> depend on legislative action, it is prior to the constitution, it was the venerable law of the sea, and it was a **customary universally accepted** law. In the field of maritime law, possibly more than in the field of commercial transaction over land, you have a strong sense of the necessity to have a body of law that is practiced by those who are at sea. There is some sort of trace of this, because there is an institution, the *Comité Maritime International*, established in Anversa in 1897 whose task is the unification of maritime law as far as possible in all its aspects. This idea that we must have a body of uniform rules at least for one field is a very ancient idea.
The first mention of the *lex mercatoria* can be found in an **English case** of 1473 in which a common law court refers to the idea that **merchants** should <u>not</u> be judged by the law of the land, but by the law of nature. This is an expedient, the judge has to find a way to bring the law of merchant within a known notion, that a court could apply. The law of nature was still in the mind of men of law and therefore, the judge uses the notion of law of nature in order to incorporate in the judgement the *lex mercatoria* which is considered to be universal law.
To mention one of the most famous constitutional cases in the US, the ***<u>Swift v. Tyson</u>***, a case revolving around the validity of a negotiable instrument, Justice Story, chief justice of the Supreme court, speaks the language of *lex mercatoria*. This is a very famous case because it establishes the

idea that even in matters not attributed to Congress, **Federal Courts have the possibility to create their own rule**. It is interesting that this happens in a case of commercial law, because the commercial means were the justification for this move and for those who are dealing with classical studies, it is nice to know that Justice Story not only cites Lord Mansfield but also cites Cicero (which is actually cited by Lord Mansfield), who said:

"There won't be a law in Rome, nor another one in Athens; not a current one, nor a subsequent one; but the ***same law will be applied*** *amongst all people and at all times".*

Cicero was not necessarily referring to commercial law, he was talking about natural law, but this jurist plays with this concept in order to argue that commercial law should be uniform. This decision was nonetheless reversed by US Supreme court in 1938 in the case *Erie Railroad Co. v. Tompkins*.

If we ask historians whether this idea of *lex mercatoria* as a uniform law applied by all merchants and universally recognized, corresponds to the historical reality, the answer will be that not necessarily the two correspond. In particular, it was clear that these **rules** could be **highly differentiated**. We must realize that the business community was not uniform and that merchants were coming from different places. When you start examining the rules that made up the *lex mercatoria* you see a certain differentiation, which probably corresponds also to the **differentiation of the business community** at that time. The **point that was crucial** was that commercial **justice** should have been **fast** and should have not been burdened with **procedural rules** that applied to normal litigation. There was a tendency to say that judges were to be dispensed ex *aequo et bono* when they had to go to court. Merchants wanted a fast dispute resolution because **they were travelling**. Nowadays we think of markets as places that were permanently there, but in the Middle Ages markets were exceptional occasions. This was for sure one of the significant points where we can observe a **uniform attitude**.

All things considered, how binding was *lex mercatoria*? To answer, it is necessary to refer to various techniques used in courts. We have, indeed, to remember that even though quite often the business community, organized in juries or tribunals, decided on disputes, *lex mercatoria* was not a completely **autonomous fully independent system**, because sometimes these litigations ended up in regular courts, and then the courts had to resort to some techniques (we have seen natural law) to establish that *lex mercatoria* was binding. Nowadays, many changes have occurred and evidence of these in the commercial law field can be found in the fact that several nations have a commercial code (such as Germany, France, just to mention the most significant ones, Italy also had one before the unification of the 1942 code). By making reference to this code, we understand that **commercial law became state law**. So, the tendency to create national system of law involved as well *lex mercatoria*. Note that even powerful kings, like the French one, never thought that they could ever unify the private law of the country. It took Napoleon to make such unification. For the king of France, it was not possible to touch the entire private law and therefore he issued only ordinances concerning also merchant law, but basically the unification and codification process was a 19th century phenomenon, when the state become the national state and it decided to control every source of law and therefore the *lex mercatoria* become part of the law of the state. And this is the end of the old *lex mercatoria*.

It must be noted that if we take **maritime matters** this is not completely **true**. The Italian *Codice della navigazione* clearly says that customary law, if there is no provision of law, is an independent source of law and while the other codes (the civil code in particular) state that customary law is valid only if a law makes it such, in the code of navigation we have the recognition that **customary law** by itself would be a **source of law** even if no law declares it so. Anyway, once the old *lex mercatoria* was over, we had a problematic situation where national state, each with its own law, was claiming absolute jurisdiction over the territory. So, people who have to deal across boundaries have the problem to understand on which law they can rely on. There is no uniform law anymore, no uniform

general merchant law anymore: therefore, in commercial transaction, a party can do nothing but hope that the other agrees with the choice of law that the former is going to do.
After WW1, we begin to witness theoretical efforts to argue that this situation is damaging the business community. Two important scholars that highlighted this issue and attempted to figure out a solution were **Clive Schithoff** and **Berthold Goldman**. The former argued that the business community had certain needs which were <u>not</u> taken care of by the law of the state. The solution he proposed was to try to **revive** the idea of *lex mercatoria* looking for new constitutive elements, namely:

- If businessmen deal regularly with a party, they are probably **using the same agreement multiple times** (especially in some fields, such as transportation, trade, and international finance). There is a tendency to rely on certain patterns that are valuable and to use them repeatedly. This is called ***business practice***.
- ***Commercial arbitration***.

Scholars, however, did <u>not</u> have exactly the same vision. For **Goldman** the idea was truly the idea of a completely **autonomous legal order**, even able to override mandatory provisions. In a way the Goldman's idea was very similar to **religious law**, religious law is binding on whoever is a believer[131] and wherever a believer is. Religious law is not fully within the jurisdiction of the State, it is independent; the state is very cautious towards this idea (e.g., matrimonial law was not within the jurisdiction of the state until the 19th century in most countries). We could say that Goldman probably had in mind something like this or at least can explore this type of analogy. A religious person has no problem in saying that religious law prevails over state law, it is the state that has a problem with this idea. **Schmithoff**, instead, was more careful and positivistic, as he was relying on techniques that were more in line with the idea that the state is sovereign. That is because he was strongly relying on **party autonomy**. The idea is that once the state recognizes party autonomy in the contract field, party autonomy can incorporate trade usages (which develop by themselves by practice) in the agreements.
This is not a mere theory, because matters are discussed in courts. There is a Judgment of the ***Corte di Cassazione*** **(722/1982)** which states that there is a **transnational dimension** in which **arbitration** operates. This is because, regardless of the law of the States, **mercantile law** is the law which economic operators adhere to, because it **responds to the value of their environment** so that their conducts actually conform to this, because they think they are binding. And by following this type of reasoning, the Court of cassation validates arbitration award that was rendered without motivation in England. Arbitral awards according to the conventions Italy has should be motivated, at least in this case it was necessary, but the Court of Cassation decided otherwise because the arbitral award was valid according to the law under which it was rendered. The business community under those rules had no problem with arbitral award without motivation, so the Court of cassation has to appeal to mercantile law in order to validate something that probably it was not valid under the conventions Italy had subscribed.
Is there anything like this beyond a single statement of a court?
We have also a concrete example from Italian legislation: **Decree 20/12/2017** of the ministry of finance concerning financial guarantees that are important in derivatives markets. The decree allows the possibility to certain entities to **operate** according to "*contracts between the Italian republic and counter parties*", **according to contractual module**s that are more **widespread in international commercial practice**. The decree makes it clear that it is referring to the is the **master agreement**, which are framework agreement that the **International Swaps and Derivatives Association** (which has 925 members in 75 nations) has written. The important point is that the

[131] Or a *belieber*? Who knows.

master agreement is a **uniform rule** for all this kind of transaction across the world, so all the derivative's contracts are under an agreement that has been published as a contractual form by this association. Imagine the difficulty to produce a treaty that would bind 75 nations in such a specific field; apparently **the business community** itself was able to make such a **contractual form effective** by its own means **without having it recognized by a treaty or customary law**. Countries that tended to deal in derivatives possibly decided to have their own legal provision that recognized the legal validity of the agreement or did otherwise. But in any case, there is no treaty behind this, it is just business practice in the financial markets.
There are several organizations whose task is essentially to set the standard for a certain way of dealing in markets. One of this is the **International Organization of Securities Commissions (IOSCO)**; the securities commissions are the public bodies that in each country regulate the financial market. However, the IOSCO is not a public body, it is an association of the representative of the commissions, which aims at being the **global standard setter for securities markets regulation**. Its objective is to set the standard for securities market regulation through **agreements and consensus.**
Of course, there are also organizations that do not act from private initiative but are the expression of the state or of supranational entities. One important reference point is **Unidroit** based in Rome. This institution tends to **promote uniform law** and has enacted many business conventions; one of the most recent and most successful is the convention of the token of security over rolling stock and airplanes. The problem with securities over airplanes is that airplanes move to airport to airport, and they may land in a state that does not recognize the security originated in another state. The convention is aimed at solving exactly this problem.
Another two important entities are:

- **Uncitral**, the UN commission for international trade; and
- The **ICC**; international chamber of commerce.

One the first *lex mercatoria* type of approach is the ***Unidroit principle on international commercial contracts***. Usually, Unidroit provides model conventions that are used for international treaties entered into by different countries, but in this case Unidroit decided not to propose ratification for this text. This text is a written as a **contractual code**. Nonetheless, it was not put into force or it was not written to be a convention, because the authors knew that such a complex text would have never been ratified. The text was designed to be **adopted by arbitral practices**. Arbitrators are nominated by the parties, which can decide whether to bound arbitrators to state law or not and can also require arbitrators to solve the dispute under the **general principles of commercial law**. In this latter case, the **Unidroit principle** on international commercial contracts could **apply**, because they are an expression of the general principles of *lex mercatoria*. The text can of course also be applied when it is expressly indicated by the parties as applicable. Furthermore, the text has been used as a source of inspiration for countries that had to codify contract law and to interpret current contract law.
An important element to be highlighted is that the text can be applied only to arbitrators, because in case of a dispute in front of a regular judge, private international law rules would apply, which in Europe are almost completely uniform after the EU regulation Rome 1. Private international law rules es do not normally allow to refer to a non-state body to adjudicate a case. Judges in most states cannot refer to Unidroit principles even if the parties have agreed upon their application. The state wants to have the monopoly on the applicable law and would never admit that other entities are able to produce law. To conclude, it is clear that what we are witnessing is the **Renaissance of non-binding law** and its relevance, especially when it is difficult to have harmonization or unification by the two most common instruments (treaties or custom). And this difficulty can be encountered when nobody has the competence or there isn't an overall organization to provide global law for

use. And, actually, we have to admit that there is no single entity that can provide a set of global law rules, except in very narrow sectors.

Counterterrorism, world security and transnational law perspectives [132]

The next chapter will focus on **counterterrorism** and Constitutionalism 3.0, and namely, on international terrorism and its constitutional implications. International terrorism is one of the main emergencies of our Century, and we will look at the reaction by the mature democracies. Emergencies, including terrorism, affect (and are affected by) constitutional principles. To define it, an ***emergency*** is a situation **different from an ordinary situation**. In a very famous work, Rosenberg defined it as *a stressful time*. Nonetheless, it is difficult to define in a positive way what emergency is. We can only know what emergency is not, giving it a **negative definition**: the contrary of ordinary circumstances. More precisely, there are at least two kinds of emergencies:

- ***Political*** **emergencies**, like war and terrorism.
- ***Non-political*** **emergencies**, such as the pandemic and natural disasters.

When we think of a situation different from ordinary times, which are called **peace times** under a legal perspective, war comes to mind for first. Indeed, war is a political emergency, and among them it is the most classical and important one. Traditional wars have some specific features that characterize them, namely:

- **Specific actors**, namely States according to the Westphalian concept.
- A **precise duration**, with a precise starting point and a final point. In the traditional idea of war, there is a specific **formal declaration** of war, which defines its beginning. The end is defined as well, usually with a **peace treaty** or other **formal agreements** that crystalize peace. War is aimed at reaching a goal, and after that the conflict is formally ended with a compromise ending the hostilities.
- A **defined battlefield**, that is, a specific warfare territory. There are one or more defined battlefields, that are always precise. In such spaces there are *traditional actors*, such as soldiers, which are also legally differentiated from civilians. In this respect, for instance the Geneva Convention obliged soldiers to wear uniforms.

The aggression to Ukraine can be considered a classical war, which we were not used to see anymore. However, the classical idea of war there is not the only political emergency. The concept of war has been transformed, and emergencies have evolved over the last 70 years into a less traditional idea of war that also include, e.g., peace-keeping operations. Given that war is not a static notion, but a **dynamic** one, terrorism cannot be defined as *war*. From a general perspective, war changed in many circumstances, such as what happened in the so-called **war on terror** after the 9/11 attacks. Indeed, the war on terror is not a traditional war, for Al-Qaeda is not a State and terrorists do not wear uniforms. The distinction among soldiers and civilians is not easy anymore, making the difference blurred. What is more, international terrorism is *outside of any well-defined time* since there is no declaration of war in a formal act: indeed, Al-Qaeda did not issue a formal declaration of war and (almost) nobody knows when terrorists are going to attack. Finally, terrorists' goal is not always clear. As a result, in such times, counter-terrorism measures have been **normalized** by mature democracies to deal with this new kind of threat.

Considering their permanence, it is a time of ***normalization of emergency***, making it difficult to mark ordinary times and extraordinary times. The war on terror is permanent, and thus represents a

[132] Taken from the lecture by the (not-guest, yet star) Prof. **Arianna Vedaschi**. Please note that the paragraph about ***Energy Law***, taken from the lecture by Prof. **Inigo Del Guayo** (e che guayo…), is unfortunately not ready yet and will be uploaded in a later version of the handout. We deeply apologize for the inconvenience.

completely different situation. Conversely, emergency, by definition, should be a **temporary situation**.

When there is an emergency, the State has several ways to deal with it. Its powers usually end up **limiting** rights and freedoms. Moreover, the powers of the State are often disruptive towards the institutions, changing the **asset of balance** among powers. The executive is the *dominus* in an emergency since its actions are quicker than the parliamentary procedures. Indeed, approving a law with the parliamentary system for each problem during an emergency, as it happened during the pandemic, might result ineffective and dangerous in order to face it. As an example, in case of terrorist attack, quick measures should be enacted in order to provide aid to the injured people. The government is able also to provide **technical measures**, making the action to fight the emergency more effective. In the field of international terrorism, experts in intelligence are also involved, and the government constantly consult such bodies.

The increased powers of the executive are then the traditional consequence of an emergency. This could cause some issues, such as the marginalization of the **ordinary legislative tools**, namely the parliament. From a theoretical perspective this situation is though justified considering the theories:

- ***Decisionism*,** elaborated by Carl Schmitt, derived by the author's idea of **constitution**, which must be conceived as a **fundamental political decision** even before being a source of law. This is why during an emergency the body exercising power should take action in order to **restore sovereignty**. The sovereign can then decide to break the rule of law based on public good. A **highly discretionary power** free from any constraints to the executive were thus a typical characteristic of decisionism, that could lead to **potential arbitrariness**, as it happened during Weimar republic, when the powers were given to the president of the Reich.
- ***Necessity***, elaborated by Santi Romano, according to whom necessity is considered an **autonomous source of law**, different form ordinary law. The difference with Schmitt's theory is that necessity is **limited** since it is aimed at the restoration of the *status quo ante*. This is very close to the idea of emergency as something temporary.

Adopting a more descriptive approach, it is interesting to analyze how emergency is meant in the various constitutional frameworks. Taking into consideration contemporary constitutions in western liberal democracies, it is possible to focus on different approaches:

- A so-called ***non-model*,** namely a model made by **constitutions that do <u>not</u> regulate emergency systematically**, such as the Italian Constitution. As we know, for historical reasons, our Constitution does <u>not</u> provide for a different structure in times of war. There are some articles that regulate war in a very *synthetic* way, mainly concerning the power of parliament to declare war giving the necessary powers to the government. Art. **77 Cost.**, in turn, states that **governmental decrees** can be issued in cases of emergencies. Nevertheless, the Italian praxis showed that those tools were used for purposes different from emergencies, in a sort of misuse. We do <u>not</u> have clear constitutional emergency powers different from war powers.
- **Constitutions that provide rules on emergency**, that includes several categories:
  - First, the ***general clause*** model, such in the French constitution, which provides that the President of the Republic can take **measures required** by the circumstances. It does not define *what* kind of measures he/she could adopt. The President is elected by the people, and that is why it has extremely important political functions.
  - Another model is the so-called ***rationalized model***, in which specific measures are provided. This model can be divided including a **growing intensity model**, such as the German one, in which there are different *degrees of dangers*. There are indeed different provisions creating a specific regime for each level of threat. Another sub-

model is the **parallel levels model**, in which the provisions change in different situations of three emergencies, such as situations of *non-political* alarm (such as in case of natural calamities), of *state of exception* (activated in case of imminent threat to the public order, e.g., terrorist attacks) and *situations of siege* (in case of aggression to Spain's integrity and sovereignty). Those three specific regimes are mentioned by the article 116 of the Spanish Constitution, and their factual definitions are described in the **Organic law 4/1991**, a specific source that is beneath the constitution but above primary legislation. It regulates in detail every single regime, providing the factual definitions. It is hence clear that it is the *political impact* of the emergency that defines the "reaction": when that is high, the Congress plays a crucial role, while the Government's discretion decreases.

- Finally, the American ***ambiguous model***. It can be defined a **semi-silent** model on emergency, since there is no *proceduralization* of emergency. Only section IX of Art. **1 US Const.** provides that the privilege of the *habeas corpus* can be suspended in cases in which public safety requires it. It is not possible to know *who* should take this decision, and *how* it should be taken. It is pretty similar to the general clause model, but it is more blurred. Some scholars claim that the President can have such powers, since he is the institutional representative of the Federation.[133]

These models are facing new kinds of emergencies, that even constitutions in which emergencies were disciplined specifically were not able to react. An example of this theory is the reaction to international terrorism. The terrorism of the past, such as the IRA, was different from the one we have now, since the former had a *clear political aim* (e.g., independence claims or far-right or -left wing leaning). Extreme Islamic doctrines, which are the basis of modern terrorism, lack a political aim: they were only aimed at fighting the evil, namely the US. Up to 2014, international terrorism did not appear to have a clear political aim, and the impossibility to predict the attacks made it a unique phenomenon in history.

However, in 2014 international terrorism started having State ambitions, with the establishment of the **Islamic State**. Nowadays, the latter has lost all of its territories, although the ambition of creating an alliance among its organizations is still alive. The phenomenon of foreign terrorist fighters is another peculiarity.

Emergency provisions enshrined in the Constitutions were not evoked in mature democracies. It is not easy to understand why constitutional emergency powers were not suitable to fight international terrorism. Perhaps, the reason was that they were aimed at being temporary. Provided that democratic countries did not use such powers, how did they react? The US war approach is unique, because its response was based on the idea of ***American exceptionalism***. This expression was used to say that the US were different from any other country, and that they were legitimized to exercise *every kind of power* to fight terrorism. Consequently, the US declared war against

[133] The Constitution identifies the Congress as the body charged with deciding on the state of war (and thus the ius *ad* bellum), leaving the power to command the armed forces (the ius *in* bellum) to the President. Thus, the Founding Fathers saw war operations as a decision for the legislature but to be handled by one person. However, in practice the President has often (e.g., Vietnam, Korea) felt that he also has the power to decide the ius *ad* bellum, giving orders to the armed forces to go to a particular place and initiate an armed conflict. Here we see the ambiguous dualism about the power of war decision-making: it is true that without the help of Congress, the President's decision would be short-lived, since it is the former who decides military expenditures within the budget (and without expenditures, the soldiers come home); however, making a contrary decision to the Head of State would entail considerable problems on the practical level. Part of the doctrine, then, argues that the President's power is legitimized indirectly by the Constitution, which gives him the role of the head of the armed forces, but also by factual situations, which could give rise to the need for a prompt and effective response. This is ultimately why we speak of an ambiguous model.

Afghanistan only because certain terrorists were there. G.W. Bush, in a famous speech, identified Al-Qaeda as enemies of freedoms and members of Taliban, thus attacking Afghanistan.
Differently, other countries used *ordinary law* to fight terrorism without using the existing constitutional tools regulating emergencies. The use of ordinary law in times of terrorism, such as criminal law and permanent provisions, might however result in the **normalization of emergencies**. Italy is one example of the use of criminal law to cope with terrorism. After the 9/11 attacks, the Italian **criminal provisions** on terrorism were strengthened by **decree**-**laws**, then converted into ordinary law. Another feature of the Italian system was to use **immigration measures**, along with criminal counter terrorism measures. This led to some controversial ordinary laws, such as the data retention law. The enactment of ordinary laws is one of the possible approaches, different from the US war approach.
European countries used some emergencies tools that are different from ordinary law:

- ***Sunset clauses***, namely conclusive provisions stating that provisions of that law will expire after a certain date. Those are typical of common law jurisdictions, such as happens in the UK. Those are similar to emergency provisions, since they allow a temporary legislation. The problem is that often they are extended and can become permanent legislation without a proper parliament scrutiny.
- ***Non-constitutional emergency clauses***, like it happened in France. It has some laws addressing emergencies, like the **law 55/385**. This law was adopter in the Algerian conflict in 1960, but also in the context of terrorism such as in the Bataclan attack. The provision that was written in a primary source was constitutionalized. This law provides that a state emergency can be declared by the Council of ministers, and the decree should be signed by the President of the republic. After this declaration most powers are given to the executive power. After the 2015 declaration, there were many restrictions imposed by the executive, even concerning personal freedoms of suspected. The state of emergency was prorogated several times, thus normalizing emergency. After it came an end, powers were applicable also if incorporated in ordinary law. In this case emergency was more normalized than ever.
- **Countries that use *non-domestic emergency tools*** that, in some ways, are incorporated into their domestic legislation. One example is Art. **15 ECHR**, which provides that, in time of certain public emergencies, several personal freedoms can be limited. In this way the UK was able to derogate some provisions concerning fair trial. It was considered a **transnational emergency constitution**, but at the same time the article was **domestic law**.

In conclusion, mature democracies deploy several techniques to react to aggressions. To what extent are we available to give up basic principles of democracy to protect national security? An ongoing struggle among international actors is changing these relationships by turning the notion of national security from an *interest* to be protected into a fully-fledged **right**, sometimes higher than *human dignity* and able to legitimize every measure. There are no longer *local* emergencies in this century. However, democracy is an crucial value and shall always be protected and balanced with national security.

Internet regulation as a transnational phenomenon [134]

We will now focus on internet regulation from an international *lawyer's* perspective.[135] The relationship between law and the internet has always been one of **mutual influence**: on the one

[134] From the guest lecture with Professor Giampaolo Maria **Ruotolo**.
[135] It is better to speak of the perspective of an international *lawyer* rather than of international *law* because we will try to use different theoretical approaches, and not only international law.

hand, international law is called upon to regulate both the internet as an infrastructure (e.g., the underwater cables that connect continents) and the human behavior that takes place on the web. On the other hand, the internet itself imposed some peculiar modifications to the legal order. These modifications happen to be a consequence of the circulation of legal institutions and model between domestic and international legal systems. Of course, this is no novelty: technological progress, indeed, has always shaped legal systems including the international one. Take, by way of instance, of the rules to use the nuclear energy, civil aviation, the outer space, and so on. In sum, when men implement new resources, law must be created to regulate them. Nonetheless, the peculiarities of the internet influenced not only its **substantive rules**, but also some ways **legal orders** perform thei r functions. The latter modification took place through some **procedural** rules (as opposed to *substantive* ones).
To understand how this influence has been produced we will use the ***Domain Name System*** (DNS) as a case study. The DNS is the system that allows to identify websites by typing names that are easy to remember, instead of the respective IP addresses (i.e., very long sequences of numbers).[136] It is a sort of telephone directory for the internet. The interesting thing is that twelve years ago the governance of the DNS system was **unilateral** by the **United States**. Indeed, only one institution could authorize modifications or unilaterally change the system. And yet, the servers where the DNS information is stored[137] were scattered all over the world. So, how is it possible that a State can unilaterally modify things that are outside its own territory? What is more, people sometimes tend to underestimate the importance of internet regulation because data on the web have not a physical location. Nonetheless, this approach is not correct: in the end, data are stored somewhere in a server. In short: there is no *cloud*, it is just someone else's computer. That is why it is particularly strange that the American **National Telecommunication Agency** (NTA) was the only institution that could authorize modifications of these database (e.g., unlinking the domain name from its IP address). Understandably, it is an extremely powerful competence: it had the power to making a website no more reachable by anybody. However, this situation never registered any protest with the only (rather irrelevant) exception of Brazil, which has always given great importance to the governance of the internet.
Some scholars and policymakers then proposed to attribute the competence to regulate the internet to an **international organization** made by States. Hence, in 2003 there was a huge round of negotiations at the **World Summit on the Information Society**. This was led by the UN and made of many working groups. One of these was the Working Group *on the Internet Governance*, whose task was to investigate and make proposals for actions on the governance of the internet. The Summit produced a report emphasizing that no government should play an *exclusive* role on the matter. Consequently, an **Internet Governance Forum** has been established every year since 2006, bringing together States, NGOs (such as the *Internet Society*) private operators, scholars, and practitioners. The Forum has the task to discuss public policies aimed at promoting **internet sustainability**, thus keeping the debate open between States and private operators. To make it brief, despite all this effort, the States have never reached an agreement to confer the competence of regulating the DNS to an intergovernmental body. This was because some (mostly Western) Countries feared that attributing powers to an international organization led by States could imply the dominance of non-liberal States (e.g., China and Russia).
Therefore, the United States continued to unilaterally manage the DNS. Yet, from an international law perspective, is this situation legally possible, or does it represent a breach of international law?

[136] This way, to download our great handouts, you'll simply need to type https://iusatb.wixsite.com/online/ and not 101.3338.2836.000…
[137] In these servers, there is a sort of **database** that links each and every domain name to its own IP address. When a user types the Domain Name, the computer through the databases search for an IP address.

First, it is necessary to identify the **legal title** under which the US exercises this power, and to do so two approaches are possible:

- On the one hand, we could use a more classical approach towards *international law*. According to them, whenever a State exercises its powers in places or on objects that are located away from its territory and sovereignty, that situation is a form of ***extraterritorial exercise*** of coercive powers. This brings to the surface the international law obligation of **non-interference**, which can be legitimately derogated only according to specific customary international law, or by Treaty provisions. What is more, the authorization to derogate the principle must come from the State on whose territory the regulated object is located. As to the DNS situation, an international law perspective would need to look for the authorization of each and every State in which DNS servers are located. Should we do this, we would find nothing. Therefore, either is the situation a **breach** of international law, or powers exercised by the US have their legitimizing title in the **acquiescence** of the States concerned: indeed, the latter have tolerated the situation probably because the US had committed itself with the international community to preserve the fundamental needs of **stability** and **security** of the DNS. This is because the US recognized that to guarantee the ongoing functionality of the DNS (and hence, of the entire web) it is necessary to meet the common and basic interests of the States in the global field.
- On the other hand, we could instead refer to *global administrative law* models. In general, global administrative law deals with the rules that guarantee the exercise by **National Public Administrations** of administrative powers at a level that involves *more than one* domestic legal system (and interests). The aim of global administrative law is to push towards **common interests**, which are by nature **transnational**. In this respect, UN legal scholarship started to think of *mixed instruments*. In particular, one of the ways in which global administrative law performs its functions is **distributed administration**, whereby the administration is executed by an apparatus belonging to a specific State, which is nonetheless entitled to carry out functions of global relevance by virtue of a *common interest* recognized by a legal mechanism. And this may be the case of the DNS (namely, of the NTA administration). Indeed, the recognition of the State and users' interest in the continuous functionality of the internet represented one of the bases for this situation to happen. By way of example, several US administrative acts recognize this consideration as legal basis.

Approximately in 2019, the US decided to transfer the legal regulation as well as the management of the DNS to the so-called **global community**[138], namely to the **Internet Corporation for Assigned Names and Numbers** (ICANN), an NGO made of many stakeholders: not only States, but also private individuals, representatives of NGOs, etc. This transferal can be seen as part of a wider trend, that is, the ***informalization*** of the international legal order, exactly as it happens, for instance, in the fields of pharmaceutical products, arms, diamonds, competition, or financial stability. In all such cases there <u>never</u> is an international Treaty nor an international "organization" strictly speaking, but *processes*, *initiatives*, *schemes*, and so on. This way, international law is becoming more and more informal because of the increasing existence of relationships and interests that transcend (i) *borders*, and (ii) *States* conceived as centers of imputation of interests. That is why such interests are not easily manageable by traditional operators of international law. Hence, we notice the emergence of **informal proceedings** that <u>cannot</u> be ascribed either to conventional international

[138] This expression is being increasingly used by scholars and operators who are referring to the constellation of entities that carry out activities of international significance (even in case they lack international law subjectivity): e.g., the UN, NGOs, corporations, experts and scholars, etc.

law or to forms of *soft law*. Indeed, soft law is usually produced by traditional subjects of international law. What is more, the DNS rules have nothing of *soft*, that is to say, non-binding. Instead, non-compliance with them implies the deprivation of the possibility to use resources regulated by them. Put differently, if one does not respect the DNS system, then it won't be able to use the web. Therefore, operators and States are in the escapable need to comply with the rules.
A lot of criticisms have been raised by scholarship, mostly due to a **lack of guarantees** in comparison to the typical rules of international law and due to the **unaccountability** of the structure that manages the DNS system. As to the former criticism, however, these rules are in practice accepted because they do work well and because operators have agreed they were suitable. Furthermore, as to the lack of accountability, the problem needs to be scaled down. And the first reason for that it that there is a legal difficulty in defining the term "*accountability*" in an international perspective. Indeed, the concept of accountability is used whenever the word *responsibility* cannot be used. Scholars usually refer to the accountability of multinational corporations, NGOs, individuals, etc., but just because they cannot use the term responsibility but for States. Moreover, there is not a **shared concept of accountability** in domestic legal systems: States so not use even the same word! What is more, some argued that ICANN is the most paradigmatic **mixed** organization in this context, as well as an example of the **fragmentation** of international law. For sure, ICANN's activity has all the characteristics of a *law-making activity*. Rules adopted by it are **secondary rules** that also govern private acts. A part of the scholarship thinks that the best way to analyze the product of ICANN's lawmaking is to adopt a *neutral* approach, that is, avoiding adopting a position concerning its legal nature and limiting to the factual elements. Such an approach requires to recognize, in a broader framework, the **abdication of legal science**. The issue of classifying different kinds of rules has been identified only in the global (or rather, transnational) context, that is a sort of *fusion* of international and domestic legal systems. This fusion gives rise to many connected sectors of regulation. Consequently, we need to manage assets of global relevance, from the internet to financial stability, thus **impacting on many State interests**. Although it is impossible to reconstruct some kind of a unity in transnational law due to the numerosity of approaches, it is clear that legal systems are now fragmented. Indeed, we have different sources coming from different legal orders, and thus an attempt to bring global law to a **normative unity** could be carried out only by reconstructing the **normative compatibility** of the many fragments that compose this set of rules. To do so, a **network** approach capable of reconciling collapsing rules must be adopted. In short, the fragmentation of global law, the only legal approach that can bring to some solutions is trying to identify the so-called **conflict rules** (as private international lawyers call it): i.e., rules that have no *substantive* content but only tell where to look to search for applicable rules. Conflict rules can refer case by case to different traditional legal systems, each of which pursues different objectives within the context of **global interests**.
To conclude, the fragmentation of the international legal system is not new, if we consider that fifteen years ago the International Law Commission adopted a report called "*Fragmentation of international law: difficulties arising from the diversification and expansion of international law*". Also, the idea of fragmentation of constitutional law is quite common also in constitutional law. The phenomenon we have just considered is merely the same: we have just changed the perspective.

Transnational law in the context of Environmental Law [139]

We will now focus on how transnational law can be applied to the context of environmental law. To begin, environmental law is now a fully recognized and autonomous specialized field of law. It can

[139] From the guest lecture by Prof. Claudia **Sartoretti**

broadly be considered to include all legal norms aimed at **governing human environmental interference**. Indeed, domestic environmental law has developed in tandem with a body of environmental norms in the international regulatory arena. Like its domestic counterpart, international environmental law has come of age at least since the *Stockholm Conference on the Human Environment* in **1972**. While much of the scholarship has principally revolved around domestic and international bodies of law, a new paradigm of analysis is now evolving, seeking environmental norms in **transnational spaces**. In this respect, *transnational environmental law* (TEL) is becoming a flourishing field of analytical enquiry, yet not fully autonomous and independent. This notwithstanding, its scope encompasses more than either domestic or international environmental law. It **transcends geographical** and functional boundaries and includes norms created and enforced by multiple **State** and **non-State** actors in regulatory spaces *within* and *beyond* States. According to a possible approach, not only does TEL incorporate international law, but it widens its enquiry to include all environmental norms that apply to transboundary activities and/or affect more than one jurisdiction. Such norms aim to respond to complex and interconnected global environmental problems, characterized by their geographical scale, **interdependences**, circularities, and conflicting stakeholders implicated in any effort to solve them: put differently, to better understand the relationship between **law and environmental protection**. In sum, TEL encompasses law *beyond* the States and provides a theoretical framework with which to consider environmental law and governance. What is more, it recognizes that the State is just *one* of the many actors involved in guaranteeing human actions *vis à vis* the environment, and hence the important normative contributions made by non-State actors. Therefore, adopting transnational lenses to find legal solutions to more and more urgent environmental problems could be a useful mechanism with which to find more effective responses.

The most evident consideration related to the rise of TEL is ***globalization***, that is an essential process describing the intensification of a global **interdependence** and, as a result, the increase in vulnerability of regulatory challenges that global actors are experiencing. In this respect, **global environmental law** is a set of legal principles developed by national, international, and transnational regulatory systems to protect the environment and manage natural resources. It is made of distinct sets of substantive principles and procedural methods, including:

- ***Public international*** *environmental law*, commonly used to the set of treaties and customary international legal principles governing the relations **between nations**.
- ***National*** *environmental law*, which describes the principles used by national governments to regulate the behavior of private individuals, organizations, and subnational governmental entities **within** their borders.
- ***Transnational*** *environmental regulatory systems*, which describes the set of legal principles used to regulate the **cross-border** relationships between private individuals and organizations.

As we will see, **climate change** is a typical example of a global environmental problem that arises a result of the increasingly globalized human activity, and it strains the regulatory machinery of a State so that it cannot be governed by a single State. Put differently, it is an **interconnected global problem** that demands that demands a collective global normative response by many State- and non-State actors at multiple – geographically and functionally defined – governance levels. This is clearly demonstrated by the current global climate law regime, which consists of **multilateral agreements** (such as the *United Nations Framework on Climate Change* of 1992, the *Kyoto Protocol* of 1997, and the *Paris Climate Agreement* of 2015) as well as of **domestic climate laws** of States, regional climate norms, policies such as those of the EU, and non-State climate initiatives.

Globalization and the birth of the concept of environmental *governance* go hand in hand. Indeed, both are contributing to the emergence of TEL, since the States' historically central role in regulatory functions is being significantly altered because of the steady emergence of new modes of regulations. These new models involve processes through which **collective aims** are defined and pursued, and in which the State is not necessarily the *only* or *most important* actor. Thus, the State has a less pronounced role in promoting social welfare, and non-State actors have the potential to assert themselves as **co-governors** in various degrees. TEL essentially aims to respond to these developments and provide alternative understandings of regulation.

But who are these ***Non-State Actors***? The group of entities usually includes **intergovernmental organizations**, international non-governmental organizations (**NGOs**), transnational **corporations**, **epistemic communities**, and professional organizations. Some of these actors are *fully private* in membership and financing (e.g., the NGO known as Greenpeace) and deal with the implementation of environmental laws. Other non-State actors have a *mixed membership* of civil society and public authorities and have normally been more successful in initiating the adoption of new legal norms, effectively influencing governments: for instance, the International Union for Conservation of Nature is a typical intergovernmental organization made of both governments and civil organizations.

It is possible to identify some **processes** that contribute to the steady growth of TEL norms:

- ***Transplantation***. Indeed, a country's legal development can serve as basis upon which other countries develop their own legal system through a process of law "borrowing".
- ***Cooperation*** and **integration**, which involve various examples of regional organizations created due to the need of integration and harmonization. For instance, the African Union was founded to allow integration and harmonization between different African regions. Likewise, the EU has elaborated an environmental law and governance regime.
- ***Networking***, which implies the creation, dissemination, and the sharing of ideas through networks made of like-minded and influential individuals and groups. By way of example, NGOs play a crucial part in networking: in addition to their global policy influence, global civil actors through their respective networks sometimes engage in the development of *soft* norms aiming at strengthening environmental protection (e.g., the ISO 14000 environmental standard developed by the International Standardization Organization as means to enhance the environmental performance of businesses).
- ***Judicial Comparative Borrowing***. In fact, comparative judicial reliance on foreign and international law has been referred to as a judicial *cross-fertilization*, judicial *dialogue*, constitutional *borrowing*, judicial *importation*, and judicial *migration*.

The emergence of TEL is evident in various areas of law. A major example is the case of **environmental rights**, which have emerged in a continuous and fast development. This is because the environment was not a concern during the first wave of constitutionalization. Instead, environmental rights only began to be featured in domestic constitutional orders following the **UN Conference on Human Environment** (Stockholm, 1972). Today, approximately ¾ of the world constitutions include some reference to environmental rights, responsibilities, or both. Despite these domestic developments, we still do not have a universally applicable global treaty that explicitly provides for environmental rights[140], nor have the latter been recognized in the corpus of customary international law. In sum, environmental rights started to develop *inside* transnational environmental law through the abovementioned processes of **cross-jurisdictional learning** (i.e., *comparative analysis* and *legal transplantation*). For example, the 1976 Portuguese Constitution

[140] For instance, surprisingly, none of the EU constitutive treaties provides for an explicit environmental right. They do talk about the environment as an *issue*, but not as a specific right. Neither does it the ECtHR, although environmental entitlements have been protected incidentally through the application of *other* rights (for instance, through that of privacy).

provided for a right to a healthy and ecologically balanced human living environment. This right has been **transplanted** in other constitutions. What is more, it is possible to notice an increasing activity of judicial **citations** and legal doctrines of supranational Courts borrowed by domestic judges, as a concrete sign of the development of a transnational legal culture for environmental rights. An example of a global initiative that went in this direction is the **International Rights of Nature Tribunal**, i.e., a citizen-driven initiative that provides an opportunity for people around the world to lament issues of nature destruction. It allows citizens to testify even in the absence of an accused party (such as a State) that has allegedly violated the rights of nature. Although it is not a conventional Court, it serves an important **awareness-rising** function. In sum, TEL is needed also because the negotiation processes of international treaties and customs can be slow, and even after their conclusion, they often result in *weak standards* that commit States to do very little. What is more, the effectiveness of international environmental law depends on its implementation, which is far from being guaranteed: even when provisions are formally enacted into national law, their effectiveness may remain in question. Therefore, TEL becomes of interest because, oppositely to traditional international law, it requires neither *formal adoption* of Treaties with meaningfully restrictive rules and broad adherence, nor formal recognition and enforcement by international Courts. This way, TEL allows to circumvent the efficacy problems of international treaties.

TEL can take many forms but often involves a **cooperative action** among States like the mutual recognition of licenses and permits, the development of jurisdictional rules. In addition, the role of environmental **activists** is also crucial since they may operate as transnational norms entrepreneurs, sometimes creating their own **private regimes**. For instance, groups such as the Worldwide Fund for Nature (**WWF**) has been essential for the development of labelling and certification monitoring regimes, especially after the failure of States to reach an agreement in Rio (1992). Private initiatives like this may be supported by States, which can reference or even fund them.

An interesting case in which transnational environmental law can be applied is **climate change**. Scholars have recognized the important role of transnational relations in shaping the dynamics and the outcome of processes of international negotiations and – more recently – have thought about how transnational actors are directly involved in governing global environmental issues. In this respect, **climate governance** can be defined as polycentric, transnational, fragmented characteristics that summarize the *plurality* and *multiplicity* of (i) levels involved, of (ii) participating actors, and of (iii) relevant arenas. Indeed, climate change involves governance systems that mix the global and the local level. National governments have taken action *unilaterally* and have been joined by non-State actors like **subnational governments**, **corporations**, and **NGOs**. This way, climate change law has broken the traditional boundaries of international law. Climate change governance is in fact largely composed by transnational law, that is, all law that regulates actions or events that **transcends national frontiers**: as seen, both public and private international law are included, as well as other rules that do not fit such standard categories. Also, TEL even includes *national* law regulating transnational relationships by agreements that set voluntary standards or requirements for market access. Although a transnational decenters State and international law, it does not marginalize them: indeed, politics of climate governance can be seen primarily at the UN Conferences and State-to-State settings, along with the development of industry standards, regulations of global supply chains, the practices of international arbitration, the decisions of domestic Courts.

In particular, the issue of climate change is characterized by increasingly diverse transnational initiatives, involving various combinations of actors coming both from public and private contexts. The **2015 Paris Agreement** on Climate Change (which superseded the Kyoto paradigm) encourages not only (sub-)national governments, but also corporations and civil society to contribute to reach ambitious climate aims. The Agreement acknowledges that **collective state action** is insufficient alone to address the problem of climate change. Indeed, its preamble calls attention to:

*The importance of the engagements of **all levels of government** and **various actors**, in accordance with respective national legislations of Parties, in addressing climate change.*

In a transition from the Kyoto's regulative attitude to the **open system** laid down by the Paris Agreement, non-State actors are integrated into the treaty-based climate regime. This way, local government and organizations set up the first climate governance initiatives followed by NGOs, whereas national governments and international organizations have more recently become involved.

The institutions of the global governance have changed in recent years and dozens of **specialized agencies**, programs, and commissions have been created within the European system. Other functional **intergovernmental organizations** such as the WTO appeared and gained influence, together with the dramatic expansion of **European institutions**. Multilateral treaties also multiplied, and environmental agreements grew by nearly 150%. However, in the early 21st Century the growth in intergovernmental organizations slowed and gave way to new organizational forms that seem more effective to deal with climate change. For instance, States have created **informal institutions** and plurilateral "clubs" such as the "G20". In line with an increasing *institutional fragmentation*, States have also established **meta-institutions** to coordinate other entities, such as the *High-Level Political Forum for Sustainable Development*. What is more, TEL for climate change also relies on transnational **public-private partnerships** (PPPs) and – most importantly – on **private transnational regulatory** organizations (PTROs), which are governed by civil society, businesses, and other actors who directly engage in transnational governance, adopting *standards* of conduct and *promoting* and *enforcing* them. These PTROs operate through markets (and not through inter-state negotiations), adopt voluntary standards, and rely on incentives such as consumer demand, reputation, and transactional costs to induce compliance. However, the problem is that they are controlled completely by private actors, and hence their activities mainly respond to private priorities, which may differ from the public ones and, instead, promote weak rules leading to monopoly and oligopoly. Also, bypassing governments, they may induce them to avoid politically costly regulation. Nevertheless, these PTROs can also bring important benefits: they frequently *reinforce public governance* with complementary standards and mechanisms and bypass the situation in which diverging interests block intergovernmental agreements. In short, they provide for new opportunities for private actors to participate in international governance, despite bypassing government control and other traditional elements of democracy.

Another interesting instrument is the so-called ***climatic lex mercatoria***, that corresponds to the growing role of companies that can rely on an important transnational instrument: i.e., the **contract**. As a norm, a contract could incorporate climatic clauses on the one hand, and on the other hand be influenced by purposive norms towards the fight against global warming. This would result in a global law created by and for its non-State addressees. Finally, a last element is represented by the ***climate change litigation strategies***. In fact, the Courts have also become global players in climate governance: both national and international Courts operate in the context of regulatory globalization and deal with different legal documents (national or international, public or private, mandatory rules or standards of conduct). They are considered indispensable since it is necessary to **maintain the rule of law**, which is a prerequisite for the success of trade and a key instrument of good governance. The climate change litigation has especially developed in some **common law countries** like Australia and the US, but there are many cases also in Europe.[141] Overall, it is an emerging part of environmental law that uses legal practice to **set a caselaw precedent** to further

[141] See, e.g., *The Netherlands v. Urgenda* and *Neubauer v. Germany*.

climate change mitigation: given a slow political action, activists and lawyers have more and more relied on national and international judiciary systems to advance their effort against global warming, and as a tool to hold companies and governments accountable. The relevant legal action is usually carried out by individuals and/or NGOs. Interestingly, climate litigation is commonly described as **transnational in nature**, as a part of a **global climate justice movement**, even in cases that involve only domestic litigants. Indeed, each case is seen as part of a *global* effort against climate change. Their cases are often accompanied by campaigns addressed to international audience. The aim is to gradually develop **narratives of responsibilities**, science, right, and wrong, which follow a specific theme involving time, the future, consequences, urgency, etc., and culminating with a **moral message**. Thus, by telling the stories of claims, litigations serve an educational purpose that exceeds the specific effects in the case at issue. This shows us how particular the interdependency between judicial reasoning and societal debate is. Narrative and storytelling as argumentative tools aiming at persuading society and decision-makers are the elements that allow us to consider climate litigation as a part of transnational law: judicial decisions like those mentioned in the last footnote indeed illustrate how judges can become narrators of climate change, applying the narrative scheme and explicitly stating that climate change is scientifically proven and affects every human being, now and in the future.