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Bringing the Outside inside
Macro and Micro Factors to Put the Dialogue among Highest Courts into its Right Context

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1. Introduction

Several decades have passed since the increasing power of courts and judges has been either praised or blamed as a truly revolutionary phenomenon.[1] Despite the relatively low degree of consensus reached in answering the question whether the increased role of courts strengthens or undermines the quality of advanced democracies,[2] it would be safe to say that courts, after the Second World War, gained weight not only in domestic politics, but also at the supranational level. In the European Union, judicial institutions have been playing a pivotal role in triggering the process of integration. This state of affairs draws from a distinctive intertwining of national and supranational jurisdictions, which has put into a stable and regular interaction the European Court of Justice (ECJ) and the ordinary courts of the European Member States by means of a number of legal instruments provided by the Treaties, such as the preliminary ruling.[3] This procedure allows any domestic court to ask the European Court of Justice to provide the 'correct' interpretation of a European law that is to be applied in domestic civil or criminal proceedings. Furthermore, the supremacy principle which establishes the primacy of EU law throughout the whole of the EU, even overruling domestic law, has represented for more than three decades a formidable power pushing through the integration of radically different legal systems.[4]

A comprehensive process of transnationalization of the law entails an increasing transnationalization of the processes of law-making and a profound transformation of the processes of law enforcement. Among the many aspects of these phenomena of radical change experienced by judicial institutions, the dialogue among high courts proved to be one of the most effective mechanisms of institutional change put into motion.[5]

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1 N. Tate & T. Vallinder, *The Global Expansion of Judicial Power*, 1995; P.H. Russell & D.M. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, 2001.

2 W. Murphy, *Judges, Courts and Politics*, 1961; J. Ely, *Democracy and Distrust*, 1980; M. Zurn & S. Leibfried (eds.), *Transformations of the State?*, 2005.

3 Art. 267 Treaty on the Functioning of the European Union.

4 A. Arnull, *The European Union and its Court of Justice*, 2006; R. Dehousse, *The European Court of Justice*, 1998.

5 K. Alter, *The European Court's Political Power*, 2009; M. Poiares Maduro, *We the Court*, 1998.

Scholars are then not surprised to discover that European domestic courts have been encouraged to enter into a pattern of dialogue,[6] which has been developed through the intervention of the European Court of Justice's case law and through the quotation of foreign case laws. This kind of dialogue proved to be as effective in enhancing European integration as it was in keeping domestic courts mostly focused on the legal adaptation of the domestic legal system to supranational law.[7] In different terms, legal reasoning seems to have unfolded as an artefact whose building blocks do not necessarily come from the same (and unique) normative source.

Here we immediately need to distinguish between what is to be considered as a compulsory dialogue among courts and a voluntary use of foreign law.[8] In our perspective, the dialogue among high courts will be voluntary and non-compulsory since it does not depend on a formal obligation to refer to other (and higher) jurisdictions (such as in the case of the reference to the ECJ's case law). In a way, exactly because of its voluntary nature, this dialogue should be considered both as a phenomenon to be explained and as a process that can account for the profound transformation which law-making and law-enforcing processes experience in the contemporary world.

The focus of this paper is going to point exclusively to those factors that should be considered if scholars want to set a future agenda to systematically explain the voluntary dialogue among courts. The authors do not reconstruct the dialogue per se, albeit referring constantly to it. They will point out the institutional and cultural conditions that are

1) conditions to be investigated in order for such a dialogue to be understood;
2) conditions to be taken into consideration in any project of institutional design impinging upon high jurisdictions.

The authors are not here arguing that the factors they are going to consider are the only forces which are active underneath the dialogue among courts. Without downplaying the importance of the dialogue that takes place among the ordinary domestic courts and the ECJ, the authors deem the interaction among the highest courts to be even more significant for the nature of European constitutional democracies, since it also impinges upon the way that constitutional courts affect the constitutional setting of national democracies in the European Union. In fact, the dialogue among the highest courts can heavily impact upon the balance between the democratic and the constitutional principle. Although different courts show a different propensity to engage in such interaction, a point that will be considered again in the concluding remarks, the intention of this paper is to analyse the institutional and cultural conditions that can be considered as important conditions in influencing positively or negatively the development of extra-systemic (voluntary) references. This will lead the authors to present an overview of the appointment mechanisms and the professional profiles of justices in six European constitutional courts: France, Italy, and UK (old Member States); Poland, the Czech Republic and Hungary (new Member States). Some conclusive remarks will then be offered to point to the institutional mechanisms that should be put in place in order to make constitutional courts accountable, given the different patterns of judicial appointment and the different professional profiles displayed by judges sitting in those courts.

2. Constitutional courts: micro and macro analysis

Constitutional justice might well be considered as one of the most important emerging phenomena of the 20th century. Notwithstanding the experiences of constitutional justice that marked previous centuries, a wide diffusion of judicial review can be detected only after the First World War and even more so after the Second World War. The third wave of democratization[9] saw judicial review increasingly

6 G. De Vergottini, *Oltre il dialogo fra le corti*, 2010, ch. 1 distinguishes between courts' dialogue or even simple interaction, but on a more or less equal level, and the influence exerted by one court over another, claiming that broadly speaking there is no dialogue between national constitutional courts but mainly relationships of influence.

7 H. Micklitz & B. Witte, *The European Court of Justice and the Autonomy of the Member States*, 2011.

8 This distinction is profusely debated in M. Bobek, *Comparative Reasoning in European Supreme Courts. A Study in Foreign Persuasive Authority*, 2011, pp. 43 et seq.

9 S. Huntington, *The Third Wave*, 1991.

gaining ground. In the new democracies established in Southern Europe and in Latin America constitutional courts seem to have enjoyed a high level of trust with the public. They have come to be seen as the most reliable actors in politics, vested with the responsibility of checking, not to say overruling, legislative decisions when they tentatively violate the fundamental rights of citizens or more general constitutional values. In a word, every new democracy has been de facto led by international discourse and the domestic political legacy to consider – and eventually adopt – the constitutional court as a solution to the perennial problem: confining political power and preventing it from overruling fundamental values and freedoms.[10]

Whereas the United States experienced, from the very beginning of its democracy, the co-existence of electorally legitimated institutions and a Supreme Court with judicial review powers, in Europe constitutional justice emerges as the most distinctive mark of the 20th century's democracies. The mechanism of judicial review spread all over Europe after the end of the Second World War and again after the demise of the socialist regimes. However, in order to consider the function performed by such a device within the political system, it would be helpful to focus on the prevailing traits of the national legal culture endorsed by each country analysed in this paper. The introduction of a mechanism of judicial review – in most cases coupled with the introduction of absolute competence in the interpretation of the constitution and also of international law – was seen as a limit to restrict the potentially overwhelming power of the majoritarian will. A second – and even more productive and heuristically useful – aspect of this process should also be highlighted. This is the need to counterbalance the political logic of action with a different type of rationale: a rationale based on principled reason. Therefore, the decision to institute a constitutional court is something that is likely to have found resistance in countries with a strong preference for the popular will represented in Parliament as the most legitimate source of law. In those countries statutory law is to be granted absolute priority to the extent that it mirrors the will of the 'people'.[11] Furthermore, and no less salient, a significant number of courts created after the Second World War have been granted a 'new competence', the interpretation and enforcement of human rights provisions.

Constitutional justice has been analysed – sometimes not without problems – both in socio-legal studies and in comparative politics. Scholars have discussed whether the quality of a democratic regime can be improved by the existence of an institution whose legitimacy does not directly stem from the electoral mandate and whose target might overlap with the set of decisions taken by the parliamentary majority. Furthermore, it has been questioned whether the constitutional court, charged with exclusive competence in constitutional interpretation, does contribute to expand the discretionary power of the judicial branch – by expanding the opportunities offered to judges to create legal norms. Constitutional courts have been also described in recent scholarly works as champions of judicial activism.

The phenomenon called 'judicial activism' is part of an increasing literature related to three main topics: the 'global expansion of judicial power' developed around the seminal work of Neal Tate and Torbjorn Vallinder; a more diffuse research field related to recent judicial reforms in the advanced and in the emerging democracies. The idea that the 'judicialization of politics' is one of the most significant trends in late 20th and early 21st century government is almost fully accepted within the academic community. While this concept is used to describe the 'infusion of judicial decision-making and of court-like procedures into political arenas',[12] the meaning of 'judicial activism' is much more diffuse and difficult to capture. The term has a shifting meaning, according to the context in which it is used. Such a multifaceted phenomenon calls not only for a description of its occurrences, but also for a careful and analytical definition.

For instance, judicial 'interventionism' has been evoked in the literature to refer to situations when judges have assumed a central role in political controversies.[13] Exceptional attention has been devoted to Italy in relation to the operation entitled *Mani Pulite* ('clean hands') in the 1990s and the pathologi-

10 M. Cappelletti, *The Judicial Process in Comparative Perspective*, 1989.

11 C. Dupré, *Importing the Law in post communist transition: the Hungarian Constitutional court and the right to human dignity*, 2003; W. Sadurski, *Rights before the Court*, 2005; H. Schwarz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 2000.

12 Tate & Vallinder, supra note 1, p. 5.

13 C. Guarnieri & P. Pederzoli, *The Power of Judges*, 2002.

cal levels of corruption.[14] The spectacle of Italian judges undermining Italy's post-war political system, or of French judges hounding Prime Ministers and Presidents, are only the most visible aspects of these developments.

The vast scholarship flourishing over past decades on this subject may be divided into two categories, according to the focus maintained by scholars. The first category covers all works that intended to analyse the interaction between the constitutional court and the elected political institutions, notably the executive and the legislative branch.[15] To this category belong all the works discussing, with a supportive or a critical attitude, the so-called counter-majoritarian difficulty of constitutional or supreme courts. This approach draws from the neo-institutional framework and points to the search for more power and more space as the main impetus pushing courts to decide against the will of Parliament. In other words, judicial behaviour is explained on the basis of an agency of rational choice.[16] Despite the unquestionable value which these works have – since they have at least enhanced the research strategies and interests of social scholars in this field and have definitely put at the centre of the research agenda one of the pivotal institutions of many new and old democracies – concepts and hypotheses by means of which such institutions have been enlightened and studied have proved to be fairly unsatisfactory. Above all, in order to analyse the relationship that exists between the development of constitutional justice and the exercise of a mechanism of checks and balances of the political branches of the State, the individual attitudes of constitutional justices and the cultural background against which constitutional jurisprudence should be assessed and interpreted have to be taken into account. In an attempt to bridge this gap, scholars devoted their analytical efforts to opening up the 'black box' and casting light onto the mechanisms by means of which constitutional judges participate in the deliberative process and ultimately take a position within the collective arena of the court. In that way, new variables started to be considered as possible leading factors in the constitutional decision-making process. These variables notably refer to the motivation of individual judges and to the professional profiles exhibited by individuals who may legitimately aspire to be appointed constitutional judges. This literature pointed to the existence of a number of factors that may intervene in shaping the deliberation, behavioural patterns and legal reasoning of the courts.[17]

Both macro analysis – meaning a set of analyses focusing mostly on the court as an institutional 'box' – and micro analysis – meaning a set of analyses having as its main focus the justices – revealed the increasing role taken by the judicial review of legislation in the advanced democracies as well as in the new democracies. For different reasons, both new and old democracies featured the same trend, notably the reform of the relationships between the democratic and constitutional principles within the domestic political systems.

In our argument the combination of macro and micro factors seems to trace a common line underneath a variety of differences displayed by courts in entering into a dialogue with foreign laws. What might be different is the way those macro and micro factors intertwine in one court or another, but the type of factors constantly play a role. Therefore, it might be conducive to a better understanding of the impact which the dialogue amongst the highest courts has upon the way democracies function, to put the constitutional courts into the broad context of the legal and political culture that characterises the democracies in which they have been set up. Whereas cultural forces are always resistant to a direct measurement, one may try an easier way to represent them by means of an overall description of the mechanisms of appointment and of the professional profile of constitutional justices. Judicial appointment mechanisms constantly impinge upon both macro and micro factors.

They represent a particularly telling aspect of a political system as they show the way in which institutions are interlocked into a pattern of inter-institutional accountability.[18] For our purpose here,

14 D. Della Porta & A. Vannucci, *Mani impunite. Vecchia e nuova corruzione in Italia*, 2007.

15 R. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', 1957 *Emory Law Journal* 6, no. 2, pp. 279-295; L. Epstein, & J. Knight, *The Choice Justices Make*, 1998; J. Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence', 1999 *Southern California Law Review* 72, no. 2-3, pp. 353-384. J. Ferejohn et al., *Constitutional Culture and Democratic Rule*, 2003.

16 G. Vanberg, 'Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review', 2001 *Journal of Theoretical Politics* 10, no. 3, pp. 299-326.

17 L. Baum, *The Audience of Judges*, 2006.

18 See on inter-institutional accountability L. Morlino, *Changes for Democracy*, 2011, ch. 8.

such a type of mechanism also unveils the balance between democratic and constitutional principles. For constitutional justices can be appointed by the political branch either jointly – as in the United States – or separately – as in several European countries – while in some cases – as in Italy – ordinary and administrative high courts play a role as well. In this way, the appointment mechanism is an indicator of a systemic state of affairs, namely the balance of powers featured by the State. If this first remark points to the macro context, one should bear in mind also a second but no less important argument. In most countries courts act collectively and dissenting opinions are not permitted. This means, in short, that the individual orientations of single justices do not have a strong impact on the external side of the constitutional decision-making process: in many cases no one will ever know for sure who was against and who was in favour of a given decision. However, the attitudes of individual justices are the material from which collective constitutional decisions are made. As correctly pointed out, individual justices bring to the court their own personal professional experiences and their orientations in terms of values and frames. By saying this we are implicitly ready to accept the idea according to which the professional profile of individual justices matters at the micro level, namely at the level of the internal decision-making process. Since knowledge and expertise set the ground upon which decisions are shaped and finally taken, the countries we are going to consider later will be also observed from the point of view of the prototypical professional profile featured by constitutional justices. Accordingly, we are very inclined to believe that adequate and reliable mechanisms of professional accountability might be extremely valuable in courts that constantly build their legal reasoning by considering foreign law together with (even if not always with the same degree of salience) domestic law.

3. 'Old' and 'new' constitutional courts

In France the introduction of a mechanism of judicial review took a leap forward after the transition from the Fourth to the Fifth Republic. The new creature, the Constitutional Council (*Conseil Constitutionnel*) has been granted full competence in checking the abstract coherence of incoming statutory laws with the French constitution. Judges are appointed by the two branches of the State, namely the President of the Republic and the presidents of the two chambers of the Parliament. According to the constitutional provisions in force, they are appointed for nine years and a third of them is replaced every three years. The interpretative approach endorsed by the French Constitutional Council relies conspicuously on the long tradition of legitimacy awarded to the law as the repository of the popular will. In a way, the Constitutional Council entered into conflict with the other branches of the State infrequently and only under specific conditions. The main reference point of the professional accountability of French constitutional justices seems to be the so-called '*Énarques*', i.e. the senior officials working in public administration, rather than legal scholars. The strong influence of the upper echelons of the civil service is still present in the French Constitutional Council: most of its judges come from the upper ranks of the public bureaucracy, with the prestigious Council of State always playing a role (Table 1). Moreover, the extremely strong influence of the Paris Institute of Political Studies should be emphasized (seven out of nine sitting judges graduated from this institution). The educational profile of French judges tends to mix law and social sciences (especially economics), while previous political experience – in Parliament and in the Government – also seems widespread. On the other hand, the two different appointing authorities do not seem to play a distinctive role and significant international and European experience seems limited.

Recently, the position of the Council has been reformed with the introduction of the concrete judicial review (*question prioritaire de constitutionnalité*) a fact enlarging its access, whose impact still needs to be ascertained. So far, the Council has never quoted extra-systemic jurisprudence. As a matter of interest, it does not quote its own jurisprudence either, as it imposes the dominant approach shared by the Council of State (*Conseil d'État*) and the Court of Cassation.[19] What seems to be distinctive about the French system is that constitutional judges do not put their knowledge of foreign law on display: 'The

19 Interview with Guy Canivet, constitutional judge, Paris, 16 December 2010.

comparative inspiration of the Conseil Constitutionnel is very difficult to assess. Similarly to other higher jurisdictions, there is no direct reference to anything foreign'.[20]

In Italy the constitutional court is composed of 15 judges (Table 2) appointed as follows: one-third (five) are elected by the highest courts – Court of Cassation, Council of State and Court of Accounts – and are always judges of those courts, having served for a long time in that capacity, although judges coming from administrative courts can exhibit a more positive or favourable attitude to the influence of the executive.[21] The five judges appointed by the President of the Republic have usually had a distinguished career as legal academics. They still resent the propensity of former President Ciampi to appoint erstwhile Cabinet colleagues. Unlike what happened in the past, academics tend to prevail among the judges – five again – appointed by Parliament, although here you can find the only 'true' lawyer. Judges mainly have a legal background: no discipline other than law seems to be considered as a requisite for the appointment.[22] The court is not keen to use extra-systemic jurisprudence in its explicit legal reasoning. We mean by this that in the way the arguments are formalized and made public the court seems to be inclined to display a systematic reference to Italian law.

On the 1st October 2009 in Great Britain supreme judicial authority was transferred from the House of Lords and granted to the Supreme Court. Despite being difficult to take any stance about the impact that this change may have on the overall behavioural pattern followed by the UK judiciary in connecting with foreign law, it should be reminded that it has always been common and not controversial (in most cases) for UK courts to quote foreign laws, in particular those that come from the Commonwealth countries.[23]

This empirical evidence should be combined with the fact that the judicial appointment mechanism designed by the 2005 Constitutional Reform Act ensured high continuity with the past. The first members of the Supreme Court have been appointed as stated in Section 24: 'the persons who immediately before that commencement are Lords of Appeal in Ordinary become judges of the Supreme Court (…) the person who immediately before that commencement is the senior Lord of Appeal in Ordinary becomes the President of the Court (…) the person who immediately before that commencement is the second senior Lord of Appeal in Ordinary becomes the Deputy President of the Court'. The judicial appointment mechanism introduced by the Constitutional Reform Act in 2005 was to consider a way to bridge the gap between the old and the new system and to provide a new procedure for appointing judges in the case of vacancies. In this latter case the Lord Chancellor is expected to convene a selection Commission, chaired by the President of the Supreme Court. The selection Commission's other members are appointed by the Judicial Appointment Commission for England and Wales, the Judicial Appointment Board in Scotland, and the Judicial Appointment Commission in Northern Ireland.

Overall, the new Supreme Court benefits from the traditionally high degree of prestige enjoyed by the judiciary. Judges who sat in the House of Lords always represented the highest level of excellence in legal scholarship and moral integrity. Moreover, the very idea that led the British Government to introduce the constitutional reform, which created the UK Supreme Court, was to ensure the independence of the judicial branch by entrenching in the UK institutional setting the separation of courts from the legislative branch. Yet, the professional accountability of judges sitting at the UK Supreme Court seems to be still an effective mechanism to ensure the impartiality of that court.[24]

After the collapse of the undemocratic regimes that had dominated Central and Eastern Europe for decades, the countries formerly belonging to the Soviet bloc shifted from a nondemocratic regime to constitutional democracy.[25] As the democratic transition opened up, the countries embarked on a discussion of the role that constitutional justice should play in the new political setting. In several cases, as in

20 Bobek, supra note 8, p. 195.

21 P. Pederzoli, *La corte costituzionale*, 2008

22 Interview with Gustavo Zagrebelsky, former President of the Italian Constitutional Court, Turin, 27 November 2010. It should be pointed out that the Constitution specifies that judges must be lawyers.

23 Bobek, supra note 8, pp. 210 et seq.

24 J. Bell, *Judiciaries within Europe. A Comparative Review*, 2006.

25 G. Ajani, 'By Chance and Prestige: Legal Transplants in Russia and eastern Europe', 1995 *American Journal of Comparative Law* 43, no. 1, pp. 93-118; S. Bartole, 'Alternative models of judicial independence. Organizing the Judiciary in Central and Eastern Europe', 1998 *East European Constitutional Review* 7, no. 1, pp. 62-69.

Poland, the Czech Republic and Hungary, past experiences of constitutional courts have been retrieved from the collective memory of the distant past and reshaped to adapt to the new scenario.

Scholars have argued that in these countries constitutional cultures affected political decisions at three levels: the balance between democratic governance and constitutionalism; the organizational pattern of the constitutional system; and the definition of individual and collective rights.[26] This statement still holds true. Constitutional courts represented a promising solution to pacify domestic politics, to handle future political uncertainty, to ensure citizens that the ultimate resort of the legal defence of their fundamental rights would have not been handled by a political body and to open up an arena in which a dialogue with international legal scholarship would not only be possible, but even welcomed. However, we suggest that in a future research agenda aiming at providing a better appraisal of the propensity of constitutional courts to act as normative entrepreneurs in a move towards a more cosmopolitan legal culture the analysis of the reference group of the justices and more precisely to the career prospects they are confronted with in each country is to be considered.[27]

But once again, let us put the courts into their proper context.

In post communist settings constitutional courts were intended 'to protect human rights of the citizens'.[28] In some cases, such as in the case of the Hungarian Constitutional Court, they became central players in the stabilizing political system.

These scholars proved very successful in indicating those factors that led the transition's elite to adopt a specific institutional design for the constitutional court. In general, the relationship between the degree of uncertainty about future elections and the power granted to the constitutional court proved to be crucial. In Hungary[29] after the demise of the undemocratic constitution, the constitutional round table[30] met and set up a very easily accessible constitutional court. Some scholars even dared to argue that the reformist socialist elite had not expected the court to be so active and intrusive.[31] Sheppele argued though that all political forces, aware of the electoral uncertainty, wanted the court to be sufficiently equipped to stand up to any potential rival and in doing so to guarantee that no one would have been able to take excessive power in the new democratic system. However, under the leadership of justice Laszlo Solyom the Hungarian Constitutional Court has struck down one law in three that Parliament has passed.

At a more abstract level, one may safely argue that the Hungarian case is a radical example of a general trend which reveals a positive relationship between a strong constitutional court and a high degree of uncertainty in the first round of democratic elections in any nascent democracy. However, this cannot explain – if considered in isolation – the preference exhibited by the courts of new democracies to quote extra-systemic decisions. We are inclined to believe that the degree of continuity with the past plays an important role. Two factors seem to matter here: the extent to which the pre-democratic judicial elites searched for strong legitimacy; and the extent to which legal scholars have been hampered by the previous regime from accessing supranational arenas where new ideas, contacts and connections with colleagues working abroad were available.[32]

This leads us to recall the macro/micro combination mentioned above. Whereas the search for legitimacy seems to be related to the strategic position the court has in the domestic system (macro), the connection with the supranational arenas refers to the cultural and professional profiles of individual judges sitting at the constitutional courts (micro).

In fact, the cases of Poland and Hungary are interesting because of the common pattern of transition – rupture based on mutual agreement (*ruptura pactada*) – which was followed by different institutional

26 W. Sadurski, *Rights Before Courts*, 2005.

27 C. Guarnieri, 'Courts and Marginalized Groups: Perspectives from Continental Europe', 2007 *International Journal of Constitutional Law* 5, no. 2, pp. 187-210.

28 C. Boulanger, 'Europeanization Through Judicial Activism?', paper presented at the European Studies Centre, St. Antony's College Oxford, 24-26 May 2002, p. 2.

29 S. Zifcak, 'Hungary's Remarkable, Radical, Constitutional Court', 1996 *Journal of Constitutional Law in Eastern and Central Europe* 3, no. 1, pp. 1-56.

30 This is the series of meetings where the constitutional committee has been sitting to design the constitutional framework of the new State after the democratic transition. See D. Piana, *Judicial Accountabilities in New Europe*, 2010, ch. 3.

31 K. Scheppele, 'Imagined Europe', Plenary Address, Law and Society Association Meeting, Glasgow, 1996.

32 Ibid.

and political settings. In both countries former Communists were involved in the constitutional process. In Poland, where previous experiences of constitutionalism had been preserved in the collective memory and legal teaching had been permitted in an independent network of research institutes,[33] constitutionalism was easily adopted after Communism. Neither Poland nor Hungary experienced a deep and dramatic break with the past. In both countries, the constitutional courts played a pioneering role in fostering respect for fundamental rights and in unfolding a doctrine of constitutionalism. However, in the Czech Republic democratic transition took place differently and the institutional setting went through a radical break both in terms of the political separation from the Slovak Republic and in terms of professionals appointed as public officials (judges and prosecutors included).[34]

On closer look, a few considerations may be put forward. First and foremost, all these countries share a continental view of constitutional justice, at least as a starting point. All justices hold a degree in law, all of them went through training in legal affairs and related disciplines. If we look at the Hungarian Constitutional Court, we notice that justices retain a quite traditional profile, with a high academic reputation, which is likely to lead to a reference group mostly located in the universities and in the scientific community.[35]

As a practitioner has argued, 'the Hungarian Constitutional Court sometimes quotes foreign constitutional jurisprudence and case law, mainly from the German Constitutional Court, the ECHR, and the Luxembourg Court's decisions, and sometimes even the US Supreme Court, especially when the subject of the decision has some international element, that is in cases in which the decision is about rights with international legal foundations: e.g. freedom of expression, fair trial etc. (…) There were cases when the Court used the foreign arguments also in cases where the decision was not about fundamental rights, e.g. right for life (abortion) cases, data protection, money laundering etc. (…).'[36]

However, the case of Hungary should nowadays be carefully observed. The recent evolution undergone by the political system reveals a move away from a constitutional court to which a good deal of power was granted by the former constitution. The new constitution will significantly reduce the power of the court and the capacity of constitutional justices to overturn statutory law.[37]

However, it is interesting to note that almost all Polish justices also have significant political experience (e.g., Commissioner for Human Rights, Senator, or Member of the Legislative Committee of the executive). Some of them also have an international profile. In particular, two of them have collaborated with the Council of Europe. One of the sitting justices was co-founder of the regional branch of Solidarity and, later, a member of the regional Temporary Council of Solidarity and of the National Commission of the Solidarity Trade Union. Once the democratic regime had been established, he was elected Senator of the Republic, chairing the Committee on Local Government and State Administration, and becoming a member of the Senate's Constitutional Committee. The path followed bore witness to a system in which policy makers who had built up their professional prestige in the pre-democratic era, managed to go through the democratic transition safely and take up in office in the democratic regime. A further point to note is the professional profiles of judges sitting on the Constitutional Tribunal whose career has been developed in representative institutions. It is not uncommon for justices to be appointed by the Sejm (the Polish Parliament) as constitutional judges, after having spent a career in the Sejm.[38] More interesting in terms of a propensity to internationalism is the presence of justices who had been appointed as Commissioners for Human Rights (both in Poland and in the Czech Republic).

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33 For instance, Cracow and Warsaw have maintained universities where the departments of law have continued to teach civil law in the Roman tradition.

34 Piana, supra note 30, ch. 3.

35 S. Geeroms, 'Comparative Law and Legal Translation', 2002 *American Journal of Comparative Law* 50, no. 1, pp. 202-239.

36 Interview with P. Hack, representative of Hungary at Transparency International and Associate Professor at the Central European University. This is also confirmed by Bobek, supra note 8, pp. 249-250.

37 K. Scheppele, 'Hungary's Constitutional Revolution', 2011 *Social Europe Journal*, available at <http://www.social-europe.eu> (last visited 4 January 2012).

38 Another of the current justices has been director of the Sejm Committees Bureau of the Chancellery of the Sejm; from 1992 to 1993 Secretary of the European Committee of the Council of Ministers as Undersecretary of State in the Office of the Council of Ministers; from 1997 to 1998 Undersecretary of State in the Ministry of Interior and Administration; from 1999 to 2001 member of the Board of the Supreme Chamber of Control. In 2006 he was President of the Council of the Civil Service and a member of the Supervisory Board of Polish Public Television.

The case of Ewa Letowska is paradigmatic in this respect: from 1987 to 1992 she was the Commissioner for Citizens' Rights, a correspondent member of the Helsinki Committee and of the International Commission of Jurists (Geneva). An even more close and effective connection with the supranational judicial arena is represented by Andrej Rzepliński. In 1990, he initiated and participated in the drafting of a Bill of Rights and Freedoms, presented by a group of members of the Helsinki Committee in Poland, which was submitted (in November 1992) to the Sejm as a draft of Poland's Constitution by the President of the Republic of Poland. He was a member of the Helsinki movement for human rights protection (Helsinki Committee in Poland and the Board of the Helsinki Foundation for Human Rights), of the Executive Committee of the International Helsinki Federation for Human Rights in Vienna, of the Committee on Bioethics of the Council of Europe, and of the UN Economic, Social and Cultural Rights Committee. Rzepliński has also served as an expert for the Human Rights Monitoring Department of the Secretary General of the Council of Europe, as a UN expert on crime prevention and as an expert at the OSCE Office for Democratic Institutions and Human Rights in Warsaw.[39]

The situation in the Czech Republic is different. Here the break with the past was much more marked than in any other country considered here and emerges as a key marker in the building of the democratic political system.[40] In the second part of the 20th century, the judicial system was dismantled twice, first during the communist period as many lawyers were forced to go into exile and second after the democratic transition.[41] Justices sitting in the constitutional court have a broad professional profile. Some of them have been members of the Bar, even if many come from the academic community.

The Czech Constitutional Court seems to have played an important role in the development of the human rights doctrine and thus provided a way for an international attitude to enter the court.[42] Many justices seem to have come from a broader reference group, which includes the Bar and the political elite. The best example is the current president, Pavel Rychetský (Table 4). From 1996 to 2003 he was a member of the Senate. Before his appointment as Deputy Prime Minister of the Government he was Chairman of the Constitutional Legal Committee of the Senate of the Czech Parliament, a member of the Mandate and Immunity Committee and of the Organizational Committee.[43]

To sum up, the situation in which constitutional justices adjudicate differs significantly according to the constitutional history and culture of different countries. Next we are going to narrow our focus on the professional profile. We will then offer a first, preliminary and introductory description of the different forces that should be considered in order to develop a comprehensive explanatory framework of the way these courts refer to and rely upon the foreign law.

4. Beyond domestic borders: appropriate or consequential logic of action?

At a very quick glance, none of the factors considered – the strategic position of the court, the professional profile of the constitutional justices, prestige – seem to account, if taken in isolation, for the decision of the courts to quote extra-systemic jurisprudence. As a matter of fact, we do know that among the courts considered here the Central and Eastern European courts – namely the Polish, the Czech and

39 He also participated in the Criminal Law Reform Commission of the Minister of Justice and, in 1992-1993, at the request of the President of the Republic, prepared (with three co-authors) a draft of the constitution of the Republic of Poland. In 1990 he served as an advisor on penitentiary law reform to the Polish prison service chief; in 1998-2000 as legal advisor to the Minister-coordinator of the secret service; and was advisor to the President of the Institute of National Remembrance from 2001 to 2005.

40 W. Sadurski, 'Constitutional Courts, Individual Rights and the problem of Judicial Activism in Postcommunist Central Europe', in J. Priban et al. (eds.), *Systems of Justice in Transition*, 2003, pp. 13-28.

41 A. Sajo, 'Pluralism in Post-Communist Law', 2003 *Acta Juridica Hungarica*, 44, no. 1-2, pp. 1-20; E. Wagnerová, 'History and Politics of the Judiciary: Position of Judges in the Czech Republic', in J. Priban et al. (eds.), *Systems of Justice in Transition*, 2003.

42 J. Priban, *Legal Symbolism: on law, time and European identity*, 2007.

43 He has been Deputy Prime Minister of the Government of the Czech Republic and President of the Legislative Council of the Government, the Council of the Government of the Czech Republic for National Minorities, the Council of the Government of the Czech Republic for Romany Community Affairs and the Council of the Government of the Czech Republic for Research and Development. From 15 July 2002 to 5 August 2003 he was Deputy Prime Minister of the Government of the Czech Republic, Minister of Justice and Chairman of the Legislative Council of the Government. In addition, from 1990 to 1992 he was President of the Union of Czech Lawyers, and between 1992 and 1998 he was President of the Board of Trustees of the Pro Bohemia Foundation. In 1996 he founded the Fund for Citizens of Prácheòsko focusing on social issues in the region. (In 2005, he was awarded the Légion d´Honneur (Officer Class) by the President of the French Republic.)

the Hungarian ones – have extensively quoted foreign jurisprudence. Yet again, it might be misleading to argue that only courts that have experienced a democratic transition and have somehow dragged the pre-democratic system into the democratic one are ceteris paribus more inclined to quote foreign case law. To be sure, no extra-systemic reasoning is on display in the decisions of the French Conseil constitutionnel, but this evidence does not support per se the statement that French constitutional judges do not draw any inspiration from foreign law: 'Foreign jurisprudence can be a source of inspiration. However, any constitutional judge feels legitimated to draw her reasoning from foreign case law, if pertinent and appropriate. The list of sources from which judges draw inspiration is provided in the *Commentaires*, drafted by the *Service Juridique* and made available to the public'.[44]

Yet on a closer look, it seems possible to draw up an analytical grid by means of which scholars can make sense of the extra-systemic jurisprudential citation. Such a grid stems from the following presupposition. Constitutional courts are collective actors. They exhibit a composite rationality, which is exercised on a set of alternatives of action. This set is defined on the basis of two criteria: the logic of appropriateness and the logic of consequentiality. Alternatives of action are defined by their legitimacy and their instrumentality, i.e. by the principled ideas with which they are coherent and by the consequences they may entail. In this sense, norms to which the constitutional justices are accountable work as limits confining the pool of legitimate alternatives of action. A constitutional justice would not easily violate a professional norm by performing an action – i.e. supporting a position, an argument, and a decision – that is patently in contradiction with the professional and cultural standards of her group of reference.

Therefore, the decision that consists in citing explicitly extra-systemic jurisprudence is assessed against a number of norms and standards, whose nature is mostly cultural. As an interview conducted at the French Constitutional Court has revealed, French justices do not quote extra-systemic jurisprudence simply because their conception of their own role does not allow them to use non-French references to frame their jurisprudential arguing.[45] This has ultimately something to do with the way law is conceived and with what is accepted as a legitimate use of the interpretation of the law.

The complex and manifold pattern depicted above forces us to point to several factors that seem to play a role both at the macro and at the micro level (the level of individual reasoning) in facilitating or opposing the choice of referring explicitly and intentionally to foreign law in constitutional case law:

1) Legal culture. This is the most slippery factor to be measured and empirically assessed. But a qualitative analysis of the programmes offered to legal scholars (in undergraduate and graduate schools) and of the cultural bonds judges have with other legal professions (the Bar) can provide very insightful information on this point.

2) The authority and the prestige of the court. Courts that have been created in countries where the national law is not considered as the exclusive source of norms are more inclined to consider extra-systemic jurisprudence as a legitimate alternative. In concrete terms, this happens in those countries in which legal norms inherited from the pre-democratic regime have been considered as not fully legitimate or not legitimate at all. Democracies that have been supported by external actors – such as the Central and Eastern European democracies – show a higher degree of openness to extra-systemic jurisprudence. This ceteris paribus (the case of the UK Supreme Court) introduces an extra variable, namely the 'common law' factor.

Under these conditions, constitutional courts, in order to strengthen the acceptability of their decisions, may actually decide to cite extra-systemic jurisprudence to adjudicate on cases that turn out to be particularly controversial within the political system.[46] In such a decision, the logic of consequentiality also plays a role. Constitutional courts prove to be acting rationally by considering the costs/benefits ratio

44 Interview with Guy Canivet, Paris, 10 December 2010. As a comment on the statement made by M. Canivet, one may argue that legal heuristics can be inspired by foreign law, whereas justification should be strictly based on domestic law. This goes towards a positivist conception of legal interpretation. The reference to the 'appropriateness' of the case as an inspiration for legal argument deserves to be noted.

45 Interview with Guy Canivet, Paris, 16 December 2010.

46 De Vergottini, supra note 6, esp. pp. 106 et seq.; E. Voeten, 'Borrowing and not Borrowing among International Courts', 2010 *Journal of Legal Studies* 39, no. 2, pp. 547-576.

in a case where they would opt for a decision that also relies on non-national legal norms, as opposed to a case where they would opt for a decision that relies exclusively on national legal norms.

3) The strategic position of the court. Courts acting in political systems where the conflict among the judiciary and the other branches of power is high may be less inclined to take the risk of adjudicating in a more active ('creative') manner, which in this specific context means by referring to foreign law.

4) The professional profile of the judges' assistants. Again, the words of the French judge, Guy Canivet are particularly revealing.[47] The practice of quoting decisions taken in other countries may be particularly misleading and biased if it does not take place on the basis of a solid knowledge of the countries in which the norms are developed and rooted. In other words, to use the 'comparative method' in constitutional justice, an extra endowment of resources – both cognitive and organizational – is necessary. The professional profile of the clerks appointed at the constitutional court is also important. But most important of all is the decision of a Government to endow the court with a specific organizational unit whose task is to provide legal assistance.

5) The degrees of managerial and organizational resources. Among the courts considered here, the Czech and the Hungarian courts are provided with a large and specialized clerks' office. The French court has at its disposal a legal services office, which regularly drafts the '*Commentaires*', critical reviews of the constitutional decisions. Legal services staff do not participate in the preliminary work that sets out the legal basis used by the court in its final deliberations. On the other hand, in Italy the court has a small clerks' office, which seems to be too poorly staffed to undertake a regular and systematic study of foreign jurisprudence. Finally, in the UK judges sitting at the Supreme Court can rely on a solid managerial staff supporting their work (and speaking a world language).[48]

If the factors which we have pointed to are salient, the analytical grid that we are now ready to suggest goes as follows. In order to understand the choice of a constitutional court to undertake some sort of dialogue with another national constitutional court by quoting its jurisprudence, one should first reconstruct the legal culture and understand the reasons that allow the court to overrule traditional legal accountability which requires the court to stick strictly to national law. Then, the position occupied by the court within the political system should be reconstructed and its prestige assessed. This gives a clue to the costs/benefits with which the court will be confronted if it decides to refer to extra-systemic norms. Finally, in order to explain the actual behaviour of the court, a further and final factor is relevant, namely the availability of resources that the court can use to set out a solid and reliable, truthful and credible preliminary comparative study of constitutional justice on the subject on which it is going to adjudicate.

This way of interpreting the behavioural pattern of a constitutional court which embarks on horizontal dialogue with other courts also has a few interesting consequences in terms of constitutional policy-making. First of all, the career path of the constitutional justices matters enormously. For this reason the recruitment mechanism should be considered in any process of institutional design as one of the most powerful leverages in facilitating/opposing the openness of the legal system to extra-systemic norms and values. In other words, constitutional justice is a special kind of communicative action. It takes place in context and has as interlocutor both the political elite and the group of reference of the constitutional justice.

A second consequence which one may note concerns the domestic conditions under which the constitutional court acts. Courts which are in need of gaining legitimacy may decide to go 'shopping' abroad and draw jurisprudential reasoning from other more experienced courts. At first sight, this seems to be the case in some of the case law we find in Central and Eastern European countries. As Justice Wagnerová put it, 'the Constitutional Court of the Czech Republic uses the foreign case law references as the background for comparative argumentation frequently'.[49] Such a background seems to offer a more solid and uncontroversial basis upon which constitutional reasoning can be built. However, systemic considerations – i.e. the situation the court experiences within the domestic political system – should be combined with micro considerations.

47 Interview with Guy Canivet, Paris, 29 June 2010.
48 On the relevance of this point, see Bobek, supra note 8.
49 Interview in Prague, 10 June 2011.

The practice of extra-systemic references depends on the type of adjudicated case and also on the individual relationship that exists between the judge and the rapporteur and, eventually, on the relationship established by each judge with the other judges sitting in the court. This accords with the position taken in which speaks of individual bridges set up across domestic borders.[50] Some others stress the functional logic that stands beyond this development: similar constitutional problems lead constitutional courts towards similar ways of reasoning.[51] However, functional forces seem to be mixed with more strategic and cognitive forces acting together: 'Some judges refer to foreign case-law very often, some use such references less often and some very seldom'.[52]

An ultimate filter in the process of extra-systemic reasoning seems to be represented by the appropriateness of the constitutional arguments developed by the foreign court. Courts – especially courts with limited experience – may prefer to draw from other courts' legacies the legitimacy to adjudicate, adding supplementary arguments in order to strengthen the salience and authority of their decisions. For instance, this might be the case for courts located in the new EU Member States referring to the decisions taken by the German Constitutional Court as a source of legitimacy. This attitude is intimately related to the cultural proximity of the courts: for instance, 'In the Czech constitutional decisions, the European Union countries experience are cited in the judgments ref. No. Pl. ÚS 3/09 (foreign frameworks), Pl. ÚS 25/06 (Germany), Pl. ÚS 39/08 (various European countries), Pl. ÚS 9/01 (Germany, Poland, Bulgaria, Romania, Albania), Pl. ÚS 19/08 (Germany), Pl. ÚS 6/10 (Slovak Republic), IV. ÚS 1403/09 (Poland), Pl. ÚS 39/01 (Poland), and Pl. ÚS 66/04 (Poland, Germany)'.[53] In this case one should note the predominance of Central European courts (Germany, Poland, Slovak Republic), which share with the Czech court a long history of constitutional tradition.[54]

5. Less a conclusion, more a suggestion

Extra-systemic citations seem to mark the new wave of constitutionalism at the dawn of the 21st century. Constitutional courts are increasingly engaged in the process of shaping and reshaping the human rights doctrine[55] which expands more or less intentionally the space they enjoy within the domestic political systems. Beyond the forces that push such a new phenomenon towards a stable and reliable pattern of cross-fertilisation among culturally similar courts or among courts facing similar constitutional problems, one point deserves to be raised as one comes to consider the impact such a phenomenon has on the mechanisms of inter-institutional and professional accountability affecting constitutional behaviour.

Extra-systemic citations feature a case-based approach. Therefore, one may safely argue that context-related conditions have particular significance and may accordingly lead the courts to different decisional outcomes. Context should not be understood exclusively as political context. The professional profile of judges sitting in the court and the capacity they have to frame the judicial problem are also a very important factor. For instance, the jurisprudence developed in the European Union on the subject of extradition following the entry into force of the European Arrest Warrant is revealing in this respect. Cases brought before the constitutional courts of some European countries – such as Germany, Poland, and the Czech Republic – provided the power to set a new balance between the authority of supranational institutions and the authority of domestic institutions in the realm of citizenship. Instead of referring exclusively to their domestic legal systems, constitutional courts have played a positive role in creating loose ties among jurisdictions, furthering in this way a sort of dialogue.[56]

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50 A.M. Slaughter, *A New World, Order*, 2004, pp. 74-75.
51 J. Allard & A. Garapon, *La mondializzazione dei giudici*, 2006.
52 Interview with Justice Wagnerová in Prague, 10 June 2011.
53 Ibid.
54 The linguistic factor here also plays an unquestionable role.
55 S. Sassen, *Territory, Authority, Rights*, 2006; A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe*, 2000.
56 Here we refer to the much disputed transposition of the European Council Framework Decision which established the European Arrest Warrant (2002/584/JHA). See on this O. Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in an Attempt to Strike the Right Balance Between Legal Systems - Part I/II', 2008 *German Law Journal* 9, no. 10, pp. 1313-1354.

Cases that can be decided on the basis of a precedent created by a foreign court which belongs to the same transnational legal system – such as the EU – can help to consolidate this precedent as a focal point, a solution towards which courts incrementally converge. We should be aware of the indirect effect which the foreign origin of a precedent can have within a very conflict-ridden political system or within a democracy which is trying to acquire legitimation at the supranational level (we refer mostly to the Central and Eastern European courts). Courts are more inclined to refer to a precedent decided by a foreign court which belongs to its own transnational legal space – as is the case within the EU. This reference – which is extra-systemic and is unavoidably an indicator of a legal policy endorsed by the court – can be easily justified on the basis of the appropriateness and the prestige of the court which is quoted. A further point should be made. The appointment mechanisms and the professional accountability of constitutional justices have always represented the two major instruments through which the political and social institutions ensure a relationship of accountability between the constitutional court and the political system. The more extra-systemic citations become salient in the tradition of the constitutional court, the more the court may be inclined to look outside the domestic system to gain the approval of a supranational epistemic community composed of foreign constitutional justices.[57] The spectacular growth of international networks of judges and legal scholars, all working to share knowledge and expertise in the field of the constitutional justice – one example of this trend is the Venice Commission – says a lot about the inner forces pushing constitutional justices to move outside the domestic borders the group of reference to which they feel somehow responsive. We should expect to find this phenomenon to a greater extent in those countries where legal scholarship has been undermined by undemocratic experiences and a domestic demand for know-how offers a highly legitimated avenue to the quest for extra-systemic references.

All correlations suggested in this paper should not be taken as final. Rather they are more a suggestion than a conclusive statement about how extra-systemic quotation can be explained. However, one statement that the authors feel should be endorsed is the following: both explaining frameworks and institutional designs focusing on extra-systemic quotations in constitutional case law should consider macro and micro factors as components of a complex scenario. In this latter sense, the most difficult task for scholars and policy makers is to detect and trace the layers of the multiple processes of changes that take place.

For good reasons or bad, the fate of these processes of change is to impinge upon the internal balance among institutions and among normative orders. In our view, this is one of the most compelling and unavoidable reasons that should encourage scholars to go deeper into the understanding of these processes both in terms of explaining factors and in terms of normative consequences for our demo-constitutional systems.

57 R. Ferrarese, *Governance fra diritto e politica*, 2010; A.M. Slaughter, *A New World Order*, 2004.

Tables

Table 1 The French Constitutional Council: composition in 2011

	Appointment	*Education*	*Professional experience*[58]	*Political or administrative*[59] *experience*	*International experience*
Jean Louis Debré	President of the Republic	PS Paris, Law, ENM	Ordinary magistrate	Minister of Home affairs; President of the Lower Chamber	
Jacqueline de Guillenchmidt	President of the Senate	PS Paris, Law	Ordinary magistrate	Ministerial cabinets	
Pierre Steinmetz	President of the Republic	PS Paris, ENA	Prefect	Ministerial cabinets	
Renaud Denoix de Saint Marc	President of the Senate	PS Paris, Law, ENA	State Councillor (V-P)	Ministerial cabinets	
Guy Canivet	President of the National Assembly	Law, ENM	Ordinary magistrate, Pres. Court of Cassation		Pres. Comparative law society, EU network
Michel Charasse	President of the Republic	PS Paris, Law	Civil servant	Deputy, Senator, Minister	
Hubert Haenel	President of the Senate	Law, ENM	Ordinary magistrate, State Councillor	Senator, Ministerial cabinets	French delegate to the United Nations
Jacquet Barrot	President of the National Assembly	PS Paris, Law, Sociology		Deputy, Minister	EU commissioner (Justice)
Claire Bazy-Malaurie	President of the National Assembly	PS Paris, Law, ENA	Court of Accounts Councillor		

Table 2 The Italian Constitutional Court: composition in 2011

	Appointment	*Education*	*Professional experience*	*Political or administrative experience*	*International experience*
Marta Cartabia	President of the Republic	Law	University, Constitutional Law		
Alessandro Criscuolo	”	”	”	Judicial Association (President), Higher Council of the Judiciary (1990-94)	
Sergio Mattarella	Parliament	”	Lawyer		
Franco Gallo	President of the Republic	”	University, Fiscal Law	Finance Minister (Ciampi)	
Sabino Cassese	”	”	University, Administrative Law	Minister (Public Administration) (Ciampi)	

58 In courts, at the Bar, in universities.
59 Ministerial Cabinet and/or other top administrative appointments.

	Appointment	*Education*	*Professional experience*	*Political or administrative experience*	*International experience*
Giuseppe Tesauro	”	”	University, International Law	Anti-trust Authority (President)	Advocate General ECJ 1988-1997
Paolo Grossi	”	”	University, History of Italian Law		Judge, Ecclesiastical Court
Mario Rosario Morelli	Court of Cassation	”	Court of Cassation	Ministerial cabinets	
Alfonso Quaranta	Council of State	”	Administrative judge	Ministerial cabinets	
Aldo Carosi	Court of Accounts	”	Court of Accounts		
Giorgio Lattanzi	Court of Cassation	”	President of a Section at the Court of Cassation		
Luigi Mazzella	Parliament	”	State Attorney	Minister (Public Administration) (Berlusconi), Ministerial cabinets	
Gaetano Silvestri	Parliament	”	University, Constitutional Law	Higher Council of the Judiciary (1990-1994)	
Paolo Maria Napolitano	Parliament	”	Administrative judge	Ministerial cabinets	
Giuseppe Frigo	Parliament	”	Lawyer		

Table 3 The UK Supreme Court: composition in 2011[60]

	Appointment	*Education*	*Professional experience*	*Political or administrative experience*	*International experience*
Lord Philip	Senior Lord of Appeal in Ordinary	Law	Bar; judge		
Lord Hope	Second Senior Lord of Appeal in Ordinary	Law, Cambridge			
Lord Walker	Lord of Appeal in Ordinary	Cambridge	Bar; judge		
Lady Hale	Lord of Appeal in Ordinary	Law, Cambridge	Bar; judge; university professor	Law Commission	

60 In the United Kingdom, the Supreme Court acts as the highest court of appeal. Occasionally, the Supreme Court will be called upon to interpret European law and the European Convention on Human Rights as they relate to domestic laws. If the Supreme Court is considering a case where interpretation of an ECJ decision is unclear, the judges can refer the question to the ECJ for clarification. They will then base their own decision on this answer. In cases relating to the European Convention on Human Rights, it is accepted that no national court should ‘without strong reason dilute or weaken the effect of the Strasbourg case law’ (Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator* (2004)). If human rights principles seem to have been breached, it may be possible to appeal to the European Court of Human Rights after all avenues of appeal in the United Kingdom have been exhausted, or if the Supreme Court has no jurisdiction in the particular case.

	Appointment	*Education*	*Professional experience*	*Political or administrative experience*	*International experience*
Lord Brown	Lord of Appeal in Ordinary	Law, Oxford	Bar; judge	Chairman of Sub-Committee E (Law and Institutions) of the House of Lords European Union Select Committee from 2005 to 2007	
Lord Mance	Lord of Appeal in Ordinary	Law, Oxford	Bar; judge		CCJE OECD Swedish Foundation for Human Rights
Lord Collins	Lord of Appeal in Ordinary	Law, Cambridge	Solicitor; judge		Institut de droit international
Lord Kerr	Lord of Appeal in Ordinary	Law, Belfast	Bar; judge		
Lord Clarke	Master of the Rolls	Law	Bar; judge	Chairman of Inquiry Commissions	
Lord Dyson	Selection Commission convened by the Lord Chancellor	Law, Oxford	Bar; judge		
Lord Wilson	”	Law, Oxford	Bar; judge		
Lord Sumption	”	Law, Oxford	Judge	Judicial Appointment Commissioner	
Lord Reed	”	Law, Oxford	Judge	Senator at the College of Justice	Ad hoc judge in the European Court for Human Rights

Table 4 The Czech Constitutional Court: composition in 2011

	Appointment	*Education*	*Professional experience*	*Political or administrative experience*	*International experience*
Pavel Rychetský	President, with the consent of the Senate	Law	General Prosecutor	Co-founded and became one of the first signatories of Charter 77, extensive political experience	
Pavel Hollander	”	Law	Professor		
Eliska Wagnerová[61]	”	Law; post doc at the Department of Political Science	Judge		Highly international scholarly profile
Balik Stanislav	”	Law	Judge		

61 Expert in human rights. 1984-1989 advisory assistance to refugees from the former Czechoslovakia; 1993-1996 active collaboration in the decision-making of the Constitutional Court of the Czech Republic; 1984-present publications in the field of human rights and constitutional law.

	Appointment	*Education*	*Professional experience*	*Political or administrative experience*	*International experience*
Duchon Frantisek	”	Law	Judge		Drafter of the Charter of European Judges
Vlasta Formánková	”	Law	Judge		
Guttler Vojen	”	Law	Lawyer; judge; assistant to the General Prosecutor		
Ivana Janu	”	Law	Lawyer	Member of the Parliamentary Commission	Delegation to the Council of Europe in Strasbourg
Vladimír Kurka	”	Law	Judge		
Lastovecka Dagmar	”	Law		Mayor city Brno; Deputy	
Mucha Jiri	”	Law	Professor		Member of the European Commission of Human Rights at the Council of Europe
Jan Musil	”	Law; Criminal Law	Professor; Rector		
Jiri Nykodym	”	Law	Lawyer		
Vyborny Miloslav	”	Law		Ministry of Defence; Mayor Heømanùv Mìstec	
Zidlicka Michaela	”	Law	Lawyer		

Table 5 The Hungarian Constitutional Court: composition in 2011[62]

	Appointment	*Education*	*Professional experience*	*Political or administrative experience*	*International experience*
Dr. Péter Paczolay	Parliament with qualified majority	Law; Theory of State; Constitutional Law	Professor	Head of the Office of the President of the Republic of Hungary	Member of the Venice Commission
Dr. András Holló	”	Law; Legality; Constitutionality; Civil Rights	Professor		
Elemér Balogh	”	Law; Canon Law	Professor		
Dr. András Bragyova	”	Law; Constitutional Law; International Law	Professor		

62 This table refers strictly to the composition of the Hungarian constitutional court before the constitutional reform passed in Hungary in 2011 which changes dramatically the entire setting for all judicial institutions.

	Appointment	***Education***	***Professional experience***	***Political or administrative experience***	***International experience***
Dr. László Kiss	”	Law; Constitutional and Administrative Law	Professor		
Miklós Lévay	”	Law; Criminal Law	Professor		
Dr. Péter Kovács	”	Law	Professor	Embassy of the Republic of Hungary to Paris	Council of Europe's Working groups (Charter of Regional or Minorities Languages, Convention for the Protection of National Minorities)
Barnabás Lenkovics	”	Law		Commissioner for Human Rights by Parliament	
Istvan Stumpf	”	Law; Political Sciences (as post-graduate studies)		Vice-president of the Patriotic Popular Front	Studies in UK, Germany and US

Table 6 The Polish Constitutional Court: Composition in 2011

	Appointment	***Education***	***Professional experience***	***Political or administrative experience***	***International experience***
Andrej Wróbel	Parliament, qualified majority	Law	Professor	Member of the Legislative Council; Deputy Chairman of the European Law Team (Ministry of Justice)	
Malgorzata Ryziak Szafnicka	”	Law	Professor	Assistant at the Constitutional Tribunal	Lecturship in France
Stanislaw Rymar	”	Law	Lawyer	President of the Supreme Bar Council	
Piotr Tulja	”	Law	Professor	Deputy Provincial Governor (*Voivodeship*) Electoral Commissioner; Assistant at the Constitutional Tribunal	
Marek Zubik	”	Law	Judicial career	Deputy Commissioner for Civil Rights Protection; Chairman of the Legislative Council to the Prime Minister	Research activities at the Helsinki Foundation for Human Rights; expert at OCSE
Slawomina Wronkowska-Jaskiewicz	”	Law	Professor	Legislative Council	

	Appointment	*Education*	*Professional experience*	*Political or administrative experience*	*International experience*
Adam Jamroz	”	Law; Political Science	Professor	Deputy to the Senate (1 legislature)	
Teresa Liszcz	”	Law; Labour Law	Member of the National Council of the Judiciary in the period 1998-2004.	Deputy to the Sejm (3 legislatures)	
Zbigniew Cieślak	”	Law	Professor		
Maria Gintowt-Jankowicz	”	Law; Fiscal Law		Vice-Chairman of the Civil Service Council	
Stanisław Biernat	”	Law , European Law	Professor In the years 2001-2008 judge of the Supreme Administrative Court	In the years 1989-1992 and 1998-2001 member of the Legislative Council of the Prime Minister.	
Andrzej Rzepliński	”	Law		Coordinator of Secret Services. Advisor to the President of the Institute of National Remembrance from 2001 to 2005.	Helsinki Committee UN Economic, Social and Cultural Rights Committee until 2007.
Mirosław Granat	”			In 1993-1996 an expert in the Chancellery of the Senate of the Republic of Poland.	
Marek Kotlinowski	”			Deputy to the Sejm of the Republic of Poland (3rd and 4th terms)	
Wojciech Hermeliński	”			Vice-President of the Polish Bar Council from 2001 to 31 October 2006.	