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Legal argumentation based on foreign law
An example from case law of the South African Constitutional Court

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1. Introduction

This article aims to make some introductory remarks concerning the phenomenon of the circulation of 'foreign law' between constitutional courts (generally defined as 'dialogue between judges'). This phenomenon involves the import of legal elements – defined here as *extra*-systemic to a specific legal system – and the use of the comparative method in interpreting constitutional provisions.

A very convenient setting for some considerations regarding this legal phenomenon is the South African constitutional jurisprudence, since Section 39 of the 1996 Constitution enables the Constitutional Court to 'consider foreign law' when interpreting the *Bill of Rights*. In fact, this provision has led to the wide use of foreign jurisprudence and legislation, as well as *extra*-systemic parameters, that have formed the basis for models of legal argumentation, the balancing of general principles and literal interpretation.[1]

The fact that the comparative method has gradually acquired concrete use in activities that state the law can be seen in several national, international and supra-national legal systems and judicial bodies. It is interesting to note, for example, that the European Court of Justice decided to draft 'constitutional traditions common to the Member States' as criteria for interpretation, which have since been crystallised in Article 6[2] of the Treaty on European Union. In interpreting the Treaties the Court also proceeds by considering the constitutional particularities of the legal systems of the EU Member States. Consequently, the constitutional systems release both *internal* and *external* forces by virtue 'of the ability to *persuade* subjects not directly bound to them',[2] in this case the European Court of Justice. The relationship, however, is bilateral (or dia-logical); reasoning with this criterion in mind, the Court aims to *persuade* 'the audience', in this case all the Member States. Two important consequences ensue. Firstly, the connection between interpretation, balancing and the comparative method surfaces within the European Community. Secondly, the classical concept of 'persuasiveness' is emphasised, that is, the ability of a legal system and its interpreters to 'induce adherence' not just of the internal addressees but also of a wider 'audience'.[3]

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1 See D.M. Davis, 'Constitutional Borrowing: the Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: the South African Experience', 2003 *Int. J. of Const. L.*, pp. 181 *et seq.*

2 Cf. A. Pizzorusso, *Comparazione giuridica e sistema delle fonti del diritto,* 2005, p. 32.

3 The thought obviously refers to Chaim Perelman's theory of legal argumentation according to which 'the orator' (in our case the interpreter) has the objective of inducing 'adherence' of a specific 'audience' through rational argumentation (whose parameters and criteria are provided by the author). The argumentation is thus organised as an 'instrument' capable of influencing the audience (socio-psychological conception

Public law doctrine works on a broad and detailed classification of such phenomenon, speaking from time to time of: a) *cross-judicial influence*[4]; b) *cross-constitutional influence*[5] or *cross-constitutional fertilization*; c) *judicial transplant*[6]; d) *trans-judicial communication or judicial dialogue*[7]; e) *trans-judicial borrowing* or *precedent borrowing*.[8] This last definition explicitly connects the entire phenomenon with Anglo-American law, which follows the principle of the binding precedent (in its various declensions). Thus, modern borrowing of precedents between constitutional judges would be an expansion of a typical format of common law that evolved from a historically common practice among the judges of the ex-Commonwealth countries. Beginning in the 19th century these judges largely used precedents of foreign judges, generally British ones and in particular the *Privy Council*. The Privy Council was the court of final appeal for the colonies and dominions, a function that it still performs today in relation to a small group of Caribbean countries. Its function of ensuring the exact observation and interpretation of the law deeply influenced the development of law in countries such as New Zealand, Australia, India, South Africa, Hong Kong, Caribbean countries, and Canada (along with other countries in the colonial area of East and Southern Africa).[9]

Currently, as shall be shown, the phenomenon of 'borrowing' precedents and interpretive solutions or argumentation models goes well beyond the legal rationale and the geo-cultural borders that defined the relationship between the British Empire's *centre* and its *peripheries*. The analysis of constitutional court rulings in legal systems that have adopted new constitutional texts (such as Canada in 1982, South Africa in 1996, or in legal systems such as Israel) indicates that judges increasingly resort to a practice of comparing constitutional law by expressly referring to and citing rulings and interpretive solutions of constitutional courts, including ones of Romano-Germanic tradition. Thus, interpretative solutions are now being actively sought and borrowed by courts from different legal traditions, a practice that no longer arises out of subordination.

Subsuming this phenomenon under the function of interpretation allows us to refer to various theories and procedures of legal reasoning, making it possible to verify whether we are

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of argumentation). He elaborated on the notion of a 'universal audience' as 'a whole of *enlightened and rational* individuals who offer themselves to the game of argumentation' (or the potential whole of all those who develop argumentative skills). This leads to the differentiation between 'persuading' and 'convincing'. The first notion is connected to the idea of 'efficacy' of argumentation (or inducing the adherence of a limited audience), whereas the second is connected with the idea of 'validity' (or reaching the approval of the universal audience about the accuracy of the logical arrangement of the argument's elements), *cf.* C. Perelman & L. Olbrechts-Tyteca, *La nouvelle rhétorique. Traité de l'argumentation,* 1970[2]. In this specific case, the audience (the whole of the Member States) is objectively limited; thus the notion of *persuasion* seems more appropriate. On the notion of 'persuasiveness' see also P. Glenn, 'Persuasive Authority',1987 *McGill Law Journal* 32, p. 261.

4 *Cf.*, A.K. Thiruvengadam, *Legal Transplants through Judiciaries: Cross-judicial Influences on Constitutional Adjudication in the Post World War II Era. A Study in Comparative Constitutional Law Focusing on Theoretical and Empirical Issues*, Paper on the Issue of Transjudicial Borrowings, New York University, 2001.

5 *Cf.* S. Choudhry, 'Globalization in Search of Justification: Towards a Theory of Comparative Constitutional Interpretation', 1999 *Indiana L. J.* 74, pp. 821 *et seq.*

6 *Cf.* B. Ackerman, 'The Rise of World Constitutionalism', 1993 *Val. L. Rev.* 83, pp. 821 *et seq.*

7 *Cf.* A.M. Slaughter, 'A Typology of Transjudicial Communication', 1994 *U. Richmond L. Rev.* 29, pp 99-137; A.M. Slaughter, 'A Global Community of Courts', 2003 *Harv. Int'l L. J.* 44, pp. 191-219. It should be noted that the author was one of the first to start the debate on this practice.

8 *Cf.* K. L. Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models', 2003 *Int'l J. Const. L.* 1, pp. 296 *et seq.*

9 See P. Nevill, 'New Zeland: the Privy Council is Replaced with a Domestic Supreme Court', 2005 *Int. J of Const. L.* 3, pp. 115 *et seq.* In some of ex-Commonwealth countries, appealing to the Privy Council was only recently formally annulled, in others such as South Africa, it was abolished long time ago. The case of Australia is worth noting: Australia only eliminated this mechanism that put the national legal system in direct communication with the British one in the 1980s, which, as stressed by Australian doctrine, produced a deep legal influence. The mechanism of the Privy Council is analysed also by P.K. Tripathi, 'Foreign Precedents and Constitutional Law', 1957 *Col. L. Rev.* 57, pp. 319 *et seq.* See also the study of S. Gardbaum, 'Japanese Law Symposium: the New Commonwealth Model of Constitutionalism', 2001 *Am. J. Com. L.* 49, pp. 707-760.

dealing with a legally acceptable form of legal argumentation.[10] It is no longer a question of verifying the existence of this phenomenon as fact: the evidence is simply irrefutable. The question is, rather, to analyse how these *extra*-systemic parameters are integrated in the interpretative phase and how the comparative method is actually used.

Legal scholars are polarised between *celebratory* approaches towards the phenomenon and radical skepticism.[11] This study proposes to evaluate if, and to what extent, the comparative method can be a resource for constitutional judges,[12] in particular assessing the risk that its use could provide judges an uncontrollable and arbitrary freedom to manipulate the interpretation and application of the law.

2. Defining the framework of the interpretation based on *extra*-systemic parameters

The observation of the phenomenon has an underlying process: the enlargement of the interpretive and argumentative parameters that a judge may resort to when assigning meaning to a normative utterance, balancing and constructing the reasoning for court decisions.

The phenomenon defined as 'dialogue' between judges can produce not only a transformation in interpretive practices, but also in the idea of the legal system as a closed one. According to this rationale, the meaning of an utterance or the resolution of a constitutional issue could potentially be solved using infinite *extra*-systemic parameters from an undefined number of legal systems other than the national one.

In other words, this type of reasoning would chip away at the idea of a closed group of positive legal norms. Rather than defining the norm applicable to a specific case, this closed system of positive legal norms defines and limits the parameters that a judge may use for interpreting the norm on which he bases his decision. The concern here is that a lack of argumentative rationale, coherence of system and a crisis of the system's unity would all be triggered.

A series of methodological questions arise: 1) when is it necessary to draw on *extra*-systemic solutions; 2) how can one choose *extra*-systemic parameters for the purpose of interpreting the national norm. This questions can be subdivided into: 2(a) where may one draw the *extra*-systemic parameters from (from which legal systems and why); 2(b) how can one check the actual 'relevance' and 'compatibility' between imported parameters and the issues of law subject to national legal disputes; 3) how can one scientifically evaluate whether the normative material imported assumes the same meaning in the original legal system as the one attributed by the importing judges.[13]

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10 Here reference is made to Robert Alexy's reconstruction of argumentation theories and techniques. In his famous study the author carefully examines the 'canons of interpretation' according to Von Savigny's models (grammatical, logical, historical and systematic elements), Larenz's (literal meaning, contextual meaning, the regulatory purposes, aims and normative intentions of the historical legislator, objective-teleological criteria, and conformity of interpretation to the constitution), and Wolff's (philological, logical, systematic, historical, comparative, genetic, and teleological interpretations) before dealing with his *theory of rational legal argumentation*, *cf.* R. Alexy, *A Theory of Legal Argumentation,* 1989, p. 3.

11 The ambivalence of the positions and the opposing views is evident, *cf.* W. Osiatynski, 'Paradoxes of constitutional borrowing', 2003 *Int. J. of Const. L.* 1, pp. 244-268; W. Ewald, 'Comparative Jurisprudence (II): the Logic of Legal Transplant', 1995 *Am. J. Comp. L.* 43, pp. 489 *et seq.*; H. Klug, 'The Dignity clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?', 2003 *Mont. L. Rev.* 64, pp. 133 *et seq.*; D. E. Childress, 'Using Comparative Constitutional Law to Resolve Federal Questions', 2003 *Duke L.J.* 53, pp. 193 *et seq.*

12 See the extensive analysis in J. Fedtke & B. Markesinis, *Judicial Recourse to Foreign Law: a New Source of Inspiration?*, 2006.

13 On this matter B. Markesinis, *Comparative Law in the Courtroom and Classroom: the Story of the Last Thirty-Five Years,* 2003, stresses the importance of developing the comparative method according to a *functionalist* approach. Comparatists must make available to judges and law professionals materials, studies and compilations supporting the application of legislative texts. The author sees the creation of new synergies between research and judicial activities as one of the ways to deal with the growing complexities of contemporary legal phenomena.

If the spread and refinement of this practice were ever made 'legitimate', the comparative method (as a scientific and knowledge seeking method) could become an indispensable tool for the legal scholar (and the judge) to fill in the gaps that the circulation of legal arguments risks generating.[14]

3. The South African case: Constitutional dispensations enabling the importation of *extra*-systemic parameters

The Constitution of post-apartheid South Africa is the only one that has an express provision allowing the judges to use *extra*-systemic parameters for interpretation.[15] Therefore, in this phase it is the South African 'model' which must be examined since it is a constitutional system endowed with a norm that has allowed the Constitutional Court to develop a pioneering interpretational role.

It should, however, be clarified that the South African Court is not the first to work in *dialogue*; some examples include the established jurisprudence of the Supreme Courts of Canada[16] and Israel, the frequent references that constitutional judges in Latin-American countries, such as Argentina, make to the Supreme Court of the United States or the unexpected comparative references made by the French *Cour de Cassation* (under the former Chief Justice Guy Canivet[17]), or those made in some important judgments of the British House of Lords. The South African Court, however, was the first to do so based on a positive norm. The judges thus had to tackle the problem of systematically establishing the criteria and limits of this practice.

Section 39 of the 1996 Constitution (indexed as *Interpretation of the Bill of Rights*) states that the Constitutional Court, when interpreting the *Bill of Rights*, 'must' promote the 'values that underlie an open and democratic society', 'must' consider international public law and 'may' take foreign law into consideration.[18] South African constitutionalist doctrine agrees on three main reasons for this provision.[19]

Firstly, the necessity of international legitimacy after decades of isolation of the apartheid regime, which had ignored international standards on fundamental rights. Secondly, the search for international *repères* capable of aiding the interpretive work of an entirely new constitutional

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14 This idea is confirmed in B. Markesinis & J. Fedtke, 'The Judge as Comparatist', 2005 *Tul. Un. L. Rev.* 80, pp. 11-167, and in D.E. Childress III, 'Using Comparative Constitutional Law in Resolving Domestic Federal Questions', 2003 *Duke L. J.* 53, pp. 193-221.

15 One of the first studies on this subject is H. Webb, 'The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law', 1998 *U. of Pen. J. of Const. L.*, pp. 205-283.

16 See the study of the former Canadian Supreme Court judge C. L'Heureaux-Dube, 'The Importance of Dialogue: Globalization and the International Impact of Rehnquist Court', 1998 *Tulsa L. J.* 34, pp. 15 *et seq.*

17 On this matter see the study on the use of comparative law by the Cour de Cassation, by G. Canivet, 'The Practice of Comparative Law by the Supreme Courts: Brief Reflexions on the Dialogue Between the Judges in French and European Experience', 2006 *Tul. L. Rev.* 80, pp. 1377-1400.

18 *Cf.* Section 39: '(1) When interpreting the Bill of Rights, (a) a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and; (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill'. It is worth noting that these same provisions are also in the text of the Interim Constitution of 1993. Section 35[1] Const. 1993 nevertheless has slightly different provisions: *In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.* In the transition form the interim text to the definitive one the phrase '*where applicable*' was removed. Constitutionalist doctrine and the Constitutional Court did profound interpretive work on the matter. Section 39 of the 1996 Constitution, in fact, seems to reinforce the openness of the South African constitutional system toward *extra*-systemic sources by eliminating the criteria of evaluating the applicability ('where applicable') of international public law or foreign law.

19 *Cf.* J. Dugard, 'International Law and the Final Constitution', 1995 *SAJHR.* 11, pp. 241-251; G. Carpenter, 'The South African Constitutional Court: Taking Stock of the Early Decisions', 1996 *H.R. Const. L. J. l of SA* 1, pp. 24-29, and Webb, *supra* note 15, p. 219.

text. In this context, the *drafters* of the Constitution became increasingly aware of not being able to find points of reference in the previous regime based on a segregationist rationale (established with the *Republic of South Africa* of 1961), which led to the Constitutional Court having to formulate a particular form of historical interpretation of the Constitution aimed at recuperating the common law of the 1910 *South African Union* (which partially recognised the rights and guarantees of *non-white people*). Thirdly and finally, the awareness that introducing judicial review in South Africa would require a period of legal and cultural 'learning'. If the transformation of the entire legal system was already a major effort for all the participants in the South African legal system, the introduction of constitutional justice brought with it the need for the development of a pedagogical approach to using this instrument for members of the ordinary judiciary, the components of the legal system and the constitutional judges themselves.[20]

For these reasons post-apartheid South Africa has had to make virtue of necessity. Acting as a listener, referring to interpretive models of other constitutional judges, calling upon widespread legal institutional culture and breathing life into a courageous constitutional compromise, it has tried to make up for its decade long cultural and legal delay.

The field should nonetheless be cleared of all possible misunderstandings that could arise when commenting on the use of *extra*-systemic legal elements. Section 39 in reality contains two distinct statements. The first sets out an obligation for the Court to consider international public law. However, this is part of the formal legal framework of constitutional sources and participation of the South African constitutional system in an international system. On the other hand, the second statements establishes a 'faculty' of the Court to consider '*foreign law*'. These are two interpretive procedures that only appear to be similar and cannot be regarded as one. In fact, as a matter of principle, international law is connected to the domestic legal system by positive enforcement norms through ratification procedures (though in different ways depending on the constitutional set up).

This cannot be said for *extra*-systemic constitutional parameters or 'alien constitutional elements' (the so called 'foreign law' of the above mentioned Section 39). This second case differs from the application of international norms of ratified conventions; the circulation, in this second case, is produced mostly journey to an extraneous constitutional system not formally connected with the 'importing' one.

Thus, it is a mistake to consider that *considering foreign law* is the same as making reference to norms of international systems (which is an obligation in South Africa grounded in constitutional norms). In other words, making effective international public law norms binding in South Africa has nothing to do with the interpretive procedure based on *extra*-systemic parameters. On the one hand, norms are applied that have been produced by a system outside of the national sphere, but to which South Africa formally belongs. On the other, interpretive solutions created or decreed by foreign constitutional courts may be freely used for interpreting the South African Constitution.[21]

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20 In the beginning the constitutional judges made pedagogical and explanatory efforts illustrating in detail *constitutional procedural law*. This attitude appears toned down in more recent decisions. This is all comprehensible in light of the fact that judicial review, which was previously unknown to the South African system, needed grounding and consensus among the various legal players. The Court thus attempted to facilitate transparency through argumentative and syntactical clarity of the court decisions, drafting long explanations of the new constitutional context. For example, the Court frequently 'illustrates' what should be the roles of the different institutional and private players. The Court's concern is to minimise the perception of constitutional justice as an infringement on the separation of powers and on the sovereignty of the legislature (a comprehensive example is *Phillips and Others* v. *Director of Public Prosecutions and Others,* CCT 20/02, § 12).

21 That these are two different circuits of interpretation has been accurately demonstrated by Markesinis, *Comparative Law in the Courtroom and Classroom, supra* note 13. The author captures this difference by analysing the development of German jurisprudence (constitutional and administrative) and the use of interpretive parameters or norms outside of the German legal system. The two circuits of interpretation

Another clarification should also be made: the *extra*-systemic parameters are not, as the Court confirms, directly *legally binding*; in fact, the Constitution simply 'authorises' the interpreters to enlarge the category of interpretive parameters by including foreign law. In addition, the Court often refers to *extra*-systemic parameters of international systems of which South Africa is not part (such as the European Convention on Human Rights and the Inter-American Convention). In this situation, circulation is created by virtue of another route of changing systems. Indeed, the relationship between the South African constitutional system and regional systems protecting human rights seems analogous in some ways to the one between the South African constitutional system and constitutional systems from which *extra*-systemic interpretive parameters are imported: in both cases the Court makes use of interpretive parameters of systems to which South Africa is not formally bound.

4. *Probative importation* or arguing *for* or *against* a main thesis: Examples of legal reasoning based on *extra*-systemic parameters

From the firsts decisions delivered shortly after its institution in 1995, the South African Constitutional Court, in interpreting the very new post-apartheid *Bill of Rights*, made extensive use of *extra*-systemic parameters. The first two cases in which 'legal alien elements' were used for Constitutional interpretation were *Zuma and others* v. *State*[22] and *Makwanyane* v. *State*.[23] In

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are based upon different sources and function according to different legal mechanisms. One operates when applying norms of international private, public or European Union law, the other works on the basis of horizontal borrowings of *extra*-systemic parameters. The former thus is mostly governed by the rationale of positive law (the validity of the norm), whereas the latter operates in absence of an 'inherent link to [the] foreign law' called upon.

22 *Cf.* CCT/5/94. The *Zuma* case involves the ruling of unconstitutionality of Section $217^{1b(ii)}$ of Criminal Procedure Act 51 of 1977 governing the controversial issue of the right to silence and the authenticity of confessions of guilt obtained by deceit, intimidation or by forms of physical or psychological pressure. According to the criminal procedure code in force during apartheid, a confession of guilt could be gathered even by police force members without it having to be repeated during the trial. The provisions in question contain elements that are traditionally absent in British *common law* according to which a confession is valid only if obtained by a judge. In particular, the Court was called to rule on the constitutional justification of the automatic inversion of the burden of proof that the norm in question creates, which is something extremely harmful to the guarantees of the accused and to the principle of the presumption of innocence. In fact, it would be up to the person confessing to prove that the confessions obtained by police force members were done so with violence or deceit. The applicant, Mr. Zuma, appeared to have confessed to the police that he was responsible for a homicide. Nevertheless, throughout the trial the defendant retracted the confession claiming that it was obtained by violence. In support of his claim Mr. Zuma called two witnesses who confirmed his argument. In order to decide whether the provisions of s. 217 regarding confession reverses the burden of proof and unjustifiably limits s. 25 of the 1993 Constitution, for the first time the Court resorts to the analysis of foreign experiences. The Court points out how the same issue was dealt with by the U.S. Supreme Court, by the Supreme Court of Canada and by the Strasbourg Court ('and doubtless others'); however, no criteria of selection are made explicit. The comparison begins with an analysis of how the U.S. dealt with the constitutional legitimacy of presumptions producing a reversal of the burden of proof. The Court analyzed *Tot* v. *United States* of 1949 (on the unlawfulness of persons *convicted of violence* possessing firearms and ammunition)*;* and *Leary* v. *United States* of 1969 (on possession of marijuana which would automatically presume smuggling). Also citing *Country Court of Ulster Country, New York et al.* v. *Allen et al.*, the South African judges figured out that in the U.S. the constitutional legitimacy of statutory presumptions is determined: a) based on a 'rational connection test' between fact and legal consequences; b) in terms of the principle of a fair trial. Two Canadian rulings were then subject to analysis: in the first, *Regina* v. *Big M. Drug Mart Ltd*. of 1985, the judges justify the use of a broad interpretation of the *Bill of Rights* introducing the criteria of *historical origins* (stated by the Canadian Court as an interpretive parameter of the *Canadian Charter of Rights*). The Canadian Supreme Court's decision sets out the general criteria and interpretive methods of the Canadian *Charter of Rights* according to which the fundamental freedoms in the constitutional text are to be interpreted *generously*, beyond the mere literal meaning (the so-called 'generous approach'). The objectives of the Charter, therefore, must be taken into consideration, broadening the activity of the fundamental rights. With a second Canadian ruling, *Regina* v. *Oakes* of 1986, the South African Court shows interest in how the Supreme Court of Canada determined the legitimacy of presumptions and of the reversal of the burden of proof. In this perspective, the inversion of the burden of proof created by s. 217 is considered to limit unjustifiably the rights enacted by s. 25 of the Interim Constitution thus making the criminal procedure norm unconstitutional.

23 *Cf.* CCT/3/94. At the core of the decision is the judgment of the constitutionality of capital punishment (Section 277^{1a} Criminal Procedure Act 51 of 1977) in relation to Sections 8 (equality before the law), 9 (right to life), 10 (protection of human dignity) and 11^{2} of the 1993 Constitution. The provisions of this last article establish the unlawfulness of cruel, inhuman or degrading treatment and punishment. Thus the Court has to evaluate if the death penalty is cruel and degrading treatment or if it is a constitutionally legitimate limitation to the right to life. The constitutional system of the United States is the first one under examination. The death penalty has been the subject of numerous U.S. Supreme Court rulings that have confirmed its constitutionality. The South African Court points out the underlying contradiction according to which, on the one hand, the U.S. Constitution sanctions the unlawfulness of cruel and *unusual punishment*; on the other, it places no obstacle to inflicting capital punishment in terms of the guarantees of the accused (some doubts are expressed solely on the long stays

the decade of constitutional adjudication thereafter, foreign legal elements can be detected in the large majority of Constitutional Court judgments.

It is intended to analyse what appears to be a recurring 'pattern' of legal argumentation used by the Court, which is defined here as 'probative importation'. In this legal argumentation technique, foreign interpretations or 'extraneous legal elements' are cited as if they were 'proof' *against* (when a judge in a dissenting opinion provides a differing interpretation than that of the main judgment to disprove of its result) or *for* (when a judge, even in a concurring opinion, provides converging foreign case studies in support of his or her hypothesis). This first pattern is grounded in the assertion: '*they also think this way abroad*'. In order to buttress a certain interpretation, judges assert that it corresponds, falls in line or coincides with the interpretation of a foreign judge. The interpretation precedes the citation of foreign cases. The use of *extra*-systemic parameters in this case has the function of adding rhetorical and evidentiary force to the interpretation.

A second pattern falls under *probative importation*; it is similar to the first, but corresponds with the assertion: '*considering that they think this way abroad…*' (that is, if this constitutional utterance has this meaning in other *pre-selected* systems), then '*… we also assign it with this same meaning*'. This formula differs from the previous one because it proceeds first with identifying the foreign interpretive model to which it subsequently links the interpretation. In this case the phenomenon has even more problematic consequences. Potentially infinite foreign interpretations or argumentations can contain parameters that can be used to distill the 'meaning' of a national constitutional norm or to derive argumentative models. If assigning meaning to an statement usually hides a 'limited creative procedure' that sometimes relies on data outside of positive law, here 'creation' goes very far. In fact, deriving the meaning of national normative utterances directly and automatically from *extra*-systemic parameters indirectly means incorporating a *pseudo-source.* In this case, having the judge's point of view be preceded by the assertion: '*considering that they think this way abroad…*' produces a *consequential* dynamic. The interpretation of a specific constitutional utterance is automatically derived from a foreign parameter by means of a procedure whereby an *extra*-systemic precedent *subsumes* a particular case.

The value assumed by the citation can vary greatly according to its location in the decision: (1) in the main text of the ruling (majority opinion), (2) in the concurring opinion, or (3) in the dissenting opinion. Notwithstanding the extreme interest of this manner of argumentation, in some cases, it might degenerate in forms of *legitimatio ex post* of interpretations already established in a judge's mind, regardless of whether this be borrowing foreign solutions for opposing the majority opinion, as proof against a dissenting opinion or as a minority judgment.[24]

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on 'death row'). Thus the U.S. interpretive paradigm is not considered to be compatible or useful for resolving the problem of the death penalty's unconstitutionality under the new democratic system. Next the 1949 Constitution of India and the Indian Supreme Court's jurisprudence on the matter are subject to comparison. The result is the same since the Indian Constitution, like the American one, contemplates the constitutional limitation of the right to life in terms of the procedures provided by the law (Art. 21 Const. India). On the contrary, the Canadian Supreme Court in *Kindler* v. *Canada* of 1992 defines the death penalty as cruel and inhuman treatment that damages human dignity. In this context the formal and material differences with the constitutions of the United States and India are reconfirmed, but a second an interesting comparison is made with the Constitution of Hungary that declared the unconstitutionality of capital punishment according to art. 54^{1} of the Constitution of Hungary.

24 This type of situation motivated Justice Kriegler (in his concurring opinion in *Bernstein et al.* v. *Bester et al,* CCT 23/1995) to express his strong doubts about the use of *extra*-systemic parameters. Kriegler puts forth three main arguments. Indeed, they are quite sound, especially in the situation defined as 'probative importation': a) the risk of dealing with superficial comparisons that lead the 'importing' judge to create misunderstandings; b) all too often *extra*-systemic parameters are used as part of the internal dialogue (sometimes argument) between the judges of the same Court; c) in some circumstances there are gaps in argumentation because the reason for using *extra*-systemic parameters is not explained.

Moving to some concrete examples. In the judgment *Phillips and others* v. *Director of Public Prosecutions and others*[25] the legitimacy of limiting the freedom of expression (Section 16) and in particular the *freedom of artistic creativity* was at stake. It was argued that this freedom is violated by the provisions of Section 160[d] of the *Liquor Act 27 of 1989* on licenses for selling liquor. The norm obliged the holder of an on-consumption license to refrain from selling liquor when there were performances on the premises that are 'offensive, indecent or obscene' or by persons 'not clothed or not properly clothed'. Heavy penalties were due if the norm was violated. The Court needed to evaluate the legitimacy of limiting a fundamental right of great symbolic importance for the post-apartheid system and whether that limitation could be justified in light of the criteria laid down by the *limitation clause* of Section 36, 1996 Constitution (when the criteria are verified, as we have already seen, the limitation of the rights contained in the *Bill of Rights* is allowed). The Court declared Section 160[d] unconstitutional; the 'obscene' content of a performance was not a legitimate criterion for the limitation of the freedom of expression in the form of a performance, even if the type of performance took place where alcohol was being served. Assigning meaning to the notion of 'obscenity' was thus fundamental for the judges, who refer to a comparative analysis (in the dissenting opinion of Justice Ngcobo and in the concurring opinion of Justice Sachs) to see whether it is legitimate to prohibit 'obscene' performances in private locales open to the public in other systems.

In the dissenting opinion of Ngcobo, who disagrees with what has been set forth by the other judges and thus orients his reasoning *against* the judgment issued by the majority of the judges, seeks 'proof' of the legitimacy of his argumentation in a Canadian judgment: *Re Koumoudouros et al and Municipality of Metropolitan Toronto*.[26] In this judgment, the Canadian Justice Erbele (as cited by Ngcobo) affirms that the freedom of expression as laid down by the Constitution of Canada also includes '"artistic" expression'. However, this does not apply to the freedom of artistic expression with obscene content for the purpose of selling a larger quantity of liquor. At the core of this judgment is the analysis that showing genitals is an activity falling within the category of obscenity that, coupled with the purpose of selling a larger quantity of alcohol, neutralises the freedom of artistic expression. The South African judge concurs with the Canadian judge's argumentation, asserting that the freedom of expression elaborated by the South African Constitution does not include, just like the Canadian one (in Justice Erbele's interpretation), performances using the exhibition of genital parts for selling a greater quantity of alcohol rather than for expressing artistic content. The choice of the Canadian judgment is arbitrary (there could be numerous other interpretations, in Canada or in other constitutional systems, to the contrary). The formula of the judge's assertion is the following: '*I do not agree with the main interpretation and as proof of my thesis I call upon the interpretation of other foreign judges*'. Justice Sachs's use of foreign jurisprudence and doctrine in the concurring opinion is completely different; he agrees with the majority but wishes to expand the field of argumentation. Sachs J. asserts, in fact, that the definition of obscenity is particularly controversial in other 'important' constitutional systems. Therefore, before proceeding with his reasoning, he considers it useful to present a brief panorama of how the same problem has been dealt with in Canada and the United States. Firstly, Justice Sachs supplies other Canadian judgments that profoundly lessen the seemingly radical value of the judgment cited by Justice Ngcobo.[27] Secondly, referring to numerous U.S. Supreme Court decisions, he shows how the Court was deeply divided for a long

25 *Cf.* CCT 20/02.
26 The judgment cited is *Re Koumoudouros et al and Municipality of Metropolitan Toronto,* (1985), 6 DLR (4th), 523.
27 *Cf. Town Cinema Theatres Ltd* v. *The Queen* [1985] S.C.R. 494; *R.* v. *Trembly* [1993] S.C.R. 932.

time on working out an unequivocal notion of obscenity and how the issue was later defined 'futile'[28]; in the end the U.S. court confirms the legitimacy only of limitations confined to single contextual aspects of potentially 'obscene' performances without considering their complete prohibition legitimate.[29]

The argumentative formula is thus the following: 'I agree with the majority's interpretation, I do not use any argument in opposition, I would like to add others, I proceed with a limited acknowledgment (and perhaps arbitrary since no criteria are laid down for choosing the legal systems referred to) that confirms the problematic nature of the issue also noticed by other prestigious constitutional judges'. Sachs's argumentative technique can also be read according to the model of setting two extremes, since he creates two opposing poles of interpretation by solely and explicitly citing Canada and the United States and places his hypothesis between them.

Sachs's reasoning based on foreign parameters is, however, weak; the parameters he invokes show that other legal systems ensure the lawfulness of performances with 'obscene' content (falling under the freedom of expression), but they do not answer the fundamental question *in casu*: is an obscene performance whose main purpose is the sale of liquor a manifestation of the freedom of expression? Can it be proved that performances that include the exhibition of genitals in a place where the serving of alcohol is authorised are really not for the purpose of artistic expression but for increasing the sale of liquor?

The problematic nature of *probative importation* clearly appears in a controversial judgment decided five against four and includes a separate concurring opinion with the minority: *Garreth Anver Prince* v. *President of the Cape Law Society et al.* of 25th January 2002.[30] The dispute considers a rather strange situation that poses legal problems dealt with by other foreign constitutional judges.

The appellant was a legal scholar with all the qualifications to become an *Attorney,* but was denied enrollment in the *Law Society* as a result of two convictions for possessing cannabis. Even in the Constitutional Court, the appellant defended himself by pleading that since he belonged to the *Rastafari* religion the personal use of cannabis is required as a religious practice and thus is protected by freedom of religion. The use of foreign interpretive models in this case became a means for conducting an internal debate between the various judges' points of view; the citations are an argumentative tool as proof of the decisions assumed by the judges, which gave rise to the methodological problems inherent in manipulating foreign 'arguments' and the inconsistencies with previous interpretations.

South African law bans the use and possession of psychotropic substances except for medical reasons or scientific research. The objective of the decision was to find out whether that ban was too restrictive in relation to a 'bona fide religious purpose' and therefore an unjust limitation of religious freedom. The preliminary analysis of the principles involved tracing a triangle between Sections 15 (*Freedom of religion, belief and opinion*), 31 (according to which the state protects and encourages *Cultural, religious and linguistic communities*) and 36, which lays down criteria for limiting rights, such as the aforementioned ones, contained in the *Bill of Rights.*

Considering the axiological and material coordinates of the new post-apartheid system built on the political myth of the *Rainbow Nation* and the rich and complex composition of South

28 Justice Sachs cites a passage of U.S. Justice Brennan from *Paris Adult I* v. *Slaton* 413 U.S. 49 (1973), 86, 9.

29 Justice Rehnquist, in *Barnes* v. *Glen Theatre, Inc.* 501 U.S. 560 (1991) 572, asserts that the provisions of Indiana state legislation forbidding dancers from wearing scanty clothing on stage introduce such 'narrowly tailored' limitations that they are not unconstitutional.

30 *Cf.* CCT/36/00.

Africa's political body, recognising the most possible forms of pluralism is fundamental to the post-segregationist constitution making agreement. The central issue of the South African judgment was thus to verify if the absolute ban on the use of cannabis, in particular for 'liturgical or ceremonial use', was a limitation on the *Rastafari* religious practice (not justifiable and unreasonable for an open and democratic society according to s. 36 1996 Const.).

The minority opinion, which opens the judgment, stressed a wide interpretation of the freedom to practice one's 'religious belief' (even if illogical and irrational[31]) and to express, practice, teach and disseminate one's beliefs as long as no 'coercion or restraint' takes place. All of this was reason enough for the minority to tolerate the use of cannabis in the aforementioned circumstances. The majority opinion is, instead, of the opposite opinion.

In any case, in determining the limits of freedom in question, the minority judges sealed their reasoning (hence according to a probative method or one supporting their reasoning) with a Canadian judgment: *R.* v. *Big M Drug Mart Ltd*.[32] This decision hinged on the constitutionality of the 'Loi sur le dimanche et observation du dimanche' which the applicant (Drug Mart) was accused of breaking by unlawfully selling merchandise on Sunday. According to established interpretation, the purpose of this law was to compel 'the observance of Sunday as a religious holy day'. The prohibition of Sunday commercial activities responded to the needs of protecting clearly one denomination, and for this reason evidently detrimental to the freedom of those who practice different religions or denominations and of those who do not follow any religion. The Canadian Court, therefore, considered the aforementioned law an unjust limitation of the freedom of conscience and religion ruled by the Charter and more precisely not a 'reasonable limit demonstrably justifiable in a free and democratic society' (analogous to the South African one, this is the formulation of the constitutional criteria for limiting fundamental rights). The comparative method used by the minority judges created the following decisional and argumentative model: the ban on commercial activities on Sunday in Canada and the absolute ban on using cannabis in South Africa are interchangeable and can be superimposed. The Canadian formula became an argumentative and evidentiary *extra*-systemic parameter employed in relation to the interpretation of the South African legal system. Bearing in mind the limited health effects of controlled use of cannabis and the lack of drug traffic encouraged by *Rastafari* liturgical use, the minority opinion held that the limitation would be disproportionate to and invasive of the freedom of religious practice. The judges would have the legislature deal with the regulation of this particular situation.

Here the problematic nature of the comparative method appears in its true shape. In the minority decision, the judges make use of other *extra*-systemic parameters derived from the opinion of the dissenting opinion of Justice Blackmun of the U.S. Supreme Court in the controversial case (and in some sense quite similar) *Employment Division, Department of Human Resources of Oregon, et al.* v. *Smith et al.*[33] The subject of this U.S. Supreme Court case was the legitimacy of the liturgical use of the hallucinogenic cactus Peyote in the ceremonies of the *Native American Church.* In this judgment, the majority of American judges rejected the legitimacy of this practice stating that the exercise of religious freedom 'does not relieve an individual of the obligation to comply with a valid and neutral law of general application on the

31 *Cf. ibid.* § 42.

32 *Cf. R.* v. *Big M Drug Mart Ltd* 18 DLR (4th), (1985), 1 SCR.

33 *Cf. Employment Division, Department of Human Resources of Oregon, et al.* v. *Smith et al.,* 494, US, 1990, 872-911. The South African judges demonstrate to have also followed the doctrine debate criticizing the judgment used by them by citing Gordon, *Free Exercise on the Mountaintop*, 1991 *Cal. L. Rev.* 79, p. 91; M. McConnel, 'Free Exercise Revisionism and the Smith Decision'*,* 1990 *U. Chi. L. Rev.* 57, pp. 1109 *et seq*; A.S. Green, 'The Political Balance of the Religion Clauses'*,* 1993 *Yale L.J.* 102, p. 1611.

ground that the law proscribes (or prescribes) conduct that his or her religion proscribes (or prescribes)'.[34] Within the South African Court, exactly the same conflict of interpretation is reproduced: the minority of South African judges cited Blackmun's dissenting opinion (with which Brennan and Marshall concur, inclined to tolerate the limited use for established ceremonial and liturgical purposes) whereas the majority reinforces itself with the U.S. majority opinion (that forbids all use of psychotropic substances).

Here it is interesting to note the inconsistencies that can emerge when using foreign interpretive models. Firstly, the two cases used in the last example although similar are not identical. Using hallucinogenic substances is not entirely the same as using cannabis (for health effects and invasiveness of the practice). The case similarity is even more questionable in the first case cited (*Drug Mart*). Secondly, in the majority opinion the South African judges argue positively making use of a U.S. Supreme Court ruling where the South African Court had stated that the American system and interpretations (although consistently analysed as an important reference model) were not compatible with the South African system due to the many asymmetries between the two systems[35]. In this case, the majority opinion shows a strong degree of contradiction, because it is mostly grounded in the majority opinion of the U.S. Supreme Court, according to which full recognition of religious freedom based on the First Amendment does not lead to the exemption for religious reasons from 'civic obligations' (such as paying taxes, provisions regarding health and public safety, obligatory vaccinations, norms on narcotics, labour rights, prohibition of child labour, inhuman and degrading treatment, etc.[36]).

The argumentative technique of *probative importation* is also used for reinforcing (or legitimising) the choice of interests or principles at stake in a particular dispute made by constitutional judges (the so-called interpretive pre-orientation). This is a notoriously important operation because it can be the basis for resolving the problem of constitutionality submitted to the judges[37]. Therefore, it is not difficult to imagine how the use of *extra*-systemic parameters as a *reinforcement* or justification of the judges' choices in defining the topography of the case can become a means of *persuasion* regarding the efficacy of the choices made. Furthermore, this manner of importing foreign parameters was frequently found in the analysis of South African rulings.

An exemplary case is *Laugh It Off Promotion CC* v. *South African Breweries International* of 27th May 2005[38]. The appellant was the company *Laugh It Off Promotion* which altered images or words of registered *brands* partially as a commercial activity. The purpose, beyond simply

34 *Cf. Employment Division* v. *Smith,* p. 878.

35 See R.C. Blake, 'The Frequent Irrelevance of US Judicial Decisions in South Africa: National Coalition for Gay & Lesbian Equality v Minister of Justice', 1999 *SAJHR* 15. This point is stressed in the separate but concurring minority opinion of Justice Sachs (§ 155), who rightfully takes into consideration a larger number of comparative parameters in an attempt to find a balance and harmonisation between opposing interests. Sachs's approach is to pay attention to the fact that the *Rastafari* religion would be one of those 'discrete insular minorities' whose protection is a problem of great interest not just for the South African Court but also for 'courts abroad' (§157) and the United States in particular (whose jurisprudence is cited, *United States* v. *Carolene Products,* US, 1938, 304, 144; and established doctrine, L. Tribe, *American Constitutionalism,* 1988[2], p. 582). Justice Sachs widens the comparison citing a case quite similar to the American one decided by the Federal Administrative Court of Germany (BverwG AZ 3 (20/00)). The German judges rejected the appeal of a *Rastafari* practitioner to whom authorities had denied the power of cultivating marijuana plants for 'personal use'. If the legitimacy of the modest quantity of use and possession of marijuana was already the subject of a Constitutional Court ruling (BverGE 90, 145 (185)) according to Justice Sachs in the Administrative Court ruling the German judges really debate on its purpose, stating that in reality the power to cultivate marijuana claimed by the appellant was more oriented toward the anti-prohibitionist campaign as opposed to an actual *Rastafari* ceremonial need. Sachs appears to deduce from this (or at least his argumentative and rhetorical technique articulates so) that also in the German context the need to use psychotropic substances for religious reasons would be a parameter to consider when evaluating the constitutionality of bans capable of harming some aspects of religious freedom.

36 This excerpt is cited by the South African judges, *ibid.*, pp. 888-889.

37 *Cf.* R. Bin, *Diritti e Argomenti,* 1992, pp. 62 *et seq.*, where the author analyzes the operations prior to balancing the interests at play in a specific dispute. These operations are defined as the 'topography of the conflict'.

38 *Cf.* CCT 42/04.

commercial, is to develop a sort type of social and political criticism.[39] The South African judges had to identify the principles subject to the dispute. On the one hand, the freedom of expression (s. 16[1] 1996 Const.) and, on the other, the protection of intellectual property (from a sub-constitutional source, s. 34[1c] of the *Trade Marks Act* 194/1993).

In order to justify that the norms on intellectual property can be limited by freedom of expression, reinforcing (that is, probative) foreign parameters are used. The technique clearly emerges in the following excerpt from the judge drafting the decision (Moseneke): 'I have intimated earlier that Section 34[1c] fails to be construed bearing in mind the entrenched free expression right under Section 16. The importance of freedom of expression has been articulated and underscored by this and other courts in this country and indeed in other *open democracies* and by its inclusion in international law instruments. Suffice it to repeat that freedom of expression is a vital incidence of human dignity, equal worth and freedom. It carries its own inherent worth and serves a collection of other intertwined constitutional ends in *open and democratic societies*'.[40]

For the purpose of *proving* or *reinforcing* the decision to allow the principle of freedom of expression to 'react' with measures that regulate intellectual property, the Court cited a extensive number of decisions issued by the Supreme Courts of New Zealand, Canada, the United States, Namibia and the European Court of Human Rights in Strasbourg.[41] The foreign cases cited tended to reinforce the pre-orientation that the freedom of expression can place a limitation on intellectual property and supplied *extra*-systemic parameters according to which the aforementioned fundamental freedom played a central role in other 'open and democratic societies'. The doubt raised here is that in reality no clear comparison was made; the foreign rulings were simply imported into the South African pool of interpretation. The decisions were are not analysed, but simply used as reinforcement of a decision regarding the principles at stake. The 'audience' that the Court wished to 'persuade', if it should desire to refute the pre-orientation, should begin with criticising the pertinence of the cases presented so assertively by the Court.

5. The dialogue between Constitutional Courts: Hypothesis on legal and political scenarios

Some conclusive hypotheses regarding the political and legal scenarios of the circulation of interpretive paradigms can now be made. It would appear that a potentially important transformation of liberal democratic constitutionalism is taking place; the multiplication of the studies in this area indicates that constitutional scholarship has noticed that fundamental changes are underway.[42]

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39 In the case in question the appellants were convicted for violating laws on brands due to a T-shirt (produced and sold by them) on which the famous slogan of a very popular beer in South Africa 'Black Label' was substituted with 'Black Labour' while the colours and shape of the beer advertisement were unaltered. The clearly political purpose was to sensitise the public about labour exploitation (with very low salaries) today still very widespread in South Africa (and which is one of the main features of apartheid).

40 *Cf.* CCT 42/04 §45, italics added.

41 Refer to the list of cases cited in note 46 § 45 (CCT 42/04).

42 It is interesting to note how many studies on this method of constitutional interpretation currently come from the United States where, paradoxically, as stressed by the author of one of the most important studies on the matter, B. Ackerman, *supra* note 6, very few references are made to foreign constitutional jurisprudence or to comparative public law. In this context, the attitude of the Supreme Court of the United States is labelled by the author as 'emphatic provincialism' (771-773). The same outlook can be seen in P. McFadden, 'Provincialism in United States Courts', 1995 *Cornell L. Rev.* 81, pp. 4 *et seq.* Other studies give voice to the growing interest in a dialogue between courts. On the subject see S.K. Harding, 'Comparative Reasoning and Judicial Review', 2003 *Y. J. of Int. L.* 28, pp. 409-464, in which the attitude of the U.S. Supreme Court, intent on creating a 'highly autonomous' national system (p. 412) is compared with the opposite attitude of the Canadian Supreme Court, which makes wide use of comparison with foreign systems. The author analyzes the consequences that comparative law produces on the processes of *decision-making* and the inevitable problems of systemic consistency that are triggered. On this matter also see K. Greenwalt, 'Free Speech in United States and Canada', 1992 *L. Contemporary Problems*, pp. 5-6; C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', 2000 *Oxf. J. of Legal Studies* 20, p. 499; also see the

First of all, we can imagine the emergence of cultural and linguistic areas where osmosis between systems takes place or the development of relationships between geopolitical areas sharing a common historical and political legacy (such as the dialogue between the courts of countries formerly part of the same colonial dominion, such as the *Commonwealth*). We could then deduce that the choice of dialogue partners is not grounded in legal and systemic compatibility, but in historical reasons or political and cultural influence. In addition to this, the format of the common law system allows judges greater familiarity with case studies and precedents from other common law jurisdictions. These elements could legitimately allow one to foresee the creation of a common law country *bloc* able to develop legal, political, economic and diplomatic influence on countries of a different legal tradition. Even though scholarship has for some time stressed the convergence in diverse legal fields, a contrast between 'legal families' can currently be seen in the political and legal dynamics of international criminal jurisdictions (limited, however, to criminal and criminal procedural matters).[43] According to scholars and international analysts the *flow* of jurisprudence circulation today, however, demonstrates a sizable volume of exchange between courts of *common law* countries and *civil law* ones, alleviating doubts about the creation of an opposition between legal and cultural *enclaves*.[44]

Secondly, there is some perplexity as to the limits to using foreign law since it can create inconsistency and confusion within a system. In fact, the study of this practice must consider the underlying risks regarding the arbitrary way in which judges are free to choose a system or judgment by investigating the problem of compatibility between the systems whose legal orientation is being *adopted* and those that import interpretive solutions.[45]

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important study of S. Choudhry, *supra* note 5, pp. 819-892, in which the author emphasizes the opinion of the U.S. Supreme Court Justice Scalia (in the famous and controversial *Lawrence* v. *Texas,* US, 539, 2003) according to which 'comparative analysis is inappropriate to the task of interpreting a Constitution' (p. 820). In this ruling, which declared unconstitutional the Texan law criminally punishing consensual homosexual sexual relations, the U.S. Supreme Court took into consideration the judgments of the Strasbourg Court, which has ruled in the same way in numerous cases (in particular, Justice Kennedy cites *Dudgeon* v. *United Kingdom*); this explains the violent reaction of Scalia, who had often expressed himself radically against the *comparative constitutional references approach* (as in *Stanford* v. *Kentucky,* 429 US, 1989). Choudhry emphasizes instead the importance of the Canadian and South African models of openness toward '*extra*-systemic jurisprudence'. The author hypothesizes that the model of the *Canadian Charter of Rights and Freedom* has become a source of inspiration for analogous texts of other states: South Africa, Israel, Hong Kong, New Zealand (see p. 822, notes 6-9); See also M. Tushnet, 'The Possibility of Comparative Constitutional Law'*,* 1999 *Y. L. Journal* 108, pp. 1225-1309; D. Fontana, 'Refined Comparativism in Constitutional Law'*,* 2001 *UCLA L. Rev.* 49, pp. 539 *et seq.*; V.C. Jackson, 'Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality" Rights and Federalism', 1999 *U. of Pen. Journ. of Const. L.*, pp. 583 *et seq.* On the French front see the study of J. Alard & A. Garapon, *Les juges dans la mondialisation. La nouvelle révolution du droit,* 2005, and the analysis of one of the members of the Constitutional Council: M.O. Dutheillet de Lamothe, *Le constitutionnalisme comparatif dans la pratique du Conseil constitutionnel,* Paper at the 7th World Convention on Constitutional Law, Santiago, Chile, 16 January 2004.

43 The use of *extra*-systemic law, aside from being a widespread practice between international and national judges (vertical circulation) and between different international jurisdictions (horizontal circulation), is a dynamic both known and discussed within the framework of *ad hoc* international criminal jurisdictions. International judges make use of different national criminal legal systems, though still in a rather asystematic manner and with an obvious lack of objectifying procedures. In international criminal justice there is, nevertheless, much perplexity with regards this methodology, especially concerning its scope. In addition to this, reference to doctrine and jurisprudence from different countries takes place at 'random'. Since neither limits nor, more importantly, criteria of predictability of the national laws called upon have been set out, the methodology of judges in international criminal jurisdictions often turns into an evident imbalance of the right to defence. Some commentators have noted how the use of comparative law in international criminal jurisdictions often becomes a form of *ex-post* legitimacy of the judges' decision-making reasoning (*cf.* E. Fronza & N. Guillou, 'Etude critique des fragments existants de droit pénal commun: le crime de génocide'*,* in M. Delas-Marty *et al.* (eds.), *Variation autour d'un droit commun,* 2001, pp. 273-296 ; W.W. Burke-White, 'A Community of Courts : Toward a System of International Criminal Law'*,* 2002 *Mich. J. of Int. L.* 24, pp. 1-101). This judicial dynamic has some very interesting features, though it also has many problematic aspects. First, yet again international criminal courts prove to be a laboratory of new judicial methodologies. Second, the international character of the courts – also in terms of the judges composing them and the courts' universalistic purpose – forces the development of legal thought on the use of multiple national laws in a comparative perspective. The conception of the International Criminal Court confirms all this. In any case, the problem has been considered also in reference to other courts with a supranational scope such as the European Court of Human Rights (see L. Favoreu, *Corti costituzionali nazionali e Corte europea dei diritti dell'uomo,* 2004, Rivista di diritto costituzionale, pp. 3-24).

44 See the large spectrum analysis in B. Markesinis & J. Fedtke, 'The Judge as Comparatist'*, supra* note 14, pp. 11-167.

45 Only a few lament the lack of rigorous constitutional theory on the circulation of interpretive paradigms: R.P. Alford, 'In Search of a Theory for Constitutional Comparativism'*,* 2005 *UCLA L. Rev.* 52, pp. 669-714.

A further concern, whose validity is yet to be verified, is that this practice may hide an argumentative ploy capable of *fabricating* the effect of the audience's adherence to the interpreter.[46] National constitutional judges could simply confirm their *auctoritas* by aligning themselves with the interpretations of judges from powerful democracies in accordance with a somewhat surreptitious rationale of subjection.

For this reason, in the future, it will be important to evaluate if the spread of interpretive paradigms implies (a) subjection, (b) mimesis, (c) affiliation with cultural and economic zones, (d) sharing of historical and political ties, or (e) derivation of constitutional formal models. In this last case, we should ascertain whether the phenomenon is a particular feature of those systems having a new generation *Bill of Rights*. In fact, if we consider how the lists of fundamental rights of Canada, Israel, South Africa and also Hong Kong are strongly linked to the circulation of models and how these are the legal systems that are witness to a more developed practice of borrowing interpretive paradigms, we could legitimately ask ourselves whether constitutional judges, when interpreting their respective *Bill of Rights*, do not autonomously sense the need to check the views of their foreign 'colleagues' whose constitutions are endowed with similar recent charters of fundamental rights?[47] It is, therefore, important to investigate the patterns of 'migration', checking to see whether they are not a walk along a kind of 'pilgrimage route' with obligatory stops at the 'sanctuaries' of contemporary constitutionalism.

To conclude this picture of the scenarios, *bottom up globalisation* should be mentioned. The notion refers to putting systems (and interpretive, cultural and legal particularities) into global communication where the judges become principal actors (sometimes autonomously and without ties to governmental activities or foreign policy). In this perspective, circulation of interpretive paradigms becomes another force (from the bottom) that pushes towards the creation of interdependence and connection between systems outside the mechanisms strictly controlled by governments and legislatures.

Finally, the role of technology should also be investigated. If one believes that the practice under examination is not conceivable in its current state without tools of computerised communication, we can find support for this hypothesis in the fact that many bodies of constitutional justice created after the post-communist transitions in Central Eastern Europe immediately built efficient websites that made national constitutional jurisprudence available in lingua francas as a sort of international political legitimacy. In this respect, it is worth visiting the website of the Supreme Court of Estonia, which was already running halfway through the 90s and the website of the Hungarian Court. Confirmation of this is exemplified by the judgment in which the Hungarian Constitutional Court abolished capital punishment in 1990, declaring it unconstitu-

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46 In particular for scholars coming from Romano-Germanic legal traditions, based on positivistic frameworks, this represents an 'uncomfortable' dilemma because it would imply accepting a concept of judicial review as jurisprudential activity suspended between judicial and political realms. The problem in terms of legal theory and philosophy is very complex and cannot be dealt with here. Some important studies on the change in the limits of the judiciary function (not just regarding constitutional justice) can be found in M. Rosenfeld, *Just Interpretations: Law Between Ethics and Politics*, 1998; C. Guarnieri & P. Pederzoli, *La puissance de juger,* 1996; L.M. Friedman, *Total Justice,* 1994; C.N. Tate & T. Vallinder (eds.) *The Global Expansion of Judicial Power,* 1995; A. Garapon, *Le Gardien des promesses,* 1996; K.W. Olson, *The Litigation Explosion,* 1991; H. Jacob *et al.*, *Courts Law & Politics in Comparative Perspective,* 1993; M. Cappelleti, *Giudici legislatori?,* 1984. On judges as *Policy Makers*: M.M. Feeley & E.L. Rubin, *Judicial Policy Making and the Modern State,* 1998. Aside from the contradictions implicit in the judiciary function usually demonstrated by the theories of American and Scandinavian legal realism (*cf.* W.E. Rumble, *American Legal Realism,* 1968; G. Tarello, *Il realismo giuridico americano,* 1962; S. Castiglione (ed.), *Il realismo giuridico scandinavo ed americano,* 1981; A. Baratta, 'Le fonti del diritto e il diritto giurisprudenziale', 1990 *Materiali per una storia della cultura giuridica,* no. XX, pp. 189-210), also see the analysis of the concept of *jurisprudence prétorienne* by O. Cayla, 'La chose et son contraire (et son contraire, etc.)', 1999 *Les Etudes philosophiques* 3, pp. 307 *et seq.*; O. Cayla, 'La qualification, ou la vérité du droit', 1993 *Droit* 18, pp. 3-18.

47 South African constitutional doctrine has for some time recognised the close connections with the Canadian legal system, which was a source of inspiration in the creation phase and continues to be so in the current phase of interpretation; see P.W. Hogg, 'Canadian Law in the Constitutional Court of South Africa', 1998 *SA P. L.* 13, pp. 16 *et seq.*

tional under the new legal system.[48] As will be shown, the judicial reasoning contained in the court decision began a significant 'migratory journey' as an example of an alternative interpretive vision to the reasoning of the U.S. Supreme Court. The most important traces of this decision (which demonstrate the penetration of the Hungarian interpretive paradigm) can be found in an analogous ruling of the South African Constitutional Court (mentioned above) which decided on the same delicate issue in 1995.

In conclusion, the consequences of legal interpretation based on *extra*-systemic parameters can be evaluated by borrowing the political metaphor of an Italian philosopher, Massimo Cacciari.[49] He uses the idea of an *archipelago* to define the type of mutual interdependence between cultural, linguistic, national or ethnic groups in Europe. As we have seen, the horizontal communication between constitutional systems is growing and it is developing outside of international and supranational pact based entities. If this is true, we could hypothesise that there is a movement from an international community towards a *Constitutional community.* In the former, legal systems are perceived as *islands.* They communicate through positive legal norms. In the latter, the *islands* are perceived as part of an *archipelago* (made up of distinct units but belonging to the same 'Constitutional community'). In the archipelago, *inter-systemic* legal relations are no longer solely founded on 'authorisations' of positive law (treaties, conventions etc.), but they can also evolve from the comparative method based on the circulation of legal arguments and *extra*-systemic parameters.

48 *Cf.* Decision n. 23/1990 (X. 31.) AB.
49 *Cf.* M. Cacciari, *L'arcipelago,*1997.