

# *European Judges in a Global Society: Power, Language and Argumentation*

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## I. Introduction

The vertiginous changes that are occurring in our society are called globalisation, and, obviously, law as an instrument or technique in the service of all society cannot be free from their effects. Precisely in this field, one of the elements characterising our society is the judge and he is in furtherance, the axis of the political system around which law is created and applied, a reason why it is also reasonable to think that the judge is suffering special transformations as a consequence of globalisation.

To overestimate the phenomenon of globalisation and its effects in law means to forget too quickly other times which were requirements for the configuration of the legal field, the expansion of the Roman empire in ancient times, the middle ages' Christendom, or even the effects that the discovery of the American continent had from the 16th century. In furtherance, Kant, in the end of the 18th century and in his well-known work *Perpetual Peace*, considered a process of globalisation associated with law in the following terms:

“The community –more or less narrow– that was established among all the peoples of earth has made it to a point in which a violation of law, committed anywhere, has effects in all other places; from this one can infer that the idea of a global citizenship law is not a legal fantasy, but a necessary complement of the unwritten code of political and international law that in this way is elevated to the category of public law of mankind and favours perpetual peace, being the condition necessary for it to be possible to keep the hope of a continuous approximation to the state of peace”.<sup>1</sup>

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<sup>1</sup> I. KANT, *Lo bello y lo sublime: La paz perpetua*, 1795, transl. [A. SÁNCHEZ and F. RIVERA, 5th ed., Madrid, Espasa-Calpe, 1972], p. 117. The Spanish version from which this excerpt was translated reads as follows: “la comunidad –más o menos estrecha– que ha ido estableciéndose entre todos los pueblos de la tierra ha llegado ya hasta el punto de que una violación del derecho, cometida en un sitio, repercute en todos los demás; de aquí se infiere que la idea de un derecho de ciudadanía mundial no es una fantasía jurídica, sino un complemento necesario del código no escrito del derecho político y de gentes que de ese modo se eleva a la categoría de derecho público de la Humanidad y favorece la paz perpetua, siendo la condición necesaria para que pueda abrigarse la esperanza de una continua aproximación al estado pacífico”.

In any event, if it was possible to simplify reality so as to better understand it we could bring ourselves closer to the contemporary judge starting from three essential features: the judge is a *power* of the state that, despite its distinctive configurations, is in general limited to the solution of concrete problems;<sup>2</sup> the judge uses a very peculiar legal *language*; and it is more and more important that in his/her decisions the judge makes an effort to justify him/herself with a particular *argumentation*, reasoning why a particular option was chosen as the most appropriate among the different possible ones.

It is thus that first of all the judge is a power of the state who, to paraphrase J.L. Austin, “does things with cases”,<sup>3</sup> with which its limitations are evident to the extent that it is not the judge who selects the cases but s/he must resolve only those disputes within their conferred competence and must act in accordance with very precise rules of procedure; probably the best articulated of these external limits to judicial power was done by Alexis de Tocqueville by observing closely the political evolution of North-American society in its foundational years from the early 19th century.<sup>4</sup> Secondly, the power of the judge is manifested in the solution of cases with words, which highlights the importance of the language of judges, the judicial language,<sup>5</sup> from which, as a rule, other powers of the state draw inspiration, for example the Administrations. And, lastly, if something characterises the judicial power it is the necessity to reason its decisions and use arguments that, according to

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<sup>2</sup> One must precise the effect that the ‘constitutionalisation’ of the whole legal order has had and the distinctive function and evolution the judicial power has had in each legal system, especially the “constitutional courts”, be it the U.S. Supreme Court or continental Constitutional Courts; about the problems created in the U.S., see the work of **L.G. SAGER**, *Juez y democracia. Una teoría de la práctica constitucional norteamericana*, transl. [**V. FERRERES**, Madrid, Marcial Pons, 2007] [Original title: *Justice in Plainclothes: A Theory of American Constitutional Practice*, New Haven, Yale University Press, 2004].

<sup>3</sup> **J.L. AUSTIN**, *How to Do Things with Words*, transl. [**G.R. CARRIÓ and E. A. RABOSI**, *Cómo hacer cosas con palabras*, Barcelona, Paidós, 1982].

<sup>4</sup> **A. DE TOCQUEVILLE**, *La democracia en América*, transl. [**D. SÁNCHEZ DE ALEU**, Barcelona, RBA, 2005], p. 104; who observes: “North Americans have kept these three distinctive characteristics of judicial power; the North American judge can only give a judgment when there is a dispute; s/he does not intervene in particular cases, and in order to act must always wait for the case to be submitted; [...] the American judge resembles in all, thus, the magistrates of other nations; but s/he is invested with an immense political power; [...] this single fact is the cause: Americans have recognised to judges the right to reason their decisions in the *Constitution* more than in *laws*; in other words, they are allowed not to apply laws they deem unconstitutional”. The Spanish version from which this translation was done reads as follows: “Los norteamericanos han conservados estos tres rasgos distintivos del poder judicial. El juez norteamericano sólo puede pronunciar sentencia cuando hay litigio; no interviene sino en casos particulares, y para actuar debe siempre esperar a que se le someta una causa [...] El juez americano se parece en todo, pues, a los magistrados de otras naciones. Pero está revestido de un inmenso poder político. [...] Este solo hecho es la causa: los americanos han reconocido a los jueces el derecho de fundamentar sus decisiones en la *Constitución* más que en las *leyes*. En otros términos, se les permite la no aplicación de las leyes que les parezcan inconstitucionales”.

<sup>5</sup> See in the North American political sphere the analysis of **R.A. POSNER**, *Law and Literature*, Cambridge (Mass.), Harvard University Press, 1998; especially when he refers to the issue of ‘legal texts as literary texts’, pp. 209-302; in fact, he dares to evaluate, for example, judge **B.N. CARDOZO** “mostly a purist, was one of the finest judicial writers in our history” [p. 291].

orthodox thinking, can only be legal. Even though the decisions of the judge are binding and must be complied with inexorably, the evolution of society allows that judgments are criticised to the point after which it is legitimate to change them, by introducing constitutional amendments, by passing new statutes, or simply changing the judges via the established procedure.<sup>6</sup>

It is interesting, thus, to observe in the context of globalisation some relevant aspects of these constitutive elements of the contemporary judge, their power, language and argumentation, and observe it precisely from the European experience; that further can identify these elements easily and almost linearly after the Second World War, in little more than half century. The results of the European experience is the configuration of a judge that should be prepared to face the new perspectives of globalisation, to accommodate a new model of what could be called “judicial cosmopolitanism”, understood as the process of establishing international and supranational judicial instances, necessarily supported by an involvement of national judges in the application of a universal order; and that must be developed in “communicative deliberative contexts”, what is visible especially in relation to human rights in regional spheres, such as the European and American, and in the global legal space.<sup>7</sup>

## **II. The power of the European judge in the society of globalisation: Constitution, European Union and fundamental rights**

Within the narrow limits imposed upon the judge, s/he has an extraordinary effective power in the cases s/he gets to analyse. In *The Federalist*, by approving the U.S. Constitution of 1787, the founding fathers of the United States of America considered that the judicial power was “the least dangerous to the rights established by the Constitution, as its capacity to disturb or curtail them will be smaller”;<sup>8</sup> nevertheless, A. Bickel undertook the duty to warn

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<sup>6</sup> A.M. BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 8th printing, New Haven, Yale University Press, 1976, p. 75; recalls the open battle in the United States between the Executive, presided by F.D. Roosevelt, and the federal Supreme Court during the period of 1937 and 1942, a period he calls the “great constitutional war”.

<sup>7</sup> G. ZAGREBELSKY, “Corti costituzionali e diritti universali”, *Rivista trimestrale di diritto pubblico*, 2006, pp. 297-311.

<sup>8</sup> A. HAMILTON, *El Federalista*, 28 May 1788, No 78, transl. [I. SÁNCHEZ-CUENCA and P. LLEDÓ, *Artículos federalistas y antifederalistas: El debate sobre la Constitución americana*, Madrid, Alianza Editorial, 2002], p. 196. The Spanish translation from which this version was derived reads as follows: “menos peligroso para los derechos que establece la Constitución, puesto que su capacidad para perturbarlos o menoscabarlos será menor”.

about the difficulties of the “compatibility of judicial control with democratic government”.<sup>9</sup> The same can be observed in present day Europe where the increasing power of judges is evident. This is due, in substance, to the fact that the judge of our days is a constitutional judge, a judge bound to fundamental norms, superior to the very laws enacted by Parliaments. But in the Europe of the last half century a new complementary phenomenon has emerged and, even though it has the same *raison d’être*, the existence of new fundamental texts, to this the decisive circumstance that these new texts have their own judicial interpreters must be added: thus, next to the judges applying the Constitution and who, in this way, are constitutional judges, a special jurisdiction in the form of a Constitutional Court; but also an international treaty has been adopted, the European Convention of Human Rights, which, nevertheless, via its supreme interpreter, the European Court of Human Rights, has attained the rank of constitutional charter in Europe. Lastly, starting from an initially economic aspiration, the European Union was created, whose Court of Justice of the European Communities consecrated by its own interpretation the community legal order as an order that, taken as a whole and in the fashion of federal constitutional law, has primacy over the laws of the member states of the Union.

Thus, what characterises European judges is their role as constitutional judges applying the Constitution, judges applying the European Convention of Human Rights and judges bound by European Union law. It is necessary to underline that the legal strength of the several fundamental texts -the Constitution, the European Convention of Human Rights and the constitutive Treaties of the European Communities and the European Union- is derived precisely from the intervention of certain courts, either Supreme or Constitutional Courts of the respective member states, or the Strasbourg Court with respect to the 47 states of the Council of Europe,<sup>10</sup> or the Luxembourg Court in the 27 states of the European Union. One could say, to sum up, that the labelling of a judge as constitutional, human rights or supranational is nothing other than a way of appreciating a certain aspect of the ‘constitutional’ power of the European judge.

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<sup>9</sup> **A.M. BICKEL**, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics, o c.*, p. 235; the later analysis of **J. HART ELY**, *Democracy and Distrust. A theory of Judicial Review*, Cambridge (Mass.), Harvard University Press, 1980, is complementary. The Spanish quote reads as follows: “compatibilidad del control judicial con el gobierno democrático”.

<sup>10</sup> The last state to join the Council of Europe on 11 May 2007, was Montenegro that has also ratified the European Convention of Human Rights.

The first revolution in contemporary law is derived from the recognition of legal effects of national Constitutions and, consequently, its application by the judges. This transformation was visible in the North American constitutional evolution advocated from its beginning in the realisation of a federation of states and of the supremacy of the federal Constitution, what took place especially in the 19th century and most prominently after the Civil War,<sup>11</sup> but was also extended to fundamental rights in particular during the 20th century.<sup>12</sup> Nevertheless, in Europe it was in the middle of the 20th century that the pioneer experiences of the 1920s and 1930s in Austria and Spain were crystallised in systems of concentrated control of constitutionality in Italy, Germany and France, expanding afterwards in the 1970s to Southern Europe; and, in the last decade of the 20th century, to countries of Central and Eastern Europe, including the Russian Federation.<sup>13</sup>

Without prejudice to national peculiarities, the creation of a Constitutional Court, supreme interpreter of the Constitution, does not presuppose taking away power from ordinary judges to interpret and apply the Constitution, but, except for some national systems, as in the paradigmatic French case, judges can question the constitutionality of the laws themselves before the Constitutional Court. In fact, and without reaching the extreme situation of the North American diffuse control that allows the judge not to apply a law s/he considers unconstitutional, in most of the European judicial systems the judge can review the constitutionality of a law in the Constitutional Court.

As the Constitutions claim normative force, the powers of the judge increase to the point that the direct application of the Constitution is done in prejudice of the supremacy of Parliamentary law. In fact, this effect has been particularly meaningful in two of the great legal systems of Europe, the French and the British, which until recently were still “statute-centered” and their deficiencies were put in evidence precisely by confronting them with other

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<sup>11</sup> Thus explains, for instance, **C. WOLFE**, *La transformación de la interpretación constitucional*, Madrid, Civitas, 1991, p. 15.

<sup>12</sup> **M. AHUMADA RUIZ**, *La jurisdicción constitucional en Europa. Bases teóricas y políticas*, Navarra, Thomson-Civitas, 2005, p. 34, explains: “the modern conception of judicial review, founding its aim of legitimacy on the protection of constitutional rights and liberties, is now so deeply rooted that it tends to be taken as classic, when it is a product of the second half of the 20th century”. The original in Spanish reads as follows: “la moderna concepción de la *judicial review*, la que funda en la protección de los derechos y libertades constitucionales su pretensión de legitimidad, está ahora tan arraigada que tiende a tomarse por clásica, cuando es un producto de la segunda mitad del siglo XX”.

<sup>13</sup> The best known expression in Europe of the normativity of the Constitution, and, especially, of constitutionally recognised fundamental rights is drawn from Germany and the Basic law of Bonn of 1949 the Article 1 § 3 of which determines that fundamental rights “bind the legislature, the executive, and the judiciary as directly applicable law”.

orders applicable in France and the United Kingdom with respect to European Union law and the law derived from the European Convention of Human Rights. Thus, for example, the role of the European human rights judge, in the case of the UK, has led to the adoption of a quasi-constitutional statute as the Human Rights Act of 1998.<sup>14</sup> And the same can be said about the effect of the reception of European Community law in the United Kingdom and in France. There, complex challenges to the constitutionality of national laws have been especially paradoxical. National laws are not immune to the effects of Union law, in that they are susceptible to judicial suspension ('disapplication'), as demonstrated by Factortame in the UK,<sup>15</sup> or can be the subject of a 'conventionality' review, as in France.<sup>16</sup>

As U. Breccia has pointed out, this increase in the powers of the judge is manifested in a complementary way in a "return to law", as a wider point of reference than the law itself, and in an "increase of the responsibility of the interpreters".<sup>17</sup>

The penetration of the supranational judge, configured in the framework of the European Communities and the European Union, has had in practice a revolutionary effect similar to the one that produced the consideration of the Constitution as a fundamental norm; probably the new factor is that the supranational judge must apply, *mutatis mutandis*, another constitutional order in the internal order. And this transforming effect has been essential in national legal systems. In fact, the Court of Justice of the European Communities, as it evolved from its condition of mere "judge of the market" towards a "constitutional judge", has developed some structural principles of Union law -the primacy of Community law over municipal law, the direct effect of Community law and the liability of national authorities for violations of Community law- and has configured a law that, despite any reticence it may bring, resembles faithfully a federal law the objective of which is to solve the problems raised by the relations this federal law must maintain with the laws of the states of the federation.<sup>18</sup>

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<sup>14</sup> **I. CRAM**, "Judging Rights in the United Kingdom: The Human Rights Act and the New Relationship between Parliament and the Courts", *Review of Constitutional Studies / Revue d'études constitutionnelles*, 2006, pp. 53-82.

<sup>15</sup> **E.C.J.**, Case C-213/89, *Factortame and others*, 1990, *Rec. p.* I-2433.

<sup>16</sup> **G. PROTIERE and P. BLACHER**, "Le Conseil constitutionnel, gardien de la Constitution face aux directives communautaires", *Revue française de Droit constitutionnel*, 2007, pp. 123-144.

<sup>17</sup> **U. BRECCIA**, "Immagini della giuridicità contemporanea tra disordine delle fonti e ritorno al Diritto", *Politica del Diritto*, 2006, pp. 361-384.

<sup>18</sup> **M. POIARES MADURO**, *We, The Court: The European Court of Justice and the European Economic Constitution; A Critical Reading of Article 30 of the EC Treaty*, Oxford, Hart, 1998.

If the relations between European Community law and the laws of the member states are so similar to the ones peculiar to federal law, the judicial system of the European Union responds precisely to this same federal institutional scheme and counts on judges of the federation, of the European Union, the Community Courts seated in Luxembourg, and the national judges that also act as judges of the European Union.<sup>19</sup>

Precisely the preliminary ruling system constitutes the most paradigmatic example of a procedure of 'federal' collaboration between national judges and the Court of Justice. In this sense, without the richness of this special way of access to the Luxembourg Court, European Community law could not have become what it is nowadays. For example, it is unlikely that in a direct action, such as the action for annulment, damages, etc., which deals with merely administrative or constitutional questions among the European institutions, could have created a jurisprudential doctrine about direct effect, primacy and liability. The same can be said about the action of non-compliance, put in the hands of the Commission or even of the member states and that, definitely, resembles and builds on the Luxembourg Court, an arbitral tribunal on the compliance of obligations derived from European Community law. In turn, in preliminary rulings and without prejudice to the prudence sometimes shown in answers to national judges, the Court of Justice resolves concrete cases of citizens.

In the evolution of the same action for non-compliance the procedure adopted, of fundamentally intergovernmental character, has been adapted in such a way to the new profiles of European integration that the classic technique of International law is softened and adapted to a focus more concerned with the resolution of questions asked initially to the European Commission but that in fact try to resolve complaints or disputes of the citizens.

For this reason the Court of Justice often resolves by two simultaneous judgments a preliminary ruling and an action of non-compliance; obviously, the jurisprudential doctrine is the same but the formal answers from the Court of Justice to the action of non-compliance and the preliminary ruling are different; in the first case the non-compliance from a member state is declared and in the second one there is an indication to the national judge on how s/he should resolve the dispute affecting the citizen.<sup>20</sup>

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<sup>19</sup> D. RUIZ-JARABO COLOMER, *El juez nacional como juez comunitario*, Madrid, Civitas, 1993.

<sup>20</sup> Thus illustrate, for example, the two judgments of the Court of Justice of the European Communities, of 27 October 2005, about public contracting; in the first judgment, about a case that was pending before a Spanish

But it is also important to underline that the jurisdictional activity of the Court of Justice of the European Communities is very meaningful if one refers to statistics in accordance with which in 2006 preliminary rulings represented 46.32% of the cases started before the Court; further, in 2006 of the 389 judgments, 192 were preliminary rulings and 111 were judgments relative to the non-compliance by the authorities of member states. From an evolutionary point of view, from 1952 to 2006, the Court of Justice has given 7,178 judgments and during this same period 5,765 preliminary rulings from national judges have been registered in the Luxembourg Court.<sup>21</sup>

In the past decades the Court of Justice has added to its work as “judge of the market” that of “human rights judge”, a task facilitated with the adoption in December 2000 by the European Union institutions of the Charter of Fundamental Rights of the European Union. It must be stressed that even in the language one can appreciate a qualitative change: one does

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judge, the *Audiencia Nacional* (C-234/03, Contse, S.A., *Rec.* p. I-9315), the Community Court answered in these terms: “It follows from all the foregoing considerations that *Article 49 EC precludes a contracting authority* from providing in the tendering specifications for a public contract for health services of home respiratory treatment and other assisted breathing techniques, first, for an admission condition which requires an undertaking submitting a tender to have, at the time the tender is submitted, an office open to the public in the capital of the province where the service is to be supplied and, second, for evaluation criteria which reward, by awarding extra points, the existence at the time the tender is submitted of oxygen production, conditioning and bottling plants situated within 1 000 kilometres of that province or offices open to the public in other specified towns in that province, and which, in the case of a tie between a number of tenders, favour the undertaking which was already providing the service concerned, in so far as those elements are applied in a discriminatory manner, are not justified by imperative requirements in the general interest, are not suitable for securing the attainment of the objective which they pursue or go beyond what is necessary to attain it, which is a matter for the national court to determine”; and in the second judgment, addressing an action for non-compliance Commission / Spain (C-158/03, not published in the *Rec.*), the Court of Justice concluded declaring “that *the Kingdom of Spain has not complied with its obligations by virtue of Article 49 EC by including* in the list of conditions for a public contract of sanitary services of residential respiratory therapies and other techniques of assisted ventilation, on the one hand, a requirement of admission that forces the procuring company to dispose, in the moment of presenting the offer, of an office open to the public in the province in which the service must be rendered or, in its case, in the capital and, on the other hand, some criteria of valuing of offers that, in order to give additional points, take into consideration the existence, in this same moment, of production and packaging facilities located, according to the case, in Spain or at least 1,000 km from the province in question, or offices open to the public in other determined locations of the latter, and that, in case of a tie among several offers, the company that has previously rendered the service in question”. The original in Spanish, from which no official English translation is available, reads as follows: “que *el Reino de España ha incumplido las obligaciones que le incumben en virtud del artículo 49 CE al incluir* en el pliego de condiciones de un contrato público de prestación de servicios sanitarios de terapias respiratorias domiciliarias y otras técnicas de ventilación asistida, por una parte, un requisito de admisión que obliga a la empresa licitadora a disponer, en el momento de la presentación de la oferta, de una oficina abierta al público en la provincia en la que debe prestarse el servicio o, en su caso, en su capital y, por otra parte, unos criterios de valoración de las ofertas que, a efectos de atribuir puntos adicionales, toman en consideración la existencia, en ese mismo momento, de instalaciones de producción, de acondicionamiento y de envasado ubicadas, según el caso, en España o a menos de 1.000 km de la provincia de que se trate, o de oficinas abiertas al público en otras localidades determinadas de esta última, y que, en caso de empate entre varias ofertas, favorecen a la empresa que haya prestado anteriormente el servicio de que se trata”.

<sup>21</sup> E.C.J., *Activity Report 2006*, Luxembourg, Opoce, 2007, <http://curia.europa.eu/es/instit/presentationfr/index.htm>



not speak in the European Union, as it is normal in the international arena, of “human rights” but of “fundamental rights”, that is, the terminology used in continental Europe, by German influence, to refer to “constitutional rights”; this is due, definitely, to the technique of this very Court of Justice in deriving its interpretation from “the constitutional traditions common to the member states”.

To sum up, the Court of Justice is acquiring a new, more constitutional profile than it was initially possible to imagine, what is derived from a revised judicial structure in the last two decades with the constitution of a Court of First Instance and a specialised Court of Public Service.<sup>22</sup> Definitely, the European Union Court faces new challenges, especially after the enlargement of the European Union to 27, but the elevation of European Union law to Constitutional law in the member states and its consideration as a constitutional norm by community courts and national courts in applying Union law is uncontested.

Lastly, the protection of fundamental rights is connected to the recognition of the normative value of the Constitutions in which they are proclaimed. Even if one could think that in the North American case since 1791 the Bill of Rights of the Constitution had effects upon the interpretation of the Supreme Court, what happened is that it was necessary to wait until the 20th century for North America to make the effective judicial protection of individuals’ fundamental rights a reality. In the European case, the point of departure is much clearer as until the second half of the 20th century one could not properly speak of judicial protection of fundamental rights. And this protection has been undertaken at the same time as the several democracy waves: in the late 1940s and 1950s in France, Italy and Germany; in the 1970s and 1980s in Southern Europe; and in the 1990s in Central and Eastern European countries.<sup>23</sup>

This judicial protection of constitutional rights has been strengthened by the work of the European Court of Human Rights in the application of the European Convention of Human Rights of 1950. Even if the evolution of the Strasbourg Court from its inception in

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<sup>22</sup> G. DE BÚRCA and J.H.H. WEILER, *The European Court of Justice*, Florence, European University Institute, 2001.

<sup>23</sup> Certainly each country has had its own evolution when it comes to the judicial recognition of fundamental rights; thus, for example, in the case of France it was the *Conseil Constitutionnel* who, through its decision of 16 July 1971, undertook a revolution expressed in four words: “vu la Constitution *et notamment son préambule*” what made that the revolutionary Declaration of 1789 acquired, almost two centuries later, full constitutional normativity.

1959 has been gradual, in it one can appreciate an opening to the presentation of individual complaints that has been made fully effective from the entry into force of Protocol 11 on 1st November 1998. But in any event the jurisprudential repository achieved until this moment was already impressive.

The European Court of Human Rights, which applies the European Convention to which there are already 47 states Parties, has experienced a spectacular increase in the number of cases what has supposed an extraordinary judicial response to the point that in 2006 in Strasbourg 47,733 complaints were received and 1,560 judgments were given. While in the foundational stage of the European Court, from 1960 to 1998, it had not given more than 837 judgments, from 1998 to 2006 the number of judgments rises to 5,655.<sup>24</sup>

Thus, once a critical mass of judicial decisions is obtained, the most important challenge faced by the Strasbourg Court is in facing the risk of a judicial collapse. In response to such a concern on 13 May 2004 Protocol 14 was signed, and it is awaiting only the last and necessary ratification, the 47th, from the Russian Federation. In this protocol important institutional and procedural changes are proposed: for example judges would be elected for a non-renewable term of 9 years (new Article 23 of the Convention); the function of admitting complaints now left to a committee of three judges would be undertaken by a single judge (new Article 27 of the Convention), and the committees would have the possibility to give judgments on matters where there is a settled jurisprudence (new version of Article 28 of the Convention); the Human Rights Commissioner of the Council of Europe would have the possibility of presenting written observations and participating in the public hearing (new Article 36 § 3 of the European Convention). A possibility of enforcement of judgments before the European Court to the Council of Minister is also foreseen (new Article 46 of the Convention); lastly, the adherence of the European Union is made possible (Article 59 § 2 of the Convention).

The institutional relation between the development of the European Union and the protection of human rights in Europe has been the work of judges. On the one hand, the Court of Justice of the European Communities, before it could rely on a Charter of Fundamental Rights of the European Union, already referred since 1974 to the common constitutional

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<sup>24</sup> **E.C.H.R.**, *Report 2006*, Strasbourg, 2007, <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity/>

traditions, to the European Convention and its interpretation by the European Court of Strasbourg.<sup>25</sup> In the same way, the European Court has been, to the greatest possible extent, respectful of jurisprudential developments of the Court of Justice of the European Communities even though it has reminded the connection of the European Union Institutions, including the Court of Justice itself, to the European Convention and the doctrine of the European Court itself.<sup>26</sup>

Thus, in the characterisation of the European judge, the complementary traits, characteristic of a constitutional jurisdiction, a supranational jurisdiction and a fundamental rights jurisdiction, relative to the several levels in the exercise of jurisdiction merge: in every state, in the European Union or on the European scene. It should be noted that, in any case, each judicial instance unequivocally aspires to simple, proper, and full constitutional jurisdiction.

### **III. The language and argumentation of contemporary European judges: The convergence of models**

The external aspect of judicial language and the internal structure of a judge's discourse are connected and have a series of implications of particular importance not only within law but also in the political conception of the functions and powers performed by judges in society. In this way, for example, Michel Troper considers that the 'motivation' constitutes an ideology that dons a mask and dissimulates the reality of power with the value of law, but also in the structure of the motivation lies its autonomy for at the same time the power is shaped, it is limited.<sup>27</sup>

Both the language and the argumentation of judges depend, to a large extent, of the legal tradition to which they belong. A long time ago, Neil MacCormick has presented in a simple yet particularly penetrating way the difference between two cultural traditions, the Continental European and the Anglo-Saxon, and explained how they are translated into the language of the judges, and also in their way of reasoning and argumentation:

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<sup>25</sup> **E.C.J.**, Case C-4/73, *Nold*, 14 May 1974, *Rec.*, p. 491, § 13.

<sup>26</sup> **E.C.H.R.**, *Matthews v. United Kingdom*, 18 February 1999, §§ 32-33 and 39; **E.C.H.R.**, *Bosphorus v. Ireland*, 30 June 2005, §§ 159-165.

<sup>27</sup> **M. TROPER**, "La motivation des décisions constitutionnelles", in *La motivation des décisions de justice*, Brussels, Bruylant, 1978, pp. 301-302.

“The contrast is sometimes considered as that between deduction and induction, sometimes as that between law as science and law as art. Certainly, I have the impression that in Continental Europe, with its tradition of a career judiciary recruited from among gifted and relatively young men and women, there is much emphasis (perhaps there has to be) on the idea of judging as a science which can be learned and which must be practised with an impersonal rigour. In Britain, on the other hand, it is not the trained scientist but the practised artist who, having distinguished himself in a long period of practise in advocacy, is eventually summoned on to the bench to be a judge. And in that role it would almost be true to say that he is being called to a more exalted practice of the same art as before, rather than graduating to a wholly different mode of thought and activity.”<sup>28</sup>

Now, these social differences and the corresponding sensitivities derived from the civil law and common law traditions fade away and converge in the European judges appreciating some new judicial models in continuous evolution and that are represented by the Court of Justice of the European Communities and the European Court of Human Rights; the Luxembourg one as the direct heir of the Roman-Germanic legal tradition -as one can deduct from the establishment of the European Communities in the 1950s as a French signal particularly relevant through one of the drafters of the ECSC Treaty, Professor Paul Reuter-, and the Strasbourg more influenced by the Anglo-Saxon legal culture – to the extent that the United Kingdom has participated since the beginnings of the European system of human rights protection, unlike the Common Market and its institutions until its adherence in 1973. In any event, the transformation points towards the achievement of a transparent language, adjustable to the demands of the democratic principle and the requirements of a judicial argumentation that, definitely, legitimises the exercise of judicial power. The result has manifested itself in a fertile dialogue among the judges, not exempt from tensions and polemic, that gradually configured an embryonic European judicial power; or, if preferred, an European judicial space open to debate and controversy.

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<sup>28</sup> **N.D. MACCORMICK**, “The Motivation of Judgements in the Common Law”, in *La motivation des décisions de justice*, Brussels, Bruylant, 1978, pp. 168-169. The Spanish translation from which the current version has been derived reads as follows: “En unos casos el contraste que resulta sería al equivalente al que existe entre deducción e inducción, y en otros se correspondería con el que se produce entre el derecho como ciencia y el derecho como arte. Tengo la impresión de que en la Europa continental, con su tradición de jueces de carrera reclutados entre hombres y mujeres brillantes y relativamente jóvenes, se tiene muy en cuenta, quizás tendría que ser así, que la tarea de juzgar es una ciencia que debe ser aprendida y que debe ser practicada con un rigor impersonal. En cambio, en Gran Bretaña no es un científico entrenado sino un artista práctico el que, habiéndose distinguido durante un amplio período de práctica en la abogacía, finalmente es llamado al estrado para ser juez; y en esta función se puede constatar que es convocado para realizar la más conspicua práctica del mismo arte que ya practicaba con anterioridad y que propiamente no le exigirá un modo de pensar y una actividad diferente de la desarrollada con anterioridad”.

The expansive force of democracy has also left some of its effects in the power of the judges, and, by influence of these, in the other powers of the state.<sup>29</sup> Now, traditionally one tends to think that judicial language, more than clarifying, tries to obscure the reasons behind the judicial decision; nevertheless, democratic values, of unveiling the powers that belong to the people, of the *arcana imperii*, require that the exercise of power is clarified, require power to be exercised in the most transparent way possible.<sup>30</sup>

In this way, the first demand imposed on the judge, or to who exercises judicial power, is that s/he understands what s/he is saying and, secondly, it is required that the *raison d'être* of the judicial decisions is explained, since modernly it is also necessary that the mandates are accepted and it is required, thus, that arguments are given why the decision is adopted in a certain way. About this one can affirm as a sign of our times, as Viola and Zaccaria indicate, that “law is a task consisting of inoculating reasonability into the exercise of authority”.<sup>31</sup>

In fact, to refer to the power of persuasion of the judge has an evident ‘valorative’ burden as to what are the powers of the judge and what her/his function in current society presupposes.<sup>32</sup> It is commonplace to consider that the motivation of decisions constitutes an

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<sup>29</sup> **A. DE TOCQUEVILLE**, *El Antiguo Régimen y la Revolución*, 1856, transl. [A. HERMOSA ANDUJAR, Madrid, Istmo, 2004], p. 171, recalled, nevertheless, that in pre-revolutionary France “the administration itself had borrowed much of the language and uses of justice. The king felt always obliged to motivate his decrees and expose the reasons before concluding; the council laid down decrees preceded by large preambles; the prefect notified his ordinances through an usher. In the bosom of all the administrative bodies of ancient origin -such as, for example, the one of treasurers in France of the elected ones-, matters were discussed publicly, being decided after the arguments. All these habits, all these forms constitute so many other barriers to the arbitrariness of the prince”. The Spanish version from which this translation was done reads as follows: “La propia administración había tomado mucho en préstamo del lenguaje y de los usos de la justicia. El rey se sentía siempre obligado a motivar sus edictos y a exponer sus razones antes de concluir; el consejo emanaba decretos precedidos de largos preámbulos; el intendente notificaba sus ordenanzas por medio de un ujier. En el seno de todos los cuerpos administrativos de origen antiguo -como, por ejemplo, el de los tesoreros de Francia o el de los elegidos-, los asuntos se discutían públicamente, decidiéndose después de los alegatos. Todos esos hábitos, todas esas formas constituían otras tantas barreras al arbitrio del príncipe”.

<sup>30</sup> **L. WITTGENSTEIN**, *Tractatus logico-philosophicus*, 1918, transl. [Madrid, Alianza, 1993], formulated a proposition 4,116 the literal application of which would do much good to judicial language: “one it can even be thought of, it can be thought of clearly; when it can be expressed, it can be expressed clearly”. The Spanish version from which this translation was done reads as follows: “Cuanto puede siquiera ser pensado, puede ser pensado claramente. Cuanto puede expresarse, puede expresarse claramente”.

<sup>31</sup> **F. VIOLA and G. ZACCARIA**, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Bari, Laterza, 2000, p. 74. The Spanish translation from which the current version is derived reads as follows: “el Derecho es una tarea que consiste en inocular razonabilidad al ejercicio de la autoridad”.

<sup>32</sup> About authoritarian societies, that could be the absolute monarchies of the 18th century, **H.G. GADAMER**, *Verdad y método, Fundamentos de una hermenéutica filosófica*, 5th ed., Salamanca, Sígueme, 1993, Vol. I, p. 401, pointed out: “For the possibility of a legal hermeneutic it is essential that the law binds all members of the legal community equally. When this is not the case, as it happened, for example, during the absolutism, where the will of the absolute lord was above the law, it is no longer possible to have any hermeneutic, ‘as a superior lord can explain his own words including against the usual rules of interpretation’”. The Spanish version from which this translation was done reads as follows: “Para la posibilidad de una hermenéutica jurídica es esencial

advancement made by the revolutionaries of the 18th century in the face of the absolute power of the *ancien régime*; more specifically, as a more eloquent manifestation of this tradition one can recall the advice of the medieval commentator: *si cautus sit iudex, nullam causam exprimet*; that is, if the judge is prudent s/he will abstain from offering reasons.<sup>33</sup> In the Anglo-Saxon legal tradition no legal text imposed as a rule on the English judge the obligation of motivating decisions; by being an officer of the King, no accountability and reasoning for decisions could be demanded, but this obligation to motivate sentences had to be founded on ancient jurisprudence from the early 18th century.<sup>34</sup>

The internal structure of reasoning employed by judges at the moment of adopting their decisions depends to a large extent on one's conception of law and one's own cultural and legal environment.

On the one hand, the reach of argumentation varies substantially according to the perspective from which the power of the judge is conceived: as a power bound to reason or as a power derived from will. When a judicial decision is considered as a result from saying the law, of *iurisdictio*, judicial argumentation has a secondary function and would consist solely of making the legal reasoning employed understandable and that inevitably leads to the judicial decision adopted, as it seems to be deducted from the technique of subsumption [*subsunción*], so much advocated in continental Europe and until recently the one responsible for the peculiar way French courts had of expressing themselves.<sup>35</sup> On the other hand, when

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que la ley vincule por igual a todos los miembros de la comunidad jurídica. Cuando no es éste el caso, como ocurría, por ejemplo, en el absolutismo, donde la voluntad del señor absoluto estaba por encima de la ley, ya no es posible hermenéutica alguna, 'pues un señor superior puede explicar sus propias palabras incluso en contra de las reglas de la interpretación usual'.

<sup>33</sup> P. GODDING, "Jurisprudence et motivation des sentences, du Moyen Âge à la fin du 18e siècle", in *La motivation des décisions de justice*, Brussels, Bruylant, 1978, p. 48.

<sup>34</sup> J. SPREUTELS, "La motivation des sentences pénales en Angleterre", in *La motivation des décisions de justice*, Brussels, Bruylant, 1978, p. 196.

<sup>35</sup> J. JIMÉNEZ CAMPO, "Sobre los límites del control de constitucionalidad de la ley [en] España", in E. AJA, *Las tensiones entre el Tribunal Constitucional y el Legislador en la Europa actual*, Barcelona, Ariel, 1998, p. 178 ; is an advocate of a deeply rooted version thus expressed: "Jurisdictional argumentations are, and this is of the greatest importance, decisive, not persuasive. Their value lies, to put it in another way, not on their positive effect of convincing or, more modestly, of persuasion, but on their objectivity, that is, their straneity to any estimatives that require, or intend, a community of 'beliefs' ('general doctrines' in the sense of John Rawls) or appreciations of opportunity between those arguing and the addressees of the argument. These, certainly, are not few in a court (the parties, the doctrine, the public opinion), but, independent of that, the value (legitimacy or acceptability) of the jurisdictional reasoning must be, strictly speaking, of negative character: one accredits most of all that one does not have and leaves it to the world of opinions". The original in Spanish from which this version was done reads as follows: "Las argumentaciones jurisdiccionales son, y esto es del mayor relieve, decisorias, no suasorias. Su valor está, dicho de otro modo, no en su positiva eficacia de convicción o, más modestamente, de persuasión, sino en su objetividad, esto es, en su ajenidad a cualesquiera estimaciones que

one understands that the function of the judge consists of a power of decision founded upon the power's will, the argumentation demands an unexpected leading role to the extent the judge must explain why s/he chooses one or another of the different alternatives offered in the application of law and that it is not for a fancy but in attending to reasons expressed by the judge and that lead to the imposition of will. Obviously, legal reality is not that simple and every judicial decision requires conformity to the law, demanding a combination of reason and will in judicial decision-making.

Similarly and by what is referred to the effect that different legal conceptions have on the way of argumentation, one can consider, for example, that in the positivist view the application of law is not more than a logical inference, the judge's way of expressing does not require more than an explanation of the elements used in the automatic application of law; in exchange, if the conception sustained admits several solutions as legally possible, the argumentation demands an extraordinary dimension to the extent that it is sought after for showing that the decision reached is the best one possible.

We could also take into account the legal tradition manifested in the choice of judges and that, obviously, has a decisive influence on the forms of reasoning, argumentation and decision of judges. Thus, the Anglo-Saxon judicial reasoning is best understood if one takes into account that it corresponds to judges who in general have been previously acting as attorneys or barristers, while in the continental European cultural sphere judges are usually recruited like the rest of servants among graduated young people and only after a professional career they reach the highest positions of judicature, a circumstance that favors decisively the more technocratic language.

The preceding factors influence, at last, the interpretation undertaken by each judge, who must choose, among the several available methods of legal interpretation, the one best adjusted to the decision. As Alf Ross already warned, "every interpretation that shifts the basis of the logical-grammatical principle is law creation".<sup>36</sup> But also Jean Hauser has recalled

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requiera, o que pretendan, una comunidad de 'creencias' ('doctrinas generales' en el sentido de John Rawls) o de apreciaciones de oportunidad entre quien argumenta y los destinatarios de la argumentación. No son pocos, por cierto, los destinatarios de la argumentación de un tribunal (las partes, la doctrina, la opinión pública), pero, con independencia de ello, el valor (legitimidad o aceptabilidad) del razonamiento jurisdiccional ha de ser, en sentido estricto, de carácter negativo: se acredita por todo aquello de lo que prescinde y relega al mundo de lo opinable".

<sup>36</sup> **A. ROSS**, *Teoría de las fuentes del derecho. Una contribución a la teoría del derecho positivo sobre la base de investigaciones histórico-dogmáticas*, 1926, transl. [J.L. MUÑOZ DE BAENA, A. DE PRADA and P.

and proved with examples a painful obviousness to any lawyer: “only with the words of the law one can make much, both in the 19th and in the 20th centuries or even, with the same words, one can maintain in the 20th century the opposite of what was maintained in the 19th century”.<sup>37</sup>

The judicial models of each legal system support these conclusions. Thus, for example, M. Lasser did a comparative analysis among three courts that are significant examples of three different ways of expression and reasoning: the model of the French *Cour de cassation* is institutional, the U.S. Supreme Court takes an argumentative focus and the community Court of First Instance adopts an argumentative and institutional perspective.<sup>38</sup> To get to this conclusion he analyses the modes of interpretation of the three courts, their composition and the origin of the judges (in the French case they come from the elitist group of magistrates; in the U.S. case the most frequent case is that they have been in several careers such as attorneys, civil servants or academics).<sup>39</sup> Lasser also examines the manner of expression (for a North American lawyer it is surprising that a decision of the *Cour de cassation* can fit into one single page, while the U.S. Supreme Court presents its decisions in an extremely detailed fashion); and, similarly, it is relevant that the debate is only internal (in the European case) or that it is made public in individual opinions (in the U.S. Supreme Court one can easily identify the opinion of each judge that is frequently laid down in a concurring or dissenting opinion in relation to the majority decision); which definitely creates different kinds of responsibility: institutional in the European case and individual in the U.S. practice. To sum up, “the key to control and legitimacy of the North American judicial system lies on an interpretive justification made public in discursive terms, while [in the French case] the republican justification is undertaken through institutional, professional and educational means”.<sup>40</sup> When it comes to the Court of Justice of the European Union, M. Lasser presents

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LÓPEZ, Madrid, Centro de Estudios Políticos y Constitucionales, 1999], p. 406. The Spanish version from which the current translation was derived reads as follows: “toda interpretación que rebase [e]l principio lógico-gramatical es creación de derecho”.

<sup>37</sup> J. HAUSER, “Le juge et la loi”, *Pouvoirs*, 2005, No 114, pp. 141-142. The Spanish version from which the current translation was derived reads as follows: “Tan sólo con las palabras de la ley se puede hacer mucho, tanto en el siglo XIX como en el siglo XX o incluso, con las mismas palabras, se puede sostener en el siglo XX lo contrario de lo que se sostenía en el siglo XIX”.

<sup>38</sup> M. LASSER, *Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court*, New York, New York School of Law, Jean Monnet Working Papers, 2003, No 1/03, p. 31.

<sup>39</sup> J.F. WEBER, *La Cour de cassation*, Paris, Études de la documentation française, 2006, p. 153.

<sup>40</sup> The original reads as follows: “la clave del control y de la legitimidad del sistema judicial norteamericano radica en una justificación interpretativa hecha pública y en términos discursivos, mientras que [en el caso



the function of intervention of the Advocate General, who, even though being a member of the Community Court, lays down his/her conclusions independently and impartially before the Court of Justice adopts the judgment through secret voting and without the possibility of individual opinions.<sup>41</sup>

Making reference to the difference between European courts, in this case the European Union Court of Justice, and American courts, J.H.H. Weiler underlined the “special and dependent relationship” between the Court of Justice and national courts and has proposed, “in what refers to the architecture”, “that the model should be less Anglo-American and more continental, but in what refers to the style of the decisions, I believe that the Court should abandon the cryptic and Cartesian style that keeps on characterising many of its resolutions and adopt a more discursive, analytical and conversational style that is more often associated with the world of common law (even though others also practice it, such as, for example, the German Constitutional Court)”.<sup>42</sup>

Thus, the divergences in legal culture can result in an extraordinarily important obstacle for the functioning of courts up to the point that, in the opinion formulated by the judge of the European Court of Human Rights Gerald Fitzmaurice, when referring to the difficulties of interpreting the European Convention, is determining the political and cultural framework:

“Both parties may, within their own frames of reference, be able to present a self-consistent and valid argument, but since these frames of reference are different, neither argument can, as such, override the other. There is no solution to the problem unless the correct -or rather acceptable- frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even

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francés] la justificación republicana se lleva a cabo a través de medios institucionales, profesionales y educativos”.

<sup>41</sup> The advocate general fulfills also a pedagogical role manifested in the custom of bringing in her/his conclusions a great number of scholarly opinions with a widespread use of footnotes from which s/he exposes her/his own proposal; one must be warned, however, of the risk that this scholarly urge of advocate generals leads them to a more professorial analysis and deviates them from the judicial solution.

<sup>42</sup> **J.H.H. WEILER**, “La arquitectura judicial después de Niza”, in *La encrucijada constitucional de la Unión Europea*, Madrid, Colegio Libre de Eméritos y Civitas, 2002, p. 480. The Spanish original reads as follows: “que el modelo debería ser menos angloamericano y más continental, pero en lo que se refiere al estilo de las sentencias, creo que el Tribunal debería abandonar el estilo críptico y cartesiano que sigue caracterizando a muchas de sus resoluciones y adoptar el estilo más discursivo, analítico y conversacional que se asocia más con el mundo del *common law* (aunque otros también lo practiquen, como, por ejemplo, el Tribunal Constitucional alemán)”.

policy, rather than correct legal or logical argument, there is scarcely a solution along those lines either”.<sup>43</sup>

For this reason, in Europe, a convergence of models is produced and one seeks to find a balance between the continental European traditions and perspectives and the Anglo-Saxon focus and practical solutions, avoiding extremes such as the synthetic oracles of French courts and the argumentative over-abundance of other European courts. This convergence is appreciated and is progressive between the modes of action and reasoning of the European Court of Justice and the more flexible model of the European Court of Human Rights.

#### **IV. The judicial cosmopolitanism and the communicative deliberative contexts in Europe and the world**

In Europe the simultaneous activity of national judges, European Community judges and judges of the European Court of Human Rights has presumed in the past five decades the opening of an intense dialogue among judges.<sup>44</sup> In a society of globalisation this judicial dialogue should be more intense in the sense indicated by, for example, G. Zagrebelsky: “when constitutional goods are made interdependent and indivisible, it is natural that constitutional justice of any level aspires to integrate itself -even if not in a cosmopolitan supranational institutional way, what is not the goal and perhaps never comes to be- at least in communicative deliberative contexts; sooner or later the interaction will not be able to prevent a certain convergence of results”.<sup>45</sup> Nevertheless, while in Europe the dialogue in the judicial space increases, in the international society it keeps on encountering obstacles.

Because it refers to Europe and practically for the same reasons why the power of the judge in his/her condition as a constitutional judge is increased, the process of constitutionalisation has converted the dialogue of judges into a “dialogue of constitutional reach”. In all levels of jurisdiction -national, supranational and human rights- a dialogue is

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<sup>43</sup> E.C.H.R., *Golder v. United Kingdom*, 21 Feb. 1975, individual opinion, § 23.

<sup>44</sup> D. SARMIENTO RAMÍREZ-ESCUDERO, *Poder judicial e integración europea. La construcción de un modelo jurisdiccional para la Unión*, Navarra, Thomson-Civitas, 2004, p. 331.

<sup>45</sup> G. ZAGREBELSKY, “Corti costituzionali e diritti universali”, *o.c.*, pp. 297-311. The Spanish version from which the current translation is derived reads as follows: “Cuando los bienes constitucionales se hacen interdependientes e indivisibles, es natural que la justicia constitucional de cualquier nivel aspire a integrarse -si bien no en una forma institucional supranacional cosmopolita, lo que no está a la vista ni quizás lo esté jamás- al menos en contextos deliberativos comunicantes. Tarde o temprano la interacción no podrá impedir una cierta convergencia de resultados”.

produced, not exempted from true battles among judges within each level and, obviously, among the different jurisdictional levels. In this way the fact that the judicial power is an effective power in our society and that there is no power to which there is no open or hidden control, or any interference from other power, is put in evidence, if anyone still doubted it.<sup>46</sup>

Internally, the judicial dialogue in European states has been conducted fundamentally among the ordinary courts and the new constitutional courts. In fact, this dialogue has presupposed, even when not explicitly, true field battles in which pseudo-legal arguments are used and there is always an appeal to a well determined policy. In Italy after World War II, the *guerra fra Corti*, but also in Spain the fight between the Constitutional Court and the Supreme Court one trying to assert itself over the other or, at least, to keep spheres immune from the intervention of the other, reveal the reach of this dialogue or of this struggle for dominance, to the point that the Spanish Constitutional Court achieved in 2007 that, at least formally, the legislator protected the supremacy of the Constitutional Court through amendments to its organic law.<sup>47</sup>

Further, the influence of European law over municipal law is particularly notable in the judicial argumentation when new judicial references start manifesting themselves and can be authoritative, even to the extent of equivalence to or supremacy over those of the Supreme or Constitutional Courts. In fact, the most important and fruitful dialogue has happened between the Court of Justice and the Constitutional Courts, especially in Germany and Italy, since the mid-1970s.<sup>48</sup> This dialogue was established precisely in the area of protection of fundamental rights and since this moment the Court of Justice -in the words of some only to defend the primacy of European Community law- has elaborated a jurisprudence respectful of

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<sup>46</sup> As Judge Jackson has warned in his well-known concurring opinion: “we are not final because we are infallible, but we are infallible only because we are final”; **U.S. Supreme Court**, *Brown v. Allen*, 1953, 344 U.S. 443, 540.

<sup>47</sup> **The Organic Law [Ley Orgánica] 6/2007**, of May 24, which modifies the **Organic Law 2/1979**, of October 3, of the Spanish Constitutional Court, *BOE*, 25 May 2007, No 125 introduces a new Article 4 § 2 according to which and in case it was not already clear: “The resolutions of the constitutional Court cannot be judicially questioned by any jurisdictional organ of the state” (the Spanish original reads as follows: “Las resoluciones del Tribunal Constitucional no podrán ser enjuiciadas por ningún órgano jurisdiccional del Estado”). This legislative reform is undertaken after grotesque battles taken in Spain between the Supreme Court and the Constitutional Court, the former even declaring the civil liability of all judges of the Constitutional Court, except one, for rejecting over procedural grounds a rights appeal (*recurso de amparo*) formulated against a decisión of the Supreme Court relative to the form of appointment of law clerks in the Constitutional Court, and convicting 11 constitutional magistrates to pay 500 Euros each **TS (Sala 1a)**, *Sierra Gil de la Cuesta*, 23 Jan. 2004, No 51/2004.

<sup>48</sup> See a more detailed analysis in the study of **J. BAQUERO CRUZ**, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, Florence, European University Institute, RSCAS Working Papers, 2007, No 13.

fundamental rights and inspired, on one hand, by the national constitutional traditions, and, on the other, by the European Convention of Human Rights and its interpretation by the Strasbourg Court.<sup>49</sup> More recently one can appreciate a dialogue between the Courts of Luxembourg and Strasbourg that is facilitated by the provisions of the European Constitutional Treaty of 29 October 2004, where Article I § 9 *alinea* 2 reads: “the Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; such accession shall not affect the Union’s competences as defined in the Constitution”. Nevertheless, this same clause seems likely to be kept once the works of the intergovernmental conference of 2007 are concluded.<sup>50</sup>

For the moment the dialogue has not had any meaningful crises, even though an increase of the control of the European Court over the Court of Justice is progressively announced. In fact, this is how the judgments of the European Court of Human Rights of 18 February 1999, *Matthews v. United Kingdom* and 30 June 2005, *Bosphorus v. Ireland* are read. In the latter judgment, the Strasbourg Court has established a jurisprudential criterion according to which:

“The protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, “equivalent” (within the meaning of § 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the EC (see § 156)”.<sup>51</sup>

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<sup>49</sup> **P. MENGOLZI**, as an Advocate General of the Court of Justice, in his conclusions of 26 October 2006, in the case *Gestoras Pro Amnistía and others v. Council* [C-354/04 P and C-355/04 P, § 180], pointed out “how unfounded is the suspicion often voiced that the jurisdiction of the Court with regard to respect for fundamental rights as general principles of Community law is inspired not so much by genuine concern for the protection of such rights as by a desire to defend the primacy of Community law *and of the Community court* in relation to the law and authorities of the member states”.

<sup>50</sup> According to the Conclusions of the German Presidency of the European Council of 21-22 June 2007, in the Draft mandate of the Intergovernmental Conference (IGC), contained in annex one, a new Article 6 for the Treaty of the European Union will be adopted, according to which: “(1) The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on [...] which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. (2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law”.

<sup>51</sup> **E.C.H.R.**, *Bosphorus v. Ireland*, 31 July 2005, §§ 154-156 and 165.

In turn the Court of Justice has acted as a “fundamental rights judge” applying the jurisprudential doctrine of the European Court as a precondition for the application of Community law itself and interpreting Community law in accordance with fundamental rights.

When it comes to the European Convention as a precondition for the application of Community law, the judgment of 7 January 2004, *K.B.*, is very important, in which the Court of Justice comes to the conclusion that “Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other”.<sup>52</sup> In this way the Community Court takes as its own the conventional tools for protection of fundamental rights coming from Strasbourg.

As to the interpretation of Community law in accordance with human rights as interpreted by the European Court, in a judgment of 12 September 2006, the Court of Justice dismisses an action for non-compliance presented by Spain against the United Kingdom relative to the new regime of elections for the European Parliament in Gibraltar adopted precisely in compliance with the judgment of the *Matthews Case* in the European Court of Human Rights. In this action for non-compliance both the European Commission and the British Government maintained in Luxembourg that the conformity of the British regulation with Community law should be examined “so far as possible in the light of and in conformity with fundamental rights” (§ 86), a reason why the Court of Justice ended up considering:

“In the light of that case law of the European Court of Human Rights and the fact that that Court has declared the failure to hold elections to the European Parliament in Gibraltar to be contrary to Article 3 of Protocol No 1 to the Convention in that it denied ‘the applicant, as a resident of Gibraltar’ any opportunity to express her opinion on the choice of the members of the European Parliament, the United Kingdom cannot be criticised for adopting the legislation necessary for the holding of such elections under conditions equivalent, with the necessary changes, to those laid down by the legislation applicable in the United Kingdom”.<sup>53</sup>

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<sup>52</sup> E.C.J., Case C-117/01, *K.B.*, 7 Jan. 2004, *Rec.* p. I-541, Opinion, § 36.

<sup>53</sup> E.C.J., Case C-145/04, *Spain v. United Kingdom*, 12 Sept. 2006, *Rec.* p. I-7917.

One must note that the Court of Justice departed from the proposal of Advocate General A. Tizzano, who in his conclusions reasoned: “such an exception can be allowed only to the extent to which it is imposed by a superior rule, such as one designed to protect a fundamental right. In the case before us, however, no such right is at stake”.<sup>54</sup> For this reason the judgment of the Court of Justice claims greater importance by adopting, unlike the Advocate General, a perspective more concerned with the rights of people than keeping the traditional focus of international relations in which ‘state sovereignty’ is a principle that, despite it all, is still deeply rooted.

As it is obvious, this dialogue between courts is not limited to the vortex of different legal systems but it allows a crossed and concurrent dialogue of all European judges. That is why it is more and more frequent that lower courts openly reject the doctrine of courts of appeal or cassation invoking or making reference, for example through the preliminary ruling procedure, to the Court of Luxembourg;<sup>55</sup> or simply giving more attention to the doctrines of some courts to the detriment of others.<sup>56</sup>

Now, outside of Europe and in a secessionist universal judicial field, one can see strong tensions and important attempts of express opposition to this phenomenon of judicial cosmopolitanism. Even when the process of globalisation requires, on the one hand, a greater attention from judges to comparative law,<sup>57</sup> and despite the fact that a ‘legal globalisation’ has occurred through more or less successful attempts following the European model of jurisdictional protection of human rights,<sup>58</sup> it is certain that this judicial cosmopolitanism is made more difficult in an important way by the proponents of a “judicial provincialism” and before the lack of evolution or of ‘jurisdictional’ solutions for the international society.

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<sup>54</sup> **E.C.J.**, Case C-145/04, *Spain v. United Kingdom*, Opinion of Advocate General A. Tizzano, 6 Apr. 2006; **E.C.J.**, Case C-300/04, *Eman and Sevinger*, § 129, *Rec. p.* I-7917.

<sup>55</sup> This is the result, for example, of the preliminary rulings from Spanish judges resolved in judgments of the **E.C.J.**, Case C-342/01, *Merino Gómez*, 18 Mar. 2004, *Rec. p.* I-2605, §§ 22-23; **E.C.J.**, Case C-81/05, *Cordero Alonso*, 7 Sept. 2006, *Rec. p.* I-7569, § 41.

<sup>56</sup> **A. GUAZZAROTTI**, “La CEDU e l’ordinamento nazionale: Tendenze giurisprudenziali e nuove esigenze teoriche”, *Quaderni costituzionali. Rivista Italiana di Diritto Costituzionale*, 2006, pp. 494-495, has proven the pression under which the Constitutional Court is put in what refers to the protection of human rights both by the Luxembourg Court and, particularly, the Strasbourg Court.

<sup>57</sup> **A. BARAK**, “L’exercice de la fonction juridictionnelle vu par un juge: le rôle de la Cour suprême dans une démocratie”, *Revue française de Droit constitutionnel*, 2006, p. 301, affirms: “I am convinced that with globalisation comparative law will play a more and more important role”. The Spanish version from which this translation was done reads as follows: “Estoy convencido de que con la mundialización, el Derecho comparado representará un papel cada vez más importante”.

<sup>58</sup> **J. GARCÍA ROCA**, “La interpretación constitucional de una declaración internacional, el Convenio Europeo de Derechos Humanos, y bases para una globalización de los derechos”, *Revista Europea de Derechos Fundamentales*, 2005, pp. 37-82.

The most meaningful example of judicial provincialism is the attempt to approve in the U.S. Congress the Constitution Restoration Act, with which it was intended to prevent that the Supreme Court and federal judges resorted to legislation or case law coming from other countries or from an international organisation. The Constitution Restoration Act proposed in 2004 and re-proposed in 2005 by some American Congress Members and which, luckily, has not been approved, had a provision according to which: “in interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organisation or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States”. The worst of this political proposal, which would be nothing but legal nonsense, is that the non-compliance with this prohibition would constitute, according to the Constitution Restoration Act, an infraction by which the judge -any judge, including the Supreme Court judges- could be removed as a breach of this law supposed non-compliance with the requirements of judicial good conduct.<sup>59</sup>

Also the limits of judicial cosmopolitanism are rooted in the lack of international judicial organs that go beyond the international regional spheres, for example the European or the Inter-American, and constitute ‘universal justice’. In fact, not even the International Court of Justice has become a true universal judge as it is mediated in its operation by states; and, to a certain extent, the same can be said about specialised Courts of the United Nations, particularly the International Tribunals for former Yugoslavia, for Rwanda, *etc.*

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<sup>59</sup> In the Anglo-Saxon legal sphere one can notice a certain setback when it comes to the international protection of human rights, as noticeable in the analysis of **M.A. WATERS**, “Creeping Monism: The Judicial Trend toward Interpretive Incorporation for Human Rights Treaties”, *Columbia Law Review*, 2007, pp. 628-705, when advising national courts to be cautious in adopting more monistic techniques of interpretation, trying to anchor the use of international sources in a firm commitment to consider, first and foremost, their function as internal actors [p. 695] and avoid that through the judicial back door international human rights norms enter which have not managed to enter through the legislative front door [pp. 697-698]. And in American constitutionalism the discussions of the past four years have had an extraordinary reach that has increased even within the **U.S. Supreme Court**: *Roper v. Simmons*, 2005, 543 U.S. 551; see, for example the analysis of **C.A. BRADLEY**, “The Federal Judicial Power and the International Legal Order”, *The Supreme Court Review*, 2006, No 3, pp. 59-113; **D.C. GRAY**, “Why Justice Scalia Should Be a Constitutional Comparativist”, *Stanford Law Review*, 2007, pp. 1249-1279; **L. HELFER and A.M. SLAUGHTER**, “Why States Create International Tribunals: A Response to Professors Posner and Yoo”, *California Law Review*, 2005, pp. 1-58; **E. A. POSNER and C.R. SUNSTEIN**, “The Law of Other States”, *Stanford Law Review*, 2006, pp. 131-179.

With respect to the International Court of Justice, it is still limited in the exercise of its jurisdictional functions due largely to the procedural and substantive legitimacy of state before the Hague Court. In this way, only timidly and through unclear constructions -from a more sensitive and developed internal judicial perspective-, as the rules about *ius cogens*, the jurisprudence of the International Court of Justice only has effects on the doctrine about the judicial protection of human rights.<sup>60</sup>

Only in cases such as the opinion, of 9 July 2004, about the legal consequences of the building of a wall in the occupied Palestinian territories, the Hague Court explains:

“To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12 § 1 of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in §§ 122 and 133 above, contravene Article 49 § 6 of the Fourth Geneva Convention and the Security Council resolutions cited in § 120 above”.<sup>61</sup>

Also indirectly, the International Court of Justice, when referring to the exercise by states of the defense of human rights the holders of which are, obviously, people, their affected nationals, could deal with questions relating to citizens. From this results the judgment of 27 June 2001, in the *Lagrand Case*, that pitted Germany against the United States, in which the Hague Court considered that Article 36 § 1 *alinea* b) of the Vienna Convention on consular relations establishes the obligations of the state of origin with respect to a person who has been detained and, in particular, the obligation that, in some instances, the state of residence informs “with no delay” the state of origin about the detention of the person in question.<sup>62</sup> Applying this same doctrine the International Court of Justice adopted the judgment of 31 March 2004, in the case of *Avena and other Mexican Nationals*, that put Mexico and the United States as adversary parties in the case and by virtue of which the

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<sup>60</sup> C. VILLÁN DURÁN, *Curso de Derecho internacional de los derechos humanos*, Madrid, Trotta, 2002, pp. 507-508.

<sup>61</sup> I.C.J., *Legal consequences of the building of a wall over occupied Palestinian territories*, Judgment, 9 July 2004, *Rec.*, 2004, p. 136, § 134.

<sup>62</sup> I.C.J., *Lagrand* [Germany v. United States], Judgment, 27 June 2001, *Rec.*, 2001, p. 466, § 77.



Hague Court declared that the United States had not complied with the obligation under Article 36 § 1 *alinea* b) of the Vienna Convention, of informing the detained Mexican nationals of their rights.<sup>63</sup>

Considering the aspired universality of human rights within the United Nations, it must be observed the way in which the United States of America are reticent, and simply do not bind themselves to certain international treaties; in fact, there is a negative and even a militant opposition from the U.S. government to becoming a party to the Statute of the International Criminal Court, adopted by virtue of the Rome Convention of 17 July 1998.<sup>64</sup> Moreover, the specialised tribunals, that will be able to establish precise doctrines about the exercise of rights by citizens, have reduced their jurisdictional scope to international crimes. Finally, as we have signalled in the European sphere, judges need a critical mass of cases to do things. In this sense, the comparison between the European Court and the Court of Justice is very revealing, with its abundant critical mass of cases, and the Inter-American Court of Human Rights, before which only gradually new cases are presented; in this sense and in the period of functioning of the Court from 1979 to 2006, it has handed down 162 judgments and 19 advisory opinions; in the non-advisory sphere the judgments only resolved 85 cases.<sup>65</sup> And the same can be said, *mutatis mutandis*, about the International Court of Justice in The Hague which in 60 years of functioning it has only registered 136 cases.<sup>66</sup>

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<sup>63</sup> **I.C.J.** *Avena* [Mexico v. United States], Judgment, 31 Mar. 2004, *Rec.*, 2004, p. 12, § 106; prior to that, in the affair relative to the provisional measures requested by Paraguay to suspend the execution of the death penalty determined against a Paraguayan national, Ángel Francisco Breard, by the courts of Virginia, the North American counsel, as indicated by the **I.C.J.** *Vienna Convention on consular relations, provisional measures* [Paraguay v. United States], Order, 9 Apr. 1998, *Rec.*, 1998, p. 248, alleged: “that the indication of the provisional measures requested by Paraguay would be contrary to the interests of the states parties to the Vienna Convention and to those of the international community as a whole as well as to those of the Court, and would in particular be such as seriously to disrupt the criminal justice systems of the states parties to the Convention, given the risk of proliferation of cases; and whereas it stated in that connection that states have an overriding interest in avoiding external judicial intervention which would interfere with the execution of a sentence passed at the end of an orderly process meeting the relevant human rights standards” [§ 22]. Despite the judicial order to suspend the execution U.S. Courts disregarded it and in Virginia the death penalty imposed was executed on 14 April 1998, being the reason why Paraguay gave up the contentious procedure, accepting only the diplomatic apologies of the United States.

<sup>64</sup> Until the signature of the Rome Statute there was hope that, with adaptations, the United States would eventually become parties to the treaty; however, the sweetening of the international judicial system in this sphere has not had effects so far; see the analysis of the negotiations in the study coordinated by **K. AMBOS**, *La nueva justicia penal supranacional. Desarrollos post-Roma*, Valencia, Tirant lo blanch, 2002.

<sup>65</sup> **I.-A.C.H.R.**, *Annual Report 2006*, <http://www.corteidh.or.cr/informes.cfm>.

<sup>66</sup> According to the data of the International Court of Justice itself, between 22 May 1947 and 2 June 2007, there had been 136 cases registered, of which 112 were contentious cases and 24 advisory opinions: <http://www.icj-cij.org/docket/index.php?p1=3>; in the case of the Permanent Court of International Justice and in the period between 1922 and 1944 there were 29 contentious cases and 27 advisory opinions.

## **V. Conclusion**

As it has happened in the last two centuries and especially in the second half of the 20th century, the new times of globalisation are presuming a gradual and unstoppable increase of the power of judges, a power that can be characterised as ‘constitutional’; but in exchange for this power the judge has to be clearer and more transparent in her/his language and must try to ascertain which are the reasons of judicial decisions in a permanent dialogue with all courts; a dialogue to which the creation of supranational courts, which, along with national judges, decide in shared spheres, has contributed decisively. For this reason, in Europe the constitutional judge, the supranational judge and the human rights judge do not stop being expressions of a same legal reality in which different levels or spheres of decision have been established that, in the case of the most evolved orders, are characterised by the creation of a superior jurisdictional organ, such as is the case, in particular, of the Court of Justice of the European Union and the European Court in the sphere of the Council of Europe, for the interpretation of the new constitutionally neighboring spheres.

One of the problems with the power of the judge is its legitimacy. Just as in internal law the issue of legitimacy of the judge can be resolved by appealing to the legitimacy of exercise and only secondarily one takes into account the judge belonging to the same national community, in supranational and international spheres the democratic legitimacy is still harder to argue and is only sustainable to refer to a legitimacy of exercise. Hence, the legitimacy of the great courts is only possible from their focus or attention to private parties, to the rights of natural and legal persons, and not to those that until now were the lead players of international and municipal public law, ‘sovereign’ states, ‘federal’ states, member states to and international organisation. In this sense, when the judicial procedures allow the access of private individuals, either directly – as is reflected in the access to the European Court of Human Rights -or indirectly- as is the case of the preliminary ruling procedure to the Court of Justice of the European Communities that must be always connected to the resolution of a pending case before national courts –, they produce a revolutionary change in the bringing of legal questions and, consequently, in judicial answers. It cannot be other the interpretation that must be given to the compliance with judgments of the Strasbourg Court, or the foundation of the great jurisprudential principles gradually construed in Luxembourg, first direct effect, and then almost automatically supremacy, and, last, as an inexcusable complement the right to

damages for private parties in cases of responsibility of national authorities in the breach of Community law.

The effectiveness of the power of the judge is rooted in the possibility of entertaining cases in which private parties are implicated and that have consequences for citizens. Further, it is necessary to build a critical mass of judgments, not too big or too limited, that allows the resolution of issues with cases. Until now the Court of Justice has managed that, to a certain extent, the critical mass is sufficient and the risk of collapse was eliminated with the creation of prior judicial instances – the Court of First Instance of 1989 and the Court of Public Service in 2004. Similarly, with respect to the European Court, the transformation of the judicial system since November 1st, 1998, with the suppression of the European Commission of Human Rights, has forced the European Court to an intense adaptation that, at this moment, is not completed.

If the European judicial experience is a step towards the attainment of a judicial cosmopolitanism, its realisation will only be possible if the United Nations charter takes into account the change operated in the international society where the states and international organisations cannot be the only subjects of the legal order, but globalisation requires a new leading role to individuals, to people. The evolution towards this new international society must pass necessarily through an international judicialisation of human rights that, even though it can seem at this moment an utopia, cannot go without being proposed, precisely because it is an ideal of justice.

In the case of the introduction of a superior and universal judicial level one must seek to strike a balance and exercise power deferentially with respect to the other courts, such as it has happened in Europe, making the dialogue among judges possible. The key to the success of the new universal court would be localised in the prudent application of subsidiarity among the courts and the exercise of their powers within a margin of discretion each court should enjoy and that must respect the superior court. This is a margin as given by the European Court of Strasbourg to the Community Courts of Luxembourg and national courts, but also the margin of action that the Court of Justice tries to respect vis-à-vis national courts, or that must be given to national courts among themselves, especially in relations among Constitutional and ordinary courts.

To sum up, judges are one of the keys to contemporary political systems and legal orders. When judges do things with cases and when they do them to resolve problems of the citizens they are democratically legitimating themselves and, obviously, they must attend to what happens to citizens in a given historical moment. For this reason in a society which is increasingly interdependent and global it is reasonable that judges keep on performing their functions but it is also understandable that it is necessary to create new supranational and international courts that, along with national courts and in dialogue with these traditional jurisdictions, closely follow the needs of citizens and offer them the solutions that new times require. The European experience is an example of what should be the foundations of a judicial cosmopolitanism centered on the person and based on his/her fundamental rights, constitutional rights, human rights.