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EDITORIAL

ESSAYS

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

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Celebrating nine years together

by

Giuseppe Martinico*

Perspectives on Federalism, Vol. 9, issue 1, 2017

Abstract

Perspectives on Federalism starts off its ninth year with this issue which gathers, as usual, a series of multi-disciplinary pieces. Almost two years have passed since we started our collaboration with De Gruyter, and our journal has since then enjoyed continued growth and has been acquiring international visibility.

2017 is going to be rich in surprises for our readers, with a wealth of interesting projects and special issues which will increase the already high standard of the journal.

2016 was also a very challenging year for scholars interested in federalism; the start of the Trump Presidency and the results of the referendum on Brexit held on 23 June 2016 are just two examples.

Key-words

Brexit, Trump Presidency

1. 2017: confusion still reigns sovereign!

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2016 was also a very challenging year for scholars interested in federalism; the start of the Trump Presidency and the results of the referendum on Brexit held on 23 June 2016 are just two examples.

Indeed, more than a year has passed since the British vote but the situation is still far from being clear. After a judicial saga which placed the UK Supreme Court under substantial pressure, with the famous Miller case, the UK Government obtained the necessary consent from the Parliament to activate art. 50 TEU, a measure which has created growing tensions with Scotland and Northern Ireland. After the delivery of the notification of the intent to leave the EU, the guidelines of the European Council were released, which confirmed that the toughest part of the match is yet to commence. However, soon after this historical activation of art. 50 TEU, Theresa May tried to increase her parliamentary majority by using the card of the snap election. The results of this political hazard are well known, and a "Hung Parliament" was the consequence of May's political miscalculation. May seems now under siege in her own political party and an unexpected alliance with the Northern Irish Unionist seems the only option to go ahead.

On 19 June 2017 negotiations officially started and the UK government offered a deal for EU citizens resident in the UK. Whereas this offer was considered a good start it is not yet sufficient.

On 13 June 2017 the new French President Macron opened the door for a British change of mind. At this point it is almost impossible to prognosticate what will happen, the only certainty is that confusion still reigns sovereigns and undisturbed.

2. In this issue

Tommaso Visone opens this issue with an article on the identity of the Association of South-East Asian Nations (ASEAN). In doing so the author describes the "the ASEAN *Sonderweg*" as an original hybrid of western and local values, a laboratory which goes beyond the Asian Values approach.

Starting from the assumption that conflicts and competition between governments balancing the demands of shared rule is thus inherent in the very nature of federal systems, William M. Myers and Davia Cox Downey delivered a piece of comparative scholarship looking at the case law of the high courts of Australia, Canada, and the United States.

Antonia Baraggia and Maria Elena Gennusa deal with the more and more complicated relationship between the Italian Constitutional Court and the European Court of Human Rights (ECtHR), by looking at the heterologous in vitro fertilization case. As the authors show in this tale of two courts even disagreements and interpretative completion may play a role in improving the multilevel protection of fundamental rights.

Orlando Scarcello enriches the issue with a legal theory piece on complex antinomies, by offering an original take on the *Taricco* saga that has brought the Court of the Justice of the European Union and the Italian Constitutional Court into confrontation over the burning issue of the retroactive application of criminal law *in malam partem*.

Canada is celebrating the 150th anniversary of the Confederation and this journal will devote a special issue to this in the coming months. In this issue Tiago de Melo Cartaxo compares the powers of the Heads of State in the United States and Canada, offering a sound piece of comparative law.

Happy reading and do not hesitate to send us essays, review articles or notes to enrich our journal.

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PERSPECTIVES ON FEDERALISM

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The "ASEAN Way". A decolonial path beyond "Asian values"?

by

Tommaso Visone*

Perspectives on Federalism, Vol. 9, issue 1, 2017

Abstract

The difference between ASEAN and EU in the political and economic realm has an interesting parallel in the system of values and "rights" that are sustained by the two organisations. In effect if we look to ASEAN Human Rights Declaration (2012) or general political principles adopted inside ASEAN we will find several value-oriented peculiarities that distinguish it from EU political and juridical fundamental principles. At the same time such a system of values does not fit with the "Asian Values approach". Thus the ASEAN *Sonderweg* results as an original hybrid of western and local values that goes beyond the "Orientalist" mask of Asia, defining an identity that assumes a singular inclination that could be defined as a difficult and problematic effort towards a "decolonial" option.

Key-words

ASEAN, decolonial thought, identity, Asian Values, regional cooperation

"One Vision, One Identity, One Community"
ASEAN motto

The ASEAN path of regional cooperation is widely recognised as different from that of the EU (Wong 2013; Berkofsky 2010; Camroux 2008). Established on 8 August 1967 with the signing of the Bangkok Declaration, the Association of South-East Asian Nations was founded on three principles that, also after the acceleration of the ASEAN Charter (2007), continue to characterise the Association's life: respect for state sovereignty, nonintervention, and renunciation of the threat or use of force in resolving disputes (Min Lee 2006)[I]. Thus what has been defined – or, better, self-defined - as the "most successful inter-governmental organization in the developing world" (ASEAN website, 2016) goes very far to conceiving the sharing of sovereignty scope that still characterise the core of EU integration process[II] or give a new supranational role to its common institutions[III]. Such a difference in the political and economic realm found an interesting parallel in the system of values and "rights" that are sustained by the two organisations. If we look to ASEAN Human Rights Declaration (2012) or general political principles adopted inside ASEAN we will find several value-oriented peculiarities that distinguish it from the EU Charter of fundamental rights (2000) or EU political and juridical fundamental principles. At the same time, such a system of values does not fit with the "Asian Values approach" as officially defined by ASEAN leaders such as Mahathir Mohammad and Lee Yuan Yew[IV]. Thus the ASEAN *Sonderweg* results as an original hybrid of western and local values that goes beyond the "Orientalist" mask of Asia, defining an identity that assumes a singular inclination that – considering its free interaction with several cultural traditions – could be defined as a difficult and problematic effort towards a "decolonial" option[V]. In such a framework it is interesting to question the direction given by the regionalisation process to local identity(ies) beyond the former path of "Asian values".

1.

Before focusing on "ASEAN values" it is interesting to remember how several intellectuals underlined the absence of theoretical foundation of "Asian values" ideology and its relation to a sort of "orientalist-occidentalist" schema[VI]. Asia, as a distinct region of

the world, is a product of European thought[VII]. After the collapse of Eurocentric world system, if it could be useful from a conventional point of view to continue to use such a concept in geography, in any case it could be use to define an homogeneous civilisation or culture[VIII]. As stated by Amartya Sen in the Nineties :

> "There are no quintessential values that apply to this immensely large and heterogeneous population, that differentiate Asians as a group from people in the rest of the world. The temptation to see Asia as one unit reveals, in fact, a distinctly Eurocentric perspective. Indeed, the term "the Orient", which was widely used for a long time to mean essentially what Asia means today, referred to the direction of the rising sun. It requires a heroic generalization to see such a large group of people in terms of the positional view from the European side of the Bosporous" (Sen 1997, 13).

Thus the idea that there are some values - community (or group), social harmony, individual duty, family ties, etc. - opposed to western ones - individual, individual freedom, individual right, atomistic family, etc. – more than a manifestation of a "Asian" or "East Asia" common culture is to be considered a kind of "Reversed Orientalism"[IX]. There are specific political reasons that allowed the rise of such an "Asian values" discourse. The leader of East-Asia countries, in fact, starting from the Eighties and continuing in the Nineties, tried to use a European concept against the growing western (American) influence in the region (Sen 1997, 28-29). At the same time the concept has been used in order to justify restriction on the individual and press freedom to sustain the paternalistic authority of the government in several ASEAN states (eg. Malaysia and Singapore; see Bloom 2016, 82-83). From this point of view the "Asian Values" discourse represents an example of that kind of political action that can be implemented throughout the new use of a concept, a manifestation of such a "thinking in a political mode" that – theorised by Quentin Skinner – aims to change the constraint on an action through the manipulation of certain normative terms (Visone 2014, 82-83). But such a discourse concretely worked? After the 1997 crisis what has been called the "slow death of Asian Values" began (Caryl 2012). In effect, the crisis created a progressive corrosion of the central Asian Values' myth of a strong correlation between paternalistic/authoritarian government and economic growth. Such a phenomenon has been fed by interesting political changes in Indonesia, Malaysia and Myanmar that demonstrated how the crisis of historical ruling parties/regime does not necessary involve an economic weakening. But such a "slow death" did not

involve the end of a debate on a regional identity that today assumes a new fundamental political and cultural dimension, avoiding the "orientalist" idea of a quintessential traditional unity among Asian cultures. In particular, according to Bilahari Kausikan, the debate concerning architecture of East Asia will become fundamental in order to define, in a more nuanced way, an original path for a region seeking a new identity (Kausikan 2014). Far more than being just a geopolitical issue – beyond the same Kausikan statements – it is possible to stress how ASEAN principles (juridical and cultural) are playing an important role in (re)defining, in an original way, the regions political identity.

2.

In effect if we look to the ASEAN Charter (2008), we will find some interesting affirmations that could support the creation of a political and cultural identity for the South East Asia community. In terms of decision-making the Charter – in article 20, clause 1 – established that "As a basic principle, decision-making in ASEAN shall be based on consultation and consensus"[X]. As noted by commentators, such principles (consultation and consensus) are close to Malawi's concept of *musjawarah* and *mufukat*[XI]. Starting from this source it is possible to stress how the following "consensus" needs not to be interpreted according to the idea of an active "unanimity" or "majority", but more as a mediated common interest that manifest itself in absence of active vetoes[XII]. Consultation, in this frame, must be thought as the attempt to arrive at a synthesis among equal partners[XIII]. Originating from the idea of "non-interference" among national sovereignties, these principles have been conceived as characteristic of the so-called "ASEAN way"(Los Banos 2012, 5). But in any case they – directly originating from Malawian culture – cannot be easily described as just "Asian Values" according to the Nineties' description of the latter (eg. Lew Kuan Yew). In fact interesting parallels were not only found in some practices and principles of the EU[XIV], but are in direct contrast with any "despotic culture"[XV], considering – in a way that cannot be seen as "democratic" according to western thought – the will of other participants and group members [XVI]. From this point of view such principles can be described as a form of "elitism" or "aristocratism" without being expression of despotism or authoritarianism (Acharya 2001, 78). The Charter also presents a commitment to "strengthen democracy" (art. 1, clause 7) which - considering

the strong differences among the ASEAN national regimes and the "non-interference" principle – could have no easy implementation[XVII]. In any case such a commitment, if it cannot translate into the westernisation of ASEAN countries, could play a role against the further legitimisation of authoritarianism in the region. From this point of view it is possible to say that if there is an "ASEAN way", it is difficult to fully situate it inside the "Asian values" or western liberal-democracy frames. Also the effort to create an ASEAN human rights system – which four years ago produced a fiercely criticised regional Human Rights Declaration (AHRD, 2012)[XVIII] – shows some significant peculiarities that could allow us to see how ASEAN is trying to develop not only as a sui generis organisation but also as a particular regional political and cultural identity. The first part of the AHRD displays some interesting features arising from such an effort. The AHRD parts dedicated to General Principles (art. 1-9) and Civil and Political Rights (art. 10-25) have only one subject : the person. Such a concept - used in order to differentiate the Declaration from the western concern with "individual rights" (Clark 2012, 22) – represents an interesting point of contact among the Islamic culture of countries such as Indonesia, Malaysia, Brunei Darussalam[XIX] and the Catholic culture of countries such as the Philippines and Vietnam (which see the biggest Catholic minority of the region - 10% of citizens)[XX]. Furthermore it established a possible point of dialogue with the Buddhist culture - with its attention to personal responsibility - of countries such as Cambodia, Thailand, Myanmar, Vietnam, Laos and Singapore[XXI]. The use of such a subject, the person, allowed thus to include inside the declaration the deeply criticised Article 6 that affirms :

> "The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect human rights and fundamental freedoms" (AHRD 2013, 4).

What is interesting about such an article in the logic of this paper is, more than its evident distance from comparable western charters such as the EU Charter of fundamental rights, its idea to balance - in a system that focuses on the promotion and protection of human rights - freedoms and responsibilities[XXII]. The attempt of article 6, as of the whole ADHR, was to find a point of encounter among the main cultural traditions acting inside

the present regional social life. That includes, of course, originally western ones (such as Christianity, Enlightenment, English language, etc.) nearby Buddhism and Islam. From this standpoint it is possible to say that the logic of "Asian values" – of a direct contraposition (and mutual exclusion) among western and eastern values – is fully overtaken by the ADHR without any simplistic adaptation to a western model[XXIII]. ASEAN's identity effort is thus that of a original – still working and incomplete – creation that, in a syncretistic way, attempts to put together (and to reciprocally limit) different cultural experiences. Today speaking of an "ASEAN way" entails also a consideration of the existence of a laboratory oriented towards the conception and affirmation of a new common identity[XXIV]. Of course, as any laboratory of this kind, it presents several political interests and risks[XXV].

3.

In fact ASEAN governments – that comprehend absolute monarchies and military dictatorships (eg. Brunei Darussalam and Thailand) - had their decisive weight in determinate the specific equilibrium of the ADHR as of the previous ASEAN Charter. The influence of governments, for example, entailed the exclusion of the right of free association from the ADHR or the absence of any reference to the rights of gay, lesbian, bisexual, transgender people (Clark 2012, 22-23). Is the ASEAN way, considered from the point of view of identity, destined to become a new regional cover for a national reality of conservative dominion? The question is licit. If a creative process of definition of common ASEAN values and principles is underway, the possible results of such an attempt are still unclear. What is possible to say here is that to abandon the path of a vision founded on a rigid contraposition between West and East is a necessary starting point in order to be in touch with the regional complexity and cultural history (or histories)[XXVI]. Nevertheless it is not sufficient to open a inter-governmental process – with a insufficient role of civil society organisations - of convergence and dialogue among the different possible perspective on the regional identity (Allison and Taylor 2017, 24-41) in order to guarantee the achievement of the purposes recommended by the same ASEAN Charter that – art.1, clauses 13 and 14 – affirms :

> "The Purposes of Asean are :… 13. To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building; 14. To promote an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of the region…" (The ASEAN Charter, 2015, 5).

From this point of view, the creation of a less inter-governmental and more participated ASEAN institutional framework will be decisive in determining what will finally be attained by such an ongoing process concerning the building of a de-colonial (beyond the dialectic West/East) regional identity. Until that moment the ASEAN Way will remain hostage to the precarious equilibriums among national governments. In effect, if there is a "Eurocentric" myth that must be still abandoned in the region, it is that of Nation-State's absolute sovereignty[XXVII]. But, in this realm, the ASEAN appears still far from the embodiment of an original and de-colonial solution.

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[I] The aims of the association have been defined in seven Bangkok Declaration points: "1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations; 2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter; 3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; 4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres; 5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples; 6. To promote South-East Asian studies; 7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves." (The ASEAN Declaration, 1967).

[II] Of course such a "process" in Europe is facing a radical crisis (Balibar 2016, 11-32).

[III] As stated by Elena Poli also after the 1997 crisis – which showed to ASEAN's elites the necessity to look with major interest to EU model – the differences among the two political and economic entities remains conspicuous and will continue to persist in future (Poli 2014, 9). On the debate for the future of ASEAN see also Masini 2015.

[IV] For an introduction to the concept of Asian Values see Monceri 2002.
[V] I use this concept according to Hamid Dabashi's statement that says "The Orient they" Europeans "had created, the Third World they had crafted to rule and denigrate, have disappeared. If only those who still see themselves as Orientals would begin to decolonize their mind too". In trying to find an original "Asean way" the people of South East Asia are defining a new singularity that does not correspond to old mechanism as "Europe/Asia" or "West/East". In this sense they began to "decolonize" their mind. See Dabashi 2015, 11.
[VI] E.g. see Rošker 2016, 153-164; Tew 2012, 12; Yau Hoon 2004, 154-174.
[VII] An invention that finds its origins in the Greek mythology and that was, only in contemporary history, adopted by the same Asian elites (Markovits 2013: 53-66).
[VIII] Asia could also be conceived as a political concept but, in such a case, its history is very short. It originates from the end of the XIX century and concretely played a role starting in the Nineties (Kausikan 2014).
[IX] And in any case they have to be consider as founded on "Confucian roots" (Rošker 2016, 163).
[X] See The ASEAN Charter 2015, 22. Clause 2 affirms "When Consensus cannot be achieved, the ASEAN Summit can decide how a specific decision can be made".
[XI] "… concepts that Sukarno and the Indonesians introduced to Southeast Asian diplomacy. These terms, rooted in the traditional village societies of the Malay region, represent an approach to decision-making that emphasizes consensus and consultation" (Min Lee 2006).
[XII] "However, "consensus does not assume that everyone must agree; it assumes at least that no one objects to the proposal". In other words, consensus does not require unanimity but rather leads to finding a common interest that could appeal to the whole" (Min Lee 2006).
[XIII] "It endorses a view that "a leader should not act arbitrarily or impose his will, but rather make gentle suggestions of the path a community should follow, being careful always to consult all other participants fully and to take their views and feelings into consideration before delivering his synthesis conclusions" (Min Lee 2006).
[XIV] The unanimity vote in the Council of EU Ministers is valid also with abstentions.
[XV] See the criticism of Lew Kuan Yew thought in Ming-Huei 2001, 85.
[XVI] At its origins the same Confucian culture – differently from what affirmed by Lew Kuan Yew – contained a tendency to consider the will of the people in a way that is not comparable to modern democracy (Rošker 2016, 159).
[XVII] About the condition of the ASEAN process of democratisation see Kraft 2014, 331-341.
[XVIII] See The ASEAN Human Rights Declaration (AHRD) 2013. About the criticism towards AHRD see Clark 2012, 20-23. An interesting statement about such a debate on AHRD is the one of Catherine Renshaw that affirmed: "A member of the Philippines drafting team described it as 'the ASEAN Magna Carta', a document that has finally 'laid to rest the Asian Values Debate and the specter of cultural relativism'. The US State Department has criticised the Declaration on a number of grounds, one being 'the use of the concept of "cultural relativism" to suggest that rights in the ... [UDHR] do not apply everywhere'. Many of the region's CSOs rejected the Declaration outright, on the grounds that 'some of its deeply flawed "General Principles"' will serve to provide ready-made justifications for human rights violations of people within the jurisdiction of ASEAN governments"' (Renshaw 2013, 559).
[XIX] In effect, from the beginning the Islamic culture gives a strong importance to the idea of person (*nafs*). See Grecchi 2009. There have also been Muslims philosophers, as the Moroccan Lahbabi, that worked on a perspective of a Muslim Personalism (Lahbabi 1964).
[XX] In Christian thought the concept of person plays a fundamental role (Ratzinger 1990, 439-454).
[XXI] Buddhist thought has developed a peculiar position about the concept of "person". The doctrine of non-self or "insubstantiality" of the self *Anatman* (sanskrit) or *Anatta* (Pali) entails a view of the being as relation (and only as relation). Thus things and beings exist only as phenomenological interactions and never as "absolutes" (without relation to the rest). According to this view the person exist as a composition of five insubstantial aggregates (materiality, feeling, perception, mental formation and consciousness). Such a person disposes – some scholars don't agree on that point - of volitional action in deeds, words and thoughts, which may be morally good or bad considering that all actions are conditioned but not inescapably determined. Each person is free/responsible of his actions inside the co-dependency relation with society. A Buddhist idea of personal responsibility is present in the ASEAN integration debate. According to such a view there is a complementary role among human responsibilities and human rights. See Busquet 2007, 114-119 and Pasqualotto 2003, 42; Jones 2013 and Kooi Fong 2015. On the debate concerning Buddhism and free will see Repetti 2012, 130-197.

[xxii] The idea of "balance" finds a precedent in the "Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting of Singapore" of 23-24 July 1993 that affirmed "that freedom, progress and national stability are promoted by a balance between the rights of the individual and those of the community, through which many individual rights are realized, as provided for in the Universal Declaration of Human Rights…In this regard and in support of the Vienna Declaration and Program of Action of 25 June 1993, they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights". The difference lies on the 1993 absence of any reference to the concept of "person", in the consequent passage from the "rights of the community" (1993) to the "responsibility of any person" (2012) and in a fundamental inversion of the accent on the issue of "development". In 1993 "Communique" development feed a criticism against the interference of western countries and international institution that sought to use human rights to condition the "development right" while in ADHR art. 35 affirms "..the lack of development may not be invoked to justify the violations on internationally recognized human rights". More generally if the text of 1993, especially on human rights, was all oriented in use the idea of balance to separate the space of ASEAN governments to that of international interference (with an accent on the relationship regarding the respect of national sovereignty and the protection and promotion of human rights) the one of 2012, birth in a different geopolitical context, operates more in trying to find a common ground among the different realities inside the ASEAN (art. 7) and among ASEAN (with its complex equilibrium) and the international community. It is not accidental that the relation among the respect of national sovereignty and the protection and promotion of Human rights completely disappeared in the ADHR. See Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting of Singapore, 1993 and AHRD 2013.

[xxiii] From this standpoint it is possible to disagree with those who affirm that there is a continuity between the ADHR and the Asian values discourse of the 1990's. See Clark 2012, 20.

[xxiv] The ASEAN Charter in effect – differently from the Treaty of Lisbon – fixed by law the symbols of the Association such as the Flag and Emblem. See Annex 3 and 4 of The ASEAN Charter 2015.

[xxv] About the risks of identitary dynamics see the recent work – centered on European context but not un-useful to understand also others – of Prosperi 2016.

[xxvi] It is important to note, also in relation to the recent history of South East Asia, how in the history of thought very frequently distinctions and struggles (eg. Order vs Revolt) have to be considered more transversal to the couple West/East than situated between the two. See Christaudo, Wah Wong and Youzhong 2014.

[xxvii] On this myth in international relations see Hobson 2012, 19-20. But that of "absolute", "non-mediated", sovereignty is more a myth than a reality in the pre-XXth century European thought (De Giovanni 2015).

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Which Governments Come Out Ahead?

by

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Abstract

Party capability theory assumes that governments, due to their immense resources and status as repeat players, hold a great advantage over individuals and organizations pursuing litigation in courts. Less known is whether all levels of government enjoy this advantage, how they fare against one another and how an institutional arrangement such as federalism complicates such relationships. These questions are investigated using decisions made by the high courts of Australia, Canada, and the United States. The descriptive findings indicate that institutional arrangements, such as federalism, in some ways, confirm and in others confound traditional notions of which governments come out ahead, which yields important implications for party capability theory, specifically, and federalism, generally.

Key-words

party capability theory, federalism, Australia, Canada, United States

Federal systems rely on formal arrangements that both define and limit the powers of each level of government and can be organized in two basic ways: vertical or horizontal federalism (Halberstam 2008: 142). Those states that have adopted the institutional framework of horizontal federalism have elected to create organizationally distinct levels of government each equipped with legislative, executive, judicial and fiscal powers. The proliferation of duplicative institutions within and across the levels of government multiplies the potential for conflict as each seeks to probe the limits of defined power. Far from being a set of static institutional arrangements, federalism is, in practice, dynamic governance (Watts 1998: 128) that is often plagued by the inability of governments to define clearly their respective jurisdictional boundaries (Burgess and Gagnon 1993). The need then for a dispute resolution mechanism is inherent in federal systems.

The dominant institutional strategy for resolving conflicts between governments in federal systems has been the referral of disputes to the courts, typically the highest court of the central or national government. The central logic is that such courts serve as "umpires" that are created to enforce the constitutional "rules of the game" against transgressions by each level of government (Field 1934). The fact that the umpire is potentially biased for the national or central government (Bzdera 1993; Dahl 1957; Wechsler 1954) has not been lost on some observers. Though others argue that these concerns have not materialized in fact (Eskridge and Ferejohn 1994; Wheare 1964). Still, the potential for bias and the problems it would create in the dispute resolution process in federal systems looms large. For constituent governments, in particular, a centralized judiciary biased against their interests could very well lead to a federal system dominated by the central government.

One particularly fruitful, but as of yet, unapplied strategy to assess how courts resolve disputes between levels of government, is party capability theory (PCT) (Galanter 1974). Party capability theory argues that litigants or parties that have more resources and experience will have an advantage over opponents who have fewer resources and experience in the context of appellate litigation (Kritzer 2003: 342). Previous analyses of PCT have been conducted at several levels in the United States (Brace and Hall 2001; Lindquist et al 2007; Sheehan et al 1992; Songer and Sheehan 1992; Songer et al 1999; Wheeler et al 1987), Canada (McCormick 1993), Australia (Sheehan and Randazzo 2012; Smyth 2000), England (Atkins 1991), the Philippines (Haynie 1994; 1995), South Africa

(Haynie 2003) and comparatively (Haynie et al 2001; 2013) and have generally provided support for the theory that the resource advantage is present in litigation.

Surprisingly, previous studies of PCT have not yet considered what happens when governments face off against one another in the course of litigation. Since conflict between levels of governments is endemic to federal systems, the government with the most resources may be able to use the litigation process to tilt the "rules of the game" to their advantage. Using party capability theory to explore and assess the success of each level of government in litigation may yield important insights into the dispute dynamics of governments in federal systems. To make such an evaluation, the decisions of three high courts, the United States, Canada, and Australia, are used to construct net advantage scores in litigation for each level of government as individual parties and head-to-head conflicts. The descriptive results, though descriptive and qualified, are broadly consistent with party capability theory. The implications of the analyses for the application of party capability theory to the study of federal systems are further discussed in the conclusion.

1. Federalism and conflict

Federalism is a system of governance where there are multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority (Halberstam 2008: 142). Whether conceived of as a "constitutional bargain" or as a "creative commitment," federalism enables inter-jurisdictional cooperation by placing limits on governments through the distribution of constitutional powers (Halberstam 2008: 143). Though perhaps counterintuitive, federal systems are not static structures but are dynamic and evolving entities that can pragmatically adapt to changing circumstances (Watts 1998: 128). This flexibility facilitates cooperation amongst units of government; however, competition between federal and state authority is also a characteristic of these systems as well (Dye 1990; Kenyon and Kincaid 1991). Since some constitutions are quite specific in the policy-making responsibilities of constituent government and some are not, the court system often becomes cluttered with cases that seek to clarify the lines of authority within certain policy areas (Tully as quoted in Schertzer 2016).

Scholars like Watts, Elazar, and Zimmerman among others have characterized federal systems in two main ways: horizontal and vertical, whereby horizontal federalism as a style is concerned with the intergovernmental relationships between sub-national units that, constitutionally, can express their desires to reflect regional differences, and vertical federalism is concerned with how the national and sub-national units related to each other. Federal systems, under their constitutional arrangements, are challenged by both types of relationships (Elazar 1987; Watts 2000; Zimmerman 2011). Federal systems, like the United States, Canada, and Australia, are emblematic of this type inter-jurisdictional competition (Breton 1996; Halberstam and Hills 2001) created by central and constituent state governments. These systems are characterized by independent political units of government sitting alongside one another, but with a full complement of powers including an independent democratic base, an independent fiscal base and the ability to formulate, execute and adjudicate its policies (Halberstam 2008: 145). The potential for conflict between governments balancing the demands of shared rule is thus inherent in the very design of such federal systems. The importance of creating safety valves to manage conflict is therefore of the utmost importance.

Most federations rely on the courts as a primary safety valve to resolve a conflict.[I] Courts fulfill the primary adjudicating role in the interpretation of the national constitution or the "rules of the game" and adapt the constitution to changing circumstances through the decision-making process (Duchacek 1970: 188-275; Watts 1998: 126). The courts protect the constitutional bargain by enforcing the boundaries of power against encroachment as each level of government seeks to expand their authority at the expense of another. This phenomenon has led scholars to refer to courts, such as the United States Supreme Court, as the "umpire of the federal system" (Braden 1942; Field 1934; Freund 1954; Lenaerts 1990). More explicitly, courts are responsible for "enforcing the legal and constitutional rules governing the mechanics of federalism—the rules governing the position in a federal system which the states occupy, or which the national government occupies (Field 1934: 233).

There is wide disagreement about the court's role as umpire of a federal system with some arguing that it is needless, ineffective or even potentially destructive (Wechsler 1954; Choper 1980; Tushnet 1999: 123). Wechsler's (1954) classic argument against judicial involvement is that there are already sufficient political safeguards in place that are inherent

in federal systems. Others maintain that the central judiciary is not independent enough to serve as an impartial umpire in disputes (e.g. Casper 1976; Dahl 1957). This argument follows from the central government's role in creating the central judiciary, supplying financial resources, and controlling appointments render the central judiciary a natural ally of the central government (Halberstam 2008: 147). Bzdera (1993) argues that there is a tendency for nationally appointed federal courts to use the power of judicial review to augment the powers of the national government at the expense of constituent sub-national units. Bzdera (1993: 28) goes on to suggest that there is a "failure of judicial review in the modern federal state" and that federal courts are complicit with the national government in "the exercise of centralized political control of member states."

Others have observed that "[i]n spite of the formal dependence of supreme courts on the executive and legislature of the general government; they have exhibited a considerable impartiality in the exercise of their function as interpreters of the division of powers" (Wheare 1964: 60-61). In the United States, for example, there has been a steady ebb and flow of the Supreme Court endorsing and withdrawing support for a broad assertion of federal powers (e.g. Eskridge and Ferejohn 1994). There are some reasons why a central judiciary may not be biased against subnational or state governments. These include advancing the judiciary's personal substantive policy preferences (Segal and Spaeth 2002), asserting power vis-à-vis the legislature and the executive (Epstein and Knight 1998) or maintaining their authority, legitimacy, and respect for the rule of law (Gibson and Caldeira 2009). Courts, as a general matter, cannot abide a deep and enduring bias in the dispute resolution process because the perception its neutrality and fairness are inextricably linked to the legitimacy of its decisions and its ability to solicit compliance with those decisions (Shapiro 1981).

Federal systems, especially horizontal types, deliberately create an institutional arrangement that generates competition and conflict between levels of government. The commonly devised solution for positively managing these institutional skirmishes is for the courts to serve as impartial umpires that patrol the boundaries of federal power as each level of government seeks to guard and enlarge their authority at the expense of the others. The project of shared governance through federalism depends on the fair and efficient resolution of disputes by the courts. Gaining a greater understanding of and identifying potential biases in the decision-making process is of great importance.

2. Party capability theory

Galanter's (1974) classic framework for why the law favors the more powerful – the "haves" – as opposed to the less powerful – the "have nots" – depends on the former's ability to draw from and access resources advantageous to litigation. These resources include developing or securing experienced legal talent and specialists, relationships with institutions and established reputations (Galanter 1974: 98-99). Access to these resources skews the probability of litigation success, winning, towards those parties that develop and deploy them regularly – the haves – because the haves long-run interests coincide with developing rules that advantage their ability to absorb some losses while maximizing gains (e.g. a minimax strategy) over the long term (Galanter 1974: 100). It is this type of litigant that Galanter refers to as a "repeat player" because they play for rules, not just a single, particular outcome (1974: 100). These repeat players share the litigation field with have-nots or "one-shotters" who use the courts rarely, more often than not have a claim that outpaces their abilities and resources, and are singularly focused on winning (Galanter 1974: 97-98). It is unsurprising then that when repeat players and one-shotters collide in litigation, the outcome usually favors the repeat players because the rules will reflect the interests or preferences of the group that has been cultivating them – the repeat players (Galanter 1974: 119-124).

A host of studies have evaluated Galanter's general thesis – that more advantaged parties will be advantaged in litigation – in a variety of settings in the United States (Brace and Hall 2001; Lindquist et al 2007; Sheehan et al 1992; Songer and Sheehan 1992; Songer et al 1999; Wheeler et al 1987), around the world (Atkins 1991; Haynie 1994; 1995; 2003; McCormick 1993; Sheehan and Randazzo 2012; Smyth 2000; Songer 2008) and even comparatively across many countries (Haynie et al 2001; 2013). Party capability theory seeks to determine whether a transitive relationship exists between types of litigants and their respective advantage or disadvantage in litigation. Litigants have traditionally been grouped into five categories: national government (including its agencies and officials), other subnational government agencies and officials, businesses (including corporations), groups (e.g., unions, interest groups, churches, and other associations) and individuals (Haynie et al 2013: 9). These categories are arranged based on assumptions of access to

greater litigation resources and where transitivity is assumed (e.g., Haynie et al 2001; 2013; McCormick 1993; Songer and Sheehan 1992; Wheeler et al 1987).

Party capability theory studies have, in general, found broad, but hardly universal, support for the argument that resource disparities systematically advantage the haves over the have-nots. Governments are, in general, strongly advantaged (Atkins 1991; McCormick 1993; Sheehan et al 1992; Songer and Sheehan 1992; Songer et al 1999; Wheeler et al 1987). Kritizer (2003: 343) suggests that government's overwhelming advantage is easily traced back to its ability to make the rules or stack the deck in its favor and that the very courts that claim independence in adjudicating litigation are a part of the government and loyal to the regime (Dahl 1957; Shapiro 1964). These institutional realities create structural advantages for governments in litigation. Nevertheless, particular head-to-head match-ups appear to undermine that advantage. These studies usually involve individuals or businesses prevailing over national or subnational governments (e.g., Haynie 1994; Haynie et al 2001; 2013; Smyth 2000). What has yet to be fully explored is whether a given government's advantage in litigation is affected when its opponent is a different level or type of government.

"Government is a special kind of RP [repeat player]," (Galater 1974: 111) maybe even the ultimate repeat player. As Kritizer (2003) suggests, governments make the rules and engender regime loyalty of courts and judges, but what about the instances when two types of governments, both repeat players, clash in the course of litigation? Repeat players depend on low stakes outcomes where a loss today seldom affects winning tomorrow. Conflicts that are high stakes, between governments, for instance, are unlikely to be conflicts over who gets what, but likely to be value differences over whom is right (Galanter 1974: 111) and will require the intervention of a court as opposed to a settlement.

Federal systems are the most likely environments to observe types of government in regular conflict attempting to resolution through litigation. Conventional wisdom suggests that central or national governments will routinely win litigation contests between subnational or local governments because of their primacy in the constitutional order and the inherent bias that exists in the national courts against other levels of government (Bzdera 1993; Casper 1976; Dahl 1957; Shapiro 1964). However, if the courts must maintain and enforce a constitution that disperses power among the levels of government,

then there may be instances where lower levels of government prevail over national or central governments. To determine which governments come out ahead, cases involving each level of government in the United States, Canada, and Australia must be explored and examined.

3. Case selection

Canada, Australia, and the United States are three federal systems under examination for this analysis. Each has its traditions regarding how much, or little power is explicitly granted within their respective national constitutions, as well as their judicial traditions that may affect interpretations of inter and intra-state powers within each state. In Canada, constitutional development can largely be described in three phases: British rule, Canadian "independence," and the post-Charter era. Originally, Canada had significant ties to Great Britain, its mother country and was considered a colony under British rule until 1931 (although the process of complete legal dependence wasn't fully completed until 1982). Like, Great Britain, Canada was founded with a strong parliamentary system, and the British framers of the first "constitution" in Canada, wrote the British North American Act of 1867 with a special eye towards avoiding the conflicts seen in the United States over issues of state's rights and federal supremacy over the issues of slavery. Unlike the United States at its creation, Canada's courts were subordinate to the British crown, and inter-jurisdictional disputes were decided by the Privy Council (Baier 2006). Upon full severance from British rule, the Supreme Court of Canada gained independence over all legal decisions.

The Canadian federal government in this initial governing regime were given the powers thought to be essential in creating a new economic union—thus had jurisdiction over trade and commerce, interprovincial transportation, banking and currency, postal service and the like. The federal government also had jurisdiction to create laws regarding Aboriginal peoples and protection of some minority and religious rights. Powers of taxation were given to the federal government as well. Section 91 of the British North America (BNA) Constitutional Act of 1867 gave the federal government in Ottawa the power to maintain laws for peace and order throughout the nation and "declaratory power" which would allow the central government to bring provinces under federal

control (Abelson, James, and Lusztig 2002; Bickerton and Gagnon 2000). Between 1867 and 1931 Canada entered into a nation-building phase and with those changes, the BNA changed fifteen times to clarify the lines of inter-jurisdictional disputes. In 1982, Canada passed the Canadian Constitution Act and enshrined in this new constitution were the following important provisions that frame the context of this analysis. First, the ability of the supreme court to nullify legislation, not only in areas of division-of-powers disputes but also by civil rights listed within the Charter of Rights and Freedoms. Second, the ability of the courts to apply "remedies the court sees as appropriate and just," establishing the power of judicial review throughout the nation (Manfredi 1994).

In present-day Canada, the federal government and the provincial governments have specific and enumerated powers (sections 91 and 92 of the Constitution, respectively). Additionally, provincial governments are given exclusive powers regarding education (section 93). The federal and provincial governments have concurrent powers in matters of agriculture and immigration, and the provincial government has limited (and controversial) powers of taxation (Smiley 1974; Simeon 2000).

In Australia, another British territory with a strong parliamentary system, a move towards independence began earlier in 1890. Like Canada, Australia integrates executive and legislative power, whereby the prime minister is chosen from the legislature after the national election, the judicial branch is independent. The Commonwealth government of Australia, like the United States, enumerates federal powers but does not detail the specific powers given to constituent sub-national units. Unlike the United States and Canada, Australia does not have a Charter of Rights and Freedoms, nor a Bill of Rights within their constitution, thus setting up issues related to conflicts over Aboriginal rights, property right disputes, as well as clashes over natural resource protections (Ghosh 2012). Australia has a judicial tradition of siding with the Commonwealth in the event of conflicts in laws created by states or the self-governing territories. Consistently, the judicial branch has invalidated State and or territorial laws that conflict with Commonwealth law (see Baier 2006 for an extensive discussion). As such, the judicial branch has tended to favor unification and federal supremacy as opposed to protecting states' rights. The High Court does, however, use the constitutional review to resolve differences between central and component courts (Saunders and Foster 2014).

The United States is commonly referred to as the first modern federation. At its founding, the framers of the constitution codified within the document the concept of enumerated powers. Thus, the American national government, unlike its state subunits, is one of specifically granted and limited powers. Unlike, Australia and Canada, the United States has separate executive and legislative branches of national government; the judiciary is independent as well. Further, the United States never had a judicial system that was subordinate regarding decision-making to another country. The practice of judicial review (i.e., giving courts the responsibility and power to interpret the constitutionality of sub-national laws) also originated in the United States with the Marbury vs. Madison decision in 1803. The use of judicial review, however, varies dependent on the clarity of enumeration of the powers and responsibilities given to federal government and sub-units as well as legal traditions within the country (Epp 2005; Shapiro 2002). Thus, we can expect that in Australia and the United States, that the lack of enumeration to sub-national units will drive higher rates of conflict, particularly in areas where state and national responsibilities are not clearly defined. Further, based on our understanding of PCT we could also expect that the judicial branch may favor federal supremacy for two reasons: to promote federal unification as we have seen historically in Australia, or because the national level of government is traditionally more resourced and experienced in trying cases against other litigants.

4. Data and measures

The data is drawn from the High Courts Judicial Database, which includes decisions by the United States Supreme Court 1953-2005, the Supreme Court of Canada 1969-2003 and the High Court of Australia 1969-2003 (Haynie et al 2007). Cases involving each type of government (national, subnational[II] or local[III]) were identified and, consistent with previous party capability theory studies, all "boards and agencies established by and operating under the authority of the respective levels of government, as well as ministers and agency heads acting in their official capacity", were included in each government category (McCormick 1993: 527; Songer and Sheehan 1992). Additionally, since we are interested in "who won the appeal in its most immediate sense, without attempting to view the appeal in some larger context" (Wheeler et al 1987: 415); cases where the winner was ambiguous (e.g.

decisions that affirm in part and reverse in part) were excluded from this descriptive analysis.

Previous studies of party capability theory have relied on a key measure of the relative advantage of parties referred to as "net advantage." The net advantage measure was first introduced by Wheeler et al (1987: 418) and is calculated as follows:

Net Advantage = Success Rate as Appellant – (100 – Success Rate as Respondent)

The formula has a theoretical range of -100 to +100 where negative values indicate net disadvantage and positive values indicate net advantage and can be read as percentages. It is commonplace to observe appellate courts, with docket control, as more likely to overturn a lower court by siding with the appellant than upholding a lower court decision by siding with the respondent; appellants tend to prevail at a higher rate than respondents. Importantly, the measure of net advantage takes into account the differences between success rates as an appellant as opposed to a respondent and therefore provides a better indication of a given party's advantage in litigation. Table 1 includes the number of cases, the success rate as appellant, respondent, overall (appellant and respondent) and the overall measure of net advantage by country and type of government.

Table 1. Number of Cases, Success Rates and Net Advantage

Country	*Level of Government*	*Number of Cases*	*Success Rate as Appellant*	*Success Rate as Respondent*	*Success Rate as Appellant and Respondent*	*Net Advantage*
United States						
	National	3006	75.16	58.32	65.10	33.48
	Subnational	3083	61.14	50.41	53.60	11.55
	Local	404	57.60	43.09	48.40	0.69
Canada						
	National	647	56.41	66.59	63.00	23.00
	Subnational	1363	57.56	65.72	63.10	23.23
	Local	246	46.74	57.14	50.90	3.88
Australia						
	National	712	54.23	51.05	51.50	5.28
	Subnational	335	51.88	47.53	48.50	-0.59
	Local	73	34.29	36.84	30.90	-28.87

It is instructive to note the difference in the number of cases that each level of government has been involved. In both the United States (3083 cases) and Canada (1363 cases), subnational governments have been the leading level of government involved in litigation before their respective high courts, whereas the national government (712 cases) leads in Australia. The fact that subnational governments in the United States and Canada appear more often than their counterparts appears to suggest that the high courts have indeed become a venue to address the proper limits of subnational power. The level of government least likely to be engaged in litigation before their nation's high court, numerically, is a local government unit in all three of our case countries. This suggests that high courts are primarily concerned with the national-subnational division of powers.

Additionally, Table 1 reports the relative success rates of each level of government as appellant, respondent and both. What is particularly striking when observing the success rate as both appellant and respondent is that six out of nine levels of government have a greater than 50% success rate overall. Only local governments in the United States and

Australia and subnational government in Australia are below the 50% success rate threshold; it would appear that governments do, in general, enjoy a distinct litigation advantage.

The net advantage values are even more illustrative of how levels of government fare in litigation across each of these three countries. Seven of the nine levels of government enjoy a net advantage against all other parties in litigation before their country's respective highest court. For example, the national government of Canada holds a 23% net advantage against other parties, as either an appellant or respondent, when it stands before the Supreme Court of Canada. The subnational governments of Canada hold a 23.23% net advantage, and the local governments of Canada hold a 3.88% net advantage. Again, net advantage indicates the differences between parties in successful litigation before a high court. These descriptive results suggest that governments of all levels in the United States and Canada hold a litigation advantage against all other parties. Interestingly, it appears that the subnational and local governments of Australia are operating under a litigation disadvantage against all other parties before the High Court of Australia.

Party capability theory suggests that there is a rank ordering between types of government based on the respective ability of each level of government to access resources that are critical for successful litigation. The implication is that the net advantage will be highest for national governments, followed by subnational governments and then local governments. The net advantage column in Table 1 indicates that this rank ordering holds in the United States (33.48% > 11.55% > 0.69%) and Australia (5.28% > -0.59% > -28.87%), but not in Canada (23.00% < 23.28% > 3.88%). The descriptive analysis indicates that the subnational governments in Canada have a slightly higher net advantage than the national government.

The net advantage for each type of government in each country reflects their respective advantage against *all* other parties *not* specifically against other government parties. In that respect, Australia appears to be the anomaly compared to the United States and Canada. In the United States and Canada, each type of government wields a net advantage against other parties while subnational and local governments in Australia are net disadvantaged against other parties (though the national government in Australia is net advantaged). Kritzer's (2003) argument that government represents an advantaged litigant class is, on the whole, consistent with the measures of net advantage presented here.

To fully assess whether a particular type of government has an advantage in litigation, the net advantage of governments in head-to-head match-ups are evaluated.

5. Which governments come out ahead?

The descriptive results of comparisons of net advantage for each type of government against the others are reported in Table 2. The table provides net advantage scores, ranging from -100 to +100, where positive values indicate an advantage and negative values indicate a disadvantage, for each country and level of government. Each level of government's overall net advantage is provided for reference along with the specific match-ups with other levels of government. National governments are compared to subnational and local governments, subnational governments to national and local governments and local governments to national and subnational governments. These comparisons will indicate which levels of government have an advantage or disadvantage when engaged in litigation against another government party.

Table 2. Comparisons of Net Advantage

Net Advantage	*United States*	*Canada*	*Australia*
National Overall	33.48	23.00	5.28
National v Subnational	43.00	3.85	28.21
National v Local	-6.67	40.00	-33.33
Subnational Overall	11.55	23.28	-0.59
Subnational v National	-42.99	-3.85	-28.21
Subnational v Local	3.57	17.05	-50.00
Local Overall	0.69	3.88	-28.87
Local v National	6.67	-40.00	-66.67
Local v Subnational	-3.57	-17.04	50.00

To begin, the head-to-head comparisons of national governments in the United States, Canada, and Australia against subnational governments are evaluated (National v

Subnational[IV]). As is expected according to party capability theory, national governments wield a net advantage against subnational governments in all three countries. The national governments in the United States (43.00%) and Australia (28.21%) are strongly advantaged in litigation against their subnational counterparts, while the Canadian national government (3.85%) is only slightly advantaged. Overall, national governments hold a decisive net advantage over subnational governments in each country and have therefore been more likely to win in head-to-head matchups before each country's highest court. These results are anticipated by party capability theory and have important implications for whether subnational governments face institutionalized disadvantages when they face a conflict with their national governments before a national high court. In other words, the decisions by high courts in the United States, Canada, and Australia have resulted in the national government holding a net advantage over subnational governments in direct conflict litigation between the two levels of government.

The dominance of national governments in these three nation's high courts does not necessarily extend to cases involving local governments (National v Local[V]). The national governments of the United States (-6.67%) and Australia (-33.33%) are net disadvantaged against local governments. These results are inconsistent with the expectations of party capability theory as national governments have much greater access to resources that lead to litigation success compared to local governments. Interestingly, the opposite result is observed in Canada, where the national government has had a 40.00% net advantage in litigation against local governments. The contrast between decentralizing decisions in the United States and Australia compared to the centralization in Canada is striking.

The final set of comparisons of net advantage is between subnational and local governments (Subnational v Local[VI]).Party capability theory suggests that more resourced parties, in this case, subnational governments compared to local governments should have a net advantage in litigation. Subnational governments in the United States (3.57%) and Canada (17.05%) have had a net advantage in litigation against local governments as expected. However, subnational governments (-50.00%) in Australia have been net disadvantaged against local governments, which is unexpected.

The overall descriptive results of the comparisons of net advantages by levels of government largely conform to expectations of party capability theory. National governments are advantaged over lower levels of government, subnational governments

are disadvantaged against national governments and advantaged over local governments, and local governments are mostly disadvantaged against the well-resourced governments above them.

To be sure, there are instances where the comparisons did not conform to expectations. First, national governments in the United States and Australia are at a net disadvantage against local governments. Second, subnational governments, in Australia, are disadvantaged against local governments. And third, in the United States, local governments are advantaged against the national government. These anomalies stand outside of expectations of party capability theory, but they are consistent with the courts acting as umpires of the boundaries of power in federal systems and not purely, in all instances, siding with the better resourced party.

6. Conclusion

This article has sought to investigate whether party capability theory can provide useful purchase in understanding the dynamics of federalism in the United States, Canada, and Australia. All three countries are examples of federal systems where the likelihood of conflict between levels of government is built into the institutional frameworks. In these systems, courts play the crucial role of serving as a venue for dispute resolution but also function as an independent arbiter or umpire of the boundaries of power. Scholars have acknowledged the concern that national courts may be biased for the national government when clashing with subnational or local governments over issues that implicate the limits on power in federal systems (Bzdera 1993; Dahl 1957; Wechsler 1954). Party capability theory suggests that parties with the most resources will have an advantage in litigation against parties with fewer resources (Galanter 1974). The question investigated here is whether litigant resources do offer an advantage to different levels of government. The descriptive findings presented here suggest that resources do in fact advantage parties in litigation.

Decisions from the High Courts Judicial Database (Haynie et al 2007) allowed for the comparison of the net advantage of each level of government against all parties as well as head-to-head match-ups between governments. The net advantage of all three levels of government in the United States and Canada conform to expectations, but contrary to

expectations subnational and local governments in Australia do not benefit from the expected resource advantage. In the head-to-head match-ups between governments, the subnational governments in Canada performed at a higher net advantage that would be expected theoretically. Also, local governments exhibited a higher net advantage against national governments in the United States and Australia, contrary to PCT. These deviations from expectations are, however, entirely consistent with the courts serving as "umpires of federalism." If national governments seek to expand or extend their authority beyond the boundaries of federalism, then the courts should and apparently do decide against them despite their resource advantage.

Despite these notable exceptions, the most striking observation from the descriptive analyses is that national governments are net advantaged against subnational governments in all three countries. The most regular conflicts take place between national and subnational governments and the implications for the balance of power in these three federal systems is important to consider. In the United States (43.00%), Canada (3.85%) and Australia (28.21%), national governments are net advantaged against their subnational counterparts. These results indicate that in conflicts over the boundaries of federalism, over at least a three-decade period, national governments have won an enduring shift in the centralization of power against subnational governments at the expense of shared governance.

The descriptive findings presented and discussed here must be elaborated upon with future research. First, the net advantage scores for each level of government include all legal issue areas, but richer and more complex relationships among governments may emerge when disaggregated into specific issues. Second, a case-by-case analysis may be required to gain leverage over instances where resource advantages have not proven effective. Lastly, it is of crucial importance to understanding the general utility of party capability theory to continue to investigate its applicability in other countries and contexts, especially emerging and consolidating democracies.

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[I] Elazar (1993) stresses the existence of a supportive federal political culture characterized by constitutionalism, tolerance and the recognition of distinctive regional groups.
[II] Subnational governments include state, regional, provincial or territorial governments.
[III] Local governments include city or other local governments.
[IV] In Table 2, note that "National v Subnational" and "Subnational v National" is equivalent; any differences are due to rounding errors.
[V] Again, in Table 2, note that "National v Local" and "Local v National" is equivalent; any differences are due to rounding errors.
[VI] Once again, in Table 2, note that "Subnational v Local" and "Local v Subnational" is equivalent; any differences are due to rounding errors.

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Intertwined but Different. The Heterologous In Vitro Fertilization Case before the European Court of Human Rights and the Italian Constitutional Court

by

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Abstract

International and constitutional law, originally distinct realms with limited areas of intersection, are getting closer and closer, particularly in the European landscape within the human rights protection field, where these mere contacts between the two systems have become intersections and overlaps.

The present article will try to shed light on the still unsolved and problematic issues to which overlapping human rights protection systems give rise, by focusing on an analysis of the heterologous in vitro fertilization case, where both the Strasbourg Court and the Italian Constitutional Court delivered relevant judgments on very similar matters (ECtHR's *S.H.* Judgment; Judgment No. 162/2014 from the Italian CC). Such analysis revealed useful in highlighting connections and disconnections between the different levels of protection of rights, and led us to argue that the development of a multilevel protection of rights is also, at least partially, a tale of Courts, each competing to have the last word on human rights adjudication.

Key-words

Multilevel protection of rights, European Court of Human Rights, Italian Constitutional Court, heterologous In Vitro Fertilization, margin of appreciation, consensus

1. The protection of fundamental rights before the European Court of Human Rights and domestic Constitutional Courts. A theoretical framework of analysis

International and constitutional law, originally distinct realms with small areas of intersection, are getting closer and closer to one another. This is particularly true within the human rights protection field, where mere contacts between the two systems have become intersections and overlaps. The European landscape of human rights protection is probably the stand-out example of such a trend, where several "Charters" (National Constitutions, the Charter of Fundamental Rights of the EU, the European Convention of Human Rights (ECHR), the European Social Charter) and "Courts" (national Constitutional Courts (CCs), the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and the European Committee of Social Rights) are committed to the protection of human rights.

The exact terms of this relationship between such different players is still an open issue among legal scholars and we witness a continuous process of definition and re-definition of the role of Courts in the European landscape. However, all the different theoretical approaches to the human rights protection system in Europe converge on what is an incontrovertible fact: the *intertwined* nature of the international, supranational and constitutional dimensions of human rights protection.

The present paper focuses on the relationship between the international (ECHR) and constitutional pillars of human rights protection – with specific regard to the Italian constitutional system – trying to shed light on the still unsolved and problematic issues to which overlapping human rights protection systems give rise.

In the first place, we need to identify the knots which create such a tangle.

From a formal point of view, the first intersection between the two legal orders is determined by the nature of the Convention: the ECHR is an international treaty to which the Contracting Parties have decided to be bound, and recognize as having a specific legal value in the domestic constitutional area. Such recognition takes place in a different way for each Contracting State, and the legal status of the ECHR within the national sphere is different too: there are States in which the Convention has been granted the status of

constitutional law, others in which it is in a sort of limbo between the Constitution and the ordinary legislation, and yet others in which it has the same status as ordinary legislation.

At the crossroads of the Charters of Rights, we find the second area of intersection which characterizes the multilevel human rights protection system in Europe: the relationship between the ECtHR and national authorities. As it has been argued,

> 'while judgments of the ECtHR have no direct effect at the national level, the increasing *de facto* importance of Strasbourg case law challenges national legal orders, calling into question the role of national constitutional legislatures and judiciary, and ultimately, the sovereignty of the member State' (Follesdal et al. 2013: 6).

Of particular interest is the relationship between the ECtHR and national supreme/constitutional courts, which is commonly referred to as "judicial dialogue". Indeed, the European human rights protection system has developed primarily through the tension – which by the way has not been alleviated - between national courts and the ECtHR, with both claiming authority on human rights adjudication: the former on the basis of their traditional role as constitutional rights watchdogs, the latter as an international regional court with jurisdiction on human rights violations. As argued,

> 'the dynamics affecting the ECHR's constitutional relevance in domestic and European law are not one-sided, nor do they challenge the very structure of constitutional adjudication as provided in some countries; […] Rather, a mutual influence is emerging between the Strasbourg Court and national judges, fairly corresponding to what twenty years ago was predicted as a "form of ordered pluralism", namely a Europe/States relationship which is neither reduced to the primacy of European norm over national rules, nor broken down in a juxtaposed collection of national and European norms which do not form a unitary system' (Delmas-Marty 1992: 321).

For Pinelli, 'It is a kind of pluralism that is not merely compatible with, but stems from, the premises of constitutionalism, and, to that extent, contributes towards demonstrating that the latter is conceivable out of the old state setting' (Pinelli 2013. 247). Moreover, such growing interconnection between the different levels of human rights protection has led to a twofold transformation of both national and international courts: on the one hand, since more and more national functions appear to be delegated to the international level, 'the ECtHR is increasingly seen, not as an international or regional court, but as a constitutional

actor that participates in the formation of European public order' (Dzehtsiarou 2015: 156); on the other hand, despite an apparent and potential marginalization of national courts, they are assigned a primary role in fundamental rights' protection, and to accomplish this role they need to enter in dialogue with the ECtHR. At the same time, 'in these circumstances the Court has to be open to communication from the states and be mindful of the signals that have been sent to the court from national authorities' (Dzehtsiarou 2015: 156).

Despite the ever growing intersection between the international and constitutional dimensions of fundamental rights protection, their relationship remains problematic. This is mainly due to the *ontological* differences (structure, procedure, role in the overall system) existing between the two levels of rights' protection. Moreover, even within each constitutional system the ECHR has a different position in the system of legal sources of law, thus having different strength and effectiveness.

The paper is structured as follows: the first part overviews the general interconnections and the main differences between international and constitutional levels of human rights protection, focusing on the ECHR's role within the Italian legal system (Sections 2 and 3). The second part moves to the analysis of national and ECtHR case law on in vitro fertilization, where similarities and differences between the two intertwined levels of protection are particularly evident. The analysis will highlight the fundamental reasons for similarities and differences between the two systems of protection (Section 4). Section 5 builds up on the previous one, and will compare the different approaches, identifying recurrent features in the relationship between national and international systems, in order to improve understandings of the "intertwined but fragmented" character of global rights protection. Finally, in Section 6 we will try to draw some conclusion from the analysis conducted before.

2. An intertwined path: The place of the ECHR within domestic constitutional systems. A focus on the Italian system

The main reason for the close interconnection between national and ECHR systems of protection of rights lies in the role played by the Convention in domestic orders. As mentioned above, the ECHR is an international treaty and, therefore, it must be respected

by the Contracting Parties, which, through ratification and/or execution, make the ECHR part of domestic legal orders. However, because of this the ECHR does not just provide individuals with a subsidiary and additional remedy against fundamental rights violations; it can also influence the interpretation and the application of domestic Bills of Rights, in ways that partially depend on the legal value accorded to the ECHR within the domestic order. On this point, as one would expect, the general approach adopted by States towards international law becomes particularly prominent. For the sake of simplicity, we can limit our analysis to the monistic and the dualistic State approach, both well known. While in monistic States international treaties become part of the domestic order as soon as they are ratified by the competent national authorities, States following a dualistic path mandatorily require an internal order (i.e. the "execution order") for a treaty to be transposed into the domestic system.

The prototype of the first model is Austria, where the ECHR has been considered since 1964 directly applicable federal constitutional law, being formally equivalent to the original recital of fundamental rights enshrined in the Austrian Constitution. Austria is most probably the 'State which has gone furthest in incorporating the Convention' (Bernhardt 1993: 27), since the rights provided by the Convention complement constitutional rights and have become constitutional parameters in the judicial review of legislation (Montanari 2002: 62).

On the other hand, Italy – upon which the following analysis will prominently focus in order to provide useful elements for a better understanding of the case analyzed in Section 4 – is an example of dualistic State, although the evolutionary trend of the last decade depicts a new kind of dualism, whose features are particularly intriguing for the purpose of this paper.

In Italy, the ordinary law no. 848 of August 4, 1955 executed and therefore incorporated the ECHR into the domestic order. Consequently, it was recognized from the outset as having the same legal value as any ordinary parliamentary statute. Some scholars held a minority position (Quadri 1968: 68) proposing to interpret Article 10, para. 1 of the Italian Constitution (It. Const.) as also capable of influencing the ECHR legal position within the internal system. Since Article 10 states that 'the Italian legal order conforms to the generally recognized rules of international law', it automatically incorporates international customary norms into the domestic system and vests them with a

constitutional status. According to this minority doctrine, due to the automatic incorporation through Article 10 It. Const. of the customary rule *pacta sunt servanda*, international treaties too – and therefore the ECHR – would acquire such a constitutional value capable of prevailing over conflicting ordinary laws. However, the Italian Constitutional Court (CC) constantly rejected this stance, confirming that Article 10 It. Const. could not cover international treaty law, which, therefore, could only get the rank pertaining to the act used for its transposition into the domestic order.[I]

Despite this strong dualistic stance that dominated the initial CC approach – an approach that lasted almost fifty years – such jurisprudence intermittently revealed signals of the CC's awareness of the deep interconnection between the Conventional system of protection of rights and the national one. Indeed, it is worth mentioning for example Judgment no. 388/1999 (Pollicino 2015: 364),[II] where the Court solemnly stated that 'the Constitution and the other Charters of rights integrate one another, each completing the interpretation of the other'.[III] In doing so, the CC implied that, although the ECHR was endowed with the formal status of ordinary statutory law, it could nevertheless influence the domestic application of fundamental rights by promoting an interpretation of internal law consistent with the principles enshrined in the Convention.

Subsequently, growing signs of interconnection between the two systems of fundamental rights protection became evident in the CC's jurisprudence following the Italian constitutional reform passed in 2001, which introduced a first paragraph into Article 117 It. Const. stating that 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

Starting from the "twin judgments" no. 348 and 349, both delivered in October 2007,[IV] the CC acknowledged that, pursuant to reformed Article 117, para. 1 It. Const., the ECHR should be ranked at a different level within the domestic order. However, the ECHR did not acquire a truly constitutional status; rather, it became an "interposed" rule, placed in an intermediate position between constitutional and ordinary norms, and maintained a sub-constitutional status while obtaining a supra-legislative one. Accordingly, for the first time in 2007, the CC asserted that the ECHR could prevail over conflicting domestic ordinary rule, but only as long as it did not threaten the unity and coherence of the domestic Constitution.

There are two fundamental implications within the CC reasoning. Firstly, the ECHR's incorporation into the domestic order is not without limits. The ECHR, indeed, cannot infringe constitutional norms, be they constitutional fundamental principles or merely constitutional operative norms, so that it must be prevented from entering the domestic order, whenever such conflict arises. Secondly, only the CC can hold the power to evaluate the consistency of the ECHR provisions with the domestic Constitution and, if this condition is not met, to possibly declare unconstitutional the ordinary statute law as violating Conventional provisions. This means that ordinary and administrative domestic Courts cannot directly apply the Conventional rules while dis-applying the domestic ones. Conversely, whenever the latter are potentially in conflict with the ECHR, Courts are required to refer the question to the CC.

Therefore, the CC firmly refused to equate the ECHR to European Union law, traditionally considered capable of prevailing over domestic law – the only exception being the supreme and untouchable principles of the domestic Constitution[V] – and of being applied directly by ordinary and administrative Courts, instead of the domestic conflicting norms.[VI] In other words, the CC expressly denied that ECHR could be placed under the scope of Article 11 It. Const.,[VII] which has been traditionally used to authorize the Italian membership of the European Union and, accordingly, to manage the relationship between EU and domestic law by ensuring the supremacy of the former.

Consequently, the ECHR is not supreme. Indeed, it is up to the CC

> 'to establish a reasonable balance between the duties flowing from international law obligation, as imposed by Article 117, para. 1 of the Constitution and the safeguarding of the constitutionally protected interests contained in other articles of the Constitution'.[VIII]

Conversely, on the other hand, the CC acknowledges the far-reaching monopoly held by the ECtHR in interpreting the Conventional provisions. Since only the Strasbourg Court is entrusted with the power to interpret the Convention, according to the ECHR legal system, the ECHR as it "lives" in the creative interpretation of the ECtHR – and not the bare ECHR provisions by themselves – becomes relevant in the CC constitutional adjudication.

In our opinion, this jurisprudence is particularly interesting for the aim of this paper. On the one hand, it highlights the fundamental role of the courts in interpreting the Charters of Rights and, therefore, in concretely ensuring the protection of rights enshrined therein. The CC is the authoritative interpreter of the domestic Constitution, while the ECtHR is the authoritative interpreter of the Convention, and it is precisely through the dialogue between these two judicial authorities that the multilevel protection of rights takes form. On the other hand, however, such relationships between two Charters and two Courts sketches out a new kind of dualism, where the boundaries between separation and integration inevitably blur.

It is probably Judgment no. 317/2009 that reveals the clearest expression of such peculiar dualism. In the judgment the CC stated:

> 'It is evident that this Court cannot permit Article 117, para. 1 of the Constitution to determine a lower level of protection compared to that already existing under internal law, but neither can it be accepted that a higher level of protection which is possible to introduce through the same mechanism should be denied to the holders of a fundamental right. The consequence of this reasoning is that the comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees, including through the development of the potential inherent in the constitutional norms which concern the same right'.[IX]

In other words, the CC is asserting that, on the one hand, the ECHR is an *external* source of law (namely, the Constitution and the ECHR are still *separated*), and therefore it can only enter the domestic order as long as it is consistent with the supreme law of that order, i.e. the domestic Constitution as a whole. Accordingly, the CC is the sole and final arbiter of domestic fundamental rights adjudication. On the other hand, the ECHR and the constitutional Bill of Rights are also mutually *integrated*. Thus, since the aim of constitutional adjudication is to 'obtain the greatest expansion of guarantees' through a comparison between the conventional and the constitutional protection of rights, the two catalogues of rights do ultimately and definitively interplay. In conclusion, we might probably speak of a sort of "intertwined dualism".

3. Looking at the differences: Structure, procedure and institutional features of fundamental rights adjudication at the ECHR and the domestic level

Despite the ever growing intersection between national and international levels of rights protection, and despite the will of the two levels to find a mutual accommodation and integration, there are several elements that make this path rough and tortuous. In this regard the different function, nature and legitimacy of national and international courts play a fundamental role. Even though in practice the differences are nuanced, and we can even see some kind of convergence between different levels of protection, nevertheless we can identify the main divergent features, which make the constitutional and international peculiar in their own function and role.

Starting from the different **roles and tasks of the international and national Courts involved in human rights adjudication**, the brilliant statement of the Italian CC in Judgements Nos. 348 and 349/2007 explains it clearly:

> 'the Strasbourg Court has the task of interpreting the Convention, while the Constitutional Court must determine whether there is a conflict between a particular domestic provision and the rights guaranteed by the Convention in the light of the interpretation provided by the ECtHR'.

Therefore, even the **subjects of scrutiny differ**: the Strasbourg Court is case oriented, being the judge of a single case; on the contrary, the Constitutional Courts' task is that of judicial review of legislation. This is why even the effects of scrutiny are dissimilar: while the ECtHR case law aims at redressing individual violations, the CCs, on the contrary - even when starting from an individual application - aim at restoring the constitutional integrity of the system, erasing the law that infringes a fundamental right, with *erga omnes* effects. Moreover, the different aims that drive the two Courts condition both the flexibility, and the outcome of the judgment. Thus, the nature of individual justice embedded in the Strasbourg system of protection of rights drives the ECtHR to condemn the respondent State when a violation of rights occurs in a particular case, regardless of whether there may exist a widespread national praxis according to which the law involved – which produced the infringement in this instance – is normally interpreted in a manner consistent with the protection of rights. On the other hand, CCs, being by their very nature

a tool intended to preserve the integrity of the whole order entrenched in the judicial review on legislation, are not inclined to declare a law unconstitutional when there is the possibility that it may be interpreted in a fundamentally rights-oriented way.

Even when looking at procedures, we see more differences than similarities. For example, a typical feature of the ECtHR is the possibility given to the judges to make concurring or dissenting opinions (White and Boussiakou 2009: 37-60). In contrast, in the Italian Constitutional Court, as in many other European supreme courts, such a possibility does not exist. Even the different rules of access to the Court play a considerable role: individuals who consider that their human rights have been violated can lodge, directly, a complaint before the ECtHR, after having exhausted all domestic remedies. The rules of access to national supreme courts differ widely from one country to another: for example, while in Germany and Spain applicants can lodge a direct complaint to the Constitutional Court, in Italy the access is exclusively incidental and only a judge can raise the question to the CC.

Beside these structural and ontological differences, which pertain to the nature of the two different systems, there are other lines of differentiation that affect the question of which is the authority legitimized to pronounce the last word on human rights adjudication. The core issue of the role of the judiciary in protecting fundamental rights concerns the problem of its legitimation and the "counter-majoritarian argument". While national Constitutional Courts rely on the provisions of the national Constitution for their legitimacy and authority, the ECtHR, like other international courts, depends on an initial consent among member States for its legitimacy. However, such consent can evolve and change over time: this is the reason why the legitimacy of the Court is built on the concept of consensus, which is 'an updated consensus because it reflects the current state of law and practice among the Contracting parties' (Dzehtsiarou 2015: 152).

4. Intertwined but different in action. A case study: The heterologous In Vitro Fertilization

Despite the differences highlighted above, in time, both the ECtHR and national judges have become more and more aware of the necessity of dialogue and have developed several instruments (the margin of appreciation tool, the consensus theory, the

interpretation of national legislation in compliance with the Convention, the principle of subsidiarity, the dynamic interpretation of the Convention) in order to deal with each other in a 'pluralistic, polyvalent and heterarchical' (Dzehtsiarou 2015: 156) landscape. However, their relationship has only developed case by case; it is still critical and in certain cases even confrontational.

This is especially true in those cases concerning "ethically controversial matters" or moral matters (abortion, end of life, gender related rights, assisted reproduction, freedom of religion) in which the ECtHR and national supreme courts seem to move on different argumentative tracks.

This paper will focus on one of the most complex and sensitive ethical issues recently addressed both by the ECtHR (*S.H. v. Austria*)[X] and by national supreme courts (Italian Constitutional Court Judgment no.162/2014): gamete donation for in vitro fertilization.

In both cases, the applicants challenged national law provisions (in the one case the Austrian Artificial Procreation Act, in the other the Italian Law n. 40/2004) which posed restrictions on the practice of heterologous fertilization. In particular, the Austrian law declared an absolute ban on ova donation, both in vivo and in vitro, and a ban on sperm donation for in vitro fertilization, but not in vivo fertilization. The Italian law was even stricter, ordering an absolute ban on every kind of heterologous fertilization. Even though the cases are highly comparable and the rights to be protected present many common elements, different conclusions were reached as to the balance of such rights, resulting in completely opposite judgments by the ECtHR and the Italian Constitutional Court: the ECtHR upheld the ban, while the Italian CC declared the ban a violation of fundamental constitutional rights.

This case study is emblematic of overlapping areas in human rights jurisdiction and is an outstanding example of the different approaches adopted by national and international courts in dealing with human rights adjudication.

In particular, this contribution aims, through the analysis of the ECtHR and the Italian CC cases, to shed light on such different approaches (which led in the case under examination to opposite conclusions). It will seek the reasons for these divergences and will address the vital question of who is the guardian of fundamental rights in the pluralistic landscape of European space.

4.1. *S.H. v. Austria* before the European Court of Human Rights

One of the ECtHR's leading cases[XI] on IVF is the well-known *S.H. and Others v. Austria* (Kete 2014), decided in 2011. The Grand Chamber decision is relevant for different reasons. First of all, it shows the different approaches of the ECtHR and Austrian Constitutional Court which ruled on the same case in 1999. Secondly, by reversing the previous decision of the First Section of the ECtHR, the Grand Chamber upheld Austria's restrictions on assisted reproduction. Last but not least, the decision represents a sort of "manifesto" of the ECtHR approach to ethical sensitive rights adjudication, in which the Court makes broad use of the margin of appreciation and the theory of consensus.

The case originated in 1999 when the Austrian Constitutional Court ruled on the application of two couples, whose reproductive organs were affected by certain reproductive diseases[XII] which could only be solved with the use of different IVF techniques (in vitro fertilization using the sperm of a donor or heterologous fertilization). None of these techniques was allowed under the Artificial Procreation Act. The applicants argued before the Austrian Constitutional Court that the law's provisions were in breach of art. 8 ECHR and of art. 7 of the Austrian Constitution (the latter protecting equal treatment). The Austrian Constitutional Court, whose function - among others - is that of ruling on the compatibility of the national legislation with the ECHR, given the "constitutional status" of the ECHR mentioned above, recognized that the impugned provisions interfered with the right to family life according to art. 8 ECHR; however, such interference was justified by the attempt performed by the legislature to properly balance the conflicting interests of human dignity, the right to procreation and the child's interest. The Court underlined the legitimate rationale under the law provision, which was to avoid the creation and development of unusual family relationships, such as a child having more than one biological mother, and to avoid the risk of exploitation of women donating ova. Moreover, the Court found that the ban on heterologous fertilization was not in breach of the principle of equality, given the substantial differences between homologous and heterologous techniques.

In 2000, the applicants applied to the ECtHR, and the First Section in 2010 stated, in *S.H. and Others v. Austria*; this First Section decision reversed the Constitutional Court's conclusions, finding a violation of art. 14 and art. 8 ECHR. Finally, in 2011, the Grand Chamber issued its decision on the case, upholding the Austrian legislation.

The Grand Chamber in *S.H. v. Austria* first of all recognized that the right for a couple to conceive a child and to make use of assisted reproduction techniques for that purpose is protected by Article 8 of the Convention, because it is an expression of private and family life. Member States, within their margin of appreciation, can adopt measures aimed at guaranteeing an effective respect for private and family life. However, such measures have to be 'in accordance with the law'; they have to pursue one or more legitimate aims and they 'have to be necessary in a democratic society'. In the case under examination, according to the Court, such measures were laid down in the Artificial and Procreation Act, which 'pursued a legitimate aim, namely the protection of health or morals and the protection of the rights and freedom of others' (para. 90).

In particular, the rationale underlying the prohibition of ovum donation for in vitro fertilization laid down by section 3.1 of the Artificial Procreation Act responds to the risk embedded in heterologous fertilization with ovum donation, namely, the threat to the basic principle of *mater semper certa*. We are referring to the split of motherhood between a genetic mother and another merely carrying the child, as well the risk of the exploitation of women, particularly those in economic or social difficulties.

More complex is the reasoning concerning the prohibition of sperm donation for IVF. Under the Austrian legislation, in fact, sperm donation is not banned in every case, but only in that of in vitro fertilization, while in vivo fertilization is allowed. Moreover, IVF with sperm donation combined two techniques which, taken individually, were allowed under the Austrian legislation: in vivo fertilization with sperm donation and in vitro fertilization. In the previous decision concerning the case under examination, the Chamber argued that the only reason underlying the prohibition of the combination of two medical techniques, which taken individually were allowed, was the fact that 'in vivo artificial insemination has been in use for some time, was easy to handle and its prohibition would therefore have been hard to monitor'. The Chamber considered such an argument, related only to a question of efficiency, inconsistent in order to justify the prohibition of sperm donation for IVF. The Grand Chamber, on the contrary, reversed the Chamber's decision, arguing that

> 'when examining the compatibility of a prohibition of a specific artificial procreation technique with the requirements of the Convention, the legislative framework of which it forms part must be taken into consideration and the prohibition must be seen in this wider context'.

Starting from this premise, the Court stressed the fact that the prohibition of sperm donation for IVF, rather than in vivo fertilization, showed 'the careful and cautious approach adopted by the Austrian legislature in seeking to reconcile social realities with its approach of principle in this field' and it was therefore compatible with art. 8 of the Convention. However,

> 'even if it finds no breach of Art. 8 in the present case, the Court considers that this area in which the law appears to be continuously evolving and which is subject to a particular dynamic development in science and law, needs to be kept under review by the Contracting States' (para. 118).

The application of the theory of margin of appreciation in connection with the theory of consensus, in its different meanings (European and internal consensus), played a central role in the Court reasoning.

Firstly, the Court recognized that in cases where an important facet of an individual's existence or identity is at stake, the State normally sees its margin being narrowed down. However, in the case of IVF, the margin accorded to the State has to be a wider one, given the lack of a long-standing consensus among Member States on the moral and ethical issues involved.

As we may all know, in fact, the margin of appreciation and consensus are intuitively in an inversely proportional relationship: the more widespread and settled the consensus, the narrower the margin; and conversely, the weaker and more unsettled the consensus, the wider the margin. This explains why in sensitive matters like the one analyzed in this paper, the margin is usually quite wide, since consensus is still 'emerging' and not yet 'based on settled and long-standing principles' (para. 96).

In particular, the Court recognized an emerging consensus among Member States in allowing gamete donation for IVF. However, this consensus is not based on long-standing principles embedded in the law of Member States; rather, it reflects only 'a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State' (para. 96).

If the lack of European consensus was used by the Court in order to justify the wide margin of appreciation accorded to the Austrian legislator, the lack of internal consensus within the national society was used to further sustain the legitimacy of Austrian legislation.

The Court argued, in fact, that the prohibition of gamete donation reflected a cautious approach by the Austrian legislator toward a matter which raises complex questions of an ethical nature and on which there is not yet a consensus in society. In contrast, the Court seemed to use the concept of internal consensus in order to justify the permission of sperm donation for in vivo fertilization, which was recognized as 'a technique which had been tolerated for a considerable period beforehand and had become accepted by society' (para. 114).

The argument in *S.H. v. Austria* is emblematic of the flexible use of the consensus theory by the Court:

> 'throughout its existence the Court has used different types of consensus in its reasoning, and has not clearly distinguished among them, thus leaving some uncertainty as to both the precise meaning of consensus and the relative weighting of the different kinds of consensus deployed' (Dzehtsiarou 2015: 39).

4.2. Judgment no. 162/2014 from the Italian Constitutional Court

On a very similar issue, concerning Italian IVF legislation, Judgment No. 162/2014 from the Italian CC declared Article 4 of Law No. 40/2004 to be unconstitutional in so far as it introduced a complete ban on resorting to heterologous artificial insemination, even when one member of the couple suffers from absolute and irreversible sterility.[XIII] Such a ban indeed violated Articles 2 and 3 (respectively protecting, as a general clause, inviolable rights and the principle of equality), as well as Articles 29, 31 and 32 of the Italian Constitution, which are more specifically addressed to guaranteeing family life and health, the latter conceived both as individual right and as interest of society as a whole.

Law No. 40/2004, approved by the Italian legislature with the declared purpose of facilitating the solution of procreative problems arising from human sterility or infertility,[XIV] had been already been challenged before the Italian CC, which had questioned from the beginning its "value oriented" structure as disproportionately privileging the protection of embryos.[XV] In Judgment No. 162/2014, the Italian CC confirmed its general

mind-set when dealing with sensitive issues, and reaffirmed its previous approach with regard to in vitro fertilization issues. More precisely, it reiterated first of all that a judicial review of Law No. 40/2004 was to be performed, jointly considering all the constitutional parameters invoked by the referring courts. Since IVF involved 'numerous constitutional questions',[XVI] and Law No. 40/2004 consequently impinged on a variety of interests, all having a constitutional status, a balanced approach was required in order to grant each of these interests an adequate protection. The safeguarding of embryos, indeed, is not absolute; it encounters limits in the need to protect a legitimate claim to procreation. Secondly, the CC stated that the identification of a reasonable balance between all the conflicting interests at stake pertains primarily to the political evaluation of the legislature, which in matters like this is called on to adequately take into consideration the fast-moving developments of medical science[XVII] too. Lastly, the CC confirmed that, although important, such a political discretion cannot affect the power of the CC to review the "non-unreasonableness" of the legislative decision.

Before analyzing in more details the reasoning followed by the CC, and in order to better appreciate its relevance for the purposes of this paper, it may be interesting to briefly examine the background of this Judgment.

Initially, questions of constitutionality concerning the ban on heterologous insemination were raised by the Courts of Milan, Florence and Catania before the Constitutional Court, with the latter preferring not to rule on the issue, adopting an interlocutory order instead. This order, No. 150/2012, returned the case to the referring judges, for a reconsideration of the prerequisite of the questions in the light of the ECtHR Grand Chamber's decision in *S.H. v. Austria*. The referring courts had challenged the constitutionality of the ban, in particular, though not exclusively, with regard to Article 117, par. 1 It. Const.,[XVIII] which would have been indirectly breached through the violation of Articles 8 and 14 ECHR as stated by the First Section of ECtHR with reference to the similar Austrian prohibition of gamete donation for IVF. Therefore, the CC considered the Grand Chamber's decision, reversing that of the First Section on the same issue and declaring that the Austrian Law did not violate the ECHR, as a kind of *jus superveniens,*[XIX] able to trigger a different consideration by the referring judges of the issue at stake. In Order No. 150/2012, indeed, the CC reiterated that 'when a modification of the constitutional parameter occurs after the issue of constitutionality is raised, or when the

normative context is subject to substantial modifications',[XX] a return of the case to the referring court is necessary for a re-examination of the aspect of the issue affected by the normative modification. Moreover, the CC underlined that such a return was essential in the case under consideration, because in the referring courts' arguments 'the challenge related to Article 117 stands out from the others'. Accordingly, it seemed that the CC had assumed that the remaining parameters invoked (Article 2, 3, 29 and 31 It. Const.) were "absorbed" by the "main" parameter, i.e. Article 117.

Order No. 150/2012 was considered therefore not only a further step in the trend followed by the Italian CC in assigning relevance to ECHR provisions – as interpreted by the ECtHR – within the domestic review on legislation (Malfatti 2012), but also a significant departure by the CC from the usual argumentative scheme adopted in its previous case law. Thus, since the issues of constitutionality referred to the CC, though focused on the challenge related to Article 117, challenged other parameters of the Italian Constitution as well, returning the case to the referring courts following a ECtHR decision could have meant giving priority to the solution of the issues of conventionality (i.e. concerning compliance with the ECHR) over the issues of domestic constitutionality (Morrone 2012).

After Order No. 150/2012, the three referring courts – Milan, Florence and Catania – once again raised the question of constitutionality concerning the ban on heterologous insemination before the CC, which, as mentioned above, declared the ban unconstitutional.

We can summarize the Italian CC's legal reasoning as follows. The Court firstly asserted that the complete prohibition of gamete donation for IVF does not arise from a duty to comply with international obligations which merely prohibit the use of medically assisted procreation for eugenic purposes;[XXI] it is not the result of settled and long-standing principles established in the system, having been introduced by Law No. 40/2004 itself. It does not possess a constitutional basis, either; although an IVF regulation can be required by the Italian Constitution to avoid a legal vacuum in procreative matters – and accordingly, for this reason, Law No. 40/2004 was qualified as a "constitutionally necessary" law by the Italian CC – its content does not derive from the implementation of constitutional principles, at least in so far as it concerns the ban on heterologous insemination.[XXII] Quite the opposite: since the ban infringes other constitutional values, unless it can be proved that the protection of embryos cannot be pursued in a different

way, a strict test of reasonableness and proportionality has to be performed in order to assess its consistency with constitutional principles.

On the other hand, the choice to found a family and to procreate is an expression of a fundamental freedom of self-determination, protected by Articles 2, 3 and 31 It. Const., so that its limitation – and even more its total sacrifice, as it happens in the case under examination – needs to be justified by the pursuit of other constitutional values. Of course, the freedom to procreate is not without limits. However, such limits, even if inspired by ethical beliefs, cannot be equivalent to a complete prohibition. The only interest that may oppose a couple's demand to procreate by heterologous IVF is the protection of the children born as a result of this medical technique, with respect to their right to be informed about their real ancestral descent and the risk of psychological disease arising from membership of an unusual family where the biological parenthood is unconnected to the natural one. But apart from the fact that similar problems also arise in adoption issues – as demonstrated by Judgment No. 278/2013, concerning the absolute right to anonymity of the natural mother in case of adoption, which the Italian CC declared partially unconstitutional – the totality of the relevant legislation appears to already guarantee satisfactorily the interests of the child born by heterologous IVF. Moreover, the regulation of IVF impinges on the right to health, which is also to be conceived as psychological health, and the difference between homologous and heterologous insemination cannot be considered relevant to this. In conclusion, the ban under examination is disproportionate and irrational, also considering that by *de facto* stimulating "procreative tourism", it discriminates couples on the basis of their economic condition. And therefore, it is unconstitutional.

In doing so, the Italian CC went above and beyond what the ECtHR's Grand Chamber had suggested in the *S.H.* Judgment, when it considered the analogous ban provided for in the Austrian legislation compatible with Article 8 ECHR. It is also worth mentioning that the unconstitutionality of the ban on gamete donation for IVF was not declared in the Italian CC's Judgment as a result of the violation of specific constitutional rights considered individually, but rather of the largely unfair balance adopted at legislative level between all the conflicting interests at stake (Morrone 2014).

However, above all, it is worth stressing that Judgment No. 162/2014 ruled the case purely in the light of internal constitutional parameters: the challenges relating to Article

117 It. Const. and concerning the violation of Articles 8 and 14 ECHR remained merely "absorbed" in the reasoning pertaining to the other parameters invoked in the issue of constitutionality. This circumstance is even more surprising if we consider the content of Order No. 150/2012, in which - as already highlighted - the internal parameters invoked (Article 2, 3, 29 and 31 It. Const.) had been arguably deemed "absorbed" by the parameter of Article 117. Judgment No. 162/2014 seems, therefore, in this respect a total reversal of the perspective adopted in Order No. 150/2012; this also demonstrates that the CC could have ruled on the merit of the case in 2012, arriving at the same outcome as later reached in Judgment No. 162/2014, though at that time it preferred not to settle the case.

5. A comparative analysis: connections and disconnections between the ECHR and the Italian constitutional level in the heterologous IVF case

The brief analysis of the ECtHR's and the Italian CC's decisions on this matter – which depict one of the most emblematic examples of the intertwined, but different nature of fundamental rights adjudication at international and constitutional level - explains quite clearly why we chose the IVF case as the focus of this paper.

First of all, interconnections and differences are apparent by merely looking at the Italian CC's decisions on heterologous IVF. On the one hand, in Order No. 150/2012 the interconnection between systems arises unequivocally. The same Italian CC seems so aware of such interconnections that it chooses not to decide the issue of constitutionality and to return the case to the referring judges for a re-evaluation of the questions in the light of the ECtHR Grand Chamber's decision in *S.H.* On the other, however, Judgment No. 162/2014 also provides evidence of the deep differences between the ECtHR and a national CC in approaching similar issues, as even the ECtHR seems to understand perfectly. Indeed, in the later *Parrillo v. Italy* case,[XXIII] the Strasbourg Court noted:

> 'admittedly, in Order No. 150 of 22 May 2012, in which it remitted to the lower court a case concerning the ban on heterologous fertilization, the Constitutional Court did refer, inter alia, to Articles 8 and 14 of the Convention. The Court cannot fail to observe, however, that in its judgment No. 162 of 10 June 2014 in the same case, the Constitutional Court examined the prohibition in question only in the light of the Articles of the Constitution that were in issue (namely, Articles 2, 31 and 32)' (para. 95).

We can deduce that the ECtHR wished to underline that protection ensured in the light of Articles 8 and 14 ECHR is not the same as protection purely embedded in domestic parameters of the national Constitution, and this is probably a further confirmation from the Strasbourg side too that the two levels of protection, even though intertwined, are nevertheless still different.

Interconnections and differences, however, appear also by comparing the Judgment No. 162 and the *S.H.* decision. Here, the most visible difference lies, obviously, in the opposite results achieved by the two Courts in adjudicating the case. While the ECtHR found no violation of Article 8 ECHR, the Italian CC declared the analogous Italian ban on heterologous insemination unconstitutional.

This difference of outcome, however, probably depends on the different type of scrutiny carried out by the Courts: the ECtHR looked uniquely into the alleged breach of Article 8 ECHR, while the CC took into consideration the constitutional framework as a whole. As mentioned above, the unconstitutionality of the Italian ban on heterologous IVF was not declared as a result of the violation of specific constitutional rights considered individually, but rather of the largely unfair balance adopted at the legislative level between all the conflicting interests at stake. We do not see it as a coincidence that, in Judgment No. 162/2014, the CC started by saying that its review would take into account all the parameters invoked, and consider them jointly, in order to prevent the protection of certain fundamental rights from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution.[XXIV]

But a further difference between the two systems, international and constitutional, may ensue from such a different approach in adjudicating human rights issues. From the duty to take into account all of the Constitutional parameters jointly, even when an issue of compatibility with an ECHR right is at stake, the CC derives, in fact, a right to claim what it names "its own margin of appreciation" in assessing the role played by the ECHR - in the interpretation provided by the ECtHR - within the domestic system. Accordingly, both Courts expressly resort to the "margin of appreciation doctrine". It is, however, obvious that the margin of appreciation as conceived and claimed by the CC is something different from the margin of appreciation as originally developed by the ECtHR.[XXV]

As clearly stated in Judgment No. 317/2009, although the CC cannot substitute its own interpretation of a provision of the ECHR for that of the Strasbourg Court,

> 'it may assess how and to what extent the results of the interpretation of the European Court interact with the Italian constitutional order. [...] In summary, the *national* "margin of appreciation" can be determined having regard above all to the overall body of fundamental rights, the detailed and overall consideration of which is a matter for the legislature, the Constitutional Court and the ordinary courts, each within the ambit of its own jurisdiction' (§7).

We could probably say that the clearest deployment of "its own margin of appreciation doctrine" is found in the Italian CC's well-known "Swiss pensions case", in which a challenge to legislation was at stake, retrospectively modifying the arrangements applicable to the calculation of pensions for workers who had spent all or part of their working life in Switzerland.[XXVI] The retrospectivity of this new calculation mechanism had already been challenged before the ECtHR, which had condemned Italy for violation of Article 6 ECHR, since the domestic law of "authentic interpretation" had the 'effect of definitively modifying the outcome of the pending litigation, to which the State was a party, endorsing the State position to the applicant's detriment'.[XXVII] Despite this fact, and even in view of the Maggio case, the CC held that the appellant had no right to expect that his pension would be calculated in line with the previous arrangements, since the contested legislation was inspired by the principle of equality and solidarity, which prevailed within the balancing of constitutional interests. More precisely, the CC affirmed that,

> 'within the balancing operation against other interests protected under constitutional law which this Court is also required to consider in this case, the protection of other countervailing interests, which are of equal constitutional standing, affected by the contested legislation, prevails over the protection of interests underlying the principle of constitutional law [of the non-retrospectivity of the law]. Therefore, in relation to this balancing operation, there are compelling general interests capable of justifying the recourse to retrospective legislation'.[XXVIII]

As a consequence, the CC declared the question of constitutionality ill founded, and in doing so, it claimed its authority not to comply with the ECtHR's decision which had condemned Italy, on this same issue.

Probably, this Judgment may also be considered as one of the clearest displays of that 'functional disobedience' deployed by domestic Courts when wishing to draw the ECtHR's

attention to national competing interests and values that were not sufficiently taken into consideration by the latter, as some Authors have exemplarily highlighted (Martinico 2015: 303). What is sure, however, is that, as can be observed in the CC jurisprudence, by deploying "its own margin of appreciation" the CC does not directly challenge the ECtHR's judgments; it can merely deprive the latter of their effectiveness within the Italian system in the light of a systemic interpretation of the constitutional framework as a whole. Accordingly, it is a margin of appreciation claimed against the ECtHR, and after the latter has settled the case, whilst at the same time avoiding an open conflict with the European Court. The CC seems to be wishing to say: 'I respectfully disagree' (Martinico 2017: 417).

With regard to the Strasbourg side, and as highlighted by Sir Nicolas Bratza, a former President of the ECtHR, the margin of appreciation was instead introduced into the ECtHR's jurisprudence as a 'valuable tool devised by the Court itself to assist it in defining the scope of its review'. It does not provide blanket exceptions in the application of rights; rather, it ensures that human rights under the ECHR develop according to a pluralistic pattern, enabling its 'striking an optimum equilibrium between convergence and divergence in a transnational or international setting' (Rosenfeld 2008: 450). Even though it could seemingly jeopardize the universalistic ambition naturally implied in the international protection of human rights, the margin of appreciation doctrine was introduced as a useful tool to accommodate diversity in the field of human rights: it is believed to be a kind of 'key to ordering pluralism', meaning that 'on the one hand, it expresses the centrifugal dynamic of national resistance to integration' and 'on the other, since the margin is not unlimited but bounded by shared principles, it sets a limit, a threshold of compatibility that leads back to the centre (centripetal dynamic)' (Delmas-Marty 2009: 44).

Hence, the ECtHR's margin of appreciation allows States to approach fundamental rights issues in the light of their national Constitutional identity, since they are allowed to find the most satisfactory solution to rights protection, one that is also coherent with the moral and social values embedded in their national systems. Conversely, when the majority of Contracting States shows a common trend in dealing with a specific issue, the ECtHR infers that a general consensus among States exists on the protection required for the Conventional right at stake, and that, therefore, the need to preserve the single national constitutional identity may be pushed into the background. Consequently, it is no

coincidence that the margin of appreciation and consensus among States are in an inversely proportional relationship, as already pointed out above.

Actually, the ECtHR's doctrine of the margin of appreciation allows flexibility in reviewing the State's compliance with the ECHR, by recognizing that, as far as it is possible,

> 'by reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the "exact content of the requirements of morals" in their country, but also on the necessity of a restriction intended to meet them'.[XXIX]

Accordingly, we can argue that the margin of appreciation is also a legitimizing tool for the ECtHR, which - as an international court - needs to rely on States' consent to ensure that its judgments are effective.

Instead, the CC does not need to seek for legitimacy. It already possesses its own legitimacy, directly stemming from the domestic Constitution, which entrusted the CC with the task of preserving the constitutional integrity of the national system. It follows that, while the ECtHR resorts to the margin of appreciation to *get* legitimacy, by deploying its own margin of appreciation the CC *exhibits* its constitutionally embedded legitimacy, and it claims its authority on constitutional matters. In conclusion, it is only apparently that the ECtHR and the CC refer to the same doctrine, when they speak of margin of appreciation. Rather, as a matter of fact, their margin of appreciation has a different meaning and performs different functions. Judgment No. 162/2014, though at that time it preferred not to settle the case.

6. Taking stock: A tale of two Courts at the crossroads at the protection of rights

The analysis of the heterologous IVF case highlighted how the connections and disconnections between the international and constitutional level of protection of rights, theoretically depicted in Sections 2 and 3 of this contribution, operate concretely. Along with a deep awareness of the intertwined nature of fundamental rights adjudication nowadays, shown by both Courts in their case law, Judgments on heterologous IVF

emphasize also several differences, pertaining to the outcome of the scrutiny, the approach taken and the apparent resort to the same doctrine by the two Courts involved – i.e. the margin of appreciation –, which is conversely very differently deployed.

However, looking again at Judgment No. 162/2014 in its connection with Order No. 150/2012 and the Grand Chamber's *S.H.* Judgment, further considerations may arise, arguably shedding light on one of the most controversial bonds in the multilevel protection of rights: the relationship between Courts.

It is worth mentioning, that in Judgment No. 162/2014, the Italian CC did actually make use, at least in part, of the legal reasoning adopted by the ECtHR in the homologous *S.H.* case, by completely embracing the idea that;

> 'the couple's choice to become parents […] is an expression of the fundamental and general freedom of self-determination. […] And as a consequence, limits to this freedom are to be reasonably and adequately justified by the impossibility of otherwise protecting interests having the same rank. Since the most intimate and intangible sphere of the human person is involved, the determination to have children or not is incoercible…'.[XXX].

However, it did so by completely neglecting to expressly mention the ECtHR's case law in its own legal reasoning. Even the right of adopted persons to know their own origins was restated by the CC in Judgment No. 162/2014 by merely referring to its previous Judgment No. 278/2013, without any reference to the ECtHR's *Godelli v. Italy* Judgment,[XXXI] which, instead, had really been the ultimate source for the recognition of that right.

The choice of the CC not to mention the ECtHR's jurisprudence on the same matter might appear even more surprising in the light of Order No. 150/2012, in which - as previously mentioned - the Grand Chamber's Judgment *S.H.* was considered a kind of *jus superveniens* that led the CC to choose not to provisionally settle the case. Why then, did the CC completely omit to mention the Grand Chamber's *S.H.* in particular - and in general, any ECtHR's decision - in Judgment No. 162/2014?

Actually, in the wake of Judgment No. 162/2014, some have argued that by completely disregarding the conventional side of the issue of constitutionality (i.e. that concerning the compatibility of Law No. 40/2004 with the ECHR), the CC had wished to show a

deferential approach to the ECtHR. Indeed, declaring the unconstitutionality of the ban on heterologous insemination for violation of Article 117 It. Const. (and therefore because it had infringed Articles 8 and 14 ECHR) would have amounted to contradicting the ECtHR, which had in its *S.H.* Judgment ruled out that the analogous Austrian ban infringed those very same ECHR provisions.

However, this explanation is not entirely convincing. Also, it is worth mentioning that the ECtHR's Grand Chamber closed its *S.H.* Judgment in the following terms:

> 'The Court also notes that the Austrian Constitutional Court, when finding that the legislature had complied with the principle of proportionality under Article 8, par. 2 of the Convention, added that the principle adopted by the legislature to permit homologous methods of artificial procreation as a rule and insemination using donor sperm as an exception reflected the current state of medical science and the consensus in society. This, however, did not mean that these criteria would not be subject to developments which the legislature would have to take into account in the future. […] The [ECHR] Court reiterates that the Convention has always been interpreted and applied in the light of current circumstances. Even it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law needs to be kept under review by the Contracting States'.[XXXII]

That is to say: the ECtHR had decided to anchor its judgment on the merits of the case to the time when the case originally arose, therefore at the end of the '90s. As we can see, by merely stating that an evaluation which was perfectly valid when pertaining to a situation arising in 1998 no longer needed to be followed in 2014, the Italian CC could have ruled the case in an international perspective too, without contradicting the ECtHR. The ECtHR, indeed, had underlined in *S.H.* precisely the relevance of the time factor as crucial for a proper settlement of the case. Furthermore, it had already given a generally negative evaluation (D'Amico 2014) of Law 40/2004 in the famous *Costa and Pavan v. Italy* case,[XXXIII] although the ECtHR had focused its analysis more particularly on the ban on preimplantation genetic diagnosis. Therefore, a declaration of unconstitutionality of Law No. 40/2004 grounded on the violation of Article 117 It. Const. could also have supported the ECtHR's conclusion in the *Costa and Pavan* case, by extending its scope to include the heterologous insemination issue.

More plausibly, therefore, it seems arguable that the CC's choice to rule the case in Judgment No. 162/2014 by focusing on purely domestic constitutional parameters depended on circumstances pertaining to the complex relationship between the ECHR and the domestic protection of fundamental rights and, ultimately, the relationship between the two "constitutional" courts, each ruling its respective system. Putting it differently; in doing so, the CC actually seemed to reveal a wish to connect constitutional human rights adjudication to the supranational dimension of fundamental rights protection, while at the same time not bowing to the ECtHR's authority.

The reasons for the CC's attitude may be found in the special position held by the Italian CC at the crossroads of the multilevel protection of fundamental rights in Europe, whose peculiar nature depends both on the CC's relationship with domestic ordinary courts and on the specific character of fundamental rights adjudication in Italy.

The inclination of the CC to promote in so far as is possible the constitutional coherence of the domestic legal order through interpretation is well-known: according to its traditional jurisprudence, it is up to domestic ordinary courts to interpret ordinary legislation consistently with the Constitution without submitting an issue of constitutionality before the CC. Only where it is not possible to settle the conflict between a law and a constitutional provision by interpretation, and therefore only where a law cannot be interpreted coherently with the Constitution, a judicial review of legislation can be brought before the CC. However, in doing so, the CC, in so far as it empowers ordinary judges to pronounce on human rights issues, ends up by depriving itself of its role as human rights adjudicator, though only partially. In contrast, the Italian system of constitutional adjudication does not provide individuals the opportunity to bring questions directly before the Constitutional Court. A judicial review by the CC can be triggered only either by a direct recourse by the State and the Regions, aimed at settling a question concerning the delimitation of their legislative competence, or by an issue incidentally raised by a judge during a concrete judicial proceeding where the constitutionality of a law to be used to settle the case is at stake. Therefore, the CC is not automatically involved when an alleged violation of human rights is at issue.

These circumstances may risk further marginalizing the role of the CC in protecting fundamental rights, with particular regard to its relationship with the ECtHR: the latter

could be called on to cover a case in which the CC was not involved, resulting in the protection of rights being significantly shifted beyond the national borders.

The most recent ECtHR jurisprudence, indeed, provides clear proof of this trend: in some cases, the ECtHR truly became the one and only judge in human rights adjudication, although the ECHR was originally shaped as a subsidiary system of protection of rights (D'Amico 2015; Sorrenti 2015).

A single example may serve to explain the Italian CC's fears: the already mentioned *Costa and Pavan v. Italy* case, concerning the Italian exclusion of preimplantation genetic diagnosis for couples that are carriers of genetically transmittable diseases, but not for infertile couples. The ECtHR's previous decisions had already shown that the exhaustion of domestic remedies was not an absolute principle, with the result that applicants were required to have exhausted internal remedies only when these were available and effective, i.e. when they were accessible, capable of offering the applicants satisfaction in redressing their grievance, and when they offered a reasonable chance of success. The *Costa and Pavan v. Italy* Judgment represents a precise and concrete application of this attitude: the recourse was declared admissible, in fact, even though domestic remedies had not been exhausted by any means.[XXXIV] As the ECtHR asserted, 'the applicants cannot truly be reproached for failing to apply for a measure which, as had been explicitly stated by the Italian government, was forbidden in an absolute manner by the law'.[XXXV] Or, in other words, since 'it was certain that the applicants could not access PGD in Italy, it was useless for them to make such an application to the Italian health authorities and to then challenge the inevitable rejection of their application before the Italian courts' (Puppinck 2012: 156).

In a case like the one we are discussing, it is obvious that by admitting direct recourse to the ECHR system when internal remedies, though theoretically accessible, do not present any chance of success, the ECtHR reduced the opportunity for the domestic CC to intervene preliminarily in order to safeguard the rights at stake at a national level.[XXXVI]

The CC's decision to rule on the case concerning the ban on heterologous insemination, solely in the light of domestic constitutional parameters, could therefore be plausibly read as a reaction against Strasbourg's encroachments when the domestic system – and the CC in particular – had not yet had the opportunity to redress the violation autonomously. In other words, the CC may have aimed to strongly affirm that it is still primarily up to the States and national authorities to ensure fundamental rights protection.

Only when they are proven inadequate, that is to say where individuals have been denied satisfaction because all internal paths have been rejected, can an intervention by the ECtHR be admissible and welcome. It is neither admissible nor welcome, on the other hand, where domestic ordinary and constitutional courts have not yet had the opportunity to redress the violation autonomously.[XXXVII]

To conclude, the analysis conducted starting from the case law of the ECtHR and of the Italian CC on a similar object, rather than showing a harmonious picture, where the different levels of protection integrate to assure human rights protection, has revealed a fragmented scenario, characterized by different lines of fractures and convergences. The two levels at times seem to converge towards a common path; at other times, instead, they give the impression that under the apparent language of human rights at the surface, the deep structure of the relationship between levels and Courts is all about authority. After all, the multilevel protection of rights is also a tale of Courts, each competing to have the last word on human rights adjudication. And precisely for this reason, the relationship between the two levels is very similar to the relationship between two tectonic plates, which remain side by side, each complementing the other, until the moment they clash under the pressure of deep, convective forces, although even clashes may play a positive role, often contributing, on the Strasbourg side, to a more pluralistic – and less hegemonic – interpretation of the ECHR (Delmas-Marty 2009) and, on the constitutional side, to a more open understanding of the rights entrenched in the domestic Constitution. The result of such an interaction among national and international levels of protection is therefore not completely predictable and cannot be attributed to the simple logic of hierarchy, but at the same time it represents the fundamental feature that permits the system to evolve dynamically.

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[I] See, among many, Judgments Nos. 104/1969, 17/1981, 15/1982, 323/1989, etc. Only Judgment No. 10/1993 seems to contradict a reconstruction of the ECHR status within the domestic system uniquely based on the formal rank of the execution order. Here, the CC states that that the ordinary law transposing the ECHR contains 'provisions arising from a source with atypical competence, and, as such, they are insusceptible to being repealed or modified by ordinary laws' (Tega 2013: 30). This peculiar statement was

not, however, reiterated in following decisions. Judgments from the Italian CC are all available at www.cortecostituzionale.it

[II] As Pollicino argues 'since this decision, the Constitutional Court has seemed less interested in looking from a formal(istic) point of view at the static position of the ECHR in the hierarchy of the sources of law, and more interested, from a substantial and axiological point of view, and by reason of its fundamental rights-based content, in its suitability to complement the recognition of inviolable fundamental rights protected by Article 2 of the Constitution'.

[III] Constitutional Court, Judgment No. 388/1999, available at www.cortecostituzionale.it (last accessed on 24 October 2016).

[IV] Constitutional Court, Judgment No. 348/2007 and No. 349/2007, English translation available at www.cortecostituzionale.it (last accessed on 24 October 2016).

[V] In Judgement No.183/1973 (the Frontini Judgement available at www.cortecostituzionale.it – last accessed on 15 March 2016) the ICC devised the so called counter-limits doctrine, i.e. the existence of a hard core of the constitutional legal order, which cannot be impinged by the supranational order. On the counter-limit doctrine see Cartabia (1995) and Pollicino and Martinico (2012).

[VI] At least starting from the seminal Constitutional Court Judgment no. 170/1984 (the Granital Judgment available at www.cortecostituzionale.it – last accessed on 7 February 2016).

[VII] Article 11 provides that 'Italy agrees, on condition of its equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organizations furthering such ends'.

[VIII] Constitutional Court Judgment No. 348/2007, § 4.7 (available at www.cortecostituzionale.it – last accessed on 7 February 2016).

[IX] Judgment No. 317/2009, § 7, available in English at *www.cortecostituzionale.it/.../S2009317_Amirante_Silvestri_en* (last accessed on 23 July 2016).

[X] ECHR, *S.H. v. Austria*, 3 Nov. 2011.

[XI] The *S.H. v. Austria* case was at that time the third case on IVF ruled by the Court of Strasbourg, after the two precedents involving UK legislation: ECHR, *Evans v. United Kingdom*, 10 Apr. 2007 and ECHR, *Dickson v. United Kingdom*, 15 Dec. 2007.

[XII] The first applicant is married to the second applicant and the third applicant to the fourth applicant. The first applicant suffers from fallopian-tube-related infertility. She produces ova, but, due to her blocked fallopian tubes, these cannot pass to the uterus, so natural fertilization is impossible. The second applicant, her husband, is infertile.

The third applicant suffers from agonadism, which means that she does not produce ova at all. She is completely infertile but has a fully developed uterus. The fourth applicant, her husband, in contrast to the second applicant, is not infertile.

[XIII] For sake of completeness, Judgment No. 162 declared also Articles 9 (concerning the prohibition to disclaim paternity when resorting to heterologous artificial procreation) and 12 (containing the pecuniary penalty for heterologous procreation ban offenders) of Law No. 40/2014 to be unconstitutional.

[XIV] Law 40/2004, Article 1, para. 1.

[XV] Judgment No. 151/2009 (available at www.cortecostituzionale.it – last accessed on 22 June 2015).

[XVI] Judgment No. 162/2014, § 4 In Law.

[XVII] Judgment No. 162/2014, § 7 In Law. On the issue of "scientific reasonableness" see Morrone (2014) and Penasa (2014).

[XVIII] See *Supra* Section 2.

[XIX] More precisely, Order No. 150/2012 described the Grand Chamber's Judgment as 'a novum directly influencing the issue of constitutionality' referred by the courts. See Ruggeri (2012); Pellizzone (2012); Romboli (2013) and Violini (2014).

[XX] Constitutional Court, Order No. 150/2012 (available at www.cortecostituzionale.it – last accessed on 22 June 2015).

[XXI] See e.g. the Council of Europe Convention on Human Rights and Biomedicine of 1997, Article 14.

[XXII] In fact, a popular referendum aimed at integrally abrogating Law 40/2004 was declared not admissible by the CC, due to its character of "constitutionally necessary law" (Judgment No. 45/2005), while the referendum focused on the prohibition of heterologous insemination was plainly admitted in Judgment No. 49/2005 (even if it ultimately failed, having achieved the participation of only 25.6% of people entitled to vote).

[xxiii] ECHR, *Parrillo v. Italy*, 27 Aug. 2015.
[xxiv] This actually is a common trend in the CC case law. We can see it, for instance, in Judgment No. 85/2013, concerning the issue of constitutionality also raised with regard to Article 117, par. 1 (in connection with Article 6 ECHR) of legislation aimed at facing the very serious problem of the polluting emissions from the Ilva factory in the Taranto area. There too, the CC reiterated that 'the rationale of the contested provision is to strike a reasonable balance between the fundamental rights protected by the Constitution, including in particular the right to health (Article 31) and the derived right to a healthy environment, and the right to work (Article 4), from which the constitutionally significant interest of maintaining employment along with the duty incumbent upon public institutions to make all efforts to that effect are derived. All fundamental rights protected by the Constitution are mutually related to one another and it is thus not possible to identify any one of them in isolation as prevailing absolutely over the others. Protection must at all times be "systematic and not fragmented into a series of rules that are uncoordinated and potentially in conflict with one another". If this were not the case, the result would be an unlimited expansion of one of the rights, which would "tyrannizes" other legal interests recognized and protected under constitutional law, which constitute as a whole an expression of human dignity'. Therefore, the issue of constitutionality was declared groundless. (See § 9).
[xxv] See, among many, Brems (2003); von Staden (2012: 1024); Legg (2012); Letsas (2006), Arai-Takahashi (2013); Gerards (2011: 104); Spielmann (2012: 392-411); Mena Parras (2015); Benvenisti (1999: 843).
[xxvi] The issue being that, whereas under the previous interpretation of the legislation, payment of contributions in Switzerland established entitlement to a pension in Italy on the basis of Italian contributions at equivalent salary, no matter that the contribution levels in Switzerland were significantly lower, as a result of an enactment providing for an "authentic interpretation", the Italian pension was to be calculated on the basis of the real level of the Swiss contribution, thus resulting in lower pensions.
[xxvii] ECHR, *Maggio v. Italy*, 31 May 2011.
[xxviii] Constitutional Court Judgment No. 264/2012, § 5.3 (available at www.cortecostituzionale.it – last accessed on 10 July 2015).
[xxix] ECHR, *S.H. v. Austria*, para. 94.
[xxx] Judgment No. 162/2014, § 6 The Law, which seems to paraphrase the ECtHR's *S.H.* decision (see, for instance, para. 86)
[xxxi] ECHR, *Godelli v. Italy*, 25 Sept. 2012.
[xxxii] ECHR, *S.H. v. Austria*, para. 118.
[xxxiii] ECHR, *Costa and Pavan v. Italy*, 28 Aug. 2012.
[xxxiv] See also, ECHR, *Parrillo v. Italy*, cit., in which the ECtHR reiterated even more clearly that its decision to declare the individual application under examination admissible despite the fact that the prerequisite of the previous exhaustion of domestic remedies had not been met, depended primarily on the Italian system of Constitutional adjudication which does not provide individuals with the opportunity to bring their cases directly before the Constitutional Court. On the relevance accorded by the ECtHR to the direct access to CCs within the domestic systems of human rights adjudication, see ECHR, *Hasan Uzun v. Turkey*, 30 May 2013.
[xxxv] ECHR, *Costa and Pavan v. Italy*, cit., para. 38.
[xxxvi] Perhaps not coincidentally, in Judgment No. 96/2015, which is the internal follow-up of the ECtHR's decision *Costa Pavan v. Italy*, the CC declared the unconstitutionality of the prohibition for genetic disease carrier couples to have access to PGD solely on account of the violation of Articles 3 and 32 It. Const. (the former aimed at protecting the principle of equality and the latter at guaranteeing the right to health), all the other challenges remaining "absorbed" , included the one concerning Article 117, par. 1 It. Const. (and therefore Articles 8 and 14 ECHR). In the CC's reasoning, the blanket ban on PGD, if read jointly with the possibility allowed by the Italian legal system to terminate pregnancy where a fetus is affected by a genetic pathology, while introducing an element of inconsistency into the system, was judged "insuperably" unreasonable and therefore was declared unconstitutional. Here the message of the CC to the ECtHR seemed to be even clearer: it admitted that the outcome of its reasoning was the same as the one achieved by the ECtHR by expressly quoting the Judgment of the latter in the *Costa and Pavan* case. Nevertheless, it anchored its reasoning to uniquely internal parameters. The same outcome, but reached by a different path, we might say: as if it wished to restate that the domestic constitutional system can already possess all the tools with which to redress fundamental rights violations autonomously if it was given the opportunity to do so.

[xxxvii] It is however worth noting that in Judgment No. 84/2016 – concerning, like the *Parrillo* Judgment, the ban on donating embryos to scientific research as provided by Law No. 40 – while quoting the latter, the Italian CC expressly adhered to the ECtHR's approach. It declared indeed the question as inadmissible, pertaining the balance between the conflicting interests and values at stake to the political discretion of the Parliament. This reference to the Strasbourg jurisprudence was, however, considered by some Authors as a symptom of a coward attitude from the CC, seeming the latter to use the *Parrillo* Judgment as a shield in order to evade its responsibility before hard choices in extremely sensitive matters (Chieregato 2016: 12).

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Conflicts by Convergence and Deep Disagreements in European Constitutional Law

by

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Abstract

In this essay the question of what kind of conflicts are at stake in the context of European pluralism will be considered, with special focus on the shift from "conflicts by divergence" to "conflicts by convergence" and on attempts to conceptualise these issues by means of the concept of "complex antinomy". It will be argued that this analysis needs some refinement and the concept of "levels of disagreements" will be introduced as an alternative. A specific focus will be maintained on the impact of different interpretive methodologies: in this way it is possible to underline the structure of "deep" and "superficial" disagreements in the context of European law. In order to illustrate this point, some notes on the recent *Taricco* saga will be developed. Finally, the relevance for European constitutionalism of deep disagreements on interpretive methodologies will be underlined.

Key-words

constitutional conflicts in Europe, *Solange*/counter-limits doctrines, disagreements in the law, interpretive methodologies, *Taricco* saga

1. Introduction

The nature of contemporary European Public law as a quite peculiar, almost mysterious legal system is almost common knowledge among lawyers. The interlocking of several systems, both national and supranational, challenges our traditional understanding. For instance, the classical Kelsenian model, i.e. the pyramid of hierarchically ordered norms and authorities[I] is clearly insufficient to conceptualize the complex entanglement between the European Union and national legal systems, as a widespread literature on "legal pluralism"[II] has often underlined.

This essay does not attempt to give a comprehensive solution to these questions: here the focus will be on a specific issue, namely the kind of conflict determined by the overlap of principles between national and supranational levels. It will be pointed out that the continuous extension of EU norms in the field of fundamental rights has inevitably created an interlaced zone between national and supranational norms on rights. Scholars have duly captured this point and proposed an account of these conflicts through the notion of "complex antinomy". The leading question of this essay is whether this conceptualisation is correct overall or whether it is possible to develop a more perspicuous representation of this kind of conflict.

In section 2 the shift in the European context from conflicts due to absence of a common ground (conflicts by divergence) to conflicts caused by its existence (conflicts by convergence) will be briefly considered. In section 3 the idea of "complex antinomy" previously proposed in academic literature to conceptualize this topic will be scrutinized and some crucial difficulties will be underlined. In section 4 a more comprehensive account will be proposed, based on the notion of "levels of disagreements" in constitutional law. This concept will be further developed in section 5 where the *Taricco* saga will be employed as an example of constitutional conflict due to convergence and an account of it based on the notion of "levels of disagreement" will be furnished.

As a result, hopefully, a single tile of a much wider mosaic representing the silent but stunning clash of *lato sensu* political forces underlying legal debate on European and national rights will be set.

2. Conflicts in Europe: from Divergence to Convergence

The history of European Public law is an affair of perennial conflict both "inside" EU law and between EU and National law, thus generating an antinomy, a conflict between two rules.[III]

The internal conflict is of course at stake when we consider norms that would clearly be considered by any lawyer as belonging to the EU legal system. Opinion 2/13 of the European Court of Justice (ECJ), harshly confronting the principle of autonomy of EU law with its "opening" towards the European Convention on Human Rights,[IV] is an example in this sense.[V] Autonomy in the end prevailed, but it is hard to deny that the opinion showed a deep and crucial case of conflicting principles *inside* EU law. The principles at stake are clearly EU norms, typical of the European legal system.

This leads us to the second group of conflicts, those between EU law and National law. Intuitively, the original purely economic function of the European Communities set up the stage for spurious conflicts between National and EU law: since States feature general aims to be pursued, including fundamental rights, while the EU had an exclusively economic function,[VI] conflicts arising between the two levels could easily derive from different grounds.

During the last fifty years, however, the deep structure of European law has evolved from its original conceptual roots. A succession of fundamental decisions issued by the ECJ starting from the late Sixties produced a *corpus* of rights to be respected at the supranational level (Weiler 1991: 2417-2419 and 2437-2438). These human rights were at the same time fundamental rights: they did not only represent a catalogue of moral claims regarding human nature and justice, they also represented a legal parameter that allowed for the scrutiny of supranational norms. They were employed as grounds for legality and were, in this sense, "fundamental" for the enactment and employment of supranational norms.[VII] This of course was at least in part strategically aimed at mitigating the disruptive effects of the "primacy" doctrine and sweeten the democratic deficit (ibid.: 2417). Moreover, some reberverating clashes between the ECJ and national constitutional courts, especially the Italian and the German ones, probably had a role in fostering this evolution too. The *Solange* saga[VIII] and the progressive refinement of the Italian counter-limits doctrine[IX] forced the ECJ to develop a more and more refined set of fundamental rights to be protected

right up to the EU level, as part of the "general principles of EU law". These were developed looking both at the "common constitutional traditions" and at the international conventions on human rights accepted by Member States, in particular the ECHR as interpreted by the Strasbourg Court. This process was eventually completed once the Charter of Fundamental Rights acquired legal value in the Lisbon Treaty:[X] this represented the final codification of EU fundamental rights and the clearest example of overlap between national and EU rights. Most of the rights we can read today in the Charter were already part of the ECJ's case law (Pizzorusso 2008: 9). It is worth noting that the ECJ did not limit itself to "listing" the rights commonly shared by Member States but was creatively involved in a process of adaptation of the common traditions to the aims and the context of EU law (Cozzolino: 2003). Sometimes this approach led the Court to a case by case, almost "nonchalant" cherry picking of the most suitable traditions, so that the value of "common constitutional traditions" turned out to be purely rhetorical. As a result, in some cases harsh reactions at the national level were brought about as in the famous *Mangold* case.[XI] Nevertheless, in other cases the ECJ actually looked at fundamental rights and principles shared among many European countries before employing it as grounds for European legality. Therefore, it is in general true that due to the "National" origin of EU fundamental rights, a common ground between the supranational and the national level was little by little developed. Consequently, a new kind of conflict between EU law and national law arose.

While conflicts based on different grounds, such as those between the fundamental freedoms and fundamental rights, can be described as "conflicts by divergence" (CBDs), the new kind of conflicts are defined by the wording "conflicts by convergence" (CBCs) since a specific conflict has the *same* fundamental right as a basis.

The classical example of the kind of conflict at stake in a CBC is the *Cordero Alonso* case.[XII] According to Spanish legislation in the case of employer's bankruptcy a certain amount of money was due to fired employees, but only if recognised by an administrative or judicial body. Private agreements between employers and workers were not legally binding in this sense. On the other side, EU law – as in directive 80/987 modified by directive 2002/74 – considered every source, including private agreements, as sufficient in order to legally concede compensation.

What is relevant for us is that both norms – the Spanish one denying compensation and the EU one conceding it – were grounded on the general principle of equality before the law. The interpretation of this principle given by the Spanish Constitutional Court allowed for this specific kind of discrimination, while the interpretation of the very same principle given by the European Court of Justice did not. Considering the principles of autonomy and primacy of EU law, the case was resolved by privileging EU legislation, but what is relevant for us is that different interpretations of the very same principle triggered different and conflicting legal consequences.

How can we conceptualize this kind of conflict? Is there something new that we can learn from this? Do we need new theoretical tools to handle the peculiar conflicts that the CBC embody? The next paragraphs will be devoted to answer these questions.

3. Complex Antinomies

In order to understand the conflicts at stake here the notion of "complex antinomy" has been used in scholarship. A brief analysis of this concept, as one of the attempts to tackle the issue, will be quite useful: it will allow to both enter deeper in the details of the problem and to figure out which problems remain to be fixed. Let us try to scrutinize this notion in detail. Here is the text that we are going to start from (Martinico 2014: 1350-1351):

> "In this sense, one could say that an antinomy is complex if it cannot be resolved by looking at the relations between legal orders: in other words, starting from the assumption of the prevalence of order A over order B, we cannot say that norm x always prevails over norm y because x belongs to order A while norm y succumbs because it belongs to order B. This occurs because in an integrated and interlaced system x and y could belong to both legal orders, A and B.
> This situation is also characterized by the absence of a clear and univocal supremacy clause. The absence of univocal norms of collision influences the 'reducibility' and the 'resolvability' of the constitutional conflict in a multi-layered system. Looking at this scenario, multilevel constitutionalism in fact suffers from the absence of an unambiguous primacy clause. The antinomies can only be resolved on a case-by-case basis, and not by an unequivocal solution offered by a precise rule for collision norms (such as a clear and undisputed supremacy clause), because in a context like this a provision which seems to belong to the national level could actually be the repetition of another norm existing at international or supranational level".

Let us try to summarize this concept and capture its essential features. The interlaced structure of European Public law, where norms are extensively exchanged between EU and national legal systems, favours the emergence of particular conflicts that we call "complex antinomies". An antinomy is complex if and only if:

1) It is impossible to apply an intersystematic criterion according to which, if norm x belongs to A and norms y belongs to B, x trumps y in every possible circumstance thanks to A's prevalence over B. This simply happens because both norms belong to A *and* to B.

We will call this feature the *Doppelganger problem*.

2) There is no single criterion to solve the antinomy, once it has risen, or at least it is not a sufficiently clear-cut one. Thus, conflict can only be solved on a case by case base. Again, this feature is considered as a consequence of the interlaced structure of norms in the European context ("*because in a context like this a provision which seems to belong to the national level could actually be the repetition of another norm existing at international or supranational level*").

We will call this feature the *Primacy problem*.

It will be argued that this notion underlines some crucial features of CBCs, especially the lack of ultimate rule of collision, but that it also needs some refinement, especially due to the norm-source distinction that should be considered. Let us begin with vices before moving to virtues.

3.1. The Doppelganger problem

First, the Doppelganger problem shall be examined, and in order to do that we will try a little thought experiment.

Let us imagine a very simple case: in legal system A there is a single legal authority creating new norms, call it A^1; similarly, B^1 is the only legislator in legal system B.

A^1 enacts the statute D^1 according to which "it is forbidden to drive faster than 50 km/h", while B^1 commands in statute D^2 that "it is allowed to drive faster than 50 km/h". Suppose that no interpretive problem arises because of linguistic clarity, so that norm N^1 "it is forbidden to drive faster than 50 km/h" perfectly corresponds to the text D^1 and norm N^2 "it is allowed to drive faster than 50 km/h" corresponds to D^2 (interpretive

isomorphism). Now suppose then that the intersystematic criterion C^1 "norms belonging to A prevail over norms belonging to B" is valid here (so that, for example, N^1 trumps N^2).

Let us see what happens in a more complex and interlaced legal system in which norms belonging to A also belong to B and *vice versa*, such as in the European context here at stake.

a) *One-sided overlap (A)*

Suppose that A^1 enacts D^2 "it is allowed to driver faster than 50 km/h" and that, therefore, N^2 now also belongs to A. Then, N^2 belongs to both A and B, while N^1 only belongs to A. Thus we will have three norms: N^{2A}, N^{2B}, and N^1. Let us consider all possible combinations:

- N^1 and N^{2A}: in legal system A the antinomy between N^1 and N^{2A} and the consequent conflict whether it is allowed or forbidden to drive faster than 50 km/h will be solved by looking at some criteria to solve the antinomies that we can assume belong to A (*lex superior, posterior, specialis* etc). For instance, N^1 "it is forbidden to drive faster than 50 km/h" will be confronted to N^{2A} "it is allowed to drive faster than 50 km/h" and the conflict will be solved according to, let us say, the *lex superior* criterion employed in legal system A. Alternatively, system A could lack criteria of this kind, so that the conflict would remain unsolved. In any case, all of this depends on the normative context typical of A. The inter-systematic criterion C^1 is irrelevant.

When we consider the relations between A and B, it goes:

- N^1 and N^{2B}: the antinomy can be solved looking at the criterion C^1, so that N^1 prevails as a norm of A;
- N^{2A} and N^{2B}: here there is no apparent antinomy. The twin norms N^{2A} and N^{2B} are perfectly identical, so that law-applying institutions could not even distinguish the results of applying one of the two. E.g. *two* norms of the kind "it is allowed to drive faster than 50 km/h" will be confronted with no result in terms of conflict. This is probably what is meant by a wording like "we cannot say that norm x always prevails over norm y because x belongs to order A while norm y succumbs because it belongs to order B": the idea seems to be that there can be no conflict between

'x' and 'x' or 'y' and 'y'. But there is no reason not to imagine that officials could employ the C^1 criterion and consequently prefer and apply N^{2A} instead of N^{2B}, *although* the applicative consequences would be irrelevant. This may seem pure formalism, but it is not. Perfect equivalence only holds as long as we talk about *norms*, but norms do not come from heaven. Generally speaking, lawyers have to "obtain" them by means of interpretation of sources,[XIII] as we will consider in more detail later. In other words, the crucial distinction between "sources" of law, in the sense of mere legal texts to be used in order to obtain legal norms and legal norms *stricto sensu*, as the meanings of these texts, shall be remembered.[XIV] The problem of interpretation is irrelevant only in cases of perfect isomorphism, where there is only *one* norm corresponding to each source. But isomorphism is purely hypothetical and it is actually quite rare in legal practice. As a consequence, the C^1 criterion would imply that officials are bound to give precedence to A-sources over B-sources. So, they would probably have to choose between slightly different sources, whose meaning (norms) could be partly different and perhaps conflict. Therefore, the irrelevance of the antinomy could quickly disappear.

b) *One-sided overlap (B)*

Suppose B^1 enacts D^1, so that "it is forbidden to driver faster than 50 km/h" is part of authoritative legal texts in B and N^1 "it is forbidden to driver faster than 50 km/h" also belongs to B. Thus we will have three norms: N^{1A}, N^{1B}, and N^2. This situation is perfectly symmetrical to case considered in a) and the same consequences follow.

c) *Two-sided overlap*

Imagine that A^1 enacts D^2 *and* that B^1 enacts D^1 and suppose again that interpretive isomorphism is at work here, then we will have that both N^1 and N^2 belong to A and to B. Thus, we will have four norms: N^{1A}, N^{2A}, N^{1B}, and N^{2B}.

Again, either we have antinomies internal to A or to B (e.g. between N^{1A} and N^{2A}), so that *internal* criteria to solve antinomies are applied, or the possible conflicts are:

- N^{1A} v. N^{1B}: same rule, thus apparent antinomy;
- N^{1A} v. N^{2B}: N^1 prevails because of C^1;
- N^{2A} v. N^{1B}: N^2 prevails because of C^1;

- N^{2A} v. N^{2B}: same rule, thus apparent antinomy;

As a result, either the C^1 criterion applies, or we face an apparent antinomy again. In any case, there is no circumstance in which the mere overlapping between legal systems A and B *for itself* forbids the application of the criterion C^1. What could happen is that interpretive isomorphism makes it irrelevant or, if interpretive isomorphism is not working, the C-criterion will become again relevant and applicable. Thus, the Doppelganger problem is not mistaken, it is simply a special case of a more general picture, featured by interpretive isomorphism. But it is for theory to consider the whole problem and this is what must be done here: we shall refine the analysis going beyond the special case.

3.2. The Primacy problem

Let us face the second defining feature of the notion of complex antinomy. It is the Primacy problem, i.e. the lack of any viable general norm of collision in cases of conflict between the two levels of norms. The point here is that, as a matter of fact, we do not have something as a C-criterion providing a stable and general solution to antinomies between interlocked legal systems. This situation can arise either because officials do not share a C-criterion or because it is doubtful whether the relevant criterion is C^1 or C^2, C^3, etc. But, as we have seen, this problem is linked to the interlaced relations between European legal systems.

There are probably two possible ways to make sense of this claim.

The first is the literal one according to which strictly speaking the lack of a single C-criterion is caused by the interlocking, but this line of reasoning seems not to be compelling. It is certainly true that in a context like the European one the C-criterion is hardly clear, but that this depends on the overlap of similar or identical norms is more questionable. As we have seen in the previous paragraph, we can imagine a context in which two legal systems share some norms, but can still be coordinated by a C-criterion. Moreover, the hard "resolvability" of complex antinomies turns out to be nothing more than its case by case method of resolution, which is typical of many other collisions of rules, such as fundamental rights conflict in the context of national constitutional norms (Zucca 2007: 54). Thus, it is hard to consider it as a defining and essential feature of complex antinomies.

The second interpretation is the following: since the conflicting rules are "twins", a clear-cut conflicting rule would be *useless*. For instance, if principle N^1 is part of both A and B, no clear cut rule will ever be able to solve the conflict, simply because there is nothing to be solved: N^1 and N^1 cannot conflict because a rule cannot conflict with itself.

This interpretation seems to be more robust, but – as we have previously seen – holds only as long as interpretive isomorphism is at the field. N^1 can be an exact *doppelganger* only if the same wording is interpreted exactly in the same way or at least if interpretations are so similar that no conflict arise, but this is far from being necessary.

In a nutshell, it does not seem to be true that the interlocking of legal systems *for itself* entails that no C-criterion will be available to solve conflicts (first interpretation). It does not seem either to be useless *because of* this merging, apart from some marginal cases of perfect isomorphism (second interpretation). Again, the concept of "complex antinomy" is quite sound, but it seems to be created to explain some special cases where no interpretive problems arise. As a result, it emphasises and generalises the phenomenon of non-resolvability of conflicts that is likely to be quite circumscribed.

4. Conflicts by Convergence and Interpretive Disagreements

Let us try to summarize. As we saw, the overlap between national and supranational fundamental rights has determined conflicts of a new kind, between national and the supranational instances of the shared norm. For instance, if the principle of non-discrimination (and the right not to be discriminate) is shared by the Spanish and the EU levels – such as in *Cordero Alonso* – the two could conflict in an unprecedented way.

Concepts like "complex antinomy" were thought sufficient to conceptualise the specificity of this phenomenon, but they are hardly capable of doing that mainly because they lack the essential distinction between norms and legal sources and between different levels of generality of norms. In other words, the very point of paragraph 3 was to underline that if we try to understand CBCs by means of a concept that does not consider: a) that what is actually shared is a set of legal sources; and b) that legal principles can be specified in different ways; we are doomed to an incomplete understanding of the issue or at least we are forced to limit ourselves to some special cases. The analysis of the "Doppelganger" problem was aimed at showing that what could *seem* to be norm sharing is

usually merely source-sharing and that in those cases conflicts that *are* solvable by means of a general C-criterion arise. The Primacy problem, on the other hand, shows that the mere overlap between two legal systems does not prevent the possible emergence of a C-criterion.

Thus, conflicts due to different interpretations of similar sources can be a feature of interlaced systems, and the difficulties in solving the antinomy will depend on the difficult acceptance of a shared general criterion to coordinate legal systems. Yet, there is something crucial in the concept of CBC and it is fundamentally correct to search for a conceptualization that does not limit itself to underline the unquestionable lack of an intersystematic C-criterion,[XV] but also considers the area of overlapping norms as the key to understand the issue.[XVI] An essential intuition in this sense is sketched in other paragraphs of the considered essay, for when describing the *Cordero Alonso* case, a different and probably more explicative lexicon is used, namely the concept of *interpretive disagreement*.[XVII] Trying to follow this line, I depart from concepts like "complex antinomy" and try to develop a different approach to the issue that puts some pressure on agreements/disagreements between the interpreters, in particular on interpretive disagreements. Therefore, the idea is that we can learn from the shortcomings of the approach previously considered and from the argument employed to underline them in paragraph 3. What we can learn is that a specific focus should be reserved to the norm-source distinction, to the specification of norms, especially principles, and to the role (or lack) of C-criteria to coordinate legal systems.

The difficulties risen by the CBCs actually are problems of norms specification:[XVIII] a certain highly abstract and general norm has to be specified by means of interpretation. Assuming that both A and B share a certain principle N^1 and that N^1 is exactly the same in A and in B, a CBC arises when interpreters specify N^1 as N^2 in A and as N^3 in B. This is what the *Cordero Alonso* case shows.

Moreover, what A and B actually share is a set of raw legal materials, i.e. legal sources,[XIX] to be interpreted.[XX] Thus, different interpretations could already appear at this stage because of possible textual differences (Dolcetti – Ratti 2013: 314-317). If this does not happen and the interpretation is the same – so that from the similar but not identical sources S^1 and S^2 the same N^1 is derived – then it is the specification of N^1 the could determine diverging interpretations. In a sense, the problem at stake here is more exactly a

problem of sources/norms distinction: the lack of a detailed examination of this distinction is the reason why the "complex antinomy" doctrine remains confined to a special case.

As a result, we can define interpretive disagreements as "those situations where different and diverging doctrinal conceptions about the meaning of legal sources in a certain legal system are held by different participants" (Dolcetti – Ratti 2013: 307). These conflicts derive from preferences for certain interpretive methodologies held by the interpreters, which, in turn, derive from *lato sensu* ethical preferences and opinions[XXI] (at the meta-interpretative level).

In the situation we are dealing with, namely conflict over the interpretation and application of shared fundamental rights, conflict is often inevitable.[XXII] Quoting Torres Perez (2009: 11-12) on this topic:

> "Given the typical, indeterminate language of fundamental rights clauses, they admit several interpretations. Moreover, fundamental rights embrace basic values for individuals and societies so that their meanings tend to be contested. Hence, the members of a community might reasonably disagree regarding fundamental rights' interpretation".

Therefore, due to both the semantic vagueness and ambiguity[XXIII] of fundamental rights language and to the fact that their role is crucial in contemporary societies,[XXIV] disagreements about them can easily emerge. Note that in the described circumstances disagreements can *emerge*, which means that in many other cases they could remain simply hidden. As Dolcetti and Ratti (2013: 318) put it:

> "In our view, this line of argument is misleading in that from convergence on a certain set of particular solutions it infers that such solutions are univocally justified by means of the same interpretative and meta-interpretative standards. But that is a proposition which must be empirically proved, as our analysis suggests. Moreover, overlooking the fact that, legally, different courses of interpretation are available (mostly, in a diachronic perspective) obscures the fact that the common solution is merely a pro tempore 'conventionally right' solution".

In other words, mere convergence on a certain solution does not entail for itself agreement on the reasons for the solution: two interpretive methodologies M^1 and M^2 could easily converge on result N^1 and still be different.

Conversely, disagreement over the interpretation of a certain right does not necessarily entail conflict:[XXV] for instance, the scope of application of the polities in which rights are applied could be different enough to prevent conflict, although this is probably more and more unlikely in contemporary Europe.

Relying on this framework, I argue that to explain the issue we need to employ the concept of "levels of disagreement".[XXVI] CBCs can be explained if we consider that law is an argumentative practice[XXVII] in which arguments[XXVIII] are provided in order to hold certain outcomes in terms of norms. What happens in the case of CBCs is that convergence arises at the level of legal sources or at the level of some highly abstract norms (principles).[XXIX] Yet, this agreement "can emerge across disagreement or uncertainty about the foundations" of principles (Sunstein: 2007, 8): in fact, the convergence on general principles is often *superficial*. Beyond it, we face disagreement at the higher level of theory of legal interpretation. We do not share the same methodologies to interpret legal sources or at least we do not have a clear criterion to order those methodologies.[XXX] This disagreement is the reason why – for example – the Spanish Constitutional Court and the European Court of Justice interpret the very same principle in a different way.

At an even deeper level, officials often disagree about meta-interpretative canons and – at the end of the chain of justification – on some *lato sensu* ethical or ideological judgements that lie at the basis of legal ideologies.[XXXI] In other words, we agree that something counts as a legal source, but we cannot agree (1) on how to interpret it or (2) on how to specify it; both the agreement on sources and the disagreement on methods of interpretation/specification, in turn, depend on some broader ideological claims themselves interlocked in various ways.

As a result, the disagreement, that was temporarily set aside, immediately strikes back when we try to obtain particular outcomes, i.e. when we try to fix valid norms and apply them in particular cases. Thus, we have disagreement at the deep level (interpretive and meta-interpretive criteria), agreement on an intermediate ground (legal principles or sources), and again disagreement at the lower level (detailed outcomes).

Note that this account is not fully explicative of CBCs: disagreement at the level of interpretive and meta-interpretive criteria is a common feature of contemporary legal systems (Dolcetti – Ratti 2013: 314-317). Consider contexts like the US legal system: several judges are bound to interpret and apply the US Constitution and its Bill of Rights

and we can easily imagine disagreement on how to interpret the same legal materials;[XXXII] this happens in Europe in the very same way. Hence, this cannot be the pivotal point that completely explains the pluralist European context. In order to complete the picture another tile shall be added: as we have previously pointed out, legal systems such as the American have the distinction of an ultimate authority vested with supreme power to adjudicate over deep disagreements.[XXXIII] This does not happen in European Constitutional law. As a result, no C-criterion is ultimately established[XXXIV] and the hypothetical resolution of CBCs drawn in 3 cannot be put into practice.

Consequently, what distinguishes CBCs is their complex structure of convergence and disagreement: 1) deep disagreement on interpretive methodologies and on meta-interpretive criteria; 2) disagreement on the C-criteria to solve antinomies between interpretive methodologies and uncertainty on the authority entitled to do that; 3) agreement on low-level principles and on a set of legal sources; 4) superficial disagreement on detailed outcomes.

5. Conflicts by Convergence today: the *Taricco* saga

What has been argued is far from being a set of abstract or hypothetical scenarios regarding constitutional conflicts in Europe. In this section I would like to argue that CBCs are right now at the centre of European Public law and represent a "hot topic" in scholarship.

In order to do that, I will focus on the recent *Taricco* saga that currently involves a tense confrontation between the ECJ and the Italian Constitutional Court and represents an example of CBC. This case clearly shows the relevance of CBCs in European studies, since it threatens the very fundamental roots of European law. The *Taricco* saga – as we will see – could perhaps involve the application of the "counter-limits" doctrine by the Italian *Corte costituzionale*, this way determining a harsh conflict between national and supranational level.[XXXV]

As a preliminary remark, it shall be pointed out that the *Taricco* saga has been widely analysed and considered by both Italian and European scholars.[XXXVI] Therefore, here the scrutiny will be limited to a very specific point, namely the different interpretations given by the two courts to the very same principle, namely the principle of legality in criminal

law. More in detail, the focus will be on the arguments offered by the courts in holding their views. This way the concept of "levels of disagreement" previously shaped will be considered in practice, to show how different views regarding interpretation can influence the judicial application of norms. In turn, the dependence of interpretive methodologies on broadly "ethical" claims hold by the interpreters will be underlined.

Factually, the *saga* regarded VAT fraud: the defendants were charged with setting up an organization in order to conduct fake trading of champagne. In particular, the company "Planet Srl" received fake returns from shell companies and wrote the VAT off. This way, Planet deceived the Italian treasury and, since part of VAT is an EU tax, the EU treasury too.

The crime had reached the stage of preliminary hearing before the *Tribunale di Cuneo*, but – due to the complexity of investigation and to some procedural delays – the court was fairly sure that no verdict could ever be reached before the expiration to the statutory limitation period, allowing for *de facto* impunity (Timmerman 2016: 780-781). Yet, the referring judge foresaw that this very short limitation period would determine systematic impunity of VAT frauds in Italy due both to the usual complexity of investigation in tax fraud matters and to the common three-stage, long-lasting structure of Italian criminal trials. Therefore, a potential conflict between Italian and EU law was at stake, according to the referring judge, since VAT is also an EU interest to be pursued by means of national criminal law. More specifically, according to EU law and in particular according to article 325 TFEU, Member States shall guarantee effective, proportionate, and dissuasive criminal penalties (including prison) in order to prevent VAT fraud and its disruptive effects on EU financial interests. The Italian Law No. 251 of 2005, on the other hand, modifying the last subparagraph of Article 160 of the Italian Criminal Code, provided for limitation periods to be extended only by a quarter following interruption, this way conferring a possible impunity on VAT defrauders. As a result, in its *Taricco* decision[XXXVII] the European Court of Justice commanded immediate disapplication of Italy's rules on limitation periods.

It is quite interesting to look at how this conclusion was reached and in particular at the role of article 49 of the Charter of Fundamental Rights. According to the Court's decision:

> "§ 54. In that respect, several interested parties which submitted observations to the Court referred to Article 49 of the Charter of Fundamental Rights of the European Union ('the Charter') which enshrines

the principles of legality and proportionality of criminal offences and penalties, according to which, *inter alia*, no one is to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed.
§ 55. However, subject to verification by the national court, the sole effect of the disapplication of the national provisions at issue would be to not shorten the general limitation period in the context of pending criminal proceedings, to allow the effective prosecution of the alleged crimes, and to ensure, if necessary, that penalties intended to protect the financial interests of the European Union and those intended to protect the financial interests of the Italian Republic are treated in the same way. Such a disapplication of national law would not infringe the rights of the accused, as guaranteed by Article 49 of the Charter".

As we can see, the ECJ recognises the principle of legality and the principle of proportionality as belonging to EU law, but the principle of legality is interpreted as merely requiring that punishable actions or omissions already constitute crimes under National law when committed. The principle of legality is not considered as also requiring the limitation period to act retroactively: disapplication of National law that merely shortened the limitation period would not represent a violation of EU fundamental rights, since these only entail that crimes are clearly identified as punishable when committed. On the other hand, the ECJ is worried by the risk of systematic violation of EU financial interests, as clearly stated in § 42:

"§ 42. In the present case, it can be seen from the order for reference that the national legislation lays down criminal penalties for the offences at issue in the main proceedings, namely, *inter alia*, conspiracy to commit offences in relation to VAT and VAT evasion amounting to several million euros. Such offences constitute cases of serious fraud affecting the European Union's financial interests".

As a result, since the risk of huge financial loss would surely jeopardise both EU financial interests and the EU norms aimed at safeguarding them, national judge are required to dis-apply them. Moreover, once again, this would not put at risk the application of the principle of legality in criminal law, considered the limited meaning given to that norm by the ECJ.

Trying to sum up, the reasoning by the ECJ seemed to be grounded on three arguments:[XXXVIII]

1. *literal* argument: the interpretation given by the Court to article 49, especially in paragraph 54, traces the same wording of the Charter and does not add up any kind of systematic connection between article 49 and other fundamental principles of criminal law. By means of this literal interpretive methodology, the meaning and scope of the norm is limited;
2. *teleological* argument: § 42 and § 55 are quite clear in underlining the importance of financial EU interests. As a consequence, the interpretive methodology is set up and norms are "built" so that they can safeguard this specific goal;
3. *authoritative* argument:[XXXIX] the ECJ employs an external, but authoritative and trustworthy source, namely decisions by the European Court of Human Rights, as a ground for its interpretation.[XL] In paragraph 57 the ECJ argues that article 7 of the ECHR, quite similar to article 49 of the Charter, is interpreted by the Strasbourg Court as if the principle of legality does not prevent shortenings of the limitation.[XLI] Thus, the concept of "principle of legality" employed by the two courts is a very similar one. Therefore, since a generally recognised authoritative interpreter on human rights gives a certain meaning to similar sources (art. 7 of the ECHR), then an analogous path is possible and advisable.

The reaction by the Italian Constitutional Court (CC) was a moderate one, but quite indicative of the deep disagreement between the two Courts. By means of the decision at stake, order 24/2017,[XLII] the *Consulta* asked for a new interpretation of article 325 TFEU. In particular, the interpretive reference was based on a doubt regarding the correct interpretation of article 325 TFEU: whether it prescribed the disapplication of internal norms on limitation periods even when this would jeopardise its degree of determinacy. More specifically, according to the Court the notion of "considerable number of cases" is vague and it is impossible for a common citizen not trained in law to foresee the disapplication of favourable norms on time limitations on the ground of article 325 TFEU. In turn, this doubt is based on the idea that the limitation period is grounded on the principle of legality in criminal law, as interpreted in the Italian legal system, and must therefore be perfectly clear and predictable. This principle is considered as part of the "untouchable core" of the Italian constitutional identity: therefore, it can never be disapplied, even when primacy of EU law is at stake: this is the core of the so called counter-limits doctrine.

What is interesting to the limited aims of this essay is the way in which this interpretation is advocated. The point through the eyes of the Italian Court is the meaning of the principle of legality in criminal law: where in the European interpretation of this norm (both by the ECJ and by the ECtHR), the principle of legality only entails that (1) criminal acts or omissions are clearly identified as crimes before the fact occurs and that (2) punishment is adequately identified, the principle in the Italian context has a broader meaning. Here the limitation period is considered as "part" of the punishment. In the vocabulary employed by the Italian Court, it is a "substantive" instead of merely "procedural" interpretation of the norm. The argumentation employed by the Court to ground this interpretation lies on two arguments:

1. Argument from *substantive reasons*: according to the Court (*Considerato in diritto*, § 4) the limitation period is part of the circumstances that determine whether someone will be punished or not. Thus, limitation is justified by the idea that punishment corresponds to a specific level of social threat and that the mere passing of the time is capable to lower this level. As a result, a right to forget the offence arises when sufficient time has passed. Therefore, punishment will not be applied anymore. If the punishment is not to be applied, then a sort of "negative" condition for the punishment is at stake: if something is capable to influence the application of the punishment both as a positive and as a negative condition, then this is part of the punishment itself and it shall be duly predictable and clearly stated. Thus, limitation is "covered" by the principle of legality too.
2. *authoritative* argument: another authoritative institution is close to this interpretation, namely the Spanish *Tribunal Constitucional*, so that the argument employed by the ECJ when relying on the ECtHR is somehow mirrored.

As a result, a different interpretation of the very same principle is on the ground. This is exactly the situation defined as a CBC.

Let us try to employ the idea of "levels of disagreement" to understand this conflict more in detail. Before we move in this direction, anyway, it is worth noting how the *Taricco* saga (still in progress) is a perfect example to illustrate how much CBCs matters for European Constitutional Law. Clashes on different interpretations of similar principles in Europe are surely among the great engines of evolution of the interlocked European legal

system. It is probably unnecessary to underline how relevant this can be in the eyes of scholarship.

So, let us move to the conceptualisation of the issue. In paragraph 4 we distinguished four levels of disagreement: 1) level of legal ideologies; 2) interpretive level; 3) low-level principles level; 4) detailed outcomes level. The *Taricco* conflict between the national and supranational levels actually fits this description. I would like to start from the lower level and then follow a "conceptual ascent" up to the more general one (Sunstein 2007: 18-20).

The *Taricco* saga demonstrates a superficial disagreement on detailed norms regarding limitation: according to the CC, limitation shall be clear and predictable and modifications to the limitation regime cannot act retroactively if they imply negative consequences for convicted people. Thus, it is hardly acceptable that in order to apply EU law the diminished limitation period is again extended. For the ECJ, instead, there is no problem with the idea that in order to limit VAT frauds the limitation period will be extended again, although this was not perfectly clear and predictable.

This superficial disagreement depends on the different meaning given to a shared low-level principle, namely the already analysed principle of legality in criminal matters.

In turn, these interpretations of similar sources depend on the fact that whilst using the same sources, the interpreters accept and apply different interpretive methodologies: the ECJ privileges (1) a literal method, preventing enlargement of the scope of application of the legality principle, and (2) a teleological method, aimed at safeguarding EU financial interests; the *Consulta*, on the other hand, is driven by an evaluative, individual-based methodology according to which if some individual-rights goal is at stake (at least in criminal law), and if this can be promoted by one interpretation, then the source ought to be interpreted in that way (MacCormick-Summers 1991: 514).

It is worth noting that both of them also employ an authoritative argument, quoting those judges that share their view. However, depending on the Court you choose to quote, this argument seems to be available for both interpretations,[XLIII] and it seems to be unable to denote the specific features of each Courts' argumentation.[XLIV]

Finally, all of this is grounded on different ethical premises (*lato sensu*), that lie at the last level of disagreement. As one can imagine, the literal-teleological interpretation employed by the ECJ seems to be linked to a certain commitment to a "europhile" ideology, where the supreme value to be pursued is the respect for the will of EU legislator (and here

especially the drafters of the Treaties) and for the EU's aims and interests. Fundamental rights themselves are interpreted so that they do not collide with these values. In contrast, the CC seems to be more committed to an individual-based ideology, where the supreme value to be pursued is the limitation – to the greatest possible extent – of the use of criminal punishment towards citizens, even if this means a potential threat to public interests, such as financial ones. This way, by highlighting different arguments, privileging certain interpretive methodologies, and showing a certain "ideology", the two courts reveal – in a way – their own "concepts" of law. In other words, by disclosing their views on how a good judicial decision should be made, the courts are revealing their views on how – by means of certain interpretive directives – the argumentative "game" called law shall be made (La Torre 2002: 396-397).

6. Conclusion

This essay was aimed at scrutinizing the concept of conflict by convergence and the jurisprudence that lies behind it.

It has been argued that in order to adequately conceptualise constitutional conflicts in Europe it is actually fundamental to underline the interlaced structure of antinomies, namely the belonging of conflicting rules to more than one legal system. It has also been pointed out that the concept of "complex antinomy" is only able to describe this phenomenon in some specific cases in which interpretive disagreement is very low, so that two norms can be "twins" at the supranational and national level.

In order to describe the scenario in a more general way the concept of "levels of agreement/disagreement" in the law has been sketched. It has been pointed out that interpretive competition is mirrored by conflicts between interpretive methodologies held by officials and that these conflicts depend on even deeper disagreements on the meta-interpretative and ultimately ideological reasons that guide the interpreters. As a result, the intermediate agreement on low-level principles or legal sources is not enough to prevent the emergence of superficial disagreement on detailed outcomes. Moreover, the fact that no ultimate criterion to solve interpretive and meta-interpretative disputes is available, since no ultimate authority is recognised in Europe, determines an ultimately irresolvable and never-ending constitutional conflict.

Put simply, the idea that constitutional conflict are central to the European context must become shared: these are probably inevitable, and maybe even "healthy", and in any case anyone who denies them is likely to be doomed not to catch the structure of the European legal system. The best way to conceptualise them, anyway, is to deepen and refine the promising notion of "disagreement caused by different interpretations". Here some broad lines of this task have been drawn by means of the concept of "levels of disagreement". Yet an interesting line of future research would be to go further and identify which kind of interpretive methodologies European and national judges prefer to use and why. The very brief analysis of the *Taricco* saga exemplifies this kind of task. This enterprise would be quite useful in order to understand why CBCs occur and why European scholarship should face these themes immediately, for very good reasons.

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I The classical Kelsenian model is based on the idea that every rule, both concrete and general, such as courts' decisions and general statutes, shall be enacted by legitimate authorities. In turn, in order for an authority to be legitimate it shall be empowered by another norm. Of course this norm has been produced by another authority, which in order to be legitimate requires another norm, and so on. The never-ending process stops at the level of the Basic Norm, beyond the First Historical Constitution. Quite clearly this interpretation of the structure of legal systems is thought to describe modern States: it is no coincidence that Kelsen considers States to be simply legal systems. See Kelsen (1967: especially chapter V and VI), see also Paulson (1992) and Hart (1983).

II As a milestone on pluralism see MacCormick (1999: 102-116); see also Walker (2002: 27) and Krisch (2008: 184). Generally speaking, pluralist theories share the view that different authorities can share supreme power although being empowered by different ultimate rules. As a result, several supreme authorities can coexist, which is denied by classical Kelsenian approaches.

III On antinomies see Guastini (2014: 283-290).

IV See article 6.2 TEU: "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".

V ECJ, Opinion of the Court, A-2/13, *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties,* 2015, ECLI 2454. For a brief comment on the case see Lambrecht (2015).

VI See Torres Perez (2009: 14): "the process of European integration was market driven, and, in this context, fundamental rights protection was not a main concern".

VII For the distinction between "human" and "fundamental" rights, see Palombella (2001: 299-304).

VIII BVerfGE 37, 271; 1974 2 CMLR 540 (*Solange I*) and BvR 2, 197/83; 1987 3 CMLR 225 (*Solange II*).

IX Corte costituzionale, *sentenze* nn. 98/1965, 183/1973, 170/1984.

X Art. 6.1 TEU: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. 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".

XI ECJ, Case C-144/04, *Mangold v Helm,* 2005 ECR I-09981 and the reaction by Herzog – Gerken (2008).

XII ECJ, Case C-81/05, *Anacleto Cordero Alonso v. Fondo de Garantia Salarial (Fogasa),* 2006, ECR I-7585.

XIII For the norm/source distinction see *inter alia* Wroblewski (1992: 85) and Schecaira (2015: 17).

[xiv] Quoting Schecaira (2015, 17): "Indeed, the purpose of the paper is to stress that sources of law should not be confused with legal norms, i.e., the normative propositions (or meaning-contents) which can be derived from sources like statutes and precedents, and by which judges are guided in arriving at their final decisions (or at least which they use in order to justify—cynics might prefer to say "rationalize"– their decisions)".

[xv] To be fair, in a sense the criterion can "exist" if a legal institution, such as the ECJ, endorses it. Accordingly, many C-criteria can exist in this sense in interlaced contexts. Nevertheless, what is meant here by "lack" of a criterion is that this rule is not shared and generally accepted and applied.

[xvi] In another work this interlock is interestingly compared to a flow of "blood" that makes the new legal system a living entity. This metaphor is somehow illuminating in underlining the importance of this overlap and circulation of rules to understand the European system. See Martinico (2013: 44-45).

[xvii] Martinico (2014: 1358): "The Cordero Alonso case is emblematic of the disagreement caused by the different interpretations given to a shared principle by two different interpreters. It confirms that the mere sharing of principles that are, from a literal point of view, common, does not mean that the interpreters will agree on the interpretation to accord it".

[xviii] On this concept see Kelsen (1967: 230) who uses the wording "individualization" or "concretization" of a general norm.

[xix] This notion of "legal source" is derived from Ross (1974: 78), whose notion of legal sources as mainly written raw materials enacted by means of specific procedures and interpreted by legal practictioners is considered essential here. See also Raz (2009: 48).

[xx] More precisely, in contexts like the European one what is often shared is the *same wording* of different sources.

[xxi] On the connection between interpretive methodologies and the "ultimate grounds" of legal systems see Alexander – Schauer (2009: 181-187).

[xxii] Waldron (1999: 11-12) talks about "ferocious disagreement" about "detailed application" of rights.

[xxiii] "Vagueness" and "ambiguity" are sometimes employed as synonyms, but they are actually different. "Vagueness" is employed to clarify that general terms in the law and in ordinary language in general denote objects with different degrees of precision. While, for example, a car is for sure a 'vehicle' – employing the classical Hartian example – and a toy is *not* a 'vehicle', it is not sure whether a tricycle is a 'vehicle'. In other words, the problem is that due to certain features of language, it is quite common that the reference of a general term to its so called "extension" is not fully determinate. As a result, when we do not know whether a certain term applies to a certain object, then that term is "vague". On the other hand, words usually and simply have different meanings, such as in the case of "bachelor". Here it is the very concept that is unclear and we will say that the word is "ambiguous". Widely on these issues see Poscher (2011: 1-7).

[xxiv] The idea that a "fundamental right" can be already "operative" when it works as "substantial directive about subsequent normative acts" for the legislator, and not only when it is used by a court to trump other norms, is drawn again from Palombella (2001: 306).

[xxv] Disagreement is necessary, but not sufficient to produce conflict: adversarial circumstances are needed too. See Zucca (2007: 49-50).

[xxvi] As for this concept, I am deeply beholden to Giorgio Pino and to his presentation "On Legal Disagreements: Typology, Scope, and Jurisprudential Implications" at the European University Institute in November 2015.

[xxvii] Dworkin (1986: 13). This point made by Dworkin is today interestingly shared also by scholars often disagreeing with him, e.g. Patterson (2016: 206).

[xxviii] I.e. namely sets of premises employed to justify a certain conclusion plus the conclusion itself, see Groarke (1999).

[xxix] Note that this account holds for the specific case of CBCs, but this is contingent. In other cases, disagreement can arise at the level of legal sources too. I.e. in some cases disagreement on whether something counts as a legal source can occur, similarly to what Dworkin (1986: 5) calls the "theoretical disagreement".

[xxx] Chiassoni (2003: 63) defines an interpretive code as "a discrete and unitary set of hermeneutic directives" (my own translation from Italian). See his essay for a detailed analysis of this concept.

[xxxi] MacCormick (1979: 234): "Law certainly embodies values and these values are characteristically expressed in statements of the principles of a given legal system".

[xxxii] Alexander – Schauer (2009: 181-182): "not only will each of these officials assign different meanings to the Constitution; in a very real sense, each official is interpreting a different constitution. And this is because,

in part, the interpretive methodology of each of these officials requires her to interpret different raw material".

[XXXIII] It is no coincidence that Alexander and Schauer (2009: 185), when underlying deep conflicts in the US legal system, ultimately look at the Supreme Court and at its decisions as the decisive tool to solve disagreements. The fact that this cannot happen in the European context is a crucial feature.

[XXXIV] Note that there is no reason to assume that the C-criterion has always to be the same: criterion C^1 could be overruled by C^2 and then become C^3 and so on and so forth. Moreover, the ultimate authority itself could change. What is relevant is that *in every moment* a legal system is featured by an ultimate criterion that can be determined by the authority recognised as supreme at that time.

[XXXV] Some scholars have actually seen this scenario as desirable. See Luciani (2017: 87). *Contra* see Faraguna (2017: 373).

[XXXVI] For a wide catalogue of perspectives among Italian lawyers see the work edited by Bernardi (2017). As for foreign lawyers see at least Billis (2016) and Timmerman (2016).

[XXXVII] ECJ, Case C-105/14, *Taricco and others,* 2015 ECLI 555.

[XXXVIII] Here the taxonomy on interpretation developed by MacCormick and Summers is employed. See MacCormick-Summers (1991: 512-516).

[XXXIX] MacCormick and Summers (*ivi*: 513) prefer the wording "argument from precedent". In my view, since here we are describing a "precedent" deriving from an "external" Court, this would be partly misleading. Therefore, I prefer the wording "authoritative". For a detailed analysis of the notion of "authority" in law and of the practice of citing authorities, in particular foreign ones, see Schauer (2008: 1935-1940 and 1954).

[XL] Relying on the Strasbourg Court rather than on national courts is, however, quite typical of the ECJ, in particular when elaborating general principles. See Conway (2008: 796-797).

[XLI] See C-105/14, §57: "The case-law of the European Court of Human Rights in relation to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which enshrines rights corresponding to those guaranteed by Article 49 of the Charter, support that conclusion. Thus, according to that case-law, the extension of the limitation period and its immediate application do not entail an infringement of the rights guaranteed by Article 7 of that convention, since that provision cannot be interpreted as prohibiting an extension of limitation periods where the relevant offences have never become subject to limitation (see, to that effect, *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 149, ECHR 2000-VI; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 110 and the case-law cited, 17 September 2009, and *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, §§ 563, 564 and 570 and the case-law cited, 20 September 2011)".

[XLII] Corte costituzionale, *ordinanza* n. 24/2017.

[XLIII] Accordingly, note that scholars have underlined how the Court of Justice picked the interpretation of legality it considered more suitable (ECtHR) and ignored others (*Corte costituzionale*). See Luciani (2017: 81).

[XLIV] This seems to be somehow an ordinary feature when authoritative reasoning is at stake, at least when optional authorities are employed. Quoting Schauer (2008: 1949-1950): "The cited authority is often not one that supports the allegedly supported proposition more than some other authority might negate it. 63 And this makes the use of an authority as "support" a peculiar sense of authority, because the set of authorities does not point inone direction rather than another. Nevertheless, the conventions of legal citation do not appear to require only strong (authoritative) support. Rather, the conventions seem to require that a proposition be supported by a reference to some court (or other source) that has previously reached that conclusion, even if of other courts or other sources have reached a different and mutually exclusive conclusion, and even if there are more of the latter than the former. Thus, to support a legal proposition with a citation is often only to do no more than say that at least one person or court has said the same thing on some previous occasion".

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Abstract

Canada and the United States of America are examples of how two constitutional systems in the same region may adopt substantially different solutions in respect of the powers of the head of state. While the United States Founding Fathers opted to follow a republican and presidential path, the Canadian constitutional system developed a framework under the British monarchic background, in part as a rejection of their neighbour country's federal and constitutional choices. This article proceeds with a comparison between both systems of Northern America, demonstrating that the powers of heads of state may vary, even between countries which were historically influenced by the same constitutional and democratic traditions, but, as a result of a multitude of historical and cultural influences, decided to follow different constitutional pathways.

Key-words

constitutional law, heads of state, separation of powers, checks and balances, federalism

1. Introduction

Although different countries may be influenced by diverse constitutional traditions, the character of the head of state has always played a dominant role in the political lives of most of the states around the world. From monarchies to republics, from the *ancien régime* to the post-revolutionary periods, from authoritarian regimes to more democratic systems, kings and presidents have been for years the last redoubt of political power, sovereignty and public order in a large number of countries. In some countries, it is also argued that the moves from a monarchy to a republic (or vice-versa) should depend on a prior identification and definition of which would be the powers of the head of state (Crommelin 2015: 1118-1139). Moreover, in some non-presidential regimes, the role of the head of state is often questioned both by scholars and the public for not being entitled to play a substantial role in the daily political and constitutional practice, though they are asked to act at moments of political crisis.[I]

And even though the countries of Northern America are relatively recent realities, their heads of state are still extremely relevant symbols of each of those constitutional and democratic systems. However, analysing the powers of the heads of state in both Northern American neighbour countries (Canada and United States) is also an exercise in historical and cultural research, since there are substantial differences between the peoples, cultures and customs of the states.

In fact, both countries have been the subject of a vast array of influences, not only from European nations, but also from peoples of other continents such as Africa or Asia, as well as, obviously, from the American continent itself. The current realities of Canada and the United States were built by immigrants and are immeasurably characterized by their multicultural societies (although the Canadian commitment to multiculturalism is quite recent and the United States could be preferably characterised as a "diverse society"). But their political and constitutional history is substantially different. While the United States declared its independence in 1776 (with the establishment of the Confederation in 1781), Canada only had its Confederation established in 1867, though its constitutional choices were also affected by the example of the United States. The Canadian constitutional settlement was conceived by the Fathers of Confederation as a rejection of the American settlement to

the advantage of "a Constitution similar in Principle to that of the United Kingdom" – as stated in the preamble of the Constitution Act –, but simultaneously under "the Desire to be *federally* united into One Dominion" – as it happened in their neighbour country.

Long before, the first inhabitants of Northern America are said to have migrated from Siberia by way of the Bering land bridge and arrived at least between 15,000 and 16,000 years ago, though increasing evidence suggests an even earlier arrival (Gugliotta 2013). However, the European cultural influence goes back to the Age of Discovery, especially to the colonisation by the British and French empires.

Now the Canadian Confederation is celebrating its 150th anniversary, this article intends to present the reader with a comparison between both systems in Northern America, trying to demonstrate that the powers of heads of state (and constitutional systems as well) are not necessarily equal in countries which were historically influenced by the same constitutional and democratic traditions and practices, such as Canada or the United States.

From the republican reality of the United States, influenced by a richly ideological revolution that, in fact, served as an introduction to the French Revolution itself, to the Canadian monarchic system, which has been peacefully evolving throughout times until a process of "Patriation" of its Constitution, the different characteristics of both systems require a continuous analysis. Because constitutional systems are not static realities and evolve side by side with social communities and their ways of exercising political power.

As both systems were created at particular moments in history, it is also worth briefly mentioning how a more recent theme, such as environmental protection – an area which political importance has been increasing during the last decades –, is dealt under the existing frameworks that foresee and regulate the powers of the heads of state in Northern America.

2. Heads of state and constitutional systems

Before the creation of the reality of states in Northern America, the position of the head of state had already gained particular relevance in the history of states, and also before the existence of states. In fact, the "invention" of the modern state could be attributed to European political history (Reinhard, 2007: 7-14), as the maximum organized form of political power in contemporary societies, in order to face a historical need of political organization, based on founding elements such as people, territory and sovereignty (de

Vergottini 2013: 125). Before that, it is possible to find various expressions: from *Polis*, to *Civitas*, *Res publica*, *Senatus Populusque Romanus*, *Regnum*, *Corona*, *Terra* or *Burg*.

Nonetheless, and though there was already a commonly accepted distinction between the king – or the *ruler* – and his kingdom – or the *realm* – (Albuquerque and Albuquerque 1999: 506), it could be said that with the birth of the state – from the Italian word *stato* and, before that, the Latin origin *status* – that distinction started to be more accentuated. The head of state became now a more *legally* differentiated character from that new reality of what could be considered as the state.[II]

In the liberal state, the principle of the separation of powers always represented a central role (Kelsen 1923-1924: 374-408; Eisenmann 1933: 163-192). The rise of the constitutional state, submitting to the rule of law and the representative system, was based on the idea of freedom and intended to impose limits to political power – historically conferred to the king or ruler –, dividing it and reducing its intervention in citizens' day-to-day life.

The constitutional monarchy was initially characterised, in England, by two centres of power: King and Parliament, who shared the acting of the sovereign power. The head of state was entitled to executive power and participated in the legislative function, limited to a certain number of acts, such as the king's sanction.

With the beginning of parliamentary forms of government, the king and the cabinet (or *government*) started to share executive power, with the king, in the first phase, as the head of the government. Meanwhile, the evolution of the parliamentary system attributed more political affirmation to Parliament, which recognized the place of cabinets with parliamentary majorities as holders of executive power *par excellence*. Consequently, the head of state became relegated to a mere role of *indirizzo* in a political system composed of the main triplet of Electorate-Parliament-Cabinet, based on a majority rule (Bin and Pitruzzella 2015: 145-148). In respect of the rights of the king, Bagehot would respond with the following well-known, and still frequently quoted description:

> "the sovereign has, under a constitutional monarchy such as ours, three rights — the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others. He would find that his having no others would enable him to use these with singular effect" (Bagehot 1873: 85).

Therefore, the office of the head of state in parliamentary systems has seen its space in the constitutional framework significantly reduced to that idea presented by Bagehot (Roberts 2009: 13-17).

After the Germanic experience of the Constitution of the Weimar Republic (1919–1933), the head of state in parliamentary systems started to be regarded as a "guardian of the constitution" – an expression introduced by Carl Schmitt (1931) –, positioned over pluralism and the different party perspectives in the political debate, as well as safeguarding the political unity of the state. However, according to the Weimar Constitution, the head of state had autonomous legitimacy and incisive powers, once he was directly elected by the electorate, having competence to appoint governments (even without support from the Parliament), to dissolve the Parliament and "emergency powers" to suspend the constitutional guarantees of rights. Therefore, the head of state could be an extremely relevant governing structure in times of crisis (Bin and Pitruzzella 2015: 270-272).

At this point, the French Gaullist conception of the head of state should also be mentioned, as it is, at least in part, related to the German precedent under Weimar. In fact, the 5th Republic in France (with the Constitution of 1958) was primarily intended to limit and rationalise the parliamentarianism of previous republics. However, it went through a metamorphosis with the strong personality of General de Gaulle, the Algerian crisis and the controversial constitutional amendment of 1962 (allegedly breaching articles 11 and 89), resulting in a referendum, which approved de Gaulle's intention that the president should be directly elected by the citizens. And since then, only in two brief periods (1986-1988 and 1993-1995) of "cohabitation" of the president and a government from a different party, has the Constitution of the 5th Republic been applied *à la lettre* (Duverger 1986: 7).

As a matter of fact, although the Weimar Constitution and the Gaullist conception have hardly influenced the constitutionalism of the states in Northern America, they are essential to understand parliamentary, presidential and semi presidential realities and their repercussions in other constitutional experiences, namely in regard of the competences of heads of state in Canada and the United States, which is the subject of this article. And that is the reason why certain historical moments should be presented in this description, starting with the constitutional reality of the United States.

3. The head of state in the United States of America

3.1. Republicanism and the Revolution

In June 1774, the Virginia and Massachusetts assemblies independently proposed an intercolonial meeting of delegates from the several colonies to restore union and harmony between Great Britain and her American Colonies.

Pursuant to these calls, the first Continental Congress met in Philadelphia in September of that year, composed of delegates from 12 colonies. On October 14, 1774, the assembly adopted what has become to be known as the Declaration and Resolves of the First Continental Congress. In that instrument, addressed to his Majesty and to the people of Great Britain, there was embodied a statement of rights and principles, many of which were later to be incorporated in the Declaration of Independence and the Federal Constitution. Because of the timing of this Congress, that followed the British and French Enlightenment, the American Revolution and its Constitution have been over the years labelled as profoundly liberal and Lockean (Hartz 1955).

However, later examinations (Robbins 1959; Wood 1969) emphasised the Republican ideology and motivations of the American Independence times, where the revolutionary literature made references to corruption, vice, and virtue. In fact, the people of the Thirteen Colonies were strongly influenced by the religious beliefs of the "pilgrims" of the Mayflower[III] and they generally considered the society of the Old World as corrupted by the prevalence of the particular and personal aims over the general good, serving the oligarchical interests of rulers and politicians (Craig 1990: 317-365).

The main idea of American republicanism was to sacrifice the individual benefits for the public and general good[IV] of society (or the *republic*), as Woods' words point out:

> "Since everyone in the community was linked organically to everyone else, what was good for the whole community was ultimately good for all the parts. The people were in fact a single organic piece (…) with a unitary concern that was the only legitimate objective of governmental policy. This common interest was not, as we might today think of it, simply the sum of consensus of the particular interests that made up the community. It was rather an entity in itself, prior to and distinct from the various private" (Wood 1969: 58)

Accordingly, the Constitution of the United States of America had to be framed by Republican ideals. Its structural provisions, the separation of powers and the checks and balances were intended to prevent the factional political officials from potentially legislating against the public good. As Sunstein states:

> "In important respects, the departure from traditional republicanism could not have been greater. Madison willingly abandoned the classical republican understanding that citizens should participate directly in the process of government. Far from being a threat to freedom, a large republic would help to guarantee it. At the same time, Madison's understanding was sharply distinct from that of the modern pluralists. He hoped that national representatives operating above the fray, would be able to disentangle themselves from local pressures and deliberate on and bring about something like an objective public good. Those representatives would have the virtue associated with classical republican citizens" (Sunstein 1985: 42).

And probably it is as a result of this interpretation that the provisions, set by the Founding Fathers of the United States, and evolving since then, which regulate the process of election of the head of state, are characterised by a considerable complexity, discussed below. As a matter of fact, this complexity could be understood as a constitutional means to ensure that the elected official is a credible or trustworthy citizen for governing a public office of the Federation. Though this question has been raised recently by opinion makers in regards of the more radical positions adopted by Donald J. Trump's administration.

3.2. The Constitution and the office of President of the United States

Before the approval of the Constitution of 1787, other relevant statements should be emphasised as part of the constitutional law of the United States of America. From the *Covenants* and other legal instruments dating from the colonial era,[V] to the Declaration of Independence, the Virginia Declaration of Rights and the declarations of the other first states, the principles, values and symbols provided by these texts assume extensive importance for those who are willing to know more about constitutional law in that country.

It should be also stressed that the twenty-seven amendments to the original Constitution (of the original seven long articles), which were approved from 1791 until 1992, have the same legal force and represent special relevance, namely in respect of fundamental rights (Miranda 2014: 147). In addition, the Constitutional Law of the United States also includes customary law (not as much as in the United Kingdom, but still relevant) and the

constitutions of the fifty federate states (officially forty-six states and four commonwealths, which are Kentucky, Massachusetts, Pennsylvania, and Virginia).

The final version of *The unanimous Declaration of the thirteen United States of America* was ratified by the Second Continental Congress (representatives of the Thirteen Colonies), in Philadelphia on July 4, 1776, stating in its preamble:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[VI]

The Declaration of Independence was heavily influenced by the Virginia Declaration of Rights,[VII] since its main author, Thomas Jefferson, was actually a delegate from Virginia to the Continental Congress.

In respect of the Constitution, it is noteworthy that the fundamental law in force today was preceded by a previous Constitution, named the *Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia* and which were agreed to by the Continental Congress on November 15, 1777 and entered in force after ratification by Maryland, on March 1, 1781.[VIII]

This first constitutional text predicted that each state would retain "its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which was not by the Confederation expressly delegated to the United States, in Congress assembled" (article II). Nevertheless, it did not provide for a strong executive and had no provision for a federal judiciary (Friedman 2005: 71-79).

The only reference to a president (or something similar to a *chief executive*) was made in article IX (para. 5), where it was foreseen that:

> "The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated 'A Committee of the States', and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction -- to appoint one of their members to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years (…)."

However, all of the functions executed by the "President of the United States in Congress Assembled", as he was known, were under the direct control of Congress. As a result, he only performed minor ceremonial duties and often signed documents on behalf of the Congress as a whole.

The presidency of those days is perhaps best compared to someone who could occasionally represent, and speak for, the organization in a public, official capacity, but was not a very important or powerful figure in day-to-day decision making.

The Articles of Confederation were replaced by a new constitution, which created a strong, executive presidency (amongst other innovations). George Washington, who had been Commander-in-Chief of the Continental Army between 1775-1783, assumed office in 1789 as the first full-fledged "President of the United States", a title only used informally until then.

Curiously, it should be also accentuated at this point that the Articles of Confederation foresaw the interesting following provision regarding the possible will of Canada (as the British-held "Province of Quebec" was already known) to enter the confederation:

> "Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States" (article XI).

The current Constitution of the United States of America was drafted in 1787 and afterwards forwarded to the states, ratified by eleven states by 1788 and by all the thirteen states two years later.

Its preamble is a remarkable piece of symbolism in constitutional and political history, as it states:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Since then, this has remained the federal Constitution of the United States, and as Friedman states:

> "The federal Constitution was marvellously supple, put together with great political skill. The main reason why it has lasted so long is that the country – aside from the Civil War crisis – has been remarkably stable. The first revolution was the last. But the Constitution itself deserves at least a bit of the credit. It was neither too tight nor too loose. It was in essence a frame, a skeleton, an outline of the form of government; on specifics, it mostly held its tongue" (Friedman 2005: 73-74).

In respect of presidential powers, among the seven articles of the American Constitution,[IX] the first three articles are of particular importance, for they enshrine the separation of powers, drawing on the ideas of Montesquieu. Article I foresees that all legislative powers are conferred to the Congress of the United States (Senate and House of Representatives), while Article II grants the executive powers to the President. The judicial power is presented in Article III, which is conferred to the Supreme Court and other inferior courts.

As a matter of fact, the American system of a separation of powers implies not only the acts which are naturally inherent to the functions of such organs (*faculté de statuer*), but also the possibility of interfering in acts of other organs (*faculté d'empêcher*). That embodies the mechanism which has been named of "checks and balances" (Manin 1994: 257-293; Carey 2009: 121-165).

The President of the United States is, therefore, elected for a mandate of four years, "and, together with the Vice-President chosen for the same Term" (Article II, Section 1),[X] formally through an electoral college; although nowadays it could be said that (due to the intervention of modern political parties and the imperative mandate of presidential electors) it is nearly a direct suffrage (Miranda 2014: 160). Still, the election rules vary from state to state.

At the same time, there is also the possibility that the candidate getting most popular votes is not elected to the Presidency, as it happened in the 2000 presidential election, in which Al Gore gained more votes, 50,999,897 but George W. Bush was elected with 50,456,002 votes.[XI] More recently, the same happened to Hillary Clinton, who received 65,853,516 votes, and Donald J. Trump was elected with only 62,984,825 votes.[XII] And the truth is that both Gore and Clinton, subsequently showed "restraint in upholding the constitutional system" (Ackerman 2010: 30).

Moreover, the Constitution foresees a reciprocal independence of the office holders, with neither the President answerable before the Congress, nor the latter dissolvable by the President. This comment notwithstanding, impeachment or the submission of the President to criminal liability by the Congress, is possible through a qualified majority of two thirds (Articles I, Sec. 3 and II, Sec. 4).[XIII]

Functional interdependence was foreseen in the Constitution, with on the one hand mutual collaboration and accountability – presidential veto to bills, which may be overcome through a majority of two thirds (Article I, Sec. 7), and messages from the President to the Congress (Article II, Sec. 3), and, on the other hand, authorizations and approvals regarding the appointment of high officer, treaties, budgetary credits and inquiry commissions. (Article II, Sec. 2).[XIV]

Actually, in this best example of a presidential system, the figure of the President has the functions of impulse or initiative, both on domestic and international levels (Hathaway 2009: 143-268), and the Congress is entitled to deliberating, i.e. the President is responsible for the most relevant decisions of the mandate, but he is also under the continuous surveillance and effective influence of the Congress (particularly the Senate).

As for the election of the President, it should be noted that each state shall appoint a number of electors in the electoral college, equal to the whole number of senators and representatives to which the state may be entitled in the Congress. But no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed as an elector. (Article II, Sec. 1). These electors will then vote for the office of President.

Article II, Sec. 1 also determines that no person except a natural born citizen, or a citizen of the United States, at the time of the adoption of the Constitution, shall be eligible to the office of President, neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and lived for fourteen years as a resident within the United States.

The same article originally foresaw that, in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said Office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act

accordingly, until the disability be removed, or a President shall be elected (original Article II, Sec. 1). However, this clause was affected by the XXV Amendment, which clarified it, setting that "in case of the removal of the President from office or of his death or resignation, the Vice President shall become President" (Section 1) and "whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress" (Section 2).

Still the Article II, Sec. 1 sets the following oath or affirmation for the inauguration on the execution of the office: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

According to Article II, Sec. 2, and notwithstanding the formal competence of the Congress for declaring war (Article I, Sec. 8), the President is also the Commander-in-chief of the armed forces[XV] of the United States, and of the militia of the several States, when called into the actual service of the United States.

This article foresees that he may also require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

The same Article II, Sec. 2 grants the President power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur. Also by and with the Advice and Consent of the Senate, the President shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States.

As foreseen in the mentioned article and section, another the power of the President is to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session. And, moreover, the Sec. 3 of that article sets that the President shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. On extraordinary occasions, he has powers to convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper.

Article II, Sec. 3 also enshrines the power of the President to receive ambassadors and other public ministers, as well as to take care that the laws are faithfully executed, and to commission all the officers of the United States.

Turning now to the lack of legislative powers of the President, the truth is that, being the sole authority over the executive branch, the holder of the office controls a vast array of agencies that can issue regulations with little oversight from Congress. Examples of those federal departments, entities and agencies are the Central Intelligence Agency, the National Security Agency, the Food and Drug Administration, the Environmental Protection Agency.

And the truth is that "contemporary political science is catching up with the rising importance of presidential unilateralism" (Ackerman 2010: 198). Although the increasing centrality of the role of the head of state had appeared well before, the presidential terms of George W. Bush and Barack Obama[XVI] have actually consolidated a trend of a strong pragmatic growth of presidential powers, facing the Congress and judicial power (de Vergottini 2013: 687), which is currently being assessed by public opinion makers with the promises of Donald J. Trump.

However, and apart from these increasing powers, the Constitution foresees that the President, Vice President and all civil officers may be removed from their office on impeachment for, and conviction of, treason, bribery, or other high Crimes and misdemeanours (Article II, Sec. 4). On this issue, it should be highlighted that no president has ever been impeached under the constitutional law of the United States. Presidents Andrew Johnson and Bill Clinton were successfully impeached by the House of Representatives, but they were later acquitted by the Senate. In the same way, the impeachment process of Richard Nixon was technically unsuccessful, as he resigned his office before the vote of the full House.[XVII]

3.3. Case law regarding the status of the President

In terms of executive privilege and immunity, only Article I, Sec. 6 explicitly states that Senators and Representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same. And for any speech or debate in either House, they shall not be questioned in any other place.

Consequently, presidential privilege and immunity is not mentioned explicitly in the Constitution. Nonetheless, the Supreme Court of the United States ruled it to be an element of the separation of powers doctrine, and/or derived from the supremacy of executive branch in its own area of constitutional activity.

On this matter, Chief Justice Warren E. Burger, writing for the majority in *US v. Nixon*, stated that:

> "Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."[XVIII]

Some years later, in *Nixon v. Fitzgerald*, the Supreme Court ruled that the President has absolute immunity from civil lawsuits seeking damages for presidential actions.[XIX]

However, the Court ruled in *Clinton v. Jones* that a sitting President does not have presidential immunity from suit over conduct unrelated to his official duties. Paula Jones's suit was based on conduct alleged to have occurred while Clinton was governor of Arkansas. Clinton had sought to postpone the lawsuit until after he left office, but the Court stated that it had never suggested that the President or any other public official has an immunity that "extends beyond the scope of any action taken in an official capacity."

The Court based its immunity doctrine on a functional approach, extending immunity only to "acts in performance of particular functions of his office." It also rejected Clinton's claim that the courts would violate the separation of powers between the executive and judicial branches if a court heard the suit. Finally, the Court rejected the President's contention that defending the lawsuit would impose unacceptable burdens on the President's time and energy.[XX]

4. The head of state in Canada

4.1. From British province to the "Patriation"

Given that the Queen represents an extremely important federal constitutional role, as her name is invoked when one refers to each of the three powers – executive (Queen-in-

Council), legislative (Queen-in-Parliament) and judicial (Queen-on-the-Bench) – it would be worth investigating how this relation between Canada and the British sovereign began (Macleod 2012: 16-17).

In 1583, Sir Humphrey Gilbert, by the royal prerogative of Queen Elizabeth I, founded St. John's, Newfoundland, as the first North American English colony. Later, the French explorer Samuel de Champlain arrived in 1603 and established the first permanent European settlements at Port Royal (in 1605) and Quebec City (in 1608).

The Royal Proclamation of 1763 (issued by King George III following Great Britain's acquisition of the French territory in North America) created the Province of Quebec out of New France, and annexed Cape Breton Island to Nova Scotia. The 1783 Treaty of Paris recognized American independence.

To accommodate the 10,000 English-speaking settlers, known as the United Empire Loyalists, who had arrived from the United States following the American Revolution, the Constitutional Act of 1791 divided the province into French-speaking Lower Canada (later Quebec) and English-speaking Upper Canada (later Ontario), granting each its own elected legislative assembly.

Consequently, the two Canadas remained divided until the issuance of the *Act of Union 1840* (which is how the *British North America Act, 1840* is commonly known), which merged them into a united Province of Canada. A responsible government was established with a Governor General, an Executive Council (then Cabinet of Ministers) and a Legislative Council.

The British Parliament approved the *British North America Act 1867*, which outlined Canada's system of government, combining Britain's Westminster model of parliamentary government with division of sovereignty (Canadian federalism).[XXI]

During the final quarter of the 20th century, a considerable number of negotiations took place in order to implement a political process that would lead to Canadian sovereignty, which is historically known as the *Patriation of the Constitution* of 1982 (Harder and Patten 2015).

The word "Patriation" was based upon the idea of repatriation but, once the Canadian constitution was originally approved under the British law, it could not be returned to

Canada. Consequently, the chosen word had to be Patriation, without the prefix *re-* (Hogg 2003: 55).

The process included the approval of the *Canada Act 1982*[XXII] by the Parliament of the United Kingdom, which decreed that no future acts of that Parliament would extend to Canada and ended the necessity to request amendments to the Constitution of Canada, once those amendments could be approved solely by Canada's constitutional institutions.[XXIII]

As Schedule B to the previously mentioned act, the *Constitution Act, 1982* was approved, it amended the *British North America Act, 1867* (now renamed *Constitution Act, 1867*), enacted a Charter of Rights and Freedoms, recognized aboriginal rights; amended the equalization formula, created an amending formula for the Constitution, and declared the documents which are part of the Constitution.[XXIV]

Since then, there have been eleven minor amendments (from 1983 to 2011), being most of them limited in range, regarding issues that affect particular provinces.

4.2. The Constitution Act, the Sovereign and the Governor General

Today Canada is composed of ten provinces[XXV] and three territories[XXVI] and, in respect of constitutional powers, all executive authority is understood to derive from the Sovereign, who is Canada's formal head of state.

The state is, consequently, embodied in the Sovereign: every Canadian Member of Parliament is required to swear allegiance to the Queen.

Elections are called and laws are enacted in the name of the Crown. No bill may become law without Royal Assent. Formally, the Prime Minister and the Cabinet are merely part of the Crown's council of advisers. They govern in the name and with the consent of the Crown, which could be defined as follows:

> "As the embodiment of the Crown, the Queen serves as head of state in Canada's constitutional monarchy. The Queen and her vice-regal representatives — the governor general and lieutenant-governors — possess what are known as prerogative powers, which can be made without the approval of another branch of government, though they are rarely used. The Queen and her vice-regal representatives also fulfil ceremonial "head of state" functions. Territorial commissioners represent the federal government in the territories but perform similar duties to lieutenant-governors."[XXVII]

As a result, the Sovereign is represented in Canada by the Governor General (as in a number of other Commonwealth realms). In fact, the Constitution Act 1867 determines, in its Article 9, that the executive government and authority of and over Canada is declared to continue to be vested in the Queen. Following that norm, Article 10 recognizes the existence of a Governor General, who chooses, summons and removes (from time to time) Privy Councillors and Members of the Queen's Privy Council for Canada, which aids and advises in the Government of Canada (Article 11).

According to Article 12, the Governor General is entitled to all powers, authorities, and functions under the acts of the Parliament, with Advice of Privy Council, or alone. Throughout the Constitution Act 1867 there are various provisions referring to "the Governor General in Council", which refers to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada (Article 13).

Furthermore, Article 14 enshrines the power of the monarch to authorize Governor General to appoint Deputies (from time to time):

> "within any Part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor General such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign (…)."

For the command of armed forces (the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada)[XXVIII], Article 15 clarifies that it is vested in the Queen.

The Constitution submits (though formally, as it will be possible to see further) the legislative to some control by the executive branch. As Article 17 determines that there shall be "One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons", Article 24 grants the Governor General the power of (from time to time and in the Queen's name) summoning qualified individuals to the Senate.

In reality, this power is literally tailored after the same powers of the Queen in the British upper house (the House of Lords). But the Queen may, by herself, on the recommendation of the Governor General, direct that four or eight members are to be added to the Senate, and so the Governor General shall summon four or eight qualified persons, representing equally all the divisions of Canada (Article 26). And Article 27 foresees that the Governor General shall not summon any person to the Senate, except on a further like direction by the

Queen on the like recommendation, to represent one of the divisions of Canada until such division is represented by twenty-four senators and no more.

According to Article 30, the resignation of senators is made by writing and addressed to the Governor General. And power to appoint a Senator to be Speaker of the Senate, and remove him and appoint another in his stead, is enshrined in the Governor General, by Article 34.

On the subject of the proceedings related to the lower house (House of Commons), Article 50 foresees the competence of dissolution by the Governor General, during the five years' legislature of that constitutional organ. Additionally, in cases of money votes in that chamber, Article 54 determines that any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost, must be first recommended by the Governor General in the session in which such vote is proposed.

Concerning the "royal assent" by the executive power in Canada, a bill passed by the Houses of the Parliament shall be presented to the Governor General for the Queen's Assent, he shall declare, according to his discretion (subject to the Constitution Act and the Queen's instructions), either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or even that he reserves the bill "for the Signification of the Queen's Pleasure" (Article 55).

However, if the Governor General assents to a bill in the Queen's Name, he shall "by the first convenient Opportunity" send it to one of the Queen's principal Secretaries of State, and if the Queen in Council within two years after receipt thereof by the Secretary of State thinks fit to disallow the act, such disallowance being signified by the Governor General, by speech or message to each of the Houses of the Parliament or by proclamation, shall annul the referred act. (Article 56). Bills reserved for the signification of the "Queen's pleasure" shall not have any force (Article 57).

On issues regarding provincial governance, the Governor General appoints an officer for each province, named Lieutenant Governor (Article 58), who is entitled to make and

subscribe before the Governor General or some person authorized by him the respective oath of allegiance, before assuming the duties of their office (Article 59).

The Governor General is also responsible for appointing administrators to execute the office and functions of Lieutenant Governors during their absences, illness, or other inabilities (Article 67).

Nevertheless, according to Article 91, it is the Queen who, by and with the Advice and Consent of the Senate and House of Commons, makes laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by the Constitution Act assigned exclusively to the legislatures of the provinces.

On other relevant issues, namely regarding exclusive powers of provinces, it is possible to verify that, even in provincial legislation respecting Education (for example), the Governor General in Council may intervene (Article 93, par. 4), requesting the Parliament of Canada to make remedial laws for the due execution of the provisions of the Constitution Act.

In terms of the judicature, the Governor General also plays an extremely relevant role, since he has powers to appoint the judges of all (Superior, District, and County) courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick (Article 96).[XXIX] Judges of the superior courts shall hold office during good behaviour, but the Governor General may remove them on address of the Senate and House of Commons (Article 99).

On issues of revenues, debts, assets and taxation, the Governor General in Council may order reviews and audits to the Consolidated Revenue Fund of Canada (Article 103), as well as having powers to order (from time to time) the form and manner of making payments made under the Constitution Act, or in discharge of liabilities created under any act of the provinces or territories of Canada (Article 120).

Before taking seat, every member of both houses of the Parliament of Canada shall take and subscribe before the Governor General (or someone authorized by him) the following oath of allegiance: "I A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty [name of the sovereign]." (Article 128 and Fifth Schedule, Part 1). Moreover, for

every member of the Senate and every member of the Legislative Council of Quebec, a similar procedure shall occur in order to subscribe the following declaration of qualification:

> "I A.B. do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [or as the Case may be], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [or seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (as the Case may be),] in the Province of Nova Scotia [or as the Case may be] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [or as the Case may be], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities" (Article 128 and Fifth Schedule, Part 2).

The Governor General in Council has also powers to appoint (from time to time) such officers as deemed necessary or proper for the effectual execution of the Constitution Act, until otherwise provided by the Parliament (Article 131). Curiously, Article 132 foresees that the powers necessary or proper for performing the obligations treaties are entitled to the Parliament and the Government of Canada, not expressly mentioning the head of state. However, the usual proceedings have established that it is the Government that decides whether to ratify the Treaty or to introduce legislation to bring the treaty into force, after obtaining the authorisation to ratify the treaty by the Governor in Council.[xxx]

Under the procedure for amending the Constitution Act 1867, determined in Part V of the Constitution Act 1982, the Governor General is entitled to issue the respective proclamation, after the requirements of authorisation by (a) resolutions of the Senate and House of Commons, or (b) resolutions of the legislative assemblies of at least two-thirds of

the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces (Article 38 – CA1982).

Proclamation powers of the Governor General[XXXI] in these matters are foreseen for cases of amendment by unanimous consent (Article 41 – CA1982) and amendment of provisions relating to some but not all provinces (Article 43 – CA1982).

As a result, analysing the provisions presented above, it is possible to conclude that, although the head of state is the sovereign (queen or king)[XXXII], vested of "executive government and authority" (Article 9), that sovereign is represented by the Governor General, with the advice or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or even individually (Article 12).

In respect of the office of Governor General, reference should be made to the extremely difficult movement of trying to take distance from Westminster rule, which reached an important moment in 1952, when Charles Vincent Massey, the first Canadian-born Governor General, was appointed. After him, a constitutional convention of alternating between anglophone and francophone Canadians was instituted with the appointment of Georges-Philéas Vanier – a Quebecer who was the first francophone Governor General. It is also worth mentioning that the practice of appointing Canadian-born citizens was broken in 1999, when Adrienne Clarkson, a Hong Kong-born refugee to Canada, was appointed the 26th Governor General.

4.3. The "Unwritten Constitution" and the Prime Minister's role

As far as constitutional conventions are concerned, large parts of Canada's Constitution are unwritten; a critical part of the unwritten constitutional rules is "constitutional principles", these derive from several related sources.

They are inherent in Canada's "basic constitutional structure"[XXXIII] or "implicit in the very nature of a Constitution."[XXXIV] Constitutional principles are constitutional imperatives and they are beyond the powers of Canadian legislatures to override.[XXXV] One element of Canada's unwritten Constitution consists of "usages, practices, customs and conventions." The "rules of responsible government" are of this character. These regulate the relations between the Crown, the Prime Minister, the Cabinet and the two Houses of Parliament.

In fact, the Constitution Act did not provide for a Prime Minister, so constitutional tradition has defined this position in Canada. Here, the position of the Prime Minister

represents the connection between the Governor General and the rest of the political and administrative branches of the government.

The Prime Minister selects his ministers from Members of Parliament and he also has the power to dismiss them, ensuring Parliamentary responsibility. Consequently, ministers may be called to the chambers to answer questions on their actions at any time, with the possibility that they might have to resign if losing Parliament's confidence. In Canada, the Prime Minister is usually elected by a national constituency that supersedes local interests and that, therefore, confers on him or her an additional power before the elected house of the legislature, the House of Commons. Unlike the President of the United States, the Prime Minister of Canada can be supported by an absolute majority of seats or a relative majority during the administration mandate, always dependent on Parliament's confidence, as in any typical parliamentary system.

The prime minister plays the role of chief executive but also of chief legislator, since it is customarily the Government which introduces the most essential legislation. And although the competence of summoning members of the upper house is conferred on the Governor General (Article 24), it is usually the Prime Minister who appoints members of the Senate and, as the central figure in the government of Canada, the Prime Minister commands the access to the nation's media (Maddex 2008: 84-85).

Nevertheless, three political crises, in which the so-called reserve powers of the Governor General were used in respect of declining (or not) the advice of the Prime Minister, have contributed to defining the role of the Governor General as it is currently understood in Canadian constitutional system.

The first case occurred in 1896, when Prime Minister Charles Tupper refused to cede power, insisting that Liberals would be unable to form a government despite their having won most of the seats in the House of Commons. In response, Governor General the Earl of Aberdeen refused to accept Tupper's advice.[XXXVI] Then the "King–Byng Affair", which happened in 1926, should also be mentioned. In that case, Prime Minister William Lyon Mackenzie King, already in minority government and having lost two votes asked Governor General the Viscount Byng of Vimy to dissolve parliament. The latter refused to do it, considering that parliament was should sit for a reasonable period before a new election

should be called, until the moment that the parliament was demonstrably unable to form another government (Forsey 1943; Forsey 1951: 457-467).

More recently, during Stephen Harper's Tory minority governments, Governor General Michaëlle Jean was faced with a with the choice of dissolving parliament, proroguing parliament, or asking the Prime Minister to resign and inviting the opposition to form a new government. As a result, after two hours of consultation with various constitutional experts, Governor General Jean decided for prorogation; the Liberals ended up changing their leadership and the proposal for 2009 government's budget was accepted by the major opposition party. Prime Minister Harper would again request the Governor General a prorogation, which was granted until March 2011, when was defeated in a no-confidence vote.

In a nutshell, these presented cases demonstrate that even institutional figures that most of the times appear to play a shy role or political position in constitutional frameworks may act at any moment, depending on importance of the political moments (normally in constitutional crises). If the powers exist, if they were constitutionally foreseen, the public official is entitled to exercise them.

5. Actual differences and similarities of heads of state's status

5.1. A general constitutional comparison

To comparing the constitutional systems of the United States and Canada is to evaluate two absolutely different forms of government. In fact, the "presidential-congressional system" (Forsey 2005: 24) in the United States was created in order to individualize a form of government in which the classical principle of separation of powers would be applied in a rigid way having, on the one hand, the legislative power dedicated to the law-making processes and, on the other hand, the executive branch committed to the activity of government (or administration).

The President of the United States appeared to be a pure Republican head of state, chosen on a national basis and only entitled to executive powers. There is an effective balance of both powers (executive and legislative), with no accountability between the President and the Congress and, at the same time, the President could not dissolute the legislative houses.

However, the position of the President of the United States has been progressively enhanced, due to: (a) the federal reality of the country and the relevance of the federal executive; (b) the increasingly relevance of the external policy and the central role of the head of the executive in that area; and (c) the need of a strong presidential executive in order to face moments of crisis. As it was stated above, the administrations of George W. Bush and Barack Obama have been only the most recent examples of that increase of the central position of presidents (de Vergottini 2013: 687).

Conversely, the Canadian monarchic and "parliamentary-cabinet government" has progressively granted more powers to the Prime Minister (even though the position was never expressly foreseen in the Constitution), relegating the position of the Governor General, who is the official representative of the head of state in Canadian territory,[XXXVII] to no more than a ceremonial office. And the Queen, who is actually and constitutionally the head of state (and formally responsible for the executive branch)[XXXVIII] has been, in practice, even more distanced from those powers.

Therefore, it could be stated that the Constitution Act of Canada appears to grant, as it was presented above, a myriad of powers to the Governor General (as the representative of the Queen), such as being responsible for the executive activity of the country, summoning senators, or even appointing judges. And by only reading the written Constitution of Canada, it could be even said that the Governor General seemed to have much more power than the President of the United States. But, in practice, many of those powers are, at the present time, distributed amongst the different branches of the constitutional system (particularly the competences of the Prime Minister and his cabinet).

One interesting example of that could be the initiative of the Prime Minister for appointing senators, or even the effective exercise of the powers of government and administration by the cabinet, leaded by the Prime Minister, who represents the majority of the deputies elected to the House of Commons. In reality, this means that the system has been progressively (and through the so-called "unwritten constitution") developing a new balance of powers between constitutional actors in Canada, and adapting the system to the progression of parliamentary democracies.

Another curious issue concerns the powers to call a referendum, unforeseen in either constitution, though several U.S. state constitutions do contain the possibility of referendum. In the case of Canada, a large number of referendums have been held and the competence

for calling the national vote (both binding or non-binding) is allocated to the federal government, although not expressly adumbrated in the Constitution (Marquis, 1993).

Nonetheless, there is still a vast number of powers which could be compared as similar between the President of the United States and the Queen or the Governor General (on behalf and in the name of the Sovereign), such as the office of Commander-in-chief of the armed forces (the President and the Queen), the power of promulgating (approving of assenting) and vetoing (rejecting or annulling)[XXXIX] bills from the legislative houses, appointing ambassadors or other officials, or the appointment of a certain number of judges (which, in fact, suggests doubts about actual separation of powers, even in the United States that is widely known for enshrining the referred principle and that of "checks and balances").

5.2. The example of environmental issues

In a world where political actors are more and more concerned about the risks and dangers of climate change, and in promoting sustainable development, at local and global level, it would be relevant to examine the powers of heads of state in both countries in respect of environmental issues and the protection of natural resources.

At this point, the Paris Agreement, within the United Nations Framework Convention on Climate Change (UNFCCC) dealing with greenhouse gas emissions mitigation, adaptation and finance starting in the year 2020, should be mentioned as a paramount theme. Particularly, after the last announcement by President Donald J. Trump that the United States will withdraw from the Paris Climate Accord.

As discussed, the President of the United States, though not being constitutionally entitled to legislative powers, in fact controls a large number of agencies that can issue regulations with little oversight and accountability from the Congress. Consequently, with regard to environmental issues, the President may play an extremely important role, once he appoints the administrator of the Environmental Protection Agency, but subject to confirmation of the Senate (Lewis 1985).[XL] Moreover, the administrator of EPA customarily sits with the President in cabinet meetings, which grants this agency an essential role within the administration and executive power. And this is why changes of heads of state (not only but also the majorities of mandates in Senate) may cause relevant shifts in environmental policies, regulation and legislation too.

For example, during the Clinton presidency, the United States signed the Kyoto Protocol on 12 November 1998, but the Senate did not ratify it and George W. Bush opposed the treaty. Another example happened during the Obama administration: the White House Office of Energy and Climate Change Policy was created (in 2008), as a new government entity that would coordinate administration policy on energy and climate change, but it was abolished in 2011, as Congress would no longer fund the office in the budget. It now moved under the umbrella of Domestic Policy Council, which coordinates the domestic policy-making process in the White House.[XLI]

It was also during the Obama administration that more than 190 countries came together to adopt the most ambitious climate change agreement in history, which became known as the Paris Agreement (within the framework of the United Nations Framework Convention on Climate Change), for greenhouse gases emissions mitigation, adaptation and finance. And most recently, new president Donald J. Trump announced that the United States would withdraw from the Paris climate accord.[XLII]

In Canada, while competences regarding the environment and natural resources are shared between national and provincial legislatures (Article 92A), there is a Minister of Environment and Climate Change (Minister of the Crown), appointed by the Governor General of Canada. This minister is part of the Cabinet, serving "at Her Majesty's pleasure", and responsible for the federal government's department named Environment and Climate Change Canada, as well as for Parks Canada and the Canadian Environmental Assessment Agency.[XLIII]

In fact, the Governor General, representing the Sovereign, is responsible for appointing and removing the Minister, as deemed necessary or proper (Articles 11), but once the "unwritten constitution" enshrines the existence of a cabinet and a Prime Minister, there is no need for the Queen (ordinarily represented by the Governor General) to interfere in those powers. Because, as Forsey would state:

> "(…) in Canada, the head of state can, *in exceptional circumstances*, protect Parliament and the people against a Prime Minister and Ministers who may forget that "minister" means "servant," and may try to make themselves masters" (Forsey 2005: 26).

And that is an imperative conduct that should be borne in mind by all politicians who exercise public functions in a constitutional system, no matter if they are heads of state, heads of government, parliamentarians or even local public officers.

6. Conclusions

In conclusion, after the enquiry described on the previous pages, it should be emphasised that when analysing the constitutional systems of Northern America, namely regarding the powers of the heads of state, the United States consists of a federal republic, with a "presidential-congressional" system, influenced by the principle of the separation of powers and tempered by a "checks and balances" structure. Instead, Canadian constitutional system is characterized by a monarchy, which was influenced by the British experience of a "parliamentary-cabinet" government.

The President of the United States is elected by universal suffrage, though indirect because of the existence of an electoral college, while in Canada it is the Queen who appoints a Governor General to represent her and act on her behalf.

The administration in the United States is led by the President, who is chief of the executive branch. The Queen of Canada is represented by the Governor General, who appoints a Privy Council, and among its members, a Prime Minister, who is an elected deputy from the House of Commons, and a Cabinet to perform the executive powers.

As a matter of fact, both are vested with executive powers, but the Queen and the Governor General of Canada are only, in practice, formally tenants of that power, once the *de facto* executive branch is exercised by the Prime Minister and his Cabinet. This means that the Constitution Act of Canada expressly foresees more *de jure* executive powers for the head of state than it is executed in the day-to-day political practice.

Curiously, both heads of state are entitled to appoint judges of the Supreme Court (and in Canada, even more than that), which, in fact, suggests doubts about the actual force of the principle of separation of powers (Ervin 1970: 108-127). Moreover, both constitutions do not expressly foresee immunity for the heads of state, though there has been some debate about that issue in the United States, namely during Nixon and Clinton administrations.

The constitutional systems presented are typical cases of the Common-law tradition (influenced by the British ancestors) and, because of that, it is possible to attest the existence

of a certain number of norms (especially in Canada) derived from the so-called "unwritten constitution", conventions or customary law (Binnie 2011; Walters 2001: 91-141). However, these specificities of different systems and traditions (and their following developments) are the ones that substantiate the continuous study and research of comparative public law, generating interest for researchers beyond borders and between continents. Even when the application of norms and principles depend on the actions of human beings, who occupy institutional offices, at certain and specific moments or periods in time.

APPENDIX I

COMPARATIVE TABLE

POWERS/CHARACTERISTICS OF THE HEADS OF STATE						
	UNITED STATES OF AMERICA (PRESIDENT)			CANADA (QUEEN, REPRESENTED BY A GOVERNOR GENERAL		
	Yes/No	Alternative/ Limitation	Article(s)	Yes/No	Alternative/ Limitation	Article(s)
Election by direct, universal suffrage	No.	Indirect. Electoral college. Universal suffrage.	II, Sec. 1	No		-
Mandate	-	4 years	II, Sec. 1	No		-
Re-election	Yes. Once.	-	XXII Amend.	No		-
Resignation	Yes.		II, Sec. 1	No	(the Queen's representative is "at Her Majesty's pleasure")	-
Dissolution of the Parliament	No.			Yes		50
Appointment and dismissal of the Prime Minister	No.	The Vice President is elected with the President	II, Sec. 1	Yes		11
Appointment and dismissal of Members of the Government	Yes.		II, Sec. 2	Yes		11
Promulgation	Yes.		I, Sec. 7	Yes		55, 56, 57
Veto	Yes.		I, Sec. 7	Yes		55, 56, 57

Convocation of a referendum	No.		-	No	Powers of the Government	-
Commander-in-Chief of the Armed Forces	Yes.		II, Sec. 2	Yes		15
Criminal Liability	Yes.	-	II, Sec. 4	No		-
Ratification of Treaties	No.	Power to sign, with consent of Senate.	II, Sec. 2	No	Only authorizes ratification	-
Appointment of Ambassadors and other representatives	Yes.		II, Sec. 2	No	Powers of the Government	-
Immunity/ Incompatibilities	No.	See case law	-	N/A	"the king can do no wrong"	-
Executive Competence	Yes.		II, Sec. 1	Yes.	As the Queen's representative, traditionally delegated to the Cabinet	9
Competence/relationship to the judiciary	Yes.		II, Sec. 2	Yes		96
Competence/ relationship to the legislative	No.	But appoints department officials, who may issue regulations	-	No.		-
Competences in education	No.	But appoints department officials	-	Yes.	Intervention, requesting the Parliament to make remedial laws for due execution of the Constitution	93
Competences in environment	No.	But appoints department officials (e.g. EPA)	-	No.	But appoints ministers (in the Cabinet)	-

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[I] See recent examples of parliamentary crisis in Italy, Spain, Portugal or Greece.

[II] About the historical types of state, see Miranda 2014: 57-76.

[III] On this purpose, Peter Drucker stated in a text named "Organized Religion and the American Creed", in the *Review of Politics* of July 1956, that: "The unique relationship between religion, the state, and society is perhaps

the most fundamental – certainly it is the most distinctive – feature of America religious as well as American political life. It is not only central to any understanding of American institutions. It also constitutes the sharpest difference between American and European institutions, concepts, and traditions. This country has developed the most thoroughgoing, if not the only truly secular state. (…) The United States is, however, also the only country of the West in which society is conceived as being basically a religious society.
By its very nature the sphere of the state has to be an autonomous sphere, a sphere entirely of the "natural reason." But also, by definition, a free society is only possible if based solidly on the religious individual. (…) This leads to the basic American concept: the state must neither support nor favor any one religious denomination. (…) But at the same time the state must always sponsor, protect, and favor religious life in general. The United States is indeed a "secular" state as far as any one denomination is concerned. But it is at the same time a "religious" commonwealth as concerns the general belief in the necessity of a truly religious basis of citizenship" (Maritain 1958: 180-181).

[IV] Better known later as *welfare* since the presidency of Franklin D. Roosevelt.

[V] The English law was not absolutely repealed after the American Revolution. It must be noted that a Virginia law of 1776 declared that "the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the first, and which are of general nature, not local to that kingdom (…) shall be considered as in full force, until the same shall be altered by the legislative power (…)." See Hening 1821: 127.

[VI] The Declaration of Independence is available on the webpage of the U.S. National Archives and Records Administration: http://www.archives.gov/exhibits/charters/declaration_transcript.html.

[VII] Which began with the words "that all Men are born equally free and independent", the power to govern was in the people, and officers of government were their "Trustees and Servants, and at all times amenable to them." See Billings 1991: 335–370.

[VIII] The Articles of Confederation are available on the webpage of *The Avalon Project: Documents in Law, History and Diplomacy* of Yale School of Law: http://avalon.law.yale.edu/18th_century/artconf.asp.

[IX] The Constitution of the United States is divided in the following parts:

- Articles I, II, and III: separation of powers → the federal government is divided into three branches:
  - Legislative (bicameral Congress);
  - Executive (President); and
  - Judicial (Supreme Court and other federal courts).
- Articles IV, V and VI: federalism, rights and responsibilities of state governments and of the states in relationship to the federal government.
- Article VII: procedure used by the (at that time) thirteen States to ratify it.
- Further Amendments to the original text.

[X] According to Article I, Sec. 3, the Vice-President of the United States shall be President of the Senate, but with no vote, unless they be equally divided. And a President *pro tempore* shall be elected in the absence of the Vice President, or when he exercises the office of President of the United States.

[XI] Full results are available on the webpage of the Federal Election Commission: http://www.fec.gov/pubrec/2000presgeresults.htm.

[XII] Final results of the last election are also available on the webpage of the Federal Election Commission: https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf.

[XIII] This requirement of a two thirds majority denotes the presidential character of the American system, once a shorter majority would imply the conversion of that system to a parliamentary one.

[XIV] The "legislative veto", or a reserve of approval of actions and decisions adopted in the use of authorizations conferred to the President, was also a practice of collaboration and accountability, for 50 years. However, it was declared as unconstitutional by the Supreme Court in 1983. See Rouban 1984: 949-970 and Nuno Piçarra 1990: 325-353.

[XV] Though the provision only foresaw at that time the army and the navy, air force must be also included in the competences of Commander-in-chief.

[XVI] Barack Obama was the last President of the United States, until January 2017, before Donald J. Trump.

[XVII] On the topic of the list of twenty-seven Amendments to the Constitution, the ones which may assume a particular relevance in the issue of the competences of the head of state are the following:

- XII Amendment: presidential election procedures, regarding vote of the electors;
- XVII Amendment: direct election of United States Senators by popular vote;
- XX Amendment: date on which the terms of the President and Vice President (January 20) and Senators and Representatives (January 3) end and begin;

- XXII Amendment: number of times a person can be elected President, which is no more than twice, and a person who has served more than two years of a term to which someone else was elected cannot be elected more than once;
- XXV Amendment: succession to the Presidency and procedures for filling a vacancy in the office of the Vice President, as well as responding to residential disabilities.

[xviii] *United States v. Nixon*, 418 U.S. 683 (1974).
[xix] *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).
[xx] *Clinton v. Jones,* 520 U.S. 681 (1997).
[xxi] On the issue of federalism in Canada, see Richard 2005.
[xxii] Including a Charter of Rights and Freedoms (Part I).
[xxiii] There is also a French language version with equal legal weight as Schedule A. And the Constitution Act, 1982 is also written in both languages (as Schedule B).
[xxiv] The government of Quebec has never formally approved the enactment of the Constitution Act, 1982, though formal consent was never necessary.
[xxv] Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan.
[xxvi] Northwest Territories, Nunavut, and Yukon.
[xxvii] See *The Canadian Encyclopaedia*, on the entrance of "crown": http://www.thecanadianencyclopedia.com/en/article/crown/.
[xxviii] As in the United States, though the provision only foresaw at that time the army and the navy, air force must be also included in the competences of Commander-in-chief.
[xxix] Article 97 also determines that, until the laws relative to property and civil rights in the Ontario, Nova Scotia, and New Brunswick, and the procedure of the courts in those provinces, are made uniform, the judges of the courts of those provinces appointed by the Governor General shall be selected from the respective bars of those provinces. And, in what concerns the appointment of judges of the courts of Quebec, Article 98 foresees that they shall always be selected from the bar of that province.
[xxx] Procedures are available on the webpage of Global Affairs Canada: http://www.treaty-accord.gc.ca/procedures.aspx.
[xxxi] Advised by the Queen's Privy Council for Canada, according to Article 48 – CA1982.
[xxxii] Currently, Elizabeth II, Queen of the United Kingdom, Canada, Australia, and New Zealand, and Head of the Commonwealth, who is represented in Canada by the Governor General, David Lloyd Johnston.
[xxxiii] *OPSEU v. Ontario* (1987), 144; *Hunt v. T&N plc* (1993), 56.
[xxxiv] *Manitoba Language Rights Reference* (1985), 64.
[xxxv] See *Hunt*, 56; *Secession Reference* (1998), 54.
[xxxvi] See Charles Tupper's biography on *Dictionary of Canadian Biography*: http://www.biographi.ca/en/bio/tupper_charles_14E.html.
[xxxvii] Article 12 of Constitution Act 1867.
[xxxviii] Article 9 of Constitution Act 1867.
[xxxix] Expressions which are used may vary between different constitutions (and even along the same texts).
[xl] See also Reorganization Plan No. 3 of 1970 (July 9, 1970), Section 1. (b).
[xli] See: https://www.whitehouse.gov/administration/eop/dpc.
[xlii] See: https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord.
[xliii] See Environment and Climate Change Canada: https://www.ec.gc.ca/; Parks Canada: http://www.pc.gc.ca/; and Canadian Environmental Assessment Agency: http://www.ceaa.gc.ca/.

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